

Second contribution to the June-September 2017 Open Consultation of the ITU CWG-Internet

Why should data flow freely?

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Summary

The principle that data should be borderless and that it should flow freely is a policy decision that has profound effects. Some base that principle on the idea that data is a commodity that should be freely traded.

But the idea that data should flow freely does not actually flow logically from the idea that data is a commodity: commodities are taxed and the producers of raw material are compensated for providing that material to the industries that transform it and add value to it.

Further, the idea that data is a commodity to be freely traded contradicts fundamental human rights.

And the benefits of free flow of data have been overstated: indeed free flow of data likely increases income inequality.

There is no obvious justification for policies favouring the free flow of data other than to allow OTTs to continue to accumulate huge profits (often monopoly profits) by extracting and refining data, without paying taxes and without compensating the users who produce the data in the first place.

As a consequence, there should be a moratorium on negotiations regarding the free flow of data.

Background and Introduction

On 25 May 2017 Council decided that Open Consultations for the CWG-Internet would be convened on the following issue:

Considering the rapid development of information and communications technology (ICT) which led to the advent of Internet-based services commonly known as “over-the-top” (hereafter: OTT), all stakeholders are invited to submit their inputs on the following key aspects from policy prospective:

1. What are the opportunities and implications associated with OTT?
2. What are the policy and regulatory matters associated with OTT?
3. How do the OTT players and other stakeholders offering app services contribute in aspects related security, safety and privacy of the consumer?
4. What approaches which might be considered regarding OTT to help the creation of environment in which all stakeholders are able to prosper and thrive?
5. How can OTT players and operators best cooperate at local and international level? Are there model partnership agreements that could be developed?

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1. What are the opportunities and implications associated with OTT?

It is obvious that personal data has great value when it is collected on a mass scale and cross-referenced.² The monetization of personal data drives today's OTT/Internet services and the provision of so-called free services such as search engines.³

Thus issues related to the flow of data have major implications for OTT's.

2. What are the policy and regulatory matters associated with OTT?

We examine below the policy and regulatory matters related to the flow of data which, as noted above, are matters associated with OTTs, because OTTs cannot thrive without data flows.

Some, in particular certain types of businesses and certain developed states, appear to base much discussion, and some decisions, on an implicit (or explicit) principle that data should flow freely. That principle appears to be derived from other implicit (or explicit) principles, including "the Internet is borderless, and so is data associated with the Internet" and/or "data is just another commodity, and so should not be subject to restrictions on trade".

The statement "the Internet is borderless" has no meaning. A correct statement is "some aspects of the Internet are not tied to national borders, for example many domain names and most IP addresses are not allocated on a national basis."

It is not contested that offline law applies equally online. So a meaningful statement would be "what national and international laws are appropriate for the Internet, and is there a need to change existing laws?"

It is in this context that there are calls to treat data as a commodity that should not be subject to trade restrictions.

In section 2.1 below we consider the idea that data is a commodity, and show that the implications of that idea are that data should be taxed and that users should be adequately compensated for the data that they provide.

However, in section 2.2 below, we show that this idea is false: data is not a commodity and cannot be treated as such.

² See for example pp. vii and 2 of the GCIG report, available at:

http://ourinternet.org/sites/default/files/inline-files/GCIG_Final%20Report%20-%20USB.pdf. Henceforth referenced as "GCIG". See also 7.4 of

http://www.oecd-ilibrary.org/taxation/addressing-the-tax-challenges-of-the-digital-economy_9789264218789-en

; and <http://www.other-news.info/2016/12/they-have-right-now-another-you/>; and the study of data brokers at:

<https://www.opensocietyfoundations.org/sites/default/files/data-brokers-in-an-open-society-20161121.pdf>;

<https://www.internetsociety.org/blog/public-policy/2017/03/my-data-your-business>;

<http://www.economist.com/news/leaders/21721656-data-economy-demands-new-approach-antitrust-rules-worlds-most-valuable-resource>

³ <http://www.theatlantic.com/technology/archive/2014/08/advertising-is-the-internets-original-sin/376041/> and

7.4 of the cited OECD report; and <http://www.other-news.info/2016/12/they-have-right-now-another-you/> and

<https://www.internetsociety.org/blog/public-policy/2017/03/my-data-your-business>

2.1 Data as a commodity

A propensity by some to advocate in favor of the principle of the free flow of data was clearly illustrated in the workshop on “Data Localization and Barriers to Cross-Border Data Flows”⁴ held at the 2017 WSIS Forum. The description of that workshop includes the following:

There is growing debate about the spread of national data localization restrictions and barriers to Cross-Border Data Flows (CBDF). Localization policies include requirements such as: data must be processed within a national territory, and involve a specific level of “local content,” or the use of locally provided services or equipment; data must be locally stored or “resident” in a jurisdiction; data processing and/or storage must conform to unique national standards; or data transfers must be routed largely or solely within a national or regional space when possible. In addition, in some cases, data transfers may require government approval based on certain conditions, or even be prohibited. Governments’ motivations for establishing such policies vary and may include e.g. promoting local industry; protecting (nominally, or in reality) the privacy of their citizens, and more broadly their legal jurisdiction; or advancing national security or an expansive vision of “cyber-sovereignty.”

The stakes here are high. McKinsey has estimated that data flows enabled economic activity that boosted global GDP by US \$2.8 trillion in 2014, and that data flows now have a larger impact on growth than flows of traded goods. The growth of localization measures and barriers to CBDF could reduce these values and impair not only business operations but also vital social processes that are predicated on the flow of data across the Internet. Hence, language limiting such policies has been included in a number of trade agreements, including the TPP and the proposed TTIP and TiSA. It also is possible that at least some of the policies in question are inconsistent with governments’ commitments under the WTO’s GATS. But the extent to which these issues should be addressed by trade instruments remains controversial, with many in the global Internet community and civil society remaining critical of non-transparent intergovernmental approaches to the Internet, and many privacy advocates opposing the application of trade rules to personal data.

This workshop will take stock of the growth of data localization measures and barriers to data flows and assess the impacts of these trends; consider what can be achieved via international trade instruments in the current geopolitical context; and explore the possibility of a parallel track of multistakeholder dialogue and norm setting that is balanced and supported by diverse actors. It will consider whether normative approaches involving monitoring and reporting could help to ensure that data policies do not involve arbitrary discrimination or disguised digital protectionism, and do not impose restrictions greater than what is required to achieve legitimate public policy objectives.

We stress here the last sentence above “do not impose restrictions greater than what is required to achieve legitimate public policy objectives”.

⁴ <https://www.itu.int/net4/wsis/forum/2017/Agenda/Session/272#intro>

This raises the question: who will decide what public policy objectives would not be legitimate? During the workshop, it was made clear that the legitimacy of restrictions, and of public policies themselves, would be made by arbitration panels under the WTO or related agreements. That is, the intent is to subordinate decisions made by national parliaments and national governments to the opinion of a panel of international jurists regarding whether or not those decisions are “legitimate” in light of the provisions of treaties such as TPP, TISA, etc.

But why should trade agreements be given primacy over other international instruments, in particular those regarding human rights? Some recognize that trade is not the only, or even the pre-eminent, matter to be considered.

For example, at the 2017 WSIS Forum High-Level Policy Session on “Digital Economy and Trade”⁵, H.E. Mr. Julian Braithwaite, UK Ambassador and Permanent Representative to the United Nations and Other International Organisations in Geneva, stated:

There are two big public policy challenges on digital the first is over data and as the Internet is so important for wider public policy the regulatory response to that, child protection online, cybersecurity, privacy is to regulate in a way to apply online the laws you that are applied offline. Putting your arms in a data in a national jurisdiction. This may be the right response for that particular public policy issue but the unintended consequence of that is you close down data flows internationally and you potentially break up this extraordinary advantage of the Internet providing as a global platform. How one achieves the wider public policy goals which involve the safe, responsible use and sharing of data while maintaining the cross-border flows that are the things that lead to the advantages, that's the first question.

According to this view, cross-border flows are always beneficial, so it is important to consider the disadvantages that might result if cross-border data flows are restricted, for example to protect privacy.

However, it is not obvious that cross-border flows are always beneficial. Reacting to the above statement, and to and other statements, a staff member of the European Commission stated, speaking in a private capacity:

I wanted to raise a word of caution from the European Commission, I will talk in my personal behalf as an economist. You introduced this session saying there is a wide consensus that broadband will grow, jobs, et cetera.

I would say that's not 100% true. There is increasing evidence and papers, other international organizations saying that technologies are increasing inequality and in the long run thus is a cause of slowing growth. This is an important point. The enthusiasm that's tried to be here for the new technology should probably be kind of moderated if we think about the Sustainable

⁵ <https://www.itu.int/net4/wsis/forum/2017/Agenda/Session/287#intro>

The transcript is at:

https://www.itu.int/net4/wsis/forum/2017/Content/Uploads/DOC/3490e121a88547aea5502d3f5cba96a9/Captio ning_287.pdf

Development Goals. So the thing is, probably on the Agenda of the international organization it should not only be data trade, common rules for access to data, et cetera, but also some other very hot issues like taxation of multinationals, migration problems, et cetera which are closely related to evolution of digital technologies.

Indeed, if data is considered to be a commodity, subject to trade facilitation rules, then why isn't it considered a commodity also from the point of view of taxation? And why aren't the producers of the raw material (the end-users who provide the data) fairly compensated for their production?

Data in the OTT context has often been compared to oil. Nobody expects the owners of the ground in which there is crude oil to provide the crude oil for free to the companies that refine it, add value to it, and sell the products derived from crude oil. And nobody expects the flow of oil to escape taxation.

So there is a fundamental inconsistency here: if one argues that data should be treated as a commodity, because it is valuable when it is combined with other data, then one cannot simultaneously argue that it cannot be taxed and that end-users should provide their personal data without adequate compensation.

Of course users are, at present, compensated for their data because they receive so-called "free" services, such as social networks, search engines, etc. But the value of those services is far less than the value of the data, as can be seen from the fact that the OTT providers are extremely profitable: in fact, far more profitable than other extractive industries. Thus users do not receive adequate compensation for the raw material that they provide: their personal data.

2.2 Data is not a commodity

But personal data is not a commodity like any other commodity: it is related to a person's private life and thus to his or her human rights.

The Universal Declaration of Human Rights provides in its Article 12:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Thus it is up to the law (meaning national law) to define what is an "arbitrary" interference with a person's privacy. Many states, in particular in Europe, have enacted, and enforce, laws regarding the protection of personal data.

Since those laws implement the human right to privacy, they take priority over other laws. Consequently, data is not a commodity like oil, because data can only be processed in accordance with laws that protect personal data, and the privacy of the people to whom the data relates.

Further, the Universal Declaration of Human Rights provides in its Article 22:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization

and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

As noted above, data is a valuable resource: OTT's derive their profits from extracting and refining data.

People have the right to realize the economic rights needed for their dignity and the free development of their personality. That right includes the right to be adequately compensated for the value of the data that is provided to OTT providers, both individually, and as residents of a state, through taxation of data flows.

2.3 Trade negotiations

Past and current trade negotiations have resulted (or are likely to result) in agreement on provisions that place restrictions on the ability of states to restrict data flows.

For example, Article 14.11 of the Trans-Pacific Partnership (TPP), which is now thankfully irrelevant (a development for which we must thank US President Trump) includes the following provisions⁶:

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.

3. Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 to achieve a legitimate public policy objective, provided that the measure:

(a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and

(b) does not impose restrictions on transfers of information greater than are required to achieve the objective.

What will prevent a state from arguing that taxation of data is a disguised restriction on trade, which is not required to achieve a legitimate public policy objective?

Or from arguing that data localization requirements, thought to be necessary to protect privacy, are a disguised restriction on trade, which is not required to achieve a legitimate public policy objective?

Recall that disputes regarding the interpretation and implementation of trade agreements are not decided by national courts. They are decided by arbitration panels composed of international jurists.

Thus national measures regarding data flows can be overturned even if they have been democratically decided by a national parliament.

⁶ <https://ustr.gov/sites/default/files/TPP-Final-Text-Electronic-Commerce.pdf>

This appears to us to be a violation of the human right to take part in the conduct of public affairs, as provided in Article 25 of the International Covenant on Civil and Political Rights (and also in Article 22 of the Universal Declaration of Human Rights).

Leaked⁷ versions of the documents being discussed in the context of the Trade in Services Agreement (TISA) indicate that provisions similar to (or even worse than) those of TPP are being negotiated at present.

This must stop. As two experts put the matter⁸:

One must wonder whether this [trade negotiations regarding e-commerce] will be an opportunity to foster digital rights or leave us with even lower standards and a concentrated, quasi-monopolistic market benefiting from public infrastructure? The rhetoric of opportunities for the excluded – connecting the next billion – sounds great, but only if we disconnect it from the current realities of the global economy, where trade deals push for deregulation, for lower standards of protection for the data and privacy of citizens, where aggressive copyright enforcement risks the security of devices, and when distributing the benefits, where big monopolies, tech giants (so called GAFA) based mostly in the US, to put it bluntly, take them all.

...

Never before has a trade negotiation had such a limited number of beneficiaries. Make no mistake, what will be discussed there, with the South arriving unprepared, will affect each and every space, from government to health, from development to innovation going well beyond just trade. Data is the new oil – and we need to start organising ourselves for the fourth industrial revolution. The data lords, those who have the computational power to develop superior products and services from machine learning and artificial intelligence, want to make sure that no domestic regulation, no competition laws, privacy or consumer protection would interfere with their plans.

Disguised as support for access and affordability, they want everyone to connect as fast as they can. Pretending to offer opportunities to grow, they want to deploy and concentrate their platforms, systems and content everywhere in the world. Enforcement measures will be coded in technology, borders for data extraction will be blurred, the ability to regulate and protect the data of citizens will be disputed by supranational courts, as local industries cannot compete and local jobs soar. If we are not vigilant, we will rapidly consolidate this digital colonisation, a neo-feudal regime where all the rules are dictated by the technology giants, to be obeyed by the rest of us.

⁷ The TISA negotiations are secret (as are other trade negotiation): even members of parliament have been denied access to negotiating texts. The discussion of such matters in secret forums is a blatant contradiction of the principles of transparency and multi-stakeholder participation. For that reason alone, these negotiations must be stopped.

⁸ <https://www.opendemocracy.net/digitaliberties/renata-avila-burcu-kilic/new-digital-trade-agenda-are-we-giving-away-internet>

2.4 Conclusion

The principle that data should be borderless and that it should flow freely is a policy decision that has profound effects. As shown above, it does not flow logically from the idea that data is a commodity, it contradicts the human right to privacy, and its economic benefits have been overstated (indeed, free flow of data is likely increasing income inequality).

There is no obvious justification for policies favouring the free flow of data other than to allow OTTs to continue to accumulate huge profits (often monopoly profits) by extracting and refining data, without paying taxes and without compensating the users who produce the data in the first place.

As a consequence, there should be a moratorium on negotiations regarding the free flow of data.