Digital Trade and the WTO: Negotiation Priorities for Cross-Border Data Flows and Online Trade in Services

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Abstract

This Working Paper provided the foundation for a THINK 20 Policy Brief, published at https://www.t20italy.org/2021/09/08/digital-trade-top-trade-negotiation-priorities-for-cross-border-data-flows-and-online-trade-in-services/ It sets out recommendations to the G20 for early progress in the WTO Joint Statement Initiative negotiations on Trade-related Aspects of Electronic Commerce. The policy recommendations focus on a number of areas which are key to closing the negotiating gaps and achieving a new multilateral framework of trade rules for the future in the digital area, thereby facilitating continued digital transformation of services and growth in cross-border flows of data. The present moment is critical. If the negotiations succeed, trade in digital services, underpinned by cross-border data flows, will complement the expected recovery in travel and tourism and provide a robust basis for continued growth. If they fail, technological change threatens a final blow to a global institution no longer fit for purpose, unable to manage the regulatory heterogeneity resulting from national policies that threaten to compartmentalize data governance and fragment the global digital economy.

1. Introduction

Digital transformation is challenging all aspects of our economies and societies, including international trade and investment. The Covid-19 health pandemic has accelerated the trend towards online work, education, professional and social communication and entertainment, as well as altered consumption habits, shifting them to electronic exchange, sales and purchases. Digitalization will further increase the role of services in the economy. The business response to the Covid-19 pandemic has increased the pace of transition to online delivery of services. Electronic commerce is increasingly drawing small and medium-sized enterprises (SMEs) into the global marketplace, providing them with a platform into which consumers and producers can tap from anywhere in the world to carry out banking, data transfers, and purchases and sales of goods and services. More than 80% of small businesses report that online sales are very important to their business success.[1]

Data flows enabling and accompanying digitalization are a central feature of new business models and product innovation. Policies towards cross-border data flows affect international trade opportunities for firms and consumers, in turn determining the scope for digital connectivity and data sharing to contribute to realizing the SDGs.

2. Multilateral Trade Negotiating Challenges

There is currently a disconnect between the growing digitalization of international trade and the rules that govern the multilateral trading system. Differences across G20 members on the relationship between the state and business, the state and citizens and business and individuals are reflected in divergent regulation of data flows and personal privacy protection. Minimizing trade and competition-reducing effects of national regulation of cross-border data flows to address security and privacy concerns will determine the prospects for digital trade growth looking forward.

Technological neutrality is one of the tenets of both the GATT and the GATS. However, other than an agnostic view as to the form traded goods and services may take, many of the issues relevant to digital trade and e-commerce are not currently covered by multilateral trade disciplines. Current multilateral trade rules are lagging behind our 21st century reality of digital transformation of the economy.

The WTO urgently needs updating in order to offer global governance for digital trade. To remedy this gap, the Joint Statement Initiative (JSI) on Trade-related Aspects of E-Commerce was launched at the 11th WTO Ministerial Council (MC11) in December 2017. After three years of significant progress in the negotiations, which have taken place in an "open plurilateral" format and attracted very broad interest and participation,[2] in December 2020 the Co-convenors of the JSI circulated to WTO Members a draft consolidated negotiating text, divided into five broad issues: enabling e-commerce, openness, trust, telecommunications, market access, and in addition cross-cutting issues. The more challenging issues are still unresolved and many of them appear implacable. Several of the recently concluded preferential trade agreements do include e-commerce or digital trade chapters and have made progress on defining new disciplines for electronic transactions.

This paper sets out recommendations for progress in the JSI negotiations in several key areas in order to close the negotiating gaps and achieve a new multilateral framework of trade rules for the future in the digital area, thereby facilitating continued digital transformation of services and growth in cross-border flows of data. The present moment is critical. If the negotiations succeed, trade in digital services, underpinned by cross-border data flows, will complement the expected recovery in travel and tourism and provide a robust basis for continued growth. If they fail, technological change threatens a final blow to a global institution no longer fit for purpose, unable to manage the regulatory heterogeneity resulting from national policies that threaten to compartmentalize data governance and fragment the global digital economy.

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[1] McKinsey, 2021

[2] Hoekman & Sabel, 2021

a. Cross-border Data Flows

Cross-border movement, storage and use of digital information has become crucial for trade and production; including for the day-to-day operations of large multinational corporations and for coordinating the different stages of production of Global Value Chains (GVCs).[3] Global data flows generate economic growth primarily by raising productivity, and countries benefit from both inflows and outflows.[4] The free flow of information creates opportunities for new players to trade, including Micro, Small and Medium Enterprises (MSMEs) and women, and this capacity is magnified by a forecast of 5.3 billion total Internet users (66% of global population) by 2023, up from 3.9 billion (51% of the global population) in 2018.[5] The Covid-19 pandemic has also illustrated the critical importance of transferring health data across borders for the development and testing of vaccines.

On the other hand, the capacity to seize these opportunities is threatened by the increasing number of data regulations which impinge on cross-border data flows, ranging from requirements that flows are conditional on adequacy determination or discretionary approvals all the way up to a complete ban on data exports, as well as local storage and processing requirements. Prior to 2000, only 19 data localization measures were imposed globally; this number more than doubled by 2008 and doubled again by 2017.[6] Today it is estimated that there are more than 200 data regulations being implemented worldwide.[7]

Although in 2020 governments eased barriers to digital trade as part of the overarching policy response to the health pandemic, the OECD warns that further policy action is needed to address the extensive build-up of barriers over past years, particularly with respect to key enabling sectors such as computer and telecommunications services and measures that inhibit the seamless transfer of data across borders.[8] The OECD also estimates, for the APEC region, that impediments to trade (as measured by the OECD STRI) could be lowered by up to 21% by APEC economies implementation of the current provisions being considered in the WTO JSI on Services Domestic Regulation. The most significant progress from easing regulatory impedients would be experienced in a range of specific sectors including computer services and telecommunications.[9] Translating this into an impact on trade costs, the OECD suggests that streamlining of services domestic regulations could potentially reduce trade costs in the APEC region by an average of 7% over a 3 to 5 year period. OECD findings indicate that big reductions in trade costs would likely be experienced in those services which are relevant to e-commerce such as telecommunications, computer services, financial services and logistics.

The need to ensure the flow of information, including personal information, for the conduct of business cannot – and should not – undercut the ability of governments to regulate data flows for legitimate purposes, including safeguarding individual personal data privacy, enabling access to information for regulatory purposes, addressing cybersecurity concerns and ensuring national security. What is needed is that these legitimate regulatory regimes minimize the adverse trade effects. Many countries are resorting to Regional Trade Agreements (RTAs) and Digital Economy Agreements (DEAs) to strike this balance, but apparent differences in the trade disciplines on data flows across RTAs are leading to sub optimal business outcomes. The G20 must identify new ways to balance this tension at the WTO.

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[3] Casalini & López González, 2019
[4] McKinsey, 2016
[5] CISCO, 2018
[6] ECIPE, 2018
[7] Casalini & Lopez Gonzalez, 2019
[8] OECD, 2021b
[9] OECD, 2021a

Proposed Solutions

G20 Members should endorse the (related) JSI on Services Domestic Regulation and call for its conclusion by WTO MC12. Adoption of the procedural principles sponsored by the JSI on Services Domestic Regulation would make a significant contribution to reducing trade costs for all modes of services trade, including online supply and also to minimizing the potential negative impact of domestic data regulations on cross-border data flows.

G20 Members should also explore provisions being adopted in recent RTAs as platforms from which to develop the outcomes emerging from the JSI on E-Commerce. The JSI on E-Commerce has thrown up a number of proposals for tackling restrictions to the cross-border flow of information that are critical to addressing the challenge outlined above. Most of these are already reflected in RTAs and DEAs among various WTO Members, where the approaches tend to differ, essentially between those that express the disciplines negatively and those that express them in positive terms.

Typically, all the various agreements include provisions on the cross-border flow of information. Where provisions are expressed negatively, a typical provision would ban Parties to an RTA from restricting the cross-border transfer of information, including personal information, for the conduct of the business of a covered person. Agreements which are expressed negatively would also typically ban Parties to an RTA from requiring a covered person to use or locate computing facilities in a Party's territory as a condition for conducting business in that territory.

Where provisions are expressed positively, a typical provision would assert the principle of freedom of cross-border flow of information, including personal information. This obligation would typically be subject to an exception allowing inconsistent measures to achieve legitimate public policy objectives (LPPOs) provided that: a) they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade, and b) that the restrictions are 'necessary' or 'not greater that required' to achieve such objective. Provisions expressed in the positive manner would not typically single out individual types of restrictions such as localization requirements for computing facilities, but would capture all restrictions as having to meet the specified requirements for LPPOs.

Some recent RTAs and DEAs avoid any carve out for any specific sector such as financial services and sometimes go further by including provisions specifically banning the location of computing facilities as a requirement for conducting financial services provided that the Party's financial regulatory authorities, have 'immediate, direct, complete and ongoing access' to information processed or stored on computing facilities that the covered financial person uses or locates outside the Party's territory. (See Annex: Summary Table of Digital Trade Provisions in recent RTAs).[10]

G20 Members should also reengage in a broad discussion in the Council on Trade in Services in Special Session (*WTO CTS/SS) on progressive liberalization of trade in services.*

Specific market access and national treatment commitments under the GATS are powerful tools to combat restrictions on cross-border transfer of information by electronic means and data localization requirements. On average, schedules of WTO Members contain specific commitments for just over one third of all services subsectors.[11] This leaves many sectors and modes of supply which are particularly heavily reliant on cross border flow of information by electronic means, uncovered by specific

[10] One agreement, not covered in the Summary Table is the European Union-United Kingdom Trade and Cooperation Agreement (EU-UK TCA) which was signed after the exit of the UK from the EU on 30 December 2020. For an in-depth analysis of the text of Chapter 2 "Data Flows and Personal Data Protection", see Kerneis, 2021.

[11] Roy, 2019

commitments. While market access is potentially on the agenda for the JSI on E-Commerce (see below), that forum has to date inclined to focus only on a subset of services that enable e-commerce. A broader discussion is also required in the WTO CTS/SS.

G20 Members should meanwhile offer technical assistance to those developing countries willing to undertake new commitments subject to the improvement of their data protection laws and regulations.[12]

b. Privacy Standards

While the amount of personal information gathered about consumers' digital economic and social interactions is growing, the use made of it is not always clear to them[13]. Privacy concerns have pushed the protection of personal data high in the policy agenda of countries across the world. But we are witnessing the emergence of significantly different approaches to protect personal data, influenced by diverse cultural values, policy preferences and legal traditions[14]. Some jurisdictions view the protection of personal data as a matter of individual privacy rights and have implemented omnibus privacy legislation, monitored and enforced by bespoke administrative bodies. Others view it more as a matter of consumer protection, prefer to follow a piecemeal legislative approach for specific sectors or type of data, and tend to rely more on self-enforcement through judicial remedies.

There is solid evidence that illustrates the significant extent of trade costs stemming from regulatory heterogeneity.[15] In particular, disparate privacy protection regimes, create different rights and obligations for governments, data subjects and data controllers, that raise compliance costs for companies. This disproportionately affects micro and small and medium-sized enterprises, compromising their chances to tap on the emerging trade opportunities offered by digital technologies. More worryingly, the deepening of these differences risk the fragmentation of digital markets to a point of no return.

It is imperative to find ways to minimize the disparities between privacy protection regimes to the maximum extent possible, and where cultural values, policy preferences and legal traditions stand against further harmonization, it is necessary to find ways to ensure the interoperability of disparate privacy protection regimes in a non-discriminatory manner.

Proposed Solutions

The G20 should first and foremost endorse good regulatory practices, including impact assessment of proposed regulations, stakeholder consultations and retrospective evaluations to ensure the quality of personal information protection laws and regulations, ensuring that regulations are necessary and proportionate to the regulatory purpose, avoiding unnecessary, duplicative or inefficient regulations. All G20 members should join the JSI on Services Domestic Regulation as commitment to the principles involved for good regulatory practice will assist significantly.

The G20 should also encourage countries to take into account international standards, principles, guidelines, and criteria of relevant international organizations or bodies, when developing their own personal information protection laws and regulations. The G20 should recognize the importance of interoperability of data privacy approaches. This starts with domestic policy makers ensuring their legal frameworks make clear that firms with a legal nexus in their jurisdiction are responsible for managing data

[12] Hoekman & Mattoo, 2013
[13] Casalini & Lopez González, 2019
[14] Aaronson & Leblond, 2018; Hillman, 2018; Schwartz, 2013
[15] Nordås, 2016

in a certain way, wherever the data is transferred and stored. A country's data-protection rules thereby travel with the data.[16]

Acknowledging the varying degrees of regulatory and institutional capacities across nations, the G20 should pledge technical assistance and capacity building support for those countries in need to introduce reforms aimed at developing or aligning their personal information protection laws and regulations to international standards, principles, guidelines, and criteria prescribed by relevant international organizations on this matter.

The G20 should support regulatory cooperation, including open dialogue, mutual understanding, and sharing of good practices to build trust in e-commerce, including by ensuring the protection of personal information transferred across borders. Indeed, the G20 should consider a more ambitious type of regulatory cooperation by which the data destination country undertakes a regulatory commitment to protect the personal data of foreign nationals in accordance with the source jurisdiction's standards, in exchange for market access commitments from the source jurisdiction. At a minimum, data destination countries should commit to adopt non-discriminatory practices in protecting all users of electronic commerce (nationals and foreign nationals) from personal information protection violations occurring within its jurisdiction.[17]

Recognizing that countries may take different legal approaches to protecting personal information, the G20 should encourage the development of mechanisms to promote compatibility and interoperability between different privacy protection regimes. These mechanisms should build on approaches embodied in recent digital economy agreements, including:[18]

> *(a) the recognition of regulatory outcomes, whether accorded autonomously or by mutual arrangement. To minimize the risk of discrimination, the G20 should signal the importance of designing mutual recognition agreements on privacy protection regimes in an open and transparent manner, offering solid due process guarantees to any country wishing to apply to join such type of agreement.*
> *(b) where available, rely on broader international frameworks;*
> *(c) where practicable, appropriate recognition of comparable protection afforded by domestic legal frameworks' national trustmark or certification frameworks; or*
> *(d) explore other avenues of transfer of personal information between the Parties.*

The G20 should encourage countries to exchange information on any such mechanisms applied in their jurisdictions and explore ways to extend these or other suitable arrangements to promote compatibility between them.

The G20 should encourage adoption of data protection trustmarks by businesses that would help verify conformance to personal data protection standards and good practices; and endeavour to mutually recognize each other' data protection trustmarks as a valid mechanism to facilitate cross-border information transfers while protecting personal information[19]

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[16] Specific models of interoperability include the APEC Privacy Framework and the OECD Guidelines governing the Protection of Privacy and Transborder Flows of Personal Data.
[17] Mattoo, 2018
[18] The approaches listed here are drawn from the trilateral Digital Economy Partnership Agreement (DEPA) between Chile, New Zealand and Singapore. See DEPA, 2020
[19] DEPA Article 4.2

c. *Cybersecurity Standards*

From a technical risk management perspective, cybersecurity is generally understood as covering data confidentiality, data integrity/authenticity and data availability i.e. networks, systems and applications are up and running.[20] Cybersecurity is essential for digital trade, creating trust for internet users and businesses. But there is an important balance to get right. Overregulation will interfere with digital innovation and competition; under-regulation will increase cyber threats and reduce trust in digital trade. The economic costs of getting it wrong are very high both for digital trade and for cybersecurity governance.

Various standards development organizations have made efforts to develop robust cybersecurity standards. The Budapest Convention of 1989 was an early effort drafted by the Council of Europe, to criminalize a minimum list of offences including both computer-related offences and cyber-enabled crime. 66 countries, have ratified the Convention. Increasingly, however, a whole range of cybersecurity measures are being introduced that have become barriers to digital trade. Some countries are now banning digital technologies on grounds of national security, with or without an evidence base, that the digital products contain malware, spyware or enable the conduct unauthorized surveillance. In some cases, government procurement of foreign digital technologies is restricted. In other case, indigenous cybersecurity standards are imposed, often involving burdensome authorization, licensing, testing and registration requirements.[21]

The costs of unilateral, restrictive cybersecurity measures are especially high. Such measures create expensive and inefficient barriers, increase business uncertainties, raise prices for consumers and reduce the quality and choice of business offerings.[22] Finding mechanisms for interoperability of cybersecurity frameworks becomes essential to reduce the costs of regulatory friction. As with privacy standards, the key missing ingredient is regulatory cooperation. Cybersecurity has not been a mainstream issue in trade agreements though recent RTAS begin to introduce initial relatively weak provisions on cooperation, sometimes with application only to limited aspects of cybersecurity.

Proposed Solutions

G20 members should encourage the use of transparent, globally competitive and market-driven cybersecurity standards and practices and avoid implementation of domestic measures that constrain competition and innovation in digital trade.[23]

As cybersecurity is an important precondition for cross-border data flows, the G20 should strive for greater international regulatory cooperation on cybersecurity.[24]

d. *Other Digital Standards Development*

Up to 80% of global trade is affected by standards or associated technical regulations.[25.] The development and adoption of consistent international standards, through collaborative technical input of both governments and the private sector, will be fundamental for medium to long-term development of the global digital economy.

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[20] ISO Standard ISO/IEC 27032:2012.
[21] Mishra, 2020
[22] Mishra, 2020
[23] Mishra, 2020
[24] Mishra, 2020
[25] Outsell, 2017

Widespread adoption of international standards in ICT have demonstrably increased interoperability and security across technology platforms, decreased barriers to trade, ensured quality and built greater public and user trust in digital products and services. Standards, including through the International Standards Organization (ISO) and the International Electrical Commission (IEC), have enabled agreement across borders and within large commercial environments, on issues as diverse as information security (ISO/IEC 27001), cloud computing ISO/IEC 27017 and quality management (ISO 9001).[26.] It is vital for inclusive growth of the global digital economy that WTO Members increase their investment in these collaborative international processes rather than race for unilateral dominance in digital standards development.

Proposed Solutions

G20 Members should encourage International standards bodies to intensify their work programs to develop a wider range of international standards relevant to data flows and digital transactions as a matter of priority. They should work together in the international standards bodies to develop and adopt globally competitive, open, and market-driven standards rather than independent national standards which tend to have less global business input and no scrutiny from the internet technical bodies.

G20 Members should commit resources to help promote inclusive collaborative participation of the business community in international digital standard-setting processes and encourage widespread business uptake of international standards.

G20 Members should signal their joint commitment to associated international regulatory dialogue, cooperation and collaborative regulatory sandbox experimentation. They should also refrain from abuse of dominant market positions to engage in unilateral extraterritorial application of digital standards.

G20 Members should seek to expand the scope provided in trade governance to recognize technical standards developed by private or multi-stakeholder bodies. Only a few RTAs include provisions acknowledging their role. Yet private and multi-stakeholder bodies are central to much digital standards setting and their role needs to be acknowledged.

International standards are trusted vehicles that promote and allow trade flows, including in the digital sphere. institutions working on standardization have extended their scope of attention to issues relevant to defining the technical requirements to facilitate data flows and electro-magnetic transmissions. Standards permit the harmonization of technical requirements that reduce technical barriers to trade and business costs and allow for the interoperability of digital products and services. By using common standards, countries can avoid redundant efforts and technical duplication at the national level.

The ISO and the IEC have developed standards for the flow of data within the cloud computing ecosystem and distributed platforms (ISO/IEC 19944-1) as well as others related to data use. The Institute of Electrical and Electronic Engineers (IEEE) has created standards for implementing wireless local network computer communication. The IEEE 802.11 standard is used in most home and office networks to allow laptops, printers, smartphones and other devices to communicate with each other. The push to develop standards for digital transactions has never been greater, such as the ISO 20-022 open standard, integral to facilitating the digital interoperability of financial transactions. These international standards are driven by the engagement of national standards bodies in standard-setting discussions.

[26] Horner, 2021

e. WTO Moratorium on Customs Duties on E-Transmissions

Right at the very time when the uptake of digital technologies offers tremendous reductions in the cost of doing international business and the biggest opportunities the world has ever seen for more inclusive economic integration, the divergent regulatory response across multiple jurisdictions is risking serious dis-integration of the global market place. The WTO Moratorium on Customs Duties on Electronic Transmissions (WTO Moratorium) has stood as a sole global beacon of hope that governments will continue to find ways of avoiding beggar-thy-neighbor policies as the shift to digitalization intensifies.

For twenty years, the global trading system has witnessed widespread benefits from the absence of tariffs on e-transmissions. The WTO Moratorium allowed business innovation to take place everywhere, at all levels of firm size and in all countries, spurring participation in global services outsourcing and other business services exports.

As a result, a steadily increasing number of WTO members are committing in RTAs to permanent application of the WTO Moratorium. All the economic and anecdotal business evidence points to this as the preferred multilateral outcome for continued global growth of digital trade.[27] But protectionist industrial policy is also raising its head and consensus in the WTO is at risk.

Proposed Solutions

The G20 members should invest resources in upholding the WTO Moratorium. In the event of pending failure to secure agreement at MC12 to extend the WTO Moratorium indefinitely, the onus will be squarely on G20 Members to, as a minimum, mobilize WTO Members to extend the Moratorium at MC12 for longer than the traditional two-year period which pertained throughout the first two decades of the WTO Work Program on E-Commerce. A minimum four-year extension period should be agreed at MC12, given the JSI on E-Commerce currently underway and its associated discussions on the Moratorium.

f. E-Commerce related Services Market Access

The GATS experience has been that to be truly effective, new rule making needs to be accompanied by and go hand-in-hand with progressive market access liberalization. In the context of the JSI on E-Commerce, liberalizing trade in a range of services sectors that are important enablers not only of cross-border services trade but also of associated goods trade would make a significant contribution to facilitating the ongoing growth of e-commerce, for both goods and services.

Accompanying commitments in areas such as computer and related services, electronic payments and other financial services, logistics, and telecommunications will be critical to making e-commerce disciplines fully effective. Agreement to negotiate on market access in the context of the JSI is not yet unanimous but an exchange of offers is anticipated to take place before the end of 2021.

The market access aspects of the JSI assume added importance when the very low level of commitments under the GATS in terms of digitally enabled services trade is considered. There are relatively fewer commitments in the GATS for mode 1 (including cross-border electronic delivery through digital networks) than for other modes. Despite significant improvements achieved in the RTAs, the under-representation of commitments in mode 1 remains the case also in the RTAs. Just as it was also true of the DDA GATS offers. Mode 1 is relatively more "unbound" across all groups of WTO members[28]

[27] Makayama & Narayanan, 2019; Andrenelli & Lopez-Gonzalez, 2019
[28] Roy, 2019

Moreover many of the existing GATS commitments on mode 1 date from a vastly different technological age in the Uruguay Round and have not been updated since. Stronger WTO commitments, even if some of these were merely to reflect the current situation in the real world, are long overdue. And there is much scope for new WTO bindings, given the considerable liberalization which has been and continues to be achieved in the RTAs.

Proposed Solutions

G20 Members should endorse the exploratory market access discussions on different clusters of related services that are currently being held by way of informal open-ended meetings of the WTO CTS-SS, including on Logistics Services,[29] Financial Services,[30] Tourism Services,[31] Environmental Services[32] and Agriculture related Services.[33]

G20 Members should commit to dealing with market access requests on services that enable E-Commerce, such as telecommunications, computer services and others34 under the umbrella of the WTO CTS/SS.

In the context of the ongoing informal market access discussions on financial services, G20 Members should consider the possibility to undertake new commitments in accordance with the Understanding of Commitments on Financial Services, which includes a specific provision limiting the right of Members to take measures that prevent transfers of information or the processing of financial information, including transfers of data by electronic means.

Built-in as part of the Uruguay Round outcome, the GATS already has a clear stand-alone multilateral mandate to negotiate progressive liberalization under Art XIX. Under Art. XIX the process of progressive liberalization is to be advanced through successive rounds of "bilateral, plurilateral or multilateral" negotiations directed towards increasing the general level of specific commitments. These negotiations got underway in 2000 but were folded into the Doha Development Agenda (DDA) at the end of 2001. The body handling the services negotiations – the WTO CTS/SS - was formed before the DDA and continues to sit. While for 2 decades the WTO CTS/SS proved a recipe for general inertia, prompting interest in the plurilateral approach, the WTO CTS/SS route remains open and has recently been reactivated. It deserves full continued G20 support.

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[29] See Communication from China - Exploratory discussions on market access: Logistics Services, JOB/SERV/301 23/07/2020, including courier, distribution, maritime transport and road transport services.

[30] See Communication from Australia, Canada, Switzerland and the United Kingdom - Exploratory discussions on market access: Financial Services, JOB/SERV/302 19/11/2020, with particular emphasis on wholesale financial services (B2B), not retail services.

[31] See Communication from Chile, Mexico, New Zealand and Panama - Exploratory discussions on market access: Tourism and Related services, JOB/SERV/286, 21/02/19

[32] See Communication from Australia, Canada, Mexico, New Zealand, Switzerland and the United Kingdom - Exploratory[...] Environmental Services – Revision, JOB/SERV/299/Rev.1 5/10/2020. The Communication requests to look beyond the environmental services as defined in the classification list and consider other relevant sectors such as engineering, architectural, construction and consulting services, R&D, repair and maintenance.

[33] See Communication from Australia, Canada, Chile, New Zealand, and Uruguay - Exploratory discussions on market a[...]: Agriculture-related services, JOB/SERV/300/Rev.1, 18/03/2021. The communication draws members' attention to services related to agriculture, hunting and forestry, veterinary services, and distribution services of agricultural and food products such as commission agents' services, wholesale trade and retailing.

[34] See also WTO CTS/SS Room Doc RD/SERV/156, tabled 26 August 2021 by Australia, Canada, Chile, New Zealand, Switzerland and the UK.

g. Dovetailing New Rule-Making with the WTO System

The "consolidated negotiating text" circulated by the co-convenors of the JSI on E Commerce in December 2020 is replete with square-bracketed references to "Parties/Members". This indicates that options are open as to the legal and institutional form of the eventual outcome i.e., whether an agreement would lie outside or within the multilateral trading system, or a mixture of the two. Till now, proponents have largely avoided discussions of legal architecture so as not to inhibit the flow of substantive work. However, questions of process affect substance, and vice versa and the stage is being reached where choices will need to be made.

Proposed Solutions

To preserve the primacy of the multilateral trading system embodied in the WTO, G20 Members should all be participating both in the negotiations on the substance and the discussions on the legal and institutional form of the outcome.

Plurilateral negotiations are a time-honoured, legitimate tool for progressing international trade negotiations. The legal form of the result is a separate matter, in which the relationship with existing international agreements is a crucial consideration. The form of the outcome will matter as well as its substance.

It is of prime importance to many WTO Members that the multilateral system should update its rule book, the better to reflect modern commercial reality and promote economic growth, particularly at this difficult juncture. A second consideration relates to the perceived balance between rights and obligations under any agreement emerging from the JSI. One facet is the trade-off between ambition and breadth with respect to both rule-making and market access. Another facet relates to the "free riding" problem. Here, the broader the participation (reaching so-called "critical mass"), the fewer free riders there are. But if this results in too low a level of ambition, the temptation may be to opt for a closed plurilateral agreement among a circumscribed number of participants.

The prospects of adding to Annex 4 of the WTO Agreement currently seem dim, given the requirement for consensus. Another approach might be an RTA style agreement under Article V of the GATS. This would require the agreement to have substantial sectoral coverage with no a priori exclusion of any mode of supply, and to eliminate discrimination in the sense of "national treatment" between parties.

In practice, some rights and obligations in any putative agreement emanating from the JSI are likely to fall within the boundaries of existing WTO provisions, while some will be outside. This raises the prospect of a hybrid outcome whereby participants could enshrine GATT and GATS-related aspects of a JSI outcome in the WTO through their schedules of commitments, and also conclude a complementary "E-Commerce/Digital Economy Agreement" to accommodate other or overlapping issues. A variation on this theme can be found in the Chile, New Zealand, Singapore DEPA, which affirms the parties' intention that the agreement should co-exist with other international agreements such as the WTO, and that it is open to accession on terms to be agreed.

G20 Members should ensure that negotiated outcomes from the JSI on E-Commerce that are relevant to digital services are given legal effect such that they fall within the limits of what can be legally incorporated in Members' services schedules of specific commitments; add the negotiated outcomes to their draft schedules on an autonomous but concerted basis; and submit them to the WTO Secretariat for certification. In this vein, G20 Members should ensure that the additional commitments are not in conflict with the provisions of the GATS, fall outside the GATS' remit or in any way undermine the rights and obligations of non-participants.

h. Taxation

Double non-taxation has been exacerbated in the digital economy where scale without mass has enabled companies to service a global market from a few production facilities – often located in low-tax jurisdictions.

Proposed Solutions

The G20 should implement the destination principle for Value-added Tax (VAT) and Goods and Services Tax (GST) and work with the OECD and others to find efficient collection systems that do not require a permanent establishment in each country.

G20 members should clarify the concept of value creation in the digital economy as a basis for the Inclusive Framework on Base Erosion and Profit Shifting (BEPS). A tax nexus based on where value is created should in principle apply horizontally to all sectors and firms.

De facto discriminatory digital services taxes should be rolled back as soon as possible and G20 should push for a solution to the Inclusive Framework on BEPS and its implementation.

The digital transformation of the economy has brought cross-border tax spillovers to the G20 policy agenda, notably through the BEPS project coordinated by the OECD. The project covers both indirect taxes and direct corporate taxes. The trade dimension of indirect taxation is straight forward and relates to the collection of VAT and GST on cross-border digital shopping. The BEPS Action Report 1[35] recommends that VAT or GST follow the destination principle combined with effective collection on cross-border supplies of services and intangibles. Depending on the effectiveness of collection and the tax incidence of VAT, this also solves some of the stated problems of non-taxation of digital platforms.

The international dimension of direct taxation relates to avoiding double taxation as well as double non-taxation. The Inclusive Framework on BEPS includes two pillars to address the double non-taxation problem. Pillar 1 covers nexus and profit allocation, while pillar 2 covers a minimum level of taxation. At their meeting in June 2021, the G7 Finance Ministers committed to a global minimum tax of at least 15% and to strongly support work at the OECD/G20 on the allocation of taxing rights. A final decision on design elements within this agreement is expected by October 2021.

Meanwhile several countries have introduced digital services taxes (DST), imposing a tax on the revenue on large foreign-owned technology companies without a local presence in their countries. The DSTs are meant to be temporary remedies in the absence on a multilaterally agreed solution. The DST is built on the premise that value is created by users of digital services, and such value should be taxed where it is created. However, raw data is abundant, non-rival and has value only when processed and used. Therefore, determining where in the data value chain value is created is not straight forward.[36]

Scholars describe the data value chain as data collection, information creation and value creation.[37] Data value chains are observed in all sectors of the economy where firms gather customer data online and offline, process the data and create value for the firm as well as for the customers.

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[35] OECD, 2015
[36] Kennedy, 2020
[37] Lim et al., 2018

In addition to questioning the premise of the DST, scholars also point out that the DSTs that have been introduced or suggested so far might be in breach of WTO commitments and rules.[38] Thus, taxes that by design are levied on specific foreign companies could be susceptible to WTO litigation. There is, however, also the view that DST can be considered a tax on location-specific rents that accrue on digital platforms from data gathered in the location.[39]

i. Competition Policy

The Telecommunications Services Reference Paper from 1996 is the only legally binding set of pro-competitive obligations in the GATS rule book. Revisiting the Reference Paper is long overdue in the light of the digital revolution that has unfolded since it came into force.

Proposed Solutions

G20 should revisit the Telecommunications Reference Paper in light of technological developments and changes in market structure over the past 25 years.

The G20 should also work with the International Telecommunications Union (ITU), OECD and others to clarify the need for regulation as well as god regulatory practices in areas relevant for market access and national treatment in electronic communications services.

In the context of the JSI on E-Commerce, the G20 should work towards replacing the Reference Paper with technology-neutral rules with flexibility for countries to regulate where needed and apply competition law where regulation is not needed.

The definition of telecommunications in the GATS schedules is based upon a product classification that no longer accurately reflects the technology and market structure of the sector. The Reference Paper mandates that an independent regulator imposes interconnection and access regulation on major suppliers to safeguard market access for foreign suppliers. The Reference Paper reflects the command-and-control approach to regulation considered good practice at the time. Today, however, it is recognized that effective regulation is collaborative and should aim at creating the conditions for bringing telecommunications into the general competition policy framework and enable innovation and new business models.[40]

Competition policy issues in the digital global economy have taken on new dimensions with the proliferation of global digital platforms, some of which offer services that may be substitutes to telecommunications. Furthermore, several large platforms build and operate their own internet infrastructure.[41] Their scale without mass stemming from close to zero marginal cost, indirect network effects and close to zero trade costs may result in market dominance on a global scale. However, even when one platform has established monopoly in a certain market, there may still be competition *for* the

[38] Bauer, 2018; Hufbauer & Lu, 2018; Kofler & Sinning, 2019
[39] Cui, 2019a; 2019b
[40] See Vogelsang (2017) for a discussion of the relationship between regulation and innovation in telecommunications and the ITU's Policy & Regulatory Framework website.
[41] Greenstein, 2020

market.[42] Such developments need to be factored in when defining markets susceptible to non-transitionary significant market power in electronic communications services.

The emergence of large global platform ecosystems does not necessarily mean that there is little or no competition. Smaller and niche platforms typically co-exist with the major player and may grow fast and take over as the dominant player, for instance during times of shifting demand conditions such as those we have witnessed during the Covid-19 crisis. Recent examples of new fast-growing platforms are Tik Tok in social media targeting teenagers; a host of regional players in car-hailing and food delivery services; and Shopify in e-commerce. A lesson from such dynamics is that mergers and acquisitions may cause more harm to competition in the platform economy than in most other markets.[43]

The telecommunications chapters in RTAs follow the provisions in the Annex and Reference Paper in the GATS surprisingly closely. Nevertheless, many recent FTAs use a functional definition of telecommunications such as "the transmission and reception of signals by any electromagnetic means".[44] Recent RTAs make a clear distinction between major suppliers (i.e. suppliers with significant market power) and other suppliers, and mandate asymmetric regulation. Thus, major suppliers should be subject to ex-ante regulation while the rest should not. Since countries may use different criteria and methodologies for identifying major suppliers, such provisions leave space for countries to use regulation and competition law as appropriate for local conditions. A systematic study of the enforcement and impact of telecommunications chapters in recent FTAs would help in modernizing the Reference Paper for the JSI.

3. Summary of Policy Recommendations

This paper calls on G20 members to:

- uphold the WTO Moratorium on Customs Duties on E-Transmissions
- roll back de facto discriminatory Digital Services Taxes
- provide technical assistance to developing countries on efficient non-discriminatory implementation of VAT and GST
- participate both in the substantive WTO negotiations under the JSI on E-Commerce and in the discussions on the legal and institutional form of the outcome
- hasten progress in the WTO JSI on E-Commerce, by building on recent outcomes on cross-border data flows in RTAs and DEAs
- foster trust in e-commerce by cooperating to achieve widespread interoperability of data protection regimes, drawing on experience in recent DEAs, including mutual recognition and other steps to promote compatibility, and adoption by businesses of data protection trust marks.
- join the WTO JSI on Services Domestic Regulation
- endorse good regulatory practices for personal data protection, ensuring regulations are necessary, proportionate and consistent with international standards, principles and guidelines.
- provide technical assistance for developing countries to upgrade and align their data protection regulations
- engage in exchanges on e-commerce-related services market access and consider extension to other services of existing GATS undertakings on financial services disciplining restrictions on transfers and processing of data by electronic means.

[42] Jullien & Sand-Zantman, 2021
[43] Argentesi, et al. 2019
[44] This definition is from USMCA and similar definitions are found in the CPTPP as well as CETA.

- commit to updating the Telecommunications Reference Paper in light of technological developments and changes in market structure over the past 25 years
- work with the ITU, OECD and others to clarify the need for regulation as well as good regulatory practices in areas relevant for market access and national treatment in electronic communications services
- work towards replacing the reference paper with pro-competition technology-neutral rules with flexibility for countries to regulate where needed and apply competition law where regulation is not needed
- refrain from unilateral extraterritorial application of all digital standards
- collaborate in the international standards bodies to develop globally competitive, open, market-driven frameworks
- cooperate to develop consensus-based international cybersecurity standards to reduce regulatory friction.

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Annex: Summary Table of Digital Trade Provisions in recent RTAs

		RCEP	CPTPP	USMCA	US/JPN	GBR/JPN	DEPA	AUS/SGP
Carve-outs	Gov Procurement	✓	✓	✓	✓	✓	✓	-
	Info held by a Party	✓	✓	but for OGD	but for OGD	but for OGD	but for OGD	but for OGD
	Financial Institution	✓	✓	✓	-	-	but for e-payments	-
	Financial Supplier	✓	✓	✓	-	-	but for e-payments	-
	Other	-	-	-	-	✓	-	✓
Cross-Border Data Flows	Prohibition	H	H	H	H	H	H	H
	Substantive test	Necessary (S)	Greater than	Necessary (O)	Necessary (O)	Greater than	Greater than	Greater than
	Application	Chapeau	Chapeau	Chapeau	Chapeau	Chapeau	Chapeau	Chapeau
	Non-conforming measures	✓	✓	✓	-	-	✓	✓
	S&DT	✓	-	-	-	-	-	-
Location of Computer Facilities (CF)	Prohibition	H	H	H	H	H	H	H
	Substantive test	Necessary (S)	Greater than	-	-	Necessary (O)	Greater than	Greater than
	Application	Chapeau	Chapeau	-	-	Chapeau	Chapeau	Chapeau
	Non-conforming measures	✓	✓	✓	-	-	✓	✓
Location of CF for Financial Services	Prohibition (subject to cross-border access)	-	-	-	H	-	-	H
Personal Information Protection	Duty to legislate	H	H	H	H	H	H	H
	S&DT	✓	-	-	-	-	-	-
	Intl' Standards	H	S	S	-	S	H	H
	Duty non-discriminatory protection	-	S	S	-	S	H	H
	Duty to publish info on personal protection	H	S	H	H	H	H	H
	Duty to encourage enterprises to publish	H	-	-	-	-	-	H
	Duty to promote interoperability	H	S	S	S	S	H	H
	Other duties	✓	-	-	-	-	✓	✓
Dispute Settlement		NO	✓	but for NVCs	✓	✓	✓	ad hoc for FS

Note: H: phrased in hard terms; S: phrased in soft terms; (S): subjective test; (O): objective test; NVC: non-violation complaint; FS: financial services; OGD: open government data. Chapeau: duty not to apply the measure in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade.