

Subject: Confirmation needed on privacy and data protection in the trade policy review.

Dear Commissioner Reynders,

I am writing to ask for your support to preserve data protection and privacy rights in trade agreements, in the context of the trade policy review. Indeed, we recently asked Executive Vice-President Dombrovskis to add a clear statement to the trade policy review that would confirm that the Commission is committed to stand firm on its position on cross-border data flows, data protection and privacy in trade agreements, as agreed in 2018¹.

This position enables the EU to include rules on data flows in trade agreements while fully preserving people's fundamental rights to data protection and privacy. BEUC supports this position as it is a balanced compromise between public and private interests. The Commission has repeatedly stated that this position is not up for negotiation². That is why we are very concerned that the legal wording has been amended in the EU-UK Trade and Cooperation Agreement (TCA).

A key element for BEUC to support the horizontal position has been deleted, namely the clause that stated that "nothing in this agreement shall affect the protection of personal data and privacy afforded by the Parties' respective safeguards". It was a strong exception which formed a shield to protect the EU from being challenged by a trading partner about the way it protects citizens' fundamental rights to privacy and data protection. In the EU-UK TCA, this exception has been replaced by a clause that seems to reaffirm the right to regulate, including on data transfers. However, contrary to the wording of the horizontal position, this would not prevent the EU from having to pass strict trade tests to justify its measures to safeguard the rights to privacy and personal data protection. As our research demonstrated³, the risk of losing a trade legal challenge under such conditions is tangible. You can find our full legal analysis in the annex attached to this letter.

We are worried about the precedent these changes are setting for other negotiations. For instance, our trading partners involved in the WTO e-commerce negotiations, that would include rules on data flows, are likely to interpret these changes as a possibility to water down the EU position and obtain concessions on data protection and privacy.

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¹ http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157130.pdf

² Since its endorsement. See https://ec.europa.eu/commission/presscorner/detail/en/MEX_18_546

³ https://www.ivir.nl/publicaties/download/trade_and_privacy.pdf

Commission officials, in both DG Trade and DG Justice, shared with us that the changes are intended to clarify the horizontal position and to secure this clause with the UK, taking into account the rules the UK already agreed with Japan on data flows. The EU-UK Trade and Cooperation Agreement is based on a unique relationship. UK law mirrors EU law, for the time being, contrary to other trading partners. We also understand that the wording agreed with the UK on data protection and privacy would therefore not necessarily be the basis for future agreements and that **the Commission remains bound by the horizontal position.**

However, to make this approach clear to all stakeholders and trading partners, **we strongly recommend to state very clearly in the trade policy review** that the Commission is committed to use the horizontal position, as agreed in 2018, in EU trade agreements. The trade policy review will define the new trade strategy of the EU for the years to come. It will take the form of a communication that will be adopted by the College on 17 February. Such a clear statement in this communication would be the guarantee that the EU will stand firm on its approach. It would clarify that data protection and privacy rights will not be up for negotiation, in line with CJEU case law⁴.

We thank you in advance for considering our concern and hope that the trade policy review will reflect the citizen-centric, ambitious 2018 horizontal position adopted by the Commission.

Yours sincerely,

Monique Goyens
Director General

⁴ Notably CJEU C-311/18, Data Protection Commissioner v Facebook Ireland Ltd, Maximilian Schrems.