

ASG Analysis: Transatlantic Digital Priorities Under a Biden Administration

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Key Takeaways

- Following the election of Joseph R. Biden, leaders in Washington and across Europe will likely move with deliberate speed to reinvigorate the transatlantic relationship, though lingering doubts over America's sustained commitment to the alliance will make this process bumpy at times. While the EU has used the last four years as an opportunity to assert its sovereignty and status as a global trendsetter – particularly in the regulation of technology companies – member states are nonetheless likely to welcome the U.S. as a partner.
- As the Biden administration prepares to work with the EU, companies in the tech sector should prepare for decisions and new regulations across multiple areas, including negotiation and implementation of a replacement for the Privacy Shield agreement; a decision on taxation of digital revenues by mid-2021; and increasing scrutiny of competition issues and antitrust violations.
- Action on EU legislation including the Digital Markets Act, Digital Services Act, and Democracy Action Plan is not expected to be finalized for the next few years. While these proposals are scheduled to be presented to the European Commission (EC) before the end of 2020, long negotiations will likely delay their implementation.
- All signs indicate that the U.S. will continue to treat China as its primary strategic and economic rival under a Biden administration. Western allies appear destined to increasingly view competition in technology through a lens that pits the approach of openness and free expression against the Chinese approach that emphasizes top-down control and censorship.
- We expect a democratic coalition to focus on abuses in Xinjiang, the erosion of democratic rights in Hong Kong, and issues such as the export of surveillance equipment or its components. Companies on both sides of the Atlantic are attempting to govern supply chains and downstream sales and the U.S. and EU will be keen to establish a set of democratic norms while avoiding any repeat of President Trump's heavy-handed approach on Europe's use of Huawei's 5G equipment.

Below we outline the state of play and potential next steps on the major technology issues the EU, its member nations, and the U.S. will address in the coming months and over the duration of the Biden administration.

Privacy and Data Transfers

The European Union has established itself over the past few years as a global leader in tech and privacy regulation. Europe's General Data Protection Regulation – which vastly expanded the ability of Europeans to control their personal data – was enacted in 2018 and has come to be considered the most influential online privacy law in the world. The EU has aggressively reformed existing laws and regulatory regimes to prepare for, and encourage, future innovations and the bureaucratic systems that will follow, ranging from individual user rights when using websites or services to regimes for data related to autonomous vehicles, smart cities, and more. The main crux of the European model is that individuals have a right to control and move their personal data on the internet as well as a reasonable expectation of protection of their data by tech companies and their advertising partners.

The United States currently lacks a common approach or federal laws like the GDPR to govern data protection. As long as disagreement over the scope of such regulations and who should draft them continues, ASG does not anticipate the Biden administration will give priority to backing an American version of the GDPR in the immediate term. Many stakeholders are advocating for such a law – including civil society groups and members of Congress – but the outsized influence of Silicon Valley and companies that rely on buying and selling user data as part of their business model are likely to create roadblocks. That said, local efforts are ongoing and expected to continue, such as laws instituted by the state of California and municipalities across the country.

The European Court of Justice made clear the differences in the European and U.S. approaches to privacy when it ruled in July that the Privacy Shield – an agreement meant to ensure the free flow of data across the Atlantic – did not offer sufficient protections to Europeans. Because such an agreement is critical to maintaining commercial, professional, and personal transatlantic ties, Biden administration officials will likely begin discussions with EU counterparts to reimplement a similar agreement by the end of 2021 that guarantees stronger privacy protections. Any new agreement is likely to go further than the original Privacy Shield, outlining specific guidelines for legal assistance or law enforcement data with a goal of creating common safeguards for content regulation.

We also expect the Biden administration to work with the EU regarding so-called “data sovereignty” – measures that ensure American companies are able to operate smoothly in the continent without overly burdensome requirements for data storage. The free flow of data between American and European borders will be seen as a key component of Biden's attempt to reinvigorate the transatlantic relationship and provide a unified front against China and others.

Looking ahead, the European Commission earlier this year published its roadmap for Europe's digital future. The primary component of the strategy is the creation of a singular market for data that will make the EU globally competitive while maintaining privacy standards and ethical use guidelines. The EU is betting that it can attract private companies to the bloc by creating a cloud computing infrastructure that is strong, secure, and governed by strict European privacy laws.

European governments and multinationals are already heavily investing in the Gaia-X initiative, a cloud infrastructure project which aims to compete with AWS, Microsoft, Google, and Huawei. The initiative, primarily targeted at European businesses, promotes investment in cloud infrastructure that provides storage protected by European privacy laws. Gaia-X is not a singular cloud service, but a coalition of companies that will each align their infrastructure with the bloc's wider goals. In an unexpected move, Gaia-X also allows foreign companies to participate, another way the EU aims to export its model for user privacy. Currently, 25 EU member states have pledged up to €10 billion over the next seven years to support this effort, as well as the European High Performance Computing Joint Undertaking, which will purchase and deploy the supercomputers necessary to build Gaia-X.

Digital Tax

Tensions between the U.S. and EU on digital taxation ramped up over the summer after the Trump administration pulled out of multilateral talks to determine which countries have the right to tax digital services companies that operate worldwide. The EU has already announced that, barring the success of efforts by the OECD (which includes non-European countries like the U.S., Australia, Japan, and Korea), it will press ahead with plans for a bloc-wide digital tax in June 2021, making it more difficult for the U.S. and EU to harmonize regulations. Under a Biden administration, the U.S. might reverse course and reengage in multilateral negotiations with the OECD if the EU and individual member states, such as France, agree to not introduce their own tax schemes.

The Biden administration is capable of narrowing internal divisions in the U.S. on the best approach to digital taxation and will likely seek to reenter negotiations with the EU on this issue, even as it attempts to repatriate overseas profits in order to collect domestic taxes. Many of these companies, particularly Apple, have faced accusations of tax avoidance by using an international loophole that allows them to "store" profits made from European customers in corporate-friendly countries like Ireland and evade higher tax rates in countries like France.

While the EU is currently holding off on its planned digital tax to accommodate OECD efforts, France recently introduced its own digital tax scheme and will begin collecting a national tax on big digital companies in December 2020. France, known for having some of Europe's highest tax rates, has in recent years cracked down on U.S. tech companies it alleges have under-declared profits. The strategy has worked in part; most recently, Facebook agreed in August 2020 to pay €106 million in back taxes and penalties for the years 2009 to 2018. This followed 2019 deals with Google (€1 billion payment), Apple (€500 million), and Microsoft (€350 million). Amazon paid a €200 million penalty in 2018.

Tech Competition and Antitrust

The European Commission has recently launched investigations into several major U.S.-based tech companies, including Google, Amazon, and Apple. EC Commissioner for Competition Margrethe Vestager has been the prime mover behind many of these efforts. U.S.-based companies will remain a target for Vestager, who is serving a five-year term as a Commission Executive Vice-President, tasked with leading the charge on a "Europe fit for the Digital Age" through 2024.

In August, the Commission began to investigate Google's proposed takeover of Fitbit over concerns that it will entrench Google's position in online ad markets. Google is also facing a battle at the European Court of Justice over the demotion of rivals in its online shopping searches. This past week, the Commission brought antitrust charges against Amazon, claiming that it has abused its dual role as a store used by vendors and a merchant selling competing goods on the platform. The Commission argues that Amazon unfairly uses its size and access to data to harm smaller merchants seeking to reach customers through the platform. The Commission launched a second investigation into anticompetitive measures regarding Amazon's "Buy Box," a feature which brings attention to high-ranked sellers.

Both the U.S. and EU will likely first attempt domestic reforms targeted at the biggest internet platforms, including Google, Facebook, and Amazon, while also coordinating to promote consistency across the Atlantic. In Washington, ASG anticipates the Biden administration will move slowly to enforce fair competition and antitrust among the tech giants. We do not expect a "breaking up" of big tech companies despite common use of the phrase during the Democratic primaries earlier this year. Instead, U.S. tech companies will likely be forced to implement more transparent decision-making processes around acquisitions and content moderation decisions and potentially sell off acquisitions that helped launch antitrust investigations during the Trump administration.

In Europe, in the long run, efforts to regulate competition will revolve around the Digital Markets Act (DMA), which aims to set aside attempts to break up tech giants in favor of pushing platforms and service providers to make changes to fix and prevent anti-competitive behavior. A blacklist of banned behavior for digital gatekeepers will likely prohibit companies from giving preference to their own products or services; maintaining exclusive use or control of customer data; pre-installing company apps or software on company hardware; and taking steps to limit consumer choice. Although the Commission has yet to clarify what kinds of companies the DMA will apply to or clearly define "gatekeepers," initial documents show that gatekeeper platforms will include companies that offer online "intermediation services," search engines, operating systems, and cloud services.

The DMA would allow the Commission to investigate digital sectors and markets on a case-by-case basis, rather than only investigating individual companies that inhibit competition. The proposal would also give Commission officials the power to intervene when they identify structural market issues or failures by making it easier for regulators to examine data or pricing algorithms. In the most extreme cases, the DMA would allow the EU to ban from the bloc those companies – or products or services – that fail to heed regulations. Commissioner Vestager is expected to present the DMA to the European Commission in early December; the New Competition Tool and *ex ante* regulations are expected to become legislation in the future but could face further delays pending a positive assessment from the Commission's Regulatory Scrutiny Board on the proposed act's economic, social, and environmental impact.

Future Issues and Regulations

Several major initiatives targeted for the end of 2020 will impact the EU's position on content moderation and disinformation. The Digital Services Act and European Democracy Action Plan are both expected to be presented by the end of 2020 but will likely be negotiated for several years before becoming legislation. Competition and strong-arming from China will continue to antagonize the West, while regulations and

guidance on artificial intelligence are in their nascent stages. Companies in the U.S. and Europe should be aware of activity on a broad range of issues, including:

Content Moderation, Disinformation, and Digital Services Act

Government and political leaders in the U.S. and EU have expressed great concern about the outsized role that internet platforms – particularly Facebook and Twitter – play in disseminating disinformation, misinformation, and hate speech. While experts have written seemingly countless reports on the subject, and it has become a favorite talking point for members of the U.S. Congress and officials in Brussels, opportunities for joint action to address these issues are not readily apparent.

The U.S. has to date proven unwilling to inject the government into moderation of online content, leaving most decisions to companies and service providers while berating those decisions from both the left and right. But there is a growing movement among both Democrats and Republicans to modify the U.S. law known as Section 230, which protects online platforms from liability for the content on their sites. Observers predict that President-elect Biden, who has said Section 230 should be scrapped, will work with Congress to reach a compromise that will put a greater burden on companies to remove false, suspect, or incendiary content and face penalties if they do not.

In Brussels and major European capitals, officials have expressed a growing interest in increasing company transparency on content moderation and have begun to shape the Digital Services Act (DSA), which will further clarify the responsibilities of digital services and platforms. The DSA is said to maintain certain fundamentals of the 2000 e-Commerce directive, such as the limited liability regime, but it will require online platforms and marketplaces to take greater responsibility for guaranteeing consumer safety by increasing the transparency of ad and content recommendation systems, content moderation methods, and efforts to counter dangerous and illegal content. The plan also establishes an EU-level notice-and-action mechanism to make platforms aware of illegal content being offered or hosted; require platforms to tell users that their content has been removed; and ensure platforms give users a mechanism to appeal content removal.

The DSA is currently a proposal for regulations, meaning it will become a legislative instrument in the future. The act will likely create a European entity to enforce regulations and investigate noncompliance, although it remains to be seen whether this will be an EU body or a coordinated network of national authorities. The effort is led by Commissioner Vestager, who is scheduled to present the draft DSA to the EC in early December; the Commission has promised to publish the act before the end of 2020, but it will likely not become legislation in the next few years.

Democracy Action Plan

The European Democracy Action Plan (DAP) is a joint approach to tackle disinformation and strengthen media freedom as well as to ensure the integrity of European elections by addressing threats of external interference and regulating political advertising. EU Commissioner for Values and Transparency Vera Jourova is expected to present the plan at the EU Commission meeting on December 2. The DAP is likely to take the form of a “communication” from the Commission – that is, a non-legislative initiative. If the Commission creates specific regulatory guidelines on disinformation and online hate speech, then the DAP

could eventually become legislation. Jourova is also considering how to build upon a recent EU communication to tackle Covid-19-related disinformation.

Challenging Chinese Products

The EU has grown increasingly wary of China and its efforts to set global technology standards and dominate markets. Member states have also voiced greater concern about China's human rights record; Beijing's restrictive market access policies; and the EU's need to diversify its supply chains. For the U.S., the dominance of China's Huawei in 5G; Beijing's creation of a new Digital Silk Road; and the belief that the U.S. and Europe have been caught flat-footed on technological advances in fields such as artificial intelligence have fueled calls for a technology alliance of democratic nations. Whether fears of the global spread of the Chinese model – and its accompanying security threats – can move U.S. and European capitals to build on shared values and produce unified, concrete measures to counter Beijing is unclear. Many obstacles lie in the way of creating such a technology alliance, but efforts would likely stand a far better chance under a Biden administration. The Japanese government may also want to be engaged in this initiative.

ASG does anticipate that leaders in Washington and Europe will come together to form an ad hoc democratic alliance to pressure China, Russia, and Eastern Europe on human rights issues in ways that affect sectors from technology to manufacturing. We expect near-term exploration of a transatlantic/OECD effort to bring together a combination of wireless carriers and equipment manufacturers such as Nokia, Ericsson, and Samsung to develop a global alternative to Huawei's subsidized 5G offerings. Given increasing calls to diversify supply chains and safeguard tech innovations, we may also see a transatlantic venture to produce semiconductors, hardware for data storage, and rare earth minerals; such efforts would likely use China's human rights abuses as leverage and motivation.

Progress would require public investments from both the U.S. and EU to compete with low-cost Chinese products and services made possible by government subsidies. That the EU remains more dependent on the Chinese market and Chinese suppliers could complicate things; EU member states are more likely to continue engaging with China both bilaterally and on multinational challenges. However, transatlantic attitudes appear to be converging as European leaders raised the issue of China's "reeducation" camps in Xinjiang in their September 14 summit with Chinese President Xi Jinping, and resolutions on the subject have drawn broad bipartisan support in the U.S. Congress. Instead of the "old normal" of a U.S.-led coalition with European allies, however, ASG expects that policy formation is likely to be grounded in cooperation from the beginning with the G7 at the core.

Artificial Intelligence

Discussions in Europe concerning the regulation of artificial intelligence are only just beginning to take shape. The European Parliament's special committee on Artificial Intelligence in the Digital Age recently held its first two hearings to confirm the strategic importance of AI for the EU and begin creating an institutional forum to coordinate upcoming legislation. The bloc is taking a "human-centric" approach to avoid bias and inadvertent discrimination that current AI systems struggle to contain. Recently passed guidelines on AI ethics, liability, and intellectual property rights mandate that future AI laws be made with several considerations that aim to protect privacy and ensure equitable user treatment. A follow up

consultation period to the Commission's original white paper on AI, released in February, is currently planned for early 2021.

In the U.S., academic institutions, think tanks, and coalitions of companies and civil society groups have produced numerous codes aimed at ensuring that machine learning and AI avoid bias and discrimination. Officials in state capitols, Congress, and the executive branch have commissioned reports and begun to draft legislation. As with content moderation, we can expect that transatlantic leaders in the public, private, and non-profit sectors will be looking at their counterparts as they attempt to reach codes of conduct that have sticking power.

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