Mr. Phil Hogan
Member of the European Commission
Commissioner for Trade
European Commission
200, rue de la loi
BE – 1049 – Brussels

Brussels, 4 June 2020

Subject: Cross-border data flows in EU Trade Agreements

Dear Commissioner Hogan,

First of all, I would like to congratulate you for your personal active role in keeping international trade as open as possible in the midst of the corona virus pandemic. Many essential services are crucial to many sectors in fighting the virus outbreak, and in keeping many economic sectors running in these difficult circumstances.

I would like to draw your attention on the importance of a well- functioning digital services economy during this COVID19 crisis. Digital services have proven to be the backbone that supports the supply chain logistics for critical medical equipment and other goods, that helps track and disseminate information on the spread of the virus and support medical research efforts; that allows the remote connections of doctors with patients, of teachers with students, of businesses with personnel and clients, thanks to teleworking, etc.. Many of these connections are cross border, within the EU and outside the EU. The crisis has shown how crucial the digital transformation, services and infrastructure are for the economy now, let alone to its speedy recovery, which the Commission has also rightly identified along with the Green Deal as a priority.

The European Services Forum (ESF) has already contributed on many occasions to the European Commission's work on cross-border data flows in trade agreements. ESF actively supported two recent statements of the Global Services Coalition, in reaction to the ongoing plurilateral negotiations on digital trade. The first statement is a response to critics of the WTO E-commerce Moratorium on customs duties on electronic transmissions. The second statement, on cross-border data flows, details the benefits of free data and the major risks of data localisation policies and undue restrictions on cross border data flows.

Recently the European Commission presented its strategies on European Data and on Shaping Europe's Digital Future reiterating the EU's long-standing commitment to international data flows. We would therefore like to revert to you with additional comments on this specific issue as well as on the on- going plurilateral and bilateral negotiations of digital trade issues.

The increasing digital nature of international trade calls for trust-building and responsible approaches to the data economy. ESF fully recognises that business operations, local and cross-border, have to be in full compliance with local data protection laws and the rights of data subjects. We also agree

that trade agreements should include European values, as specified in the EU General Data Protection Regulation (GDPR)[1]. One of these values is the commitment to cross-border data flows with adequate protection.

The EU approach to personal data protection and transfer mechanisms inspired other jurisdictions around the world and still contributes to an alignment of privacy protection levels globally. The EU regulation provides for various data transfer tools for personal data transfers to a third country or international organisation. Adequacy decisions, Binding Corporate Rules (BCR) and Standard Contractual Clauses (SCC)[2] are the primary transfer mechanisms[3] used by the vast majority of European businesses. The regulation also allows for enforceable codes of conducts and certification mechanisms. Those tools enable personal data to move out of the EU in a protected way, in compliance with EU law. As a consequence, no matter where personal data is stored or processed, mechanisms offer robust safeguards that protect personal data of EU citizens even when transferred and processed outside the EU. However, as we have mentioned in the past, the EU's transfer mechanisms deal only with **data going *out*** of the EU. Ensuring that data can move out of third countries ***to* the EU** or elsewhere under the applicable data protection rules should equally become part of the EU's trade policy objectives. This is an issue that the European services industries urge the European institutions to address, as the use of advanced digital technologies based on data flows is crucial for their success and competitiveness.

Furthermore, ESF is concerned by the alarming increase of data localisation measures and undue restrictions on cross border data flows being implemented across the world[4]. ESF supports the call by the EU trade negotiators to ensure that digital trade chapters in trade agreements include clear provisions banning data localisation requirements, with few limited negotiated exceptions, and provided that personal data is protected. However, the current EU position can be misused by countries resorting to digital protectionism under the umbrella of "data protection". Therefore, it limits opportunities for EU businesses, which could be required to set up expensive local operations. Indeed, data localisation requirements in third countries may prevent European businesses from optimising their data flow strategies to use workforces, data centres and offices in the place of their choice, either in the EU or other regional hubs.

For this reason, ESF calls upon the European Institutions to ensure that trade agreements (bilateral, regional, and multilateral) include provisions that **enable personal data transfers in all directions** i.e. for data-transfers whether into or out of the EU or between third countries that are part of such agreements (e.g. in the case of the future WTO ecommerce agreement). Tying the development of data transfer mechanisms more explicitly to trade agreements by anchoring such obligations in the provisions themselves, and promoting compatibility between privacy regimes of trading partners, would ensure that third parties cannot use unjustified localisation policies or other measures to prevent personal data from flowing out of their jurisdiction into the EU.

Furthermore, data localisation measures and other data flows restrictions by third countries are often focused not solely on personal data. They may also include other kinds of data, like machine-to-machine generated data or commercial data, which are either non-personal in nature or anonymised.

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[1] *[REGULATION (EU) 2016/679 of 27 April 2016)](#)*

[2] *It is worth noting that SCCs and the EU-US adequacy mechanism (Privacy Shield) are currently subject of litigation before the EU Courts, creating legal uncertainty for European businesses. A negative ruling would likely create massive disruption to data flows globally.*

[3] *According to a 2019 IAPP-EY report, approximately 88% of companies transferring data out of the EU rely on SCCs. Source: IAPP-EY Annual Governance Report 2019, https://iapp.org/resources/article/iapp-ey-annual-governance-report-2019/*

[4] *See for instance OECD Trade and Cross-Border Data Flows: https://www.oecd-ilibrary.org/trade/trade-and-cross-border-data-flows_b2023a47-en*

These **non-personal data now form the bulk of international data flows**[5]. Such non-identifiable data are increasingly "lumped together" with personal data when it comes to the applicable legal regime and transfer mechanisms by the third country in question. They become collateral damage of localisation requirements initially motivated, or labelled as such, by personal data protection considerations. Such regulations are sometimes clearly protectionist, and cannot be accepted as personal data protection measures or cyber security measures. Data security depends on **how** data is stored and processed, **not where** it is stored and processed. The EU must act strongly against such a trend by ensuring clearly defined criteria of personal data protection are specified in potential safeguard measures, and by provisions in EU trade agreements banning all unjustified data localisation measures.

The EU is the largest exporter of digitally enabled services. By pursuing ambitious digital trade policies that protect European values, notably on data privacy and security, while rejecting protectionism and accelerating the growth of Europe's digital economy, it can reassert its leading role as a global, open market. Thus, we invite the EU to export the principles of its internal market, namely the "Free flow of non-personal data" regulation at global level, similarly to the personal data protection's principles. These principles should be promoted globally during i) the ongoing negotiations of the WTO Joint Initiative on E-commerce and ii) the ongoing FTA negotiations with the EU's trading partners such as the UK, Australia, New-Zealand, Chile, Indonesia, and iii) ongoing partnerships e.g. with the African Union, etc. The EU should therefore **strengthen the provisions for free flow of non-personal data in the digital trade chapter of FTAs**. By doing that, Europe will be able to promote a vision for digital trade that will better contribute to enhancing data-driven economic growth and job creation.

Finally, in light of the EU's data protection diplomacy, we believe it would be a missed opportunity not to use trade agreements as another channel to **promote regulatory cooperation between EU and third countries data protection authorities** to further interoperability of privacy regimes. Regulatory cooperation mechanism need not and should not impede the right to regulate or the independence of regulators: instead, they exist to facilitate the exchange of views on best regulatory practices.

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.

Finally, as the crisis prevented us to invite you to an ESF 20th Anniversary event as mentioned in my letter of 19 November 2019, I hope that we will be able to meet in person in the near future and even possibly, once the circumstances will allow, organise an event with you on the importance of the digital trade for the resilience of the EU economy. Should you be agreeable to this, the ESF Office will liaise with your cabinet in due course.

Yours sincerely,

Noel Clehane

Noel Clehane
ESF Chairman

Cc: Ms. Margrethe Vestager, Executive Vice-President for a Europe fit for the Digital Age – European Commission
       Mr. Thierry Breton, Commissioner for the Internal Market – European Commission
       Mr. Didier Reynders, Commissioner for Justice – European Commission

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[5] *See UNCTAD Information Economy Report of 2017 page xiii: "Worldwide e-commerce sales in 2015 reached $25.3 trillion, 90 per cent of which were in the form of business-to-business e-commerce and 10 per cent in the form of business-to-consumer (B2C) sales." https://unctad.org/en/PublicationsLibrary/ier2017_en.pdf*

List of ESF members supporting the above letter

1. Amfori
2. Apple
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. BSA The Software Alliance
10. Deutsche Post DHL
11. DI – Confederation of Danish Industries
12. Digital Europe
13. EK - Confederation of Finnish Industries
14. EuroCommerce
15. European Express Association – EEA
16. European Federation of Engineering and Consultancy Associations – EFCA
17. European Public Telecom Network – ETNO
18. European Satellite Operators Association – ESOA
19. European University Association – EUA
20. Fédération de l'Industrie Européenne de la Construction – FIEC
21. FratiniVergano European Lawyers
22. Google
23. HSBC Group
24. IBM Europe, Middle East & Africa
25. Institute of Chartered Accountants in England and Wales (ICAEW)
26. Inmarsat
27. Insurance Europe
28. Irish Business and Employers' Confederation - IBEC
29. Le Groupe La Poste
30. Microsoft Corporation Europe
31. Mouvement des entreprises de France – MEDEF
32. Oracle Europe, Middle East & Africa
33. Orange
34. PostEurop
35. Prudential Plc.
36. Standard Chartered Bank
37. Svenskt Näringsliv (Confederation of Swedish Enterprise)
38. TechUK
39. Telenor Group
40. TheCityUK
41. UPS
42. Vodafone
43. Zurich Insurance