Interim analysis of JSI E-commerce Chairs' text 15 January 2024, INF/ECOM/85

Prof Emeritus Jane Kelsey, University of Auckland, j.kelsey@auckland.ac.nz, 30 January 2024

The 15 January 2024 chair's text (INF/ECOM/85) for the Joint Statement Initiative (JSI) on electronic commerce is to be discussed in a round from 30 January to 2 February 2024. This is not an agreed text. It is the work of the co-convenors from Australia, Japan and Singapore.

The previous consolidated text of 15 November 2023 (INF/ECOM/62/Rev.5) was produced after the US notified the withdrawal of its support for several core provisions relating in particular to data. The current chairs' text centres on the more transactional provisions of that text, plus making the moratorium on customs duties on electronic transmissions permanent. The cover note says the remaining provisions have not been dropped and remain "a comprehensive record of proposals, attributions and drafting notes".

Some provisions still have placeholders for further discussion in the January round. Significantly, the outstanding provisions include development, exceptions and the scope of the agreement – all fundamentally important, especially for developing countries.

Content

Nature of the obligations

The Agreement applies to "measures" adopted or maintained by a Party "affecting" trade by electronic means, whether or not the measures were directed at the digital sphere.

"Trade by electronic means" is not defined, and potentially involves any digital activity that involves a foreign supplier, including advertising, search engines and social media.

"Measures" to which the provisions apply has an extensive and open-ended definition that includes decisions and administrative actions and "any other form".

Many provisions require parties to "endeavour" to achieve certain actions or outcomes. This is still an obligation that requires evidence of positive action.

The vague term "undue" is used in several places, notably endeavour to "avoid undue regulatory burden" on electronic transactions (A.1.2(a)) and endeavour to avoid imposing conditions that "unduly prevent or restrict" specified uses of open government data (B.2.7). Some participants objected that is proxy "necessity" test. The drafting note records a "shared understanding" by "small group Members" that it would not be interpreted in that way, but this understanding would not bind a dispute body. There is no alternative explanation of what "undue" means or the relevant criteria, so the effect could be the same.

Protections and Exceptions

Parties cannot enter reservations without the consent of the other Parties. That means developing countries must rely on flexibilities in the language and any carveouts or exceptions.

There are limited exclusions for government procurement (covering the *process* of procuring goods or services for purely internal use), services supplied in the exercise of governmental authority (limited, in effect, to non-commercial monopolies), and general exceptions imported from the GATT and GATS (that have almost always failed when invoked in a dispute). The exception for prudential measures retains the circular requirement that measures are not used as a means of avoiding obligations in the Agreement. There is currently no exception for taxation – another matter to be discussed at the January round.

Occasionally, domestic laws or regulations are allowed to override an obligation (eg.A.2.2), but these laws need to be explicit and what they apply to is very specific. The provision on access to the Internet (C.3), and consumers' choice of services, apps and devices, has no obligations and explicitly says parties are not required to have a measure that gives effect to its principles.

The security exception in the chairs' text imports the limited GATT and GATS provisions, in contrast to proposals in Rev 5 for a self-judging unlimited security exception that would not "prevent any party from taking any action which it considers necessary for the protection of its essential security interest".

However, a provision on non-application between particular parties would allow one Party to cherry pick which other parties the agreement applies to. That appears to be geopolitical, given that China and Anglo-American countries are both parties. It would be very difficult for most developing countries to use in practice, in contrast to a broader self-judging national security exception.

No Development Provisions

There are no development provisions in this text, only a placeholder for "*specific implementation provisions for developing country partioes and least developed country Parties, subject to the landing zone on the JSI development articles*".

The exceptions in Rev 5 that were proposed by Nigeria and Cote d'Ivoire for developing countries and LDCs, and by New Zealand for Indigenous Peoples, are not in this text.

Because Nigeria's self-judging carveout applied only to data rules, it is out of scope anyway. Cote d'Ivoire proposed a broader carveout saying developing countries would not be required to implement the agreement until they have acquired the capacity to do so, and LDCs must only implement the rules to the extent consistent with their needs and capabilities.

New Zealand's partly self-judging carveout applies to measures to protect or promote the rights, interests and responsibilities of Indigenous Peoples, including obligations under legal, constitutional or treaty arrangements.

Neither of these exceptions had co-sponsors in the Rev 5 text and both are set down for further discussion at the January round.

Moratorium on customs duties on e-transmissions is made permanent (B)

The previous Rev 5 text had 3 options on the moratorium on customs duties on e-transmissions:

i. Permanent ban, which included the content of e-transmissions, and defined customs duties to include fees and other charges on or in connection with imports and exports (AU, CA, UA)

ii. Continuing current practice at WTO, with e-transmissions not including content. This could be adjusted in light of further developments or decisions. The practice did not preclude applying customs procedures for public policy purposes (ID, AR)

iii. Maintain the practice in WTO, including any further WTO ministerial decisions (CH, KZ, TR)

The Chairs have taken the developed countries' preferred approach of making the moratorium permanent. Governments could still apply internal taxes, fees and charges provided they were consistent with WTO rules.

Prior Comment on Electronic Transactions Framework (A.1.2(b))

A Party must "endeavour to facilitate input by interested persons in the development of its legal framework for electronic transactions". The scope of "electronic transactions" is not defined. The legal framework is linked to the UNCITRAL Model Law on Electronic Commerce from 1996, but the article additionally refers to avoidance of "undue regulatory burden".

As with "transparency" rules proposed or adopted in other agreements, this gives foreign corporate interests, including Big Tech, the opportunity to support or oppose an overall framework and specific regulation. There are many examples of tech companies threatening states over proposed regulation (eg tech companies threatened to block Australian customers over levying of GST)[1] and US threats of Section 301 Investigations if measures, such as digital services taxes,[2] proceed.

GATS-plus Telecommunications (E)

All parties must adopt the Reference Paper on Basic Telecommunications, which is currently voluntary to adopt in whole or part under the GATS. Fewer than half the WTO Members have done so. The Reference Paper constrains how universal service obligations are structured and offered, and contains rules on ensuring competitors have access to "essential facilities" that are often run by public telcos.

The main additional JSI rules require the telecom regulatory authority not to have any financial interest or operational or management role with a supplier of public telecom networks and services. The authority must have the power and ability to carry out its functions and to impose sanctions.

Facilities considered "essential" must be made available by major suppliers (often state-owned enterprises (SOEs)) to other public telecom suppliers on "reasonable", non-discriminatory and public terms, and access to them supplied on an unbundled basis so they do not need to support the entire network. Developing countries with public telcos that provide public services may struggle to compete on these terms.

Consumer protection (C.1)

This provision applies only to misleading, fraudulent and deceptive commercial activities, which are defined. Parties must adopt measures to proscribe such activities that cause harm to actual or potential consumers engaging in e-commerce. There is no minimum level of protection required and its aims are basic (eg. endeavour to ensure that suppliers deal fairly and honestly with consumers). Even achieving this level of compliance could be challenging for developing countries.

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[1] https://www.afr.com/politics/etsy-ebay-and-alibaba-join-amazon-in-threat-to-block-australian-consumers-in-gst-war-20170421-gvp951; https://www.smh.com.au/business/companies/amazon-to-block-its-us-website-for-aussie-shoppers-over-new-gst-rules-20180531-p4zikr.html

[2] https://www.twn.my/title2/latestwto/general/News/Digital%20Tax.pdf

Personal data protection (C.3)

There is a similarly minimalist approach to personal privacy, which targets consumer confidence and trust in the digital *economy* even though the Agreement relates to the broader digital ecosystem and impacts on the privacy of people and communities. The EU's more comprehensive right to adopt safeguards is to be discussed at the January round.

Parties are required to adopt a legal framework for the protection of personal data of those who use e-commerce. There is no minimum threshold. The obligation only applies to identified or identifiable persons, and it is unclear whether that includes de-anonymised data. Governments must "endeavour" to ensure the legal framework is non-discriminatory (across countries). The footnote, drawn from the US-driven Trans-Pacific Partnership (TPP), reflects the US's minimalist approach to privacy that allows compliance by sector specific laws or "other laws that address privacy violations".

Again, compliance with even this low threshold may be challenging for some developing countries.

E-authentication, e-signatures, e-contracts (A.2, 3, 4)

These provisions are designed to enable digitalised transactions. Most provisions are hard obligations, not "endeavour". Governments retain some control "in circumstances otherwise provided under its laws or regulations", eg. on specific uses of e-signatures in legal proceedings or the validity and enforceability of e-contracts. To take advantage of this Parties need to have such laws in place; most developed countries do, but many developing countries will not.

Likewise, the requirement to allow parties to a transaction to "mutually determine" the means for e-authentication would in practice allow Big Tech to dictate the means used for authenticating identity, given the power differential in its relationship with users. A government may set performance standards for e-signatures or authentication in a category of transactions, but it is unclear if this would allow standards to be applied to numerous categories.

Digitised documents and processing at the border

The goal of paperless trading (A.5) is to eliminate paper forms and documents for import, export and transit of goods. Customs authorities are required to provide border documents in digital form and governments must endeavour to have other government agencies do the same.

The obligation to accept digital forms and supporting documentation as equivalent to paper forms could be overridden by domestic or international legal requirements, but the government would have to provide a list of non-compliant documents within 2 years of the JSI entering into force.

That obligation could also be overridden if it would reduce the effectiveness of its customs or other trade procedures; however, the criteria for this are not specified and "effectiveness" would seem to be an objective factor that could be put to the test.

When providing a single window under the Trade Facilitation Agreement Parties must endeavour to enable the submission of documents electronically and in advance of goods arriving (A.6). SMEs could use intermediary service providers to do so.

Open government data (B.2)

The provision on open government data restricts how governments can regulate the use of central government data they have decided to put online for public access and use. This would include, for example, census data. It applies to "measures" (which have an open-ended definition) "with respect to" such data – the scope of "respect to" is unclear, but could be interpreted as quite narrow, compared to "relating to" or "affecting".

The aim is to allow users to search, retrieve, analyse and manipulate the data for commercial and non-commercial purposes (why non-commercial in an e-commerce agreement and what purposes might this cover?). Governments must endeavour, as far as practicable, to make the sure the data is machine-readable, searchable, retrievable, up to date, and accompanied by meta data that is based on commonly used formats so the user can understand and use the data. And do so for no or a reasonable cost.

Para 7 requires the government to endeavour to avoid imposing conditions that "unduly prevent or restrict the user of such data" from using it in various ways, including "regrouping" it (presumably through algorithms) and using it for commercial and non-commercial purposes without consent. The vague term "unduly" prevent or restrict has raised similar concerns among participants about a necessity test, and what it might mean if that is not the test.

Spam (C.2)

Parties must do 1 of 3 things to limit unsolicited commercial messaging, such as targeted advertising; again, this could be minimal:

- require suppliers to facilitate those receiving spam to prevent further spam;
- set out in law a requirement for consent to receive commercial e-messages (eg targeted advertising)
- otherwise provide for ...

Those sending messages must identify them as commercial, indicate their source, and give information on how to opt out. But it is unclear what the recipient can do if they fail to comply. Likewise, government must provide access for redress or recourse for breaches of this, but consumers will have enormous difficulties pursuing them, and develoing countries may struggle to implement these systems.

Cybersecurity (C.5) and Cryptography

This provision specifies the need to minimise "trade barriers" to tech providers when governments design responses to cybersecurity threats. Governments must "endeavour" to employ "risk-based" approaches - which are the opposite of precautionary approaches. Risk-based assessment seems contradictory when the article itself recognises the evolving environment of cyber-security threats - by definition, risks that are not yet known or well understood.

Standards are to be developed in an open, transparent, "consensus-based" manner, which reinforces the pressure to minimise constraints. A drafting note says consensus does not require unanimity, but would operate as in the WTO's TBT committee, which means "taking into account the views of all parties concerned and to reconcile any conflicting arguments", and resorting to a vote of that proves unachievable.

A provision on ICT products that use cryptography is another issue for January.

Transparency (D.1)

Governments must make public all "measures" (broadly defined) "affecting" (not just directed at) e-commerce on the date the measures come into force, at the latest, except in emergencies.

Cooperation (D.2)

Parties will endeavour to work together on issues that could include topics in the agreement plus logistics, digital inclusion and (in square brackets) intellectual property rights.

Adoption of the Agreement

This negotiation has no mandate or legitimacy as a WTO instrument, despite its facilitation by the Secretariat and statements by the Director-General to support it. The Article on Relation to Other Agreements makes it a plurilateral agreement that only applies between the Parties. This suggests the participants intend adopting it as an Annex 4 plurilateral, which would require consensus of all WTO Members.

Other provisions apply the Dispute Settlement Understanding as per the GATT and GATS. This might suggest an alternative of adopting these new rules through GATT and GATS schedules. This raises major issues already affecting the JSI on Services Domestic Regulation, and it would be technically difficult to identify the rules that fall under each agreement.

It remains unclear how this agreement will interface with the GATS, where commitments on mode 1 cross-border services and CPC84 Computer and Related Services overlap.

It seems unlikely that the proponents can conclude this first tranche agreement before the MC13. Meetings are scheduled into 2024, so they may be waiting to see the outcome of the Investment Facilitation JSI that is being advanced as an Annex 4 plurilateral agreement.