

## ISSUE BRIEF

# Engaging Europe: A Transatlantic Digital Agenda for the Biden Administration

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## INTRODUCTION

**W**hile the United States has been embroiled in electoral politics throughout 2020, the European Union (EU) has spent the year laying out an ambitious agenda for regulating digital technology and policy. The next two years will see the EU adopt a raft of new laws with impacts far beyond Europe; indeed, EU leaders have not been shy about their ambitions to create the “gold standard” of digital regulation for the world. The Joe Biden administration must engage with the EU on these issues promptly and energetically, and with a clear understanding of its own ambitions in digital policy. Without that engagement, Europe and the United States are likely to continue their disparate approaches to the digital economy, resulting in ever greater transatlantic tensions over digital tax, privacy, content moderation, competition policy, emerging technologies, and other issues. They will also lose a vital opportunity to unite in ensuring that authoritarian states—including China, with its strong tech sector—do not become the rule makers of the global digital world.

The Atlantic Council’s **Transatlantic Digital Marketplace Initiative** seeks to foster greater US-EU understanding and collaboration on digital policy matters and makes recommendations for building cooperation and ameliorating differences in this fast-growing area of the transatlantic economy.

The **Future Europe Initiative** conducts research and uses real-time commentary and analysis to guide the actions and strategy of key transatlantic decision-makers on the issues that will shape the future of the transatlantic relationship and convenes US and European leaders through public events and workshops to promote dialogue and to bolster the transatlantic partnership.

Digital and tech policy is often treated as a relatively inconsequential sideshow in the transatlantic relationship, relegated to discussions among technical experts rather than leadership meetings and summits. As a consequence, even administrations that sought to build a strong and positive partnership with Europe have found themselves at odds over digital issues, especially the transfer of data. As digitalization has transformed the entire economy—from traditional industries and agriculture to new data-driven professions and services—technology and digital policy have become central to national security, economic prosperity, and the preservation of values. The experience of the coronavirus has made the importance of digitalization even clearer. Ignoring this crucial area of transatlantic policy is no longer an option. Instead, the Biden administration must meet the challenge of building better US-EU cooperation on digital issues, for the sake of transatlantic security, prosperity, and shared values.

## THE CASE FOR US-EU ENGAGEMENT ON DIGITAL POLICY

Transatlantic cooperation is vital, in part, because of US and EU leadership in the digital economy. The United States and European Union represent 42 percent of global gross domestic product (GDP) and 41 percent of world trade (in goods and services).<sup>1</sup> Together, they comprise a huge market, one that can drive standards for goods and services traded around the world. They are also the largest investors in each other's economies, with European companies creating millions of jobs in the United States, and US companies doing the same in Europe.

This economic partnership has been key in the global emergence of the digital economy. The United States and EU are each the leading recipient of digitally enabled services from the other, accounting for about one third of exports. In 2018, the United States exported \$188 billion in information and communications technology (ICT) services, and potentially ICT-enabled services, to the EU—ten times more than it exported to China—ending the year with a surplus of \$80.9 billion with the EU.<sup>2</sup> Investment is an even bigger driver of transatlantic digital commerce. In 2018, affiliates of US firms based in Europe supplied \$201 billion in information services, almost 70 percent of the total information services provided abroad by those affiliates of US companies.<sup>3</sup>



President-elect Joe Biden stands with his nominees for his national security team at his transition headquarters in the Queen Theater in Wilmington, Delaware, U.S., November 24, 2020. From left are announces Antony Blinken to be Secretary of State, Jake Sullivan to be U.S. national security adviser, Alejandro Mayorkas to be Secretary of Homeland Security, Vice President-elect Kamala Harris, Avril Haines to be Director of National Intelligence, John Kerry to be a special envoy for climate change and Linda Thomas-Greenfield to be the Ambassador to the United Nations. Source: REUTERS/Joshua Roberts

1 Figures for 2019. "Databank," World Bank, <https://databank.worldbank.org/home.aspx>.

2 "Table 3.3.: US Trade in ICT and Potentially ICT-Enabled Services, by Country or Affiliation Bureau of Economic Analysis," US Department of Commerce, July 10, 2020, <https://apps.bea.gov/iTable/iTable.cfm?ReqID=62&step=1>.

3 "Table 4.1: Services Supplied to Foreign Persons by US MNEs Through their MOFAs, by Industry of Affiliate and Country of Affiliate," Bureau of Economic Analysis, Department of Commerce, October 20, 2020, <https://apps.bea.gov/iTable/iTable.cfm?ReqID=62&step=1>.

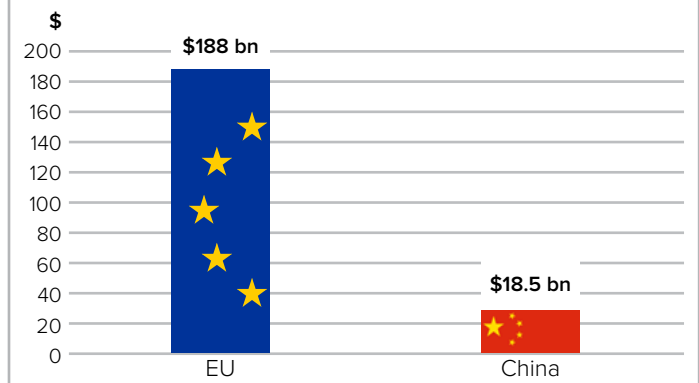
US engagement with Europe is not just about economics, but also geopolitics. As digitalization spreads throughout the international economy, this transatlantic partnership could provide the foundation for a new set of global rules aimed at balancing free markets and personal liberties. It is already clear that China and Russia, as well as some other countries, seek to advance a much more state-centric and authoritarian system, with digital policies designed to reinforce the power and authority of the government over the economy and citizens. If the United States and European Union can work together, harnessing the power of their unified market, their version of the open digital economy may prevail. But, if the United States and EU persist in moving in divergent directions, the global economy will splinter into at least three spheres: China, the United States, and Europe. Thus, US-EU cooperation on tech and digital policy is not just an economic choice, but a geopolitical one, with implications for many other countries around the world.

Transatlantic cooperation on digital and technology matters is also crucial to preserving the security of the NATO Alliance. A shared commitment to combatting foreign disinformation will be essential if the United States and its European partners are to stay unified and not see external powers erode the support of their citizens. The security of critical infrastructure, both from foreign manipulation and cyberattacks, will be key in building allied resilience. And, as new technologies are integrated into more and more sectors of the economy, vulnerabilities are likely to increase. Industrie 4.0 and the Internet of Things (IoT) can bring many benefits, but only if infrastructure, systems, and software become inherently more secure and are protected from malign—or even accidental—interference. For the United States and Europe, this is a job better tackled together than separately.

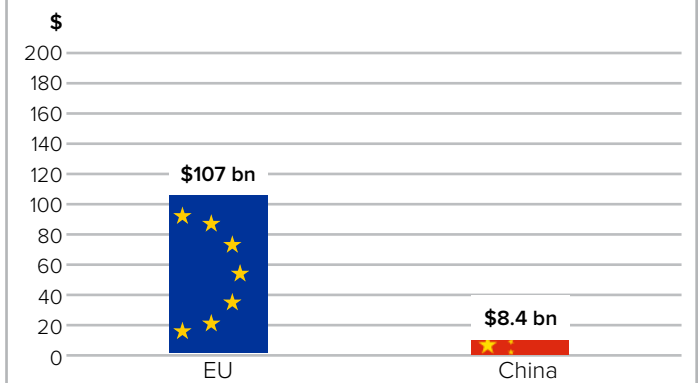
Building cooperation with Europe on these technology and digital issues will not be easy, however. Despite its closeness, the transatlantic economic relationship has not been without its troubles, and the same is increasingly true of the digital economy. While trade barriers in the form of tariffs and quotas have occasionally been problematic, the most common quarrels have focused on non-tariff barriers (NTBs); that is, domestic regulations that inhibit the free flow of goods or services. Outside of the digital sector, different food-safety regimes led to an argument over genetically modified (GM) crops and food, while different state-subsidy rules are at the heart of the long-running Boeing-Airbus dispute.

Challenges in the digital sector may be just as complex as these traditional disputes, but they do not need to be as intractable, in part because the United States and EU have much to gain

**Figure 1: US Exports in ICT and Potentially ICT-Enabled Services (2018)**



**Figure 2: US Imports in ICT and Potentially ICT-Enabled Services (2018)**



Source: US Bureau of Economic Analysis

by addressing them together. To date, most disputes in the transatlantic digital economy have centered on privacy issues. But, as digitalization is integrated into “traditional” economic sectors, regulatory differences will have an even broader impact. How are data collected, stored, shared, and used? How should emerging technologies such as artificial intelligence (AI) be regulated as they are integrated into everyday goods and services? How can regulators accurately predict the potential harms that need to be constrained as a new technology is developed? When should technology be restricted as a security matter, and how can that be distinguished from industrial policy or protectionist procurement? Does a government have a right to tax a business that has a tax domicile outside its jurisdiction, but supplies digital services to its citizens, and will doing so lead to double taxation?

These questions are likely to dominate the US-EU digital agenda in the first year of the new administration, and, at times,

may threaten to derail any effort to reset the transatlantic relationship on a more positive agenda. Finding transatlantic answers to these questions will become increasingly urgent as the EU lays out its ambitious agenda for regulating technology and the digital economy. Indeed, the Biden administration will face a serious challenge simply getting knowledgeable officials in place in time to make a difference in the European debates. Yet, as the experience of the coronavirus has demonstrated, the digital world has been key to keeping economies functioning, and will be vital to the economic recovery.

### THE EU AND DIGITAL SOVEREIGNTY

The EU has long been a much more active regulator in the digital sphere than the United States has been. While both Democratic and Republican administrations have generally seen existing regulations as sufficient, many EU leaders believe that the digital economy requires an additional regulatory framework. The most significant piece of EU regulation to date has undoubtedly been the 2018 General Data Protection Regulation (GDPR), which requires companies to protect the personal information of European residents wherever it travels in the world, and imposes specific rules to that end, backed by potential fines. For many US companies (and for others around the world) with a serious presence in the European market, the easiest course of action has been to adopt GDPR across their entire global operations.

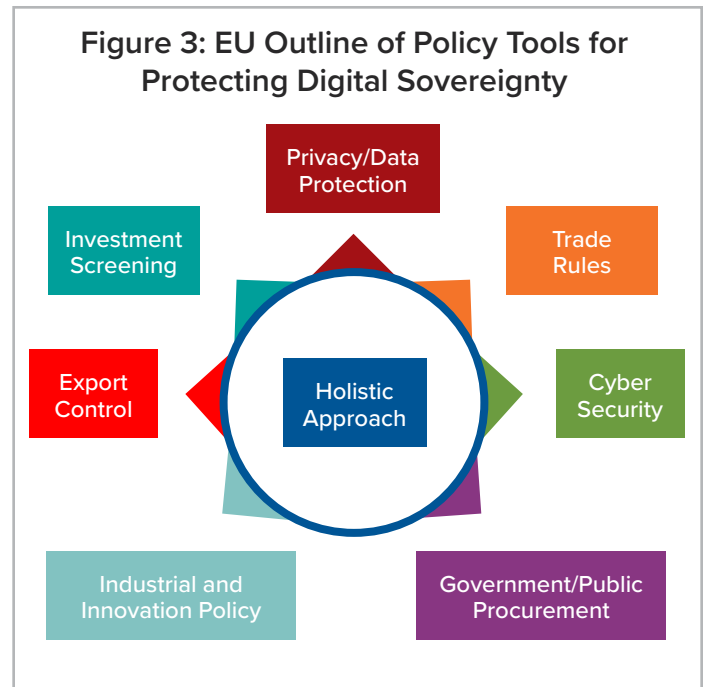
European regulation is now entering an even more activist stage. When incoming President Ursula von der Leyen laid out her agenda for the 2019–2024 European Commission, she established creating “a Europe fit for the digital age” as one of the major priorities of the next five years.<sup>4</sup> As the new commission took office in December 2019, an ambitious program emerged, with a number of leaders—in both EU institutions and key member states—calling for Europe to move toward technological or digital sovereignty. While there is no precise definition of tech or digital sovereignty, this notion reflects a perspective that Europe is too dependent on US companies—and, recently, Chinese ones—and needs to build its own capabilities in the key technologies of the

4 Ursula von der Leyen, “A Union that Strives for More: My Agenda for Europe,” European Commission, July 2019, [https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf).

5 For a full discussion of technological and digital sovereignty, see Frances G. Burwell and Kenneth Propp, *The European Union and the Search for Digital Sovereignty: Building “Fortress Europe” or Preparing for a New World*, Atlantic Council, June 2020, <https://www.atlanticcouncil.org/wp-content/uploads/2020/06/The-European-Union-and-the-Search-for-Digital-Sovereignty-Building-Fortress-Europe-or-Preparing-for-a-New-World.pdf>.

6 “Top 100 Digital Companies,” *Forbes*, <https://www.forbes.com/top-digital-companies/list/#tab:rank>.

7 “The EU Wants to Set the Rules for the World of Technology,” *Economist*, February 20, 2020, <https://www.economist.com/business/2020/02/20/the-eu-wants-to-set-the-rules-for-the-world-of-technology>.



Source: European Political Strategy Centre

future.<sup>5</sup> Europe should also be a leader in efforts to shape the all-important rules that will govern the global digital economy.

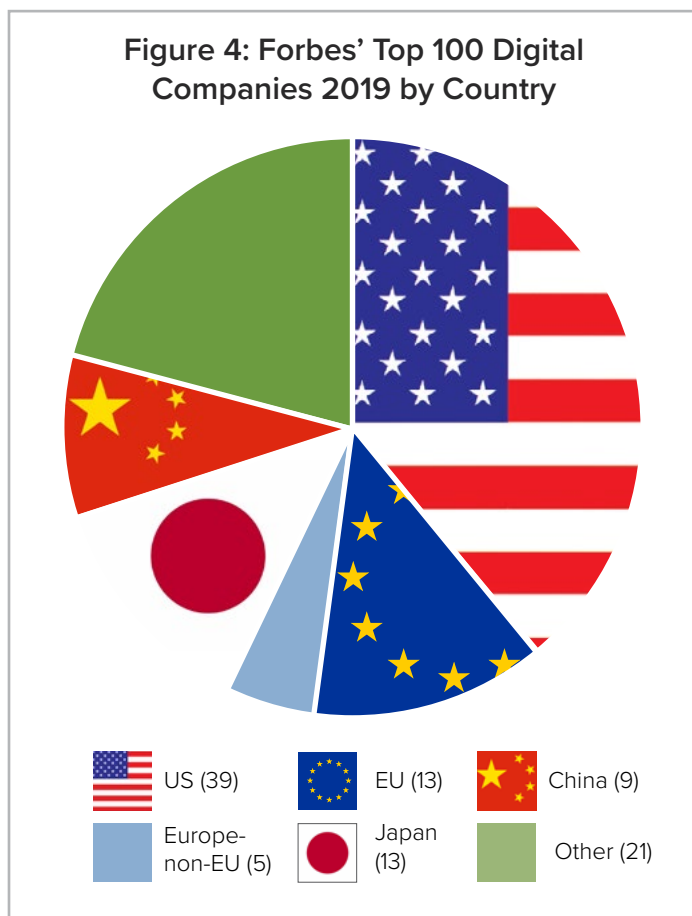
Some advocates of digital sovereignty also argue that the EU should move beyond building homegrown tech capabilities and use regulatory power as a form of industrial policy, to promote European tech champions and ensure a level playing field with non-EU companies. This position is often justified by noting how few European companies are among the leading firms of the digital economy. Of the Forbes 2019 list of top digital companies, only one in the top twenty is European (Deutsche Telekom).<sup>6</sup> Less than 4 percent of the market capitalization of the world’s seventy largest platforms is European.<sup>7</sup> Some see this situation as due to the dominance of a few US-based “big tech” firms, and argue that European firms should be given preference. As European Commissioner Thierry Breton has

said, the goal “is that European data will be used for European companies in priority, for us to create value in Europe.”<sup>8</sup>

Despite this rhetoric, however, the specifics of EU regulations will only become clear over the next few months. In February 2020, the European Commission released some preliminary documents—“A European Strategy for Data” and a “White Paper on Artificial Intelligence”—which outlined key elements of legislation expected to be formally proposed in late 2020 or early 2021. Later in the year, the commission issued a communication on industrial strategy, which included digital elements, and began a review of competition policy with a focus on the digital economy.

One of the first real legislative proposals to be released is a new Data Governance Act, which seeks to establish a new structure for the management of data, especially data from the public sphere, with some potential barriers to access by non-EU entities. In December, the European Commission proposed a Digital Services Act (DSA), which is accompanied by a Digital Markets Act. Together, this legislative package puts forward an extensive set of regulations, including revised liability for online intermediaries and new rules for online governance, as well as special rules aimed at ensuring competition in the online world, with additional responsibilities for a subset of large companies (so-called “gatekeepers”). Whether and how these proposed new rules might disadvantage non-EU companies is not yet clear, but several large US firms risk being identified as “gatekeepers” that will be subject to additional regulation.

**Figure 4: Forbes’ Top 100 Digital Companies 2019 by Country**



## A TRANSATLANTIC DIGITAL PARTNERSHIP

In this environment, building a new transatlantic digital partnership will be a challenge. There will inevitably be differences over specific regulatory proposals, but—perhaps more importantly—the EU’s initiatives are likely to emerge before a new US administration can put knowledgeable senior policymakers in place, let alone develop a coherent policy approach to this set of issues. Alongside the legislative proposals cited above, in December 2020, the European Commission released “A New EU-US Agenda for Global Change,” outlining a broad program of initiatives for transatlantic relations, including in the digital sphere.<sup>9</sup>

The Biden administration may struggle to find a unified and consistent policy approach, given the disparate views of big tech within the Democratic Party and the enhanced attention to that issue as a result of the election. The Biden campaign did not make tech policy a priority and, when in office, is likely to focus on expanding broadband and a few regulatory initiatives, especially in content regulation. There have been statements about reforming Section 230 liability protections and the desirability of privacy legislation, but few specifics have been provided.<sup>10</sup> And, while the progressive wing of the Democratic Party has been very critical of “big tech,” the Biden administration is likely to be more moderate in its actions on digital policy, as on other issues.

<sup>8</sup> Janosch Delcker, “Thierry Breton: European Companies Must Be the Ones Profiting from European Data,” *Politico*, January 19, 2020, <https://www.politico.eu/article/thierry-breton-european-companies-must-be-ones-profiting-from-european-data/>.

<sup>9</sup> “A New EU-US Agenda for Global Change,” European Commission, December 2, 2020. [https://ec.europa.eu/info/sites/info/files/joint-communication-eu-us-agenda\\_en.pdf](https://ec.europa.eu/info/sites/info/files/joint-communication-eu-us-agenda_en.pdf).

<sup>10</sup> Robert D. Atkinson, et al., “President-Elect Biden’s Agenda on Technology and Innovation Policy,” *Information Technology & Innovation Foundation*, November 2020, <https://itif.org/publications/2020/11/07/president-elect-bidens-agenda-technology-and-innovation-policy>.

Figure 5: EU Digital Legislation and Initiatives

LEGISLATION/INITIATIVE	EXPLAINER	DATE ENTERED INTO FORCE/ PUBLISHED
General Data Protection Regulation (GDPR)	Governs the collection, processing, and transfer of personal data located in the EU.	Entered into force May 2018
Directive on Copyright in the Digital Single Market	Requires online platforms to take responsibility for illegally shared copyrighted material.	Entered into force June 2019
White Paper on Artificial Intelligence (AI)	Outlines AI development and deployment in Europe and charts key elements of a regulatory regime.	Published February 2020
Communication on a European Strategy for Data	Lays out the EU's plan to reduce dependencies in cloud infrastructure and services, including through funding for a federated cloud infrastructure.	Published February 2020
Communication on a New Industrial Strategy for Europe	Outlines the EU's plan to address green and digital transformations.	Published March 2020
Communication on Business Taxation for the 21st Century	Addresses administrative burdens, tax abuse and competition, and gaps in tax transparency rules due to rapidly evolving online businesses.	Published July 2020
Data Governance Act	Would facilitate sharing of public sector and industrial data located in the EU.	Proposed November 2020
Digital Markets Act (DMA)	Would establish specialized competition rules for large digital platform companies doing business in the EU.	Proposed December 2020
Digital Services Act (DSA)	Would establish common rules for platforms' content moderation practices and legal responsibility for services they provide.	Proposed December 2020
Digital Services Tax (DST)	Would allow states to tax digital service companies on revenues from interactions with users in states where the companies lack physical presence.	In force in several EU member states including Austria, France, Italy and the United Kingdom. May be proposed at EU level in 2021.

Source: European Commission compiled by the Atlantic Council

Yet, to be effective in dealing with European initiatives, the Biden administration must be clear on what it wants and how it will steer the US approach to technology and digital issues. Thus, a first major task for the new administration will be to develop its own objectives and strategy on these issues. This should be accomplished with some urgency, as early US-EU

discussions will be crucial. The EU often becomes rigid in its policy approach after it has reached an internal consensus, so the United States will have to work hard to influence legislation already proposed. As soon as its policy direction is clear, the Biden administration should take two steps immediately to begin building a stronger transatlantic digital partnership.

- **Propose the creation of a high-level US-EU Digital Council**, involving the secretaries of commerce and state, the head of the White House’s National Economic Council, the US trade representative, the executive vice president of the European commissioner for a Europe fit for the digital age, and the European commissioners for internal market, innovation and research, and trade. The council could meet every six months for strategic discussions, sharing perspectives and concerns with the aim of gradually aligning US and EU approaches. While such a council will not end quarrels over specific regulations, it can be a coordinating body for other dialogues more closely focused on rules, providing strategic guidance and building political consensus. Broader than the Tech and Trade Council proposed in the EU Agenda for Global Change, it should also be insulated from long-standing trade disputes. A Digital Council can also be a place to discuss the global and geopolitical implications of EU-US disagreements, including identifying strategies to counter the influence of techno-nationalist powers. The Digital Council could be established as an outcome of President-elect Biden’s first US-EU summit, which should have a heavy digital component in its agenda.
- **Engage with EU member states directly on digital and tech issues**, recognizing that the EU is not a monolith, and the EU institutions do not have sole competence in this area. While the Brussels institutions play a large role in determining policy and should be at the center of US policy, the member states ultimately must agree (or at least a majority of them). Moreover, while the views of France and Germany will be key, many other member states—such as the Digital 9+ and some Central European members—have distinct views on what role regulation should play and how to grow their own digital economies.<sup>11</sup>

The new administration should conduct a thorough review of forthcoming EU initiatives, and determine which ones will pose serious problems or opportunities to build cooperation. Clearly, the United States and the EU will not agree on all matters of digital policy—just as with trade, sharp and lengthy

disagreements can be expected in some areas. But, those disagreements will be much sharper if there is not strong US-EU engagement across three main policy areas that will be key to transatlantic cooperation: technology and infrastructure, online content, and regulation of the market.

## SUPPORTING TECHNOLOGY AND INFRASTRUCTURE

A key element of the EU’s digital initiative is enhancing European technological capabilities and ensuring the resilience of those capabilities. As von der Leyen stated in laying out her priorities for the commission, “...it is not too late to achieve **technological sovereignty** in some critical technology areas.”<sup>12</sup> The EU leaders have especially emphasized the importance of infrastructure and technology that will boost Europe’s manufacturing industries, and have bemoaned the absence of indigenous cloud capabilities. Driven by the sense that they missed the opportunity to create groundbreaking social media companies, such as Facebook or TikTok, European leaders see an emphasis on digitalization of industry as playing to Europe’s existing strengths.

As a first step, the EU plans to increase the support available for research and development of new technologies through such programs as Horizon 2020, and to allocate 20 percent of the next-generation EU coronavirus recovery plan to digital projects. These efforts should lead to many opportunities for transatlantic research cooperation, but they also raise the specter of state aid and subsidies, depending upon how the funds are provided.

Secondly, the EU has sought to identify key technologies that will be essential to manufacturing and industry in the future, and to foster European capabilities in these areas. In 2017, the European Battery Alliance was launched, bringing together stakeholders in the European battery industry and EU institutions to encourage development of a European battery industry as a strategic imperative.<sup>13</sup> The European Commission has also identified cloud infrastructure as a key technology and encouraged such projects as the GAIA-X cloud initiative. In October 2020, EU member

11 The Digital 9+ consists of the top nine performers in the European Commission’s Digital Economy and Society Index (<https://ec.europa.eu/digital-single-market/en/digital-economy-and-society-index-desi>) plus two like-minded others: Denmark, Finland, Sweden, Netherlands, Estonia, Luxembourg, Belgium, Ireland, the UK, Czech Republic, and Poland. On Central Europe, see Jorn Fleck and Eileen Kannengeiser, *Digitalization in Central and Eastern Europe: Building Regional Cooperation*, Atlantic Council, October 2020, <https://www.atlanticcouncil.org/wp-content/uploads/2020/10/Digitalization-in-Central-and-Eastern-Europe.pdf>.

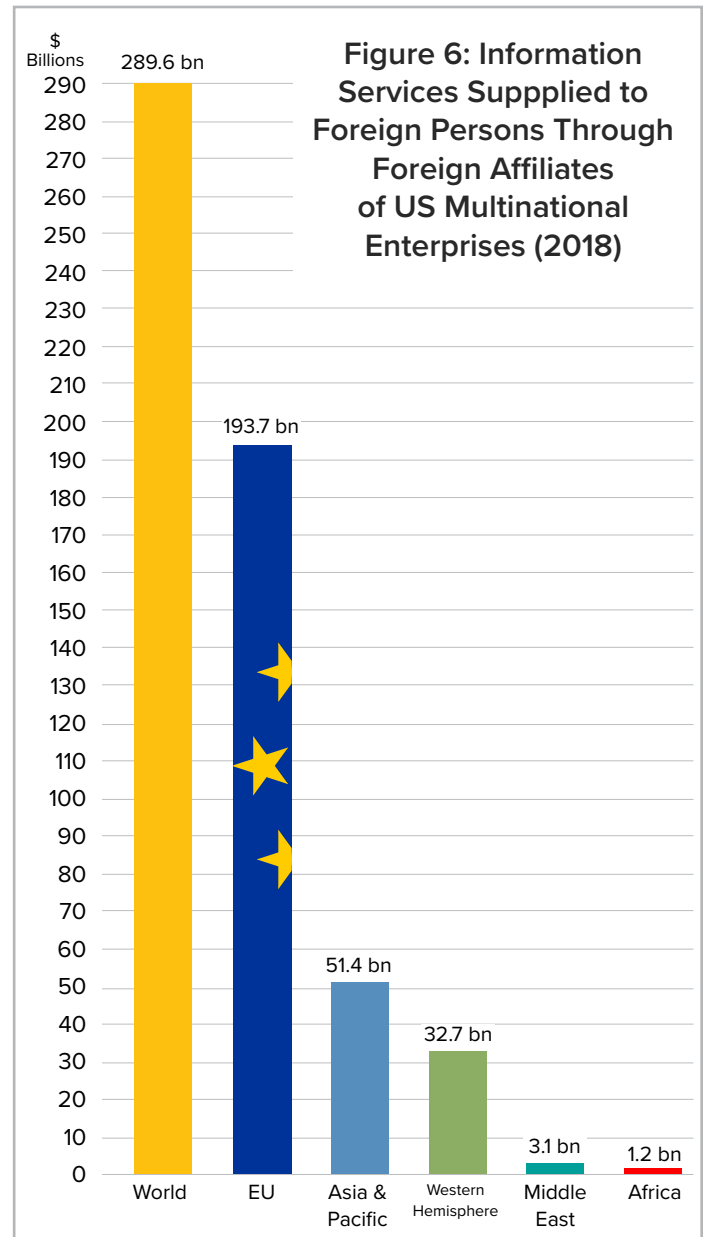
12 Von der Leyen, “A Union that Strives for More: My Agenda for Europe,” emphasis in original.

13 “European Battery Alliance,” European Commission, [https://ec.europa.eu/growth/industry/policy/european-battery-alliance\\_en](https://ec.europa.eu/growth/industry/policy/european-battery-alliance_en).

states pledged to collaborate in establishing and funding a “European Alliance on Industrial Data and Cloud.”<sup>14</sup> The European Commission has also identified quantum and advanced computing, blockchain, and AI as among the key emerging technologies that the EU must develop to support its ambition of open strategic autonomy.

A key question about these efforts, however, is what obstacles non-EU companies will face as they seek to participate. The October cloud declaration specifies that “while all cloud providers are welcome in European cloud federation, the resulting cloud capacities should not be subject to laws of foreign jurisdictions”—a stipulation that may prevent engagement by any company subject to the US Clarifying Lawful Overseas Use of Data (CLOUD) Act, or to Chinese national security laws.<sup>15</sup> At least some major US and Chinese companies have already joined the GAIA-X project, however. The “White Paper on Artificial Intelligence” sets out the possibility that the EU might impose barriers to the import of certain high-risk, AI-enabled goods and services, requiring certification and conformity assessment.

Third, along with encouraging new technological capabilities, the EU has taken steps to keep technology and infrastructure secure. It has established a cybersecurity agency, the European Union Agency for Network and Information Security (ENISA), and passed a Directive on Security of Network and Information Systems (the NIS Directive) to facilitate information sharing between member states. The EU is also working to establish a certification framework aimed at ensuring that Internet-connected devices are secure from cyberattacks. If those certifications become mandatory, devices that do not meet the criteria will be deemed unsafe and excluded from the EU market. To address the security of fifth-generation (5G) networks, in January 2020, the European Commission published a “toolbox” of measures member states and telecom companies could use to assess and improve that security, while also providing criteria for identifying high-risk vendors.<sup>16</sup> While the US Clean Network program is explicitly aimed at keeping all Chinese vendors out of key US digital infrastructure, the EU guidance is intended to preclude only those Chinese companies that meet high-risk criteria, as defined by the EU toolbox.



The graph illustrates information services supplied by majority-owned foreign affiliates (MOFAs) of US multinational enterprises (MNEs) to foreign residents. Because of the importance of physical proximity to customers in the delivery of certain types of services, many MNEs serve foreign markets partly or wholly through their affiliates located in, or close to, the markets they serve rather than through trade.

Source: US Bureau of Economic Analysis

14 Melissa Heikkila and Janosch Delcker, “EU Shoots for €10B ‘Industrial Cloud’ to Rival US,” *Politico.eu*, October 15, 2020, <https://www.politico.eu/article/eu-pledges-e10-billion-to-power-up-industrial-cloud-sector/>.

15 “Towards a Next Generation Cloud for Europe,” European Commission, October 15, 2020, <https://ec.europa.eu/digital-single-market/en/news/towards-next-generation-cloud-europe>.

16 “Cybersecurity of 5G Networks: EU Toolbox of Risk Mitigating Measures,” European Commission, January 29, 2020, <https://ec.europa.eu/digital-single-market/en/news/cybersecurity-5g-networks-eu-toolbox-risk-mitigating-measures>.



As the EU seeks to develop European technology capabilities and secure its digital infrastructure, some measures may create barriers for US firms. While standing firm against such potential barriers, the Biden administration should work constructively with the EU to achieve the shared aim of a secure and resilient transatlantic technology base that can provide a safe underpinning for societies and economies on both sides of the Atlantic. Specifically, the United States and EU should do the following.

- **Pursue opportunities for research partnerships.** The US-EU Agreement on Scientific and Technological Cooperation has governed research partnerships since 1998. This could provide a format for identifying shared scientific and technological (S&T) priorities. It could also be expanded to include the United Kingdom (UK), which brings significant research capabilities.
- **Expand the current transatlantic conversation about the security of 5G networks.** In 2020, the Donald Trump administration threatened and cajoled its European allies to remove Huawei from their 5G networks. While not always a diplomatic effort, it has led to a more active US-EU conversation about network vulnerabilities. The Biden administration should make this a truly collaborative effort and expand it to other vital digital infrastructure, with the aim of enhancing the safety and security of all digital components. This should be coupled with a discussion of export controls, aimed at ensuring that, in those cases when sensitive technologies should be restricted, the United States and EU are working together.
- **Launch a transatlantic dialogue on secure and trustworthy AI.** While the EU is currently planning how to develop AI based on EU values, the optimum solution would be for the EU and United States, along with likeminded partners, to develop an approach to AI together. This could include setting common security standards, rules on transferring technology and data, and even investment reviews for AI in highly sensitive areas.<sup>17</sup> In its recent EU-US Agenda for Global Change, the EU proposes an AI Agreement; although the proposal is vague, it is worth exploring.
- **Establish a joint effort on cybersecurity standards.** There have been informal conversations between the US National Institute for Standards and Technology (NIST)



European Commission President Ursula von der Leyen speaks during the presentation of the European Commission's data/digital strategy in Brussels, Belgium February 19, 2020.

Source: REUTERS/Yves Herman

and ENISA. These should become a more focused effort with industry to develop standards and certifications for cybersecurity, especially for the IoT and other core components of the Internet.

## MANAGING ONLINE CONTENT

With the success of online social networks, both the United States and Europe have faced the growing threat of disinformation, as well as the migration of prohibited speech to the online world. But, their efforts to address the challenge posed by online content have, so far, been based on differing approaches to protecting freedom of speech and confusion about the role of private companies—especially social media companies that host user-generated content—compared to the role of government.

Both the United States and the European Union, along with its member-state governments, prohibit online speech in certain categories, such as child pornography or incitement to terrorism. But, while the First Amendment of the US Constitution allows almost all speech, European governments have long had a more restrictive view. In Germany, for example, denial of the

<sup>17</sup> For more on transatlantic AI cooperation, see Andrew Imbrie, et al., "Agile Alliances," Center for Security and Emerging Technology, Georgetown University, February 2020, <https://cset.georgetown.edu/research/agile-alliances/>; "2020 Interim Report and Third Quarter Recommendations," National Security Commission on AI, October 2020, <https://www.nsc.ai.gov/home>.

Holocaust is illegal, and, in many EU member states, speech intended to incite racial or ethnic hatred is also prohibited.

As the sources of such illegal content moved online, European governments began to require social media platforms to identify and remove such content. The toughest such law is probably the 2017 German Network Enforcement Act (NetzDG), which requires that illegal content be removed within twenty-four hours, with a potential penalty of €50 million for noncompliance. At the EU level, the 2000 Electronic Commerce Directive requires companies to take down illegal content, without providing a clear definition of “illegal.” The proposed Digital Services Act seeks to address this issue further, clarifying that definition, and specifying processes for content takedowns and related fines.<sup>18</sup>

Disinformation, defined as false or misleading information intended to deceive for political or other reasons, has been a growing phenomenon in both US and European politics for much of the last decade. While this content is not illegal, it has proven able to disrupt elections and stimulate political unrest—and, in a few cases, has led to criminal activity. Because of the role of Russian disinformation in the 2016 US elections, it has become a partisan issue, with Democrats in Congress anxious to strike back at Russian disinformation sources, and the Trump administration reluctant to acknowledge the phenomenon at all. Recent congressional hearings featured Democrats criticizing social media for not taking down “fake news” content quickly enough, and Republicans claiming that social media unfairly blocked conservative posts.

In Europe, there has been a more coordinated effort to identify and counter disinformation, both at the EU and national levels. In 2015, the European External Action Service—the EU’s diplomatic branch—set up the East Stratcom Task Force to identify and debunk online disinformation. In 2016, the European Commission agreed with Twitter, Facebook, YouTube, Microsoft, and others on a Code of Conduct aimed at restricting illegal hate speech online. The 2018 voluntary EU Code of Practice against Disinformation brought together leading social

media platforms that promised to take specific steps to reduce disinformation and target those promoting it (this voluntary effort may be transformed into legal requirements under the proposed Digital Services Act). EU funds also support the new European Digital Media Observatory, which is intended to serve as a hub for various fact-checking organizations, sharing information and best practices, at both the EU and member-state levels.<sup>19</sup> Despite this EU activity, however, much of the policing of disinformation—such as rules concerning political advertisements—is the responsibility of national governments, and, thus, varies considerably. Indeed, the recent rise of the QAnon conspiracy theory in Europe demonstrates that disinformation still flourishes.

Given the widespread concerns about online content in both the United States and Europe, there should be many opportunities for collaboration between the Biden administration and European authorities to address this challenge. The Biden campaign has proposed the establishment of a task force on online harassment, abuse, and extremism, and these concerns are clearly shared by many European governments. Biden has also said he will convene a Summit for Democracy, which he proposes should include a call to tech companies to ensure they are not supporting anti-democratic activities. To invigorate transatlantic cooperation in this area, the Biden administration should do the following.

- ***Work with the EU and its member states to establish best practices for handling illegal content*** on social media platforms. This effort should take into account the different approaches to protecting freedom of expression both across the Atlantic and within Europe, and should also be mindful of the growing tendency of authoritarian governments to cite EU, especially German, precedent in putting their own restrictions on online content.<sup>20</sup> This could be supportive of the Organisation for Economic Co-operation and Development (OECD) effort to set transparent standards for reporting terrorist and violent extremist content, and it should also reflect discussions with social media platforms about their own efforts to restrict harmful speech.<sup>21</sup>

18 Daniel Castro and Eline Chivot, “What the EU Should Put in the Digital Services Act,” Center for Data Innovation, January 13, 2020, <https://www.datainnovation.org/2020/01/what-the-eu-should-put-in-the-digital-services-act/>. See also “Summary of Main Elements of leaded Digital Services Act Documents,” Information Technology and Innovation Council, October 5, 2020.

19 “Tackling Online Disinformation,” European Commission, <https://ec.europa.eu/digital-single-market/en/tackling-online-disinformation>.

20 Madeline Earp, “Germany Revisits Influential Internet Law as Amendment Raises Privacy Implications,” Committee to Protect Journalists, October 7, 2020, <https://cpj.org/2020/10/germany-revisits-influential-internet-law-as-amendment-raises-privacy-implications/>.

21 Jeremy West, “Why We Need More Transparency to Combat Terrorist and Violent Extremist Content Online,” OECD Innovation Blog, September 15, 2020, <https://oecd-innovation-blog.com/2020/09/15/terrorist-violent-extremist-content-internet-social-media-transparency-tvec/>.



French President Emmanuel Macron, Britain's Prime Minister Boris Johnson, German Chancellor Angela Merkel, Canada's Prime Minister Justin Trudeau and European Council President Donald Tusk attend a working lunch with invited guests to discuss the digital transformation during the G7 summit in Biarritz, France, August 26, 2019. REUTERS/Philippe Wojazer/Pool

- **Create a transatlantic forum against disinformation** that brings together social media platforms, as well as representatives from non-governmental organizations, including think tanks, which have been effective in identifying and debunking online disinformation. This effort might start from the EU Code of Practice, but it could also examine lessons from recent elections and the online spread of conspiracy theories, as well as the role of traditional media outlets in spreading false information. Such a forum could also provide a strong foundation for multilateral efforts, such as the Christchurch Call to eliminate terrorist content online and Group of Seven (G7) discussions of disinformation. The initial meeting of such a forum could be held alongside the Summit for Democracy.

## REGULATING THE ONLINE MARKET

The most divisive area of digital policy across the Atlantic is likely to be the EU's efforts to regulate the digital marketplace, as there are fundamental differences in US and EU approaches to regulating the online marketplace. For the most part, US policymakers have been content to apply existing regulations designed for the traditional economy, although there are some indications that the Biden administration will seek new rules on content and privacy. Meanwhile, the EU is steaming ahead with a number of new rules specifically designed to apply to the digital economy. Moreover, the EU approach to regulating the digital market focuses on ensuring a level playing field for EU companies, as made clear in the European Commission's "Shaping Europe's Digital Future" paper: "In the digital age,

ensuring a level playing field for businesses, big and small, is more important than ever.”<sup>22</sup> This emphasis on creating a level playing field has raised questions about whether new proposals will involve restricting market access for non-EU companies or discriminating against them in other ways. The answer is not yet clear.

As the EU moves forward with these new legislative proposals, the Biden administration must engage actively; indeed, it is already behind in influencing the end result. Given the sweeping impact that these new EU proposals are likely to have on the digital economy, the administration should aim to persuade EU policymakers to keep the European market open, and to develop a transatlantic approach to establishing standards and rules. US-EU cooperation in determining the type and level of regulation in the digital economy could offer enormous opportunities, both for growing their own economies and for ensuring that the global economy stays open. In particular, a transatlantic conversation that covers privacy, competition policy, digital services, data management, and digital tax could help build greater understanding and ameliorate looming differences.

**Privacy** has long been an area of contention between the United States and EU, since debates over airline passenger name records following the September 11 attacks. Because of the recent European Court of Justice (ECJ) decision on Schrems II, the Biden administration will likely enter office at a time of great uncertainty for transfers of personal data from the EU to the United States—potentially an enormous blow to the transatlantic economy if regulatory guidance following from the ECJ decision is strictly enforced. The ECJ, by declaring the Privacy Shield arrangement invalid and adding potentially onerous requirements to the continued use of Standard Contracting Clauses, has cast doubt on the transfer of any personal data across the Atlantic. The court’s reasoning—that EU citizens are inadequately protected from US national security surveillance and lacked sufficient redress if caught in that surveillance—has left few options short of changing US laws and regulations. By issuing strict guidance for the implementation of the ICJ decision, the European Data Protection Board has made it even more difficult for companies to have a secure legal framework for the transfer of personal data. While negotiations on a possible new framework have been under way for a few months, it is possible that the issue will not be resolved until the Biden administration is in place.

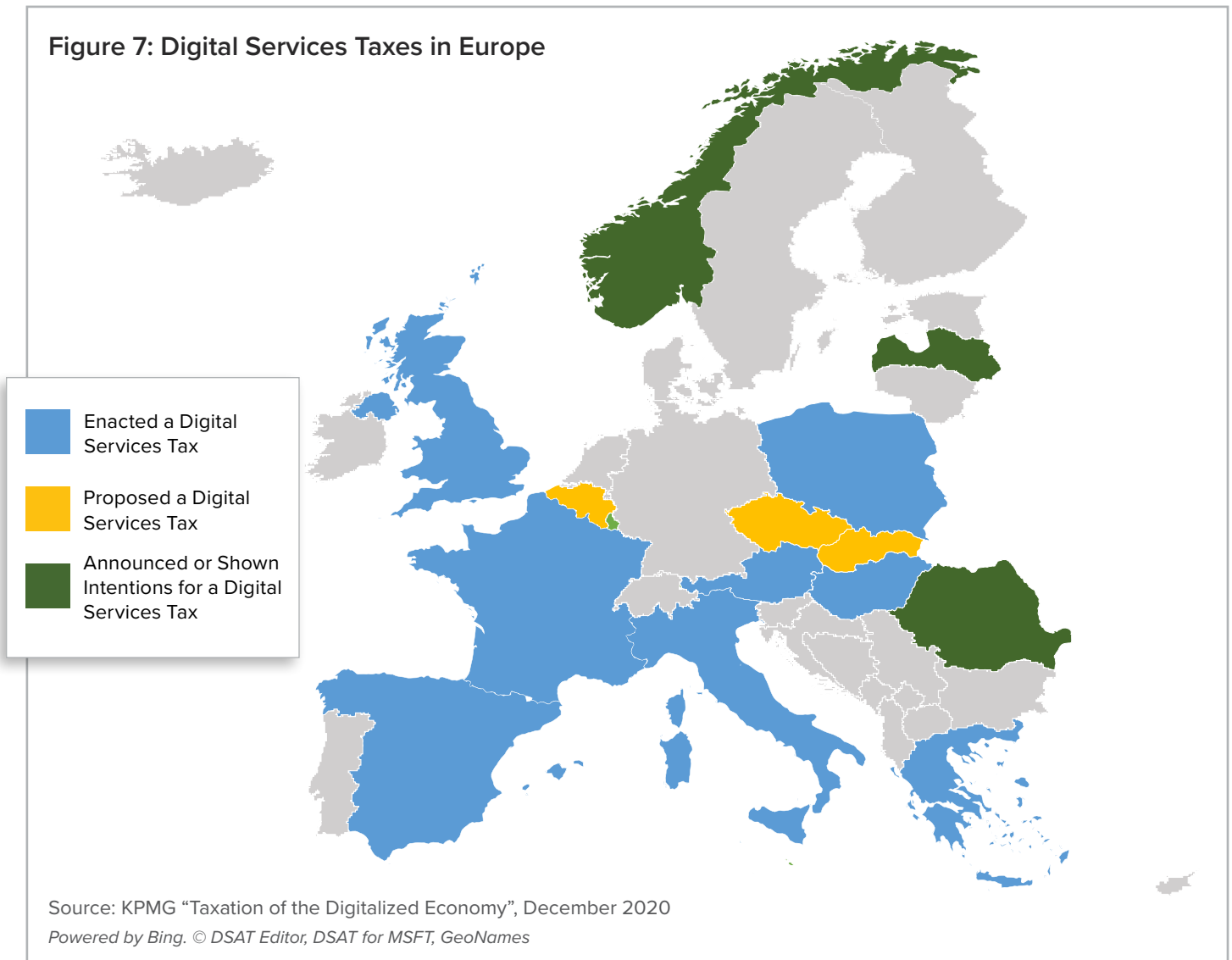
**Competition** policy in the EU has led to some significant cases against large US tech companies (and significant fines) since the Microsoft case in the early 2000s. Since then, other US tech companies—including Google, Apple, and Amazon—have found themselves facing probes by the European Commission’s competition authorities. These cases have dealt with an array of alleged anti-competitive behavior, including bundling of products, special tax deals, and self-preferencing in sales. Twenty years ago, US competition authorities pursued Microsoft’s practices in bundling software, but US competition authorities have been much less active since then against tech companies than their Brussels colleagues. However, in 2020, the Department of Justice launched an investigation into Google and practices surrounding the promotion of its search engine. The Federal Trade Commission has reportedly initiated an investigation into Facebook on anti-trust grounds, and other federal investigations are reported to have started against Amazon and Apple. In October 2020, Democrats on the Judiciary Committee of the US House of Representatives issued a staff report alleging that major US tech companies were using a range of monopolistic practices to maintain their dominant market positions. The report was widely seen as anticipating a push toward a more activist competition agenda in the next Congress.

Whether the US and EU competition policies are evolving in a similar direction—and what will be the impact of that evolution—is far from clear. US competition-reform proposals are at a nascent stage and focused on anticompetitive conduct by any company, while the EU’s Digital Markets Act is expected to set stricter rules for a set group of companies based on still-undefined criteria related to market dominance. As it is expected that most companies affected will be American, it will be important for the US and EU to engage as soon as possible in dialogue, with the intention of guarding against discriminatory approaches.

**Digital services and data management** seem likely to emerge as an area of serious contention in the coming months. In December, the European Commission released its proposal for a Digital Services Act, establishing rules for companies operating online. The DSA is widely expected to include revised rules on liability of platforms for content provided by their users, and tougher rules on the removal of that content. Meanwhile, data management has emerged as a key element of EU digital strategy, especially the creation of data pools that can be used

22 “Shaping Europe’s Digital Future,” European Commission, February 2020, [https://ec.europa.eu/info/sites/info/files/communication-shaping-europes-digital-future-feb2020\\_en\\_4.pdf](https://ec.europa.eu/info/sites/info/files/communication-shaping-europes-digital-future-feb2020_en_4.pdf).

Figure 7: Digital Services Taxes in Europe



for developing AI and other purposes. A new Data Governance Act, released in November, proposes the creation of "data-sharing service providers" that will serve as intermediaries between the suppliers of data and data users. The data are expected to comprise mostly non-personal data and open data, although they may include individuals who volunteer their data for health research, for example. The act would place limits on the monetization of data by those data service providers, as well as potential restrictions on access to the data by non-EU entities. This restricted access to European data pools could become a market barrier, because, for example, the EU "White Paper on AI" raises the process of conformity assessment requirements for AI trained on non-EU data. If this legislation is enacted in a form close to the current proposal, it will represent a huge change

in European data markets, with the potential for discrimination against non-EU entities.

**Digital taxation** is likely to be one of the earliest issues to challenge the Biden administration. Over the past few years, several European countries, and the EU itself, have considered a digital-services tax (DST), which would allow taxation of a company that derives revenue from citizens, even if it does not have a physical presence in that country. While the EU effort failed, France, Italy, Austria, the United Kingdom, and a few others have passed national DSTs. In late 2019, the United States challenged the French tax, and in mid-2020 determined that it was an unfair and discriminatory trade measure. The Trump administration then threatened to impose tariffs on French

products if the tax was collected, and the French government agreed not to collect the tax until the end of 2020 (although it did state that companies would accrue tax liability during that time). With that deadline looming, the French Treasury has indicated that it will collect the tax, raising the prospect of a US-French trade war in the last weeks of the Trump administration. Meanwhile, the OECD has established a negotiation process aimed at reaching a multilateral consensus on DSTs. While progress has been made, the Trump administration has argued that any final arrangement should be voluntary. If the OECD process fails, European Commission President von der Leyen has said that the commission will propose an EU-wide DST.

These are all complicated and difficult issues, and there is no guarantee that the United States and EU will agree. One of the biggest challenges will be timing—the Privacy Shield and DST issues are already urgent, and new EU guidance on data transfers will be put in place before the Biden administration has taken office. But, failure to agree on these issues will have serious consequences, not only for specific companies, but also for the growth of the transatlantic digital economy. As

Europe moves forward to create “a Europe fit for the digital age,” the United States must be actively engaged. The new administration should do the following.

- **Engage immediately in the negotiations for a new post-Privacy Shield arrangement for the transfer of personal data from the EU to the United States.** If an agreement on a successor for Privacy Shield is not reached before January 20, the Biden administration will need to address this issue with urgency, as the legal foundation for transfers of personal data across the Atlantic will be unclear until there is an accord. As a first step, the Biden administration should prioritize getting knowledgeable political-level officials appointed and to the negotiating table. Working with career experts, the administration should identify an alternative arrangement for individual redress of European complaints about National Security Agency (NSA) surveillance. The administration must also develop a response to the ECJ’s finding that the scale of US surveillance activities exceeds the “necessity and proportionality” requirements of EU fundamental-rights law. Part of the longer-term solution



Margrethe Vestager, European Commissioner for A Europe Fit for the Digital Age and European Commissioner for Internal Market Thierry Breton, attend a news conference on the Digital Services and Digital Markets Acts at the European Commission headquarters in Brussels, Belgium December 15, 2020. Source: Olivier Matthys/Pool via REUTERS

will involve the passage of a national US privacy law. President-elect Biden has commented that “we should be setting standards not unlike the Europeans are doing relative to privacy.”<sup>23</sup> The new California Consumer Privacy Act (CCPA) has also increased pressure for action on the federal level. But, because any legislative remedy will take time, the new administration must prioritize finding a political settlement with the EU that can stand up to the expected legal challenges.

- **Pursue a bilateral US-EU law-enforcement agreement based on the US CLOUD Act.** The US CLOUD Act enabled the United States to enter into agreements with foreign governments allowing law enforcement to obtain direct access to electronic evidence held by cloud service providers and social networks in each other’s territory. Currently, that access is provided by mutual-legal-assistance treaties, but the process can take months. Since much of the electronic evidence (e-evidence) sought by European law enforcement for purely local investigations resides on servers in the United States, a faster mechanism is needed. In 2019, the United States and UK signed the first bilateral CLOUD Act accord. The European Commission has proposed a regulation on access to e-evidence within the EU and, in parallel, proposed negotiating a bilateral US-EU version. These transatlantic negotiations are now under way, but progressing slowly. Advancing them with urgency would help alleviate some of the difficulties related to privacy and law enforcement in the transatlantic arena.
- **Establish a US-EU consultation on competition in the digital age.** There has long been a US-EU dialogue on competition between the European Commission’s Directorate General for Competition and the Department of Justice. This should be expanded from traditional antitrust concerns to explicitly explore issues related to the digital economy. Such a consultation could act as an offshoot of the US-EU Digital Council described above, bringing issues to the council and following up on leaders’ discussions. In the short term, there is unlikely to be any serious harmonization between the United States and Europe. However, this consultation would provide an opportunity for meaningful input into new rules and standards related to competition in the digital economy, helping avoid divergent or discriminatory outcomes. Discussions may also lead to greater understanding of how cooperation on certain elements of competition policy may help strengthen the transatlantic position vis-à-

vis emerging digital powers, such as China, and may pave the way toward the eventual multilateralization of norms on competition.

- **Initiate discussions aimed at building a Transatlantic Digital Trade and Economic Partnership** to promote transatlantic regulatory interoperability and avoid discriminatory outcomes. This could include such issues as cross-border data flows, digital sustainability, and standards for a range of digital technologies and processes. Because of the size of the combined US and EU markets, any joint standards will almost automatically become de facto global standards. Perhaps the most important role of this partnership will be to lay the groundwork for multilateralizing US-EU joint approaches through the WTO and other institutions. The discussions could be an important forum for comparing US and EU views on digital trade provisions in many existing trade agreements and their usefulness as guidelines for the future.
- **Engage quickly with the OECD process on digital taxation.** Some reform of the international tax regime is probably inevitable, but the best way to ensure that it is compatible with US interests is to lead at the negotiating table. Active US participation should also persuade the EU and others to hold off on their DST proposals until the OECD process is concluded. While the administration may not relish dealing with this issue in its early days, the alternative is to face a growing number of uncoordinated national and regional DSTs—a far worse scenario for both the United States and US companies.

## THE CHOICE

The next US administration will face a serious choice: it can engage with Europe in addressing the challenges posed by the digitalization of their economies and societies, or it can stand on the sidelines and ignore EU efforts to meet those challenges on its own. The latter course will almost certainly lead to serious transatlantic friction just as incoming President Biden seeks to rebuild the transatlantic partnership. The first course of action will not be a panacea, as the United States and EU already have differing views on some elements of tech and digital policy and these will be difficult to reconcile. But, engaging the European Union, as well as its member states, can help build a working consensus on these issues and reduce the transatlantic differences that may hinder economic recovery, and that others may seek to exploit.

23 Atkinson, et al., “President-Elect Biden’s Agenda on Technology and Innovation Policy,” 5.

Just as the new administration sees rebuilding cooperation in NATO as a key element of its strategy, so it should recognize the growing importance of technology and digitalization in ensuring the security and prosperity of the United States and Europe. The Biden administration must quickly identify its own ambitions and objectives in this key policy areas, and then engage with its European partners. The US and EU approaches to competition policy, data management, privacy, and many other issues sometimes seem fundamentally at odds. But, in reality, those approaches are based on many shared values and—on both sides of the Atlantic—are intended to protect citizens from harm, while allowing them to enjoy the freedoms and opportunities of the online world. This perspective differs significantly from that of governments that use the Internet to reinforce their own power over their citizens. This is the real dividing line in technology and the digital world. As the Biden administration engages with the EU on these difficult and complex issues, both parties should remember that they are fundamentally on the same side.

## ABOUT THE AUTHOR

**Frances G. Burwell** is a distinguished fellow at the Atlantic Council and a senior director at McLarty Associates. Until January 2017, she served as vice president, European Union and Special Initiatives, at the Council. She has served as director of the Council's Program on Transatlantic Relations, and as interim director of the Global Business and Economics Program, and currently directs the Transatlantic Digital Marketplace Initiative. Her work focuses on the European Union and US-EU relations as well as a range of transatlantic economic, political, and defense issues. She was the principal US-based organizer of the Wrocław Global Forum, held annually in Poland, which is the European home of the Atlantic Council's Freedom Awards. She is a member of the Advisory Board of Allied for Startups.

Her most recent report is *The European Union and the search for digital sovereignty: Building "Fortress Europe" or preparing for a new world?* (co-authored). Among her other publications are: *Making America First in the Digital Economy: The Case for Engaging Europe* (2018); *After Brexit: Alternate Forms of Brexit and their Implications* (co-authored); *Europe in 2022: Alternative Futures* (co-authored with Mathew Burrows); *A Transatlantic Approach to Europe's East: Relaunching the Eastern Partnership*; *Shoulder to Shoulder: Forging a Strategic US-EU Partnership*; *Rethinking the Russia Reset*; and *Transatlantic Leadership for a New Global Economy*. She was the principal US-based organizer of the Wrocław Global Forum, held annually during 2010 to 2016 in Poland. She is also a frequent commentator on European politics and transatlantic relations, with interviews and op-eds appearing in the Huffington Post, Handelsblatt Global Edition, Financial Times, al-Jazeera, BBC, National Public Radio, CNBC, CCTV, among others.

Prior to joining the Council, Dr. Burwell was executive director of the Center for International and Security Studies at the University of Maryland and also served as founding executive director of Women In International Security. She has a doctorate from the University of Maryland, an M. Phil from Oxford University, and a BA from Mount Holyoke College.



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