

21 October 2016

Subject:

Trade agreements, data flows, data protection and privacy

Dear Commissioner,
Dear Ambassador,

We are writing regarding trade agreements in general, and the Trade in Services Agreement (TiSA) in particular. In light of the recent speculation with regard to the potential inclusion of clauses on processing and transfer of personal data in TiSA, we would like to highlight our concerns and to encourage you to defend Europe's approach to fundamental rights to data protection and privacy.

Fundamental rights must be respected and not negotiated upon. Therefore, data flows – which refer to transfers of individuals' personal data – must not be part of trade agreements. Trade negotiations are not suitable for shaping rules affecting fundamental rights and the rule of law in a democratic society.

Regardless of the apparent strength of the general exception clauses put forward to protect privacy and data protection in trade agreements, these clauses will ultimately be interpreted by trade dispute settlement bodies. These have the object and purpose of trade liberalisation, not the protection of human rights.

If however, the negotiating parties decide to proceed with such a general exception clause, we fully support the European Parliament's recommendation "to incorporate a comprehensive, unambiguous, horizontal, self-standing and legally binding provision based on GATS Article XIV which fully exempts the existing and future EU legal framework for the protection of personal data from the scope of this agreement, without any conditions that it must be consistent with other parts of the [agreement]".

In practice, this means that this clause needs to:

- ensure that the parties to the agreement can condition the transfer and processing of personal data on the protection of privacy and personal data;
- allow the European Union, and any other party, to suspend the flow of personal data if other parties to the agreement do not respect fundamental rights requirements;
- ensure that the existence, application, modification and enforcement of measures relating to fundamental rights, including data protection and the right to privacy, are not subject to challenge on the basis of any trade agreement;
- guarantee that parties to the agreement must not be required to apply or adopt "least restrictive" privacy or data protection measures. Otherwise, the freedom to adopt measures aimed at protecting the individuals' right to privacy and data protection will be limited by potential legal challenge.

We are looking forward to your commitments to citizens and remain at your disposal for more detailed discussions.

Yours sincerely,

Organisations

European Digital Rights (EDRi), European Union

Access Now, international

AKVorrat, Austria

Alternative Informatics Association, Turkey

Amis de la Terre (Friends of the Earth), France

Arbeitskreis Vorratsdatenspeicherung (Working Group on Data retention), Germany

Association for Proper Internet Governance, Switzerland

Association for Technology and Internet (APTII), Romania

Bits of Freedom, The Netherlands

Datenschutzraum, Germany

D3 - Defesa dos Direitos Digitais, Portugal

Digitalcourage, Germany

Electronic Frontier Foundation (EFF), International

Elektronisk Forpost Norge (Electronic Frontier Norway)

Förderverein Informationstechnik und Gesellschaft (FITUG), Germany

IT-Political Association of Denmark (IT-Pol), Denmark

Just Net Coalition (JNC), International

My Nigeria Online (MyNOL), Nigeria.

Panoptykon Foundation , Poland

Privacy International

Vrijdschrift Foundation, The Netherlands

Xnet, Spain

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