



7.6.2017

# **WORKING DOCUMENT**

on Towards a digital trade strategy

Committee on International Trade

Rapporteur: Marietje Schaake

## **Towards a European digital trade strategy**

The internet, digitisation and new technologies have profoundly impacted people's lives and the way our societies function. As a consequence, the way we do business and the way we trade has changed too. Goods and services can be delivered with one click on a button. The smallest companies can potentially reach customers all over the globe at a faster pace and at lower costs than ever before.

Around half of services worldwide are already digitised, a huge increase given that two decades ago, digital trade flows were negligible. A lawyer or architect can provide services to a customer on the other side of the world without getting on a plane. Traditional industries increasingly digitize aspects of their business, which affects supply chains, manufacturing and services models. Close to one third of the growth of the overall industrial output in Europe is now the result of the uptake of digital technologies. The UN's sustainable development goals aim to significantly increase access to information and communication technologies, and strive to provide universal and affordable access to the Internet in least developed countries by 2020.

Making it easier for users to buy, sell and pay online by removing unnecessary barriers for digital trade should be at the heart of an ambitious digital trade strategy that is able to create tangible benefits for consumers. This will also benefit SMEs that trade goods or services.

Today, many of the existing global trade rules do not capture this new reality and are not easily transposed to the digital era. New technologies and business models raise new governance questions and challenges. In the absence of global rules, governments move unilaterally to regulate their domestic markets. The risk of fragmentation looms, which increases the hurdles for large and especially small companies to operate internationally. In a globally connected ecosystem, piecemeal rules make little sense.

Furthermore, governments around the world are drawing up barriers that hinder market access or create unfair advantages for domestic companies. In Vietnam, companies are forced to have at least one local server if they want to operate online social networks or 'general information websites' in the country. In Turkey, IT products that are manufactured before January 2000 cannot be imported. In other countries, technology firms are forced to hand over the source code of products to a regulator as a requirement to access a market. These barriers also have negative impacts for people, whether it be higher costs, decreased access to products and content, violations of their human rights or uncertainty and distrust regarding the use or safety of certain products. If we believe the rule of law must prevail, then fair competition must be the goal in a hyper-connected world. There can be no place for digital protectionism.

### **1. The EU as a standard-setter in a hyper-connected world**

As domestic legislation increasingly shapes and regulates the digital economy, it is crucial that international rules and agreements do not lag behind. The EU, as a community of values and the world's biggest exporter of services, must play a role in leading this process. To be able to do that, a more profound discussion is needed about both the content and process of crafting the rules framing digital trade flows. What issues should be covered by bilateral or plurilateral trade agreements? What should be the role of the World Trade Organisation? How can we ensure free, fair and reciprocal market access for digital goods and services in third countries? How can we ensure that trade rules actually render tangible benefits for consumers inside and outside the EU? How should we deal with cases where strategic investments are made in

European companies while the investor is subsidized or received state aid?

The features of digital trade also raise a number of tax challenges in terms of attribution of value of data and VAT-payments. In this context, it is important to note that in June 2017, representatives of 68 jurisdictions signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, which improves coordination between tax authorities.

In other parts of the world, we see governments formulating their own approaches to digital trade. In China, Alibaba founder Jack Ma is pushing an electronic world trade platform (eWTP) that aims to create "virtual free trade zones" which would enable SMEs to trade freely across borders without any import duties. In the US, the Trump administration decided to withdraw from the TPP, which included an ambitious digital trade chapter. Other governments are pushing a protectionist agenda specifically on digital issues. As the discussion on the way forward takes shape, the EU should have a clear position in order to lead in a way that enshrines and enforces values and safeguards our interests at the same time.

A European digital trade strategy should be built on three overarching principles:

1. Ensuring fair market access for European businesses in third countries
2. Creating tangible benefits for consumers, both inside the European Union and abroad
3. Safeguard fundamental rights of people and aspire to achieve global norms

In the debate about trade these aims have often been juxtaposed, but they can in fact be mutually reinforcing. While taking into account specific concerns, the broader interests of and implications for the European Union and the world cannot be neglected. Inaction is not without consequences.

## **2. Creating an enabling environment for digital trade**

Before elaborating on the three overarching pillars of a future digital trade strategy it is important to stress the features of an enabling environment for digital trade based on rules.

Measures which make the general business environment in a country more difficult, such as local content requirements, barriers to investment, or slow and unpredictable customs procedures, will have negative effects for companies that engage in digital trade. Equally, the quality of logistics networks, digital infrastructure, internet speed and connectivity will have an impact on the opportunities for businesses, as well as the diversity and price of products for consumers.

The availability of digital payment methods in particular is essential for consumers in order to be able to access digital services, but also for SMEs trying to reach consumers abroad through platforms like Etsy or eBay. By adopting reliable online payment systems, developing countries can open up new possibilities for consumers and companies. Trust is key.

Not only concerns over payment security prevent consumers from purchasing products and services online. Additionally, a lack of appropriate consumer protection legislation can make consumers reluctant to purchase from foreign sellers, as it may be difficult to obtain refunds or

get protection from fraudulent and deceptive commercial practices. Companies like E-bay resolve a staggering 60 million online disputes annually, using their own dispute settlement processes for transactions over its platform. It is clear that more research into innovative dispute settlement mechanisms for low value goods in digital trade is needed.

The possibility to close contracts digitally facilitates both business-to-business digital trade across borders as well as service provision to consumers. There should be no obstacles to recognize and verify electronic signatures in commercial transactions. Similarly, digital access to public procurement is important in order to be able to easily access government contracts from abroad.

### **3. Key issues in digital trade**

A number of core topics should be developed in more detail in the context of a future digital trade strategy.

#### **3.1 Data flows**

Data flows have become the backbone of the global economy. The ability to collect, process and transfer data has become a prerequisite for many companies to do business in the 21st century. This includes not only 'digital' companies, but every type of company that delivers goods and services. We should think of 'digital' not as a sector, but as a layer of almost every other sector. Consequently, the ability of data to flow across borders is a fundamental prerequisite to be able to trade internationally. Barriers to the free flow of data, including unjustified forced data localisation measures, are problematic for each company that trades internationally. For example, forcing enterprises to establish data centres within a country as a condition for providing services in that country does not make sense. A comprehensive prohibition of such forced data localisation requirements would prevent fragmentation of the digital world, and would stimulate foreign direct investment. The EU must have the ability to combat discriminatory, illegitimate and protectionist measures in third countries, to ensure that European companies can operate in a fair, predictable environment.

In this context it goes without saying that rules on the processing of personal data should not, are not and will not be a part of trade negotiations. The EU's General Data Protection Regulation acquis shall not be undermined by trade agreements, which is a position that has been repeatedly reiterated by all European institutions. Article XIV of the General Agreement on Trade in Services makes clear that measures that are genuinely intended to protect personal data are fully compatible with GATS. It should further be noted that the EU's GDPR, including its regime on international data transfers, creates a number of possibilities for companies to enable data flows while ensuring a high level of protection.

Promoting the free flow of data and protecting the right to data protection and privacy actually go hand in hand. For instance, the adoption of forced data localisation laws such as those in Russia or Vietnam increases governments' capacity to access sensitive data about their citizens, which might have not been available to them previously.

#### **3.2 Tariffs on electronic transmissions**

Since 1998, members of the World Trade Organisation have upheld a moratorium on tariffs on electronic transmissions. A moratorium is not permanent and there is a risk that the growth in

global data flows could prove an attractive way for governments to generate revenue. The moratorium should be transformed into a permanent agreement to ban tariffs of electronic transmissions. Ahead of such a move, the EU should insert commitments to this end into all its trade agreements. Tariffs on data flows would bring extra unnecessary costs for businesses and consumers alike.

### **3.3 Mandatory source code disclosure or handing over encryption keys**

In some countries, market access is only granted to companies on the condition that they disclose and hand over to the state the source codes of the software (or other products) they intend to sell. In exceptional cases, such as in government procurement procedures in the field of critical infrastructure, there may be legitimate reasons to require this. However, as a blanket requirement for market access, measures requiring source code disclosures are disproportionate.

Likewise, governments may require access to a product's encryption technologies as a condition of manufacturing or sale. Trade agreements could prohibit signatory governments from forcing companies to disclose or transfer details of the cryptographic technology used in their products, as a condition of manufacturing, selling, or distributing them in their country. Such measures can contribute to improving consumer trust, strengthening privacy and preventing illegal surveillance practices.

### **3.4 International standards for digital products**

As the internet of things grows, the threat of diverging standards for the use and development of IoT-products increases, which is detrimental for both consumers and producers. An internet of things that is safe and secure to use for consumers, will require the adoption of, and adherence to, international standards that are created by a bottom-up approach. The DDoS attack by the Mirai botnet illustrated how IoT-devices are increasingly becoming an attractive target for botnets, because there is typically less security for attackers to overcome. Security cannot be an afterthought anymore in the design and manufacturing of IoT devices. Although trade agreements will not set security standards as such, partners can agree to use internationally recognised standards, as set by the international standard setting bodies. Trade agreements could promote the interoperability of standards that benefit both consumers and producers, or could prevent that countries can arbitrarily demand that less competitive standards are forced into innovative products.

### **3.5 IP in trade agreements**

The future of the EU's knowledge-based economy in a global world lies high up in the value chain. Trademarks, investments in R&D and innovation need to be protected. No country should conduct or support ICT-enabled theft of intellectual property, including trade secrets or other confidential business information, with the intent of providing competitive advantages to companies or commercial sectors.

However, while international cooperation is key to combat counterfeiting, trade agreements are not the place to extend the level of protection for rights holders by providing for more extensive copyright enforcement powers. The defeat of the ACTA-agreement has demonstrated that there is no political will to double down on copyright enforcement, especially in the digital environment. Similarly, there may be legitimate reasons to weigh the context in which IP

protected goods will be used, to avoid people in developing economies from being forced to pay excessive prices. Also, internet service providers should not bear liability for the data they transmit or host through their services to an extent that would necessitate prior surveillance or filtering of such data.

Furthermore, technological advances have multiplied and diversified the vectors for creation, production and exploitation of creative works and striking a fair balance of interests between rights holders and users requires new approaches to liberalising access to such works through digital technologies. New opportunities exist in harmonizing further reaching exceptions, in the interest of facilitating open access to knowledge, culture and education.

### **3.6 Access to digital infrastructure**

European businesses need access to the digital infrastructure of third country markets in order to be able to operate effectively abroad. A European telecoms company cannot provide services in a third country if it cannot access the network of that country. Trade agreements can prevent parties from imposing foreign equity caps, by laying down pro-competitive wholesale access rules for incumbent operators' networks and by securing genuine access to last-mile infrastructures in export markets for EU telecom providers. A consumer-oriented telecoms chapter in a digital trade agreement can also include a mandate for the parties to abolish or reduce retail roaming fees. Netneutrality guarantees would also help facilitate fair competition and innovation.

At the same time, for citizens to be able to consume digital services, they need to have access to hardware products. In 1996, the Information Technology Agreement was signed, removing tariffs on a broad range of IT products. This agreement was subsequently expanded in 2015. This is an important step towards laying a worldwide basis for the trade in IT products as a basis for the use of digital services in the first place. Where possible, the ITA should be expanded to full coverage of all traded IT products.

## **4. Aligning a values-based digital trade strategy with other EU policies**

A strong European Union rests on a fully integrated digital single market and an open global economic system, which is facilitated by a free, open and secure internet. There can be no digital single market, digital development policy or digital trade agreements without an open internet. In many cases, the EU's foreign policy goals are not only a reinforcement of values, they are also important for economic reasons - and vice versa. The reform of the EU's dual-use export control regulation is an example that highlights that human rights considerations can and should inform and shape the EU's trade policies.

### **4.1 Digital rights, the digital single market and trade agreements**

The EU's digital trade strategy is a part of its broader trade strategy, and as such, must strengthen its general foreign policy and specifically its human rights goals, as laid down also in the Trade for All strategy. The approach towards our third country trade partners must remain complementary and fully coherent with internal policies. It is therefore interesting to explore to which extent crucial building blocks that preserve the open internet in the EU's digital single market, including principles such as net neutrality and intermediary liability, can be promoted in our digital trade agreements.

Censorship, filtering and internet shutdowns by governments have broader implications for freedom of expression, freedom of association and the right to access to information. The EU's Human rights guidelines for freedom of expression online and offline confirm this. At the same time, such actions can have negative effects for companies operating within a third country, leading to loss of profits or trust and leading to discrimination between foreign and domestic companies.

Trade agreements can be used as a lever to improve digital rights in a number of countries. Including provisions on net neutrality, forced data localisation, encryption and intermediary liability in trade agreements can have a strongly beneficial impact on the protection of freedom of speech in particular. For instance, telecommunications chapters in trade agreements could require member states to ensure that business from other states should not be discriminated against when they transmit lawful network traffic. Digital trade rules can put the principle of intermediary liability on a stronger footing, by explicitly specifying that online service providers are not liable, under certain conditions, where services of intermediaries are used by third parties for infringing activities.

Digital rights have a long tradition of being discussed in open multilateral stakeholder meetings, such as the Internet Governance Forum. A transparent process will be crucial in order to discuss topics that touch upon digital rights issues in trade negotiations. Given the importance of digital trade for our economies and societies it is crucial to demand from partners at least the same level of transparency as the EU in recent trade negotiations. Compared to other trading partners, the EU has for instance released its negotiation mandate for the CETA and TTIP negotiations, delivered systematic and comprehensive ex-ante studies as to the effects of these treaties, made position papers and negotiation text available online, while negotiators have extensively briefed democratically elected representatives on the state of negotiations. Transparency and stakeholder engagement are a necessity in general, but will be crucial to make sure civil society, technology experts and other stakeholders can share the knowledge and perspectives lawmakers and negotiators need for future proof policies.

## **4.2 A Digital Development Strategy**

According to the International Telecommunications Union 3.9 billion people on earth are still not connected to the internet, most of them in developing countries. The United Nations General Assembly's 2030 Agenda for Sustainable Development confirms that connectivity and digitisation play a fundamental role in development, and can act as an accelerator to achieve the UN's sustainable development goals. Most notably, the UN's Sustainable Development Goals includes a goal to "significantly increase access to information and communications technology and strive to provide universal and affordable access to the Internet in least developed countries by 2020".

Access to the internet can help bring services such as health care, education and finance to areas where they are not yet available. Digitisation of existing business models increases competitiveness and also creates entirely new business opportunities, fostering innovation and thereby strengthening economic development. Digitisation and new technologies can further aid other development initiatives, for example to counter corruption, improve agricultural or environmental management or deliver (humanitarian) aid. Connectivity and digitisation in third countries is also in the interest of European companies, and thus provides new investment opportunities.

Promoting the access to affordable and secure broadband connectivity and to digital infrastructure is therefore a natural part of the EU's digital trade strategy. The EU must continue to invest in infrastructure in developing countries. However, such financial aid must also be linked to conditions regarding a free, open and secure internet.

## **5 Conclusions**

The European Parliament has a binding vote on all trade agreements. Therefore, it is actively involved in monitoring ongoing trade negotiations. Digitisation and its far-reaching impacts on the global trading system are an issue on which the European Parliament should formulate its opinion and recommendations. This cannot be done only in the context and margins of ongoing negotiations. We need a self-standing European strategy on digital trade that strengthens our values and safeguards our interests. To that end, the European Parliament needs to put the important issues on the table, to facilitate debate and dialogue and work towards an approach that can find broad support amongst stakeholders and across political divisions.

This discussion paper is intended as an invitation for input that will feed into an agenda setting (INI) report which in turn will call on the European Commission to take legislative initiatives.