

European Digital Rights (EDRI) and Access Now thank INTA and, in particular, the rapporteur for issuing its [draft report](#) on the Trade in Services Agreement (TiSA). We would like to make some comments on the paragraphs that fall within our scope of work and to suggest amendments to the text.

For ease of reading,, suggested ~~deletions~~ are strike-through and suggested **amendments** are highlighted in bold. *Comments* are provided in each case when relevant.

DRAFT REPORT ON TiSA

(new indent) - having regard to the Court of Justice of the European Union's ruling c-362/14 **Schrems v Data Protection Commissioner**.

Comments: This is a landmark decision of the ECJ, which is important in the context of TiSA and more precisely within the context of transfer of data to third countries.

K. whereas data protection is not an economic burden, but a **fundamental right whose level of protection must be essentially equivalent to that guaranteed within the European Union and a source of economic growth**; whereas restoring trust in the digital world is crucial; whereas data flows are ~~indispensable~~ **important** to trade in services, **the transfer of personal data to third countries which do not ensure an adequate level of protection is prohibited**.

Comments: Data flows are relevant for the economy, but personal data should be excluded from the negotiations. The amendment uses the wording of Directive 95/46 (recitals 56 and 57 and Article 25(6)) and the European Court of Justice's ruling C-362/14 of 6 October 2015, *Schrems v Data Protection Commissioner* (paras. 48, 49, 68).

1. (c) regarding rules on the digital economy:

i. to ensure cross-border data flows **with TiSA countries in accordance with EU data protection law** ~~in compliance with the universal right to privacy~~

Comments: It is important to note that privacy is a human right. It should not be put into question by TiSA. Trade agreements are not the forum to create architectures for cross-border data flows.

ii. *to acknowledge that data protection is not a trade barrier, but a fundamental right, enshrined in Article 39 TEU and Article 8 of the Charter of Fundamental Rights of the European Union, as well as in Article 12 of the Universal Declaration of Human Rights; to incorporate, as a key point, a comprehensive and unambiguous horizontal self-standing provision, based on Article XIV of the General Agreement on Trade in services (GATS), that fully exempts the existing and*

future EU legal framework for the protection of personal data from the agreement without any condition that it must be consistent with other parts of TiSA acknowledge that GATS Article XIV, which fully exempts the existing and future EU legal framework for the protection of personal data from these negotiations, will be replicated in the TiSA core text;

Comments: Trade negotiations are not an appropriate forum to negotiate measures for the protection of data or privacy, which are fundamental rights recognized in the EU Charter on Fundamental Rights. The reference to GATS Article XIV, exempting the existing and future legal framework for the protection of personal data from the negotiations, is important. However, it should be used as the basis for the inclusion of an enforceable, comprehensive and clear horizontal self-standing clause that would ensure the exclusion of these issues from the negotiations. This amendment used the exact wording used by the European Parliament in its [resolution on TTIP](#). The Parliament should be consistent with regard to matters on which it has already voted.

iii. *to ensure that European citizens' personal data flow is **only allowed to TiSA countries whose level of protection of fundamental rights and freedoms is globally in full compliance with the data protection and security rules in force in Europe**; to ensure that citizens remain in control of their own data; to reject, therefore, any 'catch-all' provisions on data flows which are disconnected from any reference to the necessary compliance with data protection standards; to mirror the language used in the WTO Understanding on financial services*

Comments:

3rd part: [WTO Understanding on financial services](#) regarding transfers of information says that "Nothing in this paragraph restricts the right of a Member to protect personal data, personal privacy and the confidentiality of individual records and accounts so long as such right is not used to circumvent the provisions of the Agreement." If generalised to other sectors, this can create serious problems, as data protection rules could be argued to constitute a trade barrier under this text.

v. *to recognise that **broadband competition and digital innovation are** is a drivers of economic growth and productivity in the entire economy; to recognise the need for data flows; to seek, therefore, a comprehensive prohibition of forced data localisation requirements; to however keep in mind that EU rules on the transfer of personal data may prohibit the processing of such data in third countries if they do not comply with EU data protection rules; to insist that any requirements for the localisation of data processing equipment and establishments are in line with EU rules on data transfers;*

Comments: Data localisation: It is known the US in its textual proposal is demanding to ban mandatory localisation of data processing and storage. Data localisation (processing or storage)

should not be banned within the EU, especially not after the Snowden revelations, in line with European Parliament's Resolution of 12 March 2014. What is more, some countries like Germany already have rules on data localisation. We recognise that, as with most things, data localisation can be abused but, as with most things, this does not automatically mean that it should be prohibited.

vi. to ensure that the provisions of the final agreement are consistent with existing and future legislation at EU level, including the Connected Continent Package, the General Data Protection Regulation and the 16 measures embedded in the communication on the Digital Single Market; to safeguard net neutrality, **prohibiting practices which lead to access to a provider's subscribers being exploited as a monopoly service** and to guarantee that the EU retains its ability to limit or stop the transfer of data from the EU to third countries where the rules of the third party do not meet EU adequacy standards, ~~and where alternative avenues, such as binding corporate rules or standard contractual clause are not used by companies;~~

Comments: The EU and data protection authorities always have the possibility to stop the transfer of data if EU data protection rules are not complied with, without any limitation.