Understanding the EU's Understanding on Computer and Related Services

by Professor Jane Kelsey

SUMMARY AND RECOMMENDATIONS

We live in a digital era that encompasses **everything**, from Internet banking, online retailing and multi-modal logistics to automated mining and food production, additive manufacturing (3D printing), smart products and the Internet of Things. Alongside digitisation has come 'servicification' — **everything** in the production and distribution supply chain, except the final commodity, is being redefined as a service.

Most services are now driven by digital technologies that operate through an ecosystem that functions like a human body: data, computer systems, software and algorithms are the brain; telecommunications act as the nerve system; and finance is the blood supply. Those who control the digital brain will wield significant power over the future global economy, society and governance.

Old development asymmetries are embedded in this transformation. If first-mover countries and companies continue to dominate the digital domain, and make the global rules in their interest, then the digital divide among countries will widen even further. That's why the European Union's Understanding on Computer and Related Services matters.

What is the EU proposing?

Since the early 2000s the European Union has been promoting an Understanding on Computer and Related Services (the Understanding) in the World Trade Organisation (WTO) and its free trade agreements (FTAs) with individual countries or regions.

The Understanding is a short legal text that subtly expands the classification of 'computer and related services' in trade in services agreements. These classifications are how

governments indicate what they are bringing under the trade in services rules. Agreeing to the EU's open-ended definition of Computer and Related Services would guarantee digital infrastructure firms have virtually unrestricted access into countries and rights to operate there with very limited regulation.

If adopted on a wide scale, the Understanding would consolidate power and control over the digital ecosystem, including of data, in the major powers and more specifically, their corporations. Local firms in developing countries will not be able to compete.

So far, the EU has failed to get the Understanding adopted in the General Agreement on Trade in Services (GATS) in the WTO, but some version of the Understanding is included in almost all the EU's FTAs. The EU is now pushing the Understanding as part of the unmandated electronic commerce negotiations at the WTO.

What is in the Understanding?

It has three elements:

1.   Countries agree to make comprehensive high-level commitments on Computer and Related Services (technically, adopting the two-digit classification CPC 84) in their trade in services schedules, including for computer systems, programming including source codes and algorithms, maintaining computer systems and software, and processing and storage of data. Currently, governments can choose whether or not to commit one or more of those sub-services and can limit their coverage.

2.   Those commitments are interpreted using a contextual narrative that ensures it applies to **all** computer and related services, including those yet to be invented, and it says the sector **includes** the named sub-services, meaning it is non-exhaustive and can cover more. That future-proofs the scope of computer and related services to include whatever new services and technologies might be developed in the future, but with no criteria for determining what additional elements might fall within its scope.

3.   'Content' services that are delivered through digital technologies are explicitly excluded from Computer and Related Services and classified instead by their subject matter or content, such as advertising, education, or entertainment. This reflects the EU's tripartite distinction between computer and related services, telecommunication services, and computer-enabled services, which allows it to advance its commercial interests, while quarantining sensitive services, especially audio-visual services and broadcasting.

How does the Understanding go beyond existing agreements?

Countries adopting the Understanding would lose the ability to limit their exposure to Market Access and National Treatment obligations (and associated regulatory disciplines) in relation to the digital ecosystem and pre-commit themselves to apply those rules to unknown and unknowable technologies and innovations into the indefinite future. That is especially far-reaching in the GATS and FTAs, where the obligations apply to government measures that affect the supply of those services.

What could this mean for digital policy?

Full commitments to the Market Access rule would prevent countries from imposing limits on the size or scope of a foreign company's operations, consolidating the market dominance of first movers. National Treatment obligations would strengthen that dominance by impeding the development of local competitors, including start-up firms and secondary service suppliers, for example through subsidies, restricting foreign investment or reserving certain activities for national firms.

For example, full commitments on data services would constrain governments' ability to restrict the size of foreign firms, support local state or private providers to build capacity, require a local presence within the country, and potentially to regulate processing, storage, web-hosting, and database services in crucial ways.

What is the status of the Understanding?

The Understanding was initially proposed as a scheduling option for the GATS 2000 negotiations. WTO Members could choose **whether** to schedule the Understanding (subject to negotiating asymmetries), but if they did they would be opening all existing and future Computer and Related Services. Those negotiations became part of the Doha round and were never finished.

Outside the WTO, the EU has included some form of the Understanding in almost all of its bilateral and inter-regional free trade agreements since the CARIFORUM EC Economic Partnership Agreement in 2008. Although the substantive content has remained reasonably standard, there are some legally significant variations in legal form and it has allowed more flexibility in some agreements. These variations are important for countries that will be negotiating with the EU in the future.

How does the EU's Understanding relate to e-commerce negotiations at the WTO?

The Understanding on Computer and Related Services could act as a Trojan Horse for the 'e-commerce' rules that many developing countries are resisting in the WTO. Even without an e-commerce agreement, open-ended commitments on Computer and Related Services would cross-fertilise with sectoral commitments in digitally enabled services, ranging from education, health and advertising to mining, agriculture and transportation, in whatever mode of supply, as well as the overlapping categories of financial services and telecommunications.

How does the EU justify the Understanding?

The EU promotes it as a technocratic solution to well-recognised problems in the GATS that current classifications date back to 1991 and the schedules of commitments based on them are obsolete, uncertain and incoherent.

However, the Understanding will not solve any of those problems. Indeed, the classification used in the Understanding has been superseded by a new classification from the UN Statistics Division and is itself obsolete. Many overlaps would continue, especially as the US supports a different way of categorising the digital services, especially telecommunications.

Adopting the Understanding may provide greater certainty and clarity **for the EU**. But it is likely to have the opposite effect for policy-makers and regulators of other countries who adopt it, because they will face uncertain, conflicting, even irreconcilable obligations to other countries in their multiple agreements.

What would adopting the Understanding mean for the Global South?

Adopting these rules and commitments would increase the exposure of developing countries exponentially and in unlimited and uncertain ways. Those that currently have fewer commitments on computer and related services would be accepting a disproportionately high level of new liberalisation. That would greatly reduce the regulatory space available to governments to take full advantage of the opportunities, and address the serious challenges, of the digital age.

In sum, countries that adopt the Understanding in the WTO or FTAs would further disarm themselves in the face of rapid, disruptive and unpredictable technological developments. It would be unwise for any state to surrender their authority over those decisions through the Understanding, but especially for countries of the Global South.

RECOMMENDATIONS

If countries believe there may be development gains from liberalising market access or removing supports for their local suppliers of these services, they should do so unilaterally and preserve the future ability to regulate if circumstances change or liberalisation has unanticipated downsides. Domestic

liberalisation should be supported by a clear digital development strategy, and robust competition law with the capacity to enforce it.

At the WTO …

Members should continue to resist the concept of 'technological neutrality' and insist that their commitments extend only to those services that were clearly foreseeable at the time the commitments were made, consistent with the modalities of the GATS and its development acquis.

In negotiations at the WTO and bilaterally countries should…

•   Resist pressure from the EU to adopt the Understanding or make full commitments on Computer and Related Services at the two-digit level of CPC 84, citing the latest UN classifications (Rev 2.1) to show that the EU's classifications are already outmoded.

•   Insist on the freedom to make commitments in whatever sub-sectors of CPC 84, and with whatever limitations they consider appropriate, and to decide how they categorise computer-related services, making their interpretation clear in the headnote or in a footnote to the sectoral entry.

•   Explicitly exclude all measures related to digital infrastructure and data from future trade in services obligations in a headnote, as a horizontal entry in a schedule, or by repeating it in every relevant sub-sector, including Computer and Related Services, Telecommunications, Financial Services, Business Services (and many others).

In FTA negotiations …

•   If the EU insists on the inclusion of the Understanding in an FTA, and countries feel they must agree, they should invoke the best precedents in existing FTAs, in order of preference:
    (i)   Not include the Understanding or its equivalent in the text, but allow a party to choose whether and which elements of CPC 84 to adopt within the GATS-style positive list, sub-sectors, modes and rules; the EU can then adopt the Understanding in its schedule if it wishes.
    (ii)   Adopt a substantive article on Consumer and Related Services that allows parties to limit the scope of their commitments by sub-sector, mode and rule.
    (iii) Restrict application of Computer and Related Services to the specified five elements, with no narrative text that makes it all-inclusive forever, and with no cross-reference to other services.

•   Avoid negative list scheduling that would mean open-ended obligations relating to digital infrastructure. If pressure is irresistible, at least insist on a full policy space reservation on future technologies and services, as Japan did in its reservations on 'new services' in the TPP.

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