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Deepening Trade *and* Fundamental Rights?

Harnessing Data Protection Rights in the Regulatory Cooperation chapters of EU Trade Agreements

Abstract

The paper explores the descriptive and normative intersection of Data Protection rights and Regulatory Cooperation chapters in the new generation of EU Trade Agreements. While the EU has repeatedly refused to consider data protection as part of trade negotiations, it has sought deeper institutionalised forms of regulatory cooperation: the question then arises as to what extent data protection rights would come across with these mechanisms and the consequences on their protection. In a context of global trade requiring data to flow freely, regulatory cooperation has been advanced as a way to deal with regulatory divergences in data. How should the EU deal with global demands pooling data flows and regulatory cooperation? The paper finds that data protection emerges as a very much cross-cutting issue liable to be affected by Regulatory Cooperation activities. It is argued that the EU should acknowledge this state of play whereby data protection cannot be isolated or only elusively addressed; instead, mechanisms should be secured so as to ensure that data protection, as a fundamental right, is not undermined, and is instead embedded and enhanced in the regulatory cooperation chapters.

Introduction

Data flows and regulatory cooperation emerge as two critical features of global trade today: not only are they salient to trade as of themselves; they also intersect and become salient to one another. Data flows have prompted demands for global regulation and convergence; and regulatory cooperation could provide the stage for such convergence. Regulating data flows, however, becomes a significant challenge in the light of the information that such data could deploy, namely personal data. It requires making decisions on levels of protection to which such flows should be subject. The inherent tension between calls for free flows of data and data protection makes their regulation very much controversial. Against a backdrop of global calls for regulatory cooperation in data flows, the EU has been receptive to the need of regulatory cooperation in trade, while yet categorically excluding data protection from trade negotiations. Given the salience of data in trade, however, a first set of question arises as to what extent Regulatory Cooperation chapters would be liable to encompass regulatory activity on data protection: where and how do regulatory cooperation and data protection intersect in the new generation of EU trade agreements? A second set of questions opens up to considerations as to the role of the EU as a global actor in data, and more broadly the way the EU places itself in an era of global trade demanding free data flows and regulatory cooperation. How should the EU deal with global demands pooling data flows and regulatory cooperation?

It is argued that the possibility for data protection to arise in regulatory cooperation activities is something which the EU should take into consideration when negotiating these chapters, with a view to avoid challenges to data protection rights and races to the bottom of standards. Furthermore, seeking regulatory cooperation with other major developed trade partners on data matters is something which the EU could exploit, under certain conditions, to enhance its global actorness in data and promotion of its data protection standards.[1] This chapter thus starts by identifying the challenge of ensuring data protection in a context of global trade relying on data and the need of regulatory convergence of personal data flows: it looks in particular at how data protection and regulatory cooperation are both salient to trade and closely interdependent. Next, the chapter provides an assessment of the EU's approach in relation to data and regulatory cooperation, and more specifically how this approach has been reflected in the latest trade initiatives with Canada, the US and Japan. It does so by exploring the degree of intersection between regulatory cooperation chapters and data protection in trade agreements from a substantive point of view, by looking at the scope, objectives and actors' expertise in regulatory cooperation designs. The chapter concludes with some reflections on the way forward, that call for the EU to harness data protection rights via regulatory cooperation as opposed to sidelining them.

1. The Interdependence of Data Protection, Regulatory Cooperation and Trade

Data flows and regulatory cooperation are salient to trade as much as they are to one another. A close interdependence exists between data protection, regulatory cooperation and trade. This section thus explains how respectively data flows (subsection 1.1) and regulatory cooperation (subsection 1.2) are now intrinsic components of trade; and then turns to show how these parallel developments in trade have been pooled in global demands for regulatory convergence in data (subsection 1.3).

1.1. Cross-border Data Flows and the Challenge to Data Protection

'Data' is a new significant component in the digital economy and a more prominent issue in the context of trade. The composition of trade is evolving in such a way that it consists no more of goods and services alone. In the digital economy, *data* is also crossing borders. Not only is data an inherent component of goods and services across borders; it has also become a commodity on its own, accounting for significant revenue of businesses operating globally. Data thus represents a crucial tradable asset for companies; and, as for goods and services, the economy would benefit from free flows of data. The digital economy requires data to flow easily, especially for businesses which increasingly depend on data flows. Free flow and mobility of data have thus become the backbone of digital

[1] This goes beyond the scope of the chapter, however.

trade.[2] Given the importance of global data flows in the digital economy, trade agreements become an important vehicle to govern transborder data flows.[3]

Their regulation in the context of trade yet seems to be a compelling challenge for the years to come. Concerns have arisen as to when these flows contain 'personal' data. As data is increasingly salient to trade, so is data protection when trade in data flows is at stake. Inevitably, while trade increasingly moves towards a digital and information space, the more data flow, and the more protection of personal data become crucial. Data transfers in the context of cross-border services, such as financial, e-commerce and telecommunications, increasingly challenge the protection of personal data. This context has fuelled a debate between those advocating free flow of data and those concerned with the protection of personal data. While the digital economy requires data to flow easily, increasing flows of personal data need to be protected, too.

On the one hand, attempts to restrict cross-border data have been qualified as protectionist measures, a red tape or non-tariff barriers to trade.[4] Those who see restrictions of cross-border data as new non-tariff barriers to trade denounce measures that require data to be retained onshore (such as data localisation and local storage) and those that require businesses to have their physical presence on territory. Typical arguments against such measures are that they do not serve data security, while constituting an impediment to companies' competitive advantage. On the other hand, data protection is a fundamental right that should be guaranteed in the context of trade in data. Some have pointed at the risk of 'data havens', whereby data processing operations could end up being made in countries with less strict requirements for privacy.[5] Facebook is a fitting example as it has recently decided to move its headquarters to the US as a way to 'limit its exposure' to the EU General Data Protection Regulation (GDPR). Beyond national security concerns, this is liable to undermine the privacy of users and unauthorised uses of their data, which would amount to a breach of an internationally recognised human right. This is increasingly significant in a digital economy that relies on Big Data, collecting massive amounts of information on people's preferences and habits.

The challenge is thus to allow data to flow across countries and reap the benefits this would bring, while ensuring that personal data is protected. There is a need to define clear benchmarks drawing a line between, on the one hand, measures that amount to digital protectionism and unnecessary regulation impeding such flows of data; and on the other hand, measures that are addressed at the protection of personal data and privacy, and would be therefore legitimate. While this is beyond the scope of the article, it reflects the salience of data in trade and the concomitant salience of data protection, and thus the need to regulate transborder data flows. Globally, countries have understood that international trade necessitates coming to terms with data, yet divergent approaches mean that data protection will not always be the priority: this raises concerns as to the protection of personal data in an emerging global economic order where data flows are an important component. As a global actor in data, the EU framework of protection of fundamental rights, including the right to protection of personal data, could provide a normative approach to address data in trade.

1.2. Regulatory Cooperation to Overcome Divergences and Deepen Trade

Next to data, Regulatory Cooperation has arisen as a key feature of this new era of global trade. The nature of trade has changed in such a profound way that has made calls for "liberalisation of trade" obsolete and shifted the focus onto the more compelling need of "re-regulation of trade".[6] The WTO has proven an unfitting forum for discussions of regulatory divergences and countries have turned to trade agreements as venues through which

[2] Walter Berka, 'CETA, TTIP, TiSA, and Data Protection' in Stefan Griller, Walter Obwexer and Erich Vranes (eds), *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (OUP 2017).
[3] UNCTAD, 'Data protection regulations and international data flows: Implications for trade and development' (2016) United Nations 36.
[4] See e.g. John Eger, 'Emerging Restrictions on Transnational Data Flows: Privacy Protection or Non-Tariff Trade Barriers?' (1978) 10 Law and Policy in International Business 1055.
[5] Lee A Bygrave, *Data Protection Law: Approaching Its Rationale, Logic and Limits* (Kluwer Law International 2002).
[6] Thomas Cottier, Professor Emeritus of European and International Economic Law at the University of Bern, 'The future of regulatory cooperation' (Presentation at II LAwTTIP Joint Conference 'Rights, Values and Trade: Is an Agreement between EU and US Still Possible?', Bologna, 12 April 2018).

engage in closer regulatory activities.[7] Efforts to regulate trade, enable it, while addressing new behind-the-border barriers, have taken the form of 'Regulatory Cooperation' chapters. Accordingly, recent trade agreements between major developed economies have incorporated Regulatory Cooperation chapters.

Under the latter, countries seek to tackle their regulatory divergences by means of more or less deep forms of cooperation over different ranges of subject matters. Regulatory cooperation does not denote a specific type of activity and encompasses, instead, a range of mechanisms for cooperation, which mirror different degrees of ambition towards legal integration: from informal exchanges of information, to mutual recognition agreements, all through regional agreements with regulatory provisions, regulatory partnerships and full harmonisation via supranational or joint institutions.[8] At its basic understanding, regulatory cooperation can be defined as encompassing a range of activities and mechanisms whereby different actors interact in more or less institutionalised frameworks to/and cooperate on regulatory matters to tackle regulatory diversity. How regulatory diversity is tackled in practice, for what final purpose(s) and via which means and activities, not least by whom, are not intrinsic to the definition of regulatory cooperation. It is held here that these elements indeed can vary. This stance allows being open to the analysis of different shapes that regulatory cooperation takes in the trade agreements.

In trade, the main rationale for engaging in regulatory cooperation activities is to be found in the costs involved as a result of regulatory divergences, in relation to standards, approaches and practices; to avoid disputes and facilitate trade. It has been observed that in a context of increasing economic interconnectedness, including production chains and technological developments, and the nature of global trade, some challenges arise that require regulators to look beyond national boundaries.[9] As trade is increasingly less, or even no more, about tariffs; trade negotiations have become more concerned with behind-the-border measures, in particular with ways to address regulatory divergences, having emerged as the main non-tariff barriers to trade today. While regulatory cooperation activities are liable to impinge on governments' traditional areas of domestic regulation and have thus raised concerns of regulatory autonomy, race-to-the-bottom and regulatory capture,[10]especially if in the absence of scrutiny mechanisms.[11] At the same time, it has been argued that "regulatory cooperation" would not, and should not, imply *de*-regulation, but *re*-regulation intended as adapters between diverging regulatory systems.[12]

These concerns yet require looking at the specific design of regulatory cooperation chapters in the trade agreements under investigation. Depending on its design, Regulatory cooperation can prove a veritable mechanism whereby trade actors are willing to deepen their economic relationships by cooperating on regulatory matters in order to address divergences that would impede trade. Regulatory cooperation would arguably have the potential to work as a stage for dialogue, mutual learning and convergence. In the context of data, it can be questioned what would be the place of fundamental rights considerations in these emerging structures, if any. This question is the more compelling when considering global attempts at regulatory convergence in data.

1.3. The Global Demands for Regulatory Convergence on Data

Global data flows enhance demands for regulatory convergence. In a context of trade exchanges requiring free flow of data, the existence of divergent standards, practices and approaches to data inhibit or make more costly those exchanges; thus essentially arising as behind-the-border barriers to trade. Against this backdrop, it has been argued that global data flows enhance demands for regulatory cooperation: the latter would have the potential to reconcile different interests, approaches and the need of oversight.[13] Such demands can be understood against the

[7] Junji Nakagawa, 'Regulatory Co-operation and Regulatory Coherence through Mega-FTAs: Possibilities and Challenges' in Julien Chaisse and Tsai-Yu Lin (eds), International economic law and governance: Essays in honour of Mitsuo Matsushita (OUP 2016) 410.
[8] OECD, *International Regulatory Co-operation Addressing Global Challenges* (OECD Publishing 2013), see more detailed table at p.23-25.
[9] OECD (n 8).
[10] Andreas Dür and Manfred Elsig (eds), 'Preface', *Trade Cooperation* (CUP 2015) 7.
[11] Eyal Benvenisti and George W Downs, *Between Fragmentation and Democracy: The Role of National and International Courts* (CUP 2017).
[12] Thomas Cottier (n 6).
[13] Mira Burri, 'The Governance of Data and Data Flows in Trade Agreements: The Pitfalls of Legal Adaptation' (2017) 51 *UC Davis law review* 1, p.65-132.

context of fragmentation for regulation of data. Legal frameworks at the international and regional level have existed since the 1980s, under the auspices of the UN, the OECD, the Asia-Pacific Economic Cooperation (APEC) Privacy Framework, the Council of Europe Convention 1085 and the European Union General Data Protection Regulation (GDPR).[14] These frameworks are however far from setting both a global and binding direction as to the regulation of personal data flows. In the absence of a comprehensive and binding international convention relating to privacy or data protection, there has been an uprise in laws and measures having been introduced as a way to address data flows and data protection.

In a global economy increasingly relying on data, countries from North America to Asia are becoming aware of the importance of data flows in trade and the challenges that might arise for the data protection. Such concerns have accounted for an upward increase of cross-border data flows regulation in recent years.[15] As of January 2013, Kuner had identified 43 countries, plus the 27 EU member states, having data protection and privacy legislation in force, and 5 countries having legislation not fully in force; the majority of these instruments dates from 2008 and 2011.[16] The overall picture is one of legal fragmentation, reflecting divergent approaches, preferences and priorities.[17] The situation of fragmented data flows regulation has prompted scholarship to adopt a legal pluralist stance for the study of it; acknowledging the existence of competing authority claims, diverse normative schemes and the challenges, or even undesirability, of more coherence.[18]

In this picture, however, claims for a global regulatory framework have not lacked. Against the expectations about personal data being protected, the awareness of digital interconnectedness has spurred calls for "global data laws" and "international privacy standards",[19] and has led some to investigate the feasibility and features of "global data protection regulatory model".[20] Amid fragmentation and demands for global data regulation, competition has arisen as to which model would be the best apt to achieve the mission, thereby bolstering demands for regulatory cooperation. Disagreement pervades as to which legal frameworks, approaches and principles should be adopted and which standards employed as reference points. Regulation of data in the context of trade additionally emerges as a new issue where experimentation and exploration is still on process. As such, it could represent a fertile ground for Regulatory Cooperation efforts, which have been said to be more effective and successful where regulations are not yet in place as opposed to disciplines for which regulatory frameworks are long established.[21]

Against this backdrop of fragmentation and demands for regulation of data flows, the EU wants to play a central leading role; and so far, has indeed acted as, and claimed to be, a leader in data protection laws.[22] The

[14] See respectively: UN Guidelines for the Regulation of Computerized Personal Data Files UN (DOC.E/CN.4/1990/72 of 14 December 1990) <https://undocs.org/E/CN.4/1990/72>; Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (OECD 1980); the Asia-Pacific Economic Cooperation (APEC) Privacy Framework, the Council of Europe Convention 1085 and the European Union General Data Protection Regulation.

[15] Christopher Kuner, *Transborder Data Flows and Data Privacy Law* (OUP 2013) 10.

[16] Next to national legislation, as of January 2013, around 10 (more or less) binding bilateral agreements and instruments to govern transborder data flows were in place, as well as a series of private sector instruments, such as contractual clauses, as well as non-binding codes of practices. See Appendix Data Protection and Privacy Law Instruments Regulating Transborder Data Flows (as of January 2013) in Christopher Kuner, Transborder Data Flows and Data Privacy Law (OUP 2013). Among the instruments and amendments identified by Kuner, it is possible to count 6 dating the 90s, and all the rest from the turn of the century, in particular, 9 in 2011; 4 in 2010; 2 in 2009; 7 in 2008; 2 in 2007; 1 in 2006; 3 in 2005; 4 in 2004; 3 in 2003, 1 in 2002, 4 in 2001 and 2 in 2000. Countries not having legislation fully in force: Barbados, Malaysia, Hong Kong, Singapore, South Africa.

[17] Kuner (n 15) 26 and UCTAD 2016 (n 3).
For instance, unlike the EU, the US and Asia have a more self-regulatory approach. In particular, the US is highly defiant of regulating privacy and mostly relies on the private sector, as opposed to the EU where a more prominent role is given to government regulation and regulatory agencies.

[18] Kuner (n 15) 22-23.

[19] See eg. Satya Nadella Microsoft CEO, in Daniel Hurst, 'Japan Calls for Global Consensus on Data Governance' (2 February 2019) <https://thediplomat.com/2019/02/japan-calls-for-global-consensus-on-data-governance/> and Peter Fleischer, Global Privacy Counsel, 'Call for global privacy standards' (14 September 2007) <https://publicpolicy.googleblog.com/2007/09/call-for-global-privacy-standards.html>.

[20] Cécile de Terwangne, 'Is a Global Data Protection Regulatory Model Possible?' in Serge Gutwirth and others (eds), *Reinventing Data Protection?* (Springer Netherlands 2009).

[21] Reeve Bull and others, 'New Approaches to International Regulatory Cooperation: the Challenge of TTIP, TPP, and Mega-Regional Trade Agreements' (2015) 78 Law and Contemporary Problems 1; Tamara Takacs, 'Transatlantic Regulatory Cooperation in Trade' in Elaine Fahey, Deirdre Curtin (eds), *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US Legal Orders* (CUP 2014).

[22] Christopher Kuner and others, 'The Global Data Protection Implications of "Brexit"' (2016) 6 International Data Privacy Law 167.

combination of extraterritorial impact of EU data laws, the adequacy mechanism and the strict standards expected from it has made the EU a very controversial actor in data, prompting some to refer to the EU as a "privacy power"[23] or to speak of "data embargo power"[24] of the EU. Driving convergence in data protection laws and practices is among the stated aims of the Union.[25] Regulatory Cooperation can be understood as a way through which the EU could nudge convergence and advance its own standards as 'global' standards. Given the EU's ambitions to be a rule-maker in data protection law, trade agreements and the inclusion of regulatory cooperation chapters therein are important elements to be considered in their intersection with data. While the WTO has been criticised for being fixed at the analog era, this is an additional area where the EU could play a role[26] and that, as such, warrants exploration.

2. The EU's Response to Demands of Free Data Flows and Regulatory Cooperation

This section explores the EU's approach to data flows and data protection (subsection 2.1) and regulatory cooperation (subsection 2.2). It then turns to an analysis of the extent to which regulatory cooperation chapters in the recent EU trade initiatives with other major developed economies would be liable to bring data protection to mechanisms of regulatory cooperation (2.3.1); the extent of consideration that fundamental rights are given in respectively the objectives of the chapters (2.3.2) and in the expertise of actors involved in their operation (2.3.3).

2.1. The Exclusion of Data Protection from EU Trade Agreements

'Data protection' is a relatively new right to be considered in relation to trade and has been so far marginal, or only tangential, to trade agreements. The EU seeks to deal with data protection outside the realms of trade and its approach essentially involves three aspects: (1) data protection as a fundamental right, to be excluded by trade negotiations; (2) adequacy decisions to complement trade agreements; (3) data protection as ground for exceptions. With respect to the first, during the negotiations of the trade agreements with other major developed economies, the EU Commission repeatedly presented data protection as a fundamental right recognised under the Charter of Fundamental Rights of the European Union[27] and, as such, "non-negotiable".[28] Especially during the talks with the US, the EU expressed since the beginning its unwillingness to discuss data protection as part of TTIP negotiations, pointing that other fora and side arrangement would have been more appropriate.[29] Negotiations on cross-border services and e-commerce thus omitted discussions on data flows and data localisation.[30] Progress was made on several fronts outside the negotiations of TTIP, featuring for instance the conclusion of the Privacy Shield agreement and the related adequacy decision in July 2016.[31] A similar stance was adopted in the context of the

[23] Luisa Marin, 'Personal data is not bananas' Presentation at II LAwTTIP Joint Conference 'Rights, Values and Trade: Is an Agreement between EU and US Still Possible?', Bologna, 12 April 2018.
[24] Paul M Schwartz, 'Global Data Privacy: The EU Way' (2019) 94 New York University Law Review (forthcoming), 4.
[25] European Commission, 'Communication from the Commission to the European Parliament and the Council: Exchanging and Protecting Personal Data in a Globalised World' (2017) COM(2017) 7 final <https://ec.europa.eu/newsroom/document.cfm?doc_id=41157>.
[26] Burri (n 13).
[27] Article 8 Charter of Fundamental Rights of the European Union [2012] OJ C326/391.
[28] European Commission press release 'Towards a more dynamic transatlantic area of growth and investment' (29 October 2013) <http://europa.eu/rapid/press-release_SPEECH-13-867_en.htm>.
[29] See spokesperson for the Commission "The TTIP is not the right forum to discuss privacy standards. The EU is not going to lower its own standards nor is it going to try to change the US' standards. Data privacy is outside of the scope of this negotiation. Separate discussions with the US are taking place on Safe Harbour – a streamlined process for US companies to comply with EU rules on the protection of personal data – and an agreement on the use of data by law enforcement authorities" in 'European Commission: EU-US data flow discussions separate from TTIP negotiations' (25 March 2015) <https://www.out-law.com/en/articles/2015/march/european-commission-eu-us-data-flow-discussions-separate-from-ttip-negotiations/>.
[30] See report of the 12th negotiating round. The reports of the following rounds similarly reflect the lack of discussion on the issue. European Commission, 'The Twelfth Round of Negotiations for the Transatlantic Trade and Investment Partnership (TTIP)' <http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154391.pdf>. See also Estelle Masse, 'The TTIP leaks: what does it mean for your digital rights?' (12 May 2016) <https://www.accessnow.org/ttip-leaks-mean-digital-rights/>.
[31] Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield (notified under document C(2016) 4176) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2016.207.01.0001.01.ENG&toc=OJ%3AL%3A2016%3A207%3AFULL>

negotiations with Japan: discussions on data were postponed and finally approached outside the trade talks by envisaging the possibility of an adequacy decision. During the negotiations of the EUJEPA, Japan repeatedly expressed its interest in free data flows and the prohibition of data localisation requirements.[32] The EU instead refused to negotiate any substantive content of data protection standards via the FTA.[33] Parallel dialogues were launched to reach an adequacy decision with Japan; and right before the signing of the EUJEPA, the EU and Japan reached an agreement foreseeing a mutual recognition on their levels of data protection.[34] On the 23 of January 2019 the adequacy decision was adopted,[35] creating the largest area for safe transfers of personal data.[36]

As shown in these cases, the way the EU addresses transborder personal data flows in the context of trade is by means of mutual adequacy decision alongside the FTAs. The aim is to facilitate the flow of data by establishing that the other Party has 'adequate' levels of protection, meaning 'equivalent' to those of the EU. Such adequacy decisions have been said to ease trade negotiations or complement existing trade agreements.[37] The juxtaposition of trade talks and talks on data protection to reach an adequacy decision suggests a dual strategy of the EU: one which, on the one hand, understands the relevance of free flow of (personal) data as a complementary necessity for the operation of the trade agreement, in particular services-related disciplines such as finance, telecommunications and e-commerce heavily relying on data flows.[38] On the other hand, one whereby the EU can exploit its market power to use the trade agreement as a "carrot" for the other Party and engage with it in data dialogues, as a result of which the other Party could even revise its legal framework for data and adapt to the EU terms. In this sense, the EU seems to pursue concurrently both offensive and defensive interests in data. The potential of the adequacy decision as a tool for convergence around the EU is informative of the reasons for the EU's approach: the EU not only aspires to promote the protection of a fundamental right globally, but it would also benefit from an increased convergence towards its own approach. However, while the EU's preference for adequacy decisions has been criticised for revealing an offensive approach, insofar it drives the other Party to adopt the EU's standards;[39] recent criticism as to the adequacy decision for Japan also challenges this view and the extent to which, by these means, the EU would be able to secure equal levels of protection.

Finally, what can be found in trade agreements with respect to data reflects the approach at the multilateral level. Under the WTO, data protection features as an object of exceptions whereby the Parties, under a number of conditions, are allowed to derogate from the agreement and to introduce measures that are liable to restrict the flows of data. The same can be found in the EU FTAs, where data protection appears within the list of grounds for exceptions. Such an approach can be contrasted with the one towards labour rights, for which provisions are included to guarantee certain core labour standards. In CETA, labour is even dedicated a chapter of its own.[40] Conversely, what the new generation EU FTAs have in common in relation to data protection is that there is no self-standing chapter regulating it. CETA, the EU's proposal for TTIP and EUJEPA all feature data protection as a ground for exceptions. Positive obligations are very sporadic and spread in chapters where deemed the most relevant, such as e-commerce, telecommunications and financial services. When present, they require the maintenance or adoption of measures for the protection of personal data. These examples reveal the acknowledgement that liberalisation of services and data flows requires a balancing act with the protection of personal data. The approach towards them is quite elusive: it purports to safeguard the protection of personal data,

[32] See 15th and 18th negotiating rounds. European Commission, 'Report of the 15th EU-Japan FTA/EPA negotiating round Brussels, 29 February - 4 March 2016' <http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154368.pdf>; European Commission, 'Report of the 18th EU-Japan FTA/EPA negotiating round Tokyo, Week of 3 April 2017' <http://trade.ec.europa.eu/doclib/docs/2017/april/tradoc_155506.pdf>.

[33] See 15th negotiating round, ibid.

[34] See European Commission press release, 'The European Union and Japan agreed to create the world's largest area of safe data flows' (17 July 2018) <http://europa.eu/rapid/press-release_IP-18-4501_en.htm>.

[35] Commission Implementing Decision (EU) 2019/419 of 23 January 2019 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by Japan under the Act on the Protection of Personal Information OJ L 76.

[36] European Commission press release (n 34)

[37] European Commission, 'Exchanging and Protecting Personal Data in a Globalised World', Communication from the Commission to the European Parliament and the Council, p.9.

[38] Gabriel Felbermayr, 'The EU-Japan Economic Partnership Agreement and the revitalisation of the international economic liberal order' (Real Instituto Elcano, 21 February 2019).

[39] Paul Schwartz, 'Global Data Privacy: The EU Way' (2019) 94 New York University Law Review (forthcoming).

[40] Chapter 23 CETA.

yet it does so either by allowing derogation from the agreement or by mandating the maintenance (or adoption) of measures to ensure their protection.[41] Underlying this approach is the premise that the EU will reach an adequacy decision with the trade partner, yet as it has been addressed above, this does not necessarily imply an equivalent level of protection.

The way the EU addresses flows of personal data in trade is essentially by removing issues of data protection from the negotiating scope of the trade agreements with a view not to come to compromises as to the standards to be upheld. Accordingly, provisions to their respect provide exceptions that contribute to pool data protection matters out of the commitments of the trade agreement. Standards and practices in relation to data protection are rather addressed outside trade negotiations by means of adequacy decisions: in this case, it is usually the EU's standards that are expected to be fulfilled by the other Party. However, it is arguable whether adequacy decision are able to secure convergence towards EU standards. As shown below, regulatory cooperation chapters are an additional venue for nudging convergence, of which the EU has sought inclusion in its latest trade agreements with other developed economies.

2.2. The Inclusion of Regulatory Cooperation chapters in EU Trade Agreements

Despite the EU's long-standing cooperation on regulatory matters with third countries, the inclusion of Regulatory Cooperation chapters in trade agreements is a completely novel feature. Especially in relations with Canada and the US, the EU has a tradition of regulatory cooperation, via for instance mutual recognition and equivalence mechanisms, yet targeting specific sectors - among which privacy and data protection - outside the framework of trade agreements.[42] The recent trend of making Regulatory Cooperation chapters integral part of FTAs signal the ambition to integrate more deeply in a comprehensive and streamlined manner, to build in turn long-term dialogues, increased mutual understanding and trust between regulators. The rationale for incorporating these chapters in the trade agreements can be found in a series of EU documents which illustrate potential of regulatory cooperation in trade from an EU perspective.

First of all, the link between regulatory cooperation and trade finds its roots in the willingness to address non-tariff barriers (NTBs) to trade. Such perspective is in line with the global calls for regulation of trade, where behind-the-border barriers in the form of regulatory divergences have become the main obstacle to trade. In the Global Europe strategy underpinning the new generation of EU FTAs,[43] trade agreements were presented as tools to tackle NTBs to trade "through regulatory convergence".[44] One year later, the EU Commission called on to "negotiate new trade agreements with a strong regulatory component"; including by engaging in regulatory dialogues; and by adopting "flexible mechanisms to facilitate the resolution of specific non-tariff barriers".[45] In a Communication on market access and international regulatory cooperation, the Commission identified two types of NTBs, one of which deriving from differences in the regulatory approaches and in the "social, labour, environmental, public health and consumer objectives".[46] In this latter case, the potential for ongoing dialogues and cooperation was said to be the highest. The negotiating mandates of the EU trade initiatives with the US, Canada and Japan all call for tackling behind-the-border issues and reflect and the more prominent weight of

[41] The same approach has been replicated in the most recent proposal for horizontal provisions on cross-border data flows and for personal data protection to be included in future FTAs, which is nevertheless not discussed here for reasons of space. See Horizontal provisions for cross-border data flows and for personal data protection (in EU trade and investment agreements) <http://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156884.pdf> .

[42] For EU-US Regulatory Cooperation in privacy, see Gregory Shaffer, 'Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting up of U.S. Data Privacy Standards' (2000) 25 Yale Journal of International Law 1.

[43] Commission, 'Global Europe: Competing in the World' COM (2006) 567 final <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006DC0567&from=EN>.

[44] Ibid 9.

[45] European Commission, 'Commission staff working document - The external dimension of the single market review - Accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A single market for 21st century Europe' (2007) <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007SC1519:EN:HTML>.

[46] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the External Dimension of the Lisbon Strategy for Growth and Jobs: Reporting on market access and setting the framework for more effective international regulatory cooperation' (2008) COM(2008) 874 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0874&from=EN>.

regulatory divergences as NTBs.[47] The EU-US recent decision to "launch a new phase" on regulatory cooperation as a follow-up to the failure of TTIP strongly confirm this need.[48]

Beyond the economic-related arguments, the rationale for incorporating regulatory cooperation chapters in EU FTAs finds a more subtle reason in the EU's willingness to play a role in the setting of global standards; and the employment of trade agreements as vehicles for nudging global convergence. In the Global Europe strategy, regulatory cooperation was presented as a way for the EU to promote its norms and values abroad; to ensure its norms be "a reference for global standards" and play a leading role in international rule-making.[49] In the following year, the Commission acknowledged the emergence of "a new international approach focusing on regulatory cooperation, convergence of standards, and equivalence of rules".[50] It suggested regulatory cooperation be pursued both multilaterally and bilaterally; in this latter case, it should have "complemented trade negotiations". The FTAs envisaged by the Global Europe strategy then should have been negotiated with a view to reach an agreement on "regulatory dialogues" as well as "increased regulatory transparency and convergence".[51] In this sense, regulatory cooperation was conceived as a tool for for the EU to export its own standards abroad via trade agreements. Given the prominence of data flows and the need to address them in the context of trade relations, closer examination is needed of how the EU deals with these parallel aims, yet very much liable to come together.

2.3. The Consideration of Data Protection in the Regulatory Cooperation chapters of EU Trade Agreements

This section explores the substantive meeting points between regulatory cooperation chapters and data protection in the new generation of EU trade agreements with Canada (CETA), the US (TTIP) and Japan (EUJEPA). It first looks at the extent to which data protection is liable to be covered and tabled for discussion in regulatory cooperation activities: as it has been mentioned above, while data would virtually fall outside trade negotiations and discussion, the potential for it to be affected by regulatory cooperation activities is not to be underestimated (subsection 2.3.1). In the light of this, the section turns to an exploration of the extent to which fundamental rights consideration are embedded and reflected in the *objectives* of the regulatory cooperation chapters (subsection 2.3.2) and in the *expertise* of the actors composing the bodies of Regulatory Cooperation (subsection 2.3.3).

2.3.1. Data Protection as a Potential Subject Matter of Regulatory Cooperation

With respect to the subject areas covered by regulatory cooperation chapters, it appears that data protection could be potentially covered and become object of regulatory cooperation activities in all of the agreements under consideration in two ways: either as a consequence of the wide subject matter to which the regulatory cooperation chapters would apply, and in this sense data protection could become an object of regulatory initiatives; or more indirectly, where data protection were called into question or discussed in regulatory cooperation activities on areas such as e-commerce, financial services and telecommunications.[52] It has been observed, indeed, that where these chapters are included in trade agreements, the need arises to regulate on data.[53] The UK's recent proposal to the EU advocating a binding agreement with regulatory cooperation for data shows this tendency.[54] Turning to the

[47] See Council of the European Union, 'Recommendation from the Commission to the Council in order to authorize the Commission to open negotiations for an Economic Integration Agreement with Canada' (Brussels, 24 April 2009) <http://data.consilium.europa.eu/doc/document/ST-9036-2009-EXT-2/en/pdf>; Council of the European Union, 'Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America' (Brussels, 17 June 2013) <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>; Council of the European Union, 'Directives for the negotiation of a Free Trade Agreement with Japan' (Brussels, 29 November 2012) <https://www.consilium.europa.eu/media/23934/st15864-ad01re02dc01en12.pdf>.

[48] European Commission, 'EU-U.S.: Call for proposals for regulatory cooperation activities' <http://trade.ec.europa.eu/doclib/docs/2019/march/tradoc_157722.Final%20(002).pdf>.

[49] Commission, 'Global Europe: Competing in the World' COM (2006) 567 final <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006DC0567&from=EN>, 7.

[50] European Commission, Commission staff working document (n 45).

[51] European Commission, Communication on the External Dimension of the Lisbon Strategy for Growth and Jobs (n 46).

[52] Where these fall under the scope of regulatory cooperation mechanisms envisaged.

[53] Marise Cremona, 'Guest Editorial: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)' (2015) 52 CMLR 351.

[54] See UK's proposal for a beyond adequacy decision and ongoing regulatory cooperation in HM Government, 'The exchange and protection of personal data: A FUTURE PARTNERSHIP PAPER' (2018)

EU FTAs with other major economies, data protection is not explicitly expressed as falling under the subject matter of regulatory cooperation activities. However, there is reason to believe that data protection issues would be liable to be tabled for discussion.

In the case of CETA, this could happen indirectly by means of regulatory cooperation on cross-border trade in services which is said to be subject to regulatory cooperation.[55] As data protection is closely related to data flows, which are in turn related to cross-border trade in services, cooperation on regulatory matters pertaining to data protection would not be totally excluded. In EUJEPA, the subject matter is wider than in any other of the latest EU FTAs. The Regulatory Cooperation chapter is said to apply to regulatory measures "in respect of any matter covered" in the agreement,[56] but essentially with the exception of financial regulation.[57] As such, the chapter could virtually apply to regulatory measures of any matter, including data protection. Despite the wide coverage, however, there are several safeguard clauses limiting this apparent ambition, as well as unambitious commitments as to the degree of cooperation pursued.[58] Under the EU's proposal TTIP, it is unclear to what extent data protection would be excluded by the scope of applicability for regulatory cooperation; and whether it could be instead discussed as a consequence of negotiations of the terms upon which some services could be offered.[59] For instance, the provision on cooperation on regulatory issues in e-commerce states that the parties "shall maintain a dialogue on regulatory issues raised by electronic commerce" which would include "the protection of consumers" in the context of e-commerce.[60] While this would suggest that regulatory cooperation on data protection issues could be possible, the kind of regulatory cooperation activity envisaged seems to be limited to "maintain a dialogue" and exchange information about the Parties' legislation on those issues and its implementation.

From the discussion above, the aim is not to suggest that data protection should not be touched by regulatory cooperation activities; rather, it is argued that its coverage would arise as a problematic issue from the moment where other necessary conditions for its protection were not met. On the one hand, the potential for personal data to fall more or less directly under the subject matter is problematic if no additional provisions were there mandating its protection; especially if this would imply an absence of its consideration in the discussions of subject matter that would touch upon it. On the other hand, the most recent proposal for the inclusion of horizontal provisions on data flows in future trade agreements explicitly excludes regulatory cooperation on matters of personal data and privacy. It is argued that excluding exchanges on data protection altogether from regulatory cooperation activities is equally problematic: this would be so, like in the previous scenario, insofar as there were no provisions requiring their protection. Moreover, such approach would preclude the EU from ambitious aims of upward convergence that could be nudged therefrom. Against the prospect of data protection to arise as a side issue or not being taken into consideration at all in discussions that would tangentially touch upon it, the next paragraph considers the objectives of the regulatory cooperation chapters to explore the extent to which fundamental considerations could be taken into account.

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/639853/The_exchange_and_protection_of_personal_data.pdf>.

[55] Article 21.1 CETA.

[56] Article 18.3(1) EUJEPA.

[57] Article 18.18(1) EUJEPA.

[58] See eg. Articles 18.1(2), (3), (4), (5); and Article 18.12(6).

[59] TTIP - EU proposal for Chapter: Regulatory Cooperation, tabled for discussion with the US and made public on 21 March 2016, <http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf>, thereinafter TTIP - EU proposal for Chapter: Regulatory Cooperation (2016). The scope of applicability of Regulatory Cooperation is extended beyond "specific or sectoral provisions concerning goods and services" towards "any other areas or sectors" covered by the Agreement that "has or is likely to have a significant impact on trade or investment between the Parties". Data protection issues could arguably fall under the "other areas or sectors" where regulators of both Parties could find such common interest. At the same time, it is also specified that regulatory measures which relate to services outside the applicable scope of the sections on liberalisation of investment and cross-border supply of services would not form part of the applicable scope of the Chapter. Since services such as data processing, data storage and similar do fall under the services chapter proposed by the EU, it is unclear to what extent data protection would be excluded by the scope of applicability for regulatory cooperation; and whether it could be discussed as a consequence of negotiations of the terms upon which the above mentioned services could be offered.

[60] Article 6-8 TTIP - EU proposal for Chapter: Regulatory Cooperation (2016).

3.2.2. The Objectives of the Regulatory Cooperation Chapters

The objectives of the regulatory cooperation chapters are relevant in the context of rights protection for mainly two reasons: first, they would provide the principles upon which issues would be interpreted and discussed; and second, they would also guide the actions of regulatory cooperation bodies created under the chapters. The objectives are informative of the degree of ambition of the Parties and what they want to achieve through closer cooperation in regulatory matters. In this sense, the objectives would reflect more or less normative concerns and would be indicative of the degree to which fundamental rights concerns have been expressed or infused into the chapter. Moreover, they would show what negotiators expect from the regulators in terms of the interests to be pursued and balancing exercises to be made, in particular between aims of liberalisation of trade and more normative aims.[61] It follows that the objective are liable to provide the ground on the basis of which the actors and bodies involved in the operation of these chapters would understand their mandate and role.[62] It has been argued that where the purpose of regulatory cooperation is confined to the promotion and liberalisation of trade in the sense of reduction of non-trade barriers, it is more likely that questions on data will be framed in those terms and concerns over data protection overlooked.[63]

Turning to the trade agreements more closely, in both CETA and TTIP normative objectives seem to precede aims of trade and investment liberalisation. In TTIP, regulatory cooperation should be conducted for issues where common interest is identified and most importantly, "where cooperation would benefit citizens, entities subject to regulation, in particular small and medium sized enterprises, as well as the public interest".[64] Regulatory cooperation is then presented as a supporting tool for the Parties to pursue a "high level of protection" of public policy objectives, among which personal data.[65] The normative nature of this objective is arguably diluted by the addition at the end of "whilst facilitating trade and investment".[66] Also in CETA priority is given to normative objectives, yet more broadly to the protection of i.a. human life, health or safety, and not specifically personal data.[67] In both chapters, further aims are to "reduce unnecessary differences in regulation"[68] and "burdensome, duplicative or divergent regulatory requirements".[69] While in TTIP and CETA a balance would seem to be possible between competing aims of reduction of "burdensome differences" and protection of personal data, the approach in EUJEPA is one that gives precedence to trade and investment facilitation. The overarching objective is to "promote good regulatory practices and regulatory cooperation", in order to enhance bilateral trade and investment.[70]

While protection of personal data was an objective in the regulatory cooperation chapter for TTIP, in EUJEPA personal data is made the object of a safeguard clause: according to the latter, the right of each Party to its own levels of protection for purposes of public policy objectives shall not be affected.[71] In this sense, rather than making personal data an objective of regulatory cooperation, the Parties have reaffirmed their right to regulate to that respect. In TTIP, and to a lesser extent CETA, normative aims are made part of the objectives of regulatory cooperation, probably as a way to reiterate that regulatory cooperation should not imply a race-to-the-bottom and lower standards, and could instead be conceived of as a tool to achieve those aims via closer cooperation and mutual understanding. In EUJEPA, while the right to regulate is reiterated, it is questionable whether the lack of a more positive formulation as to objectives of personal data protection could limit more normative interpretations of the chapter and/or how regulators would understand their role and mandate. Beyond to the objectives, the next area of intersection to be considered is the typology of actors composing regulatory cooperation bodies, requiring consideration of the kind of expertise they would bring into the operation of the chapter.

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[61] Joana Mendes, 'Participation in a new regulatory paradigm: collaboration and constraint in TTIP's regulatory cooperation' (2016) IILJ Working Paper 2016/5 (MegaReg Series) 22.
[62] Marija Bartl and Kristina Irion, 'The Japan EU Economic Partnership Agreement: Flows of Personal Data to the Land of the Rising Sun' (2017) <http://dx.doi.org/10.2139/ssrn.3099390>, 10.
[63] Ibid.
[64] Art.x1(1)(a) TTIP - EU proposal for Chapter: Regulatory Cooperation (2016).
[65] Art.x1(1)(b) ibid.
[66] Ibid.
[67] Article 21.3(a) CETA.
[68] 21.3(c) CETA; see TTIP "pursue increased compatibility of regulatory approaches" Art.x1(1)(d).
[69] Art.x1(1)(d) TTIP - EU proposal for Chapter: Regulatory Cooperation (2016).
[70] Art.18.1(1)(1)(a) EUJEPA.
[71] Art.18.1(2)(h) EUJEPA.

3.2.3. The Expertise of the Actors of Regulatory Cooperation Bodies

With respect to the actors of regulatory cooperation chapters, it is useful to examine who is entitled and given the power to do what kind of activity. Questions arise as to who sets the regulatory agenda;[72] which voices and demands are being institutionalised in such mechanism;[73] and to what extent actors that promote and embrace fundamental rights discourses would be empowered.[74] The premise is that the lack of actors that would have an expertise in human rights and the involvement, instead, of trade and regulatory officials, would conceal discourses of data protection.[75] As a result, discourses would shift towards the more narrow language of "data flows".[76] This argument is also in line with recent calls for greater involvement of human rights expertise into the negotiation of international agreements.[77] Starting from this perspective, and turning to the case of regulatory cooperation activities more specifically, this would imply that actors involved in the operation of the chapter should have expertise on rights, among which data protection; be able to assess potential impacts on them; as well as find solutions so as to ensure their protection. The main actors to be considered to this respect are the bodies created under the regulatory cooperation chapters.

The EU trade agreements with Canada and Japan respectively establish a Regulatory Cooperation Forum (RCF) and a Committee for Regulatory Cooperation.[78] They are broadly said to consist of "relevant officials of each Party"[79] or "representatives of the Parties".[80] The latest EU proposal for the Regulatory Cooperation chapter in TTIP envisaged the establishment of a Transatlantic Regulators' Forum; the latter would have been composed of [1] "Senior Officials of both Parties responsible for cross-cutting issues of regulatory policy and good regulatory practices [2] senior officials responsible for international trade, and [3] senior regulators for the areas they are responsible for."[81] The expertise of these actors is possibly more closely related to trade and investment policy as opposed to human rights, and the likelihood for them to speak in terms of rights protection would be very low.[82] Furthermore, little is hinted about the required expertise of the relevant regulatory authorities. It is argued that more could have been done: for instance, relevant provisions in investment dispute settlement in CETA, the members of the tribunals are mandated to possess expertise in particular expressed fields.[83] Hence a similar approach could, and should, be taken with respect to the actors involved in the operation of Regulatory Cooperation chapters. In CETA, the requirement for the Parties to ensure that each issue is discussed "at the adequate level of expertise" could provide some ground to argue that competent authorities should have expertise in data protection when data flows issues are at stake.[84] In any case, while data protection matters are liable be subject to regulatory cooperation activities, little balance is struck with the need for these discussions to be addressed taking into consideration the fundamental rights nature of the issue.

The composition of the envisaged regulatory cooperation bodies, and the expertise of the actors composing them, shows that fundamental rights considerations could be left at bay. First, the exploration of the substantive interaction reveals that data protection could arise as an issue to be discussed in the context of regulatory

[72] Marija Bartl and Elaine Fahey, 'A postnational marketplace: negotiating the Transatlantic Trade and Investment Partnership' in Elaine Fahey and Deirdre Curtin (eds), A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US legal orders (CUP 2014).
[73] Joseph Corkin, 'Who, then, in [European] law, is my neighbour? Limiting the argument from external effects' in Samo Bardutzky and Elaine Fahey, *Framing the Subjects and Objects of Contemporary EU Law* (Edward Elgar Publishing 2017).
[74] For reasons of space, this section focuses on the expertise of the actors that constitute the bodies created under the chapters and does not consider external participatory mechanisms.
[75] Bartl and Irion (n 61) 10-11.
[76] Ibid.
[77] See Joint Committee on Human Rights, 'Human Rights Protections in International Agreements' (Seventeenth Report of Session 2017–19) and Marija Bartl, 'TTIP's Regulatory Cooperation And The Politics Of 'Learning' (2015), <https://www.socialeurope.eu/ttips-regulatory-cooperation-and-the-politics-of-learning>.
[78] Article 21.6 CETA and Article 18.14 EUJEPA.
[79] Article 21.6(3) CETA.
[80] Article 22.3(3)(c) EUJEPA and Article 16 EU's proposal for legal text on "Regulatory Cooperation" in TTIP, tabled for discussion with the US in the negotiating round of 20-24 April 2015 and made public on 4 May 2015, <http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153403.pdf>.
[81] Article X.2(1) EU Proposal for Institutional, General and Final Provisions, tabled for discussion with the US in the negotiating round of 11-15 July 2016 and made public on 14 July 2016, <http://trade.ec.europa.eu/doclib/docs/2016/july/tradoc_154802.pdf>.
[82] Bartl and Irion (n 62).
[83] Article 8.27(4) CETA
[84] Article 26.2(5) CETA.

cooperation activities. Second, the objectives allow to appreciate whether the chapter would enable more normative considerations and interpretations; and from the above, it appears that in CETA and TTIP this could be the case, and less so in EUJEPA. Finally, the expertise of the actors suggests the kind of contribution that the actors involved would bring to the table. As discussed, alternative options would have been possible regarding the drafting of the relevant provisions.

3. Reflections on the Way Forward: Harnessing Data Protection Rights in Regulatory Cooperation chapters

The way the EU addresses the problem of interdependence of data protection, data flows and regulatory cooperation is by excluding data from trade negotiations altogether. Furthermore, it leaves each Party the freedom to decide the levels of protection, which is normatively justified by the conclusion of parallel adequacy decisions. However, the latter might not, in fact, necessarily provide the same level of protection. Arguably, attempts to avoid negotiating on substantive standards and seek adequacy decisions would not solve or satisfactorily address the problem. While the EU rejects data protection as an issue to be tabled for regulatory cooperation, it has been found that data might arise as a cross-cutting issue and that this possibility is overlooked. Moreover, it has been argued that even where data protection did not arise as an issue to be discussed, the little (or absence of) fundamental rights consideration in the objectives and expertise of actors is liable to lead to an outcome that could disregard or even undermine the protection of personal data. Against this state of affairs, the EU should ponder challenges and advantageous opportunities, and develop mechanisms to counter the former and enhance the latter.

With respect to the challenges, the EU should thus first of all acknowledge the close interdependence of data protection and regulatory cooperation. Against a context of trade increasingly relying on data flows, and where global divergences would hamper such free flow, the EU could play a role: namely, by acting as a convergence actor via regulatory cooperation mechanisms that would nudge data convergence while protecting personal data. Accordingly, it should engage with the challenges relating to the possibility of data protection to arise 'inside' regulatory cooperation activities; or to be dismissed or not taken into consideration when it should be; or to be even undermined as a result thereof. Provided data protection is only apparently outside trade agreements, the EU should recognise these interdependence and design mechanisms to address it. The potential benefits of regulatory cooperation in data protection would be released where objectives and actors would incorporate, and/or allow considerations of, fundamental rights. Data protection rights and concerns should be embedded and procedural mechanisms designed so as to ensure that, such rights and concerns are not overlooked and that they are not undermined.[85]

Second, with respect to the opportunities, the EU should conceive of regulatory cooperation as a venue to reach upward convergence of standards. The aim would be to explore venues, possibilities and conditions that would lead to mutual understanding and upward convergence of standards. In this sense, regulatory cooperation could lead to benefits inasmuch it allowed ongoing dialogues and information exchanges and gathering with third countries on matters of data protection. The EU could explore and evaluate those advantages, and design regulatory cooperation mechanisms and conditions that were able to nudge upward convergence, not least mutual understanding and experimentation. The premise, or bottom-line, is that fundamental rights are indeed non-negotiable and their standards should not be lowered, nor should they be undermined. Accordingly, the argument advanced here does not advocate for a negotiation of data protection standards through regulatory cooperation chapters and make them vulnerable to agreement to lower standards. Yet negotiations could also be understood as not necessarily implying a process of lowering standards. It is argued that the EU should advance its own framework as the baseline and conceive of regulatory cooperation as a tol to reach upward convergence.

[85] How should data protection rights be embedded in regulatory cooperation chapters for them not to be jeopardised and be protected instead? How to formulate fundamental rights protection in regulatory cooperation chapters? Can we consider fundamental rights in regulatory cooperation at all, without the latter undermining the former? These questions are the more challenging and compelling in the light of the nature of fundamental rights and their non-negotiability. This is however beyond the scope of the chapter.

Conclusion

In a context of global trade witnessing an unprecedented relevance of data flows and calls for regulatory convergence, data protection warrants exploration in its intersection with recent efforts at regulatory cooperation in trade agreements. After discussing how data protection and regulatory cooperation are respectively salient to trade today, this chapter has provided an overview of how the two are salient to each other. It has been shown that the EU wants to play a role in this context: pursue greater regulatory convergence towards its own practices and standards and be a global actor in data. Despite global calls and pressures for convergence of data flows regulation, the EU pursues objectives of regulatory cooperation and data protection via two parallel tracks. With respect to the first aim, the latest EU trade initiatives with other major developed economies include Regulatory Cooperation chapters as a way to nudge convergence; on the other hand, the EU has so far categorically excluded data protection from the subject matter of trade negotiations.

The adoption of an approach that places data protection outside regulatory cooperation yet possibly reveals an underestimation of the challenges as much as potential benefits for data protection to be explicitly addressed from within. From this standpoint, the chapter has scrutinised the substantive intersection of data protection and regulatory cooperation chapters in the new generation of EU trade agreements to examine the extent to which fundamental rights considerations, in particular data protection rights, could permeate discussions in regulatory cooperation chapters. The findings are twofold: on the one hand, it has been shown that even though data protection seems to be outside EU trade talks, it is possibly only prima facie so, as there is potential for it to arise as a cross-cutting issue in the context of regulatory cooperation activities in matters of i.a. e-commerce, telecommunications and financial services. Even in cases where personal data were not tabled for discussion, the dismissal of data protection considerations could lead to the latter being undermined. It is also questionable to what extent the EU would be able to secure equal levels of protection by means of adequacy decisions. Arguably, regulatory cooperation could provide for a forum for ongoing dialogue and exchanges on data protection and related issues, not least increased convergence between the two legal orders.

It has been argued that the EU should acknowledge and address the potential challenges; for instance by means of both substantive and procedural guarantees within the chapters to ensure that data protection rights are not undermined. More prominent consideration should be given to data protection, and fundamental rights in general, in the objectives of the chapters and in the expertise of the actors involved in their operation. In processes of negotiation of regulatory cooperation chapters, the EU should take into consideration these elements and draft carefully so as not to undermine fundamental rights protection. Via regulatory cooperation, the EU could pursue global data convergence and enhance its role as a global actor in data protection, especially in the context of trade, of which data is a prominent component. In this sense, given its legal framework recognising data protection as a fundamental right, the EU could play a normative role and ensure that designs of regulatory cooperation chapters would guarantee protection of personal data.