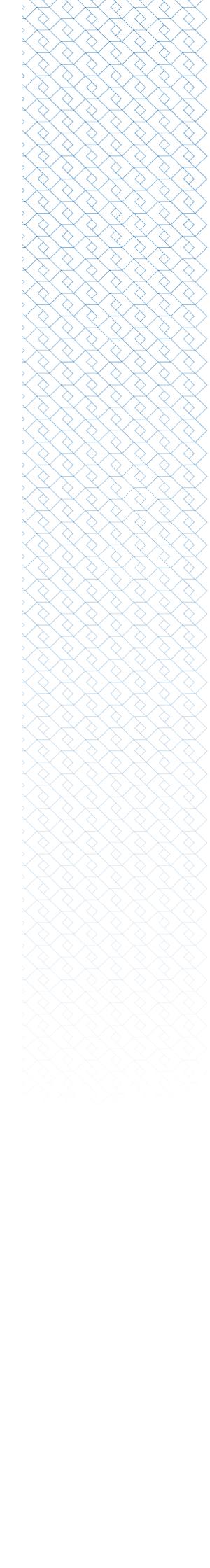




TRADE IN SERVICES AGREEMENT EDRI'S POSITION

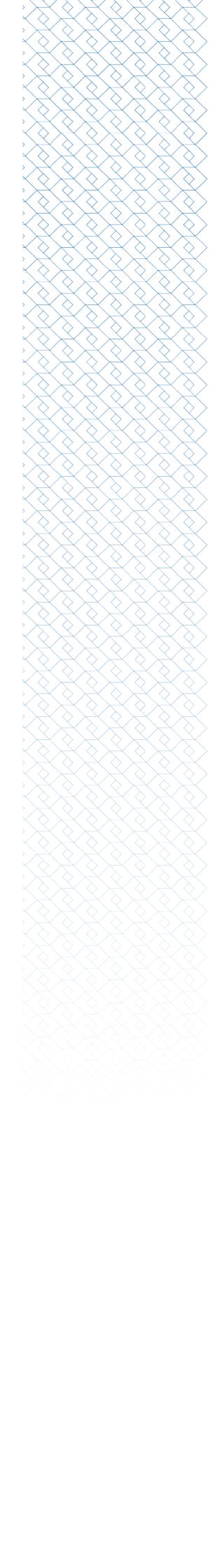
January 2016



ABOUT EDRI

European Digital Rights (EDRI) is a not-for-profit association of digital civil rights organisations. Our objectives are to promote, protect and uphold civil rights in the field of information and communication technology.

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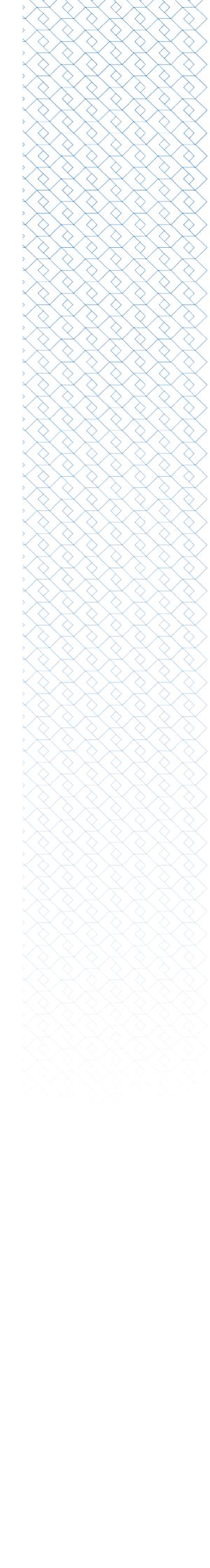


INTRODUCTION

The Trade in Services Agreement (TiSA) is a trade agreement currently under negotiation between the European Union (EU) and 22 countries, including the United States of America (USA), Australia, Canada, Chile, Japan, Mexico, New Zealand, Pakistan, Peru and Turkey. Since March 2013, representatives from these countries are discussing the content of this agreement and seeking to liberalise trade in services, such as financial services, telecoms or electronic commerce (e-commerce). TiSA is based on the General Agreement on Trade in Services (GATS), but its purpose is to go beyond the GATS and eventually replace it.

With regard to the content of the currently accessible documents, the leaked “core” text contains the general provisional language agreed by the negotiating countries, establishing the overall legal architecture of TiSA. Topics such as telecommunications, e-commerce or financial services are dealt with in separate “Annexes”, which are negotiated alongside the core text.

On the basis of the currently limited available information and leaked texts, the greatest concerns regarding TiSA involve the introduction of greater limitations on the government’s right to regulate or legislate and the inclusion of potentially harmful provisions for the protection of the fundamental rights to privacy and data protection, as well as net neutrality.



01

TRANSPARENCY

The TiSA negotiations have gained a level of notoriety on account of their secrecy. The negotiations are being conducted behind closed doors, with governments' negotiating positions held under wraps.

In the EU, some light has been shed on the negotiations due to the decision of the Council of the European Union on 10 March 2015 to declassify the Commission's negotiating mandate.¹ Limited information is also provided by the European Commission negotiating team which regularly hosts briefings about the state of play of the negotiations for civil society organisations and industry (trade associations are considered to be "civil society" by the Trade Directorate General of the Commission). However, if one compares the still very limited progress made in the Transatlantic Trade and Investment Partnership (TTIP),² we see that the even this low level of transparency is not pursued in TiSA. This contradicts the recommendations of the European Ombudsman on transparency in TTIP,³ which should also apply to all trade negotiations, including TiSA negotiations.

So far, only a few countries have disclosed their positions, such as the EU, leaving no other choice for the public and civil society than to rely on leaks⁴ to understand what the position of their respective country is. As a result, public discussions on TiSA are occurring on the basis of incomplete information.⁵ Ironically, one of the leaked document deals with transparency, introducing obligations for countries to ensure that any laws or regulations related to matters covered by TiSA are made available to all stakeholders. In addition, the leaked Transparency Annex shows that some countries aim at introducing a notice and comment system on draft regulations worldwide, which could have the potential to undermine the right to regulate.⁶

1 The mandate" represents the basis on which the Commission has to negotiate on behalf of the 28 Member States of the European Union: <http://www.consilium.europa.eu/en/press/press-releases/2015/03/150310-trade-services-agreement-negotiating-mandate-made-public/>

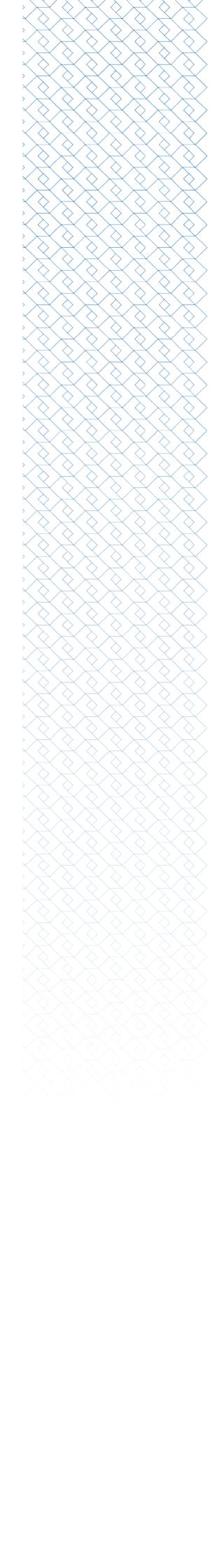
2 European Parliament, All MEPs to have access to all confidential TTIP documents, 12 December 2015, <http://www.europarl.europa.eu/news/en/news-room/20151202IPR05759/All-MEPs-to-have-access-to-all-confidential-TTIP-documents>

3 Maryant Fernández, European Ombudsman does not see sufficient transparency in TTIP, 14 January 2015, <https://edri.org/european-ombudsman-does-not-see-sufficient-transparency-in-ttip/>

4 <https://wikileaks.org/tisa/>

5 Contrary to the most recent strategy of the European Commission "Trade for all. Towards a more responsible trade and investment policy", October 2015, http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf (pp.18 and 19).

6 According to the leak, the European Union is opposing this.



02

THE RIGHT TO REGULATE

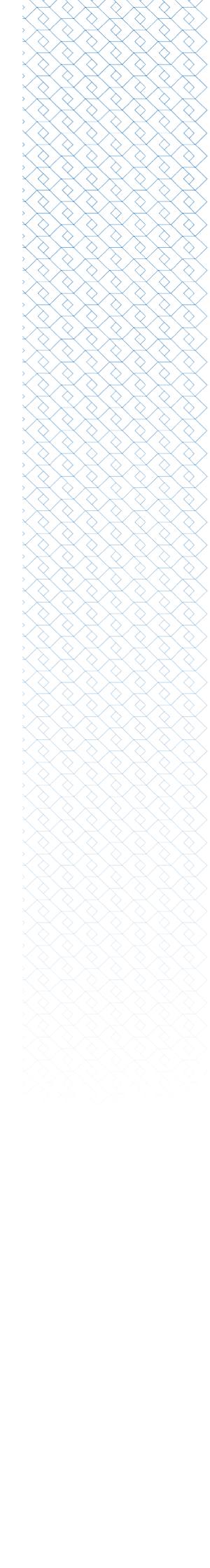
The A key concern is that TiSA could infringe upon on the ability of states to maintain, adopt or change regulations in accordance with the public interest. The subordination of the public interest to expected commercial gain can be observed in Article 1-2 of the core text. It indicates that under TiSA, services are considered as merely marketable commodities for trade, overlooking their social, cultural or development impacts. Among the sectors concerned by this limitation for governments to regulate are finance, energy, telecommunications and cross-border data flows.⁷

Article 4 of the Annex on Domestic Regulation shows that a number of delegations have proposed a provision that would require countries that ratify TiSA to ensure that the application of regulations would comply with a long list of criteria set out in the GATS, in order not to be deemed “burdensome”. Countries could therefore have to demonstrate the compliance of the content and scope of a regulation before being able to implement it. Parties to TiSA would be able to challenge laws/regulations adopted in other countries to judge the necessity of laws/regulations, and obtain a judgement as to whether other means could have been used to achieve their objectives, which would be less harmful to business interests.⁸ Such “necessity tests” directly infringe on the autonomy of national governments to regulate in the public interest. By extension, this is an assault on the primacy of democratic processes to govern our lives.

Fortunately, not all negotiators are in favour of this approach. As revealed by the most recent leaks, a group of countries have proposed to introduce an article on the recognition of a right to regulate. As negotiations continue, it is unclear at the moment whether such a right will be included as a provision in the core text or merely mentioned in the Preamble of the agreement. In any case, even if included in the core text, the mere “recognition” of a right to regulate does nothing to guarantee that it would take precedence purely economic considerations. Instead, TiSA needs a legally binding provision which clarifies how exactly countries’ right to regulate will not be challenged by their commitments under TiSA, strengthening the imperfect wording of Article XIV GATS.

7 Public Services International, Massive leak of TISA trade documents “highlights madness of secrecy”, <http://www.world-psi.org/en/massive-leak-tisa-trade-documents-highlights-madness-secrecy>

8 Wikileaks, The TISA Annex on Domestic Regulation – Analysis of the 23 April 2015 Draft, <https://wikileaks.org/tisa/domestic/04-2015/analysis/Analysis-TISA-Domestic-Regulation-Annex.pdf>



03

DATA PROTECTION

The straitjacket on the government's right to regulate also extends to data protection. In the core text, Article 1-9 on General Exceptions 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. However, the general exception included in the leaked text, which based on Article XIV GATS, offers insufficient protection from challenges contesting EU or Member States' data protection rules. EU legislation for the protection of fundamental rights could therefore be undermined or overturned through TiSA.

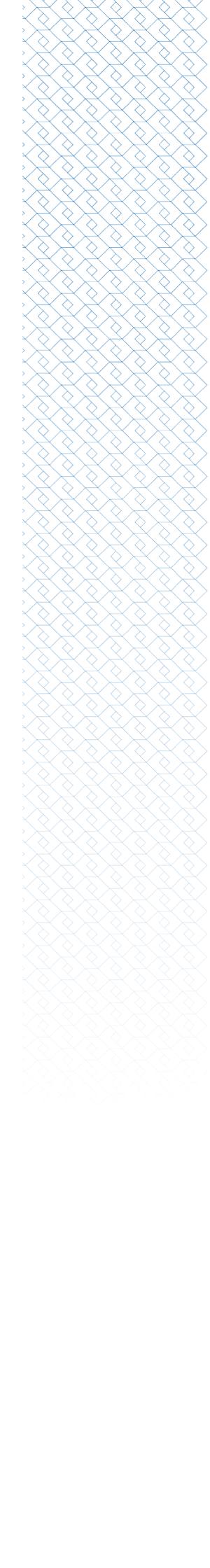
The leaked annex on e-commerce raises further concerns. For instance, its Article 2 proposes that countries may not prevent a service supplier of another TiSA country from transferring or storing information, including personal information, within or outside its territory, where such activity is carried out in connection with the conduct of the service supplier's business. This provision enables cross-border data transfers and data-processing across all services sectors without adequate safeguards, in contradiction with standards set by EU data protection laws. The ability of governments to ensure that data is processed lawfully is thereby hindered.

Moreover, Article 9 of the e-commerce Annex lays down restrictions on data localisation. A problematic proposal put forth by the US and Colombia states that no TiSA signatory country may require a service supplier to use territorially localised computing facilities for processing and storing data as a condition for supplying services to that country.

There is a common confusion between mandatory data localisation requirements and requirements for local storage of data for specific purposes, such as data protection.

On the one hand, mandatory data localisation measures putting an obligation on suppliers that operate on the Internet to store data within a specific country, rather than on servers in other countries, undermines the fundamental openness and interoperability of the Internet, and create a serious risk for security. Such data localisation practices increase the possibility of government's abuses as data is kept in limited number of easily identifiable locations, putting people's human right to privacy and freedom of expression at risk. These practices must be prevented.⁹

⁹ Alaexander Plaum, The impact of forced data localisation on fundamental rights, 4 June 2014, <https://www.accessnow.org/blog/2014/06/04/the-impact-of-forced-data-localisation-on-fundamental-rights>

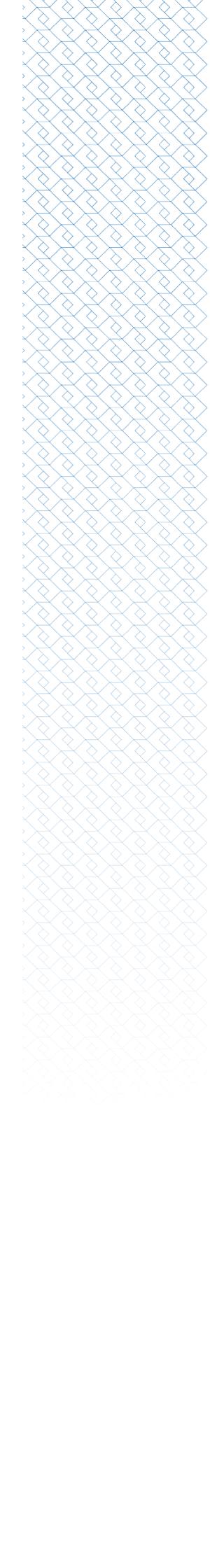


On the other hand, a local data storage requirement for the protection of data does not raise the same concerns as with forced data localisation because data are not “blocked” in a country, but can be transferred at any time within the EU or to third countries under the conditions set by EU Data protection laws.

It should be borne in mind that without barriers to data-flows, the ability to implement effective safeguards for personal data is, in effect, established by the lowest level of protection implemented among the TiSA countries. This means that the ability to have such barriers is essential for having a high level of protection of the fundamental right to privacy and avoiding a “race to the bottom”.

Finally, the Annex on Telecommunications could be seen as posing an additional threat to the EU’s data protection framework. Under its Article 2, Japan and Korea proposed that signatory countries shall not adopt or maintain limitations on full foreign participation in its e-commerce and telecommunications services. It suggests that the EU’s Data protection legal framework is considered a barrier to trade, and should EU law require any data controller or processor to comply with EU law to operate in the EU, this could be interpreted as market access limitations for foreign participation in e-commerce. Therefore, a clear and unequivocal exception on data protection is needed.¹⁰

10 Read more in EDRI-Access Now Detailed Analysis of TiSA’s Telecommunications Annex: https://edri.org/files/TiSA_TelecommunicationsAnnex_Analysis_EDRI_Access.pdf



04

NET NEUTRALITY

It appears that TiSA is an ineffective instrument to deal with the principle of net neutrality. Implicit reference is made to the issue in the Annex on e-commerce, which, under Article 8 (1) , states that consumers should be able to “access and use services and applications of their choice available on the Internet, subject to reasonable network management”. This gives rise to a number of concerns. Firstly, the last phrase carves out an exception to allow service providers to block access to services and applications for ‘reasonable network management’ purposes, a condition susceptible to interpretation and abuse. Secondly, Article 8 (1) is insufficient in terms of scope, insofar as it only considers access and use of Internet services, prohibiting the blocking of access, but failing to take other discriminatory practices, such as the prioritisation or throttling of Internet traffic, into account. Similarly, Article 8 (1) seeks to only safeguard the “access and use” of “services and applications” on the Internet, and does not extend to other discriminatory practices, which are becoming increasingly common.¹¹

Article 8(2) gives rise to further concerns. While it addresses the issue of access to content which was absent from 8(1), it only goes as far as stating that TiSA signatories “should promote” the ability of consumers legitimately to access, share and distribute information. The problem of nondescript language is recurrent as the Article states that countries shall “endeavour” not to restrict the ability of service suppliers to offer services over the Internet.

Finally, a proposal put forth by Japan states that signatory countries shall endeavour to ensure that Internet access providers avoid “unreasonable discrimination in transmitting lawful network traffic”. This leaves the door open to discriminatory practices which would be argued to be “reasonable”. In all, the draft thus falls short of providing any meaningful rules on net neutrality, which is a principle that should not be discussed in the context of trade negotiations. On the other hand, the restrictions on the right to regulate risk creating a chilling effect that will prevent TiSA countries from implementing meaningful legislation in this area.

11 Tamir Israel, TISA Annex on Electronic Commerce: A preliminary analysis by the Canadian Internet Policy & Public Interest Clinic (CIPPIC), <https://wikileaks.org/tisa/ecommerce/analysis/Analysis-TiSA-Electronic-Commerce-Annex.pdf> (p.7)



ACCESS TO SOFTWARE SOURCE CODE

Access to source code is an essential element for ensuring safety and/or security of software products for a range of applications, such as medical, aviation and automotive applications, but also mass market products. Moreover, for governmental decision support systems, access to source code is often necessary for the accountability of governments in democratic societies.

The current proposals on Article 8 of the Annex on e-commerce of TiSA are of grave concern, as it would limit access to software source code.¹² If the objective of this is to prevent playing fields being tilted by to favoured local actors, this surely can be achieved without adverse side-effects to the resilience and reliability of ICT-systems. This also may be hard to reconcile with longstanding policies in EU Member States regarding the promotion of open source software in governments. EDRI believes TiSA should not limit access to software source code.

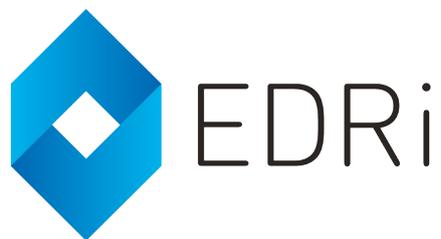
¹² Jeremy Malcolm, TPP Threatens Security and Safety by Locking Down U.S. Policy on Source Code Audit, 3 December 2015, <https://www.eff.org/deeplinks/2015/12/tpp-threatens-security-and-safety-locking-down-us-policy-source-code-audit>



CONCLUSION

EDRi does not oppose to free trade. There is a new generation of trade agreements, however, that are affecting fundamental rights in the online sphere in a non-democratic way.

- TiSA must be **transparent**. That's the starting point.
- The **right to regulate** must be protected. A self-standing legally binding provision clarifying how exactly countries' right to regulate will not be challenged by their commitments under TiSA would be helpful.
- Data protection is not a barrier to trade. It's a fundamental right. A clear, unequivocal, self-standing exception on **data protection** is thus needed.
- Forced **data localisation must be prevented, but not confused** with local data storage requirements for specific purposes, such as data protection. The latter is legal under EU law as a way for having a high level of protection of the fundamental right to privacy and avoiding a "race to the bottom".
- **Net neutrality** should not be dealt with within a trade agreement.
- TiSA should avoid rules limiting **access to software source code**.



PROTECTING DIGITAL FREEDOM

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