

Mr. Kiril Yurukov
Chair of TPC Services and Investments
Trade Policy Section
Permanent Representation of the
Republic of Bulgaria to the European Union
Square Marie-Louise 49
BE - 1000 Brussels

Brussels, 12 June 2018

Subject: Commission's Proposal on Cross-border data flows in Trade Agreements

Dear Mr. Yurukov,

The European Services Forum (ESF) has already contributed to the debate regarding the European Commission's proposal for horizontal provisions on cross-border data flows that was issued at the end of January 2018. Since then the European Commission has formally submitted its cross border data flows proposals to the TPC in May 2018 for inclusion in various FTAs. We would therefore like to revert to you with additional comments.

First, we would like to stress that ESF fully recognises that business operations, local and cross-border, have to be in full compliance with local data protection laws of data subjects. We also agree that trade agreements should not undermine the right and freedom of European citizens to have their personal data protected, and that therefore, as specified in the General Data Protection Regulation¹, the protection has to travel with the data.

ESF welcomes the long-awaited Commission proposal for "Horizontal provision for cross-border data flows and for personal data protection (*in EU trade and investment agreements*)" and supports the provisions proposed in Article A. The EU must indeed equip itself with a means in its trade agreements of preventing trading partners from maintaining and/or introducing barriers to cross-border data flows, such as local establishment requirement for businesses, localisation of data centres or computing facilities. Such barriers affect businesses operating in overseas markets and impact their competitiveness. However, given that the digital economy is in a rapidly changing environment with constant innovations, we urge that the text should ensure that the restrictions not be limited to the four listed localisation methods but also cover any other potential restrictions. We would therefore like to suggest introducing language to clarify that the list is not exhaustive (e.g. "such as" or "inter alia"). This would avoid the need to review the mechanism suggested in Article A, Paragraph 2.

ESF supports the view that the Commission's proposal should address the protection of personal data and privacy and establish the principle that respecting this fundamental right contributes to trust in the digital economy and the development of trade. We also agree that any Party should be able to adopt safeguards to ensure the respect of that right. However, as we have already expressed, we are concerned that the second sentence of Article B, paragraph 2 of the proposal may not achieve the purpose of promoting the GDPR objectives outside the EU. Indeed, we would like to note that one of the fundamental objectives of the GDPR, as stated in its Article 1 is to ensure that "*the free movement of personal data within the Union shall be neither restricted nor prohibited for reasons connected with the protection of natural persons with regard to the processing of personal data*". The EU has

¹ [REGULATION \(EU\) 2016/679 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 \(General Data Protection Regulation\)](#)

therefore enshrined in its own obligations that the strong protection of the fundamental right of data protection cannot be misused to restrict the movement of data. However, this second sentence of the Commission's proposal in Article B paragraph 2 would clearly allow a Party to do exactly that, i.e. to potentially misuse a data protection regulation for ultimately protectionist purposes and introduce localisation requirements or bypass any other commitment taken in Article A - or even a commitment in any other chapter or text of the agreement.

ESF would therefore strongly encourage the TPC to amend this sentence as it clearly creates a means for trading partners to maintain and/or introduce new trade barriers, which is the exact opposite of the objective of a trade agreement.

With this aim, we would recommend that paragraph 2 of Article B refers to the commitments undertaken in Article A (e.g. "... in full compliance with the commitments of Article A"). An alternative would be to add a sentence or a paragraph stating that any rules restricting cross-border data flows should not be arbitrary, should be transparent, non-discriminatory and based on public policy objectives justified by the purpose of protecting personal data. Thus, the right of the Parties to regulate in the field of privacy would be guaranteed.

Additionally, we would like to raise a complementary issue. The GDPR allows transfers of data if there are adequate safeguards in place². Unfortunately, GDPR-like mechanisms for international transfer of personal data only ensure personal data flows from the EU/EEA to a third country or international organisation. But *inbound* cross-border data flows from a third country to the EU/EEA are not guaranteed. For this reason, ESF calls upon the European Institutions to ensure that EU trade agreements include provisions that would enable data transfers both ways and provide legal certainty and predictability.

On another matter, we would like to note that the Commission states that the Investment Court System should not apply to the provisions in Article A and B. It is our understanding however that any violation of the obligations undertaken in a trade agreement would be subject to the state-to-state dispute resolution mechanism enshrined in the particular trade agreement. Any clarification on that matter would be welcomed.

Finally, we welcome paragraphs 1 and 2 of "Article X" on Cooperation on Regulatory Issues. We regret however that the Commission's proposal establishes that regulatory cooperation dialogues would not cover cross border data flows. We consider that this is a major missed opportunity for the EU to better explain GDPR. A forum for dialogue is non-binding and hence the EU should not hesitate to use such a mechanism to promote its approach to data protection.

ESF and its members remain at your disposal to discuss our recommendations, and wish to work constructively towards reflecting the digitalisation needs of our economies through trade policy and trade negotiations.

We would like to kindly ask you to forward this position to all members of the Trade Policy Committee Services and Investments that you are Chairing, should you find it appropriate.

Yours sincerely,



Noel Clehane
ESF Chairman

² Articles 45 and 46 of GDPR .

List of ESF Members supporting the Position here above

1. Accountancy Europe
2. Amfori
3. Architects' Council of Europe –ACE
4. British Telecom Plc
5. BDO
6. Bureau International des Producteurs et Intermédiaires d'Assurances – BIPAR
7. BUSINESSEUROPE
8. BUSINESSEUROPE WTO Working Group
9. Conseil des barreaux de la Communauté Européenne – CCBE
10. Danish Shipping
11. Deutsche Telekom AG
12. Deutsche Post DHL
13. DI – Confederation of Danish Industries
14. Digital Europe
15. EK - Confederation of Finnish Industries
16. EuroCommerce
17. European Banking Federation – FBE
18. European Community Shipowners' Associations – ECSA
19. European Express Association – EEA
20. European Federation of Engineering and Consultancy Associations – EFCA
21. European Public Telecom Network – ETNO
22. European Savings Banks Group – ESBG
23. European Satellite Operators Association - ESOA
24. European University Association - EUA
25. Fédération de l'Industrie Européenne de la Construction – FIEC
26. HSBC Group
27. IBM Europe, Middle East & Africa
28. Inmarsat
29. Insurance Europe
30. Irish Business and Employers' Confederation - IBEC
31. Law Society of England & Wales
32. Le Groupe La Poste
33. Microsoft Corporation Europe
34. Oracle Europe, Middle East & Africa
35. Orange
36. PostEurop
37. Prudential Plc.
38. SELDIA – European Direct Selling Association
39. Svenskt Näringsliv (Confederation of Swedish Enterprise)
40. Telenor Group
41. The CityUK
42. Thomson-Reuters
43. UPS
44. Zurich Financial Services