

TiSA leaks set alarm bells ringing

EDRI analysis of Wikileaks' #TiSA leaks of 15 September and Greenpeace's #TiSAleaks of 20 September 2016

ABOUT EDRI

We all have the right to keep personal information online, private and secure, and express ourselves freely. Right now, this is not the case. Our rights and freedoms online are open to abuse and misuse by governments, companies and others. European Digital Rights (EDRI) fights to defend rights and freedoms online.

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SUMMARY

On 15 September 2016, Wikileaks published several secret documents concerning one of the biggest trade agreements currently under discussion: the Trade in Services Agreement (TiSA). In addition, on 20 September 2016, Greenpeace Netherlands released other draft TiSA negotiating texts.

TiSA is a trade agreement negotiated between the European Union (EU) and 22 countries, including the United States of America (US), Australia, Canada, Japan, Mexico, Turkey, Israel and Hong Kong. TiSA is part of a “new generation of trade agreements”. This is because it includes areas which are not part of traditional free trade agreements. One of these areas is electronic commerce, which includes text on transfer of personal data into different jurisdictions.

TiSA is meant to replace the General Agreement on Trade and Services (GATS) in the long run.¹ If the final text get things wrong, the safeguards that were in place in GATS may not work any more if disputed under the TiSA's proposed **dispute settlement mechanism**.

Since the start of the negotiations in March 2013, documents have leaked into the public domain that have raise a myriad of serious concerns. The most recent TiSA leaks and available documentation² show the **secrecy** and potential dangers of the negotiations. From a digital rights perspective, EDRi is concerned about the potential of the limitations to the **right to regulate**, bypassing the democratic decision-making safeguards available when drafting legislation. Most importantly, EDRi is concerned about the detrimental effects to the fundamental rights to **privacy and data protection, net neutrality** and **access to software source code** if some of the provisions seen in the leaks become part of the final text.

Wikileaks' and Greenpeace Netherlands' TiSA leaks show that the positions of the negotiating parties are evolving. While most of the concerns already outlined by EDRi³ are not assuaged by the new texts, country positions become clearer and certain articles have become consolidated. Some novelties in the text make things worse (for example on data protection), but there are a couple of new elements proposed vis-à-vis previous leaks that we welcome, but that still do not solve our concerns in full (for example on net neutrality).

For the most part, in leak after leak we see that trade negotiators continuing to ignore input from civil society about the dangers of their proposals. Reassurances from negotiating parties like the EU (for example on respecting the safeguards for citizens' personal information) need to be accompanied by meaningful provisions and suggestions to achieve the goals of rights-respecting measures. Otherwise, they become void. While some provisions seem to remain broadly similar at the time of

1 See the analysis of by Professor Kelsey of the institutional provisions outlined by EU's non-paper dated 4 July 2016, released by Wikileaks on 15 September 2016:

https://wikileaks.org/tisa/analysis/201609_TiSA_Analysis-on-Institutional-Provisions/201609_TiSA_Analysis-on-Institutional-Provisions.pdf

2 See, for instance, the document revealed by the European Union:

<http://ec.europa.eu/trade/policy/in-focus/tisa/>

3 EDRi's position on TiSA, January 2016: https://edri.org/files/TiSA_Position_Jan2016e.pdf

writing⁴, it appears that some of the provisions are more advanced and new challenges are appearing. For example, according to the report of the European Union of the 19th round of negotiations (8-18 July 2016), “a new country” (which presumably was the US)⁵, made a “new proposal on data localisation in the area of Financial Services”⁶, which triggers the provision on “Transfer of information”. According to the Wikileaks TiSA leaks of 15 September 2016, it is confirmed that it was indeed the US.⁷ EDRi has already warned the European Commission against the inclusion of this type of measure due to the threats they create to people’s rights to privacy and protection of their personal information.⁸ Another example of new elements not seen by the public is a new proposal “with respect to the liability of internet platforms (excluding intellectual property)”.⁹ If this provision contained “voluntary” mechanisms to privatise enforcement, this could lead to violations of the rule of law, unpredictable and arbitrary behaviour by companies with no accountability whatsoever. It also, from experience, will be implementation of US law by US companies on a global level.

It appears we still need to wait to see whether this type of damaging provisions will be ultimately included in TiSA or not and if so, how they will be drafted. Now it's the turn of the negotiators to take responsibility and address the concerns of the public.

WHAT ARE THE DANGERS IN THE TiSA LEAKS FROM A DIGITAL RIGHTS PERSPECTIVE?

4 According to the EU report of the 19th TiSA negotiation round, 8-18 July 2016, “[t]here were no discussions on personal information protection and movement of information (cross-border data flows)”, cf. http://trade.ec.europa.eu/doclib/docs/2016/july/tradoc_154824.pdf

5 See http://www.innovationfiles.org/digital-trade-on-the-hill-hearing-on-expanding-u-s-digital-trade-and-eliminating-digital-trade-barriers/?mc_cid=efa30086ac&mc_eid=671b585ee6

6 EU report of the 19th TiSA negotiation round, 8-18 July 2016, http://trade.ec.europa.eu/doclib/docs/2016/july/tradoc_154824.pdf

7 TiSA Report 18th round (INTA cover note), dated 7 June 2016: https://wikileaks.org/tisa/document/201609_TiSA_Report-18th-round/201609_TiSA_Report-18th-round.pdf

8 BEUC and EDRi urge the EU Commission not to undermine citizens’ privacy in trade agreements, 13 June 2016: <https://edri.org/beuc-edri-urge-eu-commission-not-undermine-citizens-privacy-trade-agreements/>

9 EU report of the 19th TiSA negotiation round, *Op. cit.*

Transparency and the Right to Regulate

The texts leaked by both Wikileaks and Greenpeace Netherlands open TiSA to public scrutiny once again. Such disclosures allows people to verify whether the reports, claims, promises and assurances by their trade representatives are reflected in the texts or not. On top of increasing corporate influence on policy-makers, one of the concerns shared by most NGOs is the chilling effect TiSA may have against the so-called 'right to regulate'. The right to regulate means that states have the ability to maintain, adopt or change laws and regulations in accordance with the public interest.

What do the #TiSAleaks show?

The provisions on Transparency in TiSA depart from the General Trade in Services Agreement (GATS), which only requires publishing measures of general application.

TRANSPARENCY ANNEX

ARTICLE I-[...]: TRANSPARENCY

1. Each Party shall ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published **or otherwise made available** in such a manner as to enable interested persons and Parties to **become acquainted with them**.
2. [AU/CA/CL/CO/CR/EU/HK/IS/JP/KR/LI/MU/MX/NO/NZ/PA/PK/PE/TW/US propose; IL/TR considering: To the extent practicable, each Party **shall**, [CH/TR/IL/LI/PK oppose: in a manner consistent with] [CH/IL/LI/PK/TR propose; MU/US opposed: to the extent prescribed by] its [CH oppose: legal] system [CH: propose: including applicable laws [MU propose: processes] for adopting measures:
 - (a) publish in advance [IL propose: its laws and regulations] [IL oppose: measures referred to in paragraph 1] that it proposes to adopt, or publish in advance documents that provide sufficient details about a possible new [IL propose: law or regulation] [IL oppose: measure referred to in paragraph 1] to allow interested persons and other Parties to assess whether and how their interests might be significantly affected;
 - (b) provide **interested persons and other Parties** a reasonable opportunity to comment on such proposed measures or documents under subparagraph 2(a) [CH propose: taking into account its priorities and resource constraints]; and,
 - (c) **consider comments received** under subparagraph 2(b).]

As Professor Kelsey explains, “transparency” in TiSA means ensuring that big corporate interests “access and influence government decisions that affect their interests.”¹⁰

¹⁰ See https://wikileaks.org/tisa/analysis/201609_TiSA_Analysis-on-Core-Text/201609_TiSA_Analysis-on-Core-Text.pdf

In addition to what we knew from previous versions¹¹, the now public Transparency Annex¹² adds that the Parties to TiSA shall (not 'may') “consider comments” from interested persons and other TiSA countries. The problem is that this type of processes are mastered by big corporate lobbies. An explanatory note clarifies that this should be understood within the systems the Parties have to gather input from stakeholders. However, this only seem to help large corporations' interests. For example, in Parties like the European Union, when there have been more substantial responses defending the public interest in public consultations from the EU, the European Commission frequently does not meaningfully take them into account.¹³

CORE TEXT
ARTICLE [...]: DISCLOSURE OF CONFIDENTIAL INFORMATION

Nothing in this Agreement shall require any Party to provide **confidential information**, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would **prejudice legitimate commercial interests of particular enterprises, public or private.**

Big corporate interests are given further priority over that of citizens through TiSA by an Article on the prevention of disclosure of confidential information, as TiSA countries are committing not to disclose “confidential information” which would jeopardise commercial interests. This puts commercial interests a priori over the public interest.

On the other hand, previous leaks and the Core Text leaked on 15 September 2016 showed some countries were keen on introducing a clause to recognise the right to regulate. However, we reiterate our position that the mere inclusion

CORE TEXT
[ARTICLE [...] DOMESTIC REGULATION]

[AU/CA/CH/CL/CO/CR/EU/HK/IS/IL/JP/KR/MX/NO/NZ/PA/PE/TR/TW/US/UY propose:

1. Parties **recognize** the right to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet their [CR/LI/MX/TR propose: public] policy objectives.

or recognition of countries' right to regulate “does nothing to guarantee that it would

11 See the previous leak of the Transparency Annex from Wikileaks dated 15 October 2015: https://wikileaks.org/tisa/document/20151015_Transparency/20151015_Transparency.pdf

12 See https://wikileaks.org/tisa/document/20160627_TiSA_Transparency/20160627_TiSA_Transparency.pdf

13 E.g. The Commission's response to the public consultation on ISDS' results: <https://edri.org/eu-commissioner-isds-consultation-outright-attack/>

take precedence over purely economic considerations”. If adopted, TiSA would need a legally binding clause clarifying “how exactly countries’ right to regulate will not be challenged by their commitments under TiSA, strengthening the imperfect wording of Article XIV GATS.”¹⁴

Finally, Greenpeace’s TiSA leaks show specific examples where the right to regulate can be undermined. For example, this is case of the Financial Services annex.

ANNEX ON FINANCIAL SERVICES.

ARTICLE X.15: TRANSPARENCY – CONSOLIDATED VERSION, 8 APRIL 2016

[...] 4. [CA/CO/CR/MX/PE/TW/US propose:] Each

a) CA/CO/CL/CR/MX/PE/TR/US propose:] publish in advance any **regulations of general application** relating to the subject matter of this Annex that it proposes to adopt [CR considering: and the purpose of the regulation]]; and]

b) **provide interested persons and Parties a reasonable opportunity to comment** on such proposed regulations.]

5. [CA/CL//CO/CR/MX/PE/TR/TW/US propose; MU/PK considering: **At the time it adopts a final regulation**, a Party should, to the extent practicable, [MU/TR propose: and in accordance with its domestic law,] **address in writing substantive comments received from interested persons** with respect to the proposed regulation.] [...]

Instead of paragraphs 4 and 5 the EU wants to mirror the language of paragraph 2 of the horizontal Transparency Annex.

The consolidated version of Article X.15, dated 8 April 2016, shows that certain countries also want to introduce a notice-and-comment system on draft regulations and require that countries address in writing comments received by “interested persons”. The EU seems to prefer the wording of the horizontal transparency annex. Both texts show TiSA countries are keen on institutionalising lobbying. Similar, but less worrisome, wording was proposed by the US in the leaked Telecoms Annex (cf. Article 7)¹⁵, but interestingly enough, the EU, together with other negotiating Parties, opposes it.

Data Protection, Privacy and Security Online

Both data protection and privacy are fundamental rights. Nowadays, they often converge. However, privacy is a right which relates to the personal sphere of human beings. Data protection is mainly about how you control of your personal information.

¹⁴ See EDRI’s position on TiSA, January 2016: https://edri.org/files/TiSA_Position_Jan2016e.pdf

¹⁵ See https://wikileaks.org/tisa/document/20160608_TiSA_Annex-on-Telecommunication/20160608_TiSA_Annex-on-Telecommunication.pdf

EDRI's position is that fundamental rights, such as the rights to the protection of our personal information and privacy online should not be subject to negotiations in trade agreements, including TiSA.

Trade negotiators seem to be determined to ignore this key recommendation and unfortunately appear to fall short in defending these two rights. If trade negotiators steadfastly insist on including data protection and privacy in the discussions, EDRI asks for caution and asks for specific safeguards and carve-outs.

What do the #TiSAleaks show?

CORE TEXT

ARTICLE I-9: GENERAL EXCEPTIONS

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Party of measures: (...)

(c) necessary to secure compliance with laws or regulations which are not **inconsistent with the provisions of this Agreement** including those relating to: (...)

(ii) 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 and accounts**;

Article I-9 of Wikileaks' leaked core text¹⁶ introduces an exception based on Article XIV of the GATS, intended to ensure the adoption and enforcement of measures to protect personal data and privacy. However, this is conditional on *inter alia* being consistent with TiSA and not being a restriction to trade.

According to a study written by researchers from the University of Amsterdam and commissioned by EDRI, BEUC, CDD and TACD, this safeguard is unlikely to be sufficient to protect the European Union against challenges contesting EU rules safeguarding these fundamental rights.¹⁷ This interpretation is confirmed by Professor Kelsey's analysis of the leaked TiSA's core text.¹⁸

16 See https://wikileaks.org/tisa/document/20160621_TiSA_Core-Text/20160621_TiSA_Core-Text.pdf

17 K. Irion, S. Yakovleva and M. Bartl, "Trade and Privacy: Complicated Bedfellows? How to achieve data protection-proof free trade agreements", independent study commissioned by BEUC, EDRI et al., published on 13 July 2016, Amsterdam, Institute for Information Law (IviR), https://edri.org/files/dp_and_trade_web.pdf

18 See https://wikileaks.org/tisa/analysis/201609_TiSA_Analysis-on-Core-Text/201609_TiSA_Analysis-on-Core-Text.pdf

Greenpeace's leak on the Annex on E-commerce is a source of further concern. For example, its Article 2 enables "movement of information" (e.g. processing or transfer of personal data) without strong data protection and privacy safeguards, as here again, the provisions are also conditional and not safeguarded against challenges against the high standards of the EU. Not everything is bad in that proposal, a good aspect of this leaked provision is a proposal from Mauritius and Switzerland. Should data flows be included in TiSA, disregarding EDRi's recommendation, this could reduce the damage for individuals' rights.

ANNEX ON E-COMMERCE
ARTICLE 2: MOVEMENT OF INFORMATION [CH PROPOSE: CROSS-BORDER INFORMATION FLOWS]

[...]3. Parties should enhance their enforcement capacity to ensure that applicable laws and regulations concerning the protection of data and privacy re complied with.

For its part, Article 4 of the E-commerce Annex poses further concerns. For instance, several countries are proposing the development of domestic frameworks on data protection in line with international standards. In the case of the EU, this provision could challenge its legal framework because the EU is a global data protection standard

ANNEX ON E-COMMERCE
ARTICLE 4: PERSONAL INFORMATION PROTECTION

[...]

2. [AU/CA/CL/TW/CO/IL/KR/MU/MX/NZ/NO/PA/PE/CH propose: [CH oppose: To this end,] each party shall adopt or maintain a domestic legal framework that provides for the protection of the personal information of the users of electronic commerce. In the development of these personal information protection frameworks, each Party should **take into account principles and guidelines of relevant international bodies.**]

3. [CA/MU propose; CL/TW/CO/KR/MX considering: Each Party shall [CA propose; CL/CO considering: endeavour to] ensure that its **domestic framework** for the protection of personal information of users of electronic commerce is **applied on a non-discriminatory basis.**]

[...]

setter, meaning that other countries tend to have lower standards of protection. Indeed, this creates incentives that are likely to lead to a "race to the bottom". Moreover, the proposed paragraph 3 of Article 4 could be used to attack the EU's approach vis-à-vis adequacy decisions, as demonstrated by Professor Irion et al.¹⁹

¹⁹ K. Irion, S. Yakovleva and M. Bartl, "Trade and Privacy: Complicated Bedfellows? How to achieve data protection-proof free trade agreements", independent study commissioned by BEUC, EDRi et al., published on 13 July 2016, Amsterdam, Institute for Information Law (IviR),

Similarly, as in Article 2, the leak does not show any position from the EU. We hope it supports the good proposals and opposition of Switzerland.

The same concerns apply to other annexes. This is clear in relation to Greenpeace's leak on the Financial services Annex:

ANNEX ON FINANCIAL SERVICES.

ARTICLE X.10. TRANSFER OF INFORMATION

[CA/CH/CL/CO/CR/EU/IL/JP/JP/KR/LI/MU/MX/NO/PA/PE/TR/TW/US propose; NZ considering; [CL/PE propose; CH/EU/JP/MU/US oppose: Subject to prior authorization by the regulator,] [TR propose; CH/CO considering; EU/JP/US oppose: Subject to any conditions, limitations and qualifications that a Party shall set out in its schedule,] Each Party shall allow a financial service supplier of another Party to **transfer** information in electronic or other form, **into or out of its territory, for data processing**, where such processing is required in the financial service supplier's ordinary course of business. Nothing in this paragraph restricts the right of a Party to **adopt or maintain** measures to protect personal data, personal privacy and the confidentiality of individual records and accounts, **provided that such measures are not used as a means of avoiding a Party's obligations under the provisions of this Article.** [HK proposal: so long as such measures are not used to **circumvent** the provisions of this Article.]

Contrary to the previous texts, the EU seems to have pronounced itself already with regards to data transfers in the financial services sector. This TiSA provision may be stronger than GATS article XIV, but as a conditional exception, still creates uncertainty which should be avoided. Why isn't the EU asking for stronger safeguards?

Another provision which concerns us is Article 9(3) of Wikileaks' leak of the Telecommunications Annex which shows a willingness to create a loophole whereby legitimate personal data storage obligations can be nullified. While in Article 9(4) countries are discussing a possible exception for the protection of personal data, privacy and confidentiality of communications, the safeguard may not be applied if it constitutes, for example, a trade barrier.²⁰ Linked to this, it is very interesting that in Article 6 (license), there is no specific mention of the rumoured criterion imposed by US authorities requiring foreign suppliers of telecommunications services to the public to locally store or otherwise process their data in the US in order to get a licence.

https://edri.org/files/dp_and_trade_web.pdf

²⁰ See https://wikileaks.org/tisa/document/20160608_TiSA_Annex-on-Telecommunication/20160608_TiSA_Annex-on-Telecommunication.pdf

EDRi has repeatedly warned against confusion surrounding data localisation. We should distinguish between local data storage requirements for the specific, legitimate purposes of data protection where necessary to protect the fundamental right to privacy on the one hand and forced or mandatory data localisation on the other. Furthermore, the relation with the GPA is unclear and requires clarification.

Since 1998, EU law requires data to be processed within the EU in principle, in the absence of an assurance of adequate levels of protection outside the EU. Why is that? Because of the "constitutional" status of both rights to data protection and privacy. Companies or individuals cannot just give away fundamental rights nor can they be traded away. Personal data can still be transferred abroad under a variety of clear and accessible conditions laid down in law.

Article 8 of the E-commerce Annex leaked by Greenpeace establishes restrictions on the so-called "data localisation". As already mentioned in our analysis of previous leaks, "a

ANNEX ON E-COMMERCE

ARTICLE 8: LOCATION OF COMPUTING FACILITIES [KR PROPOSE: 3]

[...]

2. [CA/CL/CO/IL/JP/MU/PE/PK/US propose; MX considering; CH oppose: **No Party** may require a service supplier, as a condition for supplying a service in its territory, **to use locate or computing facilities in the Party's territory.**]

3. [CO/MU propose; PK considering: For greater certainty, nothing in paragraph 2 should prevent a Party from **conditioning the receipt or continue receipt** of an advantage on compliance with the requirement to use, establish, or expand computing facilities in its territory, including those needed for the **processing or storage of data.**]

4. [CA/CL/CO/IL/JP/MU/MX/PK/PE propose: Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 to achieve a [PK considering: legitimate] public policy objective, provided that such measures are not applied in a manner which would constitute a means of **arbitrary or unjustifiable discrimination or disguised a restriction on trade.**]

3 [KR propose; PK considering: Article 8 does not apply with respect to suppliers of public telecommunication network or services]

US: The possible applicability of this Article to financial services is under consideration

problematic proposal put forth by the US and Colombia [and now supported by some other TiSA countries like Japan] 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".²¹ A positive comment is that there is a new proposal which clarifies that Article 8(2) should not prevent data

²¹ See https://edri.org/files/TiSA_Position_Jan2016e.pdf

protection requirements for the storage or processing of data. However, the proposed Article 8(4) still requires that those measures must not constitute *inter alia* trade barriers, placing trade ahead of fundamental rights.

Separately, Greenpeace leaked another document entitled “New Provisions Applicable to All Services”. This classified document is a working document which includes US proposals to be introduced either in TiSA’s core text or an annex. Greenpeace’s #TiSALeak is more advanced as compared to the last leak published by Wikileaks in May 2016,²² which dated 1 October 2015. In fact, it is one of the most recent negotiating texts, as it purportedly dates of April 2016. The first obvious difference with prior versions seen by the public is that the European Union has already positioned itself regarding some of its provisions. The first thing that caught our attention is that the “provision on data localisation” was already part of a previous leak published by the Associated Whistleblowing Press for Education International on 25 April 2014.²³

However, these provisions have found their way into the e-commerce annex (cf. Article 2). In the current version, while most of the provisions fall outside EDRi’s scope of work, we feel it is relevant to comment on two articles, namely Articles X.3 and X.5.

NEW PROVISIONS APPLICABLE TO ALL SERVICES

ARTICLE X.3: LOCAL CONTENT AND OTHER PERFORMANCE REQUIREMENTS

[AU/CA/EU/JP/NZ/US propose; KR/NO considering: 1. No party may, in connection with the supply of a service by a service supplier [AU/CA/JP/KR propose: through commercial presence], impose or enforce any requirement or enforce any commitment or undertaking: (...)

c) to transfer [AU/NZ/US propose; CA considering: a particular] technology [CA/EU propose: a production process] or the proprietary knowledge to a person in its territory [US propose: or

i) to purchase, **use, or accord a preference to**, in its territory, technology of the Party or of persons of the Party; or

ii) that prevents the purchase or **use** of particular technology in its territory so as to afford protection on the basis of nationality to persons of the Party or to technology of the Party or persons of the Party.]

d) [EU propose: to export a given level or percentage of goods or services] (...)

provisions highlighted in Article X.3 have the potential to be negative for international data transfers in the context of trade and services. While it does not seem to affect open

22 See https://wikileaks.org/tisa/document/20151001_New-provisions/20151001_New-provisions.pdf

23 Cf. http://download.ei-ie.org/Docs/WebDepot/Leaked_TISA_education.pdf See analysis of Public Services International and Public Citizen: <http://www.world-psi.org/en/tisa-new-leaked-document-reveals-us-corporations-threat-privacy-and-data-protection>

source software, this provision does not cover the disclosure of technology for transparency, data protection and national security (including information security) reasons.

Article X.5, however, would effectively render Article X.3 entirely meaningless since we all know that countries like the US and Israel give themselves the flexibility to consider virtually everything an essential security interest.

NEW PROVISIONS APPLICABLE TO ALL SERVICES

ARTICLE X.5 EXCEPTIONS

[US propose: Nothing in Article X.1-3 shall be construed to prevent any Party from taking any action which it considers necessary for the protection of its own essential security interests.]

TiSA contains more **security exceptions**,

which can undermine all of the safeguards aimed to protect, for example, the privacy of individuals. This is shown in Article 13 of the E-commerce Annex leaked by Greenpeace and in Article I-10 of the Core text leaked by Wikileaks on 15 September 2016.

Transfer or access to software source code

Access (or transfer) of software source is essential to ensure the privacy, security and safety of many software products for a range of applications (e.g. medical applications). Such is the example of Dana Lewis, who built an artificial pancreas and is trying to show the world how to build it through her project <https://openaps.org>. This would not have been possible without open source code.

What do #TiSAleaks show?

If left unchanged, Article 6 of Greenpeace's leak on the E-commerce Annex limits access and transfer of software source code. For example, a government would "prohibit any party to the agreement from requiring the source code of mass-market software to be released openly by service providers of another party", as explained by our member EFF.²⁴ The new version of this article is worse than before. Hope may not be lost yet, because, as indicated in Wikileaks' TiSA leaks of 15 September 2016, on 7 June 2016 the European Union had not positioned itself on this matter yet.²⁵We wait in hope!

24 Cf. <https://www.eff.org/nl/node/88461>

25 TiSA Report 18th round (INTA cover note), dated 7 June 2016:

https://wikileaks.org/tisa/document/201609_TiSA_Report-18th-round/201609_TiSA_Report-18th-round.pdf

Unsolicited commercial electronic messages

Greenpeace's leak on the e-commerce Annex also contains a provision on unsolicited commercial electronic messages (e.g. spam), which appeared in previous leaks. Article 5 of the leaked e-commerce annex is not ambitious enough.

ANNEX ON E-COMMERCE

ARTICLE 5: UNSOLICITED COMMERCIAL ELECTRONIC MESSAGES

1. Each Party shall adopt or maintain measures regarding unsolicited commercial electronic messages that:

- a) require suppliers of unsolicited commercial electronic messages to facilitate the ability of recipients to prevent ongoing reception of such messages; [or]
 - b) require the consent, as specified according to the laws and regulations of each Party of recipients to receive commercial electronic messages; [or]
 - c) [PK/PE/US propose; EU/IS/IL/LI/NO/CH oppose otherwise provide for the minimization of unsolicited commercial electronic messages.]
- [...]

First, this provision does not contain cumulative requirements and this, despite the fact that the European Union weakened its position on this point compared to previous leaks. Second, TiSA countries commit to require consent for consumers to receive commercial electronic messages, without specifying that it should be obtained before the messages are actually sent. Third, according to Article 3(2) of the e-Privacy Directive, customers have the right not only see unsolicited communications minimised (as the TiSA leak asks), but the right to object, free of charge and in an easy manner to future messages, to which they previously gave consent.²⁶ We are not aware the reasons behind it, but EDRI is pleased that the European Union is opposing this provision. Fourth, TiSA's leak does not distinguish between marketing communications and value-added services. As explained elsewhere, “[c]onsent must not be bundled to cover both marketing communications and value-added services in one check box, as now sometimes happens. Smart, context-specific solutions can [and should] be found.”²⁷ We reiterate the European Union to take this on board for the forthcoming e-Privacy reform and not allow any commitments in TiSA to undermine its ability to regulate. Fourth, the text misses a key element of the ePrivacy Directive currently in force: safeguards for subscribers of unsolicited communications against the intrusion of their privacy.²⁸

²⁶ E-privacy Directive:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0058:en:HTML>

²⁷ See https://edri.org/files/epd-revision/EDRI_ePrivacyDir-final.pdf

²⁸ Cf. Recital 40 of the E-Privacy Directive.

Net neutrality

Net neutrality is a principle that all the internet traffic has to be treated equally, without blocking or slowing down certain data. This is crucial for fair competition between online services, for innovation, and for freedom of expression online.

EDRI's position is that trade agreements should not include provisions on net neutrality. Depending on how they are drafted and their binding force, they can have worrisome effects on the landmark net neutrality legislation of the European Union nor on the rules in the US.

What do #TiSAleaks show?

Article 7 of Greenpeace's TiSA leak on the E-commerce Annex contains good and bad elements.

ANNEX ON E-COMMERCE

ARTICLE 7: OPEN NETWORKS, NETWORK ACCESS AND USE OF THE INTERNET

1. Each Party recognizes the benefit of [EU oppose: consumers] [EU propose: end users] in its territory, subject to applicable laws, and regulation being able to:

- a) access [EU propose: **distribute**] and use services and applications **of their choice** available on the Internet subject to [EU propose: **non-discriminatory** and] reasonable network management;
- b) connect their choice of end user devices to the Internet provided that such devices do not harm the network; and
- c) have access to information on network management practices of their Internet Access service suppliers

There are three main differences in Article 7 of the E-Commerce Annex compared with previous leaks. Firstly, it has a less binding effect than before. In fact, the introduction of "the benefit" makes this vaguer, i.e. there are no real binding obligations supporting good net neutrality rules set by the European Union, for example.²⁹ Secondly, the European Union has made a set of new proposals which go into the right direction. However, the other Parties to TiSA seem not to have pronounced themselves. Thirdly, a paragraph which permitted "reasonable discrimination in transmitting lawful network traffic" seems not to be part of the Annex any more. The bad news is that full access to the internet is not guaranteed. The Parties to TiSA only refer to access to a very reduced set of services applications (cf. "services and applications of their choice"). This can be read as recognising the benefit of preserving price discrimination, such as zero-rated offers and what has been described as the "poor internet for poor people" - Facebook's

²⁹ See <https://edri.org/net-neutrality-wins-europe/>

FreeBasics. This interpretation is backed up by the reference to the reduction of the “digital divide” in the leaked “Article 12: Internet Cooperation” of the E-commerce annex, which is wording used by Facebook to promote its impoverished version of the internet.³⁰ The exact wording appears in a proposal of Peru in the Telecoms annex leaked by Wikileaks on 15 September 2016 and dated 8 June 2016 (cf. Article 22).³¹

Finally, it is worth mentioning that in the leaked Telecoms Annex keeps containing some of the flaws previously highlighted by EDRi and its member Access Now with regard to previous version of the annex.³² Among them, we found that in Article 3(6), the US keeps proposing that telecom regulatory authorities review their own regulatory decisions, which, as we stated previously, “seems rather ridiculous and, in keeping with the focus on deregulation, it does not cover checking its decisions not to intervene”. The European Union has similar provisions in its Framework Directive on electronic communications (cf. Article 16(2) and (3))³³. Yet, the proposal made by the US relates to obligations arising from the whole Telecoms Annex of TiSA, not from specific provisions. In this sense, the proposal does not mention that this would need to be done respecting the Parties' legislation.

Dispute settlement

On 15 September 2016, Wikileaks revealed a non-paper of the European Union with a set of proposals and explanations concerning the European Commission's view on the dispute settlement mechanism of TiSA and institutional specifications of the agreement.³⁴

What do #TiSAleaks show?

While the EU proposals are based on previous templates for concluding FTAs, some aspects are worth mentioning.

The European Union seems not to introduce improvements made in other FTAs, while including proposals already mentioned in the context of TTIP. For instance, the EU seems to have conceded to US demands not to include an appeal mechanism in its

30 See, for instance: <https://edri.org/letter-facebook-internet-org/>

31 See https://wikileaks.org/tisa/document/20160608_TiSA_Annex-on-Telecommunication/20160608_TiSA_Annex-on-Telecommunication.pdf

32 See https://edri.org/files/TiSA_TelecommunicationsAnnex_Analysis_EDRi_Access.pdf

33 See <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32002L0021>

34 See https://wikileaks.org/tisa/document/201609_TiSA_Institutional-and-dispute-settlement-provisions/201609_TiSA_Institutional-and-dispute-settlement-provisions.pdf

proposal. While in TiSA there was confirmation that the much-criticised Investor-to-State-Dispute Settlement (ISDS) would not be part of TiSA, TiSA disputes are expected to be managed by a state-to-state dispute mechanism. In this sense, the European Union introduces an innovative aspect: mediation.

In both cases, the leaks suggest that the whole agreement will be able to be subject to dispute settlement. This would for example include provisions on data protection or privacy, unless expressly excluded in the agreement.

Furthermore, Professor Kelsey argues that the proposals would not prevent an investor could still bring a dispute under bilateral investment agreements claiming an alleged breach of TiSA obligations.³⁵

CONCLUSION

TiSA negotiating texts will not deliver real benefits for people. Some good-faith intentions by certain countries are being compromised by how specific provisions are framed. TiSA negotiating countries should address the (un)intended consequences of ill-defined and not well thought-through provisions. Civil society and the public can and will keep raising our voices and stand up for our civil liberties and human rights. However, the ultimate decision very much depends on the countries' decisions and bargains they are willing to make to conclude TiSA. Negotiators need to take responsibility to avoid (hopefully) unintended negative consequences on people's lives. We are baffled that many of civil society concerns are being ignored so far.

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³⁵ Cf. https://wikileaks.org/tisa/analysis/201609_TiSA_Analysis-on-Dispute-Settlement/201609_TiSA_Analysis-on-Dispute-Settlement.pdf