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Interfacing Privacy and Trade

Submitted by: University of Lucerne

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interfacing privacy and trade

PD, DR.IUR. MIRA BURRI

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talk points / objectives

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- expose the growing contestation between privacy protection and free trade in the era of Big Data
- **show how trade venues have in recent years become important planes to mitigate this contestation**
- **trace positioning of the US and EU on the privacy/trade interface**

starting point: the centrality of data

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- like other factors of production, such as natural resources and human capital, it is increasingly the case that **much of modern economic activity, innovation and growth cannot occur without data**

- the transformative potential is great and refers not only to new 'digital native' areas, such as search or social networking but also to 'brick-and-mortar' businesses

new digital trade barriers

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- **data must cross borders for the realization of a data-driven economy**

- **yet, rise of digital protectionism and data sovereignty**
  - localization measures
  - data privacy and protection measures
  - intellectual property related measures
  - censorship
  - cybersecurity

new privacy concerns in the era of big data

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new privacy concerns in the era of big data

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- Big Data puts into question the very distinction between personal and non-personal data, as citizens become ‘transparent’
- data minimization is challenged, as firms are ‘hungry’ to get hold of more data, and the sources of data from smart devices, sensors and social networks’ interactions multiply
- one of the basic tools of data protection – that of anonymization is only of limited utility in a data-driven world
- Big Data analytics enable the re-identification of data subjects by using and combining datasets of non-personal data
- Big Data casts doubt on the efficacy of existing privacy protection laws, which often operate upon requirements of transparency and user consent
- Big Data facilitates sophisticated surveillance

different approaches to privacy protection across jurisdictions

summing-up EU-US differences to privacy

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- EU perception of **privacy as an aspect of dignity** / US perception of **privacy as an aspect of liberty**
- core Article 8 ECHR rights are rights to one's image, name and information privacy rights, which are protected against everyone, including other private individuals. By contrast, the **US approach is primarily based on the suspicion of government intrusion into one's private sphere**
- **EU: fundamental right / US perception of data as a transaction commodity**
- the **EU provides an omnibus legal framework** concerning the protection of data in both public and private sector / the **US provides a rather fragmented legal framework** on both federal and state levels
- **EU: personal data may only be processed pursuant to a legal basis**, in other words: the processing of personal data is prohibited unless it is permitted by law / **US: the processing of personal data is allowed unless it is prohibited**
- the main tool to address information privacy concerns **in Europe is the law**, enforced by independent data protection authorities / the **US relies mostly on self-regulation, market mechanisms and consumer choice**

value of transatlantic data flows: the stakes are high

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- **the United States and the EU remain each other's largest trade and investment partners**
- **in 2013, total US-EU trade in goods and services amounted to $1 trillion and U.S. FDI in EU totaled $2.4 trillion (or about 56%) of total US direct investment abroad. Conversely, EU companies accounted for $1.7 trillion (or about 62%) of direct investment in the United States**
- **according to a 2014 study, cross-border data flows between the United States and Europe are the highest in the world—almost double the data flows between the United States and Latin America and 50% higher than data flows between the United States and Asia**

- **the US and the EU are the two largest net exporters of digital goods and services to the rest of the world; in 2012, the United States' $151 billion trade surplus in digital services was surpassed only by the EU's $168 billion surplus**

interfacing privacy and trade: focus on PTAs

norms on digital trade: development since 2000

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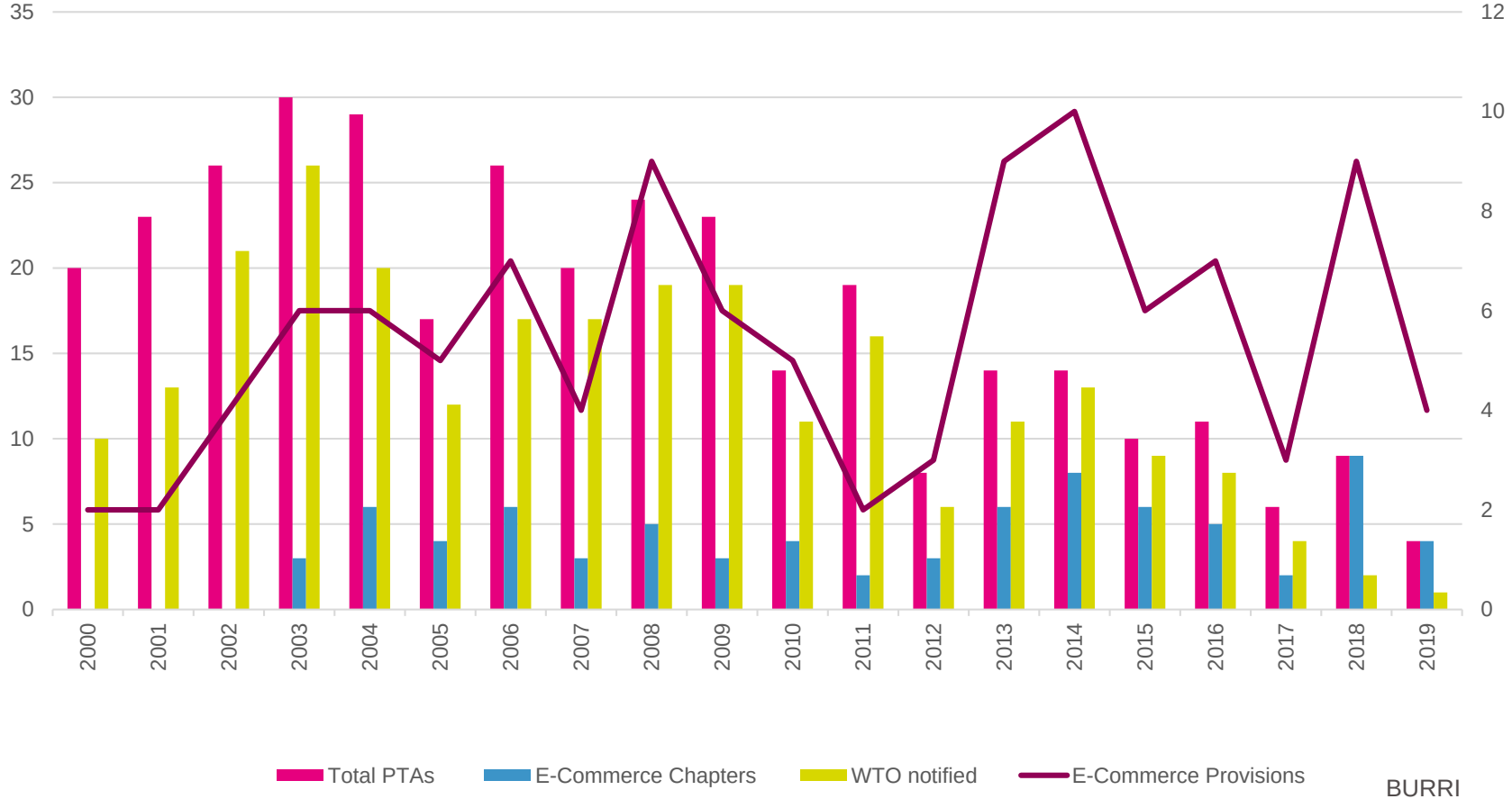

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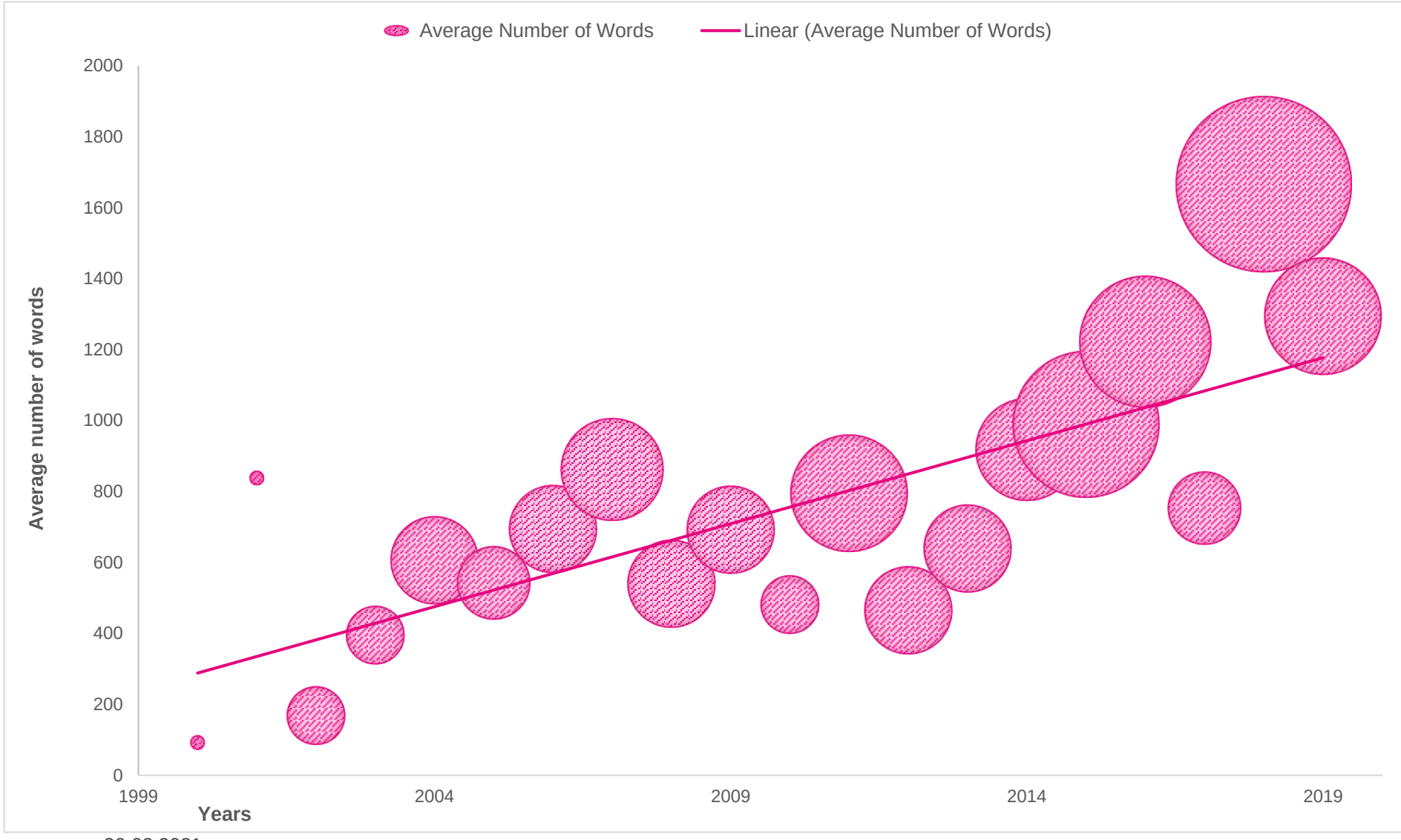
Average Number of Words
Linear (Average Number of Words)
Average number of words
2000
1800
1600
1400
1200
1000
800
600
400
200
0
1999
2004
2009
2014
2019
Years

new generation of dedicated agreements

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- **US – Japan Digital Trade Agreement (2019):** liberal provisions encompassing also financial and insurance services

- **Digital Economy Partnership Agreement between Chile, Singapore und New Zealand (2020) and Australia – Singapore DEA:** far-reaching norms e.g. on digital identities, AI

digital trade provisions in PTAs

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- **353 PTAs concluded between 2000 and June 2020**
- **188 PTAs include provisions that are related to digital trade**
- **83 PTAs have dedicated e-commerce chapters**
- **only 20+ agreements rules on data flows**
- **privacy protection has become a trade topic in particular in recent PTAs**

digital flows provisions in PTAs

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	Provisions on data flows in e-commerce chapters	Provisions on data localization
Soft commitments	17	1
Hard commitments	13	16
Total	30	17

what are data flows?

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- **no definition found in free trade agreements**
- most common language: ‘cross-border transfer of information by electronic means’ (USKOR; CPTPP)
- personal information explicitly included
- no distinction so far between data and big data

- **tendency towards a generic, all encompassing definition:**
  bits of information that are intrinsic to the provision of a product or a service but not necessarily identical with them

CPTPP: specific provisions on data flows

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- **explicit ban on data protectionism:** ‘Each Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person’
- **localization measures prohibited**
- **restrictions are permitted only for legitimate purposes** if they do not amount to ‘arbitrary or unjustifiable discrimination or a disguised restriction on trade’
- **policy space of domestic data protection regimes**

post-CPTPP developments

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- similar hard rules on data flows incorporated in other trade agreements, largely following the same wording:
- 2016 **Chile-Uruguay** FTA
- 2016 **updated Singapore-Australia** FTA (SAFTA)
- 2017 **Argentina-Chile FTA**
- 2018 **Singapore-Sri Lanka** FTA
- 2018 **Australia-Peru** FTA
- 2018 **United States-Mexico-Canada Agreement** (USMCA)
- 2019 **Brazil-Chile** FTA
- 2019 **Australia-Indonesia** FTA
- 2019 **Japan-US Digital Trade Agreement**
- 2020 **DEPA: Chile, New Zealand, Singapore**

USMCA (2018): art. 19.8: Personal Information Protection

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- Parties recognize the economic and social benefits of protecting the persona information of users of digital trade and the contribution that this makes to enhancing consumer confidence in digital trade.
- Each Party shall adopt or maintain a legal framework that provides for the protection of the personal information of the users of digital trade. In the development of its legal framework for the protection of personal information, each Party should take into account principles and guidelines of relevant international bodies, such as the APEC Privacy Framework and the OECD Recommendation of the Council concerning Guidelines governing the Protection of Privacy and Transborder Flows of Personal Data (2013).
- **A Party may comply with this obligation by adopting or maintaining measures such as a comprehensive privacy, personal information or personal data protection laws, sector-specific laws covering privacy, or laws that provide for the enforcement of voluntary undertakings by enterprises relating to privacy.**

USMCA (2018): art. 19.8: Personal Information Protection

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- **The Parties recognize that these key principles include: limitation on collection; choice; data quality; purpose specification; use limitation; security safeguards; transparency; individual participation; and accountability.**
- The Parties also recognize the importance of ensuring compliance with measures to protect personal information and ensuring that any restrictions on cross-border flows of personal information are necessary and proportionate to the risks presented.
- Each Party shall endeavor to adopt non-discriminatory practices in protecting users of digital trade from personal information protection violations occurring within its jurisdiction.
- Each Party shall publish information on the personal information protections it provides to users of digital trade, including how: (a) individuals can pursue remedies; and (b) business can comply with any legal requirements.
- **Parties may take different legal approaches to protecting personal information, each Party should encourage the development of mechanisms to promote compatibility between these different regimes.**

different approaches: US *vs.* EU

- **US:**
  - binding provisions on data flows
  - localization ban
  - low data protection standards

- **EU:**
  - slow and cautious reaction; GATS-like and cooperation norms on e-commerce
  - new: binding provisions on data flows
  - but paired with the high data protection standards of the GDPR; protection of personal data and privacy as a fundamental human right

repositioning of the EU on data flows commitments

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- earlier EU agreements (incl. CETA) contain essentially GATS-level commitments and cooperation provisions on e-commerce / no data flows language

- in the 2018 **EU-Japan Economic Partnership Agreement**, and in the Modernisation of the Trade part of the **EU-Mexico Global Agreement**, the Parties commit to 'reassess' within three years of the entry into force of the agreement, the need for inclusion of provisions on the free flow of data into the treaty

- the currently negotiated EU trade deals **(AU, NZ, Tunisia)** have data flows rules; **yet, coupled with the high standard of data protection under the EU GDPR** and including **a number of safeguards** (a revision clause plus a provision on the right to regulate)
- the EU model has been recently endorsed in the post-Brexit TCA with the UK

RCEP: rules on data flows

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- **ban on localization measures (art. 12.14) as well as a commitment to free data flows (art. 12.15)**
- **while the RCEP is almost a mirror image of the CPTPP, there are clarifications that give RCEP members a lot policy space:**
  - ‘For the purposes of this subparagraph, **the Parties affirm that the necessity behind the implementation of such legitimate public policy shall be decided by the implementing Party’** (footnote to art. 12.14.3(a))
  - **+** the article does not prevent a party from taking ‘**any measure that it considers necessary for the protection of its essential security interests. Such measures shall not be disputed by other Parties’** (art. 12.14.3(b))
  - **similar policy space protected with regard to data flows (art. 12.15)**

RCEP e-commerce chapter: evaluation

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- the RCEP's e-commerce chapter is built upon the CPTPP framework; yet, the **RCEP adds and removes language in order to give its members leeway to adopt restrictive measures to digital trade and data flows, should they wish to do so**

- **implication for the WTO:** if the JSI negotiations lead to an agreement, it is likely to resemble RCEP's chapter 12: **an agreement that is rather thin and does not do enough to promote cross-border data flows effectively; nor is future-oriented enough for the dynamic data-driven economy**
- FTAs remain as a venue to fill these gaps and move forward

concluding remarks

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- **privacy protection has become an important trade negotiation topic**
- **difficult balance act:** ‘We must insist on data protection without data protectionism. A better, safer Internet for everyone should not require breaking it apart’ (Chander and Le, 2015)
- **commitments in free trade agreements**: ban on data localization / free flow of information / conditional data flows
- **evolution of different models of interfacing privacy and trade**
- **need for enhanced international cooperation**

- thank you for the attention !
- mira.burri@unilu.ch