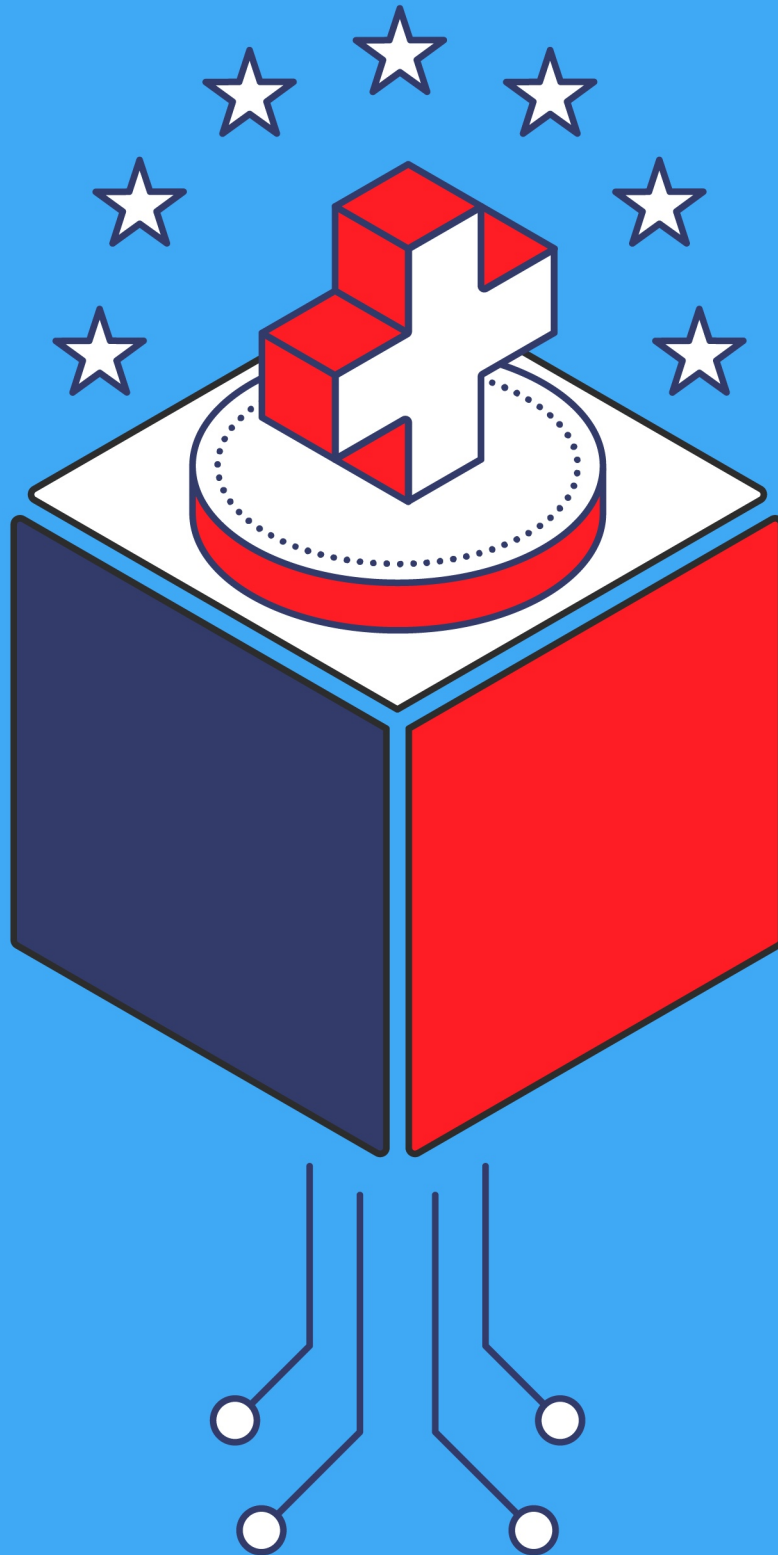


Discussion Paper:
EU Digital Policy



Which approach for Switzerland?

Imprint

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Publication date: Zurich, 17 August 2023

Translation date: Zurich, 2 November 2023

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Communication support for the publication: Thomas Weidmann, Colin Wallace and Melanie Holenweger

Graphic design: Graphic agency Hyperraum, Tobias Aeschbacher and Vincent Grand

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This document and the working group responsible for it were created between the end of April and the beginning of August 2023 and followed from the definition of thematic priorities at the strategy workshop of digitalswitzerland's Public Affairs Committee on 12 January 2023.

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About digitalswitzerland

digitalswitzerland is a Switzerland-wide, cross-sector initiative with the goal of transforming Switzerland into a leading digital nation. Together with our network of over 200 members and non-political partners, including more than 1,000 top executives, we are engaged in over 25 projects to inspire, initiate, shape and lead the digital transformation in Switzerland.

Acknowledgement

We would like to thank Ursula Sury, professor of data protection law at the Lucerne University of Applied Sciences and Arts, and Martin Steiger, lawyer and entrepreneur for law in the digital space, for their consultation and expert:ing input.

We would also like to thank Guillaume Gabus and Dominique Reber, all participants in our member survey and the Public Affairs Committee of digitalswitzerland for their commitment and internal support.

EU Digital Policy: Which Approach for Switzerland?

The EU Digital Policy Working Group is concerned with Switzerland's positioning vis-à-vis EU digital policy. This discussion paper intends to stimulate critical reflection and enable a consistent and forward-looking approach.

Where does Switzerland stand?

A clear positioning of Switzerland in EU digital policy can create more clarity for business and society to better exploit the opportunities of digitalisation and establish Switzerland as a leading location for innovative technologies. This ensures that Switzerland is better prepared for regulatory developments not only in the EU, but also in international systems and markets outside the EU.

First, there is a need to address the opportunities and risks of the various strategies that Switzerland could pursue vis-à-vis the EU.

I. Strict alignment and implementation

One scenario is the strict, timely and continuous adoption of all EU regulations in the digital sector. Although this approach would bring legal certainty through legal equivalence, predictability and connectivity (also in areas outside the digital economy), it would not be enforceable in domestic politics and would, in a premature regulatory zeal, deprive the Swiss economy of valuable room for manoeuvre and locational advantages.

II. Stronger independence

In contrast, a demarcation and an individual path with an international orientation, without making digital policy steps dependent on the EU, would give Switzerland full decision-making authority. For example, the current negotiations for a digital agreement that Switzerland (via EFTA) leads with Singapore are welcomed¹ - this will undoubtedly increase Switzerland's attractiveness as a location. However, a digital foreign policy that does not aim at compatibility with the EU as its primary goal is also risky. Partnerships with third parties would at least have to outweigh the opportunity costs that would arise from a separation from the EU.

III. The middle ground: "Status Quo"

Switzerland could also shape its digital policy vis-à-vis the EU according to the maxim "action is needed when compatibility is no longer guaranteed". A certain flexibility is surely advantageous here, as Switzerland's - albeit limited - room for manoeuvre can be better used in its digital policy and no differentiated stance towards the EU emerges in principle. Instead, a basis and a viable line is established along concrete policy projects. On the other hand, with this approach, Switzerland

¹ EFTA: <https://www.efta.int/Free-Trade/news/EFTA-and-Singapore-hold-third-round-negotiations-towards-Digital-Economy-Agreement-535346>

runs the risk that subsequent adjustments ("Swiss finishes") will also become the modus operandi in digital policy. It would be difficult not only at the political level with the EU, but also at the operational level for companies if there is closer cooperation with the EU in some sectors than in others, so that double standards potentially arise and the many companies affected then have to apply two different standards (CH and EU).

EU digital policy: clarify the approach now

In the context of the rapidly developing EU digital policy, Switzerland is once again confronted with the fact that a clear digital foreign policy focused on the relationship between Switzerland and the EU is increasingly indispensable in order to be perceived as an independent and interconnected player.

It is of great importance to maintain digital compatibility with the EU. This requires monitoring developments in the area of EU digital regulations and - where necessary - ensuring that Swiss companies experience as few technical hurdles or competitive disadvantages as possible through appropriate and well-timed adjustments to our own legal framework. This also applies in particular with regard to the Federal Council's preliminary draft on the regulation of communication platforms², which is expected in the first quarter of 2024 and is strongly based on the EU's Digital Services Act (DSA).

In areas where the adoption of EU law is necessary for reasons of legal certainty, Switzerland should move closer to the EU according to the principle of "as much as necessary, as little as possible" and refrain from imposing its own additional requirements ("Swiss finishes"). This makes it easier for companies to do business, promotes clarity and contributes to harmonisation. Otherwise, unnecessary additional work arises, as an example from a digitalswitzerland survey shows: A medium-sized Swiss IT company invested many resources to be GDPR-compliant since 2018, but then had to make costly administrative adjustments anew in the course of the revision of the Swiss Data Protection Act 2020.³

In order to move away from the "latecomer role", Switzerland should use all the influence it can exert in EU digital policy, as for example the motion of National Councillor Judith Bellaiche calls for.⁴ Switzerland is already active in the CAI of the Council of Europe. However, expanding this influence in other bodies requires precise, stringent positioning, which the multifaceted goals and different responsibilities for digitalisation topics within the federal administration makes more difficult. For example, the FDFA's "Digital Foreign Policy Strategy"⁵ is comprehensive, but also abstract - there is little concrete information on the specific, project-bound resources for managing digital foreign policy. Moreover, the strategy lacks an approach that positions Switzerland vis-à-vis the most important actors in the

² Federal Council: <https://www.fedlex.admin.ch/eli/fga/2023/680/de>

³ This finding comes from an internal digitalswitzerland survey that was sent to all members. The focus was on the members' anticipation of and preparation for the Digital Services Act and the corresponding DETEC regulatory bill for Switzerland. In addition, members were asked about other general topics concerning the relationship between Switzerland and the EU in digital policy.

⁴ See: <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20213676>

⁵ See the FDFA's "Digital Foreign Policy Strategy":

https://www.dfae.admin.ch/publikationen/de/eda/schweizer-aussenpolitik/Digitalausenpolitik_2021-2024.html

digital sphere - the EU, the USA, China and other important states - and that formulates concrete goals.⁶ However, this is precisely what is needed since not only the European, but also the global compatibility of Switzerland is of great relevance.

Excursus: A look at transatlantic digital policy

Two examples of digital policy discussions between the US and the EU show the challenges and the importance of continuous connectivity for Switzerland.

EU-US Data Privacy Framework

The European Court of Justice disqualified the adequacy of the EU-US Data Shield in 2020. Shortly afterwards, Switzerland also suspended the recognition of the adequate level of protection of the US with Swiss data protection law.⁷ It can be assumed that the resulting US Swiss Data Privacy Framework (US-CH DPF), which is still being negotiated, will be closely based on the newly drafted and recently concluded EU-US Data Privacy Framework (EU-US DPF).⁸ This can be attributed to the logic that Swiss companies that transfer data to the US under the General Data Protection Regulation will already align themselves with the EU-US DPF.⁹ The recognition of the US-CH DPF by the Federal Council, and thus the EU compatibility of the US-CH DPF, is therefore a high priority. This agreement should become binding as soon as possible after the new Swiss Data Protection Ordinance has entered into force on the 1st of September 2023. However, this also requires an adequacy decision by the US.¹⁰ As long as both parties are not yet ready, there is a certain degree of legal uncertainty for Switzerland.¹¹

Threads

Another example is Threads, the new application of the Meta Group. Due to unresolved questions regarding the Digital Markets Act (DMA)¹² and the General Data Protection Regulation (GDPR)¹³ Meta is waiting to launch the application in the EU. Although Switzerland is neither an EU nor an EEA member, Threads has not yet been made available here by the US parent company. From this example we can derive the hypothesis that in the global introduction of certain digital products (Swiss data protection law would in principle allow the launch of Threads¹⁴), Swiss autonomy is apparently not recognised, or plays a

⁶ Foraus: https://foraus.ch/wp-content/uploads/2022/07/20220704_Digitalausussenpolitik_WEB.pdf

⁷ PWC: <https://www.pwc.ch/en/insights/regulation/executive-order-on-the-eu-us-data-privacy-framework.html>, see also the Federal Council's communication: <https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-80318.html>

⁸ FDPIC: https://www.edoeb.admin.ch/edoeb/de/home/kurzmeldungen/20230410_eu_us_dpf.html

⁹ LEXcellence: <https://lexcellence.swiss/en/news/new-eu-us-privacy-framework>, see also PWC:

<https://www.pwc.ch/en/insights/regulation/executive-order-on-the-eu-us-data-privacy-framework.html>

¹⁰ Lawyer David Rosenthal has commented to this effect on LinkedIn:

https://www.linkedin.com/posts/david-rosenthal-4491378_angemessenheitsbeschluss-dpf-schweiz-activity-7084164302332383232-9oLX/?utm_source=share&utm_medium=member_desktop

¹¹ PWC: <https://www.pwc.ch/en/insights/regulation/the-eu-us-data-privacy-framework.html>

¹² The Verge: <https://www.theverge.com/23789754/threads-meta-twitter-eu-dma-digital-markets>

¹³ inCyber:

<https://incyber.org/en/meta-delays-launch-threads-european-union-due-gdpr/#:~:text=Indeed%2C%20Meta%20deems%20Threads%20incompatib,le,a%20violation%20of%20European%20law>

¹⁴ Steiger Legal: <https://steigerlegal.ch/2023/07/05/meta-threads-twitter-schweiz-datenschutz/>

subordinate role for the key players. Switzerland is thus unable to assert its supposed advantage of not being part of the DMA.

Conclusion and guiding principles

Digitalisation and its international regulation are characterised by fundamental political decisions that Switzerland sooner or later will also have to address. Each of the approaches explained at the beginning harbour both opportunities and risks. The spectrum ranges from a digital policy that increasingly focuses on autonomy to a policy that sets out EU compatibility as the first priority.

It is crucial to engage in a constructive discourse with stakeholders both at home and abroad in order to develop the best possible solutions. With every digital regulatory package coming from the EU, it is therefore advisable for Switzerland to position itself and act accordingly:

1. Ensure, whenever possible, that independence as a locational advantage is used.
2. Ensure, in the case of incipient regulations from the EU, that there is enough time to catch up with all stakeholders so that they can either react promptly to the benefit of consumers and companies or wait and not act prematurely and hastily.
3. Ensure that smooth business operations for Swiss companies in and with Europe are guaranteed at all times.
4. Ensure that any influence Switzerland has in EU digital policy is asserted.
5. Ensure that duplications and "Swiss finishes" are prevented.
6. Ensure that the design of the Switzerland-EU digital policy includes and takes into account global compatibility.

We must be aware that a zero-risk strategy is not realistic and that a cost-benefit assessment is always necessary - even within the listed guiding principles. It is important that the discourse on Switzerland's positioning is actively conducted and that Switzerland takes its stance consciously and self-confidently. By optimising and sharpening its positioning, it can actively shape the digital transformation as a global player and establish itself as a leading innovation nation.