

Prospective Policy Study on Artificial Intelligence and EU Trade Policy

Study calls for EU trade policy to anticipate ethical and responsible AI regulation

Why does this matter for the European Union and its Member States?

Artificial Intelligence (AI) holds enormous promise for our information civilization if we get the governance of AI right. For the EU – and the Netherlands in particular – ensuring ethical and responsible AI is a top priority. In its 2018 communication 'Artificial Intelligence for Europe', the European Commission concluded that 'the main ingredients are there for the EU to become a leader in the AI revolution, in its own way and based on its values.'

What makes AI even more fascinating is that the technology can be deployed fairly location-independent. Data and machine learning code can be moved across today's digital ecosystem and the predictive outcomes of an AI system can be applied at a distance. The fluidity of AI inevitably holds repercussions for the societies it interacts with which can affect individuals' fundamental rights and societal values.

What is the study about?

Cross-border trade in digital services which incorporate applied AI into their software architecture is ever increasing. That brings AI within the purview of international trade law, such as the General Agreement on Trade in Services (GATS) and ongoing negotiations at the World Trade Organization (WTO) on trade related aspects of electronic commerce. In April 2019, the European Commission tabled its initial proposal for the re-launched WTO e-commerce negotiations among 76 WTO Members.

The Dutch Ministry of Foreign Affairs commissioned this study to generate knowledge about the interface between international trade law and European norms and values in the use of AI. This independent study has been carried out by the Institute for Information Law (IViR) at the University of Amsterdam. The study embarked on research of AI with a comprehensive

look at areas where EU external trade and EU governance of AI intersect.

The study makes a number of significant findings

The EU has a preference to afford a high level of protection to individuals' rights and European values in the deployment of AI. Yet, aside from the General Data Protection Regulation (GDPR), the EU and its Member States have not yet exercised their right to regulate responsible AI. EU rule-making in this area has to anticipate the liquidity of AI which can serve European users from outside EU territory. Think for example of digital personal assistants, autopiloting of connected cars, or AI-supported diagnostics in hospitals, all of which can be supplied from abroad.

Our analysis concludes that digital services powered by AI are already covered by the GATS. This outcome requires nevertheless a stretch of imagination considering the outdated catalogue of service classifications and blurred boundaries between different modes of supply based on which WTO Members scheduled their commitments some 30 years ago. However, existing GATS disciplines, founded on general principles of transparency, predictability and non-discrimination, are sufficiently flexible to address many digital trade issues.

The study recognizes the EU's and its Member States commitment to restore the rule-based multinational free trading system. Yet, in the face of the crisis of the WTO, current WTO negotiations press ahead for new trade rules for e-commerce. Without even mentioning AI, these new rules on e-commerce would also provide for the cross-border supply of AI. However, attempting to build future rules for cross-border trade in digital service, with or without AI, on already problematic GATS mechanisms may only protract the crisis of the WTO.

At this moment in time, it is unadvisable for EU negotiators to move ahead in setting new rules for cross-border trade in AI before the EU adopts a comprehensive framework for AI governance. In the interest of future EU governance of AI, EU trade negotiators should guard sufficient space to maneuver in the ongoing WTO e-commerce negotiations as well as other bilateral trade negotiations. Given AI's transformative impact on every aspect of our information civilization, what is needed is an open and inclusive discussion about the relationship between the EU's e-commerce proposal and EU's emerging governance of AI.

Notably, EU trade policy should not rule out domestic measures that, in the public interest, require source code transparency, accountability and auditability of AI systems. Quite to the contrary, instituting a quid pro quo for cross-border digital trade would be a healthy measure of transparency of AI systems. In light of the need to make public interest determinations with respect to AI, the non-disclosure of source code requirement in the EU e-commerce proposal appears premature. The non-disclosure provision could be at cross purpose with the legitimate interest in auditing source code.

Free data flow commitments can foreclose policy space for state-of-the-art data governance in the public sector. For instance quality data, which is key for AI performance, should only be used for purposes that are compatible with European values. Legislators must not concede the prerogative to attach conditions to data. For instance, access to the high quality data originating in the EU may be contingent on its use for purposes that are compatible with European values. The WTO e-commerce negotiations lopsidedly emphasize the flow of and access to data without considering how knowledge and surplus value generated from European data should contribute to public value and societal interests.

Lastly, the WTO e-commerce negotiations must give due consideration to the situation of developing nations. WTO rules should support developing nations in their aim of becoming producers of AI, rather than

suppliers of data, or mere consumers of artificial intelligence from abroad. As has been the case during GATS negotiations, e-commerce negotiations too should give special treatment to least-developed countries.

What the European Union should do to guard its right to regulate AI?

1. The study calls for an open and inclusive discussion on the relationship between the EU's e-commerce proposal and EU's prospective governance of AI.
2. New e-commerce rules currently negotiated at the WTO should allow Members to schedule new commitments based on service sector classification fit for the digital age.
3. In leading a new global standard on ethical and trustworthy AI, the EU and its Member States should guard an adequate scope for manoeuvre in the WTO e-commerce negotiations.
4. The EU's future law and policy must cope with the fluidity of algorithmic systems without disrupting beneficial algorithmic flows.
5. Cross-border trade in AI should be contingent on transparency, accountability and auditability of AI systems.
6. Free data flow commitments in future trade rules on e-commerce should not foreclose policy space for state-of-the-art data governance in the interest of ethical and trustworthy AI.
7. Trade law should not stand in the way of domestic policies to ensure that knowledge and surplus value generated of European data contribute to public value and societal interests in Europe.
8. During WTO e-commerce negotiations, the EU and its Member States should pay attention to developing countries' perspectives to participate fully in the AI economy and afford special treatment to least-developed countries.