

WTO e-commerce negotiations

While e-commerce represents an increasing portion of the economy, international regulation of e-commerce is lagging behind. In 2017, the WTO Ministerial Conference issued a Joint Statement Initiative signalling the intention to launch plurilateral e-commerce talks. In January 2019, in the margins of the World Economic Forum in Davos, 76 of 164 WTO members, among them the EU, Australia, China, Japan, and the USA launched e-commerce negotiations. Members seek a high-standard outcome building on WTO agreements, but the legal form of the deal is not yet clear. Participants wish to modernise trade rules to fit the digital age and show that the WTO's negotiating function can deliver. Key issues in the negotiations include e-contracts and e-signatures, data flows, data localisation requirements, disclosure of source code, and customs duties on electronic transmissions. While some divergences persist, in particular on data flows and privacy, the talks are progressing with a view to deliver a consolidated draft text by the end of 2020.

European Commission proposal

In April 2019, the EU released its [proposal](#) for WTO disciplines and commitments relating to e-commerce and telecommunications services. The EU proposal is ambitious in ensuring functional data flows for businesses, improving market access and regulatory predictability, while remaining committed to consumer protection and privacy. The WTO e-commerce negotiations have been split into about [six sections](#), which are also covered in the EU proposal. First, in terms of enabling e-commerce, in particular for small and medium-sized enterprises (SMEs), the EU proposes common rules for improving the recognition of [e-contracts and e-signatures](#). Second, to promote openness, the EU proposes that members promote the principle of open internet access, subject to applicable rules, as well as reasonable and non-discriminatory network management. The EU proposal seeks to balance the free flow of data for business purposes with a commitment to personal privacy, which it considers a fundamental right. Enterprises should not be restricted by requirements to localise data or computer facilities in a given member's territory. At the same time, members need to be free to adopt rules that protect personal data and privacy, as they deem necessary. Third, to build trust in e-commerce, the EU proposes to improve consumer protection by requiring measures against unsolicited emails (spam). The EU suggests that members also put in place measures against fraudulent and deceptive practices, and potentially measures that require traders to act in good faith, provide accurate information, and grant consumers access to redress. Fourth, on cross-cutting issues, the EU proposes to improve transparency and regulatory predictability. Fifth, with regard to telecommunications, the EU proposes to revise rules for telecommunications services, such as tackling anti-competitive practices and enabling interconnectivity between suppliers. Sixth, the EU also seeks to improve market access for computer services. With regard to the more [contentious issues](#), the EU seeks to ensure that governments cannot require the transfer of or access to source code (human-readable programs), except in special cases such as enforcement of intellectual property rights or for competition law purposes. The EU, along with many other participants, proposes that members refrain permanently from customs duties on electronic transmissions (e.g. movies, emails, software). In terms of market access, the EU requests members to join the [Information Technology Agreement](#), which was concluded by 29 participants at the 1996 Singapore Ministerial Conference, and its product coverage expansion, which was concluded at the Nairobi Ministerial Conference in 2015 with over 50 members. Cultural and audiovisual issues should, however, remain outside the scope of the negotiations to protect the EU's cultural diversity.

Council mandate

In May 2019, the Council [adopted](#) a decision on the negotiating directives (the '[mandate](#)'), supplementing the mandate for the Doha round, for the European Commission to negotiate on the trade-related aspects of e-commerce. The mandate is broad, enabling the Commission to negotiate on the full range of items listed in the EU proposal and on relevant issues proposed by participating members. In terms of red lines, the EU negotiating directives state that commitments should align with the EU legal framework, and that

the EU will not agree to commitments that could affect its legal frameworks for cybersecurity or security of networks, personal data and privacy, and the protection of intellectual property rights.

European Parliament position

In late 2017, Parliament adopted a resolution, '[Towards a digital trade strategy](#)', which touches upon many key themes of cross-border digital trade. The Commission proposal is largely in line with the Parliament position in terms of calling for better market access for goods and services, consumer benefits, fair competition for the telecommunications sector and extension of the moratorium on customs duties on electronic transmissions. Parliament calls for respect of fundamental rights, the concept of [net neutrality](#), banning unjustified data localisation requirements, and condemning requirements to disclose software source code. Parliament also notes that digital trade rules should not rule out pro-development technology transfer requirements. The WTO e-commerce negotiations were discussed in the Parliament's International Trade Committee on [2 October 2019](#). Parliament will continue to monitor and discuss the negotiations.

The coronavirus pandemic has brought about [an uptick](#) in cross-border e-commerce, and governments have increased network capacity, expanded data services and facilitated cheaper mobile payments. In 2018, global e-commerce was valued at [US\\$25.6 trillion](#). While the coronavirus pandemic seems to have accelerated digital trade, net impact on value in 2020 is hard to predict. While many European [business representatives](#) have urged rapid action due to the economic importance of e-commerce, [civil society organisations](#) and [trade unions](#) have condemned the talks, noting the potential for governments to lose policy space to act in the public interest, as well as the lack of risk or impact assessments, including on carbon footprint and tax evasion.

Negotiating positions

As of September 2020, [83 WTO members](#) have held several negotiating rounds. Initial delivery, planned for the 12th Ministerial Conference in Nursultan, was postponed due to the coronavirus pandemic. [Australia, Singapore and Japan](#) are spearheading the talks. Most [proposals](#) broadly align with the topics put forward by the EU. Common ground exists on consumer protection and deceptive practices, where most participants agree that a set of guiding principles is needed, but the form or permissiveness is not yet clear. While many of the higher-income members are in favour of rules for e-authentication, the [African Group](#) has pointed out that, inter alia, the United Nations Commission on International Trade Law (UNCITRAL) already addresses these issues in its [model law](#) on e-signatures. The African Group has [criticised](#) the e-commerce negotiations, noting that new rules would constrain their domestic policy space and ability to industrialise, condemning proposals on free flow of data, as well as bans on forced technology transfers and source code disclosures. So far only a few least developed countries (Benin, Myanmar and Laos) have joined the talks. Among the large emerging economies, [India](#) and South Africa have not joined the [negotiations](#). [Indonesia](#) has joined the talks, but is opposed to the permanent moratorium on tariffs on e-transmissions. The [United Kingdom](#) has strongly welcomed the negotiations.

The US proposal is not public, but a [leaked communication](#) resembles the [digital trade provisions](#) of the US–Mexico–Canada Agreement ([USMCA](#)). The US advocates free flows of cross-border data, including personal data, if it is for the business purposes of companies from participating countries. Exceptions for a legitimate public policy objective are permitted. This approach diverges in part from that of the EU, and data flows have also been a central question in the US–China trade war. Both the EU and US have indicated a desire to carve out services supplied in the exercise of governmental authority from the e-commerce negotiations.

The position of [China](#) focuses notably on safeguarding cybersecurity, data safety and trade facilitation. There is common ground with other members' submissions on promoting the customs moratorium for e-transmissions, stopping spam, online consumer protection and facilitation of e-signatures. China calls for a better definition of what trade-related aspects of e-commerce entails, improving customs procedures and developing mobile payment options. China views data flows as being subject to the precondition of security. China does not mention source code disclosure, and is [unlikely](#) to make commitments in this area.

The distances between the negotiating positions appear wide, but the pandemic has highlighted the importance of e-commerce, and in August 2020, a first [stocktaking text](#) emerged and a consolidated draft is expected towards the end of 2020. However, the resulting [legal form](#), namely whether it will be a self-standing agreement or a modification of existing provisions, remains to be defined.

