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Article

The EU's regional trade agreements: How the EU addresses challenges related to digital transformation

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Conceptual Paper

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The EU's regional trade agreements: How the EU addresses challenges related to digital transformation

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Abstract: The objective of this paper is to provide insight into the regulatory solutions that refer to the electronic commerce (e-commerce) adopted in the regional trade agreements (RTAs) of the European Union. Our goal is to compare these regulatory measures with the obstacles indicated in the literature as key issues hampering international digital trade. We provide a formal-dogmatic analysis of all of the newly adopted RTAs. The findings resulting from this analysis indicate that even though the regulatory dimension of global economic trade attempts to somehow address the issues resulting from the specific characteristics of the digital economy, the process is still in its infancy. The majority of provisions do not consider the key problems that impede international digital trade. The originality of our work results from its focus on the most recent RTAs, the analysis of which is hardly present in the scholarship.

Keywords: digital trade, electronic commerce, European Union, regional trade agreements

JEL Classification: F1, K2, O31

1 Introduction

Even before the COVID-19 pandemic pushed the transformation into the digital economy, the popularity of Internet platforms that offered shipping overseas grew rapidly: The examples of Amazon or AliExpress show that the geographical distance between a seller and a buyer loses its importance. Ordering a book from the United States to Germany, or a hair dryer from China to Poland is comparatively simple and often cheaper than ordering one from the nearest shop. This may be perceived as a change in the global trend of participating in international trade: Platforms, as intermediaries, allow not only small- and medium-sized enterprises (SMEs), but also individuals, to buy from producers and sell their products to customers located anywhere in the world.

These changes are envisaged also in international agreements governing trade relations. As a multilateral legal framework for electronic commerce (e-commerce) is yet to be negotiated, this new issue is mainly addressed in regional trade agreements (RTAs). The aim of our paper is to answer the question whether the RTAs that were recently negotiated by the European Union (EU) address the challenges stemming from the digital transformation and new trends of international trade. As we show, the World Trade Organization (WTO) is unable to tackle this issue on the multilateral level. Thus, RTAs became, in fact, the only possible source that could provide an internationally agreed legal framework for cooperation within this field.

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The question is whether a necessity to do so is in any way envisioned in the adopted agreements, or do they rather provide a very limited approach to e-commerce. We intend to especially consider the new-type RTAs of the EU concluded mainly with developed countries, namely, with South Korea, Canada, Japan, Singapore, and Viet Nam.

First, we present an overview of barriers to the development of e-commerce, identified on the basis of desk research focusing on challenges related to international law's current framework. Next, we characterize the EU's current involvement in international e-commerce and the obstacles that the EU identifies as the barriers to e-commerce development. Then, we present the analysis of the provisions of the trade agreements of which the EU is a party. We consider chapters and provisions that refer mainly to e-commerce but also, to some extent, to data protection and intellectual property (IP) and analyze these with a view to uncover a possible regulatory model as well as its influence on the increase of e-commerce.

Our conclusions are important not only from the perspective of the current trends of regulating e-commerce in international law, but also because they may provide valuable insights into the future development of this area of international law, as there is a strong need for rethinking the role of international trade law in the era of digitization. As the regulatory framework has an impact on the possibilities of development of international digital trade, it is vital to examine whether it facilitates international e-commerce or hinders the accomplishment of the potential created by new technologies in this area.

Our research is based mostly on formal-dogmatic analysis of legal acts: We scrutinize the adopted provisions and critically analyze them in order to propose an assessment of their potential influence on international digital trade. We support our analysis with a literature review. However, it mostly serves as a supplementary method. Due to the novelty of the analyzed legal acts, the literature on this topic is scarce. Thus, the literature review in Section 2 is mostly used for the description of the barriers to cross-border e-commerce.

2 Barriers to cross-border e-commerce: A preliminary overview

Even though it seems obvious that cross-border trade undergoes significant changes due to digital transition, it is hard to unambiguously grasp the nature of the impact of digitization on global commerce. What is vital in terms of the attempts to regulate cross-border e-commerce, as defining what actually determines its development, provides the basis for discussing the adequacy of regulation. Due to this reason, this section of the article provides a preliminary overview of the obstacles for cross-border e-commerce identified in the literature.

2.1 National regulatory measures as obstacles for trade in digital services

The attempt to quantify the regulatory obstacles for digital services was introduction of the Organisation for Economic Co-operation and Development (OECD) Digital Services Trade Restrictiveness Index (Digital STRI), which focuses on the regulatory measures that influence openness or restrictiveness toward services traded digitally [see Ferencz, 2019]. Digital STRI is based on the analysis of the following areas of the regulations: (1) Infrastructure and connectivity; (2) electronic transactions; (3) payment systems; (4) IP rights; and (5) other barriers affecting trade in digitally enabled services. In each of these areas, the number of particular regulatory measures was identified [see Ferencz, 2019, p. 18]. The examples include criteria such as “Cross-border data flows: cross-border transfer of personal data is possible to countries with substantially similar privacy protection law”; “Laws or regulations provide electronic signature with the equivalent legal validity with hand-written signature”; “Discriminatory access to payment settlement methods”; or “Restrictions on online advertising”. The barriers identified in these areas are subjected to scoring (“1” if they exist, and “0” if they do not). The calculation based on the scoring and on the input from experts allows the assessment of the overall openness/restrictiveness of the particular national regulatory framework to digital services from other countries. The developed index operates on a scale ranging from “1” (which signifies maximum restrictiveness) to “0” (which indicates maximum openness).

The data show that in the case of the majority of the countries, no change in restrictiveness or openness of the regulatory measures referring to digital services has taken place since 2014, when the index was calculated for the first time. Moreover, the in-depth analysis of the Digital STRI for G20 countries indicates that the changes in the regulatory policies of the G20 countries in the years 2014–2018 had rather led to a more restrictive approach toward digital international trade than to more openness for digital services from other countries: “Seven G20 countries have a more restrictive regulatory environment in 2018 than they had in 2014, and only three countries have lowered their index values. In nine countries, the indices remained the same across the years” [Ferencz and Gonzales, 2019, p. 7]. Data from 2020 indicate a change in this regard, probably due to the COVID-19 pandemic and the necessity to facilitate the provision of digital services [OECD, 2021, pp. 11–12]; however, it is too early to make any assumptions concerning the long-term trend of reduction of the regulatory barriers to digital services.

The Digital STRI shows that the significance of the regulatory barriers grows, as the states become more prone to the adoption of restrictive approach toward digital services. The index is, however, focused on the analysis of the national legal orders. Thus, our analysis approaches the issue of tackling the barriers to e-commerce in other types of legal acts, namely, in the RTAs of the EU. In Table 1, in addition to the index, we also indicated the nature of the relations between a given third state and the EU, which is a key factor in our analysis. We divided RTAs that are already in force into two categories, namely, old type and new type. New-type RTAs of the EU are those concluded relatively recently, with a focus on economic cooperation and liberalization rather than political ties [Słok-Wódkowska, 2017] and, therefore, also more likely to regulate digitalization and e-commerce.

Table 1. Digital STRI

Year	2014	2015	2016	2017	2018	2019	2020
Country							
Australia – negotiating	0.083	0.083	0.083	0.083	0.083	0.083	0.083
Austria	0.083	0.083	0.083	0.202	0.202	0.202	0.202
Belgium	0.162	0.162	0.162	0.162	0.162	0.162	0.162
Canada – new type of RTA	0.162	0.043	0.043	0.043	0.043	0.043	0.043
Chile – old type of RTA	0.263	0.263	0.263	0.263	0.263	0.263	0.263
Colombia – old type of RTA	0.299	0.299	0.299	0.299	0.299	0.299	0.299
The Czech Republic	0.141	0.141	0.141	0.141	0.141	0.141	0.141
Denmark	0.144	0.104	0.104	0.104	0.104	0.104	0.104
Estonia	0.083	0.083	0.083	0.083	0.083	0.083	0.083
Finland	0.101	0.101	0.101	0.101	0.101	0.101	0.101
France	0.123	0.123	0.123	0.123	0.123	0.123	0.123
Germany	0.144	0.144	0.144	0.144	0.144	0.144	0.144
Greece	0.144	0.144	0.144	0.144	0.144	0.144	0.144
Hungary	0.166	0.166	0.166	0.166	0.166	0.166	0.166
Iceland	0.148	0.148	0.148	0.267	0.267	0.267	0.267
Ireland	0.144	0.144	0.144	0.144	0.144	0.144	0.144
Israel – old type of RTA	0.18	0.18	0.18	0.18	0.18	0.18	0.18
Italy	0.126	0.126	0.126	0.126	0.126	0.126	0.126
Japan – new type of RTA	0.064	0.064	0.064	0.104	0.104	0.104	0.104
Korea – new type of RTA	0.141	0.123	0.123	0.123	0.123	0.145	0.145
Latvia	0.104	0.104	0.104	0.223	0.223	0.223	0.223
Lithuania	0.104	0.104	0.104	0.104	0.104	0.104	0.104
Luxembourg	0.083	0.083	0.083	0.083	0.083	0.083	0.083

(Continued)

Table 1. (Continued)

Year	2014	2015	2016	2017	2018	2019	2020
Country							
Mexico – agreement in principle and old type of RTA in force	0.3	0.101	0.101	0.101	0.101	0.101	0.101
The Netherlands	0.104	0.104	0.104	0.104	0.104	0.104	0.104
New Zealand – negotiating	0.18	0.18	0.18	0.18	0.18	0.18	0.18
Norway	0.083	0.083	0.083	0.083	0.061	0.061	0.061
Poland	0.184	0.144	0.263	0.263	0.263	0.263	0.263
Portugal	0.184	0.145	0.145	0.145	0.145	0.145	0.145
The Slovak Republic	0.101	0.101	0.101	0.101	0.101	0.101	0.141
Slovenia	0.104	0.104	0.083	0.083	0.242	0.242	0.242
Spain	0.123	0.123	0.123	0.123	0.123	0.123	0.123
Sweden	0.144	0.144	0.144	0.144	0.144	0.144	0.144
Switzerland	0.083	0.083	0.083	0.083	0.083	0.083	0.083
Turkey – old type of RTA	0.083	0.163	0.202	0.202	0.202	0.264	0.264
The United Kingdom	0.083	0.083	0.083	0.083	0.083	0.083	0.083
The United States	0.083	0.083	0.083	0.083	0.083	0.083	0.083
Non-OECD economies							
Argentina – agreement in principle	0.361	0.34	0.281	0.281	0.321	0.321	0.34
Brazil	0.227	0.227	0.267	0.267	0.267	0.267	0.245
China (People’s Republic of)	0.488	0.488	0.51	0.51	0.51	0.51	0.51
Costa Rica – old type of RTA	0.043	0.043	0.043	0.043	0.043	0.043	0.043
India	0.239	0.239	0.304	0.304	0.343	0.343	0.343
Indonesia	0.307	0.307	0.307	0.307	0.307	0.307	0.227
Kazakhstan	0.228	0.228	0.268	0.506	0.567	0.647	0.647
Malaysia	0.126	0.126	0.126	0.126	0.126	0.126	0.126
Peru	0.242	0.242	0.242	0.242	0.242	0.242	0.242
Russia	0.241	0.281	0.281	0.3	0.3	0.319	0.341
Saudi Arabia	0.206	0.206	0.206	0.206	0.386	0.386	0.405
South Africa – old type of RTA	0.342	0.342	0.342	0.342	0.342	0.342	0.342
Thailand	0.3	0.3	0.3	0.3	0.3	0.3	0.3

Data: OECD, access: https://stats.oecd.org/Index.aspx?DataSetCode=STRI_DIGITAL#. Additionally, in Table 1, we indicate whether the particular country is a party of the old or the new type of RTA (see explanation in the following text).

Digital STRI, Digital Services Trade Restrictiveness Index; RTA, regional trade agreement; OECD, Organisation for Economic Co-operation and Development.

2.2 Regulatory obstacles for digital trade in goods and services: Conceptual framework

Another overview of the challenges faced when engaging in cross-border e-commerce was presented in a recent working paper, “Unpacking E-Commerce: Business Models, Trends and Policies” [OECD, 2019b], which provides the basis for the below-presented categorization of obstacles for cross-border e-commerce. In contrast to Digital STRI, the catalog of identified barriers includes the obstacles for trade in both goods and services. Thus, this conceptual framework better fits our analysis of the provisions included in the RTAs concluded by the EU in the recent years.

First, the authors note the difficulties concerning the application of well-established categories, such as goods and services, in the context of e-commerce businesses [see Chander, 2019; Neeraj, 2019; OECD, 2019b]. As Neeraj notes, “In the digital economy, much of the value of an increasing number of manufactured goods is being captured in the smart services that they incorporate (servicification of manufacturing)” [Neeraj,

2019, pp. 121–122]. Technologies, such as 3D manufacturing or the Internet of Things, cross the traditional boundaries between what is physical and what is intangible. Due to this reason, the traditional regulatory framework and the division between liberalization of trade in goods and services is hardly possible to transmit to the digitized reality.

Second, it must be noticed that digitization also has an impact on the trade in goods as such. The increasing number of small-value packages, which results from direct participation by individuals in business to consumer (B2C) (or even customer to customer [C2C]) e-commerce [MacKinsey Global Institute, 2016, p. 7], raises challenges “with respect to the processing capacities of customs agencies and issues arising in areas such as fraud, illicit trade, safety, security and revenue collection” [OECD, 2019b, p. 22; see also: World Customs Organization, 2018]. Moreover, the development of Internet platforms facilitates participation in cross-border e-commerce not only for customers but also for SMEs. From the strictly technological perspective, provision of goods and services to customers all around the globe does not raise many problems.

It does, however, raise problems from the regulatory point of view. The differences in, for instance, customer protection regulation or territoriality of the copyrights, limit the possibilities for using the potential of e-commerce to the fullest. Thus, thirdly, in spite of opportunities, such as facilitation of scaling, scoping, and speeding up trade [López González and Ferencz, 2018, pp. 10–11], offered by e-commerce sales channels, regulatory differences in areas such as “consumer protection, contract law, labelling, logistics and distribution systems, taxation and technical specifications such as interoperability of payment systems” [OECD, 2019b, p. 22] make it more challenging for businesses to use these opportunities. SMEs are especially vulnerable to the differences in, e.g., customer protection regulation and could benefit from the facilitation of e-contract laws [International Trade Centre, 2016].

Fourthly, digitization causes the various areas of regulation to undergo changes in their significance in terms of their impact on cross-border trade. Regulations concerning data (data protection, free flow of data) become much more vital for trade taking place in the digital environment, compared to their implications in the physical world. Measures such as data location requirements, data transfer requirements, online censorship, and data protection regulation [see Sen, 2018] determine the possibilities for foreign companies to conduct cross-border business.

Moreover, there are challenges that result from the economic dimension of e-commerce. It must be noted that – from a global perspective – challenges concerning e-commerce development vary depending on individual states’ digital development level (Internet access, human capital). However, on a global scale, it is possible to observe a universal trend of the ongoing increase of the market power possessed by a few private companies that are the biggest market players (digital platforms) in the e-commerce area. As Neeraj [2019, p. 129] notes, “An analysis of the market structure of these online platforms reveals that they are overwhelmingly dominated by a few firms, most notably Alphabet (the parent company of Google), Amazon, Apple, Facebook, and Microsoft. These technology companies are today also the largest companies in the world by market capitalization.” The tendency of the digital, mostly American, companies to monopolize the market and to spread their influence over other areas creates challenges for competition law and policy. Attempts to address the relation between data and competition law [Costa-Cabral and Lynskey, 2017] for now do not seem to provide sufficiently well-developed answers to the appearing problems.

Additionally, research on the determinants of cross-border e-commerce also highlights the importance of digital technology integration by the entrepreneurs who engage in such trade [see Ford, 2017; Mazur et al., 2018]. This shows that there are certain areas of regulation, e.g., IP law and copyrights, which may have indirect impact on the readiness of – especially – SMEs, to become involved in cross-border e-commerce. An example is a debate provoked by the proposal of the directive on copyright and related rights in the digital single market (DSM) [Directive (EU) 2019/790] in the EU, concerning the impact of the implemented obligations referring to the technological solutions that should be applied by platforms and their impact on SMEs. Specifically, the obligation to use filtering algorithms makes it disproportionately difficult for small players to enter the market because such algorithms are expensive. The possibilities for SMEs, which are unable to afford such solutions, to enter the market of platforms that serve the purposes of content sharing are, therefore, restricted by the new regulations adopted in the EU.

3 Data on the participation of the EU's SMEs in international e-commerce

What seems to hamper the possibilities to face all the above-mentioned challenges is – paradoxically – lack of data [Economics and Statistics Administration and the National Telecommunications and Information Administration, 2016]. Especially in the global perspective, we lack sufficient evidence for building evidence-based policies. The problem – and proposals for its solution – is frequently mentioned in, e.g., OECD's publications on the matter [OECD, 2019a]. On the one hand, the approach that focuses on goods belonging to the information and communications technology (ICT) category does not capture the above-mentioned fluent shift from goods to services. On the other hand, including only trade in digital services does not allow the capture of the full picture of global digital trade. Moreover, focusing on the trade performed by companies does not guarantee that the flows resulting from direct transactions between individuals will be properly estimated. Additionally, the development of cryptocurrencies has led to a further portion of transactions that take place to go unnoticed. The ability to grasp the abstract overview of the technological dimension of the ongoing changes [see United Nations Conference on Trade and Development, 2017] does not necessarily translate into sufficient information to develop adequate regulatory solutions.

Due to the focus of our analysis on the provisions included in the RTAs concluded by the EU, we focus on available data concerning the participation in cross-border e-commerce by SMEs from the European states. Eurostat Digital Economy and Society Index (DESI) data concerning e-commerce do provide us with some information on the openness of European enterprises on cross-border e-trade (both with other EU countries, and with the rest of the world). Table 2 illustrates the major differences in the percentages of enterprises of the EU Member States engaged in e-commerce sales within the borders of a particular state, with other EU countries, and with countries outside of the EU. The presented data are drawn from DESI provided by Eurostat, and these refer to the percentage of enterprises among all enterprises (≥ 10 persons employed), excluding the financial sector, for the year 2019.

This brief outlook on the data concerning European enterprises suggests the existence of nontechnological barriers for enterprises to use e-commerce in the cross-border context: While the lowest score of enterprises engaged in e-commerce sales on the scale of a particular state is 10.3% in the case of Bulgaria, for e-commerce with other EU states, the score is 3.3% (Bulgaria), and for e-commerce with the rest of the world, the percentage is only 1.7% (Romania). Despite their ability to participate in e-commerce, SMEs do not prefer to enter the global market and sell to customers from non-EU states.

This should shift our attention to the question regarding the barriers that should be tackled in order to increase enterprises' willingness to participate in cross-border electronic trade. The list of the obstacles identified by the European Commission includes the following: Differences in postal regulations and charges, regimes of the seller's liability for defects in goods, differences in the law of contracts, problems in pursuing claims, copyright terms, privacy protection requirements, creation and operation of service infrastructure, differences in technical standards, and the aspect of payment for goods or for service [Commission, 2015; see Śledzińska et al., 2016, pp. 40–49]. This list of factors, which have been identified by the European Commission, having an impact on the trade among EU Member States, to a great extent, resembles the above-mentioned obstacles for e-commerce in the global context, as illustrated in Table 3.

The question, however, remains whether the international law actually addresses these challenges and serves as a factor facilitating international e-commerce? The analysis below attempts to assess which of these numerous obstacles of international digital trade are somehow addressed by the RTAs concluded recently by the EU.

4 E-commerce in the EU trade agreements

The need for regulating e-commerce, or even the broader digital economy, is nothing new. From the globalized world economy point of view, multilateral regulations are the best way of providing regulatory framework and tackling barriers. Therefore, there are many voices calling for the WTO to act.

Table 2. Enterprises engaged in electronic sales

Country	Indicator: Enterprises having done electronic sales in their own country	Indicator: Enterprises having done electronic sales to other EU countries	Indicator: Enterprises having done electronic sales to the rest of the world
Austria	23.91	15.14	8.77
Belgium	29.49	16.10	7.15
Bulgaria	10.32	3.29	1.94
Cyprus	12.95	8.83	7.08
The Czech Republic	29.14	16.10	5.48
Germany	18.68	10.29	4.88
Denmark	31.98	11.01	6.87
Estonia	20.19	9.75	5.00
Greece	10.93	4.16	2.90
Spain	20.58	7.70	4.72
Finland	27.58	9.11	5.15
France	18.66	6.72	4.32
Croatia	19.59	10.51	7.51
Hungary	14.45	5.68	2.55
Ireland	38.38	18.36	12.42
Italy	13.71	6.66	4.56
Lithuania	24.13	13.10	7.05
Luxembourg	11.75	8.46	2.89
Latvia	12.85	6.77	4.06
Malta	22.07	13.21	9.67
The Netherlands	26.49	13.44	5.37
Poland	15.41	5.90	3.01
Portugal	16.47	8.32	6.40
Romania	10.39	6.07	1.65
Sweden	31.89	10.78	7.19
Slovenia	21.99	13.05	5.39
Slovakia	14.37	7.28	2.49
The United Kingdom	25.60	8.37	6.20

Data: Eurostat (Digital Economy and Society Index). As the data consider the year 2019, when the UK was still a Member State of the EU, it is included in the table.

The table was generated using the DELab DESI app: <https://desi.delabapps.eu>.

There have been attempts in the WTO to tackle digital trade since 1998, when the Ministerial Declaration on Global Electronic Commerce was issued [WTO, 1998a], followed by preparation of the Work Programme on Electronic Commerce [WTO, 1998b]. The program was an introductory document, with a very wide scope of application. It was also one of the first attempts to define e-commerce, which for the purpose of preparing the Work Programme “is understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means”. The definition is extremely broad, and it probably does not reflect the WTO’s or its members’ position on how to understand e-commerce in international law. But it also proves that members of the WTO were aware of the broadness of this issue already in 1998 and how deeply digitization influences trade issues.

The Work Programme, prepared in 1998, listed the provisions of the WTO agreements that, on the one hand, can be affected by the digital transformation and, on the other, can affect digital trade. The most comprehensive report that has been prepared was the one concerning trade in services [WTO, 1999]. It showed that, according to the debating members, all modes of services can be delivered online. Therefore, the majority of the analyzed provisions of the General Agreement on Trade in Services (GATS) are advised

Table 3. Comparison of the various categorizations of obstacles to digital trade

Digital STRI	OECD – conceptual framework	European Commission
Areas of regulation in which the national regulatory measures have an impact on trade in international digital services	Categorization of the obstacles for international e-commerce	Factors having impact on digital trade between the Member States
Infrastructure and connectivity	Blurring boundaries between goods and services	Differences in postal regulations and charges
Electronic transactions	Changing trends in trade of goods (e.g., direct costumers' participation in international trade)	Regime of seller's liability for defects in goods
Payment systems	Regulatory differences in areas such as “consumer protection, contract law, labelling, logistics and distribution systems, taxation and technical specifications such as interoperability of payment systems”	Differences in the law of contracts
Intellectual property rights	Growing importance of regulatory measures concerning data (e.g., data location requirements, data transfer requirements, online censorship, data protection regulation)	Problems in pursuing claims
Other barriers affecting trade in digitally enabled services	Economic factors typical for digital dimensions	Copyright terms
	Integration of digital technologies by SMEs	Privacy protection requirements Creation and operation of service infrastructure Differences in technical standards Aspect of payment for goods or for service

to be applied to the same extent to traditional and digital services. It also proves that within the regulatory framework of the WTO, services are perceived as affected the most by the digital transformation. It is also proven by the existing case law, e.g., US – Gambling [2004; *Appellate Body Report*, 2005], Mexico – Telecoms [2004], and China – Publications and Audio-visual Products [2009; *Appellate Body Report*, 2009], whereby the adjudicating bodies of the WTO tried to fit in digital services into the existing legal framework.¹ The adjudicating bodies of the WTO faced two main problems. On the one hand, there is a clearly visible difficulty in qualifying digital goods and services similar to their traditional counterparts, which – as a result – affects such crucial WTO principles as national treatment or the most-favored nation treatment. On the other hand, some instruments of the GATS, such as market access, however, can be applied equally to both categories of services, but digital services need to be explicitly mentioned in the schedules of commitments in order to gain market access. Nevertheless, all these already-conducted works at the WTO concentrated on already-existing regulations of the WTO. Moreover, with the collapse of the Doha Round of negotiations at the WTO, there is no agenda for adding multilateral provisions that are designed specially to tackle the issues mentioned in the previous sections, even though in the Ministerial Declaration, all parties agreed that obstacles to traditional trade should not be replicated in e-commerce. There are no mentions of

¹ None of these cases involved the EU directly, although it acted as a third party in these disputes.

new trade barriers in the WTO documents that were related exclusively to e-commerce, while the existence of these new barriers (e.g., blurring boundaries between trade and services) – or, at the least, difficulties in adjusting the current legal framework to digital transformation – is very often obvious.

To begin with, in the WTO law, there are no provisions related directly to data flow. As tackling the international flow of data became necessary, WTO has had to work out solutions. Since the 1998 Geneva Ministerial Conference, the WTO Members have upheld a moratorium against tariffs on electronic transmissions. It has been extended every 2 years at each WTO Ministerial Conference, but it is not permanent and can easily be questioned. Nevertheless, since 1998, it became the pillar on which contemporary international trade has been built. Firstly, the majority of the international global value chains have been built not only on lower tariffs but also on flow of data. Secondly, it would be difficult to implement such tariffs and rules for their calculation [Banga, 2019].

The very sharp distinction in the WTO law between the regulations on trade in goods and those on trade in services makes it difficult to adjust barriers. Especially taking into account the fact that, while in the WTO, all trade in goods is covered by the General Agreement on Tariffs and Trade (GATT) and other agreements, the GATS covers only those services that are explicitly listed in the schedules of commitments of members. There are no specific rules or guidelines that help to grant equal treatment to traditional and digital trade in goods and services while taking into account the necessary differences. These are only examples of problems related to digitization, but it is clearly visible from our short overview that the current regulatory framework for digital trade within the WTO is not sufficient. Existing rules are not well adjusted to tackle barriers to digital international trade and, moreover, do not address many issues that are more important to digital trade than to traditional trade.

Therefore, that gap needed to be fulfilled in the RTAs. The RTAs that are currently concluded contain two kinds of provisions. For one, there are provisions that, even though not explicitly related to e-commerce, influence digital economy and tackle potential barriers. Firstly, almost all of the EU's RTAs contain separate chapters related to IP rights. Mostly, their purpose is to confirm and/or strengthen the rights arising from the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and conventions governed within the framework of the World Intellectual Property Organization (WIPO). While generally strengthening IP rights might be also beneficial for the development of the digital economy, there is growing popularity of the provisions dedicated especially to the digital environment. Already in 10 of the EU's agreements (and in every one of the new-type agreements), there are provisions related to rights management information, with an obligation to provide protection of those rights in the national legal system. Additionally, in the *Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part* [2017], the parties also agreed to strengthen the liability of intermediary service providers for breaches of IP rights, as well as set some substantive obligations. Unfortunately, such a provision was never used in any other RTA of the EU.

Secondly, there are provisions dedicated directly to the regulation of e-commerce or even separate chapters related to e-commerce. Such provisions have been included into RTAs since the early 2000s, and their popularity has increased. The very first agreement that covered “paperless trade” was an RTA between Singapore and New Zealand, signed in 2001. As a result, separate e-commerce provisions can be found in 75 RTAs out of the 279 notified and in force in 2017 [Monteiro and Teh, 2017]. Since 2001 not only the number of RTAs that covered e-commerce, but also the number of provisions dedicated exclusively to this issue and their enforceability (enforceability means that a provision can be successfully invoked by a complainant in a dispute settlement proceeding), has grown [see Horn et al., 2009]. Significant growth in this respect can be observed since 2014 [Monteiro and Teh, 2017, p. 6].

It is also common for the EU trade agreements to include special provisions on e-commerce as well as other provisions that intend to tackle various issues related directly or indirectly to the digital economy. The EU is focused primarily on privacy issues, which is apparent in the fact that >15 of its RTAs contain provisions related to data protection [Słok-Wódkowska, 2016, pp. 134–145]. Moreover, >10 of them, including all of the newly negotiated and concluded RTAs, contain provisions that are enforceable [Słok-Wódkowska, 2017, pp. 34–53].

The EU also showed some interest in developing international cooperation within the field of the broadly defined information society. Provisions referring to such cooperation can be found in 20 of the EU RTAs, or rather association agreements (which are also free-trade agreements [FTAs], usually covering both trade in goods and trade in services), but none of them is enforceable. They are very general and rather establish a framework for future cooperation than any real obligation. Such a general reference to the information society is no longer part of the EU RTAs, as it was not included in recent agreements, including the relatively new and modern association agreement with Ukraine, Moldova, and Georgia and the modern agreements with developed countries (Japan, Canada, and Singapore).

Nevertheless, the importance of provisions related to the digital economy grows with time and with the economic significance of an agreement itself. In all of the more recent RTAs concluded by the EU, instead of a general reference to the information society, there are at least a few provisions related to e-commerce or digital trade. The majority of these RTAs include a separate chapter or subchapters on e-commerce, usually together with services or services-and-investment liberalization or the right to establishment. They are especially important in all the so-called “new-type” agreements concluded by the EU recently solely for economic purposes and trade liberalization.

Already in the FTA between the EU and South Korea [*Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part*, 2011], there is a chapter on trade in services, establishment, and e-commerce, with a subsection directly addressing the issue of e-commerce. But the provisions are limited and, in fact, very general. Both parties agreed rather to cooperate in future to enhance e-commerce than create any real opportunity for it. The provisions are, therefore, not enforceable. There is only one general provision stating that there will be no tariffs on “deliveries by electronic means”, even though South Korea underlined that it did not see e-commerce as trade in services nor in goods, which proves the existence of difficulties in considering e-commerce within the traditional division on trade in goods and in services [Ciuriak and Ptashina, 2018, p. 3]. The agreement did not address any obstacles to e-commerce.

The subsequent agreement with a highly developed state was the CETA between the EU and Canada, where e-commerce was given a separate chapter, which is more detailed than the one in the EU–South Korea Free Trade Agreement. First of all, it contains a definition of electronic delivery as “everything that is encoded”. It also includes the explicit purpose of the whole chapter, highlighting that the chapter has been added due to the fact that “electronic commerce increases economic growth and trade” (Article 16.2). Similar to the FTA between the EU and South Korea, CETA also prevents the concerned parties from imposing any tariffs on delivery transmitted by electronic means. Potentially important might be Article 16.6 also, in which both parties addressed some real barriers to international e-commerce resulting from different regulatory frameworks, such as lack of clarity, transparency, and predictability in the internal regulatory framework or lack of interoperability. Canada and the EU seem to be also obliged to promote the use of e-commerce by SMEs. Unfortunately, none of these provisions is enforceable, as – in the provisions – there appears the statement that parties “recognize the importance” of these issues, which, in fact, does not imply obligation to take any actions.

In an agreement between the EU and Singapore, the objective of the chapter on e-commerce was also stated, namely, to increase trade opportunities [*Free trade Agreement between the European Union and the Republic of Singapore*, 2018]. The parties also agreed to promote e-commerce and avoid unnecessary regulations or restrictions, but without prejudice to international standards of data protection or IP rights. As in the previously analyzed agreements, both parties agreed to not put any tariffs on electronic transmission. It is also a remainder that the means of delivery in the case of services does not change the general obligations of states. Other obligations, as in other agreements, refer only to mutual cooperation in areas related to e-commerce. Most of these obligations do not address the barriers to e-commerce directly but rather invoke consumer or data protection.

The most recently signed (on June 30, 2019) agreement between the EU and Viet Nam is extremely scarce in terms of provisions related directly to electronic trade. Thus, it may be questioned whether the EU–Japan agreement actually sets a standard for future agreements negotiated by the EU. In the EU–Viet Nam agreement, there is a general provision explaining the importance of such a chapter and stating the

parties' willingness to promote e-commerce. Moreover, there is an obligation not to impose any custom duties on electronic transmissions. The last provision in the subchapter relates to establishing a dialogue on other issues related directly or indirectly with e-commerce, which are usually covered by such chapters – consumer protection, preventing spam, and liability of intermediary service providers. However, the EU–Viet Nam agreement should be treated as an exception and a proof that, eventually, agreed provisions may vary significantly.

Meanwhile, the last-concluded (and in-force) agreement with Japan is of the “new type”. As in the agreements with Singapore and Canada, there is a separate chapter dedicated to e-commerce, with a provision explaining its aims, although the provision itself is much more detailed than in any other agreement. The EU–Japan agreement contains the definitions of “electronic authentication” and “electronic signature”. Both ways of concluding a contract have been allowed. The most precise provision, as in other agreements, refers to the topic of not imposing tariffs on electronic transmission.

However, it also expressly forbids any prior authorization for providing services by electronic means solely on the ground that they are provided by electronic means or telecommunication. Unlike in other agreements, there are also provisions set to prevent spam (unwanted electronic communication) and enhance consumer protection, although these provisions are not enforceable and are rather weak.

The EU–Japan agreement is the first one of the EU that referred directly to the principle of technological neutrality in e-commerce as a basis for mutual cooperation and boosting e-commerce. The principle of technological neutrality has been the basis of the EU telecommunication law since 2002, when it was invoked in the Framework Directive (Directive 2002/21/EC) [see Maxwell and Marc, 2014]. There are no doubts that creating a DSM within the EU requires technological neutrality concerning the solutions that are regulated between the Member States. Including the provision into the international agreement elevates the principle to another level. However, it needs to be underlined that the principle is, in fact, inevitable to achieve interoperability and for the mere possibility of providing electronic services. The same provision referring to the principle of technological neutrality is going to be included into the recently negotiated agreement between the EU and the Southern Common Market or Mercado Común del Sur in Spanish, abbreviated as MERCOSUR (trade part of the EU–MerCoSur Association Agreement), even though the agreement does not contain a separate chapter on e-commerce but only a few provisions on the subject, which very much resemble the ones that were included into the EU–Japan trade agreement. Therefore, the EU–Japan FTA can serve, to some extent, as a model for future agreements concluded by the EU.

It is also proven by other texts that have been proposed by the EU as a basis for ongoing negotiations. In 2018, the EU presented its model “*Horizontal provisions for cross-border data flows and for personal data protection*”, consisting of three articles. They form the basis for negotiations and are supposed to be not only parts of chapters on e-commerce but applicable more broadly to the whole agreement. There is a standard EU provision establishing the protection of personal data and privacy as a “fundamental right”. Nevertheless, there is also an article related to data flow, although very general, concentrating on the prohibition of some restrictions (mainly any requirements concerning the localization of storage of data or computing facilities). The third proposed article is related to cooperation on regulatory issues with regard to digital trade.

The model provisions were already used in the chapters proposed in negotiations with partners such as Australia, New Zealand, or Indonesia. These chapters proposed by the EU are in fact very similar. The major proportion of the proposed provisions is exactly the same as in the EU–Japan FTA: Prohibition of imposing tariffs on electronic communication, provisions related to electronic authentication and signatures of contracts, and obligation to cooperate in order to fight spam. There are, however, no provisions related to the principle of technological neutrality.

There are some novelties. One of the most impactful innovations is, obviously, the addition of a provision related to flow of data, allowing free flow of data to some extent. The proposed article is the same as that proposed in *Horizontal provisions*. It still might be considered a big step forward for the EU's RTA, because, in previous agreements, the EU avoided any obligations related to free flow of data. Moreover, it seems to be purposefully included, as there are provisions in the EU–Japan Agreement providing that the parties intend to come to that matter in the future (after 3 years). The EU reluctance to free flow of data

and the importance of the provisions on privacy and personal data protection were even called “privacy protectionism” [Yakovleva, 2020]. The inclusion of provisions on data flow in recently proposed texts is a sign of a significant change in the EU’s attitude toward digitization. It may also be a sign that the EU’s protectionist attitude toward data needed to be adjusted to global trends in economy and international law, because provisions on data flow are part of many recently concluded agreements, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, the United States–Mexico–Canada Agreement, or the Australia–Singapore Digital Trade Agreement. Furthermore, other trends have been imported into the EU trade agreements; another important novelty, compared to the already-agreed-upon agreements of the EU, is prohibition of the requirement of transfer of access to a source code. It is increasingly popular in other RTAs, for instance, that concluded by the US, Canada, and Mexico [*Agreement between the United States of America, the United Mexican States, and Canada* (2019), Article 19.16], as well as – to some extent – in the agreement between the US and Japan on digital trade [*Agreement between the United States of America and Japan concerning digital trade* (2019), Article 12]. However, if agreed to, it would be included into an RTA of the EU for the first time.

In all agreements discussed above, the provisions related to e-commerce are placed in chapters covering trade in services and investments. Firstly, that means that all of the general provisions in these chapters, such as general exceptions or clauses related to treatment (national or most-favored-nation) are also related to e-commerce. Secondly, it suggests that there is an understanding that e-commerce should rather be related to services and not trade in goods.

But, as already mentioned above, there is a clear need to find multilateral solutions that would probably be beneficial to the EU as well. Although there is no chance for adding a digital trade agreement into the WTO’s list of agreements, there is a possibility to negotiate plurilateral agreement. Plurilateral agreements are legal instruments to which joining is not compulsory for the states (even though they are open for all the WTO members to join). Understanding the need to create new rules, problems with sufficient efficiency of bilateral solutions, and WTO’s inability to create truly multilateral agreements, a group of 76 members of the WTO, including the EU, the US, and China, decided in January 2019 to launch negotiations toward a plurilateral agreement on e-commerce. The agenda looks quite ambitious and challenging, including regulations on tackling barriers to e-commerce, protection of consumers, permanently banning customs duties on electronic transmissions, but also addressing forced data localization requirements and forced disclosure of source code. Negotiations, led by Singapore, Australia, and Japan, were continued despite the pandemic situation in the world but despite reported progress, the official draft has not presented yet. The EU is an active participant of the negotiations. Its position has been presented in April 2019 and is clearly based on the EU’s RTAs [European Union, 2019]. In the proposal, the EU mirrored the majority of its usual provisions on e-commerce related to electronic signatures and authentication, as well as on consumer protection and personal data protection. It also proposes to add a provision related to data flow, though the EU – instead of proposing free flow of data – would like to expressly prohibit some requirements that can influence it (such as data localization or prohibiting storage or processing in the territory of other WTO members). It also agreed to add a provision on source code but also subject to requirements and exceptions. Generally, the EU’s proposal is rather more restrictive and oriented toward consumer protection compared to RTAs concluded by other negotiating parties.

5 Discussion: In search of a model chapter on e-commerce

The EU is, without any doubt, aware of the importance of the changes in society and economy caused by digitization. One of the most important projects since 2014 has been creation of the DSM. One of the three pillars of the DSM is access, which intends to facilitate access to goods and services offered through the Internet, mainly by increasing and removing barriers to e-commerce. During the past few years, the EU has succeeded in preparing a few regulations aimed at better protection of consumers and prevention of discrimination.

At the same time, the legal framework for e-commerce provided by the EU in its trade agreements is very feeble. First of all, there is only one provision that is enforceable in all of the agreements – the one related to not imposing tariffs on electronic transmission. It is the most popular provision in all RTAs and, in fact, consists of separate chapters on e-commerce and is present in 56 of the RTAs [Monteiro and Teh, 2017, pp. 28–29]. It serves as the basis for any electronic communication and so is also inevitable for any transaction made through the Internet. It also seems to be a follow-up of the Declaration of the WTO in 1998, when WTO members agreed on a temporary moratorium on imposing customs duties on electronic transmissions and later renewed this obligation. Taking it into account, one must see the relevant provision in the EU RTAs as rather a fulfillment of the EU's obligations as a WTO Member than as an attempt to facilitate e-commerce. Apart from this, there are a few problems related to imposing tariffs on electronic transmission. First of all, it is the scope and definition of the notion itself. In the EU RTAs, there are various terms for basically the same concepts (electronic transmission, electronic delivery), which makes it confusing. The notion itself is not defined in any of the RTAs. The second problem is related to the technical difficulty of imposing such tariffs. On the other hand, tariffs on electronic transmissions are expected to have a growing impact on tariffs on goods, as the number of digital products replacing physical ones is growing and this trend will be increasing with the development of 3D printing [Banga, 2019].

Other provisions are, first of all, almost never enforceable. They do not create any real obligation and cannot be challenged. They rather build a framework for future further liberalization and cooperation. In the RTAs, there are never provisions precise enough to address barriers such as problems with geo-blocking or excessive prices of postal services. The only exception can be seen in the usually enforceable provisions related to IP rights, which might also encourage digital trade, as indicated also in the Digital STRI. The real fostering of e-commerce may well arise from the general provisions on liberalization of trade in goods and, above all, intangibles (services). It should rather be seen as an advantage, as e-commerce – and broadly, the digital economy – is a cross-cutting issue not related exclusively to e-commerce. Nevertheless, as in every RTA, there are provisions that prevent discrimination or accessible obstacles to trade; they might be used regardless of the means of the conclusion of the transaction. Therefore, provisions expressly allowing the concluding of contracts through electronic signature or identification, as in the EU–Japan FTA, are of great significance, even though they are included in only one of the agreements. Strengthening these provisions should be a crucial factor in enabling digital transaction (which was also taken into account in Digital STRI).

The chapters in the EU RTAs related to e-commerce concentrate only on one aspect of digitization. But they also prove the attitude of the EU toward digital society as a whole. The EU's desire to protect consumers while having digital transactions, especially against abuse of privacy or unwanted spam, is reflected in its RTAs. But all provisions are not enforceable. The provisions usually refer to promotion of e-commerce, as well as dialogue and cooperation on these issues, though the provisions referring to protection are much more detailed than the ones referring to e-commerce in general.

The question remains whether there is a pattern in the EU RTAs that cover e-commerce. The most similar provisions are contained in agreements with Japan and with MERCOSUR. These two agreements are, at the same time, the most elaborate, covering electronic signatures or prohibition of prior authorization solely on the grounds of means of providing them. Taking into account the fact that these agreements were the most recently negotiated,² it shows a tendency of regulating e-commerce in a more complex way. At the same time, the variety of provisions proves that there is no established regulatory model for e-commerce. For one, it probably means that the other side of the agreement, which – in the majority of the above-analyzed cases – comprise developed states, had a real impact on the provisions. Secondly, the issue develops fast enough, requiring constant development and adjustment of provisions.

The last argument is also enforced by the texts tabled by the EU during negotiations with Australia and New Zealand. Even though they are not yet agreed upon, they prove that the EU model provisions are in fact evolving. The EU, while building upon the already-negotiated agreements, still adds new elements. As the recently proposed elements show, there is a growing need for the EU not only to protect consumers

² Agreements with Singapore and Viet Nam were negotiated before the agreement with Japan, but it took the parties much longer to sign them than in the case of the EU–Japan FTA.

and Internet users but also to facilitate communication in general. Although the EU claims that European regulatory models still serve as an inspiration for other states [European Commission, 2020a], it is common knowledge that its economy is still less innovative than the American and Chinese economies, which is especially visible in the field of digital services [Lee, 2018; Śledziwska and Włoch, 2020]. Therefore, the EU needs to not only change its strategy for data internally but also better cooperate externally. This change has been acknowledged by the European Commission [2020b] in its Communication in 2020. The EC stated that the EU needs to provide a legal framework for data flow, providing that it is “subject to exceptions and restrictions for public security, public order and other legitimate public policy objectives of the European Union”. As a result, we can expect that provisions on data flow will become a part of the future RTAs of the EU. Provisions related to data flow will probably also be a part of WTO’s plurilateral agreement on e-commerce, which will level the playing field for the EU compared to other major trading economies. The EU will, probably, play an important role in the negotiation of such an agreement.

6 Conclusions

The EU remains the most active participant of regional integration but, at the same time, reflects its internal policy in its RTAs. On the one hand, according to Digital STRI, most of the EU Member States, as well as a majority of the partners of the EU, are open for digital trade. Moreover, the EU is able to achieve further openness through its RTAs. Despite the fact that Digital STRI refers to the barriers to e-commerce present in the national regulatory framework, it could provide certain inspirations on what could be addressed in RTAs, namely, strengthening IP rights, addressing the responsibility of e-commerce platforms, enforcing a regulatory framework for further facilitation of online transactions, and providing a regulatory framework for easier financial transactions.

Therefore, all of the EU’s RTAs consist of either chapters dedicated to e-commerce or special provisions within the chapters on trade in services and investment. While the most commonly appearing in RTA provisions concerning e-commerce is the latter’s promotion [López González and Ferencz, 2018, p. 15], there are hardly any specific solutions implemented in RTAs, which would address the challenges related to the transition to a digital economy. Even though the international law and regulatory cooperation seem to be important tools for facilitating digital trade [Ahmed 2019], lack of data impedes the possibility to assess the potential of various regulatory measures that could be applied.

The greatest problem in providing an international regulatory framework for e-commerce is probably not the lack of proper provisions focused on liberalizing the transactions concluded and provided over the Internet. Although there are plenty of data available on international transactions generally, as well as on e-commerce, there is a lack of statistics concerning cross-border electronic transactions. The most import fact remains lack of data, which could be the basis for the analysis of existing barriers. The negotiating parties do not know the parts of transactions that are made by these means of communication, and therefore, it is impossible to answer the following question: What are the most important barriers to international cross-border electronic trade?

At the same time, the EU does not seem to be playing a leading role in creating a model regulatory framework for e-commerce. The provisions are not enforceable, except the one prohibiting tariffs on electronic transmission. Nevertheless, there are a few important trends, such as invoking the principle of technological neutrality or defining and allowing the electronic signing of contracts, which can be perceived as a step in the right direction. It is also important to note that the EU is trying to strengthen IP rights, although the provisions related exclusively to rights management information might not be sufficient to actually boost e-commerce.

Moreover, the EU’s activities in terms of e-commerce regulation, even though scarce, still exceed its actual progress in terms of participation in global e-commerce. As the global e-commerce is dominated by the US and China, the role of the current regulatory framework of the EU referring to this issue in the international law may be further questioned, as concentration on consumer and data protection may not be a proper tool for boosting e-commerce. The way forward could be based on using the experience drawn

from the adoption of RTAs during negotiations of the plurilateral agreement. It should be focused on the adoption of the regulatory framework that would address the most challenging aspects of e-commerce regulation and on ensuring the enforceability of its provisions, while protecting the EU values such as a high level of consumer and data protection.

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