

## **Civil Society Roundtable Consultation – India-EU Free Trade Agreement**

17 November 2022

IT for Change

We would like to bring to the table some concerns about the proposed text on digital trade in the EU-India trade agreement.

1. Data is a key building block of the economy today. Furthering the rights and interests of people, especially those who are on the margins of society, is possible only if the state is able to play its allocative, regulatory, and redistributive functions in relation to data as a resource. The idea of data sovereignty is tied to this truism.

Unrestricted cross-border data flows - even if limited by safeguards for personal data protection and privacy - pose a tremendous threat to the productive capacity of peoples and nations. We are concerned that trust in the digital economy is equated with the reductionist idea of privacy as an instrument of market readiness – without cognizance of the public trust doctrine, that makes it wholly unjustified to make the commons of data the subject of private ownership. Public trust would require that data flows are tied to people's right to self-determination.

The text also includes making Open Government Data available for cross-border business opportunities, beyond its use by the public sector. Emerging evidence shows how analytics firms from the Global North benefit hugely from public sector data in the South, and do so, without any public accountability. Even in Europe, the exposé around the NHS-Palantir deal still remains fresh in public memory.

The proposed provisions on unrestricted data flows and Open Government Data are thus inimical to data sovereignty – as a territorial and societal issue.

In critical sectors of economic activity and public service delivery, the Indian government will need to ring-fence access to data resources in order to legitimately protect its longer term geo-economic interests and to tackle redistributive justice within its jurisdiction.

For example, in the agricultural sector – an economic domain which is a key source of livelihood for women in the Indian economy – the bulk of data resources is currently with the public sector. In the agricultural data exchange that the government of India is setting up, it may be necessary to evolve differential terms of participation for different economic actors, (including domestic and foreign businesses), and regulate the export of data resources from this domestic infrastructure to locations outside India. The trade agreement cannot aid the corporate capture of such resources that then undercuts the ability of women and other marginal actors to compete in and benefit from the data economy.

2. The second point is about algorithmic accountability – which is essential to safeguard the foundational human right to equality and non-discrimination. The provision in the agreement that prohibits a party from demanding access to, or transfer of, source code owned by a natural or legal person located in the other party's jurisdiction is inimical to the enforcement of algorithmic accountability safeguards in cross-border digital services. It is increasingly clear that without the ability to open up algorithms, institutional oversight in the digital economy will not meet its public interest objectives. Public and private harms such as predatory profiling practices (such as reverse redlining in fintech services), violation of reproductive and sexual autonomy (such as through data extractive femtech advisory services), and anti-competitive conduct in e-commerce marketplaces cannot be addressed locally. Given that the EU is taking the lead on algorithmic accountability laws for its own jurisdiction, the source code provision seems to suggest a double speak.

3. Thirdly, the text proposes that a party should not require prior authorization of a digital service just because it is being provided online – the implicit suggestion being that existing commitments apply automatically to digitally-mediated trade as well, and no additional regulatory step is permissible. This demand is antithetical to economic and social justice. Research has demonstrated that inclusive e-commerce is contingent on the ability to introduce positive discrimination/affirmative action measures that protect MSMEs' access to e-commerce (TAPED dataset, 2021) where women tend to be concentrated.

A 2020 research report by ODI and research in Asia by GRAIN demonstrate how platformization of agricultural value chains in developing countries and entry of agri-tech platforms may actually exacerbate gender divides in agricultural participation and productivity – with women being sidelined in the contracts or squeezed through unfavorable terms.

The scramble to platformize services that were previously less trade-intensive and mainly the preserve of the public sector, such as in education and health, portends a serious social policy problem. Ed-tech and digital health sectors are booming with investments, especially from Big Tech companies. In emerging e-commerce and services trade agreements, education and health are cast as marketable commodities and not as public goods that the state is delivering to the most marginalized citizen. Under these conditions, digitalization will result in a de facto marketization of services that were previously public, directly disenfranchising the most marginalized.

Clearly, the digitally-mediated marketplace needs a new set of policy measures to determine market access and regulate dominant market players.

4. Fourthly, the provision that prevents the imposition of customs duties on electronic transmissions is antithetical to the WTO MC-12 ministerial decision that "the current practice of not imposing customs duties on electronic transmissions will continue until MC13, which should ordinarily be held by 31 December 2023. Should MC13 be delayed beyond 31 March 2024, the moratorium will expire on that date unless Ministers or the General Council take a decision to extend". India and other developing countries have consistently opposed the 'no customs duties' position, as it weakens the fiscal revenue base of developing countries, putting pressure on care-relevant infrastructure such as the social security net, and health and sanitation services, etc.

5. Finally, the digital economy needs developing countries to be unfettered in imagining policies – not just fit for the purpose of a neo-liberal trade paradigm, but fit for a fair and just future. Cooperation on regulatory issues is best left out of trade agreements. The EU has been a strong partner in the development cooperation route and this space will continue to be crucial for policy exchange on public digital infrastructure, data commons and human rights in the AI economy – especially in their relevance for social and gender justice. Also, the ongoing processes in the EU to revamp the due diligence obligations of its transnational corporations must include equal concern for the rights of citizens in the Global South, in order for trade and development cooperation to lead to global justice and equity.