

EU-Japan trade agreement undermines algorithmic transparency

Vrijschrift

The [proposed EU-Japan trade agreement](#)'s source code clause risks undermining algorithmic transparency. ¹

For regulatory supervision access to source code is necessary. Facebook's role in elections and referendums shows that the use of personal data is not only a civil rights issue, but may compromise the integrity of our institutions. The Volkswagen emissions scandal has shown that devices can be programmed to mislead researchers. ² In addition, algorithms in decision making software can be biased.

The [report](#) of the EU's independent High level Group on fake news and online disinformation points out the importance of algorithm accountability. And one of the conclusions of the Council of Europe [study](#) "Algorithms and human rights" on the human rights dimensions of automated data processing techniques and possible regulatory implications states:

"Certification and auditing mechanisms for automated data processing techniques such as algorithms should be developed to ensure their compliance with human rights."

[Zeynep Tufekci](#) notes:

"It's a pity that casinos have better scrutiny of their software than the code running our voting machines, cars and many

¹This paper has been inspired by [Jane Kelsey](#)'s work on e-commerce chapters, see, for instance, this [paper](#).

²For more information on source code clauses, see, [Neeraj R S](#), Trade Rules on Source Code: Deepening the Digital Inequities by Locking up the Software Fortress; and [Jane Kelsey](#)'s submission on revised TPP, paragraph 56 and further.

other vital objects, including medical devices and even our infrastructure. As computation spreads in society, our regulatory systems need to be funded appropriately and updated in their methods so that keeping our air clean and our elections honest is not a worse gamble than a slot machine.”

The [European Commission](#) and European politicians (for instance [Angela Merkel](#), [Katarina Barley](#), and [Kees Verhoeven](#)) want more algorithmic transparency. Kees Verhoeven also wants [strict standards](#) for internet connected things.

EU-Japan trade agreement

Under the [EU-Japan trade agreement’s](#) article 8.73 the EU and Japan may not require the transfer of, or access to, source code of software owned by a person of the other Party. The article provides some exceptions, but they have a limited scope or are limited by many conditions.³ The article restricts audits of software and algorithms, also of software embedded in “smart” products.

To protect personal data, the EU commission recently agreed on an updated, [much stronger safeguard](#). Software auditing needs an equally strong safeguard. Alternatively, the source code clause, which is not found in earlier EU trade agreements, can be removed.

Affecting e-Commerce

EU-Japan article 8.70.4 reads:

“This Section applies to measures by a Party affecting trade by electronic means.”

Any measure that affects trade by electronic means is included. This is extremely broad. This (new) formulation (not found in EU-Canada trade

³Article 8.73 (1) concerns open source software; article 8.73 (2)(a): competition law; article 8.73 (2)(b): intellectual property rights; article 8.73 (2)(c) refers to Article III of the Agreement on Government Procurement, its article III concerns National Treatment and Non-discrimination; EU-Japan article 1.5 Security exceptions does not apply as it is under-inclusive; article 8.65 concerns financial measures. This leaves article 8.3 General exceptions, a GATS article XIV like safeguard; these exceptions come with many conditions which undermine the strength of the safeguard. See, in general, [IvIR, 2016](#) and [Public Citizen, 2015](#). Note also that in the future investment protection with a form of enforcement (ISDS / [ICS](#) / [Multilateral investment court](#)) may be added. This could further undermine the possibility to audit software.

agreement CETA) may undermine important regulations.

Technological neutrality

In article 8.70.3 the parties recognise the importance of the principle of technological neutrality in electronic commerce. The effect of this is that commitments in older WTO treaties, such as GATS, with weak safeguards, written for just some limited services, now also cover new, more invasive services. This, again, undermines regulatory power. The EU-Canada trade agreement CETA does not contain this formulation.