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Making America First in the Digital Economy: The Case for Engaging Europe

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EXECUTIVE SUMMARY

The modern global economy is increasingly driven by digitalization. Digital technologies are transforming all economic sectors, from infrastructure to agriculture, and have already had a tremendous impact on traditional industries like manufacturing and transportation. The future growth of the US economy depends on the success of its digital economy.

Fortunately, the undisputed leader in this booming digital economy is the United States, home to Silicon Valley and the birthplace of many transformative technology companies. While the United States has been a trailblazer, the global leader in regulating the digital economy is the European Union (EU).

Only by working with Europe can the United States help ensure that its citizens and companies are part of an open and innovative digital economy in the future, one in which the United States and Europe remain global leaders.

A US-European Partnership

Engaging with Europe on a global digital agenda is in US interests for two reasons:

First, Europe is a digital economic powerhouse second only to the United States—and in some instances, such as quantum computing and telecommunications—it actually leads. Given its high level of digital activity, Europe is already the United States' major partner in digital trade, accounting for almost half, and it serves as the primary market for many US tech firms.

Second, the European Union (EU) is a regulatory superpower in the digital world. In the borderless world of the internet, regulation by others has an immense impact on US companies and their business practices. For the United States, which usually seeks a less regulated, flexible economy (including in the digital arena) a lack of cooperation will make it more likely that Europe's heavily regulated approach becomes a global norm and will leave the field open to other emerging powers in the digital world especially China and Russia.

Priorities for the US-EU Digital Agenda

Both the EU and the United States are still defining their approaches to the digital economy and the need for any specific regulatory regime, but over the past

few years, the following issues have been the most prominent:

Privacy: Within the EU, the protection of personally identifiable information is viewed as a fundamental right, not primarily as a consumer protection issue, as it is in the United States.

Competition Policy: The EU has an extensive record in policing antitrust behavior, including in the digital sector. Some of the highest profile cases have been against US giants of the tech world, which some have interpreted as anti-American protectionism.

Taxation of Digital Enterprises: The taxation of digital enterprises in the EU and a growing focus on differing tax rates between member states has the potential to become an area of enormous transatlantic tension.

Data Flows: The cross-border flow of both personal and business-related data has emerged as a point of potential US-EU disagreement, especially given data's increasing centrality to business profits and the EU's ambitious approach to its regulation.

Copyright: Modernizing copyright protections to take digital technology into account has been a complicated issue, and the United States and EU will have to jointly grapple with the blossoming divide between different types of companies on how to handle it.

Anti-terrorism and Hate Speech: The United States and Europe have both experienced a growing online presence of terrorist recruitment material and other extremist and racist content. Given First Amendment protections, the United States has not sought to develop rules for online hate speech, while some European states desire a different approach.

Making America First—but Not Alone—in the Digital Economy

For the United States to continue as a leader in the digital economy, it must engage with Europe. Strong and early US engagement could help moderate European policy while ensuring greater compatibility across the Atlantic. That compatibility is essential if the United States and Europe are to succeed in fighting cyberattacks, online terrorism, and criminal networks. It is also key to US and EU future economic success in the competitive global digital marketplace.

THE CASE FOR ENGAGING EUROPE

The future growth of the US economy will depend on the success of its digital economy. Already among the fastest growing areas of the economy, it is transforming all other sectors, from infrastructure to agriculture. Revitalizing American manufacturing will depend on integrating digital technologies on assembly lines, supply chains, and delivery mechanisms. The United States cannot achieve its economic success in a vacuum—it is part of an international process of digital transformation that is affecting companies and people worldwide. Although American firms and consumers have been trailblazers in this process, they are directly impacted by shifts in the digital economy elsewhere and by decisions made by other governments.

The global leader in regulating how the digital economy will work is Europe, specifically the European Union (EU). In regulating how digitalization affects its own citizens and economy, the EU has set rules that affect leading global companies, including many US firms. The EU's market of some 500 million consumers¹—bigger than that of the United States—and its advocacy for other markets to adopt its rules makes it a regulatory superpower in the digital world. For the United States, which usually seeks a less regulated, flexible economy, including in the digital arena, engaging with the EU is essential.

Only by working with Europe can the United States help ensure that its citizens and companies are part of an open and innovative digital economy in the future, one in which the United States and Europe remain

global leaders. Engaging with Europe can also help the United States achieve some key goals in the digital arena, including protecting the US government, industries, and citizens from cyberattacks; fighting the online influence of terrorists; and maintaining open markets for US companies.

The Growing Digital Economy

The global digital economy is growing at remarkable speed. In 2005, only 16 percent of people around the globe used the internet. By 2017, that share had nearly tripled to 48 percent, with 53 percent of users having internet access at home.² Between 2005 and 2017, it is estimated that global data flows will grow from

5 terabits per second to 543 terabits per second,³ and this growth is expected to continue so that by 2021, global internet traffic will be equal to 127 times the volume of 2005.⁴ It is estimated that in 2014, global data flows added \$2.8 trillion to global gross domestic product (GDP).⁵ If that total is compared to the GDP of major countries, global data flows rank seventh, behind the United States, China, Japan, Germany, the United Kingdom, and France. On a personal level, more than 914 million people have at least one foreign connection through social media, while 361 million have engaged in cross-border e-commerce.⁶

“Only by working with Europe can the United States help ensure that its citizens and companies are part of an open and innovative digital economy in the future, one in which the United States and Europe remain global leaders.”

Digital technologies have already had a tremendous impact on traditional industries, including manufacturing and transportation. In 2017, 49 percent of manufacturing and supply chain industry leaders

1 “The European Single Market,” European Commission, accessed January 28, 2018, https://ec.europa.eu/growth/single-market_en.

2 “ICT Facts and Figures 2017,” International Telecommunication Union, July 2017, <https://www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2017.pdf>.

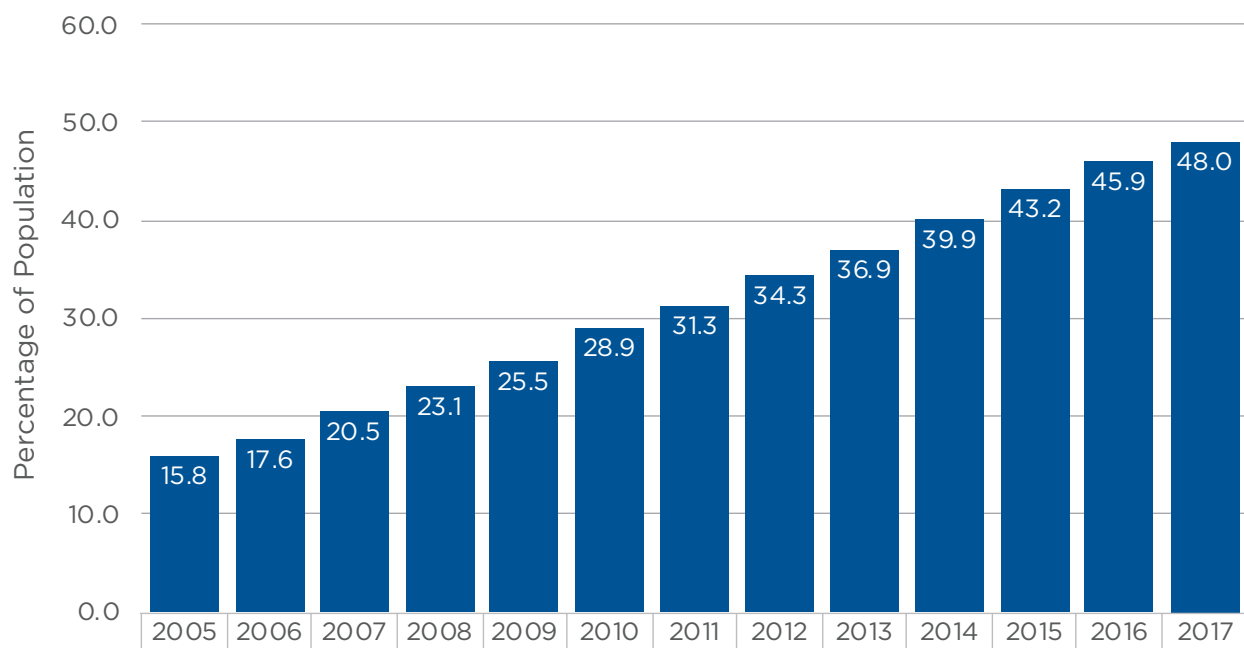
3 Jacques Bughin and Susan Lund, “The Ascendancy of International Data Flows,” *Vox: CEPR’s Policy Portal*, January 9, 2017, <https://voxeu.org/article/ascendancy-international-data-flows>.

4 “Cisco VNI Forecast and Methodology, 2016-2021,” Cisco, September 15, 2017, <http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/complete-white-paper-c11-481360.html>.

5 James Manyika, Susan Lund, Jacques Bughin, Jonathan Woetzel, Kalin Stamenov, and Dhruv Dhingra, *Digital Globalization: The New Era of Global Flows*, McKinsey Global Institute, March 2016, 10, <http://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/digital-globalization-the-new-era-of-global-flows>.

6 Manyika, Lund, Bughin, Woetzel, Stamenov, and Dhingra, *Digital Globalization: The New Era of Global Flows*, 8.

Global Internet Users, 2005–2017



Source: International Telecommunication Union.

were using sensors and automatic identification, with another 38 percent reporting that they expected to adopt the technology within five years.⁷ Artificial intelligence (AI), autonomous vehicles, big data analytics and cloud storage, custom manufacturing, the Internet of Things (IoT), and robots will have huge effects on industries ranging from automotive and chemical to energy and retail.⁸ Any revitalization of manufacturing in the United States will come through so-called smart factories that fully deploy these technologies. As costs fall dramatically for key technologies such as drones, the revolutionary impacts of digitization on the US economy are expected to continue.

Among the biggest beneficiaries of this transformation may be small- and medium-sized enterprises (SMEs). About 12 percent of global trade in goods is now conducted via e-commerce. SMEs can now broaden their customer base regionally and internationally, thanks to

outlets such as Amazon and Facebook—the latter estimates that it hosts 50 million SMEs.⁹

The United States is the undisputed leader in this booming digital economy. It is the birthplace of many transformative companies, including Apple, Facebook, Google, Microsoft, and Uber, as well as multitudes of smaller firms. Silicon Valley continues to define the start-up culture. Although the digital economy is notoriously difficult to measure, estimates of the contribution of digitalization to US GDP range from 6 percent¹⁰ to 33 percent.¹¹ Whatever the precise number, it is clear that digitalization is adding to economic growth.

The digital economy is among the most internationally competitive elements of the US economy, with regular annual surpluses: exports of digitally enabled services have exceeded imports every year since 2007.¹² In 2015, the United States exported \$398.7 billion in

7 Deloitte and MHI, *The MHI Annual Industry Report: Next Generation Supply Chains: Digital, On-Demand, and Always-On*, 2017, 29, <https://www.mhi.org/publications/report>.

8 *Digital Transformation Initiative*, World Economic Forum and Accenture, January 2017, <http://reports.weforum.org/digital-transformation/wp-content/blogs.dir/94/mp/files/pages/dti-executive-summary-website-version.pdf>.

9 Manyika, Lund, Bughin, Woetzel, Stamenov, and Dhingra, *Digital Globalization: The New Era of Global Flows*, 7.

10 Christopher Hooton, *Refreshing Our Understanding of the Internet Economy*, The Internet Association, 2017, <https://internetassociation.org/reports/refreshing-understanding-internet-economy-ia-report/>.

11 Mark Knickrehm, Bruno Berthon, and Paul Daugherty, “Digital Disruption: The Growth Multiplier, Accenture Strategy,” Accenture Strategy, 2016, https://www.accenture.com/_acnmedia/PDF-4/Accenture-Strategy-Digital-Disruption-Growth-Multiplier.pdf#zoom=50.

12 James Stamps and Martha Lawless, et al., *Digital Trade in the U.S. and Global Economies, Part 1*, United States International Trade Commission, July 2013, <https://www.usitc.gov/publications/332/pub4415.pdf>.

digitally enabled services and imported \$237.1 billion, for a surplus of \$161.5 billion.¹³ Although this surplus did not compensate for the overall trade deficit of \$500.4 billion, digitally enabled services (along with services generally) have seen a positive and growing balance. Indeed, while the United States in 2016 had a global deficit in trade in goods of \$752.5 million, it had a global surplus of services of \$247.7 million.¹⁴ In 2015, the United States had a total surplus in digitally enabled services of \$161.5 million.¹⁵ At a time when US policy discussions often focus on revitalizing traditional manufacturing and encouraging merchandise exports, it is the digital economy, along with digital enhancement of traditional industries, that is the path to economic growth and a more balanced US current account.

Europe as a Digital Partner

As the United States grows its digital economy, the best partner for this effort is Europe—specifically the European Union. Engaging with Europe on a global digital agenda is in US interests for two reasons.

First, Europe is a digital economic powerhouse second only to the United States—and in some indicators, it leads. According to the Organisation for Economic Co-operation and Development (OECD), the United States is the leading player, based on patents, in the Internet of Things

and data analytics, but the EU holds that title in quantum computing and telecommunications.¹⁶ Moreover, France, Germany, and the United Kingdom all lead the United

“The digital economy is among the most internationally competitive elements of the US economy, with regular annual surpluses.”

States in percentage of individuals using the internet and with fixed broadband subscriptions.¹⁷ Europe is also the home of major technological and digital companies, such as BlaBlaCar, Markit, Rocket Internet, Rovio, SAP, Spotify, and others. Europe does face challenges: digitalization is very uneven from country to country, and even within industries, especially when compared

with the United States.¹⁸ European start-ups have faced significant funding limitations, leading many to seek US-based investors or to be bought by US firms.

Given its high level of digital activity, Europe is already the major partner of the United States in digital trade. The EU accounts for almost half of all US digital trade, with a \$71 billion surplus for the United States in 2015.¹⁹ Europe is the primary market for many US firms: for example, 17.3 percent of Facebook’s subscribers are in Europe and 13.3 percent in North America.²⁰ Between 2010 and 2014, sales of information services by US-owned foreign affiliates in Europe (i.e., Amazon.co.uk or US law firms with offices in Europe) increased 50 percent, from \$96.3 billion to \$147.1 billion, and by 2014 accounted for 64 percent of information services supplied by US foreign affiliates globally.²¹ Europe continues to be the largest market for information services exports as more than half of US ICT exports went to

13 Alexis N. Grimm, “Trends in US Trade in ICT Services and ICT-Enabled Services,” United States Bureau of Economic Analysis, May 2016, https://www.bea.gov/scb/pdf/2016/05%20May/0516_trends_%20in_us_trade_in_ict_servics2.pdf.

14 “Historical Series,” United States Census Bureau, <https://www.census.gov/foreign-trade/statistics/historical/gands.pdf>.

15 Daniel S. Hamilton, *The Transatlantic Digital Economy 2017* (Washington, DC: The Center for Transatlantic Relations, 2017), viii, <http://transatlanticrelations.org/publication/transatlantic-digital-economy-2017/>. This study provides the most extensive examination of US-EU digital trade.

16 *G20 Innovation Report 2016*, Organisation for Economic Co-operation and Development, November 4, 2016, <https://www.oecd.org/china/G20-innovation-report-2016.pdf>.

17 “Individuals Using the Internet (% of population),” World Bank, International Telecommunication Union, World Telecommunication/ICT Development Report and Database, 2016, <https://data.worldbank.org/indicator/IT.NET.USER.ZS?view=chart>; “Fixed Broadband Subscriptions (per 100 people),” World Bank, International Telecommunication Union, World Telecommunication/ICT Development Report and Database, 2016, <https://data.worldbank.org/indicator/IT.NET.BBND.P2?view=chart>.

18 McKinsey Global Institute estimates that Europe has achieved only 12 percent of its digital potential (the United States is at 18 percent), and that overcoming these shortcomings could add 1 percent to GDP growth over the next decade. See Jacques Bughin, Eric Hazan, Eric Labaye, James Manyika, Peter Dahlström, Sree Ramaswamy, and Caroline Cochin de Billy, “Digital Europe: Pushing the Frontier, Capturing the Benefits,” McKinsey Global Institute, June 2016, <https://www.mckinsey.com/search?q=Digital%20Europe%20Pushing%20the%20Frontier%2C%20Capturing%20the%20Benefits>.

19 In 2015, the United States exported \$180 billion in digitally enabled services to Europe and imported \$109.1 billion. Hamilton, *The Transatlantic Digital Economy 2017*, viii.

20 “Facebook Subscriber Stats as of June 30, 2017,” Internet World Stats, <http://www.internetworldstats.com/facebook.htm>.

21 Daniel S. Hamilton and Joseph P. Quinlan, “The Transatlantic Digital Economy” in *The Transatlantic Economy 2017* (Washington, DC: The Center for Transatlantic Relations, 2017), 24-32.

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Europe in 2016. Between 2014 and 2016, ICT services exports to Europe increased by 5.53 percent, from \$27.012 billion to \$27.565 billion.²²

Second, Europe has become a regulatory superpower in the digital space. The United States has generally not sought to put new regulations on the emerging digital sector, and US President Donald J. Trump's administration has even rolled back some regulation put in place by its predecessor, including on net neutrality. Europe has taken a different approach—rather than relying on existing rules to prevent abuses and protect consumers in this new age, European legislators and policymakers have often sought to create rules specifically designed for the digital economy. The EU has been particularly active in the areas of privacy and competition policy, but it has also adopted legislation on net neutrality, e-commerce, and telecoms consumer pricing (i.e., roaming charges), and proposed additional legislation on a wide array of digital policy.

In the borderless world of the internet, regulation by others has an immense impact on US companies and their business practices. For many US companies operating in Europe—especially the major IT companies—it is often easier to adopt EU regulation across all markets rather than run a business with different practices in different regions. These decisions are not about regulatory preferences, but about predictability and size of the market. In some cases, such as the international transfer of personal data, the impact of EU regulation is more direct: to permit the transfer of data on individual European citizens to the United States, the EU insists that the United States have a regulatory structure equivalent to that in the EU, as is now certified through the EU-US Privacy Shield Framework.

In May 2015, the European Commission launched a new phase of regulation by seeking to create a Digital Single Market (DSM) within the EU. The DSM is intended to unlock economic potential by creating a unified digital marketplace, replacing twenty-eight different national regulatory regimes with one European rule book. As part of the DSM, the European Commission proposed new regulations across a wide range of

issues—copyright, e-commerce, competition policy, platforms, telecoms, privacy, data flows, cybersecurity, and others. The EU also created a new investment fund, which will be partly dedicated to building digital infrastructure, and launched a reform of capital markets that should allow more funds to be available for start-ups.

Although it will be many years before the full impact of the DSM on the European economy is clear, it is already affecting US companies as they operate in Europe. It will also affect their operations in the United States. Some US companies, for example, will adopt new EU privacy rules throughout their operations around the world.

Aside from promulgating internal rules, the EU is active in promoting its approach to digital policy in international fora such as the Group of Seven (G7) and Group of Twenty (G20), and among its trading partners. In April 2017, the German government, while chairing the G20, convened the first ever G20 digital ministers meeting. The EU is currently negotiating several trade agreements—including with Japan, the South American trade bloc Mercosur, and Mexico—and has used those to push its partners to adopt its approach to digital regulation.

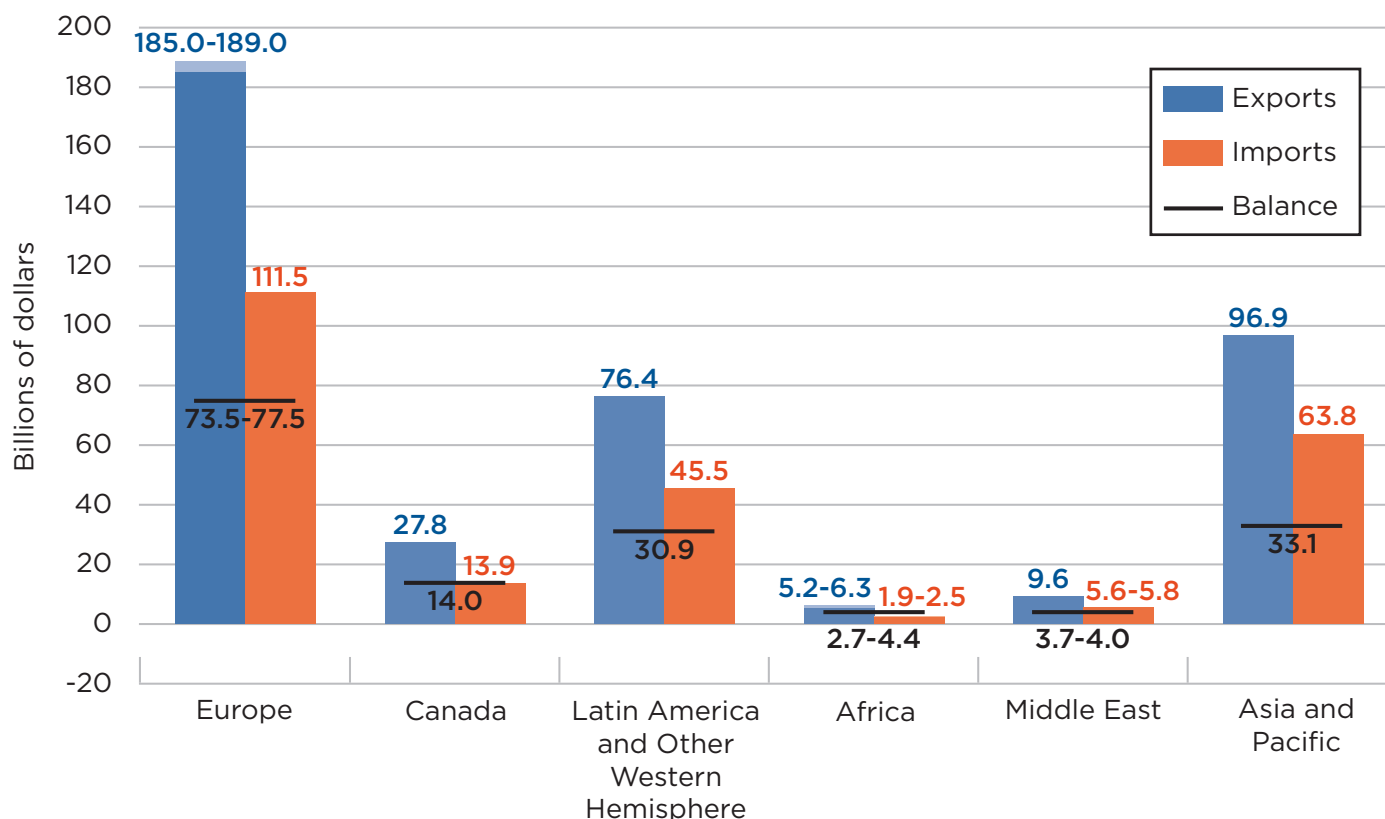
Simply ignoring this European digital activism will leave US companies more vulnerable and make it more likely that Europe's heavily regulated approach becomes a global norm. Or a lack of cooperation between the United States and EU will leave the field open to other emerging powers in the digital world, especially China and Russia, with very different approaches to privacy, copyright, transparency, and many other digital issues. Only through engagement with Europe can the United States ensure that US interests are protected in this new digital world. The Trump administration should urgently examine where it might work with the EU, including on such top priorities as cybersecurity, law enforcement, and anti-radicalization. It should also identify those issues where some engagement with the EU might shift likely policy into a more flexible and open direction.

Past Priorities on the US-EU Digital Agenda

Any engagement must start by assessing the current state of US-EU relations on digital policy. Given the

²² Shari A. Allen and Alexis N. Grimm, "U.S. International Services: Trade in Services in 2016 and Services Supplied Through Affiliates," Bureau of Economic Analysis, US Department of Commerce, October 2017, <https://www.bea.gov/scb/pdf/2017/10-October/1017-international-services.pdf>.

US Trade in Potentially ICT-Enabled Services by Major Area, 2016



Source: US Bureau of Economic Analysis.

importance of the EU market for US firms, and vice versa, it is hardly surprising that some contentious issues have arisen in the past. Moreover, both the EU and the United States are still defining their approaches to the digital economy and the need for any specific regulatory regime, so the rules change even as business moves forward. The sheer volume of transactions across the Atlantic almost guarantees that there will be disputes, but the United States and the EU should take care that these do not make it impossible for them to cooperate in maintaining an open global economy in this digital age. Over the past few years, the following issues have been the most prominent:

Privacy: Within the EU, the protection of personally identifiable information is viewed as a fundamental right, not primarily as a consumer protection issue, as in the United States. The 1995 Data Protection Directive, along with its successor, the General Data Protection Regulation (GDPR), which goes into effect in late May 2018, create

probably the most stringent legislation in the world aimed at protecting personal information.²³ Limits are set on when data can be shared, for what purposes, and how long it can be retained. Individuals are to be informed about any collection of their data and must have a way to make the collector accountable for misuse.

The United States and EU have clashed over privacy, struggling, for example, to reach agreements on Passenger Name Records (PNR) and the Terrorist Finance Tracking Program (TFTP) so that personal data could be transferred from Europe to the United States. After former US National Security Agency contractor Edward Snowden revealed the scope of US government surveillance of individuals (including German Chancellor Angela Merkel), the European Court of Justice (ECJ) ruled in 2015 that the US-EU Safe Harbor agreement was invalid because European personal data was not adequately protected in the United States. Safe Harbor had allowed the transfer of that data into the United

²³ An alternative is the Asia-Pacific Economic Cooperation Privacy Framework and Cross-Border Privacy Rules, which are far less stringent, especially in terms of breaches and handling of data by third-party processors.



Věra Jourová, Member of the EC in charge of Justice, Consumers and Gender Equality, received Penny Pritzker, United States Secretary of Commerce, in the context of the launch by the European Commission of the EU-US Privacy Shield aiming at a stronger protection for transatlantic data flows. *Photo credit: EC - Audiovisual Service/Georges Boulougouris.*

States by companies, and the consequences of a breakdown in that system would have been severe for transatlantic digital commerce.

In response, the United States and the EU negotiated the Privacy Shield, an upgraded system that allows companies to register and self-certify that they treat personal data according to European standards. Alongside the Privacy Shield, the United States and the EU negotiated an Umbrella Agreement establishing rules for the sharing of personal data by law enforcement, which was supplemented by the Judicial Redress Act of 2016, giving Europeans the ability to seek redress in US courts if their data are misused.

In July 2017, however, the ECJ disallowed the EU-Canada PNR agreement, casting doubt on the longevity of the US-EU accord. Late in 2017, the EU completed the first review of the Privacy Shield, concluding that it continued

to provide adequate assurances, but identifying some areas of concern to be addressed.²⁴ The Privacy Shield remains under legal challenge in the EU, and clearly, privacy will continue to be a key issue for individuals as well as businesses operating across the Atlantic.

Competition Policy: The EU has an extensive record in policing antitrust behavior, including in the tech sector. Some of the highest profile cases have been against US firms, including the giants of the tech world. In 2004, the European Commission determined that Microsoft had abused its dominant market position by bundling its Media Player with Windows and fined the company €497 million—a number that would be increased by €860 million in 2012, when the Commission determined that Microsoft had not complied with its earlier decision. In 2009, the Commission fined Intel €1.06 billion, alleging that the company had abused its dominant market position by providing payments

²⁴ “First Annual Review of the EU-US Privacy Shield,” European Commission, October 18, 2017, http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=605619.

to computer manufacturers to use Intel chips.²⁵ More recently, the Commission fined Google €2.42 billion in 2017 for abusing its search engine dominance in favor of its own comparison shopping network.

It has been easy for many to see anti-American protectionism in these actions; indeed, in 2017, then-President Barack Obama charged that EU actions on privacy and other matters were efforts to protect the tech sector from US dominance.²⁶ However, the context is important.

US tech companies are certainly subject to antitrust and other reviews in Europe, as they are leaders in the marketplace. Indeed, many of the complainants in cases against US tech firms are other US companies who fear their access to the EU market may be affected.²⁷ Statistics show that actions against US firms are a relatively small portion of the EU's competition caseload. Between 2010 and 2016, the European Commission finalized eighty decisions in antitrust or cartel cases, involving 358 companies, of which forty-six were US-based. Statistics on merger and state aid cases also fail to show any targeting of US companies.²⁸

But the relationship between competition policy and the tech industry is much more complicated than statistics would indicate. Although Europe has an increasingly vibrant start-up sector, a few large US firms are seen as dominating the global tech sector, and there is concern that Europe has not produced firms in the same league as Amazon, Facebook, or Google. Ensuring an open technology market is a priority for EU competition authorities, but a key question is whether competition regulations designed for the traditional economy are appropriate for the digital age. Google does dominate search engines in Europe, but it is not at all clear that its promotion of ads from its shopping service has reduced

competition from Amazon or other online retailers. Microsoft was dominant in software, but as the software and applications (app) markets have grown, that dominance has disappeared—and not just because Microsoft has unbundled Media Player from its browser.²⁹

Barriers to entry in the tech sector can also be low compared to manufacturing, where new entrants might have significant capital investment. When firms dominate a particular part of the tech sector, they may actually increase competition in formerly static markets, as BlaBlaCar and Uber have done in urban transportation, or Amazon in shopping, or as Skype, WhatsApp, and other “over the top” distribution companies have done in telecoms markets. The question is how to recognize when that dominance is stifling competition and in which market. Most recently, the Commission indicated that it will examine whether ownership of large amounts of customer data by companies should be considered in competition cases.³⁰ In 2018, the Commission plans to examine the role of platforms and whether they stifle competition in the digital economy and should be subject to specific legislation.³¹

Taxation of Digital Enterprises: The potential implications of EU tax policy for the digital industry burst onto the scene in October 2016 with the announcement by the Directorate-General for Competition (DG Competition) that Apple must pay €13 billion in taxes to Ireland, charging that the company's previous tax arrangement with Ireland amounted to illegal state aid. This judgement reflected the growing focus in the European Union on differing tax rates between member states. Ireland has long had a corporate tax rate of 12.5 percent, among the lowest in the EU, and, according to the Commission, Apple had excluded revenues earned elsewhere in Europe from taxation, making an effective

25 In September 2017, the European Court of Justice set aside the Intel antitrust ruling and sent it back to a lower court for reconsideration. See Natasha Lomas, “Intel Antitrust Decision Sent for Review by Europe's Top Court,” *Tech Crunch*, September 6, 2017, <https://techcrunch.com/2017/09/06/intel-antitrust-decision-sent-for-review-by-europes-top-court/>.

26 James Vincent, “Obama Accuses EU of Attacking American Tech Companies because It Can't Compete,” *The Verge*, February 17, 2015, <https://www.theverge.com/2015/2/17/8050691/obama-our-companies-created-the-internet>.

27 Sun Microsystems was one of the complainants against Microsoft, for example.

28 Anti-trust, cartel, merger, and state aid are the four main areas of EU competition policy. Between 2010 and mid-2017, Directorate-General for Competition required remedies in 116 merger cases involving 260 companies, of which seventy-two were US-based. Over the last fifteen years, the Commission has required recovery of assets in about 150 cases of state aid, with only a handful being US companies. Directorate-General for Competition interviews and statistics.

29 For a critical discussion of EU competition policy in the digital arena, see Diego Zuluaga, “The Google Case Shows Why Competition Policy in the Digital Economy Needs to Change,” *Euractiv*, April 23, 2015, <http://www.euractiv.com/section/digital/opinion/the-google-case-shows-why-competition-policy-in-the-digital-economy-needs-to-change/>.

30 Mike Scott and Nicholas Hirst, “Europe's Next Competition Clash: Online Data,” *Politico*, August 25, 2017, <https://www.politico.eu/article/europe-competition-google-amazon-facebook-data-privacy-antitrust-vestager/>. See also “Platform-to-Business Trading Practices,” European Commission, September 25, 2017, <https://ec.europa.eu/digital-single-market/en/platforms-to-business-trading-practices>.

31 This effort is complicated by much uncertainty about the specific definition of “platforms,” which are generally seen as enterprises that connect buyers to sellers (either consumers or businesses) or even users to other users, with no financial transaction involved. See Catherine Stupp, “Online Platforms Face EU Regulation on Transparency and Business Contracts,” *Euractiv*, May 10, 2017, <https://www.euractiv.com/section/digital/news/online-platforms-face-eu-regulation-on-transparency-and-business-contracts/>.

tax rate of 0.005 percent.³²

In September 2017, France, Germany, Italy, and Spain called for an EU proposal to tax digital companies on revenues and according to customer location, rather than on profits that can be ascribed to countries with the lowest tax rate. Estonia, during its EU presidency (July–December 2017), also launched a discussion on taxation of the digital economy, noting that without brick-and-mortar stores, it is harder for governments to ensure that they receive tax payments from revenues generated in their country. The taxation of digital enterprises has the potential to become an area of enormous transatlantic tension.

Data Flows: The cross-border flow of data, including both personal and business-related data, has emerged as a point of potential US-EU disagreement, especially given data's increasing centrality to business and its profits. Within Europe, there are numerous restrictions on where government, financial, and personal data can be stored. One study estimates that eliminating such data localization restrictions would add €8 billion per year to the EU economy by ensuring that data is held in the most economically efficient and secure way.³³ As part of the DSM strategy, in September 2017, the European Commission proposed legislation to reduce obstacles preventing the free flow of nonpersonal data within the EU, including data localization requirements.³⁴ While the US government and the European Commission generally agree on the importance of the free flow of data, it is not clear that the Commission will succeed in excluding restrictions desired by some member states such as France and Germany.

Transatlantic differences over data are important not only in the US-EU marketplace but also in the development of global rules in this area. The Trans-Pacific Partnership contained perhaps the most open rules on data flows to date in a trade agreement. Cross-border data flows were generally unrestricted except for some exceptions

“Transatlantic differences over data are important not only in the US-EU marketplace but also in the development of global rules in this area.”

for personal data, and data localization (defined as requiring data to be on specific servers) was excluded except for financial services. With the United States' abandonment of this agreement, the future of these provisions is now unclear. When the EU and Japan finalized negotiations for a free trade agreement in December 2017, they did

not include an extensive data flows regime, although one might be negotiated before the agreement is approved. A statement by the parties indicated that data flows—at least those containing personal data—were likely to be governed by a mutual recognition of adequacy of domestic rules, rather than a negotiated standard.³⁵ In January 2018, the European Commission issued a proposal specifying limits on data localization to be included in any future trade agreements negotiated by the EU, but also indicating that an adequacy determination—such as the EU-US Privacy Shield—will be required for the transfer of European personal data.³⁶ Clearly, the EU will continue to be an ambitious regulator in this area.

Copyright: Modernizing copyright protections to take digital technology into account has been a complicated issue in both the United States and EU. In this area, the divide has been less between the different sides of the Atlantic than between different types of companies, with those that serve as platforms for user-generated content often at odds with traditional media companies, from news outlets to movie and music giants. The main differences have focused on how companies should police their users for illegal use of copyrighted material, what liability the companies may have for the actions of those users, and how to balance the sharing of digital content with the rights of creators to be compensated. In the United States, the defeat of the Stop Online Piracy Act (SOPA) in 2012 marked a strong rejection of efforts to go beyond the 1998 Digital Millennium Copyright Act, which limited the liability of internet service providers and others in the case of copyright infringement by their users. In the European Union, the 2000 Electronic

32 Ivana Kottasova, “How Apple Paid Just 0.005% Tax on Its Global Profits,” CNN, August 31, 2016, <http://money.cnn.com/2016/08/30/technology/apple-tax-ruling-numbers/index.html>.

33 Matthias Bauer, Martina F. Ferracane, Hosuk Lee-Makiyama, and Erik van der Marel, “Unleashing Internal Data Flows in the EU: An Economic Assessment of Data Localisation Measure in the EU Member States,” European Centre for International Political Economy, December 2016, <http://ecipe.org/publications/unleashing-internal-data-flows-in-the-eu/>.

34 European Commission, “A Framework for the Free Flow of Non-personal Data in the EU,” press release, September 19, 2017, http://europa.eu/rapid/press-release_MEMO-17-3191_en.htm.

35 European Commission, “Joint Statement by Commissioner Vera Jourova and Haruhi Kumazawa, Commissioner of the Personal Information Protection Commission of Japan on the State of Play of the Dialogue on Data Protection,” press release, July 4, 2017, http://europa.eu/rapid/press-release_STATEMENT-17-1880_en.htm.

36 European Commission, “College Meeting: European Commission Endorses Provisions for Data Flows and Data Protection in EU Trade Agreements,” press release, January 31, 2018.



German Chancellor Angela Merkel and Dutch Prime Minister Mark Rutte at Hannover Messe, the world's leading trade fair for industrial technology, in April 2014. *Photo credit: Deutsche Messe.*

Commerce Directive has also provided similar limits on liability for internet service providers and others, based on a system in which providers received notice of suspect content and then reviewed and removed illegal material. In 2012, the European Parliament rejected the Anti-Counterfeiting Trade Agreement (ACTA) following extensive demonstrations across the EU, with many critics arguing that the treaty was too vague and wide-ranging in its efforts to protect intellectual property.

As part of the DSM, the European Commission in 2016 issued a new proposal aimed at copyright protection in the digital age. The proposal is still working its way through the legislative process but has engendered controversy on several measures. First, it obliges platforms such as Instagram and YouTube that provide public access to user-uploaded content to ensure that any agreements with those holding rights to that content are upheld. Measures to that end may include automatic content filters. This has raised questions about the effectiveness of

content filters, their impact on freedom of expression, and about whether start-ups and other new entrants to the market can comply with such requirements. Second, the Commission proposal includes stricter protections for news and magazine publishers—sometimes called ancillary copyright—if their material is used by others on the internet. For example, news aggregation sites would have to seek additional permissions from publishers, which might include licensing fees or other requirements, if they used a so-called snippet of material.

Similar laws were enacted in Spain in 2015 and in Germany in 2013, although in Spain the measure required that compensation be collected and there was no flexibility by the rightsholder, as exists in the Commission's proposal. Both the Spanish and German laws have been widely criticized. In Spain, Google News was shut down, and there were fewer views of content on the publishers' sites.³⁷ The German and Spanish laws also led to concerns about competition, as new

³⁷ Joe Mullin, "New Study Shows Spain's 'Google Tax' Has Been a Disaster for Publishers," *Arstechnica*, July 30, 2015, <https://arstechnica.com/tech-policy/2015/07/new-study-shows-spains-google-tax-has-been-a-disaster-for-publishers/>.

entrants into the market may find these rules overly burdensome.³⁸ The German and Spanish laws also led to concerns about competition, as new entrants into the market may find these rules overly burdensome.³⁹ The EU's copyright proposal has run into opposition among some members of the European Parliament and member states and has not been adopted as of early 2018.

Anti-terrorism and Hate Speech: Over the past few years, the United States and Europe have both experienced a growing online presence of terrorist recruitment material (including some extremely violent material) and other extremist, sometimes racist, content. While the United States has freedom of speech enshrined in the First Amendment to the Constitution, some European states have long restricted public speech in specific instances. France and the Netherlands, for example, criminalize speech that incites racial discrimination, or insults based on race, religion, etc. Germany criminalizes defamation of religions and denials of the Holocaust. In 2008, the EU made illegal hate speech designed to publicly incite violence or hatred directed against a group or individual defined by race, color, religion, descent, or national/ethnic origin.⁴⁰ The 2000 Electronic Commerce Directive had already established a process of “notice and take down” for illegal online content, although the form of notice and the timing for taking such material off-line was not clearly specified.⁴¹ The Electronic Commerce Directive also called on businesses and associations to develop codes of conduct that would help enforce those measures. In December 2015, the European Commission launched the EU Internet Forum, designed to develop

public-private partnerships to address the issue of illegal online content.⁴²

Following the March 2016 terrorist attacks in Brussels, the EU and several leading online companies—Facebook, Microsoft, Twitter, and YouTube—working through the EU Internet Forum, developed a Code of Conduct on Countering Illegal Hate Speech Online. The companies pledged to establish clear processes to review notifications of seemingly illegal hate speech and, if appropriate, to remove such content within twenty-four hours.⁴³ By mid-2017, the Commission reported a significant increase in removed content and a faster response time by the companies.⁴⁴ Although the EU code of conduct was largely self-regulating, Germany passed a similar law on removing hate speech from social media that could lead to companies facing fines of up to €50 million, which came into full force in January 2018. The European Commission has since also issued guidelines for taking down illegal content, in particular calling on companies to make greater use of automatic detection technologies.⁴⁵ More European legislation in this area is very possible.

Given its First Amendment protections, the United States has generally not sought to develop equivalent rules for online hate speech. However, the revelations about Russian influence on the 2016 US elections—and particularly the placement of inciteful political advertising and so-called fake news reports on major social media networks—may cause the United States to reconsider what has been a largely hands-off approach. To date, US companies such as Facebook have focused on providing greater transparency regarding political advertising on their sites, rather than any removal of content.

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- 38 Jakob Kucharczyk, “German and Spanish Competition Authorities Got It Right on the Ancillary Copyright for Press Publishers,” Disruptive Competition Project, September 17, 2015, <http://www.project-disco.org/intellectual-property/091715-german-and-spanish-competition-authorities-got-it-right-on-the-ancillary-copyright-for-press-publishers/#.WdvT2tSzIU>; Jeremy Malcom, “Spanish Copyright Amendments Will Shakedown News Sites and Censor the Web,” Electronic Frontier Foundation, November 6, 2014, <https://www.eff.org/deeplinks/2014/11/spanish-copyright-amendments-will-shakedown-news-sites-and-censor-web>.
- 39 Kucharczyk, “German and Spanish Competition Authorities Got It Right on the Ancillary Copyright for Press Publishers,” Disruptive Competition Project.
- 40 “Framework Decision on 2008/913/JHA on Combatting Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law,” Official Journal of the European Council, November 28, 2008, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:328:0055:0058:en:PDF>.
- 41 Saskia Walzel, “European Commission Consults on Notice and Takedown,” LSE Media Project, May 24, 2017, http://eprints.lse.ac.uk/78705/1/European%20Commission%20Consults%20on%20Notice%20and%20Takedown%20_%20LSE%20Media%20Policy%20Project.pdf.
- 42 The EU Internet Forum brings together the European commissioners for migration, home affairs, and citizenship and justice, consumer rights, and gender equality; the EU interior ministers; high-level representatives of major internet companies; Europol; the EU counterterrorism coordinator; and the European Parliament. See European Commission, “EU Internet Forum: Bringing Together Governments, Europol and Technology Companies to Counter Terrorist Content and Hate Speech Online,” press release, December 3, 2015, http://europa.eu/rapid/press-release_IP-15-6243_en.htm.
- 43 “Code of Conduct on Countering Illegal Hate Speech Online,” European Commission, May 31, 2016, http://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf.
- 44 European Commission, “Countering Online Hate Speech—Commission Initiative with Social Media Platforms and Civil Society Shows Progress,” press release, June 1, 2017, http://europa.eu/rapid/press-release_IP-17-1471_en.htm.
- 45 European Commission, “Security Union: Commission Steps Up Efforts to Tackle Illegal Content Online,” press release, September 28, 2017, http://europa.eu/rapid/press-release_IP-17-3493_en.htm.

THE NEXT STEPS FOR US-EU DIGITAL COOPERATION

The broad scope of EU regulatory activism in the digital arena makes US engagement imperative, if for no other reason than to ensure that the interests of US companies are respected, especially regarding any requirements that may affect how they operate in the United States. Some may ask whether engaging with the EU on its active regulatory agenda is appropriate or useful for those seeking a more open, deregulated environment. The reality, however, is that regulation at the EU level often simplifies the hodgepodge of differing regulations adopted by the twenty-eight member states, creating a relatively more open European market. Moreover, EU efforts to regulate the digital economy are not going to disappear, no matter what the United States' reaction. Thus, it is important for the United States to engage early with the EU on these issues. Once the EU has reached an internal agreement, complicated internal politics mean that further changes are unlikely.

“It is time for a focused conversation between DG Competition and the US Justice Department on how the digital economy affects competition in markets, and about what is truly anticompetitive behavior and what is not.”

To build better habits of cooperation between the United States and EU on these digital issues, officials should focus on a few key issues where positions are not yet fully established and where existing legislation does not have to be overturned.⁴⁶ Issues such as cybersecurity and anti-terrorism that are priorities on both sides of the Atlantic might provide a catalyst for a stronger consensus in other areas of digital policy. Over the next several years, the following efforts might foster such cooperation:

Boosting Cybersecurity Standards to Protect the Internet of Things: Whether linking electrical grids to

control and distribution mechanisms, home appliances and entertainment systems to cell phones, or intrusive medical devices to monitoring equipment, the internet will increasingly become the highway connecting a full range of smart devices and related information. That highway will also be vulnerable to those seeking to disrupt society or steal important data. Both the United States and the EU aim to establish standards for cybersecurity protections for the IoT, from critical

infrastructure to personal networks. Given that many of the devices and their components are marketed on both sides of the Atlantic, it makes sense that these standards be compatible, if not identical. This could be achieved by building on the increasing engagement between the US National Institute of Standards and Technology, and the EU Agency for Network and Information Security, especially given the new EU Directive on Network and Information System Security, which must be transposed into national legislation by mid-2018.⁴⁷ Greater cooperation in this area would

help keep both the United States and EU safer from disruption by criminal and terrorist attacks.

Reducing Terrorist and Criminal Exploitation of the Internet: In both the United States and Europe, intelligence services and law enforcement seek to restrict terrorist and criminal activities online, from posting content aimed at radicalizing people or fomenting violence, to illegal financial dealings. There is already significant information sharing across the Atlantic on these matters, but gathering digital evidence (electronic or e-evidence) in a timely way that will stand up in a court of law has proven much more complicated. Relying on existing

⁴⁶ For a thorough look at transatlantic opportunities for regulatory cooperation, see Task Force on Advancing a Transatlantic Digital Agenda, *Building a Transatlantic Digital Marketplace: Twenty Steps Toward 2020*, Atlantic Council, April 2016, <http://www.atlanticcouncil.org/publications/reports/building-a-transatlantic-digital-marketplace-twenty-steps-toward-2020>.

⁴⁷ For a more full discussion of this issue, see United States Chamber of Commerce and Sidley Austin LLP, *Transatlantic Cybersecurity: Forging a United Response to Universal Threats*, 2017, <https://www.uschamber.com/TransatlanticCybersecurityReport>, and Beau Woods, *Confronting Cybersecurity Challenges in the Internet of Things*, Atlantic Council, November 2017, <http://www.atlanticcouncil.org/programs/brent-scowcroft-center/cyber-statecraft/publications>.



Mariya Gabriel, European Commissioner for the Digital Economy and Society (left), speaks to Bulgarian children about coding, technology, and Europe's digital future at MegaDojo Sofia on January 6, 2018. *Photo credit:* Krum Stoev (EU2018BG).

mechanisms to move e-evidence from the United States (or US-based companies) to Europe through mutual legal assistance treaties (MLATs) has proven cumbersome. Government efforts to force tech companies to turn over relevant data to law enforcement have run into legal obstacles. In early 2018, the European Commission is expected to propose legislation intended to reduce obstacles to cross-border collection of e-evidence among EU member states. The proposal should be consistent with GDPR, which goes into effect in May 2018, and the Commission has already suggested that the legislation could be the basis of a new US-EU agreement providing law enforcement access to data across the Atlantic. Some tech companies have offered support for the idea that governments could request access to appropriate data directly from the companies—rather than going through the intergovernmental MLAT process—if that arrangement adhered to strong privacy and rule-of-law standards.⁴⁸ Along with law enforcement access to data,

US-EU cooperation in this area would also benefit from a full discussion of how to best to monitor and eliminate terrorist content and reduce online radicalization.

Coordinating Regulatory Approaches to Blockchain:

Blockchain is the leading emerging technology for tracking transactions. Although known first as the basis for the digital currency Bitcoin, it has also been used to record real estate and other transactions, including in countries where security and transparency are vital as an antidote to corruption. Blockchain could also be used to register nonfinancial records, such as patents and intellectual property rights, supply chains, and even votes. The Estonian government has used blockchain for a wide range of activities, from medical prescriptions and business registration for citizens to permits and contracts approval by government officials.⁴⁹ Although some observers believe blockchain will disrupt existing institutions, it is also true that large banks are among

48 See, for example, Kent Walker, "Digital Security and Due Process: A New Legal Framework for the Cloud Era," *The Key Word*, June 22, 2017, <https://www.blog.google/topics/public-policy/digital-security-and-due-process-new-legal-framework-cloud-era/>, and John Frank, "Finding Solutions for Law Enforcement Access to Digital Evidence," *EU Policy Blog*, November 16, 2017, <https://blogs.microsoft.com/eupolicy/2017/11/16/finding-solutions-law-enforcement-access-digital-evidence/>.

49 Phillip Boucher, "How Blockchain Technology Could Change Our Lives," European Parliament Research Service, February 2017, [http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/581948/EPRS_IDA\(2017\)581948_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/581948/EPRS_IDA(2017)581948_EN.pdf).

those putting the most research funds into this technology. One of blockchain's attractions has been its freedom from regulation, but as the technology becomes more widespread, questions arise about issues such as consumer protection, jurisdiction in case of disputes, and the use of blockchain for illegal practices. Both the European Parliament and the European Commission have started to explore whether regulation might be needed, with the latter announcing plans for an EU Blockchain Observatory and Forum to identify potential uses of the technology but also possible regulatory actions.⁵⁰ It is far too soon to know what regulation that might entail, but it is already clear that competing US and EU regulatory frameworks for a global technology like Bitcoin will not be productive.

Reaching an Agreement on E-commerce: In the United States and the EU, goods and services are increasingly bought online. This particularly benefits SMEs, which have greatly expanded their access to customers outside of their home market via the internet. In response, both the United States and the EU have sought to create rules governing e-commerce across national borders. The EU tabled a proposal for such rules during the Trade in Services Agreement (TISA) negotiations at the World Trade Organization and the United States has negotiated e-commerce chapters in several free trade agreements, including with Australia, Colombia, and South Korea. These efforts focus on measures such as trust authentication, electronic signatures, consumer protection, and electronic contracts. The EU had proposed an e-commerce text during the Transatlantic Trade and Investment Partnership (TTIP) negotiations,⁵¹ but it was not identified as one of the issues close to conclusion in the January 2017 report on TTIP's progress.⁵² Given the key role of SMEs in growing both the US and European economies, there should be an incentive to agree on some fairly simple and technical rules that would smooth transatlantic e-commerce. This might happen bilaterally initially and then be folded into TISA, but this will take considerably more time given uncertainties about that negotiation.

Creating a Dialogue on Market Competitiveness in the Digital Age: Competition authorities in the United States and the EU have long shared data and general

information about their approaches to antitrust and other antimarket behavior. There is significant agreement between them about the desire to benefit consumers and to protect competition, rather than to defend any specific competitor.⁵³ But how these principles are applied to the digital economy is the key question for the future. It is time for a focused conversation between DG Competition and the US Justice Department about how the digital economy affects competition in markets as well as what constitutes anticompetitive behavior and what does not. How should convenience to the consumer be balanced with the dominating network effects created by linking email, cloud storage, social media, and other services? And does it matter that market entry is often much easier in the digital economy than in the traditional economy, where significant investments in factories and supply chains may be involved?

Establishing a US-EU Digital Council: There is a constant churn of new dilemmas and issues on the US-EU digital agenda, and many differences could be ameliorated by a more proactive and regular discussion of these matters as they emerge. Such discussions should be held at a high political level, with the US co-chair based at the White House and the EU co-chair working for the president of the European Commission. Only this structure would provide the necessary political clout to bring together the different departments and agencies with the relevant responsibilities. Even if this Digital Council does not become a decision-making body, it can identify concerns and clarify perspectives. Such a dialogue would be immensely useful in establishing a common approach to protecting networks from cyberattacks, finding a shared balance between fighting terrorism, and protecting citizens' rights online. It could also help establish a common definition and understanding of platforms; examine the effectiveness of self-regulation by companies in some instances; and strategize about the impact of AI on these other issues.

Making America First—but Not Alone—in the Digital Economy

The global economy is increasingly driven by digitalization. Successful manufacturing now takes advantage

50 "EU Blockchain Observatory and Forum," European Commission, July 2017, <https://ec.europa.eu/digital-single-market/en/news/eu-blockchain-observatory-and-forum>.

51 "Transatlantic Trade and Investment Partnership: Trade in Services, Investment, and E-commerce," European Commission, July 2015, http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf.

52 Office of the United States Trade Representative, "U.S.-EU Joint Report on T-TIP Progress to Date," press release, January 2017, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/us-eu-joint-report-t-tip-progress-0>.

53 For a comparison of US and EU competition approaches, see Gregor Erbach, "EU and US Competition Policies: Similar Objectives, Different Approaches," European Parliamentary Research Service, March 27, 2014, [http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140779/LDM_BRI\(2014\)140779_REV1_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140779/LDM_BRI(2014)140779_REV1_EN.pdf).

of digital technology, from records management to robotization and even artificial intelligence. This plays to the competitive advantage of the United States with its talent for innovation and ability to bring new technologies into the business world. Services, especially digitally enabled services, are the growth areas of the US economy and the key to a prosperous future.

For the United States to continue as a leader in the digital economy, it must engage with Europe. Europe is the United States' biggest digital market, and Europe is rapidly becoming the regulatory superpower of the digital economy worldwide. The EU has taken the lead on regulating content, privacy, competition policy, taxation, and other key issues in the digital economy. These efforts not only affect US companies operating in Europe but also how they operate in the United

“For the United States to continue as a leader in the digital economy, it must engage with Europe.”

States and around the world. Stronger and earlier US engagement with the European Union in developing regulatory approaches toward the digital economy could help moderate the extremes of European policy while ensuring greater compatibility across the Atlantic. That compatibility is greatly needed if the United States and Europe are to succeed in fighting

cyberattacks, online terrorism, and criminal networks. It is also key to US and EU future economic success as others move quickly to enter the global digital marketplace, and as some, such as China, begin to put forward their own alternative regulatory approach. Only if the United States reengages with

Europe on an ambitious and comprehensive digital agenda will both sides safeguard their citizens' safety and security, create jobs, drive economic growth, and retain their influence in the global economy.

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