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COVER NOTE

From:	Commission
date of receipt:	1 March 2018
To:	Delegations
Subject:	European Commission letter on cross-border data flows and EU trade agreements

Delegations will find attached a letter from the Commission on cross-border data flows and EU trade agreements.

An identical letter was addressed to the Chair of Trade and Policy Committee Services and Investment in the Council (WK 1623/2018).



Frans TIMMERMANS
First Vice-President of the European Commission

Andrus ANSIP
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Jyrki KATAINEN
Vice-President of the European Commission

Cecilia MALMSTRÖM
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Member of the European Commission

Maria GABRIEL
Member of the European Commission

Brussels, 09/02/2018

Dear Mr Karadjov,

As you are aware, for some time the Commission has been looking into the issues arising in connection with cross-border data flows and trade agreements.

Today the cross-border transfer of data, including personal data, is a key element in the daily operations undertaken by European companies of all sizes, across all economic sectors in the Single Market and globally. It is therefore important to remove protectionist barriers to cross-border data flows.

At the same time, as set out in the Commission "Trade for All" strategy from October 2015¹, while trade policy must deliver growth, jobs and innovation, it must also be consistent with the principles of the European model. The protection of personal data is a fundamental right in the European Union. The nature and level of personal data protection chosen by the EU can therefore not be subject to negotiations in the context of trade or investment agreements. On the contrary, respecting privacy and protecting personal data is a condition for stable, secure and competitive global commercial flows. This is all the more important as the new EU rules on personal data protection as set out in the General Data Protection Regulation will become applicable on 25 May 2018.²

Mr Ventsislav KARADJOV
Chair of Working Group DAPIX
The European Council

¹ "Trade for All, towards a more responsible trade and investment policy" (COM (2015) 0497 final);

² Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1–88.

As already underlined in the Commission's Communication of 10 January 2017, "Exchanging and Protecting Personal Data in a Globalised World", data flows between the EU and third countries can be ensured using the mechanisms provided under the EU data protection legislation. The preferred avenue for the EU are "adequacy decisions" (meaning an equivalent level of data protection). The adoption of an adequacy decision would allow the free flow of data with the concerned third countries while ensuring that a high level of protection applies when personal data is transferred from the EU to these countries. Dialogues on data protection and negotiations of trade and investment agreements with third countries can complement each other but must follow separate tracks – such as currently with Japan and South Korea.

There might be cases where under the data protection track an "adequacy decision" with a third country cannot be realistically adopted, but under the separate track, trade or investment negotiations with that country are ongoing. In this perspective, the Commission has looked into how best to advance the EU's interests using trade and investment agreements in order to further operationalise the link between those negotiations and cross-border data flows. For this purpose, on 10 January 2017, the Commission decided to set up a Project Team of Commissioners, chaired by First Vice-President Frans Timmermans, and with the active participation of Vice-President Ansip, Vice-President Katainen, Commissioner Malmström, Commissioner Jourová and Commissioner Gabriel.

We are pleased to inform you that on 31 January 2018 the Commission has endorsed the results of the work of the Project Team with regard to a stand-alone chapter on cross-border data flows and protection of personal data to be included in future trade and investment agreements. These horizontal provisions – once included in future trade and investment agreements – will for the first time provide for a straightforward prohibition of protectionist barriers to cross-border data flows, in full compliance with and without prejudice to the EU's data protection and data privacy rules. The European Commission will maintain and defend this position in such negotiations with third countries.

The conclusion of the work of the Project Team benefited from a thorough consultation process of Member States, the European Parliament and other interested stakeholders carried out during 2017 on the basis of an informal concept paper. Several of us have discussed these issues with you.

We took note of the European Council Conclusions of 19 and 20 October 2017, which stated that: "The European Council highlights the importance of ensuring adequate rules on data flows with third countries in trade agreements, without prejudice to EU legislation."

Likewise, we took note of the European Parliament Resolution on a Digital Trade Strategy for the EU, adopted on 12 December 2017, which highlights the EU's interest in shaping global rules on digital trade and calls on the Commission to put forward, as soon as possible, its position, while stressing that "nothing in trade agreements shall prevent the EU and its Member States from maintaining, improving and applying its data protection rules".

It is on this basis that we now want to share with you the outcome of the work of the Project Team on this subject (see the text in annex: Horizontal provisions for cross-border data flows and for personal data protection (in EU trade and investment agreements)).

Our position reaches the above-defined objectives in the following ways:

- Article A, entitled "Cross-border data flows" is a horizontal clause covering all sectors of the economy and covering both personal data and non-personal data. In order to allow cross-border data flows between parties of trade agreements, it addresses the obstacles to such data flows by prohibiting their unjustified restrictions. It covers the following restrictions: the requirement to use computing facilities in a party's territory including by imposing certification requirements for such facilities; the forced localisation of data in a party's territory; the prohibition of storing and processing data in the other party's territory and other restrictions making cross-border transfers dependent on the use of computing facilities in the party's*

territory. It also includes a review clause on the list of prohibited restrictions and a requirement to assess its functioning after three years.

- Article B entitled "Protection of personal data and privacy" includes the following elements: an explicit recognition that high standards and rules on privacy and personal data protection are fundamental for the parties of trade agreements; a clause allowing parties to adopt and maintain safeguards for privacy and personal data protection, including on cross-border transfers of personal data, which applies to the whole agreement; a provision stipulating that the agreement does not affect the protection of personal data and privacy as guaranteed by the parties' laws; and a definition of personal data to avoid circumvention of the EU's *acquis*. This clause will therefore fully safeguard the EU's right to regulate in the field of personal data protection.
- Finally, there is a clarification that Articles A and B will not be subject to the Investment Court System. Moreover, an additional Article X paragraph 3 introduced in the current standard language on cooperation on regulatory issues with regard to digital trade clarifies that privacy and personal data issues will not be included in the regulatory dialogues that can be held under trade agreements.

This language has been drafted in the understanding that, as the protection of personal data is non-negotiable, future trade and investment agreements addressing these issues shall not deviate from these horizontal provisions.

We believe that these balanced provisions will allow the EU to tackle protectionist practices in third countries as regards cross-border data flows, while ensuring that trade and investment agreements cannot be used to challenge the existing and future EU *acquis* on the protection of personal data. In this way, the EU will be in a better position to take a lead in shaping global rules on digital trade.

Considering the importance of your input in the previous phases of consultation, we wanted to give you timely and full information of the conclusion of the internal work of the Commission on this matter. Whenever the Commission will consider tabling those provisions on cross-border data flows in the context of a specific trade negotiation it will consult the Council and inform the European Parliament in line with the procedures foreseen by the Treaty.

With our services, we remain at your disposal for any further clarification on the Commission position on cross-border data flows as well as trade and investment agreements.

Yours faithfully,




Frans Timmermans



Andrus Ansip



Jyrki Katainen



Cecilia Malmström



Věra Jourová



Maria Gabriel

 Electronically signed on 09/02/2018 09:25 (UTC+01) in accordance with article 4.2 (Validity of electronic documents) of Commission Decision 2004/563

Horizontal provisions for cross-border data flows
and for personal data protection
(in EU trade and investment agreements)

Article A

Cross-border data flows

1. The Parties are committed to ensuring cross-border data flows to facilitate trade in the digital economy. To that end, cross-border data flows shall not be restricted between the Parties by:

- (i) requiring the use of computing facilities or network elements in the Party's territory for processing, including by imposing the use of computing facilities or network elements that are certified or approved in the territory of a Party;
- (ii) requiring the localisation of data in the Party's territory for storage or processing;
- (iii) prohibiting storage or processing in the territory of the other Party;
- (iv) making the cross-border transfer of data contingent upon use of computing facilities or network elements in the Parties' territory or upon localisation requirements in the Parties' territory.

2. The Parties shall keep the implementation of this provision under review and assess its functioning in 3 years following the entry into force of this Agreement. A Party may at any time propose to the other Party to review the list of restrictions listed in the preceding paragraph. Such request shall be accorded sympathetic consideration.

Article B

Protection of personal data and privacy

1. Each Party recognises that the protection of personal data and privacy is a fundamental right and that high standards in this regard contribute to trust in the digital economy and to the development of trade.
2. Each Party may adopt and maintain the safeguards it deems appropriate to ensure the protection of personal data and privacy, including through the adoption and application of rules for the cross-border transfer of personal data. Nothing in this agreement shall affect the protection of personal data and privacy afforded by the Parties' respective safeguards.
3. For the purposes of this agreement, "personal data" means any information relating to an identified or identifiable natural person.
4. For greater certainty, the Investment Court System does not apply to the provisions in Articles A and B.

Article X

Cooperation on regulatory issues with regard to digital trade¹

1. *The parties shall maintain a dialogue on regulatory issues raised by digital trade, which shall inter alia address the following issues:*
 - *the recognition and facilitation of interoperable cross-border electronic trust and authentication services;*
 - *the treatment of direct marketing communications;*
 - *the protection of consumers in the ambit of electronic commerce; and*
 - *any other issue relevant for the development of digital trade.*
2. *Such cooperation shall focus on exchange of information on the Parties' respective legislation on these issues as well as on the implementation of such legislation.*
3. For greater certainty, this provision shall not apply to a Party's rules and safeguards for the protection of personal data and privacy, including on cross-border data transfers of personal data.

¹ Text in italics in paragraphs 1 and 2 denotes existing wording in trade agreements.