

**Feedback to the Draft Final Report “Trade SIA in support of negotiations on a plurilateral Trade in Services Agreement (TiSA)” and its annexes by Ecorys and CEPR for the European Commission**

[European Digital Rights](#) (EDRi) is an association of civil and human rights organisations from across Europe. We defend rights and freedoms in the digital environment.

We welcome this opportunity to provide feedback to the Draft Final Report “Trade SIA in support of negotiations on a plurilateral Trade in Services Agreement (TiSA)” and its annexes by Ecorys and CEPR for the European Commission.<sup>1</sup>

**1. Comments regarding the draft final report:**

- We note the “small [economic] expected impacts” TiSA will bring to the EU highlighted by the consultants.
- The human rights analysis overlooks several human rights, such as freedom of expression and opinion. This is relevant in the context of TiSA, in particular for the potential provisions on intermediary liability and net neutrality.
- With regard to the right to information, EDRi has called for more transparency of the negotiations as well. See for instance [https://edri.org/files/TiSA\\_Position\\_Jan2016e.pdf](https://edri.org/files/TiSA_Position_Jan2016e.pdf)
- The assessment of the right to personal data is not neutral. While, in the sector specific assessment, the draft final report acknowledges the lack of evidence of meaningful barriers to trade, in the human rights assessment of the draft final report, it is stated that “this issue of data flows...is particularly relevant”, without indicating what it may be relevant to (p. 105).
- Assessing the data protection situation from an EU perspective only is not an appropriate impact assessment (especially in the view of the variety of commitments from different TiSA countries to the protection of the fundamental rights to privacy and data protection).
- The following paragraph should be deleted, as it shows a lack of understanding of the complexity of the rights to privacy and data protection: “From the perspective of the fundamental right to the protection of personal data, what matters is that personal data are not stored or used without explicit permission of the individual whose data are involved.

---

<sup>1</sup> <http://www.trade-sia.com/tisa/wp-content/uploads/sites/7/2014/02/TiSA-Draft-Final-Report-May2017.pdf>  
<http://www.trade-sia.com/tisa/wp-content/uploads/sites/7/2014/02/TiSA-Civil-Society-Dialogue-meeting-presentation.pdf>  
<http://www.trade-sia.com/tisa/wp-content/uploads/sites/7/2014/02/TiSA-DFR-Annexes-May2017.pdf>

However, e-commerce and internet-based commercial services involve processing, storing and transferring of information– which is not the same as sharing of personal data without prior consent.” (p. 106)

- We welcome the 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 to the TiSA'. This has been recommended by EDRi on several occasions and supported by independent research commissioned by EDRi, BEUC, TACD and CDD.
- The sector specific analysis of the draft final report does not take into account human rights concerns.
- We strongly encourage Ecorys/CEPR to refrain from categorising data protection and privacy as “issues”. This is mentioned in several instances, such as in the in-depth sector analysis (p. 231). Where the independent study conducted by the IVIR – University of Amsterdam is referred to on p. 231, the year mentioned in the reference is incorrect. It is important that the consultants clarify the outcomes of the study, as the paragraph presented does not do justice to the outcomes (see summary of the outcomes of the study [here](#))
- We note that the draft final study mentions that both computer services and telecommunication face “low levels of trade restrictions”. The biggest trade barrier for computer services and telecommunication highlighted by the draft final study relates to movement of people. Therefore, we do not understand why the report refers to the fact that “the core issue” is that of the free flow of data (p. 237). The following paragraph must be deleted:

“The core issue is whether free data flow requirements are at odds with requirements that content providers and network operators comply with the legislation and regulations of countries they do business in. This is of particular concern to European stakeholders, both business and non-governmental organisations, given relatively high European standards for data protection, consumer rights, privacy protection, among others. Requiring European businesses to comply with these high standards, while exempting foreign firms, under the mantle of free data flows, would fundamentally alter the playing field in favor of foreign firms. In particular, the European Telecommunications Network Operators' Association (ETNO) argues that modern ICT technologies, in fact, allow compliance with legislation and regulations in a large number of countries at minimal cost, and without having to impose restrictions such as local infrastructure requirements.”

## Reasons for deletion:

- It is not based on evidence, as highlighted by the consultants elsewhere<sup>2</sup>;
  - The paragraph is very misleading, as it contains inaccurate information and shows a lack of understanding of how EU rules work. When the study refers to “Requiring European businesses to comply with these high standards, while exempting foreign firms” is incorrect. The EU rules on data protection and privacy’s scope of application cover both national and foreign companies.
  - NGOs are not concerned about the need for companies to comply with high standards of data protection and privacy. NGOs are concerned about the lack of compliance of EU rules and the possibility to undermine EU rules via trade agreements like TiSA (see our previous contributions).
  - Industry associations like the one mentioned in the study are actively lobbying against privacy standards in the EU, e.g. via asking for a repeal of the E-Privacy Directive: <https://etno.eu/news/etno/2016/878>
- 
- Ecorys/CEPR’s also presented data protection and privacy as “issues” in the last civil society dialogue and in the sector specific synthesis and policy recommendations (pp. 239 et seq). We suggest to rephrase the report’s recommendation regarding the issues that “the wider internet economy and increasingly other sectors” are facing. The draft final report refers to them facing “issues like data protection, privacy protection...”. Both data protection and privacy are fundamental rights, not “issues”. Framing them like that is completely inappropriate, especially considering the consultants’ own acknowledgement that due to “limited availability of data, in particular on cross-border e-commerce”, “little rigorous research” “could have informed the in-depth analysis”. The European Commission and the European Parliament have stated several times that privacy and data protection will not be subject to negotiations in trade agreements. The recommendations of the consultants overlook this important element.

---

2 E.g. “Surveys of the e-commerce industry, position papers by industry associations and statements by individual stakeholders further shed light on the barriers to cross-border e-commerce. Barriers such identified are not necessarily the true barriers to e-commerce. Trivially, surveys or positions taken by industry associations or individual stakeholders, are subject to sample biases, with large or successful firms being more likely to be included in a survey, or being more visible in public debates. Furthermore, we have to distinguish between the true underlying barriers and the barriers that are reported. The true underlying barriers are those that most severely affect firm creation or firm entry into cross-border e-commerce. These barriers will not necessarily be reported in surveys, as surveys will only includes firms that exist and that are active in the sector, and that thus might be the ones that have successfully overcome the true underlying barriers.” cf. p. 251 of the draft final report.  
“in the absence of robust evidence on policy impact and effectiveness, it is tempting to rely on the input and suggestions of interest groups and stakeholders. This approach holds the usual risk of being beholden to special interests or to be lost in a mosaic of different opinions, concerns and suggestions”. cf. p. 256 of the draft final report.

- How the draft final report defined the issue of free flow of data is inaccurate. On the one hand, the draft final report offers no evidence of the problems related to data flows. On the other hand, it says that “limitations to the free flow of data” are “a key concern for e-commerce”. This is contradictory and not appropriate for an impact assessment.
- As stated in previous contributions by EDRi, data protection and privacy are fundamental rights, not trade barriers. Failure to protect privacy and data protection would constitute a barrier to trade. It would be appropriate for the study to cover the research provided in this regard. The study overlooks this analysis. For more information, see [here](#) and [here](#).
- In the draft final report several references are made to intellectual property rights without providing evidence. In addition, these fall outside the scope of TiSA negotiations. These references should be deleted.
- We welcome the reference to the need to preserve the right to regulate (e.g. p. 240), as policy-making in this area is evolving. However, stronger safeguards for the right to regulate should be recommended.

## 2. Comments regarding the Annexes to the draft Final Report

- EDRi welcomes the effort of providing a table on the EU ratification of core international human rights treaties as well as other TiSA Parties. However, EDRi regrets there is no meaningful conclusions or assessments made out of such mapping. EDRi encourages Ecorys/CEPR to include a meaningful impact assessment of the lack of human rights commitments by parties to TiSA.
- For the purpose of analysing the impact and commitment of TiSA countries to data protection and privacy, it would be helpful to include a table on the TiSA countries' commitments regarding Council of Europe Convention 108 and its protocols.
- Annex G seems to be outdated. We understand Ecorys/CEPR will update this part in the final version of the report.