

Ecorys Survey on TiSA commissioned by the European Commission¹

Question 127. Do you think that TiSA may change the human rights situation in your country? On a scale of 1 to 5 please indicate the degree of change (1: heavily deteriorate; 2: deteriorate; 3: no change; 4: improve; 5 significantly improve). Please also state why you think so:

EDRi's response: 2: Deteriorate

According to the leaked texts and the limited available information (e.g. information published in the European Commission's website), the right to privacy and data protection would deteriorate considerably.

EDRi considers that the human right to privacy and the fundamental right to data protection should not be subject to negotiation in TiSA. We do not see the need or the possible benefit of including provisions touching on personal data and privacy. Some Parties to the TiSA seem to support the inclusion of provisions on data transfers and data "localisation" in the Electronic Commerce Annex. However, EDRi is of the view that this would bring personal data to the negotiation table, which is unacceptable. Privacy is a fundamental right, not a trade barrier. Furthermore, there is huge confusion regarding the concept of "data localisation". "Forced" or "mandatory" data localisation raises issues of interoperability, innovation, surveillance and privacy. However, local storage requirements for specific purposes, such as personal data protection are justified under Directive 95/46/EC, which will soon be replaced by the General Data Protection Regulation (GDPR).

In addition, the general exception based on Article XIV GATS does not provide adequate protection. EDRi believes that a strong and unequivocal self-standing exception on privacy and data protection would be needed if issues concerning personal data are added to the Agreement.

On the other hand, some countries have made proposals regarding personal data and privacy in the telecommunications chapter, which could endanger the protection embedded in EU law and the forthcoming reform of the E-Privacy Directive. This is not acceptable.

Finally, there is a proposal made by the US regarding access to the Internet. This proposal is restricting the definition of net neutrality to applications, contents and services of consumers' "choice". This appears to open the possibility for ISPs to use, for example, differential pricing to discriminate between certain services, applications and content, in clear contradiction to net neutrality. This would weaken individuals' rights to freedom of expression, privacy and the right to access and distribute content, applications and services without discrimination. That is, traffic would not be treated equally, as required by Regulation (EU) 2015/2120. Crucially and perversely, it would restrict trade in services.

¹ <https://s.chkmkt.com/?e=33722&d=e&h=7402DA183304325&l=en>

You can find a more detailed analysis of the texts in EDRI's position on TiSA: https://edri.org/files/TiSA_Position_Jan2016e.pdf

EDRI's final position will depend on the release of the consolidated texts.

Question 128. With regard to the possible effects of TiSA, please indicate on a scale of 1 to 5 (1: heavily deteriorated; 2: deteriorated; 3: no change; 4: improved; 5 significantly improved) to which extent the following human and labour rights may be affected. If applicable, please also state why you expect these rights to be affected.

EDRI's response: Other: 2, deteriorated

- **Privacy and data protection**

According to [leaked documents](#) on TiSA, some worrisome effects will affect privacy and the protection on personal data.

- In the core text, Article I-9 (“General Exceptions”) under TISA General Provisions states that the adoption of laws and regulations on the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records must be consistent with the provisions of TiSA. This exception offers insufficient protection from challenges contesting EU and Member States’ data protection rules. EU legislation for the protection of fundamental rights could therefore be undermined or overturned through TiSA.
- Article 2 of the Electronic Commerce Annex would enable cross-border data processing across all services sectors without adequate safeguards, in contrast with the high standards set by EU data protection laws.
- Article 9 of the Electronic Commerce Annex lays down restrictions on data localisation, a practice that has to be avoided as it undermines the fundamental openness and interoperability of the Internet, and creates a serious risk for security.
- Article 2 of the Annex on Telecommunications also raises concerns. Japan and Korea proposed that signatory countries shall not adopt or maintain limitations on full foreign participation in their e-commerce and telecommunications services. This risks creating an interpretation where the EU's Data protection legal framework is considered a barrier to trade (as parts or all of networks, depending on configuration, would need to comply with EU norms), and should the EU require any data controller or processor to comply with the EU law to operate in the EU, this could be interpreted as a market access limitation for foreign participation in e-commerce. This would clearly be incompatible with EU law.

- **Right to access, share and distribute content**

TiSA has the potential to also put the right to access, share and distribute contents into danger. According to Article 8(1) of the Electronic Commerce Annex, consumers would only be entitled to “access and use services and applications of their choice available on the Internet, subject to reasonable network management”. This provision implies numerous negative effects for the aforementioned right to access, share and distribute contents, in relation with net neutrality. In addition, the adjective “reasonable” is a condition often misinterpreted and abused by ISPs. The new EU framework on net neutrality is way more safeguarding in this matter. Including unclear “obligations” of this kind appears more likely to create rather than resolve problems for the trade in services.

EDRi is of the view that net neutrality should not be part of TiSA. Should the negotiators want to include a provision on net neutrality, they should resort to the wording used in the EU regulation, i.e. “end-users shall have the right to access and distribute information and content, use and provide applications and services, and use terminal equipment of their choice, irrespective of the end-user’s or provider’s location or the location, origin or destination of the information, content, application or service, via their internet access service”.

Moreover, Article 8(1) does not take into account other discriminatory practices, such as prioritisation or throttling of Internet traffic, which are becoming increasingly common in many countries and that the EU has rightly banned.

- **Right to access to documents**

Trade agreements are being negotiated in a non-democratic and opaque manner. So far, information on TiSA has been very limited. Comparing to TTIP, information about which is also severely limited, it seems that few steps had been made towards transparency. We urge the negotiators to follow the recommendations outlined by a broad international coalition of experts: https://edri.org/files/brussels_trade_declaration.pdf

According to the leaks, TiSA would introduce obligations for countries to ensure that any planned laws or regulations related to matters covered by TiSA are made available to all stakeholders. Moreover, the leaked Transparency Annex shows that some countries aim at introducing a notice and comment system on draft regulation worldwide. This would seriously undermine the right to regulate, and more generally, could lead to unbalanced and undemocratic decision-making procedures. This problem cannot be solved by a “right to regulate” provision.