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**Citation:** Fahey, E. (2020). Digital trade and data equivalency: Research briefing for the Welsh parliament. Wales, UK: Welsh Parliament.

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## **1. Introduction**

This research briefing provides an impartial assessment and summary in a research briefing on key issues as to digital trade and data equivalences post-Brexit for the External Affairs Committee of Senedd Cymru primarily from a legal perspective.

The paper provides an overview of the concept of Digital Trade, of key negotiation objectives of the UK, EU and US as to Digital Trade, of best practice Digital Trade provisions in trade agreements, issues relating to data flows and equivalences and the parameters of how they relate to the digital economy of Wales. A summary of conclusions follows thereafter.

The paper is based on materials published and available on 20 April 2020 only.

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**20 April, 2020**

### 1.1 Overview: No universal formula for data or e-commerce in international economic law

Digital trade and the digital economy are universally agreed to be the key elements of the successful development of the future economy. While data and digital information may have joined ‘oil, tanks and money’ as the key currency of international affairs,<sup>1</sup> from a legal perspective the complex place of data presents a challenge. There is no universal formula for data issues in a trade agreement, which may cross-cut everything from cybersecurity, intellectual property, transparency to frictionless movement of tech workers. It is also complex to capture digital services in statistics as to their precise importance to the economy, because of the difficulty of defining digital services and business. Nonetheless, it is a truth universally acknowledged that every ambitious twenty-first century trade agreement is in want of a holistic and robust chapter on electronic commerce (e-commerce mainly hereafter).<sup>2</sup> Governments and organisations are learning how to engage in this complex new field. Whereas most Regional Trade Agreements (RTAs) treat e-commerce as its own standalone chapter, outside of the EU, only a few embed e-commerce provisions as part of a broader chapter. Yet, tech sectors are predominantly services-based sectors and increasingly perceive FTAs to be ineffective for their needs.

No World Trade Organisation (WTO) member classified as a developing country by the United Nations or a low-income country by the World Bank has agreed an RTA with an e-commerce chapter.<sup>3</sup> Historically, not even advanced economies have sought a broad e-commerce chapter.<sup>4</sup> Certain country agreements have been uniquely consistent across their respective provisions relating to data e.g. South Korea e-commerce chapters as to consumer protection, paperless trading and data protection.

The EU has tended to conclude RTAs with a chapter dedicated to Trade in Services Establishment and Electronic Commerce. It has historically adopted a somewhat inconsistent approach to e-commerce, which it tends to merge with Trade in services, establishment and electronic commerce i.e. rather than giving e-commerce (or indeed digital trade) a standalone chapter. In more contemporary agreements such as the EU-Canada Comprehensive Economic and Trade Agreement (CETA), a standalone e-commerce chapter is found. By contrast, the EU-Japan Economic Partnership Agreement (EPA) has a broad chapter that covers trade in services, investment liberalisation and e-commerce.

The latest US-China Phase One Trade Agreement does not address emerging issues such as privacy protection and data regulation relating to digital trade, despite the significance of US-Sino relations for ICT and tech issues. National security issues relating to Huawei and the sales of 5G equipment are also left unaddressed by the agreement. There are thus striking inconsistencies even across some of the largest scale trade agreements as to how to formulate digital trade.

The transformations of the Internet have also been associated with new measures that inhibit digital trade, such as, ‘data localisation’ measures, e.g. requiring localisation of data servers and providers, local content policies, or discrimination against digital services or providers not locally based, to gain jurisdictional control. However, there are important regulatory gaps emerging as to such issues.

Against the backdrop of pre-Internet WTO law, many of these disruptive changes have demanded regulatory solutions outside the multilateral trade forum and States around the world have used in particular the venue of Preferential Trade Agreements (PTAs) to fill in the gaps of the WTO framework.<sup>5</sup> As a result, the framework that now regulates contemporary digital trade is not coherent and is highly fragmented.

<sup>1</sup> Henry Farrell and Abraham Newman, *Of Privacy and Power* (Princeton University Press, 2019) 173.

<sup>2</sup> Richard Wolfe, ‘Learning about Digital Trade: Privacy and E-Commerce in CETA and TPP’ (2019) 18(S1) *World Trade Review* S63-S84.

<sup>3</sup> Mark Wu, ‘Digital Trade-Related Provisions in Regional Trade Agreements: Existing Models and Lessons for the Multilateral Trade System’ RTA Exchange (International Centre for Trade and Sustainable Development and Inter-American Development Bank’, (2017) available at <<https://perma.cc/KHM9-33U>> accessed on 20 April 2020.

<sup>4</sup> Ibid 8.

<sup>5</sup> Mira Burri, Rodrigo Polanco, ‘Digital Trade Provisions in Preferential Trade Agreements: Introducing a New Dataset’ (2020) 23 *Journal of International Economic Law* 187–220. Henry Gao, ‘The Regulation of Digital Trade in the TPP: Trade Rules for the Digital Age’ in Julien Chaisse, Henry Gao and Chang-fa Lo (eds.), *Paradigm Shift in International Economic Law Rule-Making* (Springer, 2017) 345.

## 1.2 No settled definition of Digital Trade

There is no settled definition of ‘digital trade’ or ‘electronic commerce’, and so characterisations differ greatly.<sup>6</sup> Digital trade is said to be understood in two fashions—narrow and broad. As to the narrow understanding: digital trade is equated to commerce in products and services delivered via the Internet. The second fashion is much broader and relates to enabling innovation and the free flow of information in the digital networked environment. This distinction is far from academic and has profound policy implications. For instance, in WTO negotiations, China has promoted a narrow view of digital trade, focussing upon trade in goods online, while the US and others have subscribed for a more inclusive approach. The US approach tends to focus more on the ‘digital’ nature of digital trade, while the Chinese approach prefers to address the issue from the traditional ‘trade’ perspective.

Later US FTAs started to include more comprehensive rules on e-commerce. Structurally, e-commerce was elevated from a small number of articles in other chapters into a stand-alone chapter. Substantively, e-commerce disciplines also expand from passive non-interference obligations into more positive requirements that spell out what the government needs to do for e-commerce businesses. This new model of e-commerce obligations started out in the 2004 FTAs the US signed with Australia, Chile, and Singapore, respectively, and culminated in the Trans-Pacific Partnership (TPP) that was concluded in 2016. While the Trump Administration withdrew from the TPP, the e-commerce chapter was heavily influenced by the US and has been incorporated into the new Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) that the remaining 11 TPP-members signed in March 2018. The “digital trade” provisions in the United States-Mexico-Canada Agreement (USMCA) largely follow TPP’s model. However, the USMCA deviates from TPP in its framing. While TPP used “electronic commerce” as an umbrella term, in line with WTO terminology, USMCA has shifted toward “digital trade,” which avoids some of the confusion caused by the colloquial use of “e-commerce” for online shopping.<sup>7</sup> It is reasonable to expect that similar provisions will be reflected in future US FTAs.

## 1.3 No settled definition of Electronic Commerce

There is no settled definition of electronic commerce or e-commerce. At its broadest, electronic commerce involves conducting business using most modern communication instruments: telephone, fax, television, electronic payment and money transfer systems, Electronic Data Interchange, and the Internet. The WTO recognizes that commercial transactions can be broken into three stages: the advertising and searching stage, the ordering and payment stage, and the delivery stage.

In early 2016, e-commerce gained ‘renewed interests’ among WTO Members, where seven proposals were tabled by major WTO Members such as the US, the EU, Japan and Brazil. The US proposal appeared to be encouraged by its success in the Trade in Services Agreement (TiSA) and TPP negotiations. Electronic commerce has wound its way into both a WTO Ministerial Decision and a Joint Ministerial Statement, but also became the subject of a joint initiative by the WTO, the World Economic Forum, and the Electronic World Trade Platform (eWTP), the first of its kind in the WTO. With these signs, e-commerce was set to become one of the first Doha issues to bear fruit. Currently, however, the negotiations on a plurilateral agreement on e-commerce kicked off in 2019 covering a range of rules on digital trade are currently stalled. The negotiations have been structured around 8 focus groups, ‘enabling digital trade / e-commerce’, ‘openness and digital trade/ e-commerce’, trust, cross-cutting issues and telecommunications.

However, due to the divergence of views among the WTO membership, efforts to revamp the rules in the WTO have largely failed. Given the lack of progress in the WTO, the US, as the champion of digital

<sup>6</sup> Andrew D Mitchell, ‘Towards Compatibility: The Future of Electronic Commerce within the Global Trading System’ (2001) 4 *Journal of International Economic Law* 4 685–686.

<sup>7</sup> Thomas Streinz, ‘Digital Megaregulation Uncontested? TPP’s Model for the Global Digital Economy in Benedict Kingsbury, David M. Malone, Paul Mertenskötter, Richard B. Stewart, Thomas Streinz and Atsushi Sunami (eds.) *Megaregulation Contested* (OUP 2019) 312-342, 317.

trade, had turned to various bilateral, plurilateral, and regional initiatives to push for the internationalisation of digital trade rules which are based on the regulatory philosophy and approach in the US to tackle trade barriers facing the US companies. Meanwhile, although initially reluctant to engage, China has also become more willing in negotiating e-commerce rules in its recent FTAs. A 1998 WTO moratorium on import duties on e-commerce transmissions is due to lapse in Summer 2020, with concerns from developing countries as to lost government revenue where trade becomes less goods-intensive and more digital.

#### 1.4 Complex emerging relationship of RTAs with data protection and data privacy

While approximately 80 or more RTAs include provisions on privacy, in the most large-scale formulation of trade agreements, such as the CPTPP and USMCA, data has been overlooked as to its precise relationship to privacy. For example, USMCA has a chapter (Ch. 19) on digital trade and not e-commerce unlike CPTPP (Ch. 14) and so distinct differences between two major agreements exist as to international privacy regimes cited, data localisation, interactive computer services and so on. It is thus not clear what precise implications these agreements have for the prevention of algorithmic bias, protection of critical infrastructure or the protection of national security as between the agreements, which appears a missed opportunity and concern, given their scale.<sup>8</sup> One of the most progressive of EU trade deals, the EU-Canada Comprehensive Economic and Trade Agreement (CETA), has numerous provisions cross-cutting data yet without regulating its flow or positively providing protections to personal data.<sup>9</sup> By contrast, data protection provisions feature in the EU-Japan EPA and more recent iterations of the EU's digital trade chapters, e.g. draft provisions of the EU-Mexico Modernised Global Agreement, Digital Trade Chapter, Art. XX. The EU-Japan EPA is discussed above in Section 3.

<sup>8</sup> See Patrick Le Blond, 'Digital Trade at the WTO- The CPTPP and CUSMA Pose Challenges to Canadian Data Regulation' CIGI Papers No. 227 — October 2019 available at <<https://www.cigionline.org/sites/default/files/documents/no.227.pdf>> accessed on 20 April 2020. Elaine Fahey and Isabella Mancini, 'The EU as an Intentional or Accidental Convergence Actor? Learning From the EU-Japan Data Adequacy Negotiations,' (2020) 7 *International Trade Law and Regulation* forthcoming.

<sup>9</sup> Instead, data protection either falls under the exceptions (see 28.3(2)(c)(ii) Comprehensive Economic Trade Agreement (CETA) or becomes an object for which the Parties shall "maintain or adopt" (Article 16.4 CETA) or measures or "adequate safeguards" (Article 13.15 CETA) to ensure its protection.

## 2. Negotiation objectives of UK on Digital Trade with key negotiation partners

It is useful to outline the current state of negotiation objectives as to Digital Trade with two of the UK's most significant trade negotiation partners, namely the EU and US. However, at the time of writing, the objectives are mostly published in short-form in the absence of legal text (with the exception of the EU).

### 2.1 The UK Government objectives to the UK-EU partnership negotiations and Digital Trade

The UK Government, 'The Future Relationship with the EU: The UK's Approach to Negotiations' February 2020 outlined its objectives as to the UK-EU future relationship negotiations as to digital trade as follows:<sup>10</sup>

'Chapter 17: Digital Trade:

56. The Agreement should promote trade in digital services and facilitate modern forms of trade in both services and goods and in both new, technology-intensive businesses and traditional industries.

57. The Agreement should include commitments on market access and regulatory governance of digital trade. Commitments on market access should minimise barriers to the supply of digital services provided from the territory of a party into the territory of the other party and will provide a clear and predictable basis upon which business can invest. This should lock in regulatory certainty, while preserving the UK's regulatory autonomy.

58. The Agreement should include provisions to promote an open, secure and trustworthy online environment; encourage regulatory cooperation and a strategic dialogue on emerging technologies; and stimulate e-commerce through measures that facilitate the cross-border flow of data. Elements of this could draw upon international best practice and ongoing negotiations, for example negotiations on the WTO's Joint Statement Initiative on E-Commerce.

59. Digital is a growing, dynamic sector. Reflecting this, the digital provisions in recent EU Free Trade Agreements have been evolving. The provisions on digital trade in the Agreement could, in specific areas, go beyond those precedents to reflect the direction of travel in current digital trade negotiations. For example, provisions on electronic authentication have continued to evolve as part of EU Free Trade Agreement negotiations with Australia and Mexico and at the WTO, and this should be reflected in the Agreement'.

Although brief, the objectives outlined appear broad and modern and aligning well with the EU best practice to date on Digital Trade, although neither the Australia nor Mexico negotiations are complete and so they are possibly not the most optimal guides to best practice.

### 2.2 The EU negotiation mandate and proposed text on digital trade

The EU Negotiation Directives for the future EU-UK partnership provide as follows:<sup>11</sup>

'5. Digital Trade

47. In the context of the increasing digitalisation of trade covering both services and goods the envisaged partnership should include provisions aiming at facilitating digital trade, addressing unjustified barriers to trade by electronic means, and ensuring an open, secure and trustworthy online environment for businesses and consumers, such as on electronic trust and authentication services or on not requiring prior authorisation solely on the grounds that the service is provided by electronic means. They should also provide for consumer protection in the online environment and on unsolicited direct marketing communication. These provisions should address data flows subject to exceptions for legitimate public policy objectives, while not affecting the Union's personal data protection rules.

<sup>10</sup> The UK Government, 'The Future Relationship with the EU: The UK's Approach to Negotiations' (3 February 2020) available at <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/868874/The\\_Future\\_Relationship\\_with\\_the\\_EU.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/868874/The_Future_Relationship_with_the_EU.pdf)> accessed on 20 April 2020.

<sup>11</sup> 'Annex to Council Decision Authorising the Opening of Negotiations with the United Kingdom of Great Britain and Northern Ireland for a New Partnership Agreement' Brussels (25 February 2020) (OR. en) 5870/20 ADD 1 REV 3 UK 3.

48. The envisaged partnership should provide for cooperation in multilateral and multistakeholder fora in areas of mutual interest, and establish a dialogue to exchange information, experience and best practice relating to emerging technologies.’

### 2.3 Draft EU treaty text proposal March 2020

In the draft EU text of a treaty published in 18 March 2020, there are three chapters to the draft text published on Digital Trade set out in Title VIII.<sup>12</sup> The EU proposal contains general provisions in Ch. I, cross-border data flows, including location prohibitions, provisions on the protection of personal data are provided for in Ch. II and specific provisions on e-commerce are set out in Ch. III. These include provisions on customs duties on electronic transmissions, prohibitions on prior authorisation of services because of online provision, provisions on the conclusion of contracts by electronic means, electronic authentication and electronic trust services, provisions on the transfer or access to source code of software, online consumer trust, unsolicited direct marketing communications and regulatory cooperation provisions.

The provisions are broadly similar to the EU-Australia FTA negotiation texts chapter on Digital Trade of 2018 and thus aligning with the UK objectives. The provisions are highly ‘contemporary’ and sit well with the relatively ambitious EU and UK negotiation objectives but beyond this are difficult to evaluate further at this point in time. They are arguably better understood by considering the essential elements of digital trade and contemporary examples of best practice trade agreements, considered in Section 3 below.

### 2.4 UK negotiations with US Digital Trade objectives

The UK has published in early March its trade negotiation objectives with the US, which are as follows to:<sup>13</sup>

- ‘-Secure cutting-edge provisions which maximise opportunities for digital trade across all sectors of the economy.
- Include provisions that facilitate the free flow of data, whilst ensuring that the UK’s high standards of personal data protection are maintained, and include provisions to prevent unjustified data localisation requirements.
- Promote appropriate protections for consumers online and ensure the Government maintains its ability to protect users from emerging online harms.
- Support the reduction or abolition of business and consumer restrictions relating to access to the US digital market.
- Ensure customs duties are not imposed on electronic transmissions.
- Promote a world-leading eco-system for digital trade that supports businesses of all sizes, across the UK...’

### 2.5 The US Trade Representative (USTR) negotiations with the UK and Digital Trade

The US Trade Representative (USTR) has outlined a key place for digital trade in their negotiation objectives and Digital Trade appears to be a significant issue on the agenda throughout the 6 rounds of negotiations at the time of writing:<sup>14</sup>

‘A new U.S.-UK trade agreement could address [global] challenges, as well as provide an opportunity to develop new approaches to emerging trade areas where the United States and

<sup>12</sup> ‘Draft text of the Agreement on the New Partnership with the United Kingdom’ (18 March 2020) available at <[https://ec.europa.eu/info/publications/draft-text-agreement-new-partnership-united-kingdom\\_en](https://ec.europa.eu/info/publications/draft-text-agreement-new-partnership-united-kingdom_en)> accessed on 20 April 2020.

<sup>13</sup> Department of International Trade, ‘The UK’s approach to trade negotiations with the US: UK-US Free Trade Agreement’ (2 March 2020) available at <<https://www.gov.uk/government/publications/the-uks-approach-to-trade-negotiations-with-the-us>> accessed on 20 April 2020.

<sup>14</sup> USTR United States-United Kingdom Negotiations: Summary of Specific Negotiating Objectives (February 2019) available at <[https://ustr.gov/sites/default/files/Summary\\_of\\_U.S.-UK\\_Negotiating\\_Objectives.pdf](https://ustr.gov/sites/default/files/Summary_of_U.S.-UK_Negotiating_Objectives.pdf)> accessed on 20 April 2020.

the UK share common interests and are global leaders, such as digital trade and financial services...’

‘...Digital Trade in Goods and Services and Cross-Border Data Flows:

- Secure commitments not to impose customs duties on digital products (e.g., software, music, video, e-books).
- Ensure non-discriminatory treatment of digital products transmitted electronically and guarantee that these products will not face government
- sanctioned discrimination based on the nationality or territory in which the product is produced.
- Establish state-of-the-art rules to ensure that the UK does not impose measures that restrict cross-border data flows and does not require the use or installation of local computing facilities.
- Establish rules to prevent governments from mandating the disclosure of computer source code or algorithms.
- Establish rules that limit non-IPR civil liability of online platforms for third-party content, subject to the Parties’ rights to adopt non-discriminatory measures for legitimate public policy objectives or that are necessary to protect public morals....

#### Intellectual Property

...-Provide strong protection and enforcement for new and emerging technologies and new methods of transmitting and distributing products embodying intellectual property, including in a manner that facilitates legitimate digital trade, including, but not limited to, technological protection measures...’

The negotiation objectives of the UK and US appear heavily centred upon the importance of Digital Trade and reflect considerable support from stakeholders and participants.<sup>15</sup> Nonetheless, significant gaps between the EU and US approaches exist as to the balance of regulating data/ Digital Trade so that it respects privacy and leaving room for innovation. The place of the GDPR and Privacy Shield is likely to continue to prove to be vulnerable as between the two negotiations and force the UK to make starker policy choices as to the economy, privacy and data flows. Transatlantic data flows are discussed below in Section 4.

<sup>15</sup> Cf Heather A. Conley, Allie Renison, Kati Suominen ‘US-UK Digital Policy Roadmap for the Future’ CSIS/ IoD (November 2019) available at <[https://csis-prod.s3.amazonaws.com/s3fs-public/publication/191126\\_US-UKDigitalTrade\\_WEB\\_v2.pdf](https://csis-prod.s3.amazonaws.com/s3fs-public/publication/191126_US-UKDigitalTrade_WEB_v2.pdf)> accessed on 20 April 2020.

### 3. Focussing upon good practice: EU-Japan EPA Digital Trade Provisions

#### 3.1 Overview

As stated above, while many new generation trade agreements have provisions on digital trade, they are neither consistent, coherent nor cohesive. New datasets on digital trade provisions of all new preferential trade agreements are revealing, whereby several trade agreements with e-commerce chapters (47 treaties) include provisions to promote and facilitate e-commerce yet which vary considerably.<sup>16</sup> The EU's recent Economic Partnership Agreement (EPA) with Japan a useful study of best contemporary modern practice in next generation trade agreements with a developed economy. Key provisions of the EPA (in Ch. 8 thereof) are outlined here by way of example.<sup>17</sup>

#### 3.2 Sample Provisions

##### *Promotion and facilitation of e-commerce*

- Several agreements explicitly agree to promote the development of electronic commerce only between the parties, or its wider global use or development and the EU-Japan EPA is notable as to the formulation of the latter: the EU-Japan EPA, Art. 8.70.
- The EPA includes specific commitments on domestic regulation, meaning that each party shall ensure that all its measures of general application affecting electronic commerce are administered in a reasonable, objective, and impartial manner. This is accompanied by a best effort commitment not to impose prior authorization or any other requirement having equivalent effect on the provision of services by electronic means: the EU-Japan EPA, Arts 8.74, 8.75 and 8.76.

##### *Legal effect, validity enforceability of contracts*

- The EPA includes provisions that parties shall not adopt or maintain measures regulating electronic transactions that deny the legal effect, validity or enforceability of a contract, solely on the grounds that it is concluded by electronic means; or otherwise create obstacles to the use of contracts concluded by electronic promotion: the EU-Japan EPA, Arts 8.74, 8.75 and 8.76.

##### *Specificity of commitments*

- While some agreements aim to 'facilitate trade in digital products' or through 'electronic means or technologies', and to improve the effectiveness and efficiency of electronic commerce, or consider e-commerce facilitation as part of general common cooperation activities, other agreements have more concrete obligations- such as the EU-Japan EPA.

##### *Legal signatures*

- The EPA has provisions which aim to prevent the denial of the legal validity of a signature solely on the basis that the signature is in electronic form, following the framework of the United Nations Convention on the Use of Electronic Communications in International Contracts: EU-Japan EPA, Art. 8.77.3.

##### *Regulatory cooperation*

- The EPA has important cooperation commitments that are understood to be best practice e.g. to 'maintain a dialogue' on regulatory issues such as the facilitation of cross-border certification services and which thus seek to institutionalise cooperation as between the parties: the EU-Japan EPA, Art. 8.80.2(d).

<sup>16</sup> Mira Burri and Rodrigo Polanco, 'Digital Trade Provisions in Preferential Trade Agreements: Introducing a New Dataset' (2020) 23 *Journal of International Economic Law* 187–220.

<sup>17</sup> 'Agreement between the European Union and Japan for an Economic Partnership' (27 December 2018) OJ L 330/3 3–899; Council Decision (EU) 2018/1197 'On the Signing, on Behalf of the European Union, and Provisional Application of the Strategic Partnership Agreement between the European Union and its Member States, of the one Part, and Japan, of the other Part' (24 August 2018) OJ L 216/1 1-3; 'Strategic Partnership Agreement between the European Union and its Member States, of the one Part, and Japan, of the other Part' (24 August 2018) OJ L 216/4, 4-22.

*Personal data*

- While some agreements merely recognize the protection of personal information in different ways as to processing and dissemination of data, records and accounts and so on or that it should be protected, in several treaties parties specifically commit to adopt or maintain legislation or regulations that protect the personal pursue remedies and how businesses can comply with any: the EU-Japan EPA Art. 8.81.

*Future flows of data*

- The agreement reassesses within three years of the date of entry into force of this Agreement the need for inclusion of provisions on the free flow of data into this Agreement: the EU-Japan EPA Art. 8.81.

*Non-imposition of customs duties on electronic transmissions*

- The agreement prohibits customs duties on electronic transmissions: the EU-Japan EPA Art. 8.72.

## 4. Data Flows, Equivalence and Adequacy Decisions

### 4.1 Data Flows

Data is an increasingly multifaceted concept that is bound up with trade and commercial matters as much as security and law enforcement issues, as the global issues relating to Huawei 5G indicate. This renders combined attention to trade and security, particularly law enforcement issues, essential. Increased digitalisation of information, the rising power of private companies delimiting access to that information and the cross-border nature of investigations involving digital evidence have changed our understanding of access to data and jurisdictional limits on access.<sup>18</sup> The place of the EU as a first-mover internationally on best practice in data protection and data flows on account of the high standards of the General Data Protection Regulation (GDPR) will be unavoidably significant for the UK going forward. A European Strategy for Data was published in February 2020 designed to develop a Single Market in Data by 2025 and a Common European Data Space, focussing upon tackling inter alia fragmentation between Member States in 9 areas, ranging from industrial manufacturing to health, financial, energy, and agricultural data,<sup>19</sup> which was accompanied by a significant White Paper on Artificial Intelligence.<sup>20</sup> It will become significant how the UK engages, aligns, communicates or regulates with these developments.

### 4.2 Adequacy Decisions and Partial Adequacy Decisions

EU regimes on data equivalences are highly instructive and also critical for the UK going forward. The EU now has data transfer regimes and flows with third countries which count as some of the largest in the globe (e.g. EU-US Privacy Shield, 2016 covering over one billion citizens, EU-Japan Data Adequacy Decision, 2018, relating to the world's largest safe data flow area between the EU and Japan). These safe flows are principally achieved through an Adequacy Decision. An Adequacy Decision is the EU's primary way of facilitating the free flow of personal data from the EU to third countries for general and commercial purposes. While the level of protection in the third country must be 'essentially equivalent' to that guaranteed by EU law, the means may differ from that employed within the EU. The European Commission has the power to determine, on the basis of article 45 of Regulation (EU) 2016/679 (the GDPR) whether a country outside the EU offers an adequate level of data protection and examines wider factors such as the country's judicial system, the rule of law and its national security policies and as a result, the overall system for data protection must be deemed 'essentially equivalent' to the EU's for a positive decision to be made, it is periodically reviewed by the European Commission and it can be revoked at any time. While the European Commission has never revoked an adequacy decision following a review, the CJEU has. The concept of an 'adequate' level of protection has been significantly developed by the CJEU in Case C-263/14 *Schrems v. Data Protection Commissioner* relating to arrangements with the US, where 'partial' Adequacy Decisions exist involving self-certification practices, similar to arrangements in place with Canada. These adequacy decisions do not cover data exchanges in the law enforcement sector which are governed by the 'Police Directive' (article 36 of Directive (EU) 2016/680).

While the UK Prime Minister has confirmed UK plans to diverge from the EU data protection standards in February 2020, the UK has also, after specific recommendation from Parliament, set out in detail recently the groundwork for an Adequacy Decision with the EU going forward.<sup>21</sup> In a detailed series of documents, they aim to ease negotiations and indicate that the UK has adequacy as a third country from the perspective of the standards applied by the European Commission. This shows the UK's intention

<sup>18</sup> Jennifer Daskal, 'Privacy and Security across Borders' (2019) *Yale Law Journal Forum* 1029-1051 available at <[https://www.yalelawjournal.org/pdf/Daskal\\_v3q35qwf.pdf](https://www.yalelawjournal.org/pdf/Daskal_v3q35qwf.pdf)> accessed on 20 April 2020.

<sup>19</sup> Communication from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions 'A European Strategy for Data' COM (19 February 2020) 66 final (Brussels).

<sup>20</sup> European Commission, White Paper 'On Artificial Intelligence- A European Approach to Excellence and Trust' COM (19 February 2020) 65 final (Brussels).

<sup>21</sup> UK Government, 'Explanatory Framework for Adequacy Discussions' (12 March 2020) available at <<https://www.gov.uk/government/publications/explanatory-framework-for-adequacy-discussions>> accessed on 20 April 2020.

to protect data and digital trade to a high degree and to adhere to EU standards, practices and norms as far as possible as a third country, in particular, as to the GDPR. Under the GDPR, alternative legal vehicles for transfers of personal data include: Binding Corporate Rules, Standard Contractual Clauses and Approved Codes of Conduct, or certification. However, as the UK Government has noted, none of these alternatives are as wide-ranging as an adequacy decision and can also be costly and onerous for businesses, especially for small and medium sized enterprises (SMEs). An Adequacy Decision for the UK is, however, not a foregone conclusion. There is no timeline for such a decision, and it is not permanent. Significant concerns remain, as to the far-reaching provisions of the UK Investigatory Powers Act 2016 and CJEU litigation concerning the UK's surveillance practices.<sup>22</sup> There are considerable economic implications from the uncertainty affecting business concerned with the depth of alignment which will follow- whether it is before or after the transition period, the gaps arising in between and the costs to SMEs in particular are significant issues. A future UK-US Privacy Shield-equivalent also seems necessary and is championed by many. However, this may challenge the EU-UK-US relations, where insistence on lower data standards or weaker institutionalisation of data flows by the US could compromise the UK-EU relations. The capacity of the US to develop a GDPR equivalent is also a possibility mooted. Already, however, there are significant the UK-EU-US transatlantic differences emerging on exchange of electronic evidence e.g. the contradictions between the UK-US e-evidence agreement hastily concluded where the EU-US e-evidence agreements are still being negotiated to deal with the US CLOUD Act, concerning US law enforcement access to data located abroad, where considerable gaps and differences appear to have emerged.

There is much evidence of the support that SMEs increasingly require, given the economic impact of data regulation, where many services rely more and more on data.<sup>23</sup> It is important for the Senedd to continue to actively support the work of the Information Commissioner's Office (ICO) actions regionally within the UK e.g. as to the Codes of Conduct and Certification, which play a critical role in the operation of data flows, enforcement, compliance and to vigorously support local businesses in operating best practices as to data, irrespective of the regime in place.

<sup>22</sup> See Oliver Patel and Nathan Lea, 'EU-UK Data Flows, Brexit and No-Deal: Adequacy or Disarray?' (23 August 2019) available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3441698](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3441698)> accessed on 20 April 2020.

<sup>23</sup> Matthias Bauer, Martina F. Ferracane, Erik van der Marel, 'Tracing the Economic Impact of Regulations on the Free Flow of Data and Data Localization', GCIG Paper No. 30, Global Commission on Internet Governance Paper Series (10 May 2016), <<https://www.cigionline.org/publications/tracing-economic-impact-regulations-free-flow-data-and-data-localization>> accessed on 20 April 2020.

## 5. The Digital Economy and Wales

Wales will need to advocate Digital Trade provision that can address its broader underlying economic issues and to obtain a working definition of digital trade that aligns best with the needs of Wales. The broader economic, social or technical impact of trade agreements on devolved territories cannot be ignored because the differing economic profiles of territories within the UK means that it is not beyond the realm of possibility that the negotiation of a trade agreement that creates broad economic benefits for the UK as a whole may lead to losses in certain devolved regions.<sup>24</sup>

In ‘Delivering a Digital Wales: The Welsh Government’s Outline Framework for Action December’ 2010, The Welsh Government identified ‘the digital economy as a key element in Economic Renewal: a new direction and as critical enabler in the rural economy.’<sup>25</sup> In Wales 4.0 Delivering Economic Transformation for a Better Future of Work: Review of Digital Innovation for the Economy and the Future of Work in Wales (September 2019), the Welsh Government stated that it:

‘... should set an ambitious vision for Wales 4.0 in response to the challenges and opportunities posed by the fourth industrial revolution ... This vision should be informed by commencing a national conversation with citizens on the future of work and the economy in Wales ...[on] digital innovation (including ... AI).’<sup>26</sup>

However, despite these policy statements and commitments, the Welsh Economy Research Unit Digital Maturity Survey for Wales 2019 paints a mixed picture of the preparedness of business as to digitalisation. It stated that:

‘Although the overall picture is one of businesses increasingly adopting and using digital technologies in Wales ... the transition towards digitalisation is likely to be bumpy when viewed at the regional level, with some indicators going up, while others going down...

...Digitally disengaged 15% (12%) Passive Exploiters 38% (34%) Active Exploiters 31% (36%) Digitally Embedded 16% (18%) ‘FIGURE 04’ – Digital maturity groups in Wales, % of SMEs in 2019 (2018 in brackets)... Businesses tending to be standard broadband users, with a high proportion of employees with below average ICT skills.’<sup>27</sup>

Support for digital skills training in the regional workforce appears to be critical. There has been much evidence that the rapid growth in digital services in the UK has been fuelled by input from non-UK migrants, in particular EU nationals moving to the UK to fill high-skills jobs, long in advance of Brexit.<sup>28</sup> The specific needs of the region as to migration and employment will need to continue to be carefully delineated, relative to these issues.

More broadly, the regional place of Wales in the UK digital trade policy needs further careful examination. For instance, according to the Department of International Trade as it outlined the UK’s approach to the US trade negotiations in early 2020:

<sup>24</sup> Billy A. Melo Araujo ‘UK post-Brexit Trade Agreements and Devolution’ (2019) 39 *Legal Studies* 555-578, 559-560.

<sup>25</sup> Welsh Assembly Government, ‘Delivering a Digital Wales: The Welsh Assembly Government’s Outline Framework for Action’ (December 2010)

<<https://gov.wales/sites/default/files/publications/2019-07/delivering-a-digital-wales.pdf>> accessed on 20 April 2020, 17.

<sup>26</sup> Welsh Government, ‘Wales 4.0 Delivering Economic Transformation for a Better Future of Work: Review of Digital Innovation for the Economy and the Future of Work in Wales’ (September 2019) <<https://gov.wales/sites/default/files/publications/2019-09/delivering-economic-transformation-for-a-better-future-of-work.pdf>> accessed on 20 April 2020, 10.

<sup>27</sup> Welsh Economy Research Unit, ‘Superfast Broadband Business Exploitation Project Digital Maturity Survey for Wales 2019’ (7 February 2020)

<[https://www.cardiff.ac.uk/\\_\\_data/assets/pdf\\_file/0008/1883591/DMS-Report-2019-0-4.pdf](https://www.cardiff.ac.uk/__data/assets/pdf_file/0008/1883591/DMS-Report-2019-0-4.pdf)> accessed on 20 April 2020, 4, 42.

<sup>28</sup> House of Lords European Union Committee 18th Report of Session 2016-2017: ‘Brexit: Trade in Non-Financial Services’ (22 March 2017) conclusions, para. 158 available at <<https://publications.parliament.uk/pa/ld201617/ldselect/ldecom/135/135.pdf>> accessed on 20 April 2020.

‘London and the South East will see benefits to the UK’s dynamic and globally competitive professional business services, while agreements on digital trade and copyright frameworks will provide a boost for innovative UK tech firms.’<sup>29</sup>

Digital Trade as a policy field appears both historically and currently focussed upon a specific region of the UK, not Wales and this necessitates careful reflection about gains and losses from this strategic focus. On 19 March 2020, the Government published the Finance Bill 2020, which includes the final provisions of the UK’s Digital Services Tax (DST). From 1 April 2020, the government will introduce a new 2% tax on the revenues of search engines, social media services and online marketplaces which derive value from the UK users. The precise effects of a UK digital services tax across the UK needs further exploration, also given possible US tariff measures if imposed.

Overall, Welsh policy ambitions will need to be carefully aligned to the specific challenges of UK Digital Trade policy- and also vice versa.

<sup>29</sup> Department of International Trade, ‘The UK’s Approach to Trade Negotiations with the US: UK-US Free Trade Agreement’ (02 March 2020) containing 27 references to Digital Trade available at <<https://www.gov.uk/government/publications/the-uks-approach-to-trade-negotiations-with-the-us>> accessed on 20 April 2020.

## 6. Summary of Conclusions

- Digital Trade has no consistent formula in trade agreements. There is no settled definition of digital trade and there is no settled definition as to e-commerce
- Major trade agreements, however modern or large-scale, have a complex relationship with data privacy
- The negotiating objectives of the UK and EU appear broad, ambitious and represent best practice as to Digital Trade.
- The negotiation objectives of the UK and US priorities Digital Trade to a high degree but will likely face considerable hurdles in aligning the UK-EU arrangements with the UK-US arrangements as to standards, data privacy and data flows.
- The Digital Trade provisions of the EU-Japan Economic Partnership Agreement (EPA) are a good model of best practice in next generation trade agreements.
- The UK has shown firm intent thus far to acquire an Adequacy Decision from the EU and to maintain high data protection and data flow standards in line with EU law, although stark policy choices may soon become apparent as between the UK-EU and the UK-US negotiations.
- Policy-makers in Wales need to be cognisant about the costs of supporting SMEs effectively in implementing data regulation/ Digital Trade.
- Urgent attention is needed by policy-makers in Wales as to broader supports for the digital economy having regard to infrastructure, skills, training and employment needs.
- Policy-makers in Wales need to be cognisant about the definition of digital trade most optimal for Wales which align with the needs of its digital economy.