

TRADE AND PRIVACY: COMPLICATED BEDFELLOWS?

How to achieve data protection-proof
free trade agreements



WHY DOES IT MATTER FOR CITIZENS?

Modern digital markets are fuelled by personal data. In e-commerce, for example, a consumer's personal data needs to be processed to conclude an online sale. Citizens shouldn't need to care about territorial borders, although regulations on how to protect these data differ widely around the world. Modern trade agreements increasingly try to tackle these differences, in order to make trade easier. For European Union (EU) citizens, it is crucial that trade deals do not undermine fundamental rights to privacy and personal data protection, and ultimately, trust in the online economy.

WHAT IS THIS STUDY ABOUT?

Modern trade agreements increasingly include provisions which allow unrestricted transfers of data between countries, including personal data. The EU's trade negotiators claim that present and future trade deals will not undermine data protection and privacy rights. As organisations defending consumer interests and fundamental rights and freedoms in the digital environment, we want to be sure that personal data and privacy are not weakened by EU trade agreements. This study analyses how the WTO agreement on trade in services (GATS), the EU-Canada agreement (CETA), the future EU-US agreement (TTIP) and the planned Trade in Services Agreement (TiSA) deal with personal data and privacy.

MAIN CONCLUSIONS OF THE STUDY

- The current measures used by the EU to safeguard its data protection laws in trade agreements are not sufficient.
- It cannot be excluded that a trade partner will bring legal actions against the EU because of its rules on data protection. For example, the way the EU grants trade partners 'adequacy' status for personal data transfers could be accused of being obscure and inconsistent, and this would make them vulnerable to a legal challenge.

WHAT THE EU SHOULD DO TO BETTER PROTECT ITS CITIZENS' PERSONAL DATA AND PRIVACY IN TRADE AGREEMENTS

- Keep rules on privacy and data protection out of trade agreements, by means of a legally-binding exclusion clause. This is also recommended by the European Parliamentⁱ.
- Include an exception that allows any signatories to regulate cross-border data transfers. This should apply to any sector that deals with the processing and transfer of personal data, such as financial services, within a trade agreement.
- Insert a clause into trade agreements that prevents an EU measure from becoming automatically invalid or inapplicable.
- Prevent clauses in trade agreements which would oblige the EU to submit forthcoming rules on privacy and data protection to trade 'tests' in order to see if they are more burdensome than necessary.
- Treat all trade partners the same way when granting 'adequacy status' for data transfer purposes to prevent the EU from being vulnerable to potential challenge under trade rules.
- Require the European Data Protection Supervisor (EDPS) to issue an opinion on the texts of free trade agreements.

ⁱ European Parliament, Resolution of 3 February 2016 containing the European Parliament's recommendations to the Commission on the negotiations for the Trade in Services Agreement (TiSA) (2015/2233(INI) para. (c).iii