Trade, digital rights, and access to knowledge

Some considerations regarding trade and digital rights, and trade and access to knowledge.

Algorithmic transparency

EU trade agreements should not undermine algorithmic transparency.

In order to have regulatory supervision, we need access to source code and algorithms. The Volkswagen emissions scandal has shown that devices can be programmed to be misleading. In addition, algorithms in decision making software can be biased. And Facebook's (now Meta) role in elections and referendums shows that the use of personal data is not only a civil rights issue, but may compromise the integrity of our institutions.

Algorithmic transparency is also an important aspect of artificial "intelligence" legislation. Besides regulatory supervision, researchers and civil society organisations may have a role in auditing software and automated decision-making systems for instance regarding discrimination.

Politicians call for algorithmic transparency and software audits. However, the EU-Japan trade agreement's software code clause limits the possibilities to audit software and algorithms. Under the agreement's article 8.73 the EU and Japan may not require the transfer of, or access to, source code of software owned by a person of the other Party. The article provides some exceptions, but they have a limited scope or are limited by strict conditions. The clause is in conflict with important policy objectives.

The EU ratified the agreement, and ratified more agreements with the clause. Normally speaking, with these ratifications, the fate is sealed. But

with the perplexity about AI's disruptive capabilities, there may be a window of opportunity to reopen the debate.

We need policy space to properly regulate AI. The EU should not allow software code clauses in trade agreements.

Cross-border flows of data

Consumer trust is essential for the development of digital trade. Cross-border flows of data should not interfere with data protection and consumer trust.

Recent EU trade agreements are accompanied by a simultaneous finding of an adequate level of protection of personal data by both sides. Allowing cross-border data flows through an adequacy decision is, in principle, the correct way to approach this issue. However, some issues remain. First, the formulation "simultaneous finding of an adequate level" suggests a negotiated compromise in which fundamental rights may be traded against economic interests. It also remains to be seen whether the European Commission would really revoke the adequacy status if needed.

Second, EU trade agreements contain implicit and explicit commitments regarding cross-border flows of data. If the EU would not grant adequacy status, or withdraw it, these commitments would still stand. These commitments are accompanied by insufficient safeguards. [1]

The draft EU - New Zealand trade agreement contains a sweeping cross-border data flow commitment, which goes way beyond such commitments in earlier trade deals. The commitment comes with a safeguard – an exception to the commitment, a carve out – for the protection of personal data and privacy. This safeguard seems strong from one angle, and weak from an other.

In 2012 the European Commission decided that New Zealand adequately protects personal data. As a result, in the case of New Zealand, the strength of the data flow commitment and of the exception to the commitment may not matter much.

[1] K. Irion, S. Yakovleva and M. Bartl, "Trade and Privacy: Complicated Bedfellows? How to achieve data protection-proof free trade agreements", independent study commissioned by BEUC et al., published 13 July 2016, Amsterdam, Institute for Information Law (IViR).

Marija Bartl and Kristina Irion; Flows of Personal Data to the Land of the Rising Sun; EU-Japan trade agreement not compatible with EU data protection;

However, the EU commission expressed its intention to use the sweeping commitment and the strong / weak exception also in free trade agreements (FTAs) with countries without adequate data protection. This seems imprudent.

A lock in of a regulatory void

Jane Kelsey argues that trade agreements may cement the oligopoly that entities like Google, Amazon, Facebook and Apple have established in the absence of domestic regulation. [2] These companies seek, Kelsey argues, to lock in the regulatory void through binding international rules that prevent governments from regulating their operations, as the risks become more apparent.

Kelsey notes various issues: predatory practices to drive competitors out of business; lack of onshore presence for consumer complaints; regulatory evasion by defining itself as a computer rather than as more regulated service; tax avoidance; anti-competitive network effects; dynamic pricing depending on users' profiles; gender, race, nationality and class profiling when displaying commercial, advertising and news information; manipulation of political and social views, for instance the Cambridge Analytica scandal; purportedly self-employed workers who are denied the protections of domestic labour laws; and more.

Societies have to avoid a lock in of a regulatory void.

Implications for developing countries

In February 2018, Dan Ciuriak (CIGI) argued that data is not treaty-ready and drew the conclusion that Canada, which has much at stake in claiming a role in the data-driven economy, should be cautious about entering into international commitments, the implications of which are as yet unclear.

This conclusion may be all the more true for developing countries. The EU should assess the consequences for developing countries.

As an example, the EU commission wants to tackle "protectionist practices" in third countries, an issue also known as banning localisation.

A ban on localisation may prevent developing countries from building up

[2] See paragraphs 40 and 41 of Jane Kelsey; Submission to the Foreign Affairs, Defence and Trade Committee on the revised Trans-Pacific Partnership Agreement, otherwise known as the Comprehensive and Progressive Agreement on Trans-Pacific Partnership;

their own digital companies. A ban could "kick away the ladder". Companies from developed countries would not only extract oil and gold from developing countries, but also data, and add value and pay taxes elsewhere (in so far taxes are paid at all). As exploited countries may hardly be able to protect democracy and fundamental rights, this is also a democracy and fundamental rights issue.

The EU could consider to add an exception for development to a ban on localisation.

Copyright and patents

In its trade policy, the EU must appreciate the importance of the limitations on and exceptions to intellectual property rights, and the importance of the public domain, and avoid disproportionately strong rights and enforcement. The EU should not export the highly controversial recent copyright reform in trade agreements. [3]

[3] See, in general: Washington Declaration on Intellectual Property and the Public Interest and IP out of TAFTA