



The Road to Cooperation: Exploring India-EU Digital Trade Relations

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Foreword

To understand where the EU and India stand on issues of digital trade, the Friedrich-Ebert-Stiftung and Koan Advisory are conducting a series of roundtable discussions between stakeholders from both jurisdictions. The first of these discussed general stakeholder views on issues in digital trade, with a focus on data protection. This paper is a synthesis of views from the first discussion.

List of Abbreviations

CEPA	Comprehensive Economic Partnership Agreement
DPDA	Digital Personal Data Protection Act, 2023
EU	European Union
FTA	Free Trade Agreement
GDP	Gross Domestic Product
GDPR	General Data Protection Regulation
ICT	Information and Communications Technologies
IT	Information Technology
IT-BPM	Information Technology and Business Process Management
UCPD	Unfair Consumer Practices Directive
UK	United Kingdom
UAE	United Arab Emirates
US	United States

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Figure 1 Weightage Accorded to Values and Interests by India and the EU across Digital Trade Provisions on Consumer Trust, Customs Duties on Electronic Transactions, Cross-Border Data Flows, and Prior Authorisation

Part I.

Introduction

In 2021, the European Union (EU) and India resumed moribund trade negotiations that began in 2007 and halted in 2014.¹ The sticking points, before talks were paused, were, among others, the EU's insistence that India raise the cap on foreign direct investment in insurance and reduce the tariffs on automobiles.² India, in turn, demanded greater market access for its service sector as well as what was then known as "data secure" status.³ The parties did not arrive at an agreement by their last ministerial meeting in June 2013, the final chance to close the deal before India's general election in 2014.

The service sector was an important consideration in the earlier India-EU trade talks, and it will possibly figure even more prominently in the renewed negotiations. Digital trade is important for both parties. For the EU, digitalization is a key lever for sustainable development and managing economic uncertainty.⁴ Meanwhile, India has a sizeable IT services industry that accounts for 30 percent of gross value added,⁵ but makes up only a fraction of global exports in IT.⁶ The question is, will the two sides be able to resolve their differences and come to an agreement this time round?

To understand where the EU and India stand on issues of digital trade, the FES and Koan Advisory are conducting a series of roundtable discussions between stakeholders from both jurisdictions. The first of these discussed general stakeholder views on issues in digital trade, with a focus on data protection. This paper discusses the findings of the first roundtable. The broader goal of the discussions is to chart possible pathways for cooperation between India and the EU.

This report synthesizes the views of both sides, primarily through the lens of interests and values. There is considerable academic debate on how these factors affect the trade positions of various jurisdictions. By "values" we refer to normative or ideological issues outside of trade, such as trust, privacy and other forms of consumer welfare unrelated to prices. By "interests" we refer to trade commitments that seek commercial, economic or political gain (or avoid any kind of disadvantage).

Part II.

The EU's Outlook on Digital Trade

Scholars argue that the EU's positions tend to be more value driven, though there is some debate on this. A number of scholars argue in favour of Europe's role as a normative global actor. Prominent among them is Manners (2002), who argues that the EU prioritizes value-driven goals because of its "historical context," "hybrid polity," and "constitutional configuration."⁷ On the other hand, Zimmermann (2004) suggests that Europe is motivated considerably by "gocioeconomic and mercantilist" considerations in matters of international trade, based on its conduct during China and Russia's WTO accessions.⁸ There is, however, a degree of consensus among scholars of the EU's foreign policy and trade relations that values inform its stance on these issues, albeit to varying degrees (Leeg 2014).⁹

The view that the EU's decision-making is informed by values reflected in our discussions as well. The European side was guided by value-based considerations. This emerged most

prominently in considering the ecological implications of paperless trade, and online consumer trust. While economic efficiency is typically cited as the primary motivation for paperless trade, when the European side was pressed to choose between efficiency and environmental preservation as their primary motivator for going paperless, they had some difficulty in making a choice before ultimately landing on the former. Their dilemma suggests that they give weight to the normative implications of trade commitments.

Part III.

India's Outlook on Digital Trade

India has historically been bearish on trade commitments, especially in services. Its approach was based on concerns over the impact of (1) imports on domestic industry, and (2) international agreements on policy sovereignty. The latter concern may have been driven by its experience negotiating with developed economies such as the United States.¹⁰

Recently, however, India began embracing bilateral trade arrangements. In 2022, it concluded a Comprehensive Economic Partnership Agreement with the United Arab Emirates, and is engaged in trade negotiations with several other jurisdictions, including the United Kingdom and the EU.

Emerging economic realities compelled a change in India's stance on digital trade. For India, digital trade promises growth and productivity rather more than trade in goods. Global trade patterns over the last decade reveal a growing contribution of trade in services to gross domestic product, as well as a decline in the share of trade to GDP.

India has a strong position in services. Information technology and business process management (IT-BPM) is the largest export out of the country, and accounts for about half the total service exports in 2021-22. India ranked amongst the top ten largest exporters in digitally deliverable services in 2021. In the last decade, however, its contribution to the global share of IT exports largely stagnated, while the compound annual growth rate of exports in the segment, short of 7 percent, stayed well below other Asian economies such as Singapore and China.¹¹

Despite its enthusiastic pursuit of trade arrangements, however, India's outlook on trade remains much the same: it will not enter an arrangement where its autonomy over domestic affairs is curbed or challenged. For instance, most provisions in the digital trade chapter in the India-UAE CEPA are not hard pledges for either party. And where firm commitments have been made (such as maintaining the current moratorium on customs duties on electronic transmissions) they come with caveats (such as permitting the levy of internal taxes and fees on digital businesses).

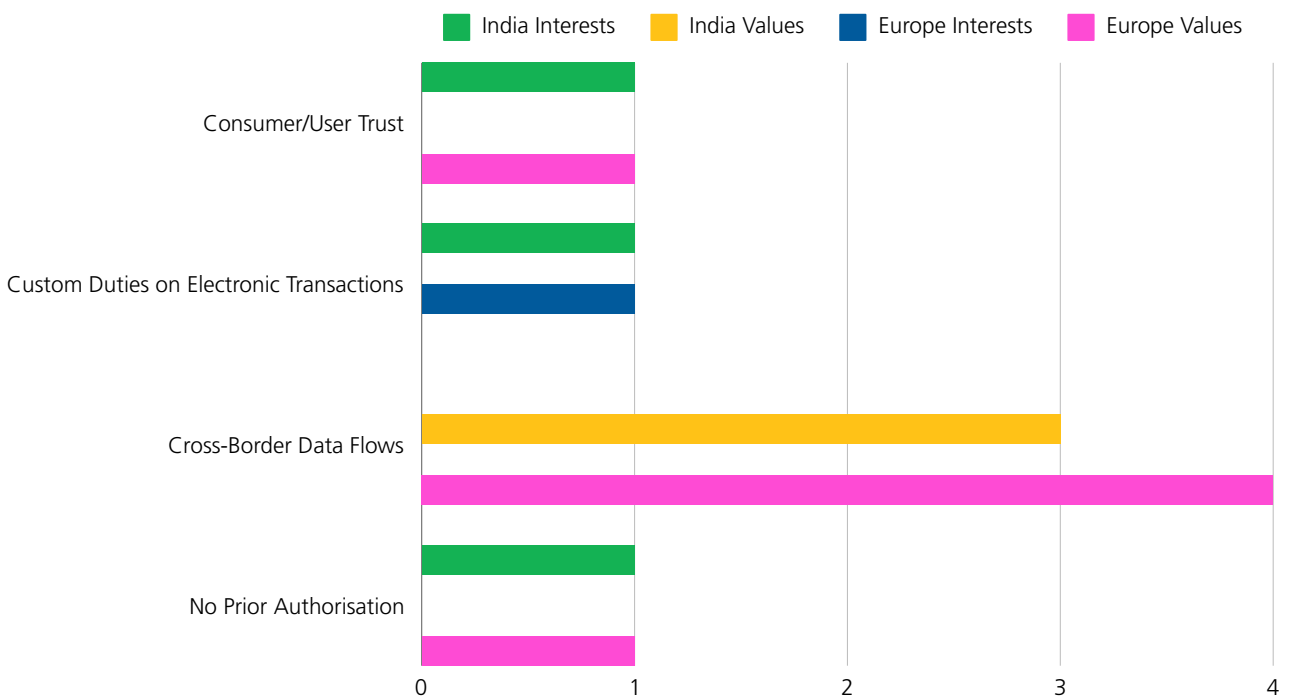
Part IV.

Values and Interests: Are the EU and India Aligned on Issues of Digital Trade?

Our roundtable discussions indicated that Europeans were more likely to give weight to value-based trade imperatives, while Indians tended to be guided by interests, across issues pertaining to digital trade. These are reflected in the graph below. The graph was compiled using attendee responses to multiple-choice questions concerning various provisions in digital trade

chapters in trade agreements. The questionnaire was framed to ensure the responses fell in the bucket of values or interests. Each response had a score of 1 that was then apportioned to a column for either values or interests. The positions of India and the EU on various digital trade provisions, as reflected in Figure 1 below, are further explained below.

Figure 1: Weightage Accorded to Values and Interests by India and the EU across Digital Trade Provisions on Consumer Trust, Customs Duties on Electronic Transactions, Cross-Border Data Flows, and Prior Authorisation



Where They Agree

Both sides agreed that the moratorium on customs duties should continue. In addition, both supported regulations to engender consumer trust such as prohibitions on unsolicited messages and consumer protection laws. The only point of difference here was

the Indian side considered the business promotion angle (interest) more important for engendering online trust, whereas for the European side, safeguarding consumer interest (value) was the foremost priority.

Where Disagreements May Emerge

Cross-Border Data Flows

Participants from both sides agreed that cross-border data flows should be conditional. The Indian side would prefer to limit these conditions to sectoral regulations and prohibitions on sending data to non-trusted jurisdictions, while the European side further wanted restrictions on the transfer of sensitive and critical personal data. The European side also noted that no data should be transferred to jurisdictions with incompatible data protection frameworks.

Unpacking their position further, the European stakeholders highlighted certain concerns over the newly instituted Indian Digital Personal Data Protection Act, 2023, in the context of digital trade. The first issue was that India does not require a jurisdiction's adherence to its data protection norms for the legal transfer of citizens' data to that jurisdiction. Rather, it enforces a negative list of non-trusted jurisdictions to which data cannot be transferred. Conversely, the EU General Data Protection Regulation requires adherence to its frameworks that is enforced using instruments such as adequacy decisions and binding contractual rules.

Second, the EU may be uncomfortable with the wide-ranging exemptions granted to Indian government agencies under the DPDPA. Section 17(4) of the DPDPA exempts the State and its instrumentalities from obligations pertaining to the erasure of personal data and the correction or completion of data where the purpose of data processing by the State does not include a decision affecting the data principal. Section 17(2) broadly exempts notified State instrumentalities, by invoking interests of national security, sovereignty, diplomatic relations, maintaining public order, and preventing offences, from all provisions of the DPDPA. Section 17(2) would also seem to exempt the Central Government from adhering to the tenets of the Act in instances where the notified instrumentalities furnish it with personal data.

Third, the lack of independence of the Data Protection Board was an issue for the European side as well. Specifically, Section 19(2) of the DPDPA provides that the chairperson and members of the Board would be nominated by the Central Government.

The Europeans noted that these issues – namely the absence of an adherence requirement, the broad exemptions for Government from data protection law, and the lack of independence of the Data Protection Board – may make it difficult for an agreement on data transfers to be concluded between India and the EU.

Prior Authorization

The principle of prior authorization provides that a business must have express approval to offer its products or services in a market. Prior authorization requirements are often brought in when jurisdictions see digital businesses as a threat to some key industrial segment. Trade agreements can demand that participating countries not subject businesses to prior authorization requirements, on the ground that the services they offer are digital. The European Union is evidently not in favour of prior authorization requirements for digital firms. Illustratively, the electronic commerce chapter in the EU-Japan Economic Partnership Agreement contains a provision on the principle of no prior authorisation which states that “the Parties will endeavour not to impose prior authorisation or any other requirement having equivalent effect on the provision of services by electronic means”.¹² However, India's internal policy positioning has muddled its stance on prior authorization. As an instance, the Ministry of Information and Broadcasting recently published a draft law for broadcasting that contains an intimation requirement for OTT video streaming services.¹³ There are concerns that this may, over time, evolve into a registration or licensing requirement.

Part V. Conclusion

Digital trade is important for both India and the European Union. For India, Europe is a market of strategic economic importance as it is the world's largest trader of services. For the EU, India presents an important and sizable digital market. Given some of the obstacles to a binding agreement between the two jurisdictions, India and the EU could consider entering a digital partnership as a starting point. Digital partnerships are vehicles for collaboration under the EU's Digital Compass Strategy. They are geared toward building relationships with other countries around digital "skills, infrastructures, transformation of business and of public services".¹⁴

Thus far, the EU has signed digital partnerships with Japan, South Korea, Singapore, and Canada. Its digital partnership with Japan is a flexible cooperation instrument to advance collaboration on safety and security in 5G, 6G and beyond, artificial intelligence, and semiconductor supply chains.¹⁵ The EU and India could negotiate a digital partnership agreement on similar lines in areas of mutual strategic importance.

In addition, the gaps in India's data protection laws are not insurmountable. The EU has entered agreements on cross-border data flows with jurisdictions, such as the United States, that do not have an overarching data protection legislation. The transatlantic Data Privacy Framework enables the free flow of data between the US and the EU and imposes binding **"safeguards to limit access to data** by U.S. intelligence authorities to what is **necessary and proportionate** to protect national security".¹⁶ In 2023, the EU adopted an adequacy decision¹⁷ for the framework. A similar framework could be devised for India.

Endnotes

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- 14 European Union (2021). '2030 Digital Compass: the European way for the Digital Decade'. Brussels. <https://eufordigital.eu/library/2030-digital-compass-the-european-way-for-the-digital-decade/>.
- 15 European Union, European Commission (2023). 'Digital Partnerships'. Brussels. <https://digital-strategy.ec.europa.eu/en/policies/partnerships>.
- 16 European Union, European Commission (2023). 'Digital Partnerships'.
- 17 An adequacy decision is a mechanism established in the General Data Protection Regulation (GDPR) to permit the transfer of personal data from the EU to non-EU countries. Data transfer is contingent on the European Commission's assessment that the non-EU countries in question ensure a level of personal data protection comparable to that in the European Union.

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