



A Quantitative Evaluation of the Balance between Values and Interests in the European Union's Digital Trade Commitments

Meghna Bal

FRIEDRICH
EBERT 
STIFTUNG

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List of Abbreviations

CARIFORUM	Caribbean Forum
DMA	Digital Markets Act
EPA	Economic Partnership Agreement
EU	European Union
FTA	Free Trade Agreement
GDP	Gross Domestic Product
GDPR	General Data Protection Regulation
ICT	Information and Communications Technologies
TCA	Trade Cooperation Agreement
UCPD	Unfair Consumer Practices Directive
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
US	United States

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Part I.

Introduction

The world is heading towards an increasingly uncertain future. Despite being one of the world's largest suppliers of goods and services, the European Union (EU) recognizes the need for a rethink on economic strategy to prepare for the upcoming challenges over the next decade. The EU has recognized that harnessing opportunities from digital transformation is one key lever for future success, due the pervasiveness of digital technology, coupled with its ability to mitigate against systemic breakdown of institutions in times of crisis, such as the COVID pandemic. However, the EU is far behind other developed nations in the race for developing digital capability. As such, it is bringing out ambitious digital strategies, and reworking its internal and external laws and policies to support its agenda in the digital sector.

This paper considers Europe's ambition for digital expansion in the context of its trade policy. The EU sees trade policy as a key lever to ensure that its digital businesses are globally competitive but also as a channel to export its social values through normative standards set out in digital trade chapters in different

bilateral and plurilateral arrangements. The idea is that these agreements that are consonant with European domestic policy and law serves as a path towards ensuring the adoption of similar laws and policies in other countries.¹ To assess where the EU stands on this front, this paper gives a broad overview of the European policy objectives in the context of digital trade and quantifies their consonance with internal policy stances. It also seeks to understand how the EU's digital trade provisions balance considerations around values and interests. Such considerations may be useful for prospective trading partners to craft effective negotiation strategies for future trade agreements with the EU, particularly on finding consonance in matters related to digital trade. For clarity, this paper proceeds with the EU's definition of digital trade, namely as any commerce in goods and/or services enabled by electronic means.²

Part II.

A World Characterized by Threats to the EU's Economic Sufficiency

While the EU is the world's largest trader of agricultural and manufactured goods and services,³ emerging global trends may threaten its economic sufficiency. According to the World Uncertainty Index, a statistical tool to gauge economic uncertainty, economic uncertainty has been on the rise for the last six years.⁴ These years saw several significant "economic shocks" including an unexpected outcome to the US Presidential election, Brexit, a rise in trade tensions between the US and China, the COVID pandemic, and the Russia-Ukraine war.⁵ Some scholars argue that spikes in uncertainty mark the beginning of

an era of turbulence amidst increased geopolitical tensions and the palpable impacts of climate change.⁶ Economic uncertainty, in turn, prompts declines in growth. The International Monetary Fund notes that the increase in uncertainty in the first quarter of 2022 could prompt a decrease in growth by 35 percentage points.⁷ It can also impact overall volumes in trade due to investment delays, cautious savings, and slowdowns in consumption.⁸ The rise in global uncertainty also creates a situation where there is less enthusiasm for cooperation and coordination between nations.⁹

Part III.

European Economic Strategy in the Face of Greater Global Uncertainty: Go Big on Digital

The challenges presented by the coming decade have prompted the EU to focus on, among other things, harnessing the opportunities from digital transformation for sustained economic recovery.¹⁰ It issued the ambitious the European Digital Strategy in 2020 – Shaping Europe’s Digital Future, where it outlined broad objectives of capturing digital transformation opportunities to support the EU’s broader strategic agenda.¹¹ In 2021, this document was

supplemented by the 2030 Digital Compass: the European way for the digital decade which outlined Europe’s ambitions for the digital economy for the next ten years.¹² These documents follow from a process that began in 2010, when the EU first identified information and communication technologies as critical levers for economic development and growth. Accordingly, Figure 1 below charts the evolution of Europe’s digital objectives over the last 12 years.

Figure 1: Evolution of Europe’s Digital Strategy from 2010 – 2021

2010 A Digital Agenda for Europe	2015 Digital Single Market Strategy	2020 Shaping Europe's Digital Future	2021 2030 Digital Compass
<ul style="list-style-type: none"> • First identified ICTs as critical to the EU for achieving its economic goals • Objectives <ul style="list-style-type: none"> ◦ Digital single market ◦ Consumer access to content ◦ Streamlining cross-border transactions ◦ Building digital confidence ◦ Interoperability between IT products ◦ Trust and security 	<ul style="list-style-type: none"> • Called for the breaking down of barriers to digital trade across the EU • Objectives <ul style="list-style-type: none"> ◦ Better access to online goods and services for EU businesses and consumers ◦ Establishing the right conditions for digital networks and services to thrive ◦ Maximise the growth potential of the European Digital Economy 	<ul style="list-style-type: none"> • Second five-year digital strategy • Objectives <ul style="list-style-type: none"> ◦ Technology that works for people ◦ Fair and competitive economy ◦ Open democratic, and sustainable society 	<ul style="list-style-type: none"> • Outlines the EU's ambitions for the digital economy for the next decade • Objectives <ul style="list-style-type: none"> ◦ Digital skilled population and a highly technically skilled workforce ◦ Secure and performant sustainable digital infrastructure ◦ Digitalisation of business and the public sector

Source: Ratcliff, Martinello, and Litos. 'Digital Agenda for Europe'.

The focus on digitalization emanates from several different factors. First, trade in services account for 25 percent of the EU's GDP and provides direct and indirect employment to 21 million people in the continent.¹³ The digital realm is critical to solving for the challenges Europe will face in the coming decade. It was key to securing supply chains in times of crisis, such as COVID, where physical infrastructure had to be supplanted by a digital one for the delivery of essential services.¹⁴ The digital sphere is also key for the EU to achieve its climate goals. Illustratively, the communications capabilities offered by digital technologies also decreases the need for travel, and new frontiers in Information and Communications Technologies (ICT) harbor efficiencies that could bring down the climate impact of several key industrial activities.¹⁵

The emphasis on digitalization also stems from the fact that European companies account for a small percentage of digital services on offer both within the continent and internationally. According to a report by the European Investment Bank, only 4 European firms

are in the top-25 of global digital companies, as opposed to 8 American enterprises.¹⁶ A study by Mckinsey found that European companies, on average, for the period between 2014 to 2019, spent 40 percent less on research and development and grew 40 percent slower than US counterparts.¹⁷ They do not feature in the top-10 quantum computing companies in the world. European corporations also spend about 70 percent less than US enterprises on frontier technologies such as artificial intelligence.¹⁸ Moreover, European champions are falling behind in key areas of technological advancement in their sectors. For instance, European-made vehicles account for a miniscule margin, less than 1 percent, of kilometers traveled by autonomous vehicles.¹⁹ It has been argued that the EU has played a large part in its technological laggardness.²⁰ However, it now recognizes that it must take drastic measures to advance its digital enterprises.

Part IV.

European Economic Strategy in the Face of Greater Global Uncertainty: Go Big on Digital

IV A. Competition Regulation: The Digital Markets Act

As per the EU, technology markets present certain unique challenges for competition. EU representatives are of the firm belief that digital markets “enable some companies to profit from winner-take-all dynamics”.²¹ Over the last few years, the European Commission, along with several national competition regulators have decided multiple cases involving large, and mostly non-European, technology companies. The frequency of these cases has led European competition authorities to believe that the anti-competitive conduct and unfair trade practices are systemic in larger technology companies, and that ex-ante regulation is the only way to effectively check such behavior.²²

Consequently, the EU has identified large technology businesses as “core platform services” which are characterized by “extreme scale economies”, “strong network effects”, and “lock-in effects”. Thus, the EU firmly believes that competition interventions are the only means available to dislodge entrenched monopolies in the digital markets. This is contrary to prevailing theory on the subject, which indicates that market forces can dislodge digital monopolies.²³ There is also recent evidence supporting this position, where TikTok, a Chinese social media company, has dislodged Facebook as the world’s most downloaded social media application.²⁴

To address some of the systemic competition concerns the EU deems prevalent in the digital economy, it introduced the Digital Markets Act, an ex-ante digital competition regulation statute. Broadly, the Digital Markets Act prescribes what it deems digital gatekeepers can and cannot do. Broadly, under the DMA, gatekeepers are large entities that either have a strong economic or intermediation position, service large customer bases, operate in multiple countries, and have a significant capability to impact the market.

The Digital Markets Act places several prohibitions on “gatekeepers” with a view to make digital markets both fairer and more “contestable”.²⁵ The sub-text of

the Digital Markets Act is levelling the playing field for EU technology companies to compete against American and Chinese incumbents. However, the move has been criticized because several facets of the DMA will be hard to implement and there are concerns that it will hurt the prospects of existing European champions in the digital sector.²⁶ For instance, Booking.com, one of the largest online travel aggregators, is a Dutch company and is likely to be adversely affected by the DMA. However, it is likely that the Europeans have calculated that their entities will not be as adversely affected as those from the US. It is also likely that they see the DMA opening up new opportunities for EU start-ups through the restrictions placed on gatekeepers. But it is unclear how the DMA will reconcile with the importance of scale for the success of a digital business, and the need for global market access.

IV B. Legislative Reform to Encourage Investment in European Start-Ups

The EU, however, is not all stick and no carrot. In parallel with the release of the DMA, the EU has also mooted proposals to encourage investment in its domestic start-ups. For instance, it is easing initial-public offering rules, establishing means through which European founders can retain control of their companies after going public through the EU Listing Act.²⁷ It has also pledged to invest EUR 1.6 billion on “breakthrough technologies”.²⁸

IV C. Pushing for a Digital Society Centered Around Democratic Values: The Digital Services Act

Along with pushing forward an agenda to serve its interests in the digital sphere, however, the EU is also introducing proposals to ensure that growth in digital sphere is consonant with European values, as digital technologies have a socio-political impact as well. Towards this end, it introduced the Digital Services Act, which emphasizes greater protection and fundamental rights for online consumers, and more transparency and accountability in the way platforms engage with consumers.

IV D. European Trade Policy Review to Harness Opportunities from Digital Transformation

Despite its hard stance against large digital entities, the EU recognizes that digital businesses need to scale globally to succeed. At the same time, it sees gaps in effective multilateral governance of the digital sphere.²⁹ As such, it reviewed its trade policy in 2021 to pursue the following strategies:³⁰

- i. **Open Strategic Autonomy:** Broadly, open strategic autonomy entails independent decision-making while also influencing the world around the EU to ensure its interests and values in the digital realm are reflected both internally as well as across the wider global context.
- ii. **Openness as a Strategic Choice:** As the world's largest exporter and importer of goods and services, the EU recognizes significance of market access as an economic imperative. At the same time, openness gives the EU a key channel to export values related to social values in the digital sphere.

- iii. **Enhancing the Resilience of Supply Chains:** Focus on maintaining stability in international rules-based trading norms, diversifying supply chains by engaging with new trading partners, and working on "fair and equitable access to critical supplies".
- iv. **Expand EU influence by stepping up the execution of free-trade agreements:** The EU seeks to leverage free trade arrangements to expand its economic footprint and social influence across the globe. The EU currently has preferential trade agreements with 70 countries, with another 24 that are in the process of being adopted, and 5 that are in negotiations. The EU's trade arrangements involve a healthy mix of bilateral and plurilateral agreements. Concomitantly, it will also work to deepen its engagement on WTO-reform, particularly on commitments related to digital trade.

Part V.

Assessing Where the EU Stands on its Trade Policy Objectives in the Context of Digital Trade

This section evaluates the extent to which the EU is:

- 1 Successfully mirroring its internal objectives and policy stances in digital trade chapters across trade agreements and proposal for digital trade rules at the World Trade Organisation.
- 2 The extent to which its trade commitments prioritize values over interests.³¹

The EU first included a digital trade chapter in the EU-CARIFORUM Economic Partnership Agreement that was signed in 2008. In recent years, it has, by its own admission, devised a comprehensive digital trade chapter that it proposes in all FTA negotiations.

The EU's proposed digital trade priorities, coupled with some of the digital trade commitments agreed to over the last couple of years i.e. the EU-UK Trade Cooperation Agreement (TCA) which entered into force in May 2021, the EU-Japan Economic Partnership Agreement (EPA) (entry into force in February 2019), and the EU proposal for the WTO on commitments relating to e-commerce, allow for extrapolation on the kinds of commitments the EU will pursue, their consonance with internal policy, and where they fall on the spectrum of values and interests.

These documents were chosen for the analysis given below precisely because they have comprehensive digital trade commitments. These insights may be useful for prospective trading partners when formulating negotiation strategies for discussions with the EU.

V A. Methodology

We consider digital trade rules set out by the EU in the EU-UK-TCA, EU-Japan EPA as well the EU WTO proposal and evaluate whether they are weighted

more towards values or interests. These can be gleaned from the broad principles underpinning the EU's position on digital trade, namely consumer security and safety online, certainty and predictability for businesses, and doing away with unjustified barriers to trade.³²

Interests would involve trade commitments that seek economic or commercial advantage (or the avoidance of any kind of disadvantage) i.e., certainty for businesses and removal of barriers to digital trade.

Values, on the other hand, point to trade commitments that specifically reference or emphasize issues related to trust, privacy, and non-price related consumer welfare.

These are evaluated both in aggregate as well as individually. Thus, it may be that one chapter/provision may weigh more heavily in favor of values over interests, but when seen in the larger context of the entire scheme of digital trade commitments it may have different weightage. There are also general provisions for the enablement of e-commerce that we count as neutral, as they do not further any specific interest or value of the EU.

Broadly, the digital trade commitments that are key for the EU, which are also present and, are therefore comparable, across the three documents are as follows:

Table 1: Provisions in EU's Digital Trade Title

	Provision	Rationale
Neutral	Conclusion of Contract by Electronic Means	Emanate from the UNCITRAL model law on electronic commerce. ³³ Laws based on the model law have been enacted by 164 jurisdictions. ³⁴ Hence, these provisions can be treated as neutral given its widespread adoption.
	Electronic authentication and electronic trust services	
Interests	Cross-border data flows	These provisions are geared towards giving businesses greater certainty, and/or removing barriers to digital trade. These provisions constitute commitments where there may be competing interests. A prospective trading partner may not agree to the inclusion of these provisions, as they may wish impose restrictions along such lines to hamper any competitive advantage against local players. Illustratively, a country may call for localization of data and therefore, may not agree to a condition requiring free cross-border data flows.
	(No) Customs duty on electronic transmissions	
	No prior authorization	
	Transfer of or access to source code	
Values	Protection of Personal Data and Privacy	These provisions encompass concerns that are either rights-based, put consumers first, or relevant to social and political considerations.
	Online Consumer Trust	
	Unsolicited Direct Marketing Communications	

Source: Author's Own

V B. A Note on How to Interpret the Figures in this Section

In the Figures assessing consonance of trade commitments with EU frameworks, a score of 1 is given for each trade provision (across the three documents, namely the EU-UK TCA, EU-Japan EPA, and the EU WTO proposal) that meets the condition specified. For example, in the Figure evaluating consonance between the GDPR and the EU trade provisions on data protection, wherever a criterion was met by a trade provision in a document, a score of 1 was given under 'Yes' and a score of 0 was given under "No". Similarly, where criteria were not met, a score of 1 was given under "No" and a score of 0 was given under "No".

For the Figures assessing the balance between values and interests, a score of +1 was given where a portion of a trade commitment completely aligned with interests and correspondingly, +.5 where it was somewhat interest-based. Similarly, a score of -1 was given where parts of a trade commitment was more value-centric, and correspondingly -.5 was given where the portion of the trade commitment was value-centric.

V C. Values

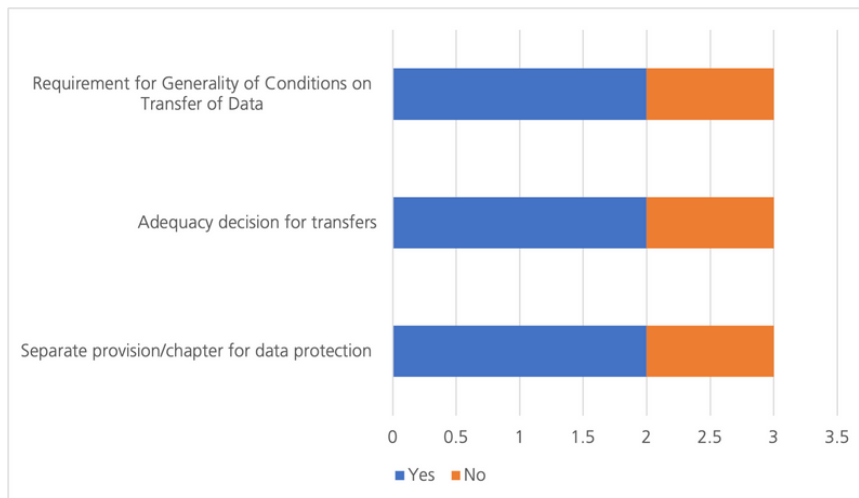
V C1. Protection of Personal Data and Privacy

Protection of Personal Data and Privacy	<p>Overview</p> <ul style="list-style-type: none"> ▪ EU trade commitments regarding data protection largely link a strong privacy regime to building consumer trust online. ▪ There is considerable consonance between the EU’s trade commitments and the GDPR. ▪ This trade commitment favors values over interests.
Online Consumer Trust	
Unsolicited Direct Marketing Communications	

The EU’s General Data Protection Regulation (GDPR) establishes requirements businesses must meet when collecting, storing, transferring, and processing personal data and sets out the data-related rights of users. In the context of trade, Articles 44 and 45 of the GDPR permit the transfer of personal data across the EU’s borders to third countries only if the latter have an “adequate level of data protection”.³⁵ Tests for adequacy include considerations around human rights, fundamental freedoms, access of law enforcement authorities to data, the presence of an independent supervisory authority that oversees compliance with data protection norms, and any international commitments the third party may be privy involving the protection of personal data.³⁶

As a key focus of EU’s trade policy is to enable the reflection of its internal policies in external commitments, it is important to evaluate the extent to which such an objective has translated into practice. Overall, an assessment of the EU’s proposal to the WTO on Specific Commitments for Digital Trade, and its recently concluded trade cooperation agreement with the UK show considerable consonance with Articles 44 and 45 of the GDPR (Figure 2). The outlier is the Economic Cooperation Agreement between the EU and Japan. This is because Japan had not yet amended its data protection law to meet the conditions under Articles 44 and 45 of the GDPR when the EU-Japan EPA entered into force.

Figure 2: Assessing the Consonance of EU Trade Commitments with the GDPR

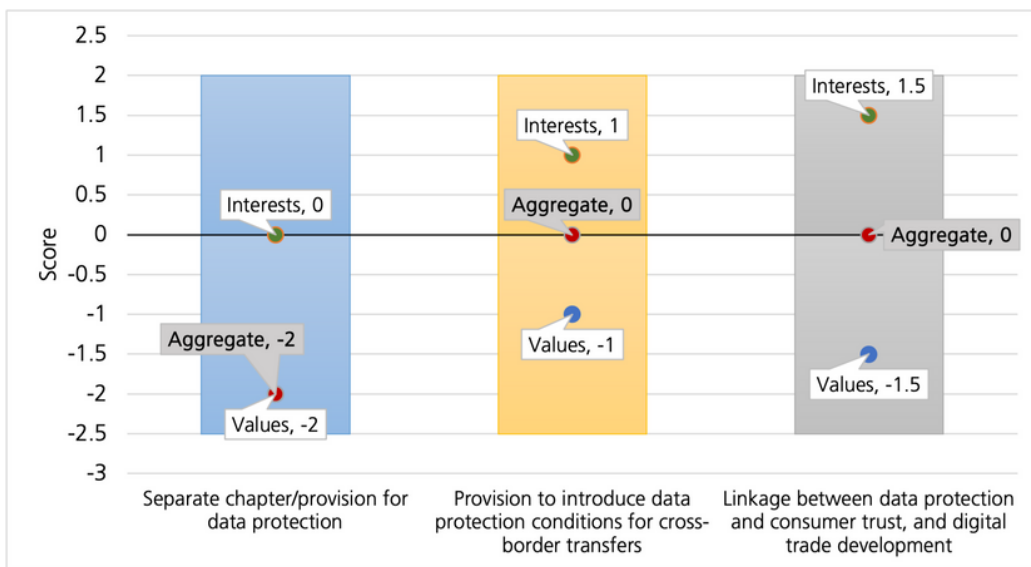


Source: Author’s Own

The wording of the data protection provision in the EU-UK TCA links the importance of high standards data protection to engendering trust in the digital environment, thereby contributing to development of digital trade. It projects a careful balance between interests and values – something that is prevalent throughout the data protection chapter in EU-UK TCA. In Figure 3 below, we have measured where the data protection chapter in the EU-UK TCA lies on the

spectrum of the EU’s values and interests. as the table below indicates, these are balanced as countries are permitted to place conditions on the transfer of data provided that such transfer is permitted if general conditions are met. Overall, the chapter on data protection expectedly veers more in favor of EU values over interests.

Figure 3: Assessment of the Balance between Values and Interests in EU Trade Commitments Relating to Data Protection and Privacy



Source: Author’s Own

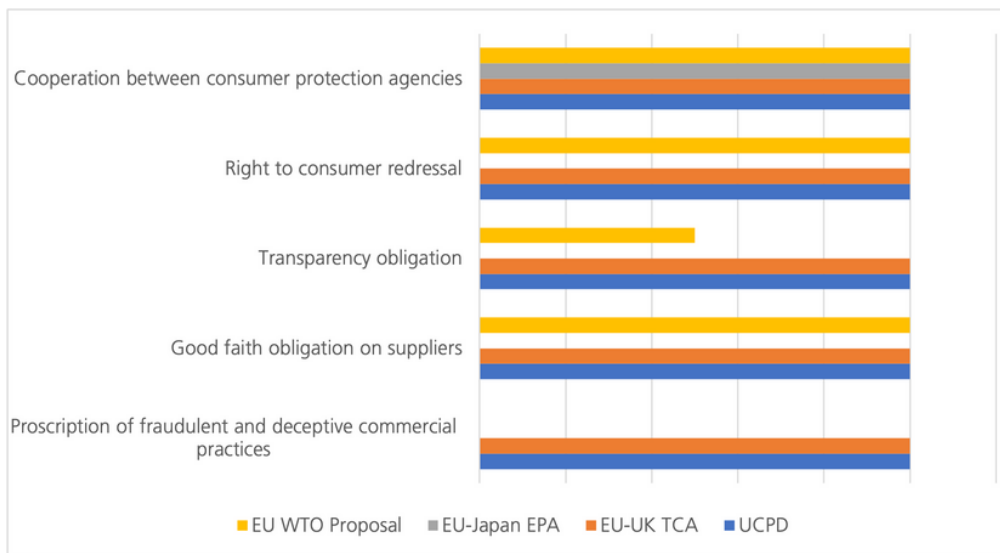
V C2. Consumer Protection and Trust in the Digital Sphere

Protection of Personal Data and Privacy	<p>Overview</p> <ul style="list-style-type: none"> Trade provision outlines a minimum threshold for transparency and accountability that must be met by those providing goods and services online to consumers in participating countries There is considerable consonance between the consumer trust provisions in the EU-UK TCA and the EU WTO proposal and existing consumer protection legislation The EU’s trade commitments on consumer protection and trust veer more heavily towards values than economic interests.
Online Consumer Trust	
Unsolicited Direct Marketing Communications	

In 2022, the EU updated its consumer protection regulations, the Unfair Commercial Practices Directive (UCPD) and the Consumer Rights Directive to reflect the realities of the digital single market. The trade provision that corresponds with consumers rights is broadly termed online consumer trust, the explicit principle being that building consumer trust or confidence is necessary for electronic commerce to flourish. It outlines a minimum threshold for transparency and accountability that must be met by those providing goods and services online to consumers in participating countries.

As Figure 4 below indicates, there is significant consonance between the UCPD, and the commitments set forth in the EU’s WTO proposal and the EU-UK TCA. The wording in the treaty with Japan, however, is slightly different from the EU-UK agreement and the WTO, encompassing wide and general commitments to ensuring consumer protection online.

Figure 4: Assessing Consonance Between Trade Commitments on Consumer Protection and the EU Unfair Consumer Practices Directive



Source: Author’s Own

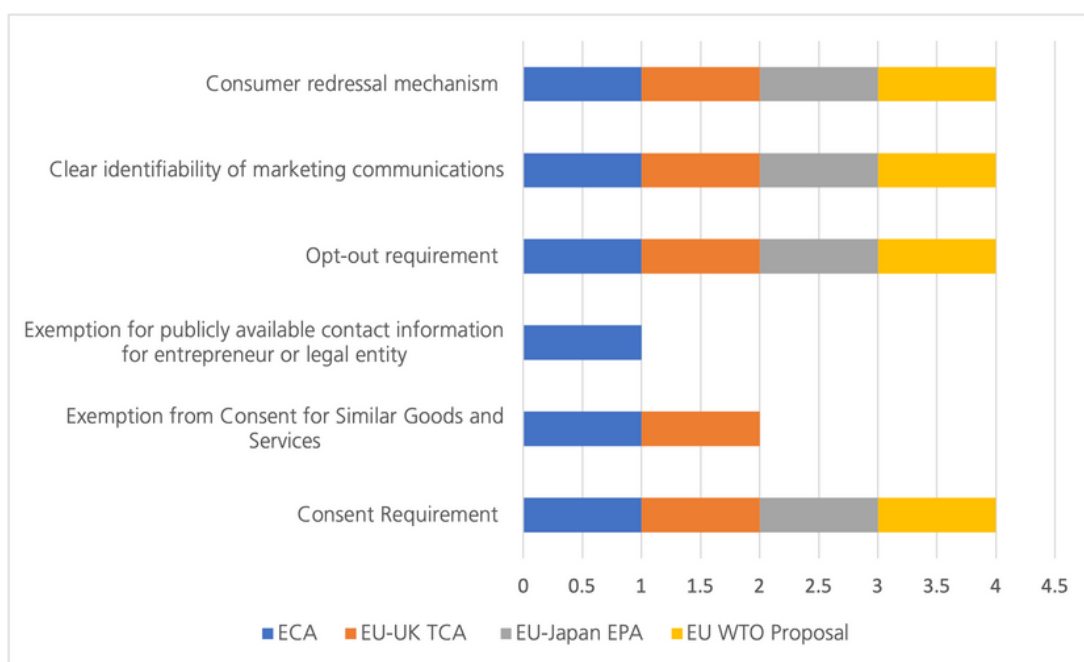
V C3. Unsolicited Direct Marketing Communications

Protection of Personal Data and Privacy	<p>Overview</p> <ul style="list-style-type: none"> ▪ Deals with online spam ▪ Trade provisions are considerably consonant with EU legislative positions.
Online Consumer Trust	
Unsolicited Direct Marketing Communications	

Another subset of consumer protection relates to unsolicited direct marketing communications otherwise known as spam. Act No. 452/2021 on Electronic Communications, which entered into force in February 2022, is the latest EU law to govern direct marketing communications to consumer.³⁷ Under the law, anyone wishing to send direct marketing communications to EU consumers must obtain the latter’s consent.³⁸ There are exceptions to the consent requirement, however, which include “marketing own identical or similar goods and services”.³⁹ This can occur when a business has acquired customer contact

information through the regular supply of goods and services and wishes to send them things like offers or notifications on sales.⁴⁰ The other exception relates to contacting entrepreneurs or legal entities through publicly available information.⁴¹ There must also be a simple, consumer-friendly opt-out mechanism for marketing communications in such instances. For instance, if a company puts its contact information up on its website. These obligations are almost directly transposed in the EU-UK TCA, while in the EU-Japan EPA, and in the EU WTO proposal, the exemptions from consent are missing (see Figure 5).

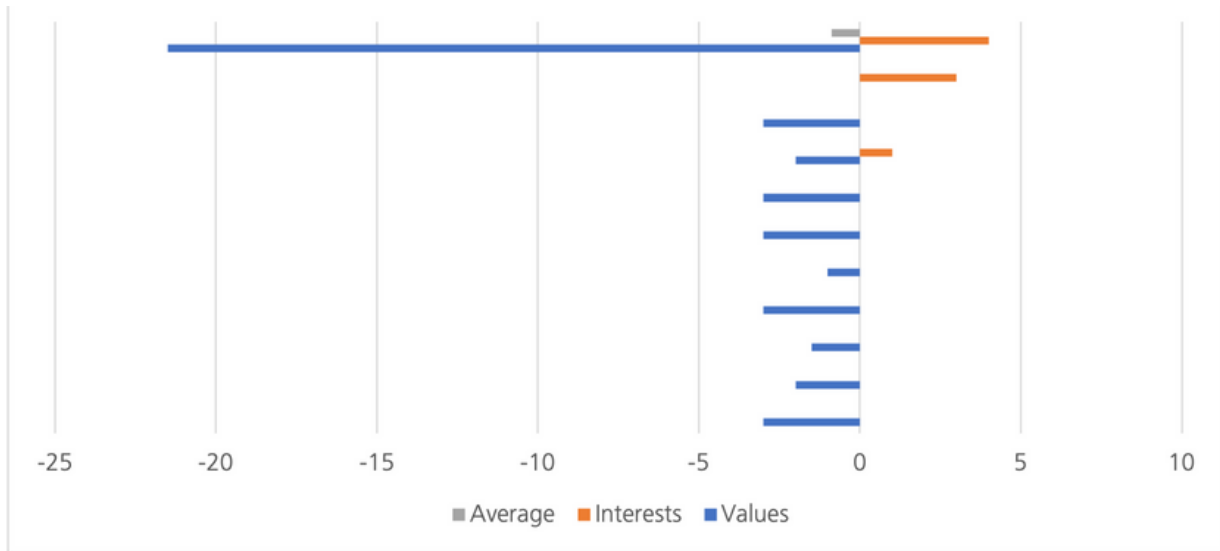
Figure 5: Consonance between EU Law and Trade Commitments on Unsolicited Direct Marketing Communications



Source: Author’s Own

As is evident from Figure 6 below, the EU’s trade commitments on consumer protection and trust veer more heavily towards values than economic interests.

Figure 6: Assessment of the Balance between Values and Interests in Consumer Protection Commitments



Source: Author’s Own

V D. Interests

V D1. Cross-Border Data Flows

Cross-border data flows	<p>Overview</p> <ul style="list-style-type: none"> Free cross-border data flows are a key consideration for international digital trade as they permit businesses to efficiently service customers across different jurisdictions. The EU is strongly in favor of enabling free cross-border data flows, and its trade commitments tend to favor interests over values.
Customs duty on electronic transmissions	
No prior authorization	
Transfer of or access to source code	

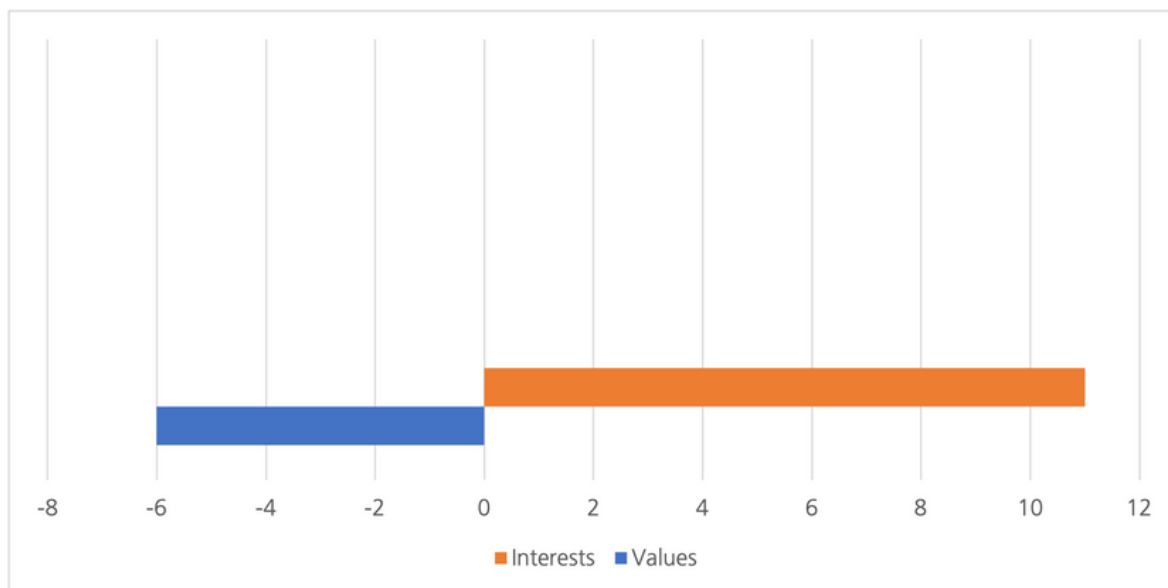
Free cross-border data flows are a key consideration for international digital trade as they permit businesses to efficiently service customers across different jurisdictions. In EU trade commitments, restrictions are typically placed on cross-border data flows under considerations surrounding:

1 Data protection i.e., a country may not permit the data of its citizens to be transferred to jurisdictions where the level of data protection provided by national law is deemed inadequate. As mentioned earlier, the EU places conditions on data flows under such considerations.

2 Competition: A country may place localization requirements on service providers to create an onerous compliance obligation that reduces their competitiveness with local businesses.

3 Law Enforcement: A country may require localization to enable easier access to service provider data for law enforcement purposes.

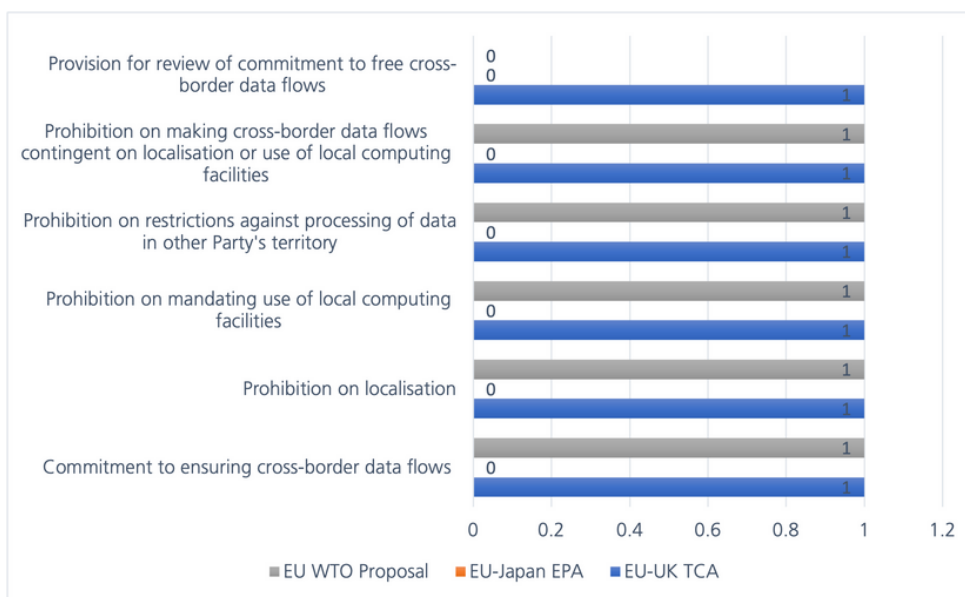
Figure 7: Assessment of the Balance between Values and Interests in Cross-Border Data Flow Commitments



Source: Author’s Own

While the EU-UK TCA and the EU WTO proposal have substantive provisions on enabling cross-border data flows, the EU-Japan EPA provides that the parties will assess within three years the need to include provisions on the free flow of data in the Agreement. This is likely because the EU was already in the process of granting Japan an adequacy decision, which came through in January 2019, a month prior to the date the EU-Japan EPA came into force.⁴²

Figure 8: Comparative of EU Trade Commitments on Cross-Border Data Flows



Source: Author's Own

V D2. Custom Duties on Electronic Transmissions

Cross-border data flows	<p>Overview</p> <ul style="list-style-type: none"> Since 1998, WTO members have agreed to refrain from imposing custom duties on "electronic transmissions".⁴³ Developing countries like India and South Africa oppose the moratorium, alleging they incur significant losses in tariff revenues on account of it. Jurisdictions like the EU oppose the imposition of custom duties on electronic transmissions because it may significantly hinder cross-border digital trade and innovation.
Customs duty on electronic transmissions	
No prior authorization	
Transfer of or access to source code	

The EU is against the imposition of custom duties on electronic transmissions, as is evident from its WTO

proposal as well as the commitments in the EU-UK TCA and EU-Japan EPA.

V D3. Principle of No Prior Authorization

Cross-border data flows	<p>Overview</p> <ul style="list-style-type: none"> ▪ The principle of prior authorization is that a business requires an express approval before it offers its products or services in a market. Prior authorization requirements can be brought in when countries see digital businesses as threats to key industrial segments. ▪ Trade provisions requiring no prior authorization require participating countries to refrain from subjecting businesses to such requirements on the ground that the service is digital. ▪ The EU-UK TCA and the EU-Japan EPA contain no prior authorization commitments.
Customs duty on electronic transmissions	
No prior authorization	
Transfer of or access to source code	

V D4. Access to Source Code

Cross-border data flows	<p>Overview</p> <ul style="list-style-type: none"> ▪ Lawmakers in different countries are increasingly calling for making the source code of algorithms available, to ensure greater transparency in algorithmic functioning. ▪ Given the possible economic impact such stipulations can have for companies, jurisdictions such as the EU include prohibitions against forced transfers or access to source code of software in trade agreements. ▪ The prohibition against forced access to source code comes with certain riders, including exceptions related to prudential requirements and security, voluntary transfers, and judicial mandates.
Customs duty on electronic transmissions	
No prior authorization	
Transfer of or access to source code	

As algorithms play a seminal role in shaping behavior online, an increasing number of countries are mooting legislation to make algorithmic functioning more transparent.⁴⁴ This often involves calls for making the source code of algorithms available to regulators/decision-makers, which raises concerns about forced technology transfers and other risks to intellectual property.⁴⁵ Given the possible economic impact such stipulations can have for companies, jurisdictions such as the EU include prohibitions against forced transfers or access to source code of software in trade agreements.⁴⁶ These prohibitions, however, come with certain riders. For instance, in the EU-UK TCA there are exceptions related to prudential requirements and security on this rule.⁴⁷ Moreover, bar on forced access to source code does not apply where

there is voluntary transfer or access given to source code, or a situation where there is an order from a court, a tribunal, or a competition authority requiring such access, or a requirement from a regulatory body in a situation where there may be concerns around online safety.

The access to source code issue presents an interesting conundrum for the EU. On the one hand, there may be several EU firms that would want to limit exceptions to the rule, due to concerns about forced technology transfers. On the other hand, however, the EU may view it as an important lever for greater transparency in the workings of online platforms and an effective tool to mitigate any abuse of market power by large internet firms.

Part VI.

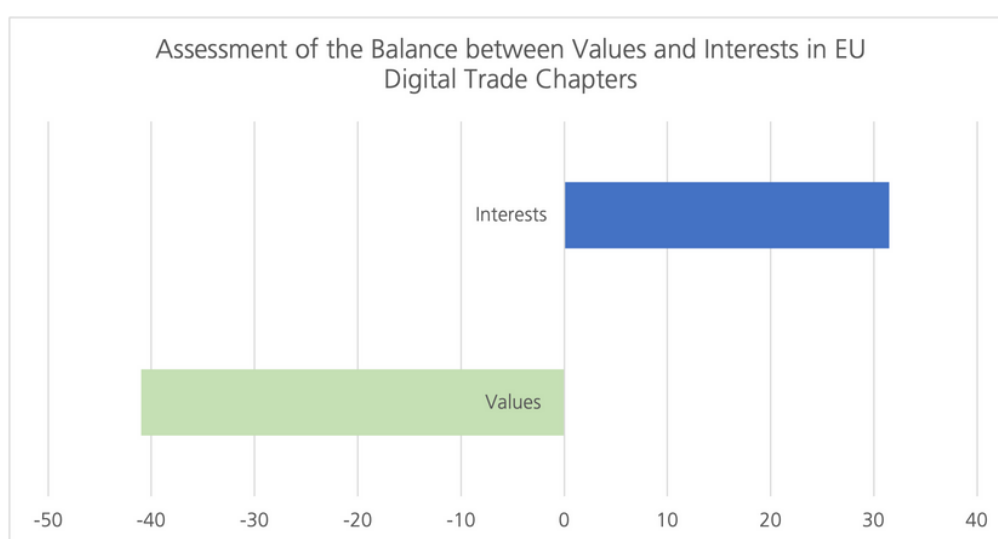
Conclusion

Overall, the limited distinction between the EU-UK TCA and the EU-Japan EPA reveals that the EU can effectively use trade arrangements advance its values and interests in other countries to a certain extent. In addition, there is also considerable consonance

between its internal legislation, and external positions, particularly when it comes to values.

In total, however, EU digital trade chapters give marginally greater weightage to values over interests.

Figure 9: Assessment of the Balance between Values and Interests in EU Digital Trade Chapters



Source: Author's Own

First, it may be the case that the EU gives values greater weightage because it is, by its own admission, a technological laggard in some senses. It has, on its home turf, used value laden frameworks to erode the competitive advantage of foreign competitors. That being said, values could also be treated as akin to interests in some senses but this may only work out for the short term. As the EU's technological progress mounts, will it still want to give values similar weightage even if it works to the detriment of its own firms?

Second, the balance between values and interests also creates scope for prospective trading partners to craft

an effective negotiating strategy with the EU. This is particularly the case with developing countries like India that are often at odds with the digital trade considerations proffered by developed nations. India is in a similar position to the EU. It is behind the US and China in terms of technological advancement and has a nascent start-up industry with global ambitions. It could, then, find considerable common ground with the EU. At the same time, however, the similarity in contexts could set the stage for conflict.

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About the Author

Meghna is consultant at Koan Advisory and a Fellow at the Esya Centre, a Delhi-based technology policy focussed think-tank. She is a lawyer by training with deep experience in media and emerging technology. Previously, she worked on legal and policy strategy at the Walt Disney Company. Before Disney, she set up and led the India office for Consensus, the world's largest blockchain technology company at the time.

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K-70-B, Hauz Khas Enclave I New Delhi-110016 India

Responsible:

Ulrich Storck | Country Director

Nithya Kochuparampil | Program Advisor, Peace and Security

T: + 91 11 26561361-64

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