

# Trade Sustainability Impact Assessment in Support of Negotiations on a Plurilateral Trade in Services Agreement (TiSA) : DIGITALEUROPE response to the draft interim technical report

*Brussels, January 2017*

## Introduction

Rapid advances in information and communications technology (ICT) have brought tremendous change to the services and manufacturing sectors, enabling the electronic delivery of many services to markets around the world and creating opportunities for connected global value chains, innovative services and new business models.

The dynamic European services sector has benefited greatly from these developments by leveraging its strengths in many high-value, knowledge-based services, including financial, insurance, business, professional, technical, information and entertainment services, that can be delivered efficiently and conveniently over global communication networks.

DIGITALEUROPE continues to fully support the negotiations for an ambitious Trade in Services Agreement (TiSA) and calls for its completion as soon as possible as it can serve as an important enabler to a wider WTO agreement. Building upon the success of the expansion of the Information and Technology Agreement (ITA), the WTO has a timely opportunity to address the next challenges for the ICT sector. The TiSA represents a tremendous opportunity for the WTO to advance on Electronic commerce and Digital trade for the benefit of every individual, business or Industry.

As the world's largest exporter of services and leader on Digital trade, the European Union (EU) has much to gain from a strong agreement that is focused on this vital sector of the economy. However, the EU also has much to lose – from the rising threat of “digital protectionism” – if the TiSA does not establish rules to enable the global digital economy.

DIGITALEUROPE would like to seize the opportunity of the publication of the draft interim technical report on TiSA to respond to some of the questions raised in the report, particularly on the need for digital trade rules touching upon the areas of e-commerce and telecommunications, the recognition of the principle of the free flow of data between TiSA parties and the respect at the same time of EU privacy standards, the challenges set by the EU carve-out on new services, the establishment of a commercial presence and the temporary movement of natural persons for business purposes.

## The Opportunity for Digital Trade

The EU data economy was valued at EUR 272 billion in 2015 with a year-on-year growth of 5.6% according to recent studies<sup>1</sup>. Cross-border data flows are also the fastest growing component of international trade. The easiest way to understand the potential for digital trade and how the services sector has changed is to look at the amazing growth in the number of Internet users over the last two decades. In 1995, the year that the General Agreement on Trade in Services (GATS) went into effect, there were only about 16 million Internet users worldwide. In 2016 there were over 3.4 billion Internet users around the world, creating an enormous potential market for European service providers. Clearly, a lot has changed since the GATS established the rules under which services trade is conducted today, and it is time to update those rules to address issues for the digital economy.

In their recent study 'Digital Globalisation'<sup>2</sup>, McKinsey reports that global flows have raised world GDP by roughly 10 percent over what would have resulted in a world in without any flows. In 2014 alone, they generated roughly EUR 7.3 trillion in value. Flows of goods and FDI account for about half of this impact, while data flows, the hallmark of 21st-century globalization, account for EUR 2.6 trillion.

According to UNCTAD data<sup>3</sup>, global B2C e-commerce is valued at about EUR 1,1 trillion. While considerably smaller than business-to-business (B2B) e-commerce, valued at more than EUR 14,1 trillion, this segment is growing faster, especially in developing countries. The number of Internet-connected devices has reached 12 billion while some studies expect around 75 billion of connected devices by 2020 and the total number of devices connected to the Internet in some way estimated around 500 billion<sup>4</sup>.

All businesses with global operations rely on ICT infrastructure and cross-border data flows to operate, so these issues are critical for the economy as a whole.

## The Need for Digital Trade Rules

The promotion and preservation of internet openness and cross-border information flows must be actioned as a matter of priority. Trade is no longer possible without the flow of data and digitally deliverable services. Today's world is entering in a new era of digital globalisation and innovation. The Internet is transforming how the world trades whilst simultaneously, boosting trade growth.

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<sup>1</sup> *European Data Market*, SMART 2013/0063 D8 — Second Interim Report, IDC, 9 June 2016,

<sup>2</sup> *Digital Globalization: the new era of global flows*, McKinsey, Executive Summary, March 2016, p.10, <http://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/digital-globalization-the-new-era-of-global-flows>

<sup>3</sup> *UNCTAD designs business-to-consumer electronic-commerce index*, UNCTAD 24 march 2015, <http://unctad.org/en/pages/PressRelease.aspx?OriginalVersionID=237>

<sup>4</sup> OECD Digital Economy Papers No.192, 'Machine-to-Machine Communications: connecting billions of devices', 30 January 2012, p.7, <http://www.oecd-ilibrary.org/docserver/download/5k9gsh2gp043-en.pdf?expires=1484579898&id=id&accname=guest&checksum=B8B82A15B48379AE1D81B9BAB30FD3F5>

DIGITALEUROPE encourages DG Trade to build on the e-commerce principles developed in the EU Digital Single Market (DSM) strategy and to scale them up at a global level: simplification and harmonisation of rules to incentivise consumers and businesses to engage in cross-border e-commerce.

Given the growing importance of the Internet as a delivery mechanism for trade in services, the right to move data related to covered services must be made explicit in the TiSA. Promoting this principle would provide greater clarity and certainty regarding coverage and would complement cross-border market access and national treatment commitments.

In addition, the e-commerce chapter should also include a provision that opposes measures that require companies to provide access to source code and/or encryption keys as a condition of doing business.

Further, the TiSA should prohibit to requiring the local storage or processing of data or the use of local facilities, hardware, or services. As highlighted by the Swedish National Board of Trade<sup>5</sup>, restrictions on data flows disrupt production, trade and business models. In an extremely competitive market, data barriers generate both direct (compliance costs, extra labour costs and costs associated with separating data) and indirect (more expensive and perhaps less effective local suppliers) costs for companies when they are prevented from accessing global cloud or other digital services.

Data localisation has proven to have also a negative impact on the GDP (ranging from -0,8% to 1,3%) of the country adopting such kind of measure, as estimated by European think tank ECIPE<sup>6</sup>.

This approach would not prevent TiSA parties from pursuing legitimate public policy objectives such as national security, cybersecurity, consumer protection and privacy policies - as stated in the Article 14 of the General Agreement on Trade in Services (GATS). The Industry is fully committed to ensure that data flows occur in respect with data protection rules.

However, as rightfully stressed in a recent study<sup>7</sup> written by two experts from the Melbourne Law School at the University of Melbourne, relying solely on these overarching exceptions, without a recognition of the principle of freedom of data in the first place, associated with some criterias of conditionality and proportionality, may have the effect of deferring international consensus on the appropriate regulation of data and data transfer, in the meantime leaving much to the discretion of WTO panels and the Appellate body.

If we fully agree that data protection rules shouldn't be negotiated in a trade agreement, it is also imperative that the EU, as the top exporter of digitally deliverable services, is at the negotiating table when discussing principles touching the digital economy, also to make sure that its red lines are respected.

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<sup>5</sup> *Protectionism in the 21st Century*, Swedish National Board of Trade, May 2016, p.47,

[http://www.kommers.se/Documents/dokumentarkiv/publikationer/2016/Protectionism%20in%20the%2021st%20Century\\_webb.pdf](http://www.kommers.se/Documents/dokumentarkiv/publikationer/2016/Protectionism%20in%20the%2021st%20Century_webb.pdf)

<sup>6</sup> *The costs of data localisation : friendly fire on economic recovery*, ECIPE, No3.2014, p.2, [http://www.ecipe.org/app/uploads/2014/12/OCC32014\\_1.pdf](http://www.ecipe.org/app/uploads/2014/12/OCC32014_1.pdf)

<sup>7</sup> *Don't fence me in: reforming trade and investment law to better facilitate cross-border data transfer*, Andrew D. Mitchell & Jarrod Hepburn, September 2016, p.10.

An ‘exporter’ perspective has to be included in the European Union’s strategy on digital. Unless new trade rules are developed, the threat of digital protectionism will continue to undermine the value of cross-border services commitments and the trade diplomacy promoted by the European Union around the globe.

We ask for this opinion to be reflected in section 3.4. ‘Fundamental Right to protection of personal data’ (currently pp. 80 & 81) of the European Commission draft interim technical report for the Trade Sustainability Impact Assessment in Support of Negotiations on a Plurilateral Trade in Services Agreement (TiSA) published in December 2016.

## **Market Access and National Treatment Commitments in a Broad Range of Services**

DIGITALEUROPE seeks full market access and national treatment commitments in computer and related services and telecommunication services, which provide the infrastructure that supports the global digital economy.

The issue of coverage for evolving IT services was discussed extensively in the “Friends of Computer Services” group during the Doha Round negotiations. Some very useful work came out of this group, including scheduling commitments at the two-digit level (CPC 84), as captured in the Understanding on Computer and Related Services and in the Plurilateral Request on Computer and Related Services, which were endorsed by many TiSA participants. The TiSA negotiators should build upon and update this work to ensure that evolving IT services are covered and that the commitments will not become obsolete due to technological advances.

Therefore, DIGITALEUROPE also strongly discourages to maintain the EU carve-out on new services. Future-proofing the scope of TiSA is essential for the rapidly evolving digital economy.

Including a future-proof approach will moreover make it more difficult for third countries, which might later join the TiSA commitments, to favor domestic services by discriminating against European services.

Indeed, over the past, we have seen at WTO level many contentious classification issues arising with respect to different forms of digital content that are frequently traded.

Finally, DIGITALEUROPE also supports the efforts to liberalise services in our customers’ sectors, including financial, insurance, retail and wholesale distribution, express delivery, information, advertising, media and entertainment, and energy and environmental services, among others. Many of these services can take advantage of communication networks to reach global markets. DIGITALEUROPE’s members will benefit from improved market access in all of these sectors as they provide ICT solutions to support the growth of their customers around the world.

## **Establishment of a commercial presence and the temporary movement of natural persons for business purposes**

Growth of European ICT companies is hampered by limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment. Those barriers exist among TISA negotiating parties.

Other obstacles that should be tackled in the scope of the negotiations are residency requirements for senior management or board of directors, difficulties in obtaining a license or authorization, treatment by state-owned enterprises.

Restrictions of temporary movement of natural persons for business purposes are also complicating trade in ICT services. European digital technology companies point at difficulties in obtaining work permits and visas, as well as requirement to hire or train local workers.

We insist also on the need for a discipline in trade agreements for a fair and equal access to public procurements for EU operators in partnering countries.

## **Conclusion**

DIGITALEUROPE asks the European Commission to take an active leadership and to ensure that the TISA will establish strong 21st century rules to promote the continued growth of the global digital and data economy - in line with the principles developed in the Digital Single Market strategy.

We look forward to continue working with the Commission to achieve this important goal.

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For more information please contact:

Diane Mievis, Senior Policy Manager on Global Economic Affairs at DIGITALEUROPE  
+32 2 609 53 23 or [diane.mievis@digitaleurope.org](mailto:diane.mievis@digitaleurope.org)

## ABOUT DIGITALEUROPE

DIGITALEUROPE represents the digital technology industry in Europe. Our members include some of the world's largest IT, telecoms and consumer electronics companies and national associations from every part of Europe. DIGITALEUROPE wants European businesses and citizens to benefit fully from digital technologies and for Europe to grow, attract and sustain the world's best digital technology companies.

DIGITALEUROPE ensures industry participation in the development and implementation of EU policies. DIGITALEUROPE's members include 62 corporate members and 37 national trade associations from across Europe. Our website provides further information on our recent news and activities: <http://www.digitaleurope.org>

## DIGITALEUROPE MEMBERSHIP

### Corporate Members

Airbus, Amazon Web Services, AMD, Apple, BlackBerry, Bose, Brother, CA Technologies, Canon, Cisco, Dell, Dropbox, Epson, Ericsson, Fujitsu, Google, Hewlett Packard Enterprise, Hitachi, HP Inc., Huawei, IBM, Ingram Micro, Intel, iQor, JVC Kenwood Group, Konica Minolta, Kyocera, Lenovo, Lexmark, LG Electronics, Loewe, Microsoft, Mitsubishi Electric Europe, Motorola Solutions, NEC, Nokia, Nvidia Ltd., Océ, Oki, Oracle, Panasonic Europe, Philips, Pioneer, Qualcomm, Ricoh Europe PLC, Samsung, SAP, SAS, Schneider Electric IT Corporation, Sharp Electronics, Siemens, Sony, Swatch Group, Technicolor, Texas Instruments, Toshiba, TP Vision, VMware, Western Digital, Xerox, Zebra Technologies, ZTE Corporation.

### National Trade Associations

**Austria:** IOÖ

**Belarus:** INFOPARK

**Belgium:** AGORIA

**Bulgaria:** BAIT

**Cyprus:** CITEA

**Denmark:** DI Digital, IT-BRANCHEN

**Estonia:** ITL

**Finland:** FFTI

**France:** AFNUM, Force Numérique, Tech in France

**Germany:** BITKOM, ZVEI

**Greece:** SEPE

**Hungary:** IVSZ

**Ireland:** ICT IRELAND

**Italy:** ANITEC

**Lithuania:** INFOBALT

**Netherlands:** Nederland ICT, FIAR

**Poland:** KIGEIT, PIIT, ZIPSEE

**Portugal:** AGEFE

**Romania:** ANIS, APDETIC

**Slovakia:** ITAS

**Slovenia:** GZS

**Spain:** AMETIC

**Sweden:** Foreningen Teknikföretagen i Sverige, IT&Telekomföretagen

**Switzerland:** SWICO

**Turkey:** Digital Turkey Platform, ECID

**Ukraine:** IT UKRAINE

**United Kingdom:** techUK