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Chapter 8

HEALTH, CLIMATE, ENERGY AND CYBER IN THE EU-UK TCA: TRANSNATIONAL AREAS, LIMITED COOPERATION AMBITIONS?

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Abstract

There are arguably few genuine multilateral engagements in the EU-UK Trade and Cooperation Agreement (TCA), with foreign policy omitted and generally evidence of limited ambitions. There are also limited commitments to international regulatory cooperation in the TCA, unusually for an EU trade agreement in contrast with many other major economies. The chapter contrasts international transnational cooperation objectives provided for in the TCA as to cyber, health, energy, climate, embodying areas presenting significant global challenges. The general lack of ambition is a key feature of the TCA. As a result, it is difficult to see the TCA as a model for the transnational in any sense. On the other hand, the TCA is clearly a modern and contemporary agreement that deploys a contemporary lexicon as to trade, concluded in a rushed and highly politicised environment and where its aims and objectives need to be viewed in such a light.

Keywords

EU-UK Trade and Cooperation agreement, cyber, health, energy, climate, transnational, international

1. Introduction

The TCA makes provision for a variety of cooperation, amidst an agreement providing for rules on trade in goods and in services, digital trade, intellectual property, public procurement, aviation and road transport, energy, fisheries, social security coordination, law enforcement and judicial cooperation in criminal matters, thematic cooperation and participation in Union programmes. For many, it is not an agreement that has excited much interest or attracts much for its significance. It is, instead, reputed for its lack of ambitions and notably its highly esoteric stance as to external relations and international matters.¹ UK International trade is currently in a difficult place and at the time of writing, relations with the EU continue to be complex, unambitious and underwhelming on foreign affairs.²

There are arguably few genuine multilateral engagements in the TCA, with foreign policy entirely omitted from the relationship.³ There are limited commitments to international regulatory cooperation in the TCA also, unusually for an EU trade agreement in contrast with many other major economies. As a result, it is difficult to see the TCA as a model for the transnational in any sense. The general lack of ambition is in fact a key feature of the TCA. On the other hand, the TCA is clearly a modern and contemporary agreement that deploys a contemporary lexicon as to trade, even if concluded in a rushed and highly politicised environment and where its aims and objectives need to be viewed in such a light. Some are very critical of the way the TCA was concluded, particularly as to external competences and member

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¹ Eg Piet Eeckhout, 'Brexit Sovereignty and its Dead Ends' (2022) 13 Global Policy 13; Clair Gammage and Philip Syrpis, 'Sovereignty Fictions in the United Kingdom's Trade Agenda' (2022) 71 International & Comparative Law Quarterly 563.

² Jun Du and Oleksandr Shepotylo, 'The impact of the Trade and Cooperation Agreement on UK trade' (*UK in a Changing Europe*, 14 June 2023) <<https://ukandeu.ac.uk/the-impact-of-the-trade-and-cooperation-agreement-on-uk-trade/>> accessed 3 October 2023.

³ See Petit in this volume.

states (MS) powers and a dramatically rushed conclusion's process.⁴ As a result it can be said that it is hardly an example of best or 'leading' practice in EU external or international relations. Van Elsuwege notes how unprecedented the nature of the withdrawal process was to justify the exceptional practices such as the preference for facultative EU only agreement and recourse to prior involvement without the role of the EP, clarified by the MS to be without prejudice to future agreements.⁵ This is particularly so as to the competence issue and EU-only conclusion of the TCA.⁶

While there are hundreds of references to the 'international' in the TCA, there is only one reference to the 'transnational' in the TCA in Article 85, 'Cooperation on antimicrobial resistance'. Moreover, there are 36 mentions of the global, although not necessarily about global cooperation, more so standards. It arguably reflects well the lack of ambition of the agreement but paradoxically also the contemporary nature of the TCA to include the term. The idea of the 'transnational' is a complex one in trade agreements. It is not a term that is commonly found in EU trade agreements, despite the EU being an emerging yet eminent global governance actor.⁷ Instead, the terms 'international' tend to be more common in EU trade agreements, far less so 'global' or 'transnational'. These differences reflect the contestability of the term transnational and its complex relationship in international economic law, itself a subject mired in much complexity. Other modern and recent EU trade agreements place international cooperation more centrally in core cooperation and make provision for a broad range of dialogues with international and bilateral cooperation at their core.⁸ The most contemporary or newest of the EU's trade agreements in 2023 also makes no reference to the transnational, although making many references to 'international'.⁹ The relative differences or absences of such provision is argued here to make for a further and important reflection point.

It is important to say that these issues matter. The EU is a long-standing 'internationalist' in the global legal order in an era of shifts away from internationalisation in recent times.¹⁰ The EU is explicitly committed in its treaties to being even more than 'an internationalist' in so far as it a 'globalist' as a matter of law and to being obliged to pursue multilateral solutions and to be a good global actor.¹¹ The effects of EU law externally are now widely studied and noted.¹² Many leading EU policy documents have an explicitly global dimension and span ranges of EU international relations, in the pre- and post-Lisbon period.¹³ Until recently, the EU's vision of the global, to hold a rules-based global order with

⁴ Christina Eckes and Päivi Leino-Sandberg, 'The EU-UK Trade and Cooperation Agreement – Exceptional Circumstances or a new Paradigm for EU External Relations?' (2022) 85 *Modern Law Review* 164.

⁵ Peter Van Elsuwege, 'A New Legal Framework for EU-UK Relations: Some Reflections from the Perspective of EU External Relations Law' (2021) 6 *European Papers* 785.

⁶ See Eckes and Leino-Sandberg (n 4): 'In the final days of 2020, the European Union and the United Kingdom concluded a Trade and Cooperation Agreement (TCA) covering a broad range of policy areas, including cooperation of law enforcement authorities and social security systems. The EU-UK TCA is unique as concerns the circumstances of its negotiation and adoption, as well as its substance. However, contrary to the argument of the EU institutions, the agreement will have broad implications for the understanding of the EU's external competence and Member States' ability to act in areas that are national competence and rely on national budgets. We are critical of the legitimacy of the TCA's conclusion process, consider that the lack of a deep constitutional analysis of the consequences of EU-only conclusion of the TCA, and of the TCA itself, are problematic, and believe that the choices made are likely to create difficulties for the implementation and enforcement of the agreement.

⁷ Elaine Fahey, *Introduction to Law and Global Governance* (Edward Elgar 2018), ch. 1.

⁸ European Union-Mercosur Free Trade Agreement in principle (28 June 2019); Free Trade Agreement between the European Union and New Zealand (EU-New Zealand FTA) (9 July 2023).

⁹ EU-New Zealand FTA.

¹⁰ See Karen Smith, 'The European Union in an Illiberal World' (2017) 116 *Current History* 83.

¹¹ Cf. Consolidated Version of the Treaty of Functioning of the European Union (TFEU) [2012] OJ C326/47, art 21.

¹² Eg Anu Bradford, *The Brussels Effect* (OUP 2020).

¹³ E.g. European Council, 'European Security Strategy' (2009) <<https://www.consilium.europa.eu/media/30823/qc7809568enc.pdf>> accessed xxx; European Commission, 'Trade for all: Towards a more responsible trade and investment policy' (2014) <https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf> accessed 3 October 2023; 'Shared Vision, Common Action: A Stronger Europe - A Global Strategy for the European Union's Foreign And Security Policy' (2016) <https://eeas.europa.eu/sites/default/files/eugs_review_web_0.pdf> accessed 3 October 2023; European Commission, 'Joint Communication to the European Parliament and the Council: Joint Framework on countering hybrid threats a European Union response' JOIN (2016) 018 final; European Commission, 'Joint Framework on Countering Hybrid Threats: A European Union Response' JOIN (2016) 18 final and European

multilateralism as its key principle, contrasted sharply with other administrations eg the Trump administration. While it consistently advocates internationalisation as part of its multilateralism-first agenda, the development of the EU as a global actor continues to have multiple facets to it across disciplines.¹⁴

Certain trade and economics scholars have accused the EU of advocating multilateralism vociferously but practising routine bilateralism.¹⁵ However, there are many nuances to the EU internationalisation in trade agreements. The absence of multilateralism as an agenda in a trade agreement can also signify broader underlying tensions and this chapter proceeds on the basis that the TCA arguably showcases this.

This chapter considers four areas of the TCA with 'transnational' character, defining the transnational loosely as international or global ambition, either expressly or impliedly as provided for in the TCA. Two of the topics, health and cyber, are to be found in Part IV thematic cooperation, in Titles I and II respectively. The other two, energy and climate, instead, arise in Part II, Title VIII as to Energy while climate is a more cross-cutting element of the TCA. Some suggest that energy and climate are dominated by geopolitics and international issues and it is hard to avoid their evolving character in this light.¹⁶ The placement of cyber and health in the thematic cooperation section was arguably intended to reflect their lower order of focus in the negotiations, albeit emerging as critical topics overtime. The chapter is structured as follows: section 2 considers energy, section 3 reflects upon climate, then health in section 4, followed by cybersecurity in section 5.

2. Energy

2.1. Overview

After 50 years of EU membership, the EU-27 and UK energy markets have been heavily interlinked, on account of electricity interconnectors and gas pipelines running between Great Britain and Northern Ireland on the one hand and France, the Netherlands, Belgium and Ireland on the other. In fact, the UK has been a net importer of energy.¹⁷ As Cameron states, Brexit still implied a growing disconnect between the energy policy of the EU and that of the UK. Even if key laws and regulations remain in place in both, divergence was foreseeable.¹⁸ The UK and EU included a not inconsiderable number of energy-related commitments in the TCA's trade provisions, which can be found in Title VIII of Heading One of Part Two. Title VIII provides for UK-EU trade and investment in four related annexes as to energy and raw materials and security of supply; electricity and gas; safe and sustainable energy; and energy goods and raw materials. Title VIII applies until 30 June 2026 but can be extended until 31 March 2027 and until 31 March of each subsequent year. Article 299 provide that the objectives of Title VIII are to: 1. facilitate UK-EU trade and investment in energy and raw materials; and 2. support security of supply and environmental sustainability, notably in contributing to the fight against climate change in those areas. A separate agreement between Euratom and the UK, which complements the TCA, covers cooperation on the safe and peaceful uses of nuclear energy. The UK is not able to participate in EU bodies such as

Commission, 'Communication from the Commission: The European Agenda on Security' COM (2015) 185 final; European Council, 'Conclusions on the Action Plan on Human Rights and Democracy 2015 – 2019' (2015) 10897/15.

¹⁴ See Elaine Fahey (ed), *Framing Convergence with the Global Legal Order: The EU and the World* (Bloomsbury 2020).

¹⁵ Katharina Meissner, 'The EU and world regions: Multilateralism, bilateralism, and commercial realism' in San Bilal and Bernard Hoekman (eds), *Perspectives on the soft power of EU trade policy* (CEPR 2019).

¹⁶ Andreas Goldthau and Richard Youngs, 'The EU Energy Crisis and a new geopolitics of climate transition' (2023) *JCMS* 1.

¹⁷ Ana Stanić and Silke Goldberg (eds), *Brexit and Energy Law: Implications and Opportunities* (Routledge 2023); See also Peter Cameron and Raphael Heffron (eds), *Legal Aspects of EU Energy Regulation* (2nd edn, Oxford University Press 2016); Nicola McEwen and Alexandra Remond, 'The Repatriation of Competences: Implications for Devolution' (2019) Centre on Constitutional Change Paper <<https://ukandeu.ac.uk/wp-content/uploads/2019/01/Climate-and-energy-policy-after-Brexit.pdf>> accessed 3 October 2023.

¹⁸ Peter Cameron P, 'Cooperation over UK and EU Energy Policy is a must' (2023) The Royal Society of Edinburgh <<https://rse.org.uk/resources/resource/blog/cooperation-over-uk-and-eu-energy-policy-is-a-must/>> accessed 3 October 2023.

the Agency for the Cooperation of Energy Regulators (ACER), the European networks of transmission system operators for electricity (ENTSO-E) and for gas (ENTSOG).

The agreement contains provisions for cooperation in the development of offshore renewable energy, with a clear focus on the North Sea and Irish Sea. The EU and the UK will be able to continue to cooperate in this area, building on the North Seas Energy Cooperation, a platform developed by the EU, a number of Member States and Norway to develop the use of renewables in this region. The scope of the cooperation in this field envisaged by the agreement reflects the EU's strategy on offshore renewable energy, in which the Commission proposes to increase EU's offshore wind capacity to at least 60 GW by 2030 and to 300 GW by 2050.

2.2. International cooperation and standards: the TCA and energy

As well as the horizontal level playing field provisions relevant for the energy sector, for example on social and environmental issues, the agreement includes certain specific provisions and place energy prominently.¹⁹ These relate to energy sector subsidies, non-discriminatory promotion of energy from renewable sources, prohibition on export restrictions (including export monopolies and export licences), and on dual pricing of energy goods. International standards cooperation is also provided for to a small degree. Article 321 of the TCA provides that the Parties shall cooperate on the development of offshore renewable energy, as noted above. A UK-EU Parliamentary Partnership Assembly established in Article 11 by the TCA has called for cooperation to promote renewable energy through the promotion of joint projects between the UK and the EU, which would allow for cost-efficient deployment of the clean energy transition but based upon international cooperation.²⁰ TCA establishes the Specialised Committee on Energy (SCE) as the main UK-EU forum for energy cooperation and has also had some international focuses. It has discussed energy security at both of the meetings (on 30 March 2022 and 28 September 2022?) since Russia's war of aggression against Ukraine. The meetings are notable for their extensive efforts to collaborate internationally in the domain of energy security in light of the Russian war of aggression. A very high level of international solidarity is evident between the EU and UK describing their efforts as significant cooperation eg the Parties praised the ongoing coordination within the International Energy Agency and G7, and the ongoing senior and technical cooperation between the UK and the EU.²¹ However, it is hard to avoid the obvious limits of the TCA for cooperation in this field otherwise.

3. Climate

3.1. Overview: The context of the TCA and EU and UK climate law

There are complex perspectives to consider as to the benefits of Brexit for UK environmental policy, reflecting the fractured nature of Brexit on public policy.²² The Climate Change Act was passed in the UK

¹⁹ See European Parliament Research Service (EPRS) 'Post-Brexit EU-UK relations on energy and climate' (June 2023) <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/749801/EPRS_BRI\(2023\)749801_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/749801/EPRS_BRI(2023)749801_EN.pdf)> accessed 3 October 2023.

²⁰ UK Parliament, 'UK-EU Parliamentary Partnership Assembly 'Recommendation concerning UK-EU energy cooperation' <https://www.parliament.uk/mps-lords-and-offices/offices/delegations/uk-eu-parliamentary-partnership-assembly-delegation/uk-parliament-to-host-session-of-uk-eu-parliamentary-partnership-assembly/recommendation-concerning-uk-eu-energy-cooperation/#_ftn1> accessed 3 October 2023. It noted North Sea Energy Cooperation grouping (NSEC), involving eight EU Member States and Norway, is a forum for such cooperation and welcomed the commitment to relaunch cooperation within NSEC and the progress made on engagement between the UK, the Commission and NSEC countries, as reflected in the successful negotiation of a draft Memorandum of Understanding (MOU) on offshore renewable energy cooperation.

²¹ The EU highlighted its plan to make the EU independent from Russian fossil fuels well before 2030. The UK highlighted its commitment to phase out Russian oil imports this year, and stated it would set out an energy strategy to explain the UK's long-term plans for greater energy security.

²² Maria Lee M, 'Environmental Past and Futures: The European Union and the "British Way"' (2019) 31 Journal of Environmental Law 559 considering how Pontin argues that 'the British way' of environmental protection is superior to European Union (EU) environmental law, and

in November 2008 with an overwhelming majority across political parties, the first global legally binding climate change mitigation target set by a country. The post-Brexit UK Environmental Bill has been highly controversial, rushed and the subject of much piecemeal reform.²³ The EU's climate policy originated in its external relations activities, where it has been at the vanguard of international law-making, from the United Nations Framework Convention on Climate Change (UNFCCC), to the Kyoto Protocol and now Paris Climate Agreement. In November 2019, the EU began to develop its iconic European Green Deal, setting out plans to "transform" the European economy sustainably.²⁴ An EU Climate Law has been passed in 2021 as have a sweeping package of legislative reforms, commonly referred to as the 'Fit for 55 package', in reference to the European Climate Law's objective of reducing emissions by 55% compared with 1990 levels by 2030.²⁵ Domestically, the UK political environment is still convulsed with the uncertainty of Brexit. Its Environment Act 2021 makes provision for post-Brexit environmental law in the UK, yet was created on the basis that retained EU law would continue to exist. The Retained EU Law (Revocation and Reform) Bill is a major new piece of legislation in the UK as to EU law and was considered to have profound implications for environmental law.

3.1. TCA provisions and international standards

Climate is a much more significant area of the TCA in theory underpinned by mutual commitments to ensure a level playing field for open and fair competition and to sustainable development. There is a EU/UK joint ambition to achieve economy-wide climate neutrality by 2050. Despite the Political Declaration mandating no more than a discussion about climate cooperation, the resulting set of TCA provisions is said by Gehring to be innovative in that it constitutes the first trade agreement to make the climate crisis a 'make-or-break issue', providing for the challenges of climate change as a one of the bases for cooperation in Article 764, alongside democracy, the rule of law, human rights and the non-proliferation of weapons of mass destruction (WMDs) as 'essential element' of the partnership. The TCA Article 401 requires each party to respect the Paris Agreement and the process set up by the UNFCCC and refrain from acts or omissions that would materially defeat the object and purpose of the Paris Agreement an important first act in which climate change is an 'essential element' of a trade agreement, referencing the Paris Agreement 9 times. It represents a key step in this area.

The level playing-field (LPF) provisions of the TCA seek to safeguard fair competition between the parties and evolve the 'trade and sustainable development' (TSD) chapters in other free trade agreements in Article 722.²⁶ The TCA includes tools and mechanisms for the enforcement of the level playing field commitments, including the ability of either party to impose duties unilaterally, subject to review by an arbitration panel, where a change creates a significant negative effect on trade or investment between the EU and the UK. It requires that parties do not weaken or reduce their levels of social, labour and environmental protection below those in place at the end of 2020 (non-regression). In addition, the TCA introduces a mechanism whereby a party can take appropriate rebalancing measures to offset any (adverse) 'material impacts on trade or investment' arising from 'significant divergences' between parties.²⁷

that when we return to the British way after Brexit, the environment will be better served. He relies on four central case studies: waste, water (revealingly entitled 'rivers', consistent with the focus of 'the British way'), air quality, and habitat conservation.

²³ Maria Lee M, 'Brexit and the Environment Bill: The Future of Environmental Accountability' (2022) 13(S2) Global Policy 119.

²⁴ For example, the Commission in its Green Deal communication included a heading on "The EU as a global leader"; See European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Green Deal' COM (2019) 640 final, 20.

²⁵ Catherine Higham and others, 'Climate change law in Europe: What do new EU climate laws mean for the courts?' (2023) Centre for Climate Change Economics and Policy and Grantham Research Institute on Climate Change and the Environment Policy Report <<https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/03/Climate-change-law-in-Europe-what-do-new-EU-climate-laws-mean-for-the-courts.pdf>> accessed 3 October 2023.

²⁶ See Mariani, Paola and Sacerdoti, Giorgio 'Trade in Goods and Level Playing Field' in Federico Fabbrini (ed.) *The Law & Politics of Brexit. Volume 3: The Framework of New EU-UK Relationships* (Oxford University Press 2021).

²⁷ Issam Hallak, 'The level playing-field for labour and environment in EU-UK relations' (2021) European Parliamentary Research Service PE 690.576.

The TCA LPF provisions represents a notable innovation with its rebalancing and review provisions, with some international elements.²⁸ The TCA thus provides, for the first time, a strong mechanism for parties to implement sustainable development obligations. However, it remains to be seen how enforcement of this chapter will work in practice, as the TCA does not provide a definition for “significant divergences,” and neither does it specify examples of appropriate “rebalancing measures.”²⁹ Second, the EU and the UK pledge to support adherence to and implementation of relevant international instruments of the fair competition and sustainable development chapter of the TCA in Article 406, which states that the parties recognize the importance of responsible supply chain management and corporate social responsibility (CSR) practices and international standards here are at the heart of good and best practices.³⁰

Gehring has noted that the title is a slight misnomer as the obligations in these fields are more akin to non-regression obligations rather than any form of dynamic alignment, or indeed level playing field.³¹ Thus still similar to other EU international treaties, the TCA does not provide for direct effect in order to permit challenge a party's noncompliance. Nonetheless, the agreement contains one of the strictest formulations of a non-regression provision by adopting mandatory language prohibiting the weakening or reduction of levels of environmental or climate protection’, including ‘by failing to effectively enforce’, with the sole caveat that this regression should not occur ‘in a manner affecting trade or investment.’

Minutes of the EU-UK TCA Partnership Council published in July 2023 indicated UK concern with the EU Green Deal Industrial Plan and its compliance with the TCA – albeit with a refusal by the EU to accept that it posed any difficulty.³²

4. Health

4.1. Overview

Prior to Brexit and COVID-19 pandemic as key crises of EU law, it was said that the various subsections of Article 168 TFEU demonstrated that while EU competence in the field of public health might be expanding, there were undoubtedly limits to its scope.³³ Guy has argued that the history of EU health law demonstrated less the emergence of a unified EU policy than a complex system of partial overlapping national and EU competences that at various points both come into conflict and complement each other. Overall, the net effect is an increasing impact of EU policies on healthcare even in what for the foreseeable future will be the absence of an EU policy on health. Limited provision is made in the TCA

²⁸ Hallak (n 27); Article 9.4 Title XI: Level Playing field for open and fair competition and sustainable development” allows the EU or the UK to impose rebalancing measures when significant divergences regarding their policies and priorities with respect to labour, social, environmental or climate protection, or with respect to subsidy control, arise and cause material impacts on trade and investment between them. If no agreement is reached, after five days from the conclusion of the consultations, the party can adopt necessary and proportionate rebalancing measures to remedy the situation, providing that the other party has not requested the establishment of an arbitration tribunal. If an arbitration tribunal is established, but does not deliver its final ruling after 30 days, the party is allowed to adopt rebalancing measures. In return, the other party can also take proportionate counter-measures until the tribunal delivers its ruling. In enacting measures, the aim is to craft something so that disruption to the trading relationship is minimized Markus Gehring, ‘The EU-UK agreement is the first to make climate a make-or-break issue’ (*UK in a Changing Europe*, 25 January 2021) <<https://ukandeu.ac.uk/the-eu-uk-agreement-is-the-first-to-make-climate-a-make-or-break-issue/>> accessed 3 October 2023.

²⁹ Ann-Evelyn Luyten, ‘The EU-UK TCA: A Front-runner in Trade and Sustainable Development’ (*Trade Experettes*, nd) <<https://www.tradeexperettes.org/blog/articles/the-eu-uk-tca-a-front-runner-in-trade-and-sustainable-development>> accessed 3 October 2023.

³⁰ Eg OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the UN Global Compact, and the UN Guiding Principles on Business and Human Rights.

³¹ Gehring (n 28).

³² Minutes of the second meeting of the Trade and Cooperation Agreement Partnership Council 24 March 2023.

³³ Mary Guy and Wolf Sauter, ‘The History and Scope of EU Health Law and Policy’ (2016) CCP Working Paper No 16-02; Tamara Hervey and Jean McHale, *European Union Health Law – Themes and Implications* (Cambridge University Press 2015); Scott Greer and others, ‘Everything you always wanted to know about European Union health policies but were afraid to ask’ (2019) Health Policy Series No. 52; European Observatory on Health Systems and Policies, Brussels 2014; Scott Greer and others, ‘Health Law and Policy in the European Union’ (2013) 381(9872) *The Lancet* 1135.

as to health in Part VI Thematic Cooperation of the TCA. Overall, the TCA introduces significant barriers that did not previously exist, notably a customs border and the exclusion of the UK from the Single Market.³⁴ In the area of health, the trade for all products, including medicines and medical devices remains at zero tariff, and both parties maintain reciprocal healthcare and the intention to cooperate on addressing health research.³⁵ However, it is said that the TCA creates parallel regulatory processes on medicines, medical devices, and clinical trials, enabling the UK to diverge from the EU on medicines policy, with possibly international consequences eg in international organisations.³⁶ The short ‘vaccines war’ resulting from the EU triggering Article 16 of the Northern Ireland (NI) Protocol in 2021 indicates the depth of the complexity of this area.

Fahy et al note how internally the Withdrawal Agreement (WA) with its Protocol on Ireland/Northern Ireland, and the EU–UK Trade and Cooperation Agreement (TCA) and ‘Common Travel Area’ (CTA), entails that having such arrangements in itself has meant that the UK’s relations with the EU have avoided some of the worst consequences for health and the National Health Service (NHS).³⁷ Overall, the EU-UK TCA is said by health law researchers to be a net loss for public health, particularly in the UK, but also in the EU whereby trade-focused bilateral relationship may hamper public health cooperation going forward.³⁸ It is argued that the institutional framework of the deal does offer the potential for increased cooperation on these issues albeit necessitating that governments prioritize health in the EU-UK relationship. The development of a “European Health Union” was announced by Commission President von der Leyen in September 2020 as a response to the COVID-19 pandemic and the timing of the TCA in this respect is important to emphasise.³⁹ Although the leadership of the Commission was welcomed initially in the context of the global pandemic, it inevitably invites longer-term questions of how the EU and national levels will interact within this Union, and how the relationship between Commission and Member States constrains or facilitates its development internally as much as externally with third partners. Thus far, there has been limited explicit EU-level competence: health is seen fundamentally as a national competence.⁴⁰

4.2. Health and the international in the TCA

Health is a complex legal field as regards the discussion of the transnational. With the exception of the citizens’ rights provisions in the WA, legal texts and instruments as to Brexit are primarily trade agreements. Health occupies a complex peripheral place in legal texts- despite all trade agreements generally having important consequences for health.⁴¹ The TCA includes only very limited references to global public health standards eg a weak commitment to ‘dialogue and cooperation’ on antimicrobial resistance in Article 85. There is an intention to cooperate, including optionally through exchange of information using the European Early Warning Response System, on ‘health security’ in Article 702.

³⁴ Nick Fahy and others, ‘Impact on the NHS and health of the UK’s trade and cooperation relationship with the EU, and beyond’ (2022) 17(4) *Health Economics, Policy and Law* 471; Nick Fahy and others, ‘How will Brexit affect health services in the UK? An updated evaluation’ (2019) 393(10174) *The Lancet* Volume 949.

³⁵ Fahy and others, ‘Impact on the NHS and health of the UK’s trade and cooperation relationship with the EU, and beyond’ (n 34); Fahy and others, ‘How will Brexit affect health services in the UK? An updated evaluation’ (n 34).

³⁶ Mark Dayan and others, ‘Parallel, divergent or drifting? Regulating healthcare products in a post-Brexit UK’ (2023) 30 *Journal of European Public Policy*.

³⁷ Fahy and others, ‘Impact on the NHS and health of the UK’s trade and cooperation relationship with the EU, and beyond’ (n 34); Fahy and others, ‘How will Brexit affect health services in the UK? An updated evaluation’ (n 34).

³⁸ *Ibid* (Fahy).

³⁹ Elizabeth Kuiper and Mary Guy, ‘Forging a European Health Union: Between subsidiarity and sovereignty?’ (2022) 28(3) *EuroHealth* 50. It is plausible to say that there was an entrenchment of health as a national competence in the context of EHU discussions. For a while Treaty change had been mooted, and this had gone beyond the “crisis” response of COVID to the Conference on the Future of Europe in 2022 with citizens calling for “more EU” in health to the point that the European Parliament recognised the Conference’s recommendation for health to be “upgraded” to shared competence, but appears less likely now. I am grateful to Mary Guy for discussions on this point.

⁴⁰ Elizabeth Kuiper and Mary Guy (n 39), *ibid*; Mary Guy and Wolf Sauter, ‘The History and Scope of EU Health Law and Policy’ in Tamara Hervey, Calum Alasdair Young and Louise L Bishop (eds), *Research Handbook on EU Health Law and Policy* (Edward Elgar Publishing 2017).

⁴¹ Nick Fahy and others, ‘Impact on the NHS and health of the UK’s trade and cooperation relationship with the EU, and beyond’ (2022) 17(4) *Health Economics, Policy and Law* 471.

There is a commitment to maintain ‘environmental levels of protection’, defined as national rules ‘which have the purpose of protecting the environment, including the prevention of danger to human life or health from environmental impacts’. Yet there might be reasonable concerns as to what these rules will mean in practice. Much of the key international support that the TCA could enable is possibly also understood to be indirect: for instance, the TCA provides for the UK and EU to collaborate and share information in the event of a global health crisis, enabling the UK to request access to the EU’s Early Warning and Response System and to participate in the EU Health Security Committee.

In general, the TCA’s provisions on global public health standards arguably demonstrate well the lack of ambition of the TCA, particularly considering that this treaty was negotiated in the midst of a global pandemic: health is conceptualised in the TCA mostly as a potential obstacle to trade.⁴² As such, public health standards in a range of areas are permitted as exceptions to the implied benefits of the free trade consequent upon the TCA. The UK is no longer tied into EU standards, which increases domestic policy scope for regulation, and so impacts on health will depend on how those powers are deployed. The WA and TCA mitigated some immediate problems, such as access to health care for migrants and visitors, and a ‘solution’ for the island of Ireland that is untested as the relevant rules are yet to be fully implemented.⁴³ The transnational dimension of health in the TCA is thus arguably quite weak and unambitious but not surprisingly so. Regulation of pharmaceuticals, medical devices and equipment represents another example where the TCA does not enable trade or cooperation, but prioritises the ability to diverge from the EU in domestic law and policy, with international consequences.⁴⁴ As Flear et al state, Brexit has changed the UK’s relationship with fora where it was previously represented by the EU as a whole eg bringing together regulatory authorities and the pharmaceutical industry to produce global bioethics standards that are *de facto* binding through the law of members. Brexit might mean international organisations could lose valuable UK experience, and the UK could lose out on engaging with regulatory processes in key markets for UK products- but it could also mean that the UK will forge its own membership. The devolved nations also continue to examine the relationship between the global and Brexit going forward eg Wales.⁴⁵ Whether this results in stronger transnational or international alliances remains to be seen.⁴⁶ To similar effect, there are several ethical fora within the EU in which the UK can continue to be involved. The degree of involvement is unclear and evolving and depends as much on UK as EU willingness.

5. Cyber

5.1. Overview

The EU is the world’s second-most active user of restrictive measures after the US (US), with four thematic sanctions regimes including recently cyber sanctions.⁴⁷ Cyber is one of the EU’s most significant

⁴² Fahy and others, ‘Impact on the NHS and health of the UK’s trade and cooperation relationship with the EU, and beyond’ (n 34).

⁴³ Mark Dayan and others, ‘Going it alone: Health and Brexit in the UK’ (2021) Nuffield Trust Research Report <https://www.nuffieldtrust.org.uk/sites/default/files/2021-12/1639914471_nuffield-trust-health-and-brexit-in-the-uk-web.pdf> accessed XXX; The UK’s legislation for scrutiny of international agreements gives Parliament limited powers to be consulted or to stop ratification.

⁴⁴ Fahy (n 34), 482.

⁴⁵ Welsh Parliament ‘Has Brexit changed how Wales participates in global infectious disease prevention, preparedness and response?’ (2022) <<https://phw.nhs.wales/publications/publications1/has-brexit-changed-how-wales-participates-in-global-infectious-disease-prevention-preparedness-and-response-briefing-note/>> accessed 3 October 2023. It notes how: International collaboration is important to three main areas of infectious disease: preparedness, prevention and response: Data and information sharing, Trading of medicines and medical goods and collaborating on prevention and preparedness.

⁴⁶ Sue Tansey, Mark Flear and Siobhán O’Sullivan, ‘What Might Brexit Mean for UK and International Bioethics?’ (2021) (Nuffield Council on Bioethics Blog, 29 September 2021) <<https://www.nuffieldbioethics.org/blog/what-might-brexit-mean-for-uk-and-international-bioethics>> accessed 3 October 2023.

⁴⁷ Ramses Wessel, ‘Cybersecurity in the European Union: Resilience through regulation?’ in E Conde, Zhaklin Yaneva, Marzia Scopelliti, *The Routledge Handbook of European Security Law and Policy*. (Routledge 2019). Elaine Fahey, ‘Developing EU cybercrime and cybersecurity: On

policy fields in recent times, however new, and increasingly externalised despite its initially internal focus, making it a highly prominent and active site of external relations.⁴⁸ As a result, the EU also increasingly appears to nudge international cybersecurity developments. It has been a core proponent of the Council of Europe Budapest Convention forum for global law-making.⁴⁹ It also has an increasingly broad range of cyber partnerships linked explicitly to both trade and multilateralism. The EU Cyber security strategy (EUCSS) expressly advocates that the EU be a coherent international cyberspace policy in order to be able to promote EU values.⁵⁰ Cybersecurity is a highly complex regulatory phenomenon not suited to a trade agreement: it is heavily dependent upon incomplete international law, private power, soft law and practical cooperation. Cyber security provisions were increasingly in EU strategic partnership agreements, ie soft law alongside trade provisions with partners. The EU is well represented in all international forums on cyber law-making, which is reflected in its increasingly global elements of its cyber law-making.

In this regard, cyber security provisions have been found increasingly in EU international relations but mainly in EU strategic partnership agreements, ie soft law agreements, negotiated, signed and ratified alongside trade provisions with partners. A good example of until recently the EU's most robust and broad-ranging set of cybersecurity provisions for a key developed economy trade partner operating as a template for multilevel cooperation is the EU-Japan SPA with provisions in Article 36 thereof on cybersecurity. Multilateralism and international law forms a key plank of this cooperation and there is a significant effort to learn to collaborate.

The provisions on cybersecurity here mirror to a degree provisions in the EU-Japan EPA in the ecommerce chapters with respect to regulatory cooperation, where cyber security cooperation are also referenced. The provisions of EU-Japan Economic Partnership Agreement (EPA) in Article 8.80 as to regulatory cooperation in digital trade explicitly mention cyber security, particularly in Article 8.80.2(b), and signifies its place as a next generation agreement of data matters. Here, dialogues are a notable and important form of engagement here when seen against this backdrop of the SPA grounded in multilateralism. The soft law provisions of the SPA thus interact and compliment the EPA through using dual-faceted institutionalization, bilaterally and multilaterally. The EU-Japan provisions are of note and may be seen as a high-water mark thereof in contrast to its earlier predecessor, the EU-Canada Strategic Partnership Agreement (SPA) of 2016 which makes provision for a shorter and lighter form of cyber based cooperation.

It reflects the significantly more prominent role played by Japan in multilateral fora as to cyber issues.⁵¹ The EU-Canada SPA 2016 makes provision in an agreement alongside its partnership trade agreement, in 'Article 22 Cybercrime' that the 'Parties recognise that cybercrime is a global problem requiring global responses',⁵² Similar to the earlier EU-Canada agreement, the EU-Korea SPA, also one of the EU's earliest next generation agreements, made similar provision with respect to breadth, depth and scope. EU-Korea Framework Agreement, Article 37 combating cybercrime: 'The Parties will strengthen cooperation to prevent and combat high technology, cyber and electronic crimes and the distribution of terrorist content via the Internet through exchanging information and practical experiences in compliance with their national legislation within the limits of their responsibility'.⁵³

legal challenges of EU institutionalisation of cyber law-making' in Thomas Hoerber, Gabriel Weber, Ignazio Cabras (eds), *The Routledge Handbook of European Integrations* (Routledge 2022).

⁴⁸ Wessel, *ibid*, (n 47) 507.

⁴⁹ Jörg Polakiewicz, 'The emperor's new clothes – data privacy and cybersecurity from a European perspective' in Elaine Fahey and Isabella Mancini, *Understanding the EU as a Good Global Actor: Ambitions, Values and Metrics* (Edward Elgar 2022).

⁵⁰ European Commission, 'EU Cybersecurity plan to protect open internet and online freedom and opportunity' (2013) <https://ec.europa.eu/commission/presscorner/detail/en/IP_13_94> accessed 3 October 2023.

⁵¹ See ch 5.

⁵² Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part [2016] OJ L 329/45.

⁵³ Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part (EU-Korea Framework Agreement) [2013] OJ L 20/2, art 37 'Combating cyber crime.'

5.2. Cyber and the international in the TCA

The provisions of the TCA mark a highly significant shift in EU trade agreements as to cybersecurity. Cybersecurity occupies a highly central position in this TCA unlike in its predecessors. Title II of the TCA makes highly significant provision for thematic cooperation in part Four thereof, alongside health cooperation. In a trade agreement devoid of more recent provisions on regulatory cooperation and dialogues based upon multilateralism, the cybersecurity provisions of the TCA are noticeable for their exceptional commitments to multilateralism. Although mostly voluntary, they are also very noticeable for the breadth of the institutionalised cooperation. The TCA includes voluntary arrangements for the UK to work with expert bodies including the European Union Agency for Cybersecurity (ENISA) and the EU's Computer Emergency Response Team (CERT-EU).⁵⁴ These provisions are striking also for their detail, their length and breadth despite ultimately being strictly speaking voluntary in nature. The provisions also reflect well the 'global challenges' dimension of cybersecurity but ultimately are not well linked to the digital trade chapter of the TCA and despite its depth and breadth, ultimately appears as a form of missed opportunity. In fact, not at all in digital trade chapter. They reflect well the 'global challenges' dimension of cybersecurity yet are poorly linked to other key chapters of the agreement eg the digital trade chapter of the TCA. Given the relative strengths of the UK in cybersecurity and its efforts to evolve EU cybersecurity policy successfully as a member, the TCA is a missed opportunity

6. Conclusions

The chapter has contrasted international qua transnational cooperation objectives provided for in the TCA as to cyber, health, energy, climate, embodying areas presenting significant global challenges. This chapter has specifically considered four areas of the TCA with 'transnational' character although there are no doubt many more, defining the transnational loosely as international or global ambition, either expressly or impliedly as provided for in the TCA. Two of the topics, health and cyber, are to be found in Part IV thematic cooperation, in Titles I and II respectively and in Part II, Title VIII as to Energy, with climate is a more cross-cutting element of the TCA. This reflects two issues, namely the tensions of the TCA dynamic itself and the constraints of the negotiation timeframe for grander ambitions and relations. The absence of multilateralism as an agenda in a trade agreement can signify broader underlying tensions and this chapter has shown that the TCA arguably showcases this. The TCA is justifiably not an agreement that has excited much interest or attracts much for its significance, instead, reputed for its lack of ambitions and its highly esoteric stance as to international matters. However, the TCA still remains some dimensions of international openness for the future, however modest in the grander scheme of things.

⁵⁴ Article 707: Cooperation with the EU Agency for Cybersecurity (ENISA) ; Article 705 Cooperation with the Computer Emergency Response Team – European Union.