

BLOG POST

STRATEGIC CHOICES FOR THE EU'S DIGITAL TRADE POLICY AFTER THE US ELECTION

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Key messages ■

- EU digital policies must navigate the geopolitics of a strategic triangle with the US and China.
- The digital agenda is now an important element of trade negotiations. The EU needs to move fast to avoid falling behind in the global regulatory race. Transatlantic cooperation on the regulation of digital trade could push global standards.
- The EU's digital trade policy needs to aim for a recognition of EU standards to increase market access of European industry, but access to the European digital market can also be leveraged to pursue other political objectives. This may require difficult trade-offs.
- Digital taxation and data flows will likely become a sticking point in transatlantic relations, but transatlantic views on the role of antitrust, privacy, and artificial intelligence seem to be converging. Crucially, the EU and the US have a shared foundation of liberal democratic values.
- Widening the aperture on digital trade issues could lead to a grand bargain between liberal democracies, but this needs to be pursued at the highest political levels.
- The EU has to carefully sequence its digital legislation to balance its collective preferences, while at the same time making sure that potential paths for cooperation with the US and other partners are not blocked off prematurely by presenting them with a *fait accompli*.

I ■ Introduction

In spite of being the world's largest exporter of services, the EU has fallen behind in the development of key digital technologies. In 2019, of the thirty largest technology firms, eighteen were headquartered in the United States, seven in China, and only one in Europe.¹ Moreover, the market value of US technology firms is already greater than the entire European stock market.² As services are increasingly delivered digitally, this side-lining could signal tough times ahead for European industry. Even though the EU has begun to play catch up, its **digital policies must navigate the treacherous currents of geopolitics in a strategic triangle with the United States and China**. Trump has been shattering transatlantic cooperation on trade, climate and foreign policy. China's unfettered use of industrial subsidies and its problematic human rights record has unnerved European policymakers enough to label it a "systemic rival".³ In the digital realm, China, the European Union and the United States are also diverging into distinct governance models. This is raising fears over a "splinternet", which in turn could widen geopolitical faultlines.⁴

It is no surprise that there was a collective sigh of relief in Brussels and in most European capitals after it became clear that the Trump era was nearing its end. The EU has since been trying to sound out how to restore the transatlantic relationship and to shift the strategic triangle to its advantage. The result: **the "new EU-US agenda for global change", which calls for a global alliance of like-minded partners to meet the "strategic challenge" of China's rise, in particular by cooperating on digital technology**.⁵ But how realistic is this proposal at this point in time? For the answer, it is necessary to take a closer look at the context of the nascent EU digital trade agenda and study the potential areas for convergence and conflict.

II ■ From digital policy to digital trade policy

The von der Leyen Commission issued ambitious political guidelines for its five-year term.⁶ Amongst other goals, it aims to take the EU to the forefront in digital technologies, protect the values of European citizens, and play a stronger role in the world. Certainly, a whole-of-government approach will be required to bring this vision to reality, but the Commission's Directorate General for Trade (**DG Trade**) **will play a central role in the process**, because it has jurisdiction over crucial digital policies with an external dimension. Internet governance used to happen in a mostly self-governed sphere between private actors but has in recent years become the subject of negotiations between governments, in particular in the trade policy domain. As such, **the digital agenda is now an important element of bilateral, plurilateral, and multilateral trade negotiations**.

1. Mary Meeker's 2019 Internet Trends Report, Slide 12

2. Europe needs to build the digital future not just bash Big Tech, *Financial Times*, 19 November 2020

3. EU-China, A Strategic Outlook, European Commission, JOIN(2019) 5 final, European Commission, 12 March 2019

4. Governing the Internet: the Makings of an EU Model, Andrew Puddephatt, European Council on Foreign Relations, 30 July 2020

5. A new EU-US agenda for global change, JOIN(2020) 22 final, European Commission, 2 December 2020

6. Political Guidelines for the next European Commission, 2019-2024, European Commission, 9 October 2019

Since June 2020, DG Trade has been conducting a major review of the EU's trade and investment policy—the first in five years. It puts emphasis on the role of trade policy to support the digital transition and is guided by a conceptual framework for "open strategic autonomy", which aims to "strengthen then EU's capacity to pursue its own interests independently and assertively, while continuing to work with partners around the world to deliver global solutions to global challenges".⁷ The Strategic Plan 2020-2024 of DG Trade explicitly states that EU trade policy will be "the embodiment of the mix of EU values".⁸ Both frameworks recognize that **EU regulatory and trade policies can have meaningful leverage to achieve strategic goals beyond market access** for European exporters.⁹

In light of the growing importance of digital issues in its trade policy, **the EU is facing a series of strategic choices**. This could involve trade-offs between different objectives and determine if the EU will indeed become more open, strategic, and autonomous. First and foremost, the EU is the world's largest exporter of services. There is therefore a strong economic interest to maintain and improve market access for European exporters of services. Given that services are increasingly delivered via digital networks, **the EU's digital trade policy will have to aim for a recognition of EU standards** on privacy, cybersecurity and artificial intelligence, avoid data localization requirements in partner countries, maintain open cross-border data flows, and restrict the mandatory disclosure of source code. At the same time, **access to the European digital market will also be leveraged to pursue other political objectives**. These goals include industrial policy to become a leader in strategic technologies, competition policy and digital taxation to create a level playing field for European firms, the promotion of democracy and human rights around the world, as well as privacy and consumer protection of European citizens.

The European Union was a first mover on digital policy when it introduced the General Data Protection Regulation (GDPR) in 2016. Many jurisdictions around the world have since modelled their privacy legislations on European rules, which has made GDPR a de-facto global standard—including in California, the home base of the world's most prominent technology firms. But just like a bicycle needs to keep moving to avoid tipping over, **the Commission will need to move fast to avoid falling behind in the regulatory race for the digital realm**. In particular in the Asia-Pacific, a number of digital trade initiatives are currently moving full-steam ahead. This includes the Chinese-led "Global Data Security Initiative" and the Asia-Pacific Economic Cooperation (APEC) "Cross-Border Privacy Rules System". A new generation of digital trade agreements, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the Australia-Singapore Digital Economy Agreement (DEA) and the Digital Economy Partnership Agreement (DEPA) between Singapore, Chile and New Zealand also include strong provisions on data flows, data localization, and source code protection. Lastly, at the WTO, the plurilateral Joint Statement Initiative on electronic commerce is meant to deliver results on global rules for the digital economy before the Twelfth WTO Ministerial Conference in Kazakhstan in June 2021.¹⁰

7. *A renewed trade policy for a stronger Europe*, Consultation Note, European Commission, 16 June 2020

8. *Directorate-General for Trade Strategic Plan 2020-2024*, Ares(2020)4789801, European Commission, p.7

9. Cf. *The Brussels Effect, How the European Union Rules the World*, Anu Bradford, Oxford University Press, 2020; *National Power and the Structure of Foreign Trade*, Albert Hirschman, University of California Press, 2018 (1945)

10. Note that the ongoing negotiations at the WTO suggest that the plurilateral e-commerce agreement will have a low level of ambition.

III ■ High stakes and high interest across the Atlantic

The Atlantic Rim is the region with the greatest volume of cross-border data flows in the world.¹¹ It is also highly interdependent: more than half of Europe's cross-border data flows are with the US and more than half of US cross-border data flows are with Europe. **Transatlantic agreement on the regulation of digital trade would therefore have a significant impact on the domestic digital economies in both Europe and the US and also set an example for global standards.** Biden has made clear that the US will not join any new trade agreements until domestic competitiveness has improved.¹² Digital trade will nevertheless be at the forefront of Biden's trade agenda, as former United States Trade Representative (USTR) Michael Froman recently emphasised.¹³ If done right, this is a window of opportunity for the renewal of the transatlantic relationship.

The EU has sent multiple signals that it wants to engage with the US on digital trade. Commission President von der Leyen proposed working together on a "rule book for the digital economy and society covering everything, from Big Tech to data use and privacy, from infrastructure to security."¹⁴ EU Trade Commissioner Valdis Dombrovskis called for solving existing trade disputes and establishing an EU-US trade and technology council—a holdover from the regulatory cooperation body that was envisaged under the failed Transatlantic Trade and Investment Partnership (TTIP).¹⁵ There have also been other symbolic moves, such as the settlement of the lobster dispute and signals for reconciliation on the Boeing-Airbus case. But von der Leyen also cautioned EU ambassadors that "some shifts in priorities and perceptions run much deeper than one politician or administration" which would not "disappear because of one election".¹⁶ **Digital taxation and data flows, for example, will likely become a sticking point in transatlantic relations in the coming months.**¹⁷ At the same time, **transatlantic views on the role of antitrust, privacy, and artificial intelligence seem to be converging.** Crucially, the EU and the US have a **shared foundation of liberal democratic values**, which could help to break deadlock in the face of an external systemic threat.

11. Joint Industry Letter on Schrems II Case Ruling

12. Biden: "We're Going to Fight Like Hell by Investing in America First", *The New York Times*, 2 December 2020

13. Michael Froman speaking at the Peterson Institute for International Economics, 18 November 2020

14. EU braces itself for battle despite new faces in White House, *Financial Times*, 25 November 2020

15. Introductory Remarks by Executive Vice President Valdis Dombrovskis at the Foreign Affairs Council Trade Press Conference, European Commission, SPEECH/20/2062, 9 November 2020; note that Biden's designated Secretary of State, Antony Blinken, has also called for ending the "artificial" trade war with the EU, because "we have the same basic goals", *Europe Sends Biden a Reminder of Why Transatlantic Ties Matter*, *Bloomberg*, 28 November 2020

16. EU braces itself for battle despite new faces in White House, *Financial Times*, 25 November 2020

17. Cf. Users, Data, Networks. Taxing the Digital Economy, Pola Schneemelcher, Jacques Delors Centre Berlin, 9 February 2020

IV ■ Opportunities and pitfalls for collaboration

Digital taxes and the conclusion of the OECD Base Erosion and Profit Shifting (BEPS) framework could be amongst the most difficult issues to resolve. On the campaign trail, Biden promised to increase corporate tax rates from twenty-one to twenty-eight per cent. He specifically called on technology companies to pay a larger share of taxes through raising the global intangible low-taxed income (GILTI) tax and promised to close offshoring loopholes. But Biden did not offer proposals for structural reforms of the international tax system, unlike some other Democratic candidates in the primaries.¹⁸ Of course, the role of tax enforcer may not come naturally to Biden, who has for four decades been Senator of Delaware, one of the world's most significant tax havens. Silicon Valley was also an important contributor to his presidential campaign and to Vice President-elect Kamala Harris, and they may not want to bite the hand that fed them, at least not too much.¹⁹ In any case, **tax policy in the US is a prerogative of the legislature and digital taxes have faced strong bipartisan opposition** in the House and the Senate—possibly also related to generous campaign contributions from technology firms.²⁰ Moreover, the Biden administration will need to finance the substantial fiscal programs it intends to implement in the coming years. It will therefore **unlikely want to forgo the considerable tax revenue from US technology firms that could be diverted to other jurisdictions**.

Yet there could still be room for progress. OECD tax officials do not expect a fundamental shift in the US position, but express hope that a Biden administration will support a multilateral solution.²¹ While the Trump administration threatened retaliatory tariffs in return for unilateral European digital taxes, **it seems less likely Biden would retaliate in the same forceful manner as Trump while he is trying to mend the diplomatic relationships with key allies**.²² If an ever-increasing number of US allies were to introduce unilateral digital taxes in 2021 or 2022, this could create pressure for the US to join OECD BEPS.

Further discord can be expected on transatlantic data flows. In July 2020, the European Court of Justice ruled in the so-called Schrems II case that the EU-US Privacy Shield, which governed transatlantic data flows, is incompatible with European privacy standards. This followed the ECJ's 2015 invalidation of the preceding Safe Harbour framework (Schrems I). In both cases, the role of systematic surveillance by the US government was key to the reasoning of the court, that the privacy of EU citizens was insufficiently protected. It is clear that **any meaningful new agreement on data flows between the EU and the US has to be based on a deeper level of trust**, for example through a credible "no-spy" agreement. This, however, would likely be met with stiff resistance from the US national security apparatus as much as from European intelligence agencies, and would therefore require political will at the highest levels of government.

18. Biden Likely Wouldn't Upend Current US Digital Tax Approach, Alex M. Parker, *Law360*, 11 August 2020

19. Here are the 15 Silicon Valley millionaires spending the most to beat Donald Trump, *Vox.com*, 27 October 2020; How Kamala Harris Forged Close Ties With Big Tech, *The New York Times*, 30 October 2020

20. Tech industry cash flows to Democrats despite 2020 scrutiny, *The Hill*, 19 December 2019

21. Digital tax bytes Weekly update, Eversheds Sutherland (US) LLP, 16 November 2020

22. Of course, Biden will not necessarily remove the tariffs that were levied under Trump and will make sure to use them as leverage in negotiations.

The EU's recently proposed "data governance act" could throw yet more sand into the gears of transatlantic digital trade.²³ While its aim to localize industrial data within the European Union could be an effective industrial policy to promote so-called "European champions", it will likely be fiercely resisted by the US, for whom free data flows have been a cornerstone of recent trade agreements like the United-States–Mexico–Canada Agreement (USMCA). As the European legislative process for the data governance act is still in its early stages, **data localization for industrial data will likely become an important area for transatlantic negotiations on digital trade.**

At the same time, the **political discourse on antitrust and the outsized market power of large technology firms seem to be converging** between the EU and the US.²⁴ Bipartisan support in Congress and recent personnel choices of Biden's transition team indicate that the US will take a hard line against the dominant market position of the largest technology firms.²⁵ However, the **EU will need to tread carefully** if it wants to avoid the appearance that its antitrust policies targeting large technology firms, which happen to be mostly American, don't have the whiff of industrial policy. This will be a difficult balancing act for both substance and communication of the "Data Governance Act", "Digital Services Act" and "Digital Markets Act" that are currently in the legislative pipeline.

Even though the battle for the GDPR was hard fought and involved its share of criticism from the US, more recently the **views on consumer privacy are also converging** across the Atlantic. California's 2018 Consumer Privacy Act shares many of the features of GDPR and has catalyzed the move towards federal privacy legislation in the US, which will likely be passed in the coming years.²⁶ Moreover, both the EU and the US are discussing the regulation of artificial intelligence.²⁷ As both sides have large overlap in their understanding of individual rights, **it should be possible to come to an agreement on the ethical regulation of artificial intelligence, in particular in view of the challenge that authoritarian systems have a built-in advantage in developing this technology.**²⁸

Biden's Global Summit for Democracy, planned for the first year of his presidency, could become a focal point for many of these discussions.²⁹ Several recent initiatives suggest that the time has come to reinforce the transatlantic alliance and US treaty alliances in the Asia-Pacific by **linking digital policies with a wider national security agenda.** The Canadian Centre for International Governance Innovation (CIGI), for example, has suggested to create a plurilateral "Single Data Area" with shared standards that are developed by an international data standards board.³⁰ The "Technology Alliance Project" by think tanks

²³ Proposal for a Regulation on European data governance (Data Governance Act), COM(2020) 767 final, European Commission, 25 November 2020

²⁴ See, for example, the recent *investigation of competition in digital markets* by the House subcommittee on antitrust, US House of Representatives

²⁵ *Biden is Expected to Keep Scrutiny of Tech Front and Center*, New York Times, 10 November 2020

²⁶ *What could a Biden administration mean for privacy, cybersecurity?* Jedidiah Bracy, The International Association of Privacy Professionals, 9 November 2020

²⁷ Cf. *A European approach to regulating AI: The Commission's AI strategy*, Maarja Kask, Jacques Delors Centre Berlin, 9 November 2020

²⁸ *The importance and opportunities of transatlantic cooperation on AI*, Joshua P. Meltzer, Cameron Kerry and Alex Engler, Brookings Institution, June 2020

²⁹ *Why America Must Lead Again*, Joseph R. Biden, Foreign Affairs, March/April 2020

³⁰ *A Plurilateral "Single Data Area" Is the Solution to Canada's Data Trilemma*, Patrick LeBlond and Susan Ariel Aaronson, CIGI Paper No. 226, 25 September 2019

from Germany, Japan and the US advocates for close technological cooperation of like-minded countries to safeguard liberal-democratic institutions against authoritarian powers.³¹ The US Council on Foreign Relations (CFR) has proposed to weaponize digital trade by establishing a "Digital Trade Zone to Promote Online Freedom and Cybersecurity" which ties democratic values with access to digital markets.³² These proposals share the promise that **widening the aperture on digital trade issues could lead to a grand bargain between liberal democracies that includes free data flows, digital taxes, antitrust and privacy.**³³



In spite of the short-term relief over Biden's election, there is lingering uncertainty in Europe about the future of the transatlantic relationship. Even if cooperation will be rebuilt in the coming months, the last four years have exposed deep fissures in the American political system. It is far from certain how far Biden will be able to push his agenda and heal the deep divisions, in particular if Democrats fail to regain control of the Senate in January. Seventy-four million Trump voters will remain a strong political asset over the next four years and it is likely that Trump was not only the cause of ongoing polarization, but also the symptom of a deeper malaise.

Trump has forced Europe to reflect on its role in the world, which reignited old debates on European sovereignty. But if the EU wants to engage with the US to take on the "systemic rival" China, it will soon have to make some hard choices. The European Commission has rightly identified digital trade issues to be a key area for transatlantic cooperation. However, the multiple objectives (market access, industrial policy, antitrust, consumer protection, and democracy) could sometimes be at odds with themselves. The EU will have to make difficult trade-offs on digital trade between its interests and its values. Most importantly, it will need to take into account whether it expects the US to be a reliable partner in the future. For now, however, the EU has to carefully sequence its digital legislation to balance its collective preferences, while at the same time making sure that potential paths for cooperation with the US and other partners are not blocked off prematurely by presenting them with a *fait accompli*. Otherwise, there is a distinct risk that the EU will end up neither open, strategic, nor autonomous. ■

³¹. Joint project by the Centre for New American Security, the Mercator Institute for China Studies (MERICS) and the Asia Pacific Initiative (API).

³². *Weaponizing Digital Trade, Creating a Digital Trade Zone to Promote Online Freedom and Cybersecurity*, Robert K. Knake, *Council on Foreign Relations Special Report No.88*, September 2020

³³. Note, however, that Rupert Schlegelmilch, Director at DG Trade with responsibility for transatlantic relations, has cautioned against ambitious package deals that failed in the past. Webinar on transatlantic trade under Biden, Greens-European Free Alliance, 1 December 2020

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