

# TRADE LAW AND AI REGULATION

Source code disciplines in trade agreements must enable a high level of consumer protection and AI accountability in the EU<sup>1</sup>

## WHY DOES THIS MATTER TO CONSUMERS?

Consumers are at the receiving end of Artificial Intelligence (AI): AI applications can bring many benefits to consumers as well as influence consumer behaviour and can transform entire consumer markets through the personalisation of offers. But as beneficial and useful many AI applications are, they can also bring harm to consumers: Just think of virtual personal assistants that could personalise prices based on willingness to pay or gender; or booking platforms that could exclude consumers based on the analysis of personal traits.<sup>2</sup> Therefore, it is of great importance for the European Union (EU) to enact AI regulation that strengthens consumer trust through a high degree of transparency and accountability.

## WHAT IS THIS STUDY ABOUT?

The study takes a closer look at the intersection of the internal debate in the EU on AI transparency and the regulation of AI technologies on the one hand and the EU's proposal on source code in the negotiations on electronic commerce in the World Trade Organisation (WTO) on the other. This intersection is of particular importance to ensure the compatibility of EU policies with trade commitments to which the EU is then bound by international law. Especially as AI technologies are not (yet) regulated and the understanding of risks is still nascent and will likely be evolving in the years to come. Therefore, a broad debate about the impacts of trade commitments in this particular sector is important – also to ensure a high level of consumer protection.

## KEY FINDINGS OF THE STUDY

### On AI accountability and a high level of consumer protection:

- ❖ **A modular approach to AI accountability** is needed that should encompass both the auditing of source code (“white-box” method) and also the auditing of inputs and outputs of an AI system via interfaces (“black-box” method). Therefore, strategic importance should be given to the role of interfaces (APIs).
- ❖ To ensure a high level of consumer protection, also **“medium-risk” AI needs to be regulated** to make sure consumers are not discriminated and are protected from (systemic) flaws e.g. due to incorrect databases.
- ❖ To safeguard consumer rights, more **public scrutiny of AI** through private enforcement and a “regulation towards auditability” is needed to counterbalance the information asymmetry between providers and users of AI technology.

<sup>1</sup> Based on a study written by: Prof. Kristina Irion, Institute for Information Law, University of Amsterdam; <https://www.vzbv.de/dokument/handelsabkommen-duerfen-die-regulierung-von-algorithmen-nicht-einschraenken>

<sup>2</sup> See cases: p.72 of the study.

### On the EU's WTO proposal to limit the access to source code:

- ❖ Currently, there is **no experience with a trade law discipline on source code** of software and insufficient analysis of its scope, application and effects on the EU's autonomy to regulate.
- ❖ The **scope of the current EU source code proposal** would not only cover computer and machine-learning algorithms but also protect the interfaces of an AI system against access.
- ❖ A number of **mechanisms of AI regulation would most likely be inconsistent** with the current EU proposal on source code, leaving it to general exceptions under world trade law to justify measures, such as ex ante external auditing of AI systems and the regulation of interfaces (APIs).
- ❖ **Justifying such inconsistencies under trade law** is very cumbersome, especially in areas such as AI where no international standards and very few domestic rules on algorithmic accountability and external audits exist.

### HOW TO ENABLE A HIGH LEVEL OF AI ACCOUNTABILITY AND CONSUMER PROTECTION WHILE PREVENTING FORCED TECHNOLOGY TRANSFERS

- ❖ The EU needs to ensure the **internal compatibility of its trade law commitments** with its internal EU policies, now and in the future.
- ❖ The **principles of foresight, precaution and protection of the weaker party** should be paramount in any elaboration of trade commitments to guard a sufficient margin of manoeuvre to respond to the evolving risks – especially in AI technology – and to ensure a high level of consumer protection in the Union.
- ❖ Similar to its internal policy processes, the European Commission needs to ensure that a **broad debate** takes place in advance of the submission of proposals that have a potentially wide-ranging impact on the EU's internal policies.
- ❖ **The EU should limit the scope of its source code provision to forced technology transfers for dishonest commercial practices, or clearly carve out measures on algorithmic accountability.** This would be prudential and provide time to develop domestic policy for accountable AI and to develop international standards on AI auditing.<sup>3</sup>

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<sup>3</sup> A textual proposal for such language can be found on p. 81 of the study.