

Development-oriented e-commerce proposals

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1. INTRODUCTION

1.1 A number of WTO members have initiated plurilateral discussions on new rules for e-commerce, with a view towards protecting consumers, enabling MMSEs better to participate in e-commerce, and favouring development.

1.2 We propose here elements that will help to achieve these goals. The elements are related to the following topics:

1. Data
2. Competition
3. Taxation
4. Access to the Internet
5. MMSEs
6. Artificial Intelligence
7. Access to Technology
8. Consumer Protection
9. Employment and Working Conditions

2. PROPOSED ELEMENTS

2.1 Data

Rationale

2.1 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 digital economy and the provision of so-called free services such as search engines.³ The relevance of these issues for trade and development are well highlighted in paragraphs 21-25 of the Note by the UNCTAD Secretariat, *The value and role of data in electronic commerce and the digital economy and its implications for inclusive trade and development* (TD/B/EDE/3/2, 23 January 2019)⁴.

2.2 Thus issues related to the flow of data have major implications for trade and development, see for example the 2018 UNCTAD Trade Development Report, at:

<https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=2227>

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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>

⁴ https://unctad.org/meetings/en/SessionalDocuments/tdb_ede3d2_en.pdf

2.3 As the Introduction of the Report puts the matter:

Technological changes are having a profound impact on the way we go about our daily lives. Digital innovations have already changed the way we earn, learn, shop and play. Collectively, as a fourth industrial revolution, they are changing the geography of production and the contours of work. But in the end, social and political actions – in the form of rules, norms and policies – will determine how the future unfolds.

In this respect, the digital revolution has the misfortune of unfolding in a neo-liberal era. Over the last four decades, a mixture of financial chicanery, unrestrained corporate power and economic austerity has shredded the social contract that emerged after the Second World War and replaced it with a different set of rules, norms and policies, at the national, regional and international levels. This has enabled capital – whether tangible or intangible, long-term or short-term, industrial or financial – to escape from regulatory oversight, expand into new areas of profit-making and restrict the influence of policymakers over how business is done.

This agenda has co-opted a vision of an interconnected digital world, free from artificial boundaries to the flow of information, lending a sense of technological euphoria to a belief in its own inevitability and immutability. Big business has responded by turning the mining and processing of data into a rent-seeking cornucopia.

Recent events – beginning with the financial crisis, through the sluggish recovery that has followed, to the fake news and data privacy scandals now grabbing headlines – have forced policymakers to face the inequities and imbalances produced by this agenda. Governments have begun to acknowledge the need to fill regulatory deficits that harm the public, to provide stronger safety nets for those adversely affected by technological progress and to invest in the skills needed for a twenty-first century workforce. But so far, actions have spoken more softly than words.

Despite the talk, this is neither a brave nor a new world. The globalization era before 1914 was also one of dramatic technological changes as telegraph cables, railroads and steamships speeded up and shrank the world; it was also a world of unchecked monopoly power, financial speculation, booms and busts, and rising inequality. Mark Twain castigated a “Gilded Age” of obscene private wealth, endemic political corruption and widespread social squalor; and, not unlike today’s digital overlords, the railroad entrepreneurs of yesteryear were master manipulators of financial innovations, pricing techniques and political connections that boosted their profits even as they harmed business rivals and the public alike.

And much like today, the new communication technologies of the nineteenth century helped capital to reconfigure the global economy. Many commentators wistfully describe this as a “free trade” era, evoking David Ricardo’s idea of comparative advantage to suggest that even technological laggards were better off specializing in what they did best and opening up to international trade. Here was a comforting win-win narrative for a winner-takes-most world, and an article of faith for the globalist cause, which led John Maynard Keynes, in his *General Theory*, to draw parallels with the Holy Inquisition.

In reality, international trade in the late nineteenth century was managed through an unholy mixture of colonial controls in the periphery and rising tariffs in the emerging core, often, as in the case of the United States, pushed to very high levels. But like today, talk of free trade provided a useful cover for the unhindered movement of capital and an accompanying set of rules – the gold standard, repressive labour laws, balanced budgets – that disciplined government spending and kept the costs of doing business in check.

As the growing imbalances and tensions of contemporary globalization play out in an increasingly financialized and digitalized world, the multilateral trading system is being stretched to its limit. Uncomfortable parallels with the 1930s have been quickly drawn. But if there is one lesson to take from the interwar years, it is that talking up free trade against a backdrop of austerity and widespread political mistrust will not hold the centre as things fall apart. And simply pledging to leave no one behind while appealing to the goodwill of corporations or the better angels of the super-rich are, at best, hopeful pleas for a more civic world and, at worst, wilful attempts to deflect from serious discussion of the real factors driving growing inequality, indebtedness and insecurity.

The response cannot be to retreat into some mythical vision of national exceptionalism, or to sit back and hope that a wave of digital exuberance will wash these problems away. There is, rather, an urgent need to rethink the multilateral system, if the digital age is to deliver on its promise.

In the absence of a progressive narrative and bold leadership, it is no surprise that the interregnum, as Antonio Gramsci would have predicted, is exhibiting disturbing signs of political morbidity. Finding the right narrative will be no easy task. For the moment, we might do best to recall the words of Mary Shelley – whose monstrous creation, Frankenstein, celebrating 200 years this year, has lost none of its power to evoke our fear of and fascination with technological progress – “the beginning is always today”.

2.4 In this context, it is worth noting that a respected Harvard Business School professor has referred to the current Internet business model as “Surveillance Capitalism” and severely criticized it⁵.

2.5 As already noted, the topic of data, and its importance, is also well analyzed in cited UNCTAD document TD/B/EDE/3/2.

2.6 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 is, there are calls to treat data as a commodity that should not be subject to trade restrictions.

2.7 But 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?

2.8 Data in the context of the digital economy 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.

2.9 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.

2.10 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 providers of such services 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.

⁵ <https://www.theguardian.com/books/2019/feb/02/age-of-surveillance-capitalism-shoshana-zuboff-review>

2.11 Furthermore, it is important to consider the collective value of data. A ride sharing company has valuable data on traffic flows within a city. That data is generated by the residents of the city, so the residents of the city should benefit from the value-added of the collective data.

2.12 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.

2.13 As noted above, data is a valuable resource: dominant Internet companies derive their profits from extracting and refining data.

2.14 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 dominant Internet companies, both individually, and as residents of a state, through taxation of data flows.

2.15 Further, it is not disputed that the privacy of personal data must be protected, see for example paragraph 48 of the cited UNCTAD document TD/B/EDE/3/2.

Elements to Consider

- In order to ensure the protection of personal data, thus increasing consumer trust, Parties shall accede to Convention 108 of the Council of Europe and the 2018 Protocol amending that convention (CM(2018)2 of 18 May 2018).
- Parties shall ensure that national laws regarding personal data conform to the provisions of Convention 108 as amended in 2018, and shall apply those provisions to cross-border data flows.
- Prior to acceding to trade-related provisions regarding data flows, Parties shall have enacted a national data policy which includes, in addition to personal data protection, provisions to ensure equitable distribution of the value-added derived from the monetization of data.

2.2 Competition

Rationale

2.16 As UNCTAD puts the matter⁶: “Winner-takes-all dynamics are typical in platform-based economies, where network effects can generate major benefits to first movers. Whoever controls the platform also controls the distribution channel, giving the dominant platform (and data) owner considerable market power. ... As a result of network effects, platforms may gain market power and could abuse their dominant position, for example by imposing exclusivity arrangements on their providers or carrying out predatory pricing against competitors.” See also paragraphs 36-40 and 64-67 of the cited UNCTAD document TD/B/EDE/3/2 and the April 2019 report to the European Commission “Competition Policy for the Digital Area”⁷.

⁶ UNCTAD, *Making Digital Platforms Work for Development*, Policy Brief no. 73, March 2019, https://unctad.org/en/PublicationsLibrary/presspb2019d2_en.pdf

⁷ <http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>

2.17 As noted scholar Tim Wu points out⁸, antitrust law must not be restricted (as it is at present in the USA) “to deal with one very narrow type of harm: higher prices to consumers”. On the contrary, “It needs better tools to assess new forms of market power, to assess macroeconomic arguments, and to take seriously the link between industrial concentration and political influence”. The same has been said by other scholars⁹, by a newspaper¹⁰, an advocacy group¹¹, a commission¹² of the European Parliament, a group¹³ of European industries, a well-known academic¹⁴, and even by a plutocrat¹⁵ who benefitted from the current regime.

2.18 One method to reduce concentration in the Internet, or at least to mitigate some of its potentially negative effects is to ensure that, if a company has a very large amount of data, then it would have to make that data accessible to others on some sort of fair terms, or after some period of time¹⁶. This is conceptually similar to the time limits that apply to copyright and patents, or to the reasonable and non-discriminatory (RAND) provisions that most standards-making bodies require if patent licenses are required in order to implement a standard.

Elements to Consider

- Prior to acceding to trade-related provisions regarding e-commerce, Parties shall have enacted a national competition/anti-trust law which is not restricted to consumer harm.
- Prior to acceding to trade-related provisions regarding e-commerce, Parties shall have acceded to global anti-trust rules and an international enforcement mechanism for such rules.
- Prior to acceding to trade-related provisions regarding e-commerce, Parties shall have enacted data-sharing legislation¹⁷.

2.3 Taxation

Rationale

2.19 As the UNCTAD paper *Making Digital Platforms Work for Development* puts the matter: “Policymakers in both developing and developed countries face the challenge of taxation with regard to the digital economy. ... the digital economy could enable more tax planning and erosion, which reduce the availability of domestic resources for development.” See also paragraphs 69-71 of the cited UNCTAD document TD/B/EDE/3/2. The UNCTAD paper *Growing Trade in Electronic Transmissions*:

⁸ Wu, Tim (2018) *The Curse of Bigness: Antitrust in the New Gilded Age*, Colombia Global Reports. A review is at: <http://www.boundary2.org/2018/10/richard-hill-too-big-to-be-review-of-wu-the-curse-of-bigness-antitrust-in-the-new-gilded-age/>

⁹ <http://www.yalelawjournal.org/note/amazons-antitrust-paradox>
<http://www.kcl.ac.uk/sspp/policy-institute/CMCP/Tech-Giants-and-Civic-Power.pdf>
<https://promarket.org/wp-content/uploads/2018/04/Digital-Platforms-and-Concentration.pdf>

¹⁰ https://www.washingtonpost.com/business/is-amazon-getting-too-big/2017/07/28/ff38b9ca-722e-11e7-9eac-d56bd5568db8_story.html

¹¹ <https://ilsr.org/amazon-stranglehold/>

¹² <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARG+PE-627.635+01+DOC+PDF+V0//EN&language=EN>

¹³ <http://www.digitalmusiceurope.com/2018/09/24/hi-world-6-2-4-2/>

¹⁴ <https://www.wired.com/story/tech-swagger-triggered-government-distrust/>

¹⁵ <https://www.politico.com/magazine/story/2014/06/the-pitchforks-are-coming-for-us-plutocrats-108014>

¹⁶ <https://www.foreignaffairs.com/articles/world/2018-08-13/big-choice-big-tech>

¹⁷ See for example pp. 92 ff of the EC Report at <http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>

*Implications for the South*¹⁸ identifies digitizable products and estimates their trade in physical form and their electronic transmissions; it also estimates the impact of growing trade in electronic transmissions on tariff revenues of governments.

2.20 Further, enforcement of national tax laws may be difficult if companies do not have a local presence, and/or if data required to audit tax declarations is not stored in the jurisdiction where the taxes are due.

Elements to Consider

- Parties may impose local presence and/or data localization requirements in order to facilitate the enforcement of tax laws.
- Prior to acceding to trade-related provisions regarding e-commerce, Parties shall have acceded to global taxation rules and an international enforcement mechanism for such rules.
- Parties may impose customs duties on data flows, in particular when such flows are eroding existing tax bases and/or when alternate types of tax bases are insufficient to generate required tax revenues.

2.4 Access to the Internet

Rationale

2.21 It is not disputed that the Internet is less available, and relatively much more expensive, in developing countries than in developed countries, see for example paragraphs 14 ff. of the cited UNCTAD document TD/B/EDE/3/2.

2.22 It is also not disputed that access to the Internet is facilitated by modern and harmonized telecommunications environments, that steps should be taken to reduce the cost of international Internet connectivity, and that scarce resources should be administered in the public interest.

Elements to Consider

- Prior to acceding to trade-related provisions regarding e-commerce, Parties shall have acceded to the 2012 version of the International Telecommunication Union's *International Telecommunication Regulations*.
- Prior to acceding to trade-related provisions regarding e-commerce, Parties shall have transposed to national law the provisions of ITU-Recommendation D.50, *International Internet connection*.
- Each Party shall administer its procedures for the allocation and use of scarce telecommunications resources, including frequencies, telephone numbers, Internet Protocol addresses, Internet domain names, and rights-of-way, in an objective, timely, transparent, and non-discriminatory manner, in the public interest.

2.5 Micro, Small and Medium Enterprises

Rationale

2.23 It is not disputed that steps should be taken to facilitate the use of e-commerce by micro, small and medium sized enterprises (MMSEs).

¹⁸ https://unctad.org/en/PublicationsLibrary/ser-rp-2019d1_en.pdf

2.24 Companies in developing countries may not have adequate access to the e-commerce platforms used in developed countries, and/or the terms of access, including loss of control over data, may be unfavorable.¹⁹ E-payment platforms may not be accessible or available in developing countries.²⁰ Cross-border delivery may be difficult for both companies and consumers in developing countries.²¹

2.25 MSMEs are the least likely to be able to effectively compete with multinational corporations, who have become global digital leaders, and have decimated smaller companies and who have benefitted from digital industrial policies such as subsidies, R&D subsidies, development of, and access to, and ownership of technologies, economies of scale, government-sponsored infrastructure, tax benefits, etc.²²

2.26 A survey of MSMEs found that:²³

a) MSMEs have expressed concern over concentration in the markets for e-commerce platforms, e-payment solutions and cross-border delivery services. ... Market concentration is especially a concern for MSMEs, as they have limited capacity and resources, and often rely on external suppliers for critical services for their cross-border operations.

b) The cost of membership fees in cross-border e-commerce platforms ranked third among all major challenges (15%), and this was a more prominent challenge for companies in African countries (19%). In addition to, or in place of, membership fees, some e-commerce platforms charge a relatively high commission on the sales conducted through the platforms. Some e-commerce platforms, for example, may charge up to 40% commission on sales.

2.27 While signatures are not generally required for e-commerce (e.g. they are not required for contract formation), they are required on certain customs documents. Since it is unlikely that global agreement could be reached on specific harmonized e-signature technologies, e-commerce by MSMEs would be facilitated by the creation of a clearing house for e-signatures.²⁴

2.28 Steps should be taken to reduce the ability of dominant platforms to abuse their market power to the detriment of MSMEs. Examples of such abuse include:

a) Thirty percent of one large platform's sales are generated by its recommendation engine.²⁵ That is, it's because the platform knows that when people buy X, they also like to buy Y, so the platform suggests Y to those who are buying X and so gets them to buy more. So this requirement to allow the purchasing records of consumers worldwide to flow into the

¹⁹ Pages 12 and 24 of the International Trade Center (ITC) paper *New Pathways to E-Commerce: A Global MSME Competitiveness Survey*, CEES-17-105-E, available at: <http://www.intracen.org/publication/New-Pathways-to-E-commerce/>.

²⁰ Page 14 of the cited ITC paper; see also page 46 of UNCTAD's *Information Economy Report 2017: Digitalization, Trade and Development*,

<http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1872>;

see also paragraphs 42-43 and 48-52 of the 14 February 2018 UNCTAD Secretariat Note *Fostering development gains from e-commerce and digital platforms* (TD/B/EDE/2/2)

http://unctad.org/meetings/en/SessionalDocuments/tdb_ed2d2_en.pdf.

²¹ Page 19 of the cited ITC paper; see also pages 46 and 86 of the cited UNCTAD report; see also paragraphs 53-55 of the cited February 2018 Secretariat Note.

²² Paragraph 3.4 of the cited Statement by the African Group.

²³ <http://www.intracen.org/publication/New-Pathways-to-E-commerce/>

²⁴ For a relatively detailed discussion of these issues, with references, see:

https://ourworldisnotforsale.net/2017/Hill_E-signatures.pdf

²⁵ Big data : concepts, methodologies, tools, and applications, Information Resources Management Association. Publisher: Hershey, PA : Information Science Reference, 2016

platform's recommendation engine further increases the platforms profits and dominance, allowing it more power to squeeze MSMEs for fees etc. that MSMEs are already finding unaffordable.

b) In some cases a platform may be abusing its dominance by listing its own product more prominently, even if an MSME's equivalent product is cheaper.

Elements to Consider

- Prior to acceding to trade-related provisions regarding e-commerce, Parties shall have ensured that MSMEs have affordable access to Internet connectivity, international payment platforms, and international physical delivery services.
- Parties shall establish an international clearing house to facilitate and simplify mutual recognition of national e-signatures on customs and other legally required signed documents.
- Each Party shall ensure that retail platforms do not themselves supply goods or services offered for sale on the platform.

2.6 Artificial Intelligence

Rationale

2.29 It is not disputed that access to data is key to the development of much modern Artificial Intelligence, and that Artificial Intelligence raises new ethical and legal issues²⁶.

Elements to Consider

- Prior to acceding to trade-related provisions regarding e-commerce, Parties shall have adopted a model law or a treaty on ethical principles for Artificial Intelligence.

2.7 Access to Technology

Rationale

2.30 It is not disputed that it is increasingly important to enable entrepreneurs in developing countries to have access to the technologies that will allow them to compete in the global market.

Elements to Consider

- Each Party shall ensure that enterprises around the world have access to modern technology on affordable, objective, timely, transparent, and non-discriminatory terms.
- Parties are encouraged to procure open source software for government use.
- No provisions of trade-related agreements shall be construed as preventing the procurement of open source software for government or private use.

²⁶ <http://www.publications.parliament.uk/pa/cm201617/cmselect/cmsctech/145/14502.htm>
https://www.nitrd.gov/news/national_ai_rd_strategic_plan.aspx
<http://www.europarl.europa.eu/news/en/press-room/20170210IPR61808/robots-and-artificial-intelligence-meps-call-for-eu-wide-liability-rules>

https://artificialintelligencenow.com/media/documents/AINowSummaryReport_3_RpmwKHu.pdf
<https://royalsociety.org/topics-policy/projects/machine-learning/>

and paragraphs 72 ff. of the cited UNCTAD document TD/B/EDE/3/2. See also pages 4-5 of UNCTAD's *Information Economy Report 2017: Digitalization, Trade and Development*, available at:

<http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1872>

- Access to source code may be mandated under national law for specific purposes, such as verification of compliance with national laws and regulations (competition, taxation, safety, environmental, etc.).

2.8 Consumer Protection

Rationale

2.31 It is not disputed that it is increasingly important to protect consumers, and increase their trust, as e-commerce expands, including by improving cybersecurity (in particular for IoT²⁷), addressing the market failures²⁸ that are engendering inadequate security, and by preventing robo-calling and misuse/hijacking of telephone numbers.

2.32 It is also important to protect consumers against deceptive offers of all sorts, including counterfeiting of geographic origin.

Elements to Consider

- Prior to acceding to trade-related provisions regarding e-commerce, Parties shall have transposed to national law the provisions of ITU-Recommendation E.157, *International calling party number delivery* and shall have enacted national laws prohibiting the misuse of international telephone numbers (see ITU-Recommendation E.156, *Guidelines for ITU-T action on reported misuse of E.164 number resources*).
- Prior to acceding to trade-related provisions regarding e-commerce, Parties shall have acceded to the World Intellectual Property Organization's *Lisbon Agreement for the Protection of Appellations of Origin and their International Registration*.
- Prior to acceding to trade-related provisions regarding e-commerce, Parties shall have enacted national law or regulations mandating minimum security requirements²⁹ for ICTs devices, in particular those interconnected to form the Internet of Things (IoT).
- Prior to acceding to trade-related provisions regarding e-commerce, Parties shall have enacted legislation that protects appellations of origins under the Internet domain names within their jurisdiction. (For greater clarity, generic top-level domains such as ".com", ".net", and ".org", and new top-level domain names, are under the jurisdiction of the United States of America.)

2.9 Employment and Working Conditions

Rationale

2.33 As the UNCTAD paper *Making Digital Platforms Work for Development* puts the matter: "The evolving digital economy has been accompanied by the rise of trade in tasks mediated by online labour platforms. ... Policies and regulations need to be designed to enable this expanding segment of the economy to ensure the provision of quality and decent jobs." See also the ILO's work in this area.³⁰

²⁷ https://www.schneier.com/blog/archives/2016/07/real-world_secu.html

²⁸ <https://www.internetsociety.org/globalinternetreport/2016/> and <https://www.enisa.europa.eu/publications/enisa-position-papers-and-opinions/infineon-nxp-st-enisa-position-on-cybersecurity>

²⁹ See for example <https://www.enisa.europa.eu/publications/enisa-position-papers-and-opinions/infineon-nxp-st-enisa-position-on-cybersecurity>

³⁰ <https://www.ilo.org/global/topics/future-of-work/lang--en/index.htm>

Elements to Consider

- Parties shall take appropriate measures to address the employment issues arising from e-commerce, including in particular by implementing relevant recommendations of the International Labour Organization.