Introduction: the Framework of data Institutionalisation

Overview

This book explores the waning and rising of EU institutionalisation in data. It argues that data embeds security into trade and trade into security and changes the face of institutionalisation, creating the need for cooperation, needs for trust, governance and rigour. This book exposes how the EU is ultimately an institutionalist, acting through and by institutions as a means of developing, advancing and changing the architecture of a field. It does this increasingly in the field of data. Institutionalisation is defined here as the process by which an organisation becomes increasingly subject to rules, procedures and stable practices.[1] It is thus arguably the most under-defined, under explored and misunderstood term deployed as to EU law and policy because of assumptions as to its existence or operation. Data operates as a key means to understand the breadth of the EU's approach to data law and governance. The EU's approach to AI policy development is to establish a European Artificial Intelligence Board or its approach to cyber law-making is to establish a European Cybercrime Centre (EC3) as a desk of Europol. Its approach to a new generation of trade agreements is to establish a broad architecture of bodies within trade agreements, from e.g. Joint Committees, specialised committees, civil society and Domestic Advisory Group entities. Institutionalisation is in the proverbial DNA of the EU as an organisation as much as its modus operandi.

This book represents a first major legal book on institutionalisation, focussing upon 'data' holistically, one of the most cutting-edge areas of national, regional and international regulation. Institutionalisation is the *solution* to most of the world's problems but the concept is rarely scientifically developed. The book takes the EU efforts at institutionalisation as its subject and the data transfer and governance regimes under EU law, from data privacy, data transfers to cyber law and policy, as its object. Data is the 'lifeblood' of the economies across the world but is also the source of much concern about the future of individuals and their rights. Data is increasingly captured by new regimes globally yet its study is highly siloed. Few data privacy scholars focus upon digital trade; few trade lawyers focus upon cyber security and so forth. The study of institutionalisation has the capacity to synthesise these many cross-cutting themes.

In a world where its appears that there is too much data to regulate[2] and where Europe is not the hub for tech innovation, tech GDP or innovation creation, the EU is still the world's leading legislator, regulator and rule-making organisation in data governance. The EU is one of the most influential global actors in data and is constantly innovating in data transfer regimes, having some of the largest safe flow regimes in the world. Country after country replicates or builds on the GDPR.[3] EU policy creep in data rises exponentially given the nature of data which is evolving, malleable and cross-cutting. The EU is increasingly attempt to regulate all aspects of data, all of the value chain, all procedures, all geopolitics, through a so-called alphabet soup of regulation, from the DMA, DSA, AI, DGA, PNR to the GDPR- letters to be articulated throughout this book. Yet it has regulated the previously unregulated frequently and pushes the boundaries of extra-territoriality. This is to a certain degree that there is no universal formula for data issues in a trade agreement, which may include many cross-cutting issues from cybersecurity, intellectual property, transparency to frictionless movement of tech workers. There is still no global privacy, cybersecurity or cybersecurity treaty. The EU has had 'first-mover' advantage in many domains of data regulation- principally data privacy, but not all. Trade negotiators might understand the importance of data governance questions but mainly operate without reliable data

[1] See E Fahey, 'Introduction: Institutionalisation beyond the Nation State: New Paradigms? Transatlantic Relations: Data, Privacy and Trade Law' in E Fahey (ed), *Institutionalisation beyond the Nation State* (Springer 2018); JE Alvarez, *The Impact of International Organizations on International Law* (Brill Nijhoff 2016); F Terpan, 'Soft Law in the European Union-The Changing Nature of EU Law' (2014) 21 *European Law Journal* 68.

[2] D Acemoglu and others, 'Too Much Data: Prices and Inefficiencies in Data Markets' (2019) National Bureau of Economic Research, Working Paper No 26296.

[3] E.g. Thailand, China, California; See A Bradford, *Brussels Effect: How the European Union Rules the World* (OUP 2020).

about the global digital economy. They also continue to overlook the losers of the digital transformation, underappreciate the right to regulate and misjudge the extent to which global digital corporations transcend territorial jurisdictional boundaries.[4] In contrast to other major international trade agreements, the EU's model agreements increasingly require its negotiating partners to sign onto its conception of personal data protection and privacy as a fundamental right. An explicit carveout makes sure that the anti-localisation provisions cannot be directed against personal data protection and privacy safeguards.[5] Such carveouts even extend to the dialogues on regulatory issues in digital trade. Ostensibly, the carveouts maximise the 'Brussels Effect' of voluntary adoption of its high privacy standards at transnational level in addition to requiring adequacy with the EU's GDPR in return for the facilitation of personal data exported out of the EU.[6] Yet there are risks to presuppose European dominance- which easily appearing as the 'law of everything', over-expansive, over-embracing and over-regulating of data.[7] There are also risks to understanding the EU as a monolithic entity- in reality its Court and legislator and even its European Council have all pulled in different directions as to data matters.[8] Big Tech actively escape and circumvent EU data regulation but adopt it voluntarily in a variety of ways.[9] The EU's many new data regime proposals cover cybersecurity, digital tax and digital trade and – spanning both internal and external dimensions. All are equally significant components of the regulatory construct of data governance but yet reach in many different ways to a variety of subjects and objects.

Instead, this book argues that to capture a realistic and accurate picture of EU data institutionalisation practices, more holistic focus is needed upon data, i.e. including cross-cutting areas of data governance, transfer, digital trade, cyber regulation, law enforcement and the internet of things. In turn, a holistic focus on data helps us understand institutionalisation, feeding in to each other. Topics previously never under the study of international trade agreements are now part and parcel of FTA texts and strategic partnership agreements alike. They are the subject of more institutionalised regimes than ever.

This book aims to consider data institutionalisation holistically, as a composite area of contemporary regulation, by using cross-cutting studies of competence spanning internal and external dimensions but largely focussing upon the external dimensions. It analyses *both* personal and non-personal data, looking at the heterogenous concept of data in the digital economy. It largely presents a descriptive rather than normative account as to the need to frame legal, legislative and regulatory developments in this fashion.

It does so as follows in this introduction: by outlining I. the normalisation of institutionalisation; II. defining institutionalisation; III. EU-centric institutionalisation IV. Comparative institutionalisation; V. informal organisations and information law-making and VI Institutionalising data: the data forum problem.

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[4] T Streinz, 'Digital Megaregulation Uncontested? TPP's Model for the Global Digital Economy' in B Kingsbury and others (eds), *Megaregulation Contested* (OUP 2019) 317.

[5] European Commission, 'Horizontal provisions for cross-border data flows and for personal data protection (in EU trade and investment agreements)' (May 2018) Tradoc No 156884, template art B.1, https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156884.pdf accessed 31 December 2021.

[6] Streinz (n 4) 317; Bradford (n 3).

[7] N Purtova, 'The Law of Everything. Broad Concept of Personal Data and Future of EU Data Protection Law' (2018) 10 *Law, Innovation and Technology* 40; Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR) [2016] OJ L119/1; Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union [2018] OJ L 303/59; Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013 (Cybersecurity Act) [2019] OJ L151/15; Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information [2019] OJ L172/56.

[8] J Polakiewicz, 'The Emperor's New Clothes – Data Privacy and Cybersecurity from a European Perspective' in E Fahey and I Mancini (eds), *Understanding The EU As A Good Global Actor: Whose Metrics?* (Edward Elgar 2022, forthcoming).

[9] Bradford (n 3).

I. Why institutionalisation? The normalisation of institutionalisation

Institution building is a historic-foundation stone of EU integration and the EU polity.[10] The creation of institutions to solve transnational problems is also one of the most consistent features of law-making, at national level, regional level and beyond the State. It is a key feature of some of the engagement with the most complex elements of globalisation. For example, it is at the heart of increased regulation of cross-border data flows, contemporary deeper trade agreements, and strengthened responses to cross-border migration flows. Such bodies increasingly raise inter alia legitimacy and accountability issues as to the powers they possess to engage in quasi-legislation, legislative substitution and forms of de facto and de jure regulation, with different forms of function, legitimation and accountability. This project explores how institutionalisation is fundamentally at the heart of these challenges. Although not well understood across disciplines, the process of the creation of institutions may be understand as institutionalisation.[11] Institutionalisation remains largely understood in highly *political* but not legal terms. Understudied is the place of law, autonomy and legal norms within this matrix. How does legal design contribute to understandings of processes of institutionalisation? What legal constructs relating to autonomy evolve institutionalisation? The EU continues to evolve innovations in institutionalisation. How are they understood outside of the EU? What legal norms have the capacity to open up processes of institutionalisation and expose their content, context and anatomy? Institutionalisation practises, studied in design, empirics or as transnational regimes can shed light on increasingly salient interactions of bodies, actors or associations across legal orders. Political scientists pay insufficient attention to shifts in innovations through legal autonomy, to legal constructs and rule-making powers and competences. Unlike international courts and law-making beyond the state as a process, the transnational dimension to institutionalisation is understudied. In particular, as data protection and data transfer globally becomes more sensitised to concerns of standards, enforcement and compliance, institutional structures have evolved considerably. As the most unsolved puzzle of globalisation, migration has had a difficult policy journey to becoming strengthened by institutions and institutional structures. As trade agreements increasingly deepen in scale, outlook, objectives and reach, their core formative elements have also similarly advanced. This book asks in the chapters that follow, what is a most fruitful way to study the institutionalised dimension of new challenges 'top down' or 'bottom up'? How does independence operate here? What is oversight in institutionalisation beyond the State? What type of regulation or governance is it? Does it institutionalise actors who are non-institutions? How flexible or formal is it? What is the appropriate subject and object in the most complex areas of global governance? Institutionalisation provides a means to meaningfully frame and synthesise such questions and problematisations.

The EU's efforts on institutionalisation are argued here to be usefully studied through data given that EU rules, actors and standards as to data are considered internationally to be some of the highest global standards or at worst to set complex bars for international cooperation and international debates on data flows.[12] Yet the EU's high privacy standards and shifts towards data localisation directly and indirectly are allegedly protectionist. This allegation is argued in this book to be overstated and best narrated through institutionalisation. The EU's institutionalisation practices are arguably hampered by other factors. For instance, adequacy decisions increasingly place indirectly complex constraints on the trade negotiations. There are several who suggest that the EU has reached adequacy decisions unduly easily e.g. as to Japan.[13] It has also played an outsized role in the Brexit negotiations, as one area where the UK has actively sought to engage with the EU and show its demonstrable

[10] See A Vauchez, *Brokering Europe: Eurolawyers and the Making of a Transnational Polity* (CUP 2015)
[11] Fahey, *Institutionalisation beyond the Nation State* (n 1).
[12] See EPIC (US Civil liberties body) on the need for a US Data Protection Agency: https://epic.org/dpa/ accessed 31 December 2021; S Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Profile Books 2019).
[13] G Greenleaf, 'Japan: EU Adequacy Discounted' (2018) 155 *Privacy Laws & Business International Report* 8.

credentials to have such safe data flows. They have placed institutional strengthening, institutional innovations and actors as central entities therein, directly or indirectly. The EU has some longstanding efforts at collaboration in data flows with the US in both civil and criminal fields (Passenger Name Record, Umbrella agreement, Privacy Shield, TFTP). EU-Japan is one of the world's largest safe flow of data regimes. EU-Japan regulatory cooperation in digital trade is cutting-edge. EU-China approaches to data regulation are as yet embryonic but characterised by Chinese adoption voluntarily of EU law privacy rules and standards derived from the GDPR, in the absence of any formalised EU-China adequacy agreement on safe data flows or any treaty-based or formalised agreement. Yet there are still significant developments in Chinese data law, EU-China relations as well as global governance to suggest that the comparative study thereof is of much value. This book thus examines the methodology of institutionalisation, focussing upon the case study of EU third country data flows and regulatory cooperation in trade. The case studies are examined from regional, international and transnational perspectives, in law, political science, international relations, political economy and sociology. The case studies also relate to third countries where significant data issues are arising in law enforcement issues bilaterally or otherwise.

Three third party country partners or negotiation partners of the EU are selected as casestudies for degrees of 'institutionalisation', from 'furthest away' from institutionalisation degrees (in ch. 6 as to EU-China relations) to closer EU-Japan (in ch. 5) and EU-US casestudies (in ch. 4). The latter two are longstanding key EU external relations partners, where significant developments in particular since the 1990s has seen a push to transatlantic cooperation and a pivot to Asia.[14] They relate to: North America (EU-US), Far East/ Asia (EU-Japan), Asia (EU-China). They three casestudies relate to some of the largest scale trade agreements or negotiations or data flow agreements that the EU, with two of the three partners as longstanding trade partners and highly developed economies of scale, with China as a 'late comer' to this metric but nonetheless today the largest trading actor globally. The three casestudies relate to partners at highly variable states of negotiation as to their EU relationship in data flows and digital trade, from negotiations over two decades to most recent post-Treaty of Lisbon and post-GDPR negotiations with the EU and are thus worthy casestudies.

II. On origins and terminology: defining institutionalisation

Institutions are foundational to most social sciences scholarship and frequently discipline shifting.[15] Over the past two decades, developments in Science and Technology Studies (STS) have contributed to our understanding of the socio-technical aspects of information infrastructures.[16] Such scholarship defines infrastructure as a stable sociotechnical substrate on which other systems and tools are built and that underpins, enables or constrains a wide variety of society intervention. Regulatory capacity over data governance in a digitised society is increasingly normalised.[17] Normalisation here becomes an issue. For many 'Institutionalisation' might appear to be an overly obvious term for many to use to be worthy of definition- arguably even a banal one. It's official dictionary definition can be said to be either a practice or very positive or negative.[18] It could be said that its 'blandness' is the term's worst

[14] U Krotz, K Klaus Patel and F Romero, *Europe's Cold War Relations: The EC Towards a Global Role* (Bloomsbury 2019); See F Bindi and I Angelescu (eds), *The Foreign Policy of the European Union: Assessing Europe's Role in the World* (2nd edn, Brookings Institution Press 2012) chs 1, 13, 17 to 21 in particular, and 33 also. See the accounts ibid in chs 4, 5 and 6 also on specific jurisdictions and their historical contexts.

[15] E.g. DC North, *Institutions, Institutional Change, and Economic Performance* (CUP 1990).

[16] H Shen *Alibaba: Infrastructuring Global China* (Routledge 2022) 2.

[17] E.g. MG Jacobides and I Lianos, 'Regulating platforms and ecosystems: an introduction' (2021) 30(5) *Industrial and Corporate Change* 1131.

[18] I.e. from (1) the *establishment* of ('something, typically a practice or activity') a convention or norm in an organization or culture: the institutionalised *practice* of collaborative research on a grand scale ('as adjective, institutionalised') institutionalised religion; (2) to *place or keep (someone) in a residential institution*: he was institutionalised in a school for the destitute; and (3) ('as adjective, institutionalised') (of a person), *apathetic and dependent* after a long period in an institution: became less institutionalised, more able to function as an individual; See 'Institutionalisation', *Oxford English Dictionary,* (3rd edn, OUP 2016) (British English spelling employed throughout).

offence for legal scholars, as an 'isation' of a word.[19] For example, the rapid development of digital technologies has been alleged to make possible a platform-ization of infrastructures and an infra-structuralisation of platforms.[20] It is arguably a normalised discourse of social sciences and law without any explicit acknowledgement of it. It simply features greatly in many subjects, below the radar. However, this author argues that in the context of the EU, institutionalisation *'matters'. The adoption of stablished practices, ideals and processes make the EU more organised, bureaucratically sophisticated and effective, in the form of institutionalisation*. They may also contribute to EU accountability and transparency requirements.

Institutionalisation is mostly about 'process'[21] and is not usually the subject of a definition certainly not as a matter of EU law. [22] It usually involves probing incomplete situations or involves predictions as to what will prevail. For lawyers, the prediction of the future of EU law is not an easy task.[23] EU literature explicitly discussing the term largely emanates from discrete political science studies in the 1990s. Institutionalisation of the EU is argued here to constitute the *joint processes of formalisation and stabilisation of procedures, institutional coordination, with the ability of individual actors to influence institutional development.* It has dimensions moving in different directions possibly, inwards and outwards or across actors and fields. EU institutionalisation has largely been theorised early on as being 'bottom-up'.[24] Nowadays, the development of a policy field in the EU in external relations is also understood as a form of institutionalisation but without much emphasis upon its legal provisions.[25] It is thus argued here to be a core characteristic of the EU's evolution as an international organisation.[26]

Institutionalisation at international level can be argued to take place as an antidote to concerns about the delegation of authority beyond the Nation State. Institutionalisation shows the value of institutions and the faith held in the creation of public bodies, authorities and actors. It can defray concerns about transfers of authority and create sites for the creation of legitimacy, however imperfect. There are many vivid examples of the deepening and widening of institutionalisation studied in political science, eg the rising delegation by Member States of authority to international organisations, the growth of international organisations or the increase of majority-voting in international organisations.[27] Conceptually mapping and engaging with institutionalisation is thus of much value.

III. Is Institutionalisation EU-Centric?

In the EU context, the EU's capacity to generate new configurations of institutions, for its own actors to evolve as agencies or quasi-agencies into autonomous agencies and to generate new international institutions is a core feature of EU law and policy. It is also a core feature of its policies as to the global legal order. The EU espouses the view that international institutions reflect the EU's interests rather than shape them. It has taken many decades after the work of Robert Keohane to show how institutional effects are most visible not when regimes are first established, but at subsequent points

[19] Cf. J Resnik, 'Globalization(s), privatization(s), constitutionalization, and statization: Icons and experiences of sovereignty in the 21st century' (2013) 11 *I-CON* 162, 163; See S Hofmann, 'Elastic Relations: Looking to both Sides of the Atlantic in the 2020 US Presidential Election Year' (2021) 59(1) *Journal of Common Market Studies* 150, on 'institutional elasticity' without referencing any actual institutions. See Fahey, *Institutionalisation beyond the Nation State* (n 1).

[20] JC Plantin and others, 'Infrastructure studies meet platform studies in the age of Google and Facebook' (2018) 20(1) *New Media & Society* 293-310; H Shen, *Alibaba: Infrastructuring Global China* (Routledge 2022).

[21] D Soltys, 'Challenges to the Institutionalisation of Environmental NGOS in Kazakhstan's Corporate Policy Arena' (2014) 44 *Journal of Contemporary Asia* 342, 362; See also Fahey, *Institutionalisation beyond the Nation State* (n 1), as to transatlantic developments, policies and actions.

[22] E.g. H Heclo, 'Thinking Institutionally' in SA Binder, RAW Rhodes and BA Rockman, *The Oxford Handbook of Political Institutions* (OUP 2008) 732.

[23] E Fahey, 'Future-Mapping the Directions of European Union (EU) Law: How Do We Predict the Future of EU Law?' (2020) 7(2) *Journal of International and Comparative Law* 265.

[24] M Smith, *Europe's Foreign and Security Policy: The Institutionalisation of Cooperation* (CUP 2004).

[25] See A Moravcsik and C Emmons, 'A Liberal Intergovernmentalist Approach to EU External Action' in S Gstohl and S Schunz (eds), *The External Action of the European Union – Concepts, Approaches, Theories* (Macmillan 2021).

[26] E.g. African Union from the ICC, UK from the Council of Europe and European Union, US from WTO or UN.

[27] M Zürn, 'Opening up Europe: Next Steps in Politicisation Research' (2016) 39 *West European Politics* 16, 82; M Zürn, 'The Politicization of World Politics and its Effects: Eight Propositions' (2014) 6 *European Political Science Review* 47.

where constellations of power and interests emerge.[28] The EU has thus espoused a longer-term vision of society, aligning with a particularly liberal non-realist view of institutions, that international. institutions matter. However, how long term the life span of international organisations is precisely remains to be seen. *Externally*, the EU has a recent history of promoting new multilateral institutions, from the International Criminal Court to a Multilateral Investment Court and reforming those it founded, e.g. WTO.[29] *Internally*, the EU struggles with partial institutionalisation as a solution to many complex policy fields e.g. migration and eurozone.[30] In the most crisis-ridden domains of the EU, partial-institutionalisation is often at the root of major challenges. Institutionalisation is also the default means for the EU to develop a regulatory policy, as an entity grounded in the rule of law and rules-based law and governance. As noted above, the EU's approach to AI policy development is to establish a European Artificial Intelligence Board or its approach to cyber law-making is to establish a European Cybercrime Centre (EC3) as a desk of Europol. Its approach to a new generation of trade agreements is to establish a broad architecture of bodies within trade agreements, from e.g. Joint Committees, specialised committees, civil society and Domestic Advisory Group entities. Still, however, significant legitimacy concerns surround EU regulatory cooperation in all major trade agreements post-Lisbon.[31] Earliest migration solutions appear to fall short of fuller institutionalisation.[32] Yet institutionalisation has broadly positive and even laudable public interest goals when pursued by the EU. Earlier EU scholarship contended that greater institutional adaptation and change had led to heightened formalisation and stabilisation- i.e. the more institutionalised policy space became.[33] The more stable the governance arrangements were and the more institutionalized the policy area is-, i.e. more refined the established governance structures and procedures.

EU regimes evolve where the substantive rules underpinning them are as important as the institutional actors or configurations of actors themselves. The nature of the EU as an innovator but also an entity willing to expose itself to institutionalisation, more, deeper, wider etc institutionalisation practices reaches into all fields and areas of EU level, from areas of long-established competence, cutting-edge regulatory issues to sensitive complex areas, e.g. data to defence.[34] Indeed, the organisation responsible for regulating the internet, ICANN, in its comments upon the EU's GDPR noted that the EU's development of a lead supervisory authority, one stop shop mechanism under the GDPR *was* a substantial development globally for organisations carrying out cross-border processing.[35]

However, in certain contexts the limits of EU institutionalisation may also be said to have been reached possibly- or the high-mark mark thereof breached perhaps. As will be outlined in ch. 4, recent high-profile decisions in *Schrems* II, invalidating one of the world's largest data flow regimes (i.e. the EU-US Privacy Shield), resting upon a complex partial institutionalisation at transnational level has been struck down in favour of significant privatisation and private actors- but also immense empowerment of national authorities. How should we understand the limits and flexibilities of institutionalisation in the EU context? Is the EU's push *towards* data localisation in trade agreements also generating more

[28] Cf. The classic R Keohane, 'Ironies of Sovereignty: The European Union and the United States' (2002) 42 *Journal of Common Market Studies* 743.
[29] Fahey, *Institutionalisation beyond the Nation State* (n 1) 5.
[30] J Caporaso, 'Europe's Triple Crisis and the Uneven Role of Institutions: the Euro, Refugees and Brexit' (2018) 56 *Journal of Common Market Studies* 1345.
[31] W Weiß, 'Delegation to treaty bodies in EU agreements: Constitutional constraints and proposals for strengthening the European Parliament' (2018) 14(3) *European Constitutional Law Review* 532.
[32] A Rippoll Servant and F Trauner (eds), *Routledge Handbook of Justice and Home Affairs* (Routledge 2017).
[33] A Stone Sweet, Wayne Sandholtz and Neil Fligstein, *The institutionalization of Europe* (OUP 2001).
[34] Fahey, *Institutionalisation beyond the State* (n 1); N Chrysoloras, 'EU Set to Allow US Participation in Joint Defence Projects' (*Bloomberg*, 4 November 2019), www.bloomberg.com/news/articles/2019-11-04/eu-set-to-allow-u-s-participation-in-joint-defense-projects accessed 31 December 2021.
[35] Internet Corporation for Assigned Names and Numbers, 'ICANN Org Comments on the Two-Year Review Exercise of the GDPR' (April 2020), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12322-Report-on-the-application-of-the-General-Data-Protection-Regulation/F514217 accessed 31 December 2021.

refined and localised understandings of EU institutionalisation?[36] How broad should we define and understand institutionalisation? How do we understand the delicate balance between data as the lifeblood of modern economies and the increasing range of concerns in Europe about transferring data abroad? Is the balance founded in institutional design and de-institutionalising data? To the naked eye, the Court of Justice increasingly appears to be incessantly blocking institutionalisation negotiated by the EU institutions. From the EU-US Privacy Shield to the EU-Canada Passenger Name Records Agreement negotiated with one of the most sophisticated fundamental rights regimes in the world, Canada, also the EU's partner in a trade agreement and Strategic Partnership Agreement adjudged to be the gold standard of trade agreement, the CJEU has not been shy of finding faults in the structures negotiated as to data transfer internationally.[37] In other contexts, the Court of Justice has upheld limited institutionalisation structures of justice outside of the EU legal order, such as in the EU-Canada Economic and Trade agreement, in Opinion 1/17.[38]

How can the EU hope to build strong international and transnational institutionalisation when its own internal institutions suffer from continuous strain and pressure?[39] Upholding democracy remains a major issue with the rise of social media giants seeking to develop their own autonomous transnational system, free from national, regional or international law constraints.[40] Arguably, the EU's long-standing tendency towards rules-based framework and developing consistent institutionalisation strategies insulates it from critiques. Data is arguably a litmus test of emerging practice here.

V. Whose institutionalisation? Comparative Approaches to Institutionalisation

It may be said that the EU recently reached a point of multilateralism as one of the few remaining advocates of multilateralism and international institutions in an era of 'exit'.[41] There is an increasingly significant literature 'outside-in' on regional organisations where the EU plays an outsized role. Here, the place of the EU on institution building is widely studied given the fact that the EU integration process was a relatively novel phenomenon in international politics, particularly as to the influence of the Court of justice on generating other regional copies (alter) or the influence of the European Parliament on regional parliaments around the world.[42] It is said that the influence of the EU is more far-reaching than merely being a model and pattern for a new wave of regional organisations e.g. Andean Community, Mercosur, ASEAN.[43] Institutionalisation makes an identifiable difference to regional organisations in other parts of the world, where others seek to catch up with the EU's level of institutionalisation.[44] However, there is also an emerging gap between the rhetoric of multilateralism on the part of the EU and its more dominant practice of bilateralism, particularly in trade. Even

[36] A Chander and UP Lê, 'Breaking the Web: Data Localization vs. the Global Internet' (2014) UC Davis Legal Studies Research Paper No 378, https://ssrn.com/abstract=2407858 accessed 31 December 2021.

[37] Opinion 1/15 of the Court (Full Court) of 26 July 2017 EU:C:2016:656; Case C-311/18 *Facebook Ireland v Schrems* EU:C:2020:559; O Lynskey, 'Delivering Data Protection: The Next Chapter' (2020) 21(S1) *German Law Journal* 80.

[38] However, we might say that this took place only on highly circumscribed terms, e.g. where EU law is not being applied and where a Joint Interpretative Instrument was agreed with Canada to delimit and limit the operation of CETA tribunals / appellate tribunals: Opinion 1/17 of the Court (Full Court) 30 April 2019 EU:C:2019:341; S Mayr, 'CETA, TTIP, TiSA, and Their Relationship with EU Law' in S Griller, W Obwexer, and Erich Vranes (eds), *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (OUP 2017)**;** C Riffel, 'The CETA Opinion of the European Court of Justice and its Implications—Not that Selfish After All' (2019) 22 Journal of International Economic Law 503; M Fanou, 'The CETA ICS and the Autonomy of the EU Legal Order in Opinion 1/17 – A Compass for the Future' (2020) 22 Cambridge Yearbook of European Legal Studies 106.

[39] RD Kelemen, 'The European Union's Authoritarian Equilibrium' (2020) 27 *Journal of European Public Policy* 481.

[40] K Klonick, 'The Facebook Oversight Board', in City Law School Working Paper 2020/2 'The Law of Facebook'; E Benvenisti, 'Upholding Democracy Amid the Challenges of New Technology: What Role for the Law of Global Governance?' (2018) 29 *European Journal of International Law* 9.

[41] E Lazarou, 'The future of multilateralism: Crisis or opportunity?' (2017) European Parliamentary Research Service Paper PE 603.922, www.europarl.europa.eu/RegData/etudes/BRIE/2017/603922/EPRS_BRI(2017)603922_EN.pdf accessed 31 December 2021.

[42] T Lenz, *Interorganizational Diffusion in International Relations: Regional Institutions and the Role of the European Union* (OUP 2021) 22; See also C Dri, 'Limits of the Institutional Mimesis of the European Union: The Case of the Mercosur Parliament' (2010) 1(1) *Latin American Policy* 52; J Navarro, 'The Creation and Transformation of Regional Parliamentary Assemblies: Lessons from the Pan-African Parliament' (2010) 16(2) *Journal of Legislative Studies* 195; B Theodoro Luciano, 'A Clash between Creature and Creator? Contemporary Relations between the Pan-African Parliament and the European Parliament' (2020) 58 *Journal of Common Market Studies* 1182.

[43] Lenz (n 42) 33.

[44] ibid 9.

adherents of the EU and passionate supporters of the EU as an international organisation (IO) criticize its over extensive diplomatic and regional ambitions, that appear immensely stretched relative to its useful engagements.[45] The nature of the EU as an innovator but also an entity willing to expose itself to new levels of internal and external institutionalisation, reaches into all fields and areas of EU level, from areas of long-established competence, cutting-edge regulatory issues to sensitive complex areas, e.g. data to defence. On occasion, this has taken place outside of the treaties e.g. Unified Patent Court. On other occasions, the EU has pushed for new institutionalisation at the margins of multilateralism through bilateralism e.g. WTO Dispute Settlement Reform. The CJEU has settled for pragmatic fudges in certain instances e.g. splitting trade and investment or discretely encouraging multilateralism along with a rising rigour to the autonomy of EU law after Opinion 2/15 and Opinion 1/17. Yet the EU's major efforts at multilateralism or institutionalisation beyond the state e.g. Multilateral Investment Court or a Unified Patent Court look increasingly fragile, albeit for various reasons.

As will be shown in ch. 6, the Belt and Road Initiative (BRI) of China is understood to constitute a law-light, institution-light, treaty-light 'top-down' non-institutionalised form of globalisation, differing from EU's globalisation through institutionalisation in 'bottom-up' structures at the core of the EU's deep and comprehensive post-Lisbon trade agreements.[46] China has used processes extrinsic to traditional frameworks as to investments e.g. swingeing loans and has disregarded social, environmental and labour law.[47] These developments take place against the significant backdrop of China adopting a Civil Code in 2020, in force in 2021, the first for Communist China after half a century of codification efforts.[48] Does the Belt and Road approach amount to an exception to globalisation? Does its legality have significance for the study of global governance? The EU's planned Global Gateway, discussed in ch. 6 emerges as a counterweight to this. Yet it largely proposes to adopt an investment-oriented view of infrastructure. Will it bring the EU and Asia closer together or further apart? Does it constitute an esoteric mode for the EU to engage with globalisation? A gap between EU and Chinese approaches to globalisation poses an important series of question on institutionalisation. How do we understand the future of institutionalisation in globalisation? Does institutionalisation in this vein contribute to our understanding of EU-Asia relations generally, broader than EU-China relations? How bottom-up is institutionalisation in recent times- and going forward? Is it Europe-centric? Looking across the other side of the Atlantic to a 'closer' region, how can Europe and the US come closer to each other in methods of globalisation? What place does Asia have in this matrix? How significant is the EU-Japan data flow agreement? Does EU institutionalisation work better at different stages of international agreement? How do we assess these claims in the current period and going forward? Is it Europe-centric? How can Europe and the US come closer to each other in methods of globalisation? How revealing are case studies of sectoral differences?

This book thus examines comparative approaches to data institutionalisation in North America with the US and Asia with the EU, considering Japan and China in Chs. 5 and 6. It considers leading trade and EU external relations partners since the 1990s in particular, after which a key turning point for data and digital trade regulation blossoming thereafter. It examines how the EU engages with countries with different approaches to law and institutions and it examines the fundamental differences between Japan and China as to data issues, a partner and another at further arm's length with far less legal and institutional interactions. The EU's impact upon third country legal orders through esoteric adequacy

[45] A Gardner, *Stars with Stripes: The Essential Partnership Between the United States and the European Union* (Palgrave 2020); Cf. R Bellamy, J Lacey and K Nicolaïdis (eds), *European Boundaries in Question?* (Routledge 2018).

[46] J Chaisse and J Kirkwood, 'Chinese Puzzle: Anatomy of the (Invisible) Belt and Road Investment Treaty' (2020) 23 *Journal of International Economic Law* 245; B Kingsbury, 'Infrastructure and InfraReg: on Rousing the International Law 'Wizards of Is' (2019) 8(2) *Cambridge International Law Journal* 171; M Wu, 'Digital Trade-Related Provisions in Regional Trade Agreements: Existing Models and Lessons for the Multilateral Trade System' (2017) RTA Exchange International Centre for Trade and Sustainable Development and Inter-American Development Bank, https://perma.cc/KHM9-33U accessed 31 December 2021; Although see M Li, 'The Belt and Road Initiative: Geo-economics and Indo-Pacific security competition' (2020) 96 *International Affairs* 169, on the role of Chinese officials.

[47] S Rolland and D Trubek, *Emerging Powers in the International Economic Order* (CUP 2019) 196.

[48] H Jiang, 'The Making of a Civil Code: Promises and perils of a new civil law' (2021) 95 *Tulane Law Review* 777; H Wang, 'The Belt and Road Initiative Agreements: Characteristics, Rationale and Challenges' (2021) 20 *World Trade Review* 282.

processes such as data flows is understudied- just how much change does it foist upon or demand from another order? Are findings transparent? The executive-led practice is generated by the Commission from somewhat opaque ideals. What are its effects? As noted above, the EU increasingly generates institutionalisation through its trade agreements, particularly in regulatory cooperation/ digital trade. But this is not the only phenomenon of institutionalisation. We may say that the adoption of EU rules, practices, ideas is partly generated through hard law but also partly through soft law processes e.g. the power of EU markets. How does comparative law deal with the EU, and its capacity to generate rule transfer and indirect dissemination of rules and standards, given its status as a non-state and complex regional supranational entity? Is it a blind-spot of comparative law? The EU presents a unique case study for comparative law, favouring strong institutionalisation as part of its DNA. Institutionalisation is simultaneously opposed by many US lawyers, US laws and US views on market intervention, top-down intervention and the role of the private sector. Equally, EU institutionalisation practices contrast sharply with Asian approaches to law and rights. EU data infrastructures agreed with such entities generate questions as to blind spots of comparative law and comparative studies of the development of data regimes. Does comparative law embrace international economic law developments as to data and trade agreements? Are advances in comparative approaches being seen? Does the EU generate comparative shifts in institutionalisation its partners domains? Such questions are likely to be outside the scope of this work but are also predictably important future questions e.g. as to a US privacy agency increasingly under discussion. Ch. 6 will outline how developments in EU-China relations arguably eclipse these EU-US structures and developments and show deeper elements of institutionalisation of EU norms, values and rules, albeit embryonically.

As will be developed in this book, more generally, the EU approach to digital trade in a global context is frequently thought to lie in the '*middle-ground*', usually between polarised US and Chinese approaches.[49] As to data flows, US agreements frequently have unfettered cross-border data flows but has restrictive approaches to net neutrality and content moderation. Chinese approaches using its Great Firewall have given economies of scale to data companies with a huge population, although increasingly adopting aspects of the EU's GDPR but also bolstered by the Belt and Road Initiative (BRI) to support Chinese firms. It gives much power to an independent national data regulator, although their independence is questioned. The EU has by contrast binding provisions on cross-border data flows, as in EU-Japan Economic Partnership Agreement (EPA). It requires countries that want to exchange personal data to become "adequate" in their protection of personal data. Similarly, on the definition of digital trade, in WTO negotiations, China has promoted a narrow view of digital trade, focussing upon trade in goods online, while the US and others have subscribed for a more inclusive approach. The US approach tends to focus more on the 'digital' nature of digital trade, while the Chinese approach prefers to address the issue from the traditional 'trade' perspective. The EU has arguably there shifted 'mid-way'.[50] Still, despite its *middle-ground* stance, the EU will be shown to play an outsized stance in its effects upon regulation, its extra-territoriality, the force of its laws and the reach of its high standards. The difference arguably lies in the place of institutionalisation therein, where the EU innovates, regulates and externalises through and by institutions. This is not to say that all casestudies present comparable examples or generate eg 'spread'- eg it is more difficult to claim that the EU's approach to digital trade for example is 'spreading'- more accurate its protection of data therein becomes more salient and its adequacy process will be argued to generate convergence.

[49] P Leblond, 'Digital Trade at the WTO - The CPTPP and CUSMA Pose Challenges to Canadian Data Regulation' (2019) CIGI Papers No 227, www.cigionline.org/sites/default/files/documents/no.227.pdf accessed 31 December 2021; S Aaronson, 'What Are We Talking about When We Talk about Digital Protectionism?' (2019) 18 *World Trade Review* 541.

[50] See AD Mitchell, 'Towards Compatibility: The Future of Electronic Commerce within the Global Trading System' (2001) 4 *Journal of International Economic Law* 685; H Gao, 'Digital or Trade? The Contrasting Approaches of China and US to Digital Trade' (2017) 21 *Journal of International Economic Law* 297.

This leads to a broader question as to looking at the place of law and checks and balances in institutionalisation and in major casestudies of institutionalisation. Is their adjudication normatively significant for study?

IV. Arguing that Institutionalisation goes beyond Judicialisation

Latest debates about the methods and methodology of EU law are largely data-driven or advocate deeper law-in-context methods or historical studies.[51] Certain schools now advocate, for example, that the future of EU law must become more empirical to realise its scientific benefits and to develop the discipline.[52] Many such advocates, however, are predominantly often heavily "court-centric" and propose a highly court-centric understanding of EU integration as a modus operandi of EU law or place the Court as the ultimate subject and object of the data analysis. EU legal scholarship has long tended to adopt a highly "court-centric" approach. This is not inevitable either.[53] One of the first places in the world to teach EU law was at Harvard Law School in the 1960s where Koen Lenaerts (now CJEU President) had to teach the content of the EEC treaties.[54] To impugn "court-centric-ness" is not to denigrate this approach - but rather to emphasise that organisational practice, law-making practice and Court judgments are different. Yet to advocate that a resolutely "non-court-centric" look at the EU may be considered is perhaps a "minority" methodology. However, non-court-centric views need to be taken into account in any realistic view of contemporary and future EU law as part of the study of actors embedded in a specific socio-political context, e.g. as regards the relationship between courts and other institutions, or between courts and the civil society at large.

The legalisation of society has contributed to this development and the growing sophistication of judicial review, although these developments are routinely imperilled. Legal scholarship and other fields of scholarship now invests considerably authority in the judicialisation of policy fields. Judicialisation relates to the central role played by courts in political systems, in particular as to the EU.[55] Judicialisation can be defined as the "reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies".[56] Judicialization is national, regional, international and supranational.[57]

In the EU, the role of the judiciary has been acknowledged first by lawyers seeing European integration as "Integration through law",[58] then by political scientists focussing on judicial politics in the EU,[59] and

[51] E.g. A Dyevre, W Wijtvliet and N Lampach, 'The Future of European Legal Scholarship: Empirical Jurisprudence' (2019) 26 *Maastricht Journal of European and Comparative Law* 348; U Sadl and M Madsen, 'A "Selfie" from Luxembourg: The Court of Justice and the Fabrication of the Pre-Accession Case-Law Dossiers' (2016) 22 *Columbia Journal of European Law* 327; W Alschner, J Pauwelyn and S Puig, 'The Data-Driven Future of International Economic Law' (2017) 20 *Journal of International Economic Law* 217; See R van Gestel and H-W Micklitz, 'Why Methods Matter in European Legal Scholarship' (2014) 20 *European Law Journal* 292, 313-316; M Egan, 'Toward a New History in European Law: New Wine in Old Bottles?' (2013) 28 *American University International Law Review* 1223.

[52] Dyevre, Wijtvliet and Lampach (n 51); Sadl and Madsen (n 51); U Sadl and I Panagis, 'The Force of EU Case Law: An Empirical Study of Precedential Constraint' (May 31, 2016) iCourts Working Paper Series No 68, https://ssrn.com/abstract=2787119 accessed 31 December 2021; A Dyevre and M Ovádek, 'Experimental Legal Methods in the Classroom' (2020) 16 *Utrecht Law Review* 1.

[53] E Fahey, 'Future-Mapping the Directions of European Union (EU) Law: How Do We Predict the Future of EU Law?' (2020) 7(2) *Journal of International and Comparative Law* 265.

[54] Lecture of Koen Lenaerts, Brussels, 2013, notes of author.

[55] E.g. N Mussche and D Lens, 'The ECJ's Construction of an EU Mobility Regime-Judicialization and the Posting of Third-country Nationals' (2019) 57 *Journal of Common Market Studies* 1247.

[56] See in the context of the EU-US Privacy Shield: E Fahey and F Terpan, 'Torn between Institutionalisation and Judicialisation: the demise of the EU-US Privacy Shield' (2021) 28 *Indiana Journal of Global Legal Studies* 205; See further R Hirschl, 'The Judicialization of Politics', in GA Caldeira and others (eds), *The Oxford Handbook of Law and Politics* (OUP 2018) 253.

[57] R Sieder, L Schjolden and A Angell (eds), *The Judicialization of Politics in Latin America* (Pelgrave 2016); B Dressel (ed), *The Judicialization of Politics in Asia* (Routledge 2012); Anne-Marie Slaughter, 'Judicial Globalization' (2000) 40 *Virginia Journal of International Law* 1103; G I Hernández, 'The Judicialization of International Law: Reflections on the Empirical Turn' (2014) 25 *European Journal of International Law* 919; KJ Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2014).

[58] E Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) 75 *American Journal of International Law* 1; Mauro Cappelletti, M Seccombe and JH Weiler, *Integration through law: Europe and the American federal experience*, vol 1 (De Gruyter 1986).

[59] A Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP 2000); S Saurugger and F Terpan, *The Court of Justice of the European Union and the Politics of Law* (Red Globe Press 2016).

the CJEU as a "political power"[60] or an activist court. [61] The CJEU is an unusually powerful court in for example, international relations, (IR), with powers of, e.g. ex ante Opinion review pursuant to Article 218 TFEU, that are viewed as non-justiciable political questions in some legal orders. Beyond the EU, there is a broad scholarship on 'juristocracy' and the rise of judicial authority beyond the State in light of the emerging proliferation of international courts,[62] largely concerned with the numerical proliferation of courts and their significance.[63]

The more the involvement and impact of courts and tribunals, the more the judicialisation. The proliferation of international courts and tribunals is the most common focus of the study of institutions and the phenomenon of institutionalisation. Globally, the authority in transnational judicialisation has led to vast swathes of scholarship, research, actions on the legitimacy of the proliferation of courts and tribunals at international level.[64] The judicialization beyond the State of all stages of law-making is an increasingly studied phenomenon. Its capacity to resolve the delegation of authority remains to be seen. Yet undue focus upon judicialization when it comes to law-making beyond the state and its authority appears blinkered as to law-making or processes of decision-making. Indeed, the place of courts as checks and balances in legal scholarship overwhelmingly nudges analysis towards the output of law-making and procedural processes whereas legal scholarship interest in design of institutions is less studied. This book considers the following: Is institutionalisation in the EU context judicialised? What advantages and disadvantages are there to relative consideration of judicialization? The nature of the EU as a global digital actor arguably does not begin with the narrative of the courts as is usual but rather elsewhere. Landmark judgments notably do not mainly set the pace of development- rather institutionalisation itself does.

V. Informal organisations and informal law-making: what role for institutionalisation?

The EU's institutionalisation practices are all the *more* exceptional in a broader context. Informal organisations are said to be proliferating in international law and policy.[65] In contemporary law and political science, informality of law-making and organisational practice continues to emerge as a key research agenda for understanding law and global governance. Informal international organisations (IIOs) are thus increasingly studied as entities falling short of international organisations that are formal and that are lesser more flexible entities taking effect since the 1970s- now 30-40% of all international organisations (IOs) are asserted to be informal organisations, which thus constitutes a highly substantial body of evidence.[66] The EU's efforts to increasingly engage with more entities and actors, including private actors, are arguably important to highly as a driver *beyond* informal organisations.[67] International soft law literature shows us of the desire of entities to regulate, creep power using soft law.[68]

[60] A-M Burley and Walter Mattli, 'Europe Before the Court: a Political Theory of Legal Integration' (1993) 47 *International Organization* 41.
[61] R Dehousse, *The European Court of Justice: the Politics of Judicial Integration* (Springer 1998); RA Kagan, 'Globalization and Legal Change: the "Americanization" of European Law?' (2007) 1 *Regulation and Governance* 99; S K Schmidt, *The European Court of Justice and the Policy Process* (OUP 2018); RD Kelemen, *Eurolegalism: the Transformation of Law and Regulation in the European Union* (Harvard University Press 2011).
[62] R Hirschl, *Towards Juristocracy* (Harvard University Press 2004 & 2007); KJ Alter, LR Helfer and MR Madsen, *International Court Authority* (OUP 2018).
[63] See D Lustig and JH Weiler, 'Judicial Review in the Contemporary World—Retrospective and Prospective' (2018) 16 *I-CON* 1.
[64] Hirschl, *Towards Juristocracy* (n 62); Alter, Helfer and Madsen (n 62).
[65] C Roger, *The Origins of Informality: Why the Legal Foundations of Global Governance are Shifting, and Why It Matters* (OUP 2020).
[66] ibid; Roger understands the EU as state-like, using its competition powers as an example where it has far-reaching competence.
[67] ibid.
[68] A-M Slaughter, 'Agencies on the Loose: Holding Government Networks Accountable' in GA Bermann, M Herdegen and P Lindseth (eds), *Transatlantic Regulatory Cooperation* (OUP 2000).

Informality is thus a particularly powerful concept to consider in processes of institutionalisation because it becomes a *driver* thereof.[69] This book argues that the growing morass of informal law-making by EU institutions places more faith in institutional actors to develop institutional design and autonomy- as evidence of institutionalisation, thereby contributing to understanding this emerging research agenda and the esoteric nature of the EU. Formalisation through legal change is not ultimately well understood. Informal organisations have arguably been driven by desire to exclude developing countries in formal organisations at intra-state level and inter-state level.[70] This is not necessarily the case in data, where organisations such as ICANN have been emancipated from the Nation State and subjected to increasingly public regulation. There are many examples of informal organisations in e.g. Trade, banking, antitrust (GATT, IMF, Basel Committee); International Competition Network (ICN) created informally outside of trade negotiations.[71] At times of a huge increase in the state economy at national level in the post-COVID world has the capacity to change the parameters of formal and informal, state versus private and so on. However, EU-specific literature on the state of EU soft law shows its explosion in use from 15% some time ago to a key driver of EU action in times of crisis (eurozone, health, migration etc).[72] Moreover, EU external relations law proliferates with examples of informal law-making from the EU institutions themselves.[73] From areas of stronger to weaker competence, informal law-making has increasingly more significant effects and increasing judicial and other forms of accountability. Even in trade negotiations with key partners in areas of key EU exclusive external competences there is no shortage of examples. For example, one notable instance is the EU-US lobster deal and the EU-US Joint Statement in 2018: -leading a *longer* time later to a Commission Regulation-after the Joint Statement appeared to become a binding instrument of sorts and created significant inter-institutional disputes as to the exclusion of the European Parliament.[74] In fact, amongst the EU, institutional key actors have been circumvented through the routine development of ad hoc informal processes – such as the exclusion of the European Parliament from recent trade negotiations with the US. The European Commission emerges as a clear actor generating new forms of law-making but it is not the only actor generating these practices. There are many incentives for institutional actors to use informal law-making given the time and complexity of formal law-making, particularly in trade. Indeed, even the CJEU has arguably adopted an increasingly more benevolent and pragmatic view of informal law-making.[75] The Opinion of the Court of Justice in Opinion 1/17 *inter alia* on the Joint Interpretative Instrument (JII) gives significant force to the legalisation, institutionalisation and entrenchment of informal law-making as a means to bolster legitimacy concerns about EU external relations.[76] The very fervent actions of the EU institutions e.g. the Council and Commission at the time of signing of CETA placed great emphasis upon the bindingness of the JIT. As this book will outline in Ch. 4, there are significant developments in EU-US relations on data transfer law grounded in a series of letters obscurely linked to Commission decisions with far-reaching implications for the operation of a data transfer regime governing 1 billion citizens. Some suggest that the use of binding international

[69] O Stefan, 'The Future of EU Soft Law: A Research and Policy Agenda for the Aftermath of Covid-19' (2020) 7(S2) *Journal of International and Comparative Law* 329; E Korkea-Aho, 'EU Soft Law in Domestic Legal Systems: Flexibility and Diversity Guaranteed?' (2009) 16(3) *Maastricht Journal of European and Comparative* Law 27.

[70] Roger (n 65).

[71] ibid. Roger gives the example of how the US forced EU to create the ICN as an informal organisation: see ch. 7.

[72] E Fahey, 'Hyper-legalisation and Delegalisation in the AFSJ: on Contradictions in the External Management of EU Migration' in S Carrera, J Santos Vara and T Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar 2019).

[73] Informal non-binding law-making here relates to law-making departing from Article 218 TFEU *stricto sensu*, where the latter relates to binding instruments. Informal law-making is not formless and there are many examples thereof e.g. MoU or administrative arrangements established in writing. Binding instruments are international agreements including exchange of letters of decisions of bodies established by international agreements.

[74] See also 'Joint statement of the 11th Union for the Mediterranean (UfM) Trade Ministers Conference (10th November 2020)' (2020) Tradoc 159033, https://trade.ec.europa.eu/doclib/docs/2020/november/tradoc_159033.pdf accessed 31 December 2021.

[75] See The Court of Justice has had to consider in the Swiss MoU decision and gave a highly practical answer to the question of the effects of a MoU: Case C-660/13 *Council of the European Union v European Commission* EU:C:2016:61.

[76] For example, in para 220 and 221 of the CETA opinion, where much of the legal legitimacy under review therein apparently hinges upon such instruments; See Opinion 1/17 (n 38) paras 220-221.

law agreements e.g. in EU-US evidence negotiations are fanciful.[77] Thus, the place of institutionalisation here is important to consider in understanding these developments because it assists in understanding the rollout of institutional design and the increasing autonomy of actors in law-making. In particular, informality of designs of law-making institutionalisation and its architecture is significant to the development of accounts as to Ch. 4 and 6. Ch. 4 will show how EU-US hybrid governance in data transfers is increasingly legalised, evolving informality and similarly Ch. 6 as to EU-China relations, similarly show slow legalisation.

VI. Institutionalising data: the data 'forum' problem

This book argues that the future of data as an entity entails engaging with the complexity of trust in standards. All over the world, many now grapple with the fact that trade agreements alone cannot solve the complexity of digital trade and data flows. It entails a necessity to acknowledge the practical nature of flows and the shortcomings of trade agreements which take a surprisingly limited view of data and its contours, links to privacy, localisation and security. Information has joined oil, tanks and money as the key currency of international affairs.[78] From a political science perspective, institutions do not solve distributional issues in which some win and some lose.[79] Yet from a legal perspective the curious and complex place of digital trade and data institutionalisation where it emerges represents perhaps a taxonomy challenge but also a victory for individual rights and the rule of law. The EU's GDPR regulation is forecast to generate even more legal disputes, possibly with the US and third countries with profound consequences for social media companies' business models amongst others. Yet political science is castigated by Farrell and Newman, for example, for its incapacity to fathom the new *politics* of information. This book contends that Big Data has arguably infrastructural effects and leads to transformation of institutional infrastructures which existing regulatory frameworks tend to miss. It is thus a ripe area for the study of institutionalisation given its challenges for capture. The digitisation of trade as a reality is not reflected in the regulation of the world trading system, where WTO rules barely touch upon the matter, and only tangentially.[80] Existing WTO rules are also said to be limited in their ability to address the range of opportunities and challenges presented by digital trade.[81] Yet ironically while every twentieth century trade agreement is in want of a chapter on electronic commerce, one of the politically and technically sensitive or challenging issues is the place of privacy therein. Data continuously suffers from the nexus problem- it is easily proximate but also paradoxically far from other issues.[82] Data has increasingly voluminous yet also complex place in contemporary trade agreements. In the most large-scale formulation of trade agreements, such as the megaregionals CPTPP and USMCA, data may be understood to have been overlooked as to its precise relationship to privacy. Data regulation has emerged as an extraordinary challenge of the 21st centre where the market is no longer invisible and the competitive struggle amongst surveillance capitalists produces the compulsion towards totality e.g. Mark Zuckerberg's notorious boast 'that Facebook would know every book, film and song a person had consumed' etc.[83] Data has become captured by surveillance capitalism whereby new economic imperatives whose mechanisms and effects cannot be grasped and do not fit within existing models and assumptions.[84] Here, price, payment, free access and user

[77] T Christakis and F Terpan, 'EU–US Negotiations on Law Enforcement Access to Data: Divergences, Challenges and EU Law Procedures and Options' (2021) 11(2) *International Data Privacy Law* 81.

[78] H Farrell and AL Newman, *Of Privacy and Power: The Transatlantic Struggle over Freedom and Security* (Princeton University Press 2019) 173; Cf. A Fisher and T Streinz, 'Confronting Data Inequality' (2021) IILJ Working Paper 2021/1 and S Viljoen, 'Democratic Data: A Relational Theory for Data Governance' (2020) 131 *Yale Law Journal* 370.

[79] Farrell and Newman (n 78) 170.

[80] M Janow and P Mavroidis, 'Digital Trade, E-Commerce, the WTO and Regional Frameworks' (2019) 18(S1) *World Trade Review* 1.

[81] M Burri, 'Should There Be New Multilateral Rules for Digital Trade?' (2013) E15 Expert Group on Trade and Innovation; M Burri, 'The International Economic Law Framework for Digital Trade' (2015) 135 *Zeitschrift für Schwezerisches Recht* 10; M Burri, 'Designing Future-Oriented Multilateral Rules for Digital Trade' in P Sauve and M Roy (eds), *Research Handbook on Trade in Services* (Edward Elgar 2016).

[82] As Murray and Black remind us discrete aspects of data regulation do not need to operate in isolation from existing regulatory regimes and much unnecessary energy can be spent upon devising new regimes: J Black and A Murray, 'Regulating AI and Machine Learning: Setting the Regulatory Agenda' (2019) 10 *European Journal of Law and Technology*.

[83] Zuboff (n 12).

[84] ibid.

integration constitute wholly new models of engagement. Yet this totality has not been matched with holistic views of the place of data, warranting a broader framework which captures the nature of EU practice with global effects- here through the place of institutionalisation.

The content of the chapters are next outlined in order to provide an overview of the text.

Outline of the book chapters

Chapter 1 outlines the conceptual framework as to the EU as a global digital actor. The EU now has data transfer regimes and flows with third countries, which count as some of the largest in the globe featuring significant institutional dimensions. It examines questions of extra-territoriality at the heart thereof and its relationship to the global reach of EU data law. The chapter considers the global alternatives to the GDPR. It examines the development of the EU as a data localisation actor, championing high European standards in the wake of Schrems II and including cloud computing regulatory plans. The chapter reflects upon EU digital sovereignty and its overall meaning. The EU as a global data actor is exemplified in the reach of the Brussels Effect, where digital frameworks on privacy and hate speech are adopted globally. From the DMA, DSA to AI Civil liability, the EU has sought to write a new code civil for internet and digital society through its institutionalisation. It emerges as a constitution for the technical, trying to operationalise constitutional values through atypical institutional design and the rising autonomy of actors. The dense institutional design and autonomy of individual actors furthered by the GDPR continues to be a core hallmark of EU regulatory capture of data.

Chapter 2 then examines the development of the EU as a digital trade actor against the backdrop of a highly fragmented international framework on digital trade, lacking consensus and definition, with inadequate and tardy WTO developments. The chapter considers holistically the challenges of unity on digital trade, data flows and how they impinge upon EU unity and actorness and its capacity to generate institutionalisation. The EU has, however, generated very significant developments in international economic law in the area of digital trade through championing best practice and high standards as to privacy, although often resting between US and Chinese developments thereon as a 'middle ground' actor. The EU appears increasingly to shift beyond a 'middle-ground actor' position in digital trade, aiming for higher standards of data privacy yet also advocating an ambitious digital trade agenda. However, its efforts appear increasingly stymied by data localisation allegations. The chapter examines the negotiation objectives of several key recent EU negotiations. Alongside digital trade, the chapter considers the place of data flows in negotiations, specifically as to adequacy decisions, and developments in practice after Schrems II and their capacity to generate further localisation. Here, the EU has sought to adopt an expansive approach to institutionalisation, e.g. with the US. Ultimately, it remains a challenge to see whether the EU's institutionalised vision of data can succeed in future negotiating forums, integrating high standards of privacy frameworks.

Ch. 3 moves on to examine how EU's cyber law-making appears long dominated by weak efforts at institutionalisation and few actors. This could radically change given the unfolding internal market directions of cyber law-making. The reality of cyber law is dominated by a need to use CFSP sanctions and the overall matric of law-making appears increasingly skewed in different directions, destined towards partial institutionalisation. Its own complexity as an international organisation increasingly is also apparent as the Budapest Convention developments demonstrate. The history of EU cyber law-making is of the evolution of weak actors and a diversity of competences, from the single market to the CFSP. EU cyber action is significant in understanding EU integration practices appearing to be weakly institutionalised until recently. The EU has had a limited range of institutionalization activities as to

cyber security in its trade agreements, largely dependent upon soft law frameworks and voluntary cooperation, yet which is rapidly changing.

Ch. 4 reflects upon the development of transatlantic relations through dialogues and the development of many transatlantic data flow regimes (PNR, TFTP, Privacy Shield, Umbrella Agreement), focussing upon the institutionalisation of data flows, in particular in the Privacy Shield. The chapter outlines how developments in EU-China relations arguably eclipse these EU-US structures and developments. The chapter considers its development as a weakly institutionalised mechanism with an Ombudsman and atypical transatlantic governance. The chapter examines its judicial review in recent caselaw resulting in strong judicialization of the Privacy Shield. The chapter further analyses developments in EU-US cyber law-making, with tendencies towards internationalisation therein. The chapter explores how significant convergence may arguably be emerging as between EU and US regulators on the need to weaken Big Tech. Transatlantic convergence on regulatory standards from competition law to privacy and speech law suggests a commonality here of regulatory capture but is embedded within weak institutionalisation. The EU-US Joint Agenda for Global Change includes a Transatlantic Trade and Technology Council, putatively developing a loose institutionalisation of key global challenges currently not well covered or dealt with by, for example, the WTO seems like a useful forum to generate transatlantic convergence. Much remains to be seen as to the future of soft or weak institutionalisation and its sustainability in the face of many other challenges, not least global, generated internally and beyond the EU.

Chapter 5 then considers EU-Japan relations as a key study of the emerging place of data and digital trade with an Asian partner. The EU-Japan Economic Partnership Agreement (EPA) and the EU-Japan Adequacy decision cumulatively form one of the largest free trade areas in the world and one of the largest safe flow regimes of data. Significant convergence between the EU and Japanese legal orders seems apparent in recent caselaw, where Japanese law has adopted aspects of the right to be forgotten, seemingly moving closer to European law. The digital trade / electronic commerce provisions of the EU-Japan EPA are particularly notable for their international best practice standards, their commitments to multilateralism, internationalisation and high standards of privacy protections. EU-Japanese cybersecurity cooperation, is also embedded in multilateralism and commitments to international law and has intensified in recent times and is the subject of institutionalised cooperation within the EU-Japan EPA. The chapter reflects upon the institutionalisation of the relationship particularly in regulatory cooperation and through convergence of standards, generating deeper intersections between the two legal orders. Although the relationship is couched in weak institutionalisation, the EU enables and commits a key partner to significant convergence in data flows and digital trade.

Finally chapter 6 considers the relationship between the EU and China in data related issues. Negotiations on investment are ongoing between the EU and China for some time and do not cover data or digital trade. Many EU Member States have signed up the law-light institution-light Belt and Road Initiative (BRI) regime in the absence of an EU agreement. There is a growing consensus that China has sought to utilise many EU GDPR concepts and principles in its recent Cybersecurity law but does not institutionalise them internally in its domestic procedures, enforcement or compliance regimes, instead substantively committing ‘away’ from EU law. The Chinese legal order and its body politic appears open to forms of European institutionalisation. Limited convergence with EU law on some level does not equate with EU values and appears to indicate considerable distance between the parties. EU-China relations are nonetheless a significant study of law-light institution-light regimes. The chapter examines the absence of an overarching legal framework, the EU Member State engagement with the BRI and the place of data localisation in the future. EU-China relations are technically the ‘furthest’ away and the least institutionalised of EU international relations yet emerging infrastructures and growing legalisation of the Chinese legal order indicates that convergence may well be in sight. It

emerges thus as a clear study of reverse convergence more than institutionalisation for now. EU-China relations are depicted as a source of manifold contradictions but predicated upon reverse convergence.