

Mrs Cecilia Malmström  
Commissioner  
European Commission  
Rue de la Loi 200  
B – 1049 Brussels

Ref.: BEUC-X-2017-152/MGO/GBE/rs

15 December 2017

**Subject: Data flows in trade**

Dear Commissioner Malmström,

On behalf of the European Consumer Organisation (BEUC) and European Digital Rights (EDRI), we write to urge you to protect EU citizens' fundamental rights from any future threat that might stem from trade negotiations as you prepare to take a decision on the crucial issue of data flows in trade.

**Data flows should not be included in trade agreements by default**

As we stated previously through the [Transatlantic Consumer Dialogue \(TACD\)](#), we believe European negotiators should, as a principle, leave the issue of data flows out of trade negotiations. Efforts to address anti-competitive or politically-motivated forced data localisation policies in trade deals risk being tactically exploited to undermine our data protection and privacy legal framework.

**If data flows are part of trade agreements, additional safeguards are imperative**

The EU's data protection and privacy rules are unique in the world and represent a fundamental pillar of our legal system that responds to the necessity of protecting and promoting EU citizens' fundamental rights in practice. These rules must never be undermined by a trade agreement.

The [independent study](#) commissioned by our organisations together with TACD and the Center for Digital Democracy (CDD) demonstrated that there is a tangible, serious risk that the EU data protection and privacy legal framework could be challenged by a trading partner in the future. The only way to prevent the risk of such challenges through trade dispute processes is to build an additional safeguard that shields our legal framework.

In this regard, we fully support the European Parliament's clear request<sup>1</sup> to incorporate into trade agreements "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 agreements themselves.

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<sup>1</sup> [European Parliament Digital Trade INI report](#), [European Parliament's recommendations to the Commission on the negotiations for the Trade in Services Agreement \(TiSA\)](#), [European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership \(TTIP\)](#)

The European Parliament's plea has been backed by independent academia, civil society and by the European Commission's Trade Sustainability Impact Assessment on the Trade in Services Agreement (TISA).<sup>2</sup>

### **Prohibit forced data localisation policies when they are unjustified**

We are aware there are concerns about the potential emergence of forced data localisation policies in third countries that might impede cross-border data flows. Firstly, it is important to adequately assess the validity of such concerns. Secondly, the inclusion in trade agreements of any provisions designed to address the potential risks of forced data localisation shall not become the default option. Such provisions must be narrowly designed to address significant problems that have been detected and to tackle forced localisation policies that are unjustified.

Lastly, it is important that trade agreements allow other countries to develop a high level of protection of personal data and privacy like the EU has done and continues doing.<sup>3</sup> The EU should thus continue encouraging trading partners to adhere to Convention 108 and its Protocol, which is an international treaty open to countries other than Council of Europe States<sup>4</sup>. Moreover, the EU should continue working on improving adequacy decisions as one of the means to enable data flows with third countries when their level of data protection is considered "essentially equivalent to that guaranteed within the EU"<sup>5</sup>.

### **The success of the EU's trade agenda is at stake**

Shielding EU citizens' fundamental rights from any future risk that might emerge through the EU's trade dealings is a necessary step to rebuild European citizens' trust in trade. Our organisations trust that you will respond to our plea and remain at your disposal to continue our constructive discussions.

Yours sincerely,

Monique Goyens  
Director General, BEUC

Joe McNamee  
Executive Director, EDRi

C/C: First Vice-President Frans Timmermans; Vice-President Andrus Ansip; Commissioner Vera Jourova and Commissioner Mariya Gabriel

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<sup>2</sup> Page 270, Trade Sustainability Impact Assessment on the Trade in Services Agreement.

<sup>3</sup> [EU legislative priorities 2018-2019](#)

<sup>4</sup> <https://www.coe.int/en/web/data-protection/convention108-and-protocol>

<sup>5</sup> [Judgement of 6 October 2015, C-362/14, Maximilian Schrems v Data Protection Commissioner](#), EU:C:2015:650, paragraph 73.