

## EDRi response to the European Commission's public consultation “A renewed trade policy for a stronger Europe”

**Question 10: How can digital trade rules benefit EU businesses, including SMEs? How could the digital transition, within the EU but also in developing country trade partners, be supported by trade policy, in particular when it comes to key digital technologies and major developments (e.g. block chain, artificial intelligence, big data flows)?**

Trade policy can support a human-centric digital transition by protecting fundamental rights of people online while enabling businesses to build digital services that respect user freedoms and create alternatives to the centralised platform business models based on surveillance advertisement. The EU Commission should follow the principles below to make this happen:

- **Trustworthy digital services:** The number of EU citizens relying on digital services in their day-to-day lives is constantly increasing. The COVID-19 crisis has increased this tendency, with everybody—from school children to businesses to families—depending on video call services, online office software, social networks and so on. Trade policy can ensure people can trust that the digital services they use respect their fundamental rights like the right to privacy and other EU laws like GDPR. Each trade agreement concluded by the EU should therefore include language guaranteeing that users will know where a digital service is hosted, who is offering it, and how personal data will be used. Trade agreements should also guarantee that people have easy access to redress if something goes wrong.
- **Privacy and data protection:** The European Union has clearly stated that the fundamental rights to privacy and personal data protection are not up for negotiation. The Commission has repeated this at several occasions. After years of multi-stakeholder engagement, inter-service and inter-institutional consultations, the EU agreed on a horizontal position,<sup>1</sup> which constitutes a compromise that allows the EU to negotiate rules on cross border data flows in trade agreements while fully safeguarding EU citizens fundamental rights. Consumer and digital rights groups in Europe and abroad warmly welcomed the adoption of this EU position on cross border data flows, data protection and privacy in trade agreements.<sup>2</sup> The EU must now stick to its position as its red line. If the outcome of trade negotiations on this topic does not respect this red line, EDRi strongly urges the EU not to commit to it. The EU must build on the international success of the GDPR and be a trend setter rather than reducing its citizens' rights in favour of international trade.
- **Net neutrality:** Net neutrality is a cornerstone principle of the internet. Having full access to the internet without discrimination is what empowers a viable democratic discourse online and it's also what enables non-discriminatory digital trade. Net neutrality allows people to effectively enjoy the right to access information, and to use services, applications and devices of their choice without discrimination. However, trade rules on net neutrality so far have not succeeded in making sure all Parties adhere to this principle and some of the EU's trading partners have very different views on the matter. If the EU Regulation on the Open Internet cannot be mirrored in trade agreements, the EU should not agree to them or otherwise accept lower standards.

1 EU horizontal position on cross-border data flows and protection of personal data and privacy in trade agreements, available at [https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc\\_156884.pdf](https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156884.pdf).

2 See <https://www.beuc.eu/press-media/news-events/civil-society-groups-respond-eu-position-data-privacy-trade-negotiations>.

- **Software code clause:** Canada, like the US, proposed text that would limit the possibility for the EU to audit software and algorithms.<sup>3</sup> Such proposals would make it impossible for the EU to require the transfer of, or access to, source code of software owned by a person of the other Party and therefore conflict with important EU policy objectives like transparency and auditability of artificial intelligence applications. Such extra protection for foreign companies would limit the level of transparency and accountability the EU and its citizens could require from them with regard to the impact of software and automated decision-making processes on people's lives. Regulatory and oversight authorities would be unable to scrutinise the legality of software and AI systems and their outcomes under EU and national laws. Journalists, researchers and civil society organisations would be barred from fulfilling their crucial function to observe, discover and report the truth when software or automated decision-making systems discriminate or take otherwise unjust decisions. Trade agreements should not serve as a pretext to undermine the EU's ability to enforce its laws and to regulate software and AI and, if necessary, protect people from it.

**Question 11: What are the biggest barriers and opportunities for European businesses engaging in digital trade in third countries or for consumers when engaging in e-commerce? How important are the international transfers of data for EU business activity?**

At scale, it turns out that international data transfers are much more important for U.S. big tech companies than for European SMEs. That is partly due to their smaller size, but mostly because EU businesses can often revert to digital services providers based within the EU. Positive side-effect: those service providers often have a better data protection track record than their non-EU counterparts.

EDRi does not support forced data localisation laws in the EU or anywhere else but when data flows across borders outside EU jurisdiction, trade agreements should never weaken people's privacy and data protection rights. The desire of global tech businesses to move around data internationally should never trump fundamental rights. It is important to understand why this matters for people's trust in digital trade, too: Data is not a tradable asset. No one can sell or renounce their right to privacy or data protection as much as no one can renounce their right to the integrity of the person and sell out their organs. These are fundamental rights. The right to privacy is non-negotiable.

What is more, people in the EU trust that their personal data will be protected by the General Data Protection Regulation (GDPR). The GDPR is a trade and trust enabler. Without strong privacy and data protection rules, we would have a serious barrier to digital trade for consumers. This should not be put in question by international trade negotiations.

Some stakeholders argue for more 'compatibility' of data protection rules (by which they usually mean lowering EU standards). The GDPR allows for free, safeguarded international data transfers under the condition that the country to which the data is transferred provides an essentially equivalent protection than that offered in the EU. Although the current practice of measuring this adequacy is flawed (and has therefore been invalidated by the European Court of Justice in *Schrems II*), the principle still stands rock-solid: Countries that decide to guarantee an essentially equivalent level of data protection to personal data coming from the EU can serve as safe hosting environment. Everyone else cannot.

Unfortunately, this not all the compromise that all trading partners or industry players prefer. To constructively engage in cross-border data flow discussions, the EU adopted a horizontal position on data flows, data localisation and the protection of privacy and personal data. As explained in our answer to the previous question, EDRi strongly welcomes this EU horizontal position. It is the only acceptable

<sup>3</sup> See [https://docs.wto.org/dol2fe/Pages/FE\\_Search/DDFDocuments/254874/q/INF/ECOM/34.pdf](https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/254874/q/INF/ECOM/34.pdf).



compromise to preserve fundamental rights in trade policy and enable safe international data flows. After *Schrems I* and *II*, it would be legally risky and politically inappropriate for the EU to reopen this debate. Fundamental rights are non-negotiable.

In addition, the EU should not agree to overly broad wording like Article 8.70.4 of the EU-Japan FTA ("This Section applies to measures by a Party affecting trade by electronic means."). This formulation is extremely far-reaching by automatically covering any measure that affects trade by electronic means.

**Question 13: What other important topics not covered by the questions above should the Trade Policy Review address?**

**Copyright:** The EU should ensure that its trade agreements put limitations on and exceptions to intellectual property rights, that they stress the importance of the public domain and avoid disproportionately strong property rights protections and enforcement. The EU should not export the highly controversial recent copyright reform in trade agreements.