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## **WTO's impact on GDPR's Cross-Border Data Flows: ensuring the balance between privacy and trade?**

### *Abstract*

With the rapidly developing technological developments, data has become a very important trade service unit, while the World Trade Organization (WTO) has been insufficient so far in the regulations on this matter. The fact that data also contains personal information makes WTO unreliable for the European Union (EU), which recognizes privacy and private life as a fundamental right, which pushes the EU to insist on its own data protection law in cross-border data transfers.

In this article, we will question the role of the WTO obligations and principles on the EU's General Data Protection Regulation (GDPR) and trade-restrictive data localization measures, and examine whether GDPR can justify itself with the GATS' General Exceptions Article XIV. Finally, we will conclude our work with recommendations and evaluations for better implementation at the multinational level.

### *1. Introduction*

International trade allows countries to expand their markets for goods and services that are not available domestically or available at a higher cost. However, the development of world trade and economies can only be possible by providing an environment of trust. Providing this environment of confidence is only possible with the set of rules of a multinational level organization.

The World Trade Organization (hereinafter referred to as WTO) is the only global international organization that deals with trade rules between countries. The primary purpose of the WTO is to open trade for the benefit of the all member nations, try to solve the trade problems they face with each other and help producers of goods and services, exporters and importers carry out their business.<sup>1</sup>

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<sup>1</sup> World Trade Organization: *About WTO*. [https://www.wto.org/english/thewto\\_e/whatis\\_e/whatis\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm) (last visited 14.05.2020)

With the rapidly developing technology, the internet age has created the digital economy. According to UNCTAD Digital Economy Report 2019, digitally available service exports amounted to \$ 2.9 trillion, or in other words 50 percent of global service exports in 2018.<sup>2</sup> So the data, the smallest unit for the implementation of the digital economy, has become very important in functioning international digital trade. Therefore, the international free flow of data is very important considering WTO's open trade purpose.

However, the cross-border data flow is usually restricted by the nations protecting goals such as privacy and cybersecurity. Laws and regulations obstructing data flows across borders (“data restrictive measures” or “data restrictions”) are also often trade-restrictive, and therefore, some of these measures can violate WTO obligations.<sup>3</sup>

Countries justify these measures under exceptions to international trade agreements that allow governments to implement the necessary measures to achieve their domestic policy goals, possibly including local internet stability and security policies.<sup>4</sup> However, the absence of multinational cross-border data flow regulations causes uncertainty and instability for the countries, especially the developing countries, that transfer data to third countries.

While the WTO implicitly governs the cross-border data flows through its General Agreement on Trade in Services (hereinafter referred to as GATS), countries are trying to protect their data privacy and cybersecurity with data localization laws and bilateral agreements<sup>5</sup> (e.g. EU-US Privacy Shield<sup>6</sup>).

Data localization is a policy whereby national governments compel internet content hosts to store data about internet users in their country on servers located within the jurisdiction of that national government (localized data hosting).<sup>7</sup> In this regard, the adequate level test for transferring data to third countries of the EU's General Data Protection Regulation<sup>8</sup> (hereinafter referred to as GDPR) is also considered as data localization.<sup>9</sup>

In this paper, we will firstly examine the role of the GATS rules in data localization measures of the GDPR and discuss if the adequate level basis can be an exception on the privacy and personal data protection under the GATS. We will question if the WTO

<sup>2</sup> United Nations Conference On Trade And Development (UNCTAD): *Digital Economy Report 2019*. United Nations Publications, 2019, p. 6.

<sup>3</sup> MITCELL, ANDREW D. – MISHRA, NEHA: *Regulating Cross-Border Data Flows in a Data-Driven World: How WTO Law Can Contribute*. *Journal of International Economic Law*, 22(3) 2019, p. 389.

<sup>4</sup> MITCELL – MISHRA 2019, p. 390.

<sup>5</sup> AARONSON, SUSAN ARIEL – LEBLOND, PATRICK: *Another digital divide: the rise of data realms and its implications for the WTO*. *Journal of International Economic Law* 21(2) 2018, p. 248.

<sup>6</sup> Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield, OJ L 2017, 12.07.2016, pp. 1–112.

<sup>7</sup> SELBY, JOHN: *Data localization laws: trade barriers or legitimate responses to cybersecurity risks, or both?* *International Journal of Law and Information Technology* 25(3) 2017, p. 214.

<sup>8</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) OJ L 119, 4.5.2016, pp. 1–88.

<sup>9</sup> BLUME, JOSHUA D.: *Reading the Trade Tea Leaves: A Comparative Analysis of Potential United States WTO-GATS Claims against Privacy, Localization, and Cybersecurity Laws*. *Geo. J. Int'l L.* 49 2018, pp. 821–824.

rules are sufficient to ensure transnational cross-border data flows safely. Finally, we will conclude with our assessments and recommendations for improving WTO rules to prevent unfair data localization and providing an open trade environment.

## 2. The role of the GATS in data localization measures of the GDPR

In the natural flow of life, EU institutions and bodies or other legal persons and data controllers may need to transfer personal data to recipients outside the EU. According to Article 45 of the GDPR, a transfer of personal data to a third country or an international organisation may take place where the Commission has decided that the third country ensures an adequate level of protection.<sup>10</sup>

At any time, the European Parliament and the Council may request the European Commission (hereinafter EC) to maintain, amend or withdraw the adequacy decision on the grounds that its act exceeds the implementing powers provided for in the regulation. The effect of such a decision is that personal data can flow from the EU to that third country without any further safeguard being necessary. In other words, transfers to the country in question will be assimilated to intra-EU transmissions of data.<sup>11</sup>

However, only 13 countries namely Andorra, Argentina, Canada (commercial organisations), Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, New Zealand, Switzerland, Uruguay and the United States of America (limited to the Privacy Shield framework) has been so far recognised by the EC as providing adequate protection.<sup>12</sup>

Considering this fact, it can be argued whether other member countries of the WTO are exposed to discrimination in the EU's data market and we will see below if the adequacy decisions of the GDPR violate the GATS rules that support open global trade.

### 2. 1. Most-Favoured-Nation Treatment

The GATS Article II requires that if a country allows foreign competition in one sector, equal opportunities should be provided to service providers from all other WTO members in this sector. This is true even if the country has not made a special commitment to ensure that foreign companies have access to their markets under the WTO. In brief, Most-Favoured-Nation Treatment (hereinafter MFN) means treating one's trading partners equally on the principle of non-discrimination.<sup>13</sup> MFN principle serves to create trust environment.

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<sup>10</sup> GDPR, Article 45(1)

<sup>11</sup> Adequacy Decisions, [https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions\\_en](https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en) (20.02.2020)

<sup>12</sup> [https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions\\_en](https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en) (last visited 25.11.2020)

<sup>13</sup> General Agreement On Trade In Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994), Article 2 and WTO, Services: rules for growth and investment, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm) (last visited 16.05.2020)

GDPR's adequacy decision only for some countries could violate EU's MFN obligation, but it is argued as data transfer can continue with Articles 46 and 49 even in the absence of the adequacy decision, because the adequacy decision is not the only solution for cross-border data flow.<sup>14</sup> Nevertheless, this adequacy test creates discrimination against the developing and less developed countries since they do not have sufficient equipment and protection systems. Because reaching the level of competence that the EU is looking for and being in this market would cost them a lot.<sup>15</sup>

Developing countries, the rule-takers, lack the comparative advantage in the data-driven sectors and this system makes the developed countries like EU, USA, China the rule-makers.<sup>16</sup>

To ensure equal opportunities in terms of cross-border data transfers, there should be a multinational framework that requires developed countries to help developing and less developed countries to participate in the digital economy, including the mandatory assistance to develop their infrastructure regulators. Although such a comprehensive framework requires greater participation, goodwill, and commitment to countries, we believe that this solution will be more meaningful, relevant, and sustainable at the end of the day.<sup>17</sup>

## 2. 2. National Treatment and Market Access

GATS Article XVII, the National Treatment principle, ensures non-discrimination between foreign and domestic services and service suppliers in the sectors inscribed in the Member's own Schedule.<sup>18</sup> A Member wishing to maintain any limitations on National Treatment — that is any measures which result in less-favourable treatment of foreign services or service suppliers — must indicate these limitations in the third column of its schedule.<sup>19</sup>

It is particularly worth mentioning that the National Treatment obligation, which is a general obligation under the GATT, is in contrast under the GATS only a specific one that needs to be explicitly committed to by the WTO Member.<sup>20</sup>

This difference between GATT and GATS is arising from the different techniques of writing the commitments lists. When using a positive list as GATS does, a Party has to explicitly (“positively”) list those sectors and subsectors in which it undertakes Market Access and National Treatment commitments. As a second step, the Party lists all

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<sup>14</sup> VELLI, FEDERICA: *The Issue of Data Protection in EU Trade Commitments: Cross-border Data Transfers in GATS and Bilateral Free Trade Agreements*. European papers: a journal on law and integration 4(3) 2019, p. 885.

<sup>15</sup> VELLI 2019, p. 889.

<sup>16</sup> AARONSON – LEBLOND 2018, p. 271.

<sup>17</sup> MITCELL – MISHRA 2019, p. 416.

<sup>18</sup> GATS XVII and WTO ECAMPUS: The National Treatment Principle. <https://www.youtube.com/watch?v=y1DW-xPGgdI> (last visited 18.05.2020)

<sup>19</sup> Guide to reading the GATS schedules of specific commitments and the list of article II (MFN) exemptions, [https://www.wto.org/english/tratop\\_e/serv\\_e/guide1\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/guide1_e.htm) (last visited 18.05.2020)

<sup>20</sup> WEBER, ROLF H.: *Regulatory Autonomy and Privacy Standards under the GATS*. Asian J. WTO & Int'l Health L & Pol'y, 7(25) 2012, p. 28.

exceptions or conditions to these commitments, stating the Market Access and/or National Treatment limitations it wants to apply.<sup>21</sup>

When using a negative list as GATT does, the Parties do not have to list the sectors for which they take commitments. All sectors or sub-sectors that are not listed are, by default, open to foreign service suppliers under the same conditions as for domestic service suppliers. The Parties list only those sectors or subsectors which they limit or exclude by inscribing reservations for all measures which they consider would run counter to the Market Access and National Treatment principles.<sup>22</sup>

For instance, Hungary requires in the European Union Schedule of Specific Commitments GATS/SC/157 under the Financial Services Sector that the transfer of information containing personal data, bank secret, securities secret and/or business secret is not allowed. With this limitation, no Member can accuse Hungary by violating National Treatment principle regarding this sector.<sup>23</sup>

For this reason, Members that are particularly committed to the National Treatment obligation should be equal between domestic and foreign service and should not impose trade barriers. Hence, whether the GDPR adequacy test violates the National Treatment principle should be examined individually according to each concrete and current case.<sup>24</sup>

According to GATS Article XVI, Market Access provision, if a country lists a particular sector on its Schedule of Specific Commitments, that country must provide access to foreign supplies of that particular sector to its market. This also requires that WTO members provide foreign suppliers treatment "no less favourable" than provided to domestic suppliers.<sup>25</sup>

Slovak Republic requires license in the European Union Schedule of Specific Commitments GATS/SC/157 under the Data Processing Services Sector that for commercial presences and with regard to on-line information and/or data processing (including transaction processing).<sup>26</sup> With this limitation on Market Access provision, Slovak Republic is exempted from non-discrimination obligation.

Therefore, for the GDPR's adequacy decision, we should question the EU Member States according to their specific commitments on the trade in services to conclude whether the decision is discriminative or favourable.

### 2. 3. Article XIV(c)(ii) exception on the privacy and personal data protection

If privacy standards are too high in one country, a problem may arise when a service provider from another country with lower privacy standards cannot easily deliver financial services or health services without agreeing to incur significant additional

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<sup>21</sup> WEBER 2012, p. 28.

<sup>22</sup> WEBER 2012, p. 28.

<sup>23</sup> For further information: WTO, European Union Schedule of specific commitments GATS/SC/157, 07.05.2019, p. 1–200, [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=253942,31391,10335,2244,15832,33570,37471,26509&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=253942,31391,10335,2244,15832,33570,37471,26509&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True) (last visited 19.05.2020)

<sup>24</sup> VELLI 2019, p. 887.

<sup>25</sup> BLUME 2018, pp. 808–809.

<sup>26</sup> GATS/SC/157, p. 61.

costs to improve the level of data protection. Therefore, the first point to always look at is the scope of national commitments related to market access. Because confidentiality issues cause controversy only when in principle a commitment to grant access to the market. For example, if a country with high privacy standards has made an entry into the Market Access column of the National Commitment List Sub-Sector as “none” (meaning no restriction) for the cross-border supply, that country has committed to providing full market access in that Sub-Sector.<sup>27</sup>

From the perspective of international trade law, GDPR's cross-border data flow provisions may violate the EU's non-discriminatory commitments under the GATS. At this point, the GATS contains an exception to privacy and protection of personal data under Article XIV (c) (ii). However, there is a risk that EU's potential violations may not be justified under this exception. Because the GDPR's adequacy approach is difficult to pass the “necessity test” of the exception.<sup>28</sup> As it was ruled by the Appellate Body in the US Gambling case, it is necessary for a member country to prove that they have no other “reasonably available” alternative and that the measures have been taken because they are “necessary”.<sup>29</sup>

Besides, according to GATS Article VI, the measures, technical standards, and licensing requirements of countries regarding their qualification requirements and procedures should not be more burdensome than necessary to ensure service quality and should not create unnecessary barriers to service trade.<sup>30</sup>

The GATS requires all regulations inconsistent with it to be least restrictive in terms of trade. In this case, it can be claimed that the adequacy approach is not “least trade-restrictive”. For example, GDPR may encounter an argument about the available alternatives that practised in Canada and the Asia-Pacific Economic Cooperation (APEC).<sup>31</sup>

CBPR is based on data protection principles that provide a basic standard in the APEC Framework. The APEC Framework is not as comprehensive or prescriptive as GDPR. APEC requirements are essentially a regional data protection standard that provides minimum protection, whereas GDPR is a regulation that requires a high level of protection, which is directly applicable in the EU.<sup>32</sup>

In these circumstances, it does not seem like an appropriate solution for WTO to leave this important privacy issue, which concerns not only the service providers in the sending countries but also the users of the service, to the countries’ own decisions through bilateral agreements and domestic regulations.<sup>33</sup>

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<sup>27</sup> WEBER 2012, p. 32.

<sup>28</sup> YAKOVLEVA, SVETLANA – IRION, KRISTINA: *Toward Compatibility of the EU Trade Policy with the General Data Protection Regulation*. AJIL Unbound 114 2020, p. 11.

<sup>29</sup> United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS285), [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/1pagesum\\_e/ds285sum\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds285sum_e.pdf), (last visited 25.05.2020) retrived in HODSON, SUSANNAH: *Applying WTO and FTA Disciplines to Data Localization Measures*. World Trade Review 18.4, 2019, p. 16.

<sup>30</sup> GATS Article VI (4) and VI(4)(b)

<sup>31</sup> YAKOVLEVA – IRION 2020, pp. 1–12.

<sup>32</sup> SULLIVAN, CLARE: *EU GDPR or APEC CBPR? A comparative analysis of the approach of the EU and APEC to cross border data transfers and protection of personal data in the IoT era*. Computer Law & Security Review 35(4) 2019, p. 383.

<sup>33</sup> VELLI 2019, p. 894.

### 3. Conclusion

As stated in the Digital Economy Report of UNCTAD in 2019, 50% of the service trade is provided by internet-connected technologies. In this case, since it is necessary to facilitate data flows in order to support continuous growth in digital commerce, ways to eliminate the barriers and data localization rules set by the countries are sought.

However, facilitating this data flow should apply only to non-personal data. Because personal data is a human right protected by Article 8 of the European Convention on Human Rights, and the right to privacy should be protected by an agreed framework that would satisfy the EU and other member countries, not at minimum standards. Because it should not be forgotten that personal data is not only a commercial tool but also intimate information about private life.

In this article, we discussed the role of WTO rules and principles on GDPR's data localization measures and questioned how effective the MFN, National Treatment and Market Access principles are. We also investigated whether an adequate level test of GDPR could be an exception under GATS.

In terms of the MFN principle, we can say that the GDPR's adequacy test is not advantageous for the developing and less developed countries but it still ensures a level playing field since all third countries play by the same set of rules. Therefore, one cannot claim the EU by being unfair although each player does not have an equal chance of succeeding.

However, in terms of global trade, it would be appropriate to create a multinational framework that provides compulsory assistance to develop infrastructure regulators for developing countries by developed countries. Although such a comprehensive framework brings more participation and responsibility to countries, we believe this solution is stable and meaningful, as we mentioned earlier.

When it comes to National Treatment and Market Access principles, the parties can write their commitments and exceptions in two different techniques using a positive list or a negative list in their charts.<sup>34</sup> As several scholars agreed, it would be a better solution for the GATS to change the style of commitments schedule from positive list to negative list as GATT does.<sup>35</sup>

While these differences between positive and negative listing may seem trivial, they are not especially for internet and high-tech companies. The main difference is that the positive list approach discriminates against new products and services that are not protected under previous commitments. Due to the instability of international trade rules, it is not clear that new products have the same status as products such as telephones, fax machines and keyboards.<sup>36</sup>

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<sup>34</sup> EC: *Services and investment in EU trade deals Using 'positive' and 'negative' lists*, Trade 2016, p. 3. available at: [https://trade.ec.europa.eu/doclib/docs/2016/april/tradoc\\_154427.pdf](https://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154427.pdf) (last visited 25.05.2020)

<sup>35</sup> SEN NIVEDITA: *Understanding the Role of the WTO in International Data Flows: Taking the Liberalization or the Regulatory Autonomy Path?* *Journal of International Economic Law*. 2018 Jun 1., 21(2) pp., 323–48., p. 346.

<sup>36</sup> O'CONNOR, DANIEL: *When A Negative Is Positive: Updating International Trade Agreements for the 21<sup>st</sup> Century*, 2012, available at: <http://www.project-disco.org/21st-century-trade/when-a-negative-is-positive-updating-international-trade-agreements-for-the-21st-century/>, (last visited 25.05.2020)

When we get to the general exceptions of the GATS, we see that the new GDPR and the EU are trying to create a new foundation that can change the interpretation of GATS commitments for data transfers forever. The EU has long been considered the pioneer of privacy protections for data holders, but comments by EU officials as well as many other academics, professionals and other researchers suggest that the GDPR's GATS Article XIV (general exceptions) defence does not seem in place according to the US Gambling ruling concerning the necessity test as we examined in the above part.<sup>37</sup>

From this viewpoint, WTO, the leading multilateral trading institution, is positioned to undertake many of the reforms needed to achieve a better balance between promoting the free flow of data while addressing the commercial interests of consumers and businesses while maintaining a safe and stable regulatory environment for data. However, WTO cannot deal with any issues related to data transfer or act on its own. Instead, the WTO needs to reshape its policy approach to engage with more relevant and knowledgeable international and multi-stakeholder institutions and to develop disciplines that address the relevant dimensions of data organization.<sup>38</sup> For example, it may consult with the authorized and specialized units of the EC on data protection and get advice.

The EU's data protection law and privacy approach may seem too strict or formal for other WTO countries. However, no one can interfere with the data protection approach of the Union's internal affairs. Each country will strike a different balance between the liberalization of digital trade and other non-trade policy priorities, reflecting its constitutional traditions, digital and economic development level, and the desire to endure digital colonialism.<sup>39</sup> However, when it is a matter of cross-border data flows, a multinational solution should be found to balance both the privacy and economic concerns of the countries.

We hope this study encourages WTO authorities to create a multilateral agreement that better ensures the place and importance of protecting personal data in international data transfers and balances trade and privacy.

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<sup>37</sup> BLUME 2018, p. 842.

<sup>38</sup> MITCELL – MISHRA 2019, p. 416.

<sup>39</sup> YAKOVLEVA – IRION 2020, p. 14.

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A WTO HATÁSA A GDPR HATÁROKON ÁTNYÚLÓ  
ADATÁRAMLÁSÁRA: A MAGÁNÉLET ÉS A KERESKEDELEM  
KÖZÖTTI EGYENSÚLY BIZTOSÍTÁSA?

(Összefoglalás)

A gyors technológiai fejlődésnek köszönhetően az adatok nagyon fontos kereskedelmi szolgáltatási egységgé váltak, azonban a Kereskedelmi Világszervezet (WTO) szintjén mindeközéig nem született erre a kérdésre vonatkozóan megfelelő szabályozás. Ez a tény, és az, hogy az adatok személyes információkat is tartalmaznak, megbízhatatlanná teszi a WTO-t az Európai Unió (EU) számára, amely tiszteletben tartja a magánéletet és alapvető jogként ismeri el a magánélethez való jogot. Mindez arra készíti az EU-t, hogy saját adatvédelmi szabályaihoz ragaszkodjon a határokon átnyúló adattovábbítás során.

A tanulmány célja, hogy megvizsgálja a WTO kötelezettségeinek és alapelveinek az EU általános adatvédelmi rendeletével (GDPR) és a kereskedelmet korlátozó adatok helymeghatározási intézkedéseivel kapcsolatos összhangját, és azt, hogy a GDPR igazolhatja-e a GATS általános kivételeinek XIV. Cikkét. A tanulmány a fennálló helyzet értékelésével és a megoldásra irányuló ajánlásokkal zárul a nemzetközi szintű végrehajtás javítása érdekében.