

Digital Trade and Electronic Commerce

Digital trade

- No universally agreed definition
- «It encompasses digitally-enabled transactions of trade in goods and services that can either be digitally or physically delivered, and that involve consumers, firms, and governments» (*López González and Jouanjean, 2017*)
- EU Commission refers to it as «commerce enabled by electronic means – by telecommunications and/or ITC services – and covers trade in both goods and services» (<https://ec.europa.eu/trade/policy/accessing-markets/goods-and-services/digital-trade/>)
- Broader definition than electronic commerce

Electronic commerce

- «The production, distribution, marketing, sale or delivery of goods and services by electronic means» (*WTO Work Programme, WT/L/274*)
- «commerce conducted through telecommunications, alone or in conjunction with other information and communication technologies» (CETA Art. 16.1)

Servicification of manufacturing

- The increasing use, production, and sale of services in manufacturing (*Lodefalk, 2017*)
- The sector is increasingly relying on services, whether as inputs, as activities within firms or as output sold bundled with goods (*Miroudot & Cadestin, 2017*)

Data

- Massive production and processing of personal and non-personal data
- Privacy of personal data takes center stage
- Data ownership issues
- Data as the new oil?
- Data underpins the digital economy

Digital Trade and Digital Products: Legal Definitions

EU-UK TCA (Title III – Art. Digit.2)

- EU PTAs usually do not include a definition of digital products
- EU PTAs usually include chapters or sections on electronic commerce rather than digital trade
- EU-UK TCA is among the first to include a Title on 'Digital Trade'
- No explicit definition of digital trade BUT Art. DIGIT.2 states that Title III ('Digital Trade') applies to "measures of a Party affecting **trade enabled by electronic means**" (except audio-visual services)
- However, in EU-Japan the Parties used the same language to refer to the section on electronic commerce (Art. 8.70(4))

DEPA (Art. 3.1)

- **Digital product** means «a computer programme, text, video, image, sound recording or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically»
- *Footnote 9*
 - For greater certainty, digital product does not include a digitised representation of a financial instrument, including money.
- *Footnote 10*
 - The definition of digital product should not be understood to reflect a Party's view on whether trade in digital products through electronic transmission should be categorised as trade in services or trade in goods.
- Same language of CPTPP (Art. 14.1) and USMCA (Art. 19.1)

Digital Trade: Applicable WTO rules

- No explicit reference to ‘digital trade’, ‘digital goods’, ‘digital products’ or ‘digital services’ in WTO agreements
- No universally agreed definition of ‘digital products’, ‘digital services’, or ‘electronic transmissions’ among WTO Members
- Agreements implicitly related to digital trade (*Aaronson, S. A. & P. Leblond, 2018*):
 - **Information Technology Agreement (ITA II)**
 - Participants must eliminate and bind customs duties at zero (on a MFN basis) for high technology products, including computers, telecommunication equipment, semiconductors, semiconductor manufacturing and testing equipment, software, scientific instruments, as well as most of the parts and accessories of these products
 - **General Agreement on Trade in Services (GATS)**
 - Annex on Telecommunications (Art. 5(c)) refers to transfer of ‘information’ within and across borders and ‘data transmission’ as a type of ‘public telecommunication transport service’
 - **Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)**
 - Protects trade-related intellectual property pertinent to information technology (e. g. computer programs; source code as trade secret)

WTO Work Programme on E-Commerce (WT/L/274)

- Launched in 1998 at MC2
- Mandate → «examine all trade-related issues relating to global electronic commerce» → this is **NOT** a negotiating mandate
- Definition of ‘electronic commerce’ → «the production, distribution, marketing, sale or delivery of goods and services by electronic means»
- WTO bodies involved in work programme on e-commerce
 - *Council for Trade in Services*
 - *Council for Trade in Goods*
 - *Council for TRIPS*
 - *Committee for Trade and Development*

Moratorium on Custom Duties on Electronic Transmissions

- Adopted for the 1st time in 1998 at 2nd Ministerial Conference (MC2)
- «Members will continue their current practice of not imposing customs duties on electronic transmissions» (WT/MIN(98)/DEC/2)
- Renewed every 2 years from MC to MC
- **Last renewed on Dec. 2019**
- No universally agreed definition of 'electronic transmissions'
 - Option 1: Only bits and bytes, not content
 - Option 2: digitized and digitizable goods
 - Option 3: services transmitted electronically
- Disagreements among WTO Members over renewal
 - PRO renewal → increased consumer welfare (lower prices)
 - AGAINST renewal → moratorium causes loss of government revenue

Legal and economic challenges

Countries' reaction to emergence of digital economy

- Some countries have adopted measures that particularly affect digital trade
- Wide array of objectives behind the adoption of measures affecting digital trade (e.g. national security, protecting privacy & personal data, protecting public morals, protecting consumers, increasing trust in electronic commerce & electronic transactions, promoting innovation, reducing digital divide, increase technological capabilities)

Economic impact of measures on digital trade

- Acting as a market access restrictions to 'digital products'
- Making it more cumbersome, costly and time-consuming to export 'digital products'
- Diverting trade
- Discourage imports in favour of local production (forced import substitution)

Issues with applicability of WTO Agreements

- Uncertainty about extent of coverage of data (and measures affecting the free flow of data across borders) in WTO agreements
- There is no agreement on how to define and classify digital products within the WTO goods/services dichotomy
- Uncertainty about interpretation of services commitments in the digital era
 - Technological neutrality principle
 - Modes of supply (Mode 5 proposal)

The Joint Statement Initiative on E-Commerce

WHAT	WHEN	WHO	PURPOSE	WHY
<ul style="list-style-type: none">• WTO negotiations on trade-related aspects of electronic commerce» (WT/L/1056)• Plurilateral initiative	<ul style="list-style-type: none">• Informal initiative (explorative talks) launched in 2017 at MC11• Formal negotiations launched in Jan. 2019	<ul style="list-style-type: none">• Initiative launched by 71 WTO Members• All WTO Members can join the initiative and participate to the negotiations• Several Members are opposed to it and do not participate to the discussions	<ul style="list-style-type: none">• Achieving «a high standard outcome that builds on existing WTO agreements and frameworks» (WT/L/1056)	<ul style="list-style-type: none">• DDA failed and desire to push the agenda forward to closed a perceived gap in regulation of digital trade

JSI on E-commerce: Scope

- **Potential Scope (based on draft consolidated text of December 2020 leaked by bilaterals.org)**
 - a. Section A: enabling electronic commerce (e.g. paperless trading, electronic contracts, electronic payment services)
 - b. Section B: openness and electronic commerce (e.g. non-discriminatory treatment of digital products, cross-border data flows, customs duties on electronic transmissions, open government data)
 - c. Section C: trust and electronic commerce (e.g. online consumer protection, personal data protection, source code)
 - d. Section D: cross-cutting issues (e.g. transparency, domestic regulation, cybersecurity, capacity building)
 - e. Section E: telecommunications (e.g. updating the WTO Reference Paper on Telecom Services)
 - f. Section F: market access (e.g. services MA, temporary entry and sojourn of electronic commerce-related personnel, goods MA)
 - g. Annex 1: scope and general provisions (e.g. definitions, general and security exceptions, dispute settlement)

JSI on E-commerce: Legal Architecture

- Uncertainty regarding how to integrate outcome of the negotiations into WTO framework
 - MFN-based?
 - Binding for a sub-set of members or all members?
 - Key issue: Amendment to WTO Agreements as per Art. X Marrakesh Agreement requires consensus
 - Annex 1 (like TFA)
 - Annex 4 (like GPA)
 - Other options (e.g. amending schedules of commitments)?

Regulating Digital Trade in PTAs

- Number of RTAs has increased over time in the period 1995-2015
- Stall in Doha Round negotiations as a contributing factor in rise of RTAs
- RTAs are increasingly including e-commerce provisions or chapters
- Signatories and time of signature influence scope and depth of provisions on e-commerce

Scope and limits of digital trade rules in PTAs

Differences in location of rules

- Stand-alone agreement (e.g. Digital Economic Partnership Agreement – DEPA)
- Self-standing chapter (e.g. CPTPP, CETA, RCEP)
- Dedicated section within chapter on cross-border trade in services (e.g. EU-Vietnam, EU-Japan)
- Specific provisions across different sections of the RTA (e.g. EU-Serbia)

Differences in scope of coverage

- Narrow (e.g. EU-Korea, EU-Singapore)
- Broad (e.g. CPTPP, USMCA, DEA)

Substantive content of provisions (non-exhaustive list)

- Non-imposition of customs duties on electronic transmissions (e.g. EU-Vietnam, Colombia-Panama)
- Non-discriminatory treatment of digital products (e.g. CPTPP, USMCA)
- Electronic authentication / electronic signatures (e.g. EU-Japan, Korea–Australia)
- Paperless trading (e.g. New Zealand-Singapore, DEPA)
- Data flows (e.g. Korea-US, CPTPP, USMCA, Mexico-Panama)
- Data localization (e.g. CPTPP)
- Consumer protection (e.g. Australia-Singapore, Japan-Mongolia)
- Unsolicited electronic messages (e.g. Australia-Malaysia)
- Personal data protection (e.g. EU-led RTAs, New Zealand-Thailand)
- Prohibition of forced disclosure of source code (e.g. CPTPP, Japan-Mongolia, EU-Japan)
- Artificial intelligence (e.g. DEPA, DEA)

Differences in scope and depth of individual provisions

- soft / best endeavour language (e.g. 'shall endeavour to', 'should')
- hard language (e.g. 'shall', 'must')
- EXAMPLE
 - **CPTPP Art. 14.11(2):** "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."
 - **KOREA-US FTA Art. 15.8:** "Recognizing the importance of the free flow of information in facilitating trade, and acknowledging the importance of protecting personal information, the Parties **shall endeavor to refrain from** imposing or maintaining unnecessary barriers to electronic information flows across borders."

Digital Trade Regulation: Differences in Approach and Impact on Private sector

Emergence of three 'data realms' (*Aaronson and Leblond, 2018*)

- US: few limits on cross-border data flows
- EU: personal data protection is top priority
 - Post-GDPR EU stated intention to introduce horizontal provisions on cross-border data and personal data protection in future PTAs → aim is to ensure that the fundamental right to privacy is not undermined by trade disciplines (*Sauvé and Soprana, 2020*)
- China: restriction of the free flow of data and information both within and across borders

Fragmentation of rules across jurisdictions

- Higher costs of compliance for firms (especially SMEs)
- Lack of predictability of rules
- Disincentive to trade with countries with more stringent rules
- Risk of a race-to-the-bottom in regulation to attract exporters and investments

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