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Competition policy and agent discretion: transatlantic regulatory cooperation in the digital economy

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ABSTRACT

Despite a framework of bilateral agreements governing cooperation in competition policy since 1991, the European Union (EU) and United States of America (US) established a new Joint Technology Competition Policy Dialogue in 2021, which was different from previous cooperation and separate from the transatlantic Trade and Technology Council. Drawing from the principal-agent literature, this article argues that the choice to establish the new Joint Dialogue can be understood as an exercise of discretionary authority by agents in different jurisdictions with similar preferences who responded similarly to the common external factor of digitalisation. Facing new and shared challenges arising from the digital economy, the EU and US competition authorities undertook a new effort at cooperation – the Joint Dialogue – through which regulatory agents at various levels can interact, exchange information and improve enforcement in a rapidly changing business environment.

KEYWORDS

Competition policy; EU-US relations; principal-agent; digital economy

Introduction

The transatlantic market between the European Union (EU) and United States of America (US) remains a significant hub of commercial activity in the global economy (Hamilton and Quinlan 2024), accounting for a quarter of global trade and nearly half of global gross domestic product (White House 2022). However, as digitalisation of the market increases, so too may economic and political tensions arise between these two ‘regulatory great powers’ (Young 2024a). These tensions may be down to regulatory differences, such as incompatible or conflicting approaches across different sectors (Beaumier, Heering, and Newman 2024; Young 2024b) or the broader pressures of geopoliticisation (Herranz Surrallés, Damro, and Eckert 2024). In the area of competition policy, these regulatory differences may also be based in and exacerbated by broader ideational and institutional variation between the two systems (Ergen and Kohl 2022; Foster 2022; Foster and Thelen 2023). Such differences and the tensions that arise from them may even lead to resentment and mistrust among businesses and political leaders (Bradford 2023), contributing to a transatlantic environment characterised by increasing regulatory competition and conflict.

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Despite this context of ideational and institutional variation and economic and political tension, the EU and US met in June 2021, to announce the establishment of a new Trade and Technology Council (TTC) for partnership in the digital age and to negotiate various issues across ten Working Groups (see also Birchfield 2024; Shahin 2024). The Summit statement also noted that the EU and US ‘intend to establish’ a Joint Technology Competition Policy Dialogue (White House 2021). These cooperative efforts formally began with the TTC officially launching in September 2021, and the Joint Dialogue on competition policy launching separately and ‘in parallel’ in December 2021 (Joint Dialogue 2021).

Why the EU and US decided to create a *new* and *separate* Joint Dialogue specific to competition policy presents a puzzle. The decision to pursue this new effort at cooperation is surprising because the EU and US had two viable alternatives through which they could pursue a joint competition agenda. In addition to negotiating through the TTC, they could have decided to rely on an existing series of bilateral competition agreements that had already provided a framework for cooperation since 1991. Despite these two alternatives, why did the EU and US decide a new Joint Dialogue was necessary for competition policy? In this sense, the primary focus of the analysis is why this particular effort at cooperation – the Joint Dialogue – was chosen, not its outcomes, which are still at too early a stage to assess with rigour and dependability.

To understand this development, we must look beyond the institutional and ideational differences and the economic and political tensions in transatlantic relations to investigate actors and incentives that *do* exist for pursuing new efforts at cooperation. Therefore, we need to consider the views of US and EU actors who are not political leaders or the business community but who nevertheless play an important role in transatlantic competition relations. In particular, we need to look at the preferences and actions of the US and EU regulatory authorities responsible for implementing competition policy.

Given the central role played by these regulators, as agents to whom competition authority has been delegated, insights from the Principal-Agent Model (PAM) of delegation and agency can help to clarify the regulatory dynamics at play. This article is particularly interested in the post-delegation aspects of agent behaviour that explain why regulatory authorities behave the way they do. As such, the article is less about political principals establishing and/or aligning rules – which has received attention elsewhere (Cini and Czulno 2022; Foster 2022) – and more about regulators discussing the interpretation and implementation of rules in similar ways. Combining PAM insights and empirical analysis to understand agent preferences, the article explores factors in the broader external context that may influence agents’ discretionary behaviour in competition policy and help to determine the extent to which EU-US relations are cooperative or conflictual.

Drawing from primary and secondary sources, the article employs a qualitative analysis of transatlantic relations in competition policy. The primary sources include formal EU-US agreements and public statements by regulatory agents on both sides of the Atlantic. The statements are collected from the regulatory leads of the EU Directorate-General Competition, US Department of Justice’s Antitrust Division and US Federal Trade Commission. Assessing evidence from all three competition regulators provides a comprehensive analysis of the different viewpoints and generates comparative insights on the similarity of EU and US preferences. Such statements from regulatory leads are also

insightful because, while publicly available, they are typically delivered to audiences of competition practitioners. They are, in effect, position signalling to other competition officials, both across the Atlantic and within their own jurisdictions.

Contributing to the PAM literature, the article finds that digitalization of the economy is a crucial conditioning factor in the broader external context that poses significant and similar challenges to the enforcement activity of EU and US competition authorities. In short, digitalization of the economy makes the goals of competition policy more difficult to achieve. To complement the existing bilateral agreements, a new effort at discretionary cooperation was undertaken to address the intensity of changing market realities – in terms of scale, scope and speed – associated with digitalisation. If left unaddressed, these challenges would reduce the ability of competition authorities to protect consumers and competition and, in turn, increase the likelihood of political intervention in their activity. In addition to digitalisation, the increasing institutional compatibility of EU and US competition policies helped to create the right moment in 2021 for the establishment of the Joint Dialogue. Notably, the analysis below of primary sources finds no evidence that geopolitical considerations – such as the increasing technology competition between China and the West that are evident in other policy areas covered in contributions to the special issue (Birchfield 2024; Brown 2024; Fahey 2024; Shahin 2024; Young 2024a) – contributed directly to the decision to establish the Joint Dialogue.

Through this new effort at discretionary cooperation, regulatory agents at various levels interact, exchange information and improve enforcement in a rapidly changing business environment. Such findings suggest that regulatory agents play an important role in mitigating EU-US regulatory differences and, ultimately, in making transatlantic relations more cooperative than conflictual. This article thus highlights an additional form of transatlantic cooperation that complements the other contributions to the special issue, which focus on efforts to reconcile differences in the rules themselves (e.g., Beaumier, Heering, and Newman 2024; Young 2024b).

The article proceeds in the following manner. The next section discusses the PAM literature and the ways in which it helps us understand agent behaviour in transatlantic competition relations. The article then explores the political and economic tensions and notes the regulatory differences that exist in transatlantic relations, especially relating to competition policy, as well as the bilateral framework of competition agreements that agents developed since 1991 through their discretionary authority. The article then turns to an empirical analysis of the establishment of the Joint Dialogue, highlighting the discretionary nature of the undertaking. The next section provides an empirical analysis to reveal the ways in which digitalisation challenges competition enforcement and agent preferences and behaviour. The article then analyses public statements from competition authorities to assess the agents' preferred response to digitalisation, in particular noting the role played by the intensity of changes and the increasing institutional compatibility of EU and US competition policies. The final section of the article summarises the findings.

Principal-agent model and competition policy

This article employs the logic of the Principal-Agent Model (PAM) to understand the regulatory relations underlying the EU-US decision to pursue a new effort at cooperation in competition policy. The turn toward PAM is a crucial starting point because, unlike the

Trade and Technology Council, the Joint Dialogue was established by the leads of EU and US competition authorities (i.e., agents), and subsequent negotiations are driven by the competition authorities, not political principals. As such, the insights from PAM help to reveal important dynamics beyond the tensions and differences that often inform depictions of transatlantic regulatory competition and conflict.

PAM provides a useful simplification of regulatory politics that focuses on the actors (principals and agents) involved in transatlantic regulatory relations. In this sense, it can be seen as a 'heuristic tool that helps to identify the key factors for understanding and explaining the politics of delegation and discretion' (Delreux and Adriaensen 2017, 3). The domestic institutional context – in particular, the statutes delegating authority to agents and the associated control mechanisms available to political principals – then helps to inform the roles played by these actors (Moe 1984).¹ But it is important to highlight that this article is less interested in questions related to the initial delegation or exercise of principal control instruments and more interested in the subsequent agency and discretionary authority – as well as the potential role of external factors – that helps to explain why agents behave the way they do, in the context of transatlantic competition negotiations.

According to PAM, political principals delegate regulatory authority on a contractual basis to un-elected agents. After delegating this authority, the elected political principals must ensure that the regulatory agents will continue to act in accordance with the principals' interest. Agents, however, can use certain advantages, such as inherent information asymmetries and greater technical expertise (Majone 1996, 72), to produce policy outputs that conform to their own interests and preferences instead of those of the principals. Political authorities must, therefore, rely on control instruments that are embedded in domestic institutional arrangements (McCubbins and Page 1987).²

Under these circumstances, principals provide agents the authority to engage in certain activities at their own discretion, which allows regulatory agencies to fill the gaps in policy implementation that are left when political principals draft broad legislation (Epstein and O'Halloran 1999, 51). In the area of EU-US competition relations, this policy implementation typically includes agents using their discretionary authority to investigate anti-competitive activity that arises from cartels, mergers and abuse of dominance (i.e., monopolies).³ These agents, therefore, are able to cooperate in policy implementation and *ex post* enforcement, such as merger and abuse of dominance investigations (Cini and Czulno 2022).

In both the EU and US, the discretionary authority of competition agents is relatively broad (e.g., exclusive competence in EU). While there is 'no consensual definition in the literature of discretion or autonomy ...' a useful definition of discretion is 'the leeway enjoyed by the agent in the execution of the delegated task' (Delreux and Adriaensen 2017, 6). Given such an arrangement, PAM envisages a constant struggle between principals (aided by their control instruments) and agents (employing their discretionary authority) for influence over regulatory outputs.

If agents are able to use their discretionary authority to pursue their own preferences, then it is important to understand what their preferences are in competition policy. In short, the basic and ultimate goal of EU and US competition authorities is complementary – they both seek to protect consumers and competition in their relevant markets.⁴ To pursue this goal, competition agents prefer avoiding political intervention by principals

who may have other goals that are related to non-competition objectives, such as electoral benefits or competitive advantage for firms in their constituency (Damro 2006). Such political interventions raise the prospect that individual competition decisions may become politicised and linked to non-competition issues that agents see as being outside the scope of competition analysis.

EU and US competition authorities, therefore, prefer avoiding political principals intervening with control instruments in individual competition cases, especially those cases that span multiple jurisdictions and could lead to economic and political tensions and conflicts. Rather, they would likely seek to use their discretionary authority to develop cooperative frameworks that increase regulatory cooperation and the likelihood that they reach compatible decisions that satisfy their preferences (i.e., protecting consumers and competition) and decrease the likelihood of political intervention via principal control instruments.

But why would the EU and US agents decide to use their discretionary authority to pursue a *new* effort at cooperation in competition policy *at this time*? Here the role of external contextual factors – which have traditionally been outside PAM's focus on domestic institutional contexts – may play a role. As Delreux and Adriaensen argue, perhaps the strategic behaviour of agents and their 'discretion is not completely determined by the principal but is also affected by the broader context' (Delreux and Adriaensen 2017, 9). If so, agents could shape their response to the changed broader context in a way that is consistent with their preferences. Therefore, the empirical analysis below takes seriously changes in the behaviour of agents as well as changes in the broader context – including those related to the digitalisation of the economy – that may help to explain the 2021 EU-US decision to undertake a new effort at cooperation for competition policy.

It is worth pointing out that in addition to digitalization of the economy, such broader external contextual factors may include geopolitical developments (Herranz Surrallés, Damro, and Eckert 2024; Young 2024a). When such developments are related to market competition, they may, at least indirectly, affect the behaviour of competition authorities. But the PAM framework suggests that competition agents would likely be reluctant to include such non-competition issues directly in their cooperation because doing so would increase the likelihood of politicisation in their competition analysis and, therefore, the likelihood of intervention by political principals in their discretionary implementation of competition rules. In addition, if geopolitical developments were an important factor driving this cooperation, the political principals would likely seek more involvement in the decision-making processes by, for example, including the Joint Dialogue in the Trade and Technology Council.

Tensions and benefits in transatlantic competition policy

Transatlantic relations in competition policy have not been perfectly harmonious and, with the dawn of the digital age, the relationship has been tested by new developments and political responses to digitalisation. For example, as Bradford notes, 'the reason for the friction is that the battle lines in antitrust regulation have been highly asymmetrical: US companies dominate the European market across almost all aspects of digital services while European regulators repeatedly challenge these companies' alleged abuse of their

dominant position’ (2023, 242). Such European challenges in individual competition cases can help generate very real political tensions in today’s digital economy.

Likewise, these tensions may also be embedded in a longer history that includes regulatory differences arising from institutional and ideational variation between the EU and US systems. For example, Foster (2022) has identified differences between the US *laissez-faire* jurisprudential regime and the EU ordoliberalism jurisprudential regime, which also helps to highlight the role of ideas and variation in administrative systems as conditioning factors in transatlantic competition relations (Foster and Thelen 2023). For Bradford, such differences may be understood as a US approach that focuses on the market versus a European approach that focuses on the individual (Young 2024a), or a European ‘rights-based model’ versus an American regulatory ‘market-driven model’ that has resulted in the US taking a more *laissez-faire* approach to digital firms for the ‘past half a century or so’ (Bradford 2023, 244).⁵ As a result, there may be concerns and a ‘prevailing sentiment among the US political leadership and the business community’ that EU competition policy is being used for protectionist measures, which ‘has deepened the broader US-EU regulatory conflict, fuelling resentment and mistrust between the parties while complicating the pursuit of a joint transatlantic digital policy agenda’ (Bradford 2023, 246).

While EU sentiments may be influenced by digital competition policy measures undertaken by the US, both in terms of litigation and proposed and adopted new policies, US perceptions of protectionism may be linked to EU actions on industrial policy (McNamara 2023), ambitions to assert its ‘digital sovereignty’ (Birchfield 2024; Adler-Nissen and Eggeling 2024; Heidebrecht 2024) or the pursuit of new competition enforcement powers through initiatives like the 2022 Digital Markets Act (Bradford 2023, 244) or the draft 2022 Horizontal Block Exemption Regulations. Developments such as the Digital Markets Act (DMA) may even be seen as a significant shift in EU competition policy from *ex post* enforcement to an *ex ante* regulatory approach (Cini and Czulno 2022). For example, the European Commission has designated ‘gatekeepers’ that must ensure full compliance with DMA obligations because they ‘provide an important gateway between businesses and consumers in relation to core platform services’ (European Commission 2023b).⁶ The function of the new legislation was recently seen in action when the European Commission’s preliminary finding in June 2024 indicated that Apple was in breach of the DMA due to its App Store rules preventing other ‘app developers from freely steering consumers to alternative channels for offers and content’ as well as the opening of a new non-compliance procedure over Apple’s contractual requirements for third-party app developers and app stores (European Commission 2024). However, despite these potential challenges to US business activity, it is striking that US competition authorities do not identify the DMA as a problem or obstacle to cooperation. Rather, to the extent that the DMA matters for transatlantic cooperation, they view it as a positive reason to increase cooperation in the digital age (Kanter 2022c; Khan 2022a).⁷

While recent policy responses in the US and EU to the implications of digitalisation for competition policy and the interpenetration of the transatlantic economy provide reasons for competition officials on both sides of the Atlantic to want to cooperate, their decision to create a new effort at cooperation – the Joint Dialogue – is a puzzle as two plausible alternatives existed. First, there was already a long-established framework for cooperation on competition policy (see Table 1). Second, the EU and US had launched a new

Table 1. Framework of transatlantic cooperation in competition policy.

Year	Agreement	Content
1991	Competition Cooperation Agreement	Reciprocal notifications, information exchanges, bilateral meetings, coordination of enforcement, requests for enforcement action
1998	Positive Comity Agreement	Clarification of requests for enforcement action
1999	Administrative Arrangements on Attendance	Clarification of procedures for attending investigations in individual competition cases
2002 (updated and revised in 2011)	Best Practices on Cooperation in Merger Investigations	Advisory framework for interagency cooperation in individual merger cases

Source: Author's own.

cooperative framework intended to address issues associated with the digitalization of the economy, the Trade and Technology Council. To begin understanding this decision and the behaviour of the competition authorities, we first need to investigate the historical background and potential benefits of transatlantic cooperation in competition policy that existed before the establishment of the Joint Dialogue in 2021.

EU-US cooperation in competition policy has developed through a framework of bilateral agreements that can be traced from 1991. As noted in [Table 1](#), the framework started with the EU-US Competition Cooperation Agreement and continued through successive agreements to increase information exchanges and improve enforcement activity at various levels. Notably, these bilateral agreements have been pursued under the discretionary authority of the EU and US competition authorities. Such an approach conforms to the PAM expectation that agents will use their discretionary authority to avoid political intervention and control instruments.

Crucial to understanding the importance of this established transatlantic cooperation is the significant benefit both EU and US competition agents have reported from the bilateral framework. For example, the benefits that follow from this series of bilateral agreements is summarised in the (Joint Dialogue's [2021](#)) launch statement, which asserts that the EU and US competition agents 'have a longstanding tradition of close cooperation in antitrust enforcement and policy ... In 2011, the three agencies reaffirmed their strong commitment to this mutually beneficial cooperative relationship by adopting joint Best Practices on Merger Cooperation' (Joint Dialogue [2021](#)).

These close contacts and the information sharing among regulatory agents are beneficial in individual competition cases. For example, Makan Delrahim, who served as US Department of Justice Assistant Attorney General during the 2017–21 Trump Administration, notes that this case cooperation helps to ensure 'strong relationships' among staff in the different competition authorities, which is important because 'Assistant Attorneys General and Commissioners for Competition may come and go, but lasting bonds formed at the staff level between our International Section and the International Relations Unit of DG Competition are vital to ensuring that the culture of cooperation continues' (Delrahim [2018](#)). Such a culture of cooperation can help to ensure that ideas and policies on one side of the Atlantic inform developments and are taken into consideration on the other side.

The transatlantic cooperative framework is also an important basis for improving relations through formal visiting staff exchanges. The US's Delrahim makes clear the benefits that have followed from such EU-US staff-level cooperation, noting that the

Antitrust Division's Director of Civil Enforcement 'spent two weeks at DG Competition in 2013, and described her experience as "extraordinary." As she pointed out, "these kinds of exchanges make later cooperation easier because, in antitrust, as well as in many other fields, relationships matter. This face-to-face interaction helps build *trust and understanding*, both of which are key to successful cooperation [*italics added*] (Delrahim 2018).

Because this practical cooperation is focused on staff-level interactions, it remains within the agents' discretionary authority. But what is perhaps most striking about this staff-level cooperation is that it contributes to the development of 'trust and understanding' among EU and US competition authorities. This benefit of close cooperation among competition authorities (i.e., agents) stands in contrast to general depictions of resentment and mistrust existing among political leaders (i.e., principals) and business in transatlantic relations as well as the obstacles associated with broader ideational and institutional regulatory differences in the EU and US systems.

The joint dialogue – an exercise in discretion

As outlined in the previous section, the EU and US competition authorities have created a cooperative framework of bilateral agreements that provides a formal basis through which to pursue their discretionary cooperation. This cooperation beneficially increased interactions among the agents and focused on information exchanges and competition enforcement activities at multiple levels, including staff levels. However, to understand the reasons why the new Joint Dialogue was initiated, it is useful first to consider the actions of the political principals in 2021.

The Trade and Technology Council (TTC) was launched at the EU-US Summit on 15 June 2021, by the political principals US President Joe Biden and European Commission President Ursula von der Leyen, with the inaugural meeting convened on 29 September 2021. The TTC has an ambitious agenda to address various aspects – across multiple policy areas – of transatlantic cooperation in digital markets. This agenda is managed and implemented through ten Working Groups, which cover issues such as standards (Shahin 2024), climate/energy, artificial intelligence (Birchfield 2024), semiconductors, export controls and investment. Notably, the TTC's agenda does not include a Working Group with the explicit remit of competition policy. In fact, the TTC's inaugural joint statement of September 2021 only mentions the term 'competition' once, and that was in Working Group 5 (Data Governance and Technology Platforms) to the need to 'ensure effective competition and contestable markets', not a direct reference to a competition policy work agenda.

Instead, two months after the TTC's inaugural meeting, the EU and US competition authorities launched a separate Joint Technology Competition Policy Dialogue on 7 December 2021, in Washington, DC. While the TTC is clearly a high-level political initiative launched by EU and US political leads (US President and European Commission President), the Joint Dialogue was launched by regulatory leads of the three EU and US competition agencies: Executive Vice President Margrethe Vestager of the European Commission, Lina Khan of the US Federal Trade Commission, and Assistant Attorney General Jonathan Kanter of the US Department of Justice Antitrust Division.⁸

This Joint Dialogue has a clear and exclusive focus on competition policy. Notably, the EU-US statement on the Joint Dialogue points out that 'The cooperation and exchanges

within the Joint Dialogue are intended to occur *in parallel* with other forms of cooperation and exchanges between the European Union and the United States on various digital policies and legislation, including within the context of the EU-U.S. Trade and Technology Council' (italics added) (Joint Dialogue 2021, 2). By running in parallel with the TTC, the Joint Dialogue remains focused on competition issues and conducted under the discretionary authority of the competition agents.⁹

The EU-US statement on the Joint Dialogue also makes clear that the initiative respects the limits of the agents' discretionary authority, stating explicitly that 'The cooperation and exchanges within the Joint Dialogue are of a legally non-binding nature and without prejudice to the regulatory and law enforcement autonomy of the European Union and the United States, their respective domestic legal frameworks, and the EU-U.S. Agreement on the application of their competition laws' (Joint Dialogue 2021, 2). Without such clear stipulations, the activities taking place in the Joint Dialogue could fall outside the agent mandate and provoke principal interventions. Cooperation through the Joint Dialogue, therefore, is designed to respect the legal mandates established by political principals, under which EU and US competition authorities conduct their competition enforcement and are legally obligated to, for example, review mergers or cartels in their respective jurisdictions.

Agent preferences and the challenge of digitalisation

The beneficial historical relationship between EU and US competition authorities has helped ensure stable agent preferences over time for continued discretionary cooperation. But this does not necessarily tell us the whole story of why these competition agents would prefer to undertake a new effort at cooperation (i.e., the Joint Dialogue) instead of relying on the previous series of bilateral agreements. If transatlantic cooperation is already so beneficial in competition policy, why was a new effort at cooperation needed? Perhaps there are new conditioning factors in the broader context that, while not anticipated by traditional PAM analyses, still challenged competition authorities and prompted the decision to establish the Joint Dialogue.

Based on evidence from all three competition authorities, the most pressing factor is found in the broader context and conditions both competition agents' views and behaviour: the digitalisation of the economy. As noted below, changes associated with digitalisation challenge in many ways the traditional thinking about markets and analysing different types of anti-competitive behaviour.¹⁰ The impact of digitalisation – including the emergence of digital platforms and the need to protect consumers' personal data from abusive uses (Cayla 2022) – is so acute that competition authorities find it increasingly difficult to pursue their goal of protecting consumers and competition. Indeed, as the US DoJ's Delrahim noted, digitalisation now means that the shared preference of competition authorities is 'protecting consumers and competition during an era of rapid technological change' (2018). Therefore, in PAM terms, digitalisation presents a fundamental challenge to the ability of agents to pursue their preferences. If the challenges of digitalisation undermine the ability of competition agents to protect consumers and competition, then they also, in turn, increase the likelihood of political intervention by principals attempting to remedy what may be seen as a regulatory failure.

As a conditioning factor in the broader external context, digitalisation should have a similar effect on competition authorities in the US and EU jurisdictions. It is, therefore, useful to scrutinise the views of the leads of all three competition authorities regarding the challenges of digitalisation for competition policy.

First, the US FTC's Lina Khan noted the important and challenging role of digitalisation when she argued, '... the digital revolution has caused our threat landscape to evolve constantly. A key challenge is making sure our consumer protection efforts keep up with the pace of technological change' (2022b). Elaborating the various ways in which digital technologies can change market realities, she added, 'While dominant networks are not new, several aspects of the digital economy have altered certain core capabilities and incentives,' including minimal marginal costs, network effects and high barriers to entry, data feedback loops and platform surveillance techniques (2022c).

Second, from the perspective of the US DoJ, Jonathan Kanter, expressed similar concerns for his agency over the new challenges of digitalisation, stating that, 'The digital age is not only characterized by the presence of monopoly power, but by new means of its exploitation more threatening to individual freedom than ever before' (Kanter 2022c). Such changing market realities present a direct challenge to the ability of competition authorities to protect consumers and ensure competition. As Kanter elaborates, 'Today, citizens have too little choice in many digital markets. Citizens have too little choice where they get their information, or who takes and uses their personal data. They have too little choice which algorithm will decide what news is promoted across the culture. They have too little choice how to interact with their social network online. This threatens democracy and puts at risk economic progress and prosperity. It stifles open markets and competition' (Kanter 2022a).

Third, on the other side of the Atlantic, the EU's Margrethe Vestager similarly noted the challenges that arise from the digitalisation of markets when she stated that, 'In the last few years, our economies have gone through deep changes, which raise difficult questions for competition authorities. The digital economy has created new gatekeepers, with power not just in their own markets, but throughout the economy' (2021). Vestager elaborated the challenges for competition enforcement that arise from digitalisation of market: 'The role played by data is in some ways unique because it allows for zero-pricing models, and it allows conglomerates to jet-propel their reach, using consumer data as their fuel' (2022).

As the preceding views show, the three competition authorities share similar concerns related to the changing market realities that arise from digitalisation. Without finding ways to address these new challenges, regulatory agents would find it increasingly difficult to pursue their preferences for protecting consumers and competition.

Agent preferences and the response to digitalisation

While the three competition authorities clearly agree that digitalisation presents significant and new challenges, it is still unclear why exactly the Joint Dialogue was agreed in 2021, instead of relying on the existing framework of bilateral agreements. To understand this decision, this section investigates public statements from all three competition authorities regarding their preferred response to the challenges of digitalisation and

their views regarding the reasons why the Joint Dialogue was needed and appropriate at this time.

The market changes caused by digitalisation are intense, which creates direct challenges for competition authorities trying to protect consumers and ensure competition. This intensity can be understood in terms of the scale, scope and speed of digitalisation. First, regarding the changes in *scale*, digitalisation affects markets across the economy, not just technology markets. As the US's Kanter noted, 'Times have changed because the advent of the digital economy has transformed industry. The digital revolution has not only impacted new markets like tech, but markets across our economy' (Kanter 2022b; see also Vestager 2021). Second, digitalisation affects the *scope* of business activity in that it does not respect national regulatory boundaries. Because digital firms and services are not geographically limited to single national markets, digital business activity increasingly crosses and includes multiple jurisdictions. Third, the *speed* of digitalisation refers to the newness and rapidity of technological change. Regarding the newness, for example, Kanter argued that 'The digital economy has enabled monopoly power of a nature and degree not seen in a century ...' (Kanter 2022c). This means new products, services and markets develop and need to be addressed by competition policy. In addition, regarding the rapidity of change and its link to cooperation, Vestager argued that 'When markets move fast, cooperation across borders becomes more necessary than ever' (2022). In short, the intensity of digitalisation required an intensification of cooperation through which competition authorities could increase their ability to discuss and respond to changing market realities. This change in cooperation was pursued through the Joint Dialogue as a new way for the competition authorities to *specifically* and *intensively* address the challenges of digitalisation.

In addition, this new effort at cooperation was enabled by an environment among regulators – despite institutional and ideational variation and quite unlike depictions of general transatlantic political and economic tensions – in which EU and US competition authorities viewed competition policies as becoming more compatible (Young 2024a). This increasing compatibility can be traced at least to the early 2000s, when institutional developments brought EU and US competition policies closer together and thus enabled closer cooperation. For example, according to the US's Delrahim, the actual cooperation is facilitated by important institutional developments that reflect US arrangements, such as DG Competition's independent Chief Economists Office, enforcement procedures, cartel leniency programme and settlement procedures and the EU's Damages Directive (Delrahim 2018).

Despite the broader domestic institutional differences between the EU and US systems (Foster 2022), these reductions in the institutional gaps were important developments for transatlantic competition relations because they would help reduce the likelihood of incompatible or conflicting decisions in individual competition cases. Such developments also helped advance EU-US cooperation and contributed to building trust and understanding among EU and US competition authorities (Delrahim 2018). As such, transatlantic competition relations had matured to a point that competition authorities were ready for closer regulatory cooperation that could respond to the challenge of digitalisation. The EU's Vestager echoed the view, noting the 'growing convergence between our policies and rules' encouraged her belief that 'now is the time to cooperate even more closely than we've done before' (Vestager 2021). Elaborating further, Vestager argued that 'to

grasp this moment,' the EU and US need make use of existing types of high-level and staff-level cooperation while also signalling that there is 'room for new forms of cooperation, to help us tackle new challenges – especially the challenges of the digital economy' (Vestager 2021).

The Joint Dialogue is, therefore, seen as an opportunity for closer relations based on existing and potentially new forms of cooperation. It does not replace the existing framework for cooperation that was established by the previous bilateral agreements. Rather, it creates a discretionary 'dialogue' through which competition authorities can engage in discussions that focus specifically and intensively on competition policy and digitalisation.

These views have been subsequently and consistently reaffirmed publicly by the leads of the regulatory agencies, especially via the three high-level meetings that have been held in the context of the Joint Dialogue from 2021–2023. At the first high-level meeting, in Washington, DC, in December 2021, the leads of the three competition authorities met and issued a Joint Inaugural Statement, which makes clear that digitalisation is driving these new efforts at cooperation (Joint Dialogue 2021). Outlining their approach to the transformed economic landscape of digitalisation, the competition authorities agreed that the cooperation will 'explore new ways to facilitate coordination and knowledge and information exchanges to ensure that enforcement authorities are sufficiently equipped to address new challenges together'. Notably, the competition authorities also share a view that the close cooperation undertaken via the Joint Dialogue holds the potential to increase further the compatibility of approaches and enforcement.

The second high-level meeting of the Joint Dialogue in Brussels in October 2022, was again convened by the leads of the three competition authorities. In public comments, the EU's Vestager noted that closer cooperation was needed in the 'fast evolving technology sector' (European Commission 2022). Likewise, the FTC's Khan noted the importance of deepening partnership and exchanging insights in order to 'ensure that our enforcement practices and policies reflect modern market realities' (European Commission 2022). Finally, the DoJ's Kanter added that the European Commission was 'an invaluable partner as the Antitrust Division advances its understanding of the market realities and competition challenges presented by digital markets' (European Commission 2022). In addition to the high-level meeting among the regulatory leads, 'several technical meetings' of staff-level contacts took place during 2022 to discuss 'various topics covering both merger and antitrust matters' (European Commission 2022).

The third high-level meeting in Washington, DC in March 2023, was again convened by Vestager, Khan and Kanter. The regulatory leads each commented on the benefits of and reasons for these new and valuable efforts at cooperation. Similar to the previous high-level meetings, all three leads commented on the need for the EU and US to remain committed to deepening discretionary cooperation in order to address the intense challenges of fast-moving digitalisation specifically for competition policy (European Commission 2023a).

Based on the evidence above, the competition authorities share similar views and have clearly undertaken these new efforts at discretionary cooperation in response to the challenges of digitalisation. The intensity of this digitalisation, coupled with increasing institutional compatibility of competition policies, created the right moment in 2021 for the advancement of transatlantic cooperation via the

Joint Dialogue. Because this new effort at cooperation is separate from the Trade and Technology Council, it operates as a discretionary initiative that reduces the likelihood of politicisation in favour of focusing on competition issues and objectives. The Joint Dialogue also builds on the existing framework of bilateral cooperation to increase contacts and information exchanges – at multiple levels, including regular high-level summit meetings and staff-level contacts – allowing the agents to discuss new and common approaches to changing business activity in the digital markets.

Conclusions

This article has sought to explain why the EU and US decided a new Joint Dialogue on competition policy separate both from existing transatlantic cooperation on competition policy and from the new TTC was needed in 2021. The decision to pursue this new effort at cooperation is surprising, given existing depictions of transatlantic relations as characterised by political and economic tensions and embedded in ideational and institutional differences that may contribute to regulatory conflict and competition. The analysis, therefore, focuses on why this particular effort at cooperation – the Joint Dialogue – was chosen, not its outcomes, which are at too early a stage and present a separate question that is beyond the scope of this article.

To understand this decision, the article looked beyond the political and economic tensions and the domestic contextual factors to investigate the preferences and actions of those actors who are actually pursuing cooperation in transatlantic competition relations: the regulatory authorities. Given the central role of competition regulators as agents, the article employed insights from the Principal-Agent Model to highlight factors in the broader context that influence agent behaviour and to evaluate the extent to which EU-US relations in this policy area are cooperative or conflictual (Young 2024a).

In contrast to other contributions in this special issue that look at rule differences resulting from political decisions, the use of PAM in this article helps to focus the analysis on agent behaviour (i.e., discretionary cooperation) instead of questions related to EU and US political principals developing new competition rules that may converge or diverge. While the political principals are not central to the analysis in this article, it is worth watching for future changes in their relevant domestic contexts. For example, elections and other political changes on either side of the Atlantic could have important implications for the extent to which principals develop new legislation or exercise control instruments and the subsequent extent to which agents can continue advancing their discretionary cooperation. Similarly, geopolitical changes in the external context could affect the behaviour of competition agents in the future, especially if such developments prompt political principals to change the agents' legal mandate to consider non-competition issues more directly in their implementation of competition rules. Again, in contrast to other contributions in this special issue (Birchfield 2024; Brown 2024; Fahey 2024; Shahin 2024; Young 2024a), the analysis in this article is noteworthy in that none of the primary source evidence on the Joint Dialogue mentions the challenge of geopolitization as the reason why the regulatory authorities decided to pursue this new effort at cooperation.

Informed by the PAM logic, the three EU and US competition authorities generally share a preference to protect consumers and competition and, in turn, decrease the likelihood of political intervention via principal control instruments. To satisfy these preferences, the competition agents agreed the Joint Dialogue under their discretionary authority. Importantly, competition policy remains a separate but parallel policy area in transatlantic negotiations that is not included with the other policy areas being directed by the political principals in the TTC.

But what then explains why the EU and US competition authorities decided to undertake new efforts at cooperation at this time? The analysis shows that the most important conditioning factor is an external factor that is not typically found in the PAM literature: digitalisation, which similarly affects the competition agents on both sides of the Atlantic. Digitalisation of the economy – particularly its intensity in terms of the scale, scope and speed of changing market realities – challenges traditional ways of thinking about markets and enforcing competition. While alternative forms of cooperation under the existing bilateral agreements were not fatally flawed, the competition authorities agreed a new effort at discretionary cooperation through which they could specifically and intensively address the new challenges of digitalisation. In addition, when the pressures of digitalisation were coupled with the increasing institutional compatibility of EU and US competition policies, the moment became right for advancing cooperation through a new Joint Dialogue.

In conclusion, EU and US competition agents with complementary preferences overcame transatlantic tensions and differences by engaging in discretionary behaviour that responded to the challenges of digitalisation by undertaking a new effort at cooperation specific to competition policy, the Joint Dialogue. Through this new effort at cooperation, competition agents at various levels – including high-level and staff-level – are able to interact, exchange information and improve enforcement in a rapidly changing business environment. The Joint Dialogue, therefore, increases their ability to pursue the goal of protecting consumers and competition which, in turn, reduces the likelihood of political intervention. Such findings contribute to an understanding of regulators as central actors that can mitigate the implications of regulatory differences and reveals the potential for transatlantic regulatory relations to be more cooperative than conflictual and competitive.

Notes

1. The domestic institutional context can also include the broader ideational and institutional variation between the EU and US systems (Ergen and Kohl 2022; Foster 2022; Foster and Thelen 2023).
2. For different categorizations of control instruments, see Delreux and Adriaensen (2017), Pollack (2003) and Epstein and O'Halloran (1999).
3. Note that the term 'competition policy' covers US antitrust policy. In the European Union, competition policy also includes state aid, which is not considered part of US competition policy.
4. There are various factors that determine regulatory preferences and goals. Regulatory preferences for the agents typically follow from their legal mandate, which may be open to change in this new digital landscape. For example, in the EU, the 2024 Market Definition Notice suggests that competition policy goals may now be including digital innovation.

5. For a useful discussion of the (false) regulation v innovation dichotomy and US reluctance to regulate the tech industry, see Bradford (2024). For more on US changes to antitrust that may spell a shift from the traditional *laissez-faire* approach, see Abbott (2024), Young (2024a), Bartz and Sen (2023) and Paul, Daniel Sokol, and Baca (2022).
6. As noted in Young (2024a), it is notable that the presence of American companies dominates these gatekeepers.
7. On the DMA, see also Hoeffler and Mérand (2023).
8. Compared to the US competition authorities, Vestager's role may appear more hybrid and political because she also holds the position of 'Executive Vice-President of the European Commission for A Europe fit for the Digital Age'. However, in line with the traditional PAM understanding, political principals are elected individuals who delegate statutory authority on a contractual basis to agents. Vestager is, therefore, considered an agent in this article for analytical simplification and because she has been delegated authority by the political principals (i.e., Member States). While she may play a political role at times via her multiple positions, despite this blurring, she is not responsible for the delegation of statutory authority to DG Competition officials.
9. Those issues being negotiated under the TTC may also fall under the discretionary authority of relevant (non-competition) regulatory agents. If such negotiations lead to efforts at cooperation among their relevant regulatory agents, then the TTC could also be understood as supporting discretionary cooperation that takes place in parallel with the Joint Dialogue.
10. This is true for abuse of dominance as well as other business activity, including mergers (Kanter 2023; Lawrence 2022). Likewise, cartel activity among dominant players would be particularly problematic and damaging for the development of the digital market.

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