

Guiding frameworks for regulation of digital trade in services

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The importance of digital trade to APEC economies is now recognised. Developing an enabling environment for access to and delivery of 'digital services' is a new focus in APEC. It is emerging as a core part in APEC's plans to improve the competitiveness of services and trade in services in the region.

What constitutes a digital service is not yet well understood or agreed by policymakers and regulators. Accordingly, the relationship between the digital platform and the services, and how these services might be most efficiently traded is yet to be systematically analysed. How they should be regulated is commanding increasing attention from governments.



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Competing regulatory models are starting to emerge over the extent to which governments should control cross-border data flows to implement policy goals such as privacy, cybersecurity or public order.ⁱ For example, the recent EU General Data Protection Regulationⁱⁱ imposes more stringent rules on businesses operating in or trading with the EU to protect data and consumer privacy, while the US has advocated international disciplines to reduce restrictions on digital trade.ⁱⁱⁱ

At the same time, controls on digital services are extensive in most APEC economies. Governments have been reluctant to liberalise despite the need for competitive services to support growth. There has been a widespread proliferation of regulatory restrictions which impact on the ability of firms to harness digital technology to conduct services business internationally. Data localisation requirements, local content measures and restrictions on investment impede delivery of services, data and payments across borders. Divergence in approaches can create obstacles to cross border business.

Trade agreements now include measures which address digital trade in services. The recently signed Comprehensive Progressive Trans Pacific Partnership Agreement (CPTPP) provisions on e-commerce are the most advanced of any agreement yet negotiated - covering cross border data flows, transparency, cloud computing, technology transfer and data localisation. For example, the agreement guarantees the free flow of data across borders for service suppliers and investors; prohibits forced technology transfers and ensures that companies can locate servers in the country they choose and are not forced to hold data locally.^{iv}

Commitments to liberalise services are also significant for facilitating trade in all services. They expand upon those in previous FTAs. For example, they permit the cross-border delivery of electronic payment card services, enable the transfer of information for data processing for financial institutions and provide freedom of payments and transfers that relate to the cross-border supply of services.^v The way the agreement is structured means that new services are automatically opened to TPP members unless

countries explicitly decide to close them. And where a party eases or lifts certain existing restrictions, the liberalised measure becomes an integral part of the party's treaty commitments.

Various bilateral FTAs of Australia and other APEC economies include similar commitments. Australia has included electronic commerce chapters in almost all of its bilateral FTAs. All agreements provide for services liberalisation beyond WTO commitments. It is currently pursuing commitments on digital trade in ongoing negotiations (eg: bilateral agreements with Hong Kong, Indonesia). Ecommerce rules and commitments to further services liberalisation are under negotiation in the Regional Comprehensive Economic Partnership Agreement (RCEP) involving numerous APEC members. A joint Australian initiative with ASEAN countries to promote digital trade and support inclusive economic growth was recently announced.^{vi}

And at the multilateral level there is support in WTO for the creation of a working group to consider negotiating global rules on e-commerce. Commitments to advance digital trade in services are under consideration in the (currently stalled) Trade in Services Agreement (TiSA).

Provisions on e-commerce in trade and investment agreements are relatively new. Their application to general trade and investment law disciplines is uncertain and complicated.^{vii}

Notwithstanding this, provisions in international trade and investment agreements, like the CPTPP, can serve as reference points for the development of legal and policy frameworks that promote trade enabling rules for the free flow of information and services.

Australia for example recognises the role of international rules in advancing digital trade. Its international cyber engagement strategy^{viii} seeks to 'actively shape global rule making on digital trade,' and to 'promote trade enabling rules and the free flow of information,' including through FTAs.

Open legal and regulatory frameworks will generate trade and investment opportunities for digital services in APEC. APEC is an important platform for building policy coordination and consensus within and between governments to support this. It is well positioned to take the lead in advancing a facilitative framework to promote policy settings for cross-border e-commerce that support an open and competitive environment for digital services. This includes both advancing rules in trade agreements and encouraging alignment of these rules with broader international frameworks (for example, normative principles like net neutrality, OECD Principles for Internet Policy Making^{ix}) and the realities of the digital economy.^x

As pointed out by trade law experts,^{xi} approaches to build a better framework for open, secure and efficient services trade should be underpinned by extensive policy coordination across a variety of stakeholders. This includes the wider internet community, international bodies dealing with broader internet governance issues, services industries and consumers. Greater quantitative and qualitative evidence on the link between services, data flows, productivity, innovation, and digital trade would also help.

ⁱ Andrew Mitchell and Jarrod Hepburn, Don't Fence Me In: Reforming Trade and Investment Law to Better Facilitate Cross-Border Data Transfer' (2017) 19 *Yale Journal of Law and Technology* 182–237, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2846830

ⁱⁱ See <https://www.eugdpr.org/>

ⁱⁱⁱ The US supports a work program on developing rules on e-commerce in the WTO which includes permanent bans on duties on electronic transmissions, forced technology transfers and discriminatory technology requirements. It has commissioned research by the USITC on barriers to US digital exports.

^{iv} This commitment does not apply to financial services.

^v Commitments are conditional, are subject to privacy and confidentiality requirements and in some cases are limited to the specific commitments that have been made by each party. See CPTPP Chapter on Financial Services at <http://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/official-documents/Pages/official-documents.aspx>

^{vi} See <http://minister.industry.gov.au/ministers/cash/media-releases/australia-and-asean-driving-digital-trade>

^{vii} See note 1.

^{viii} Australia's International Cyber Engagement Strategy, accessed at http://dfat.gov.au/international-relations/themes/cyber-affairs/aices/chapters/part_1_digital_trade.html

^{ix} See <https://www.oecd.org/sti/ieconomy/oecd-principles-for-internet-policy-making.pdf>

^x See note 1.

^{xi} See note 1.