

The Consumer Voice in Europe

ANALYSIS OF THE TiSA E-COMMERCE ANNEX & RECOMMENDATIONS TO THE NEGOTIATORS

TiSA leaks, September 2016



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Disclaimer

This analysis is based on a leaked text published on 19 September 2016 by Greenpeace. This leaked text is not the most recent version of the draft e-commerce annex of the TiSA negotiations and is not a definitive version of the annex. However, as the official draft consolidated version of this annex is not available to the public it is relevant to analyse the present leak. This analysis will explain the content of this leaked draft annex to the general public. It also contains BEUC's recommendations to better consider the consumer interest.

General comments

General comment #1: TiSA is not the place to discuss data protection rules

The leaked draft e-commerce annex shows that the European Union (EU) has not yet commented on data flows provisions. This is because the EU was waiting for a final agreement on the Privacy Shield, the EU-US adequacy agreement on data transfer, before addressing the issue of data flows in TiSA. The Privacy Shield was agreed in July 2016. In BEUC's opinion, the Privacy Shield fails to adequately **protect consumers' fundamental rights to privacy and data protection**¹, as established in the EU Charter of Fundamental Rights and the EU General Data Protection Regulation². **We strongly urge the EU to keep data flows out of TiSA.** It is impossible to address the issue of data flows when the data protection regimes in several TiSA countries and EU are starkly different and unbalanced. Without adequate oversight and transparency, any attempts to include data flows, and thus data protection³, in the TiSA negotiations could easily result in a significant weakening of consumer protections.

General comment#2: Where are the tangible benefits for consumers?

Again, negotiators have missed the opportunity to deliver tangible benefits to consumers. **TiSA is designed make it easier to trade services so it must not forget to make consumer life easier too.** Article 3 on online consumer protection would be the perfect framework for the TiSA parties to seize this opportunity. This must go beyond the protection from spam and fraudulent practices – as foreseen in the text.

Consumers do not necessarily know whether or not they will be protected by their domestic rights when buying services in the context of TiSA. They might not be able to benefit from easy access to a **dispute resolution mechanism** nor an effective **redress solution** if something goes wrong with providers outside the EU. The annex often refers to consumer trust. This trust is also a matter of equality online, **geo-blocking practices suffered by consumers when trying to purchase or access services abroad should be tackled in this annex.** We strongly recommend the TiSA parties to include this logic in this annex while there is still time. This is also a recommendation of the European Parliament⁴.

¹ See BEUC [press release](#) and [the Transatlantic Consumer Dialogue position on the Privacy Shield](#)

² The General data protection Regulation (GDPR) will be applicable as of May 2018, replacing the 1995 Data Protection Directive

³ It is almost impossible to differentiate in data flows personal data from non-personal data. Therefore, by including data flows in trade negotiations like TiSA, Parties per se will touch upon the issue of data protection.

⁴ 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

Detailed analysis by articles

Article 1. General provision

Paragraph 2: It is quite striking to see the degree of opposition to the Swiss proposal. This proposal intends to make sure that citizen's privacy and consumer protection will not be lowered through TiSA. It comes in complement with the general exceptions in the core text (ex. Article 14 GATS). This proposal should be widely supported as the general exceptions alone are not sufficient to the respective protect data protection rules of the parties⁵. It is very disappointing and revealing for the intention of TiSA parties that a provision to uphold consumer protection rights is so widely opposed.

Paragraph 7: The joint EU and Mauritius proposal is very interesting. It aims at ensuring **consumer trust** in digital trade through consumer protection provisions, protection of personal information, protection against spam and provisions on electronic authentication. Most of the other parties are considering it. They should support this proposal. The problem here is that this proposal is linked with other articles of this annex (3, 4, 5 and 9) but these articles are not ambitious enough to achieve the objective mentioned in the present paragraph. Consumer trust is indeed key but it needs real and effective tools to be earned (see our analysis of these specific articles below).

Article 2. Movement of information

This article contains concerning demands of certain Parties to prohibit data localisation requirements. Indeed, demands in the leaked text refer to notions such as "no party may prevent a service supplier of another party from transferring, accessing and processing information, including personal, within or outside the party's territory where such activity is carried out in connection with the conduct of the service supplier's business". The main problem of this article is that it completely ignores the fact that data flows cannot be separated from data protection rules. In the EU, the transfer and processing of personal data is subject to certain limitations. There is a risk that such a blanket prohibition would undermine EU data protection safeguards.

In the EU, data protection is a fundamental right enshrined in the Charter of Fundamental Rights of the European Union. As such, EU data protection rules must be safeguarded. As explained for article 1, the data protection safeguards in TiSA are currently not solid enough to guarantee the protection of personal data of EU citizens⁶, and of citizens of all TiSA parties.

Different proposals in this article aim at ensuring a free flow of data on the one hand and maintaining data protection rules on the other hand. The most efficient solution to legally secure data privacy would be for the EU to propose to follow the recommendations of the European Parliament⁷ by **incorporating a comprehensive, unambiguous, horizontal, self-standing and legally binding provisions based on GATS Article XIV which fully exempts the existing and future EU legal framework for the protection of personal data from the scope of this agreement, without any conditions that it must be consistent with other parts of the TiSA**. Such provisions should apply to all other TiSA annexes, not only to the present annex. Other TiSA participants could also follow this recommendation to safeguard their own data protection rules.

⁵ See study Trade and privacy, complicated bedfellows? Kristina Irion, Svetlana Yakovleva, and Marija Bartl, Ivir Institute July 2016 (http://www.beuc.eu/publications/beuc-x-2016-070_trade_and_privacy-complicated_bedfellows_study.pdf)

⁶ idem

⁷ 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. (b).v, (c) viii and x

Article 3: Online consumer trust

This article contains some positive provisions for consumers notably by focusing on their “well-being” and preventing “unfair practices”. Parties should build on that positive trend and be more ambitious regarding **consumer redress** which is **the great absent in this annex**. Indeed, companies from one TiSA party providing a service to a consumer of another party will not necessarily have to comply with the domestic law of this consumer. In the case of EU consumer law for instance, it is not just a question of place of residence but depends upon several factors such as law applicable to consumer contracts and whether non-EU providers target EU consumers⁸. Moreover, even in case EU law would be applicable to such situations, it will be more complicated for the consumer, in case a dispute arises with a TiSA party, to seek redress (choice of forum clauses might localise the dispute before the courts or even arbitrators of the home country of the service provider). In addition, when a consumer needs to be compensated by a service provider who has no asset in the EU, redress is unlikely. Therefore there is no easy access to dispute resolution mechanisms nor effective redress guaranteed today for cross border services. The positive provisions to prevent fraudulent and deceptive practices like spams are positive but not sufficient to ensure consumer rights in a plurilateral context. Therefore, provisions should be added in this annex and in the core text to define the applicable law for all services when directed to consumers.

Article 4: Personal information protection

According to the current leak, the EU has not yet considered nor proposed provisions on this issue as it was waiting for the Privacy Shield, the EU-US adequacy agreement on data transfer, to be approved first. The agreement was approved in July but, in our view, it fails to provide an adequate level of protection for EU citizens when their personal data is sent over the Atlantic⁹. The EU is also about to review its e-privacy directive. We urge the EU to ensure that the provisions in TiSA will be in line with the revised directive and with the General Data Protection Regulation, which will be applicable as of May 2018, not the other way around. Again, TiSA is not the place to address the issue of data protection rules.

Paragraph 2: The second sentence of this paragraph is highly problematic: “in the development of these personal information frameworks, each party should take into account principles and guidelines of relevant international bodies.” The risk here is to codify in a trade agreement international guidelines for the protection of personal data that would be less ambitious than domestic data protection rules and limit the ability of the Parties to adopt rules which go beyond those international principles. This paragraph basically limits the sovereignty of the EU to decide how it wants to protect consumers’ personal data.

Paragraph 3: It is of course logical in a plurilateral context to prevent any protectionist measure by committing not to apply domestic regulations in a discriminatory manner. However, measures related to localised data storage must not be used as a tactic to prevent legitimate protections for personal data¹⁰.

Paragraph 4: It is important to ensure transparency and public awareness about the applicable data protection rules for users and business. We welcome the inclusion of the obligations contained in this article but the information that shall be published should be expanded to also cover other aspects such as data subjects’ rights and general data

⁸ On the [website](#) of the Commission, it is mentioned that “Your consumer rights under EU rules normally also apply to purchases from non-EU online traders targeting consumers in the EU. However, please be aware that you may have more difficulties in claiming your rights against traders based outside the EU.” We believe that consumer dispute might increase in the future due to further facilitation of trade and intend to focus on the issue of consumer protection outside of the EU in cases related to TiSA.

⁹ See [BEUC press release on the Privacy Shield](#).

¹⁰ See the [joint BEUC and EDRI letter to EU Commissioner Malmström of 10 June 2016](#)

protection principles. Similar obligations shall apply in article 3 when it comes to information about consumer rights and redress options.

Article 5: Unsolicited commercial electronic messages (spam)

This article is very important for consumers as it could help them avoid spam. It takes into account some of the recommendations of the Transatlantic Consumer Dialogue on unfair commercial practices online¹¹. It is crucial to maintain the possibility for the parties to impose an **opt-in (consent) requirement in order to receive unsolicited commercial communications** (1,b). The joint proposal of Pakistan, Peru and the US to include the possibility of simply providing for the minimisation of spam must be opposed by the rest of the Parties. It would be an outrageous roll back on consumer rights, stripping them off any possible choice or control over the commercial communications that they receive.

In this article, Parties use a wording that is intended to be read as a number of principles. However, it can also be interpreted as being a prescriptive wording (for instance with the repeated use of the word 'shall'). As direct marketing technologies are rapidly evolving it is important to make it much clearer in this article that it has to be read at principles level, not restricting the ability of legislators to go beyond its provisions. To better take into account the consumer interest, we recommend to switch the order of point a) and b) in order to have first the consent and then the opt-out.

Article 6: Transfer or access to source code

BEUC is not working on this topic but other organisations made previous interesting analysis¹².

Article 7: Open networks, network access and the use of the internet

Some Parties are proposing provisions on net neutrality in this article. However, we consider that **a trade agreement is not the adequate instrument to regulate issues related to Internet Governance**, and in particular the crucially important issue of net neutrality. Net neutrality and Internet Governance-related matters are to be addressed via open, multi-stakeholder platforms to ensure a participatory process with civil society and public scrutiny. **Article 7 must therefore be deleted.**

If Parties really want to seek concrete benefit the e-commerce experience of consumers, they should replace it by another article in which they would commit to **adopt measures to reduce geo-blocking practices**. A global marketplace would enable consumers to compare prices and buy services from all TiSA countries. But too often, business practices such as rerouting to national websites, non-delivery to certain countries and price discrimination are major sources of consumer frustration. Geo-blocking in e-commerce is a crystal clear contradiction of the very notion of free trade.

Article 8: Location of computing facilities

In this article, some Parties intend to prevent others from using **data localisation** measures. Again, this is understandable to avoid protectionist measures but a balance needs to be found in order not to jeopardise such requirements that would not be protectionists but designed to protect the personal data of citizens.

The text reveals that the US is considering to expand the ban on data localisation requirements to financial services. Financial services data are excluded from the recently concluded Trans-Pacific Partnership (TPP). This was heavily opposed by some stakeholders.

¹¹ See [the Transatlantic Consumer Dialogue resolution on unfair commercial practices online](#).

¹² See for instance the [analysis of Burcu Kilic and Tamir Israel](#) as well as [Edri position on TiSA](#)

It seems that the US are using the opportunity of the TISA negotiations to respond to this industry pressures¹³. From a European perspective, **any cooperation on data flows and data protection and privacy issues involving the European Union should happen outside the context of trade negotiations.**

Article 9: Electronic authentication and electronic signatures

This article does not contain any brackets which indicate that Parties agree on its current content. This article makes sure that the validity of electronic signature will not be denied because of its digital nature. The provisions ensure that parties to an electronic transaction will be authorised to mutually decide of the appropriate electronic authentication method. The idea is to make sure that it will be possible to establish with the authorities of the Parties that these authentication methods comply with any legal requirements. The article still allows Parties to set criteria to be met by authentication methods for certain transactions.

Article 10: Customs duties

Elimination of tariffs is one of the main consumer benefits of free trade agreements in particular in view of reducing geo-blocking in e-commerce. Therefore is it positive to see that Parties agree in this article to remove custom duties for services provided by electronic transmissions. This article does not contain any brackets which indicate that Parties agree on its content.

Article 11: Electronically transmitted content

This article is proposed by the US. It aims at ensuring that content transmitted electronically cannot be less favourably treated if the content or its author comes from another party.

Article 12: International cooperation

This article aims at enhancing the cooperation between the Parties in order to boost e-commerce. It should be read in conjunction with the domestic regulation annex and the transparency annex. The current text could be improved to use this cooperation to benefit citizens as follow:

- Such cooperation shall include the development of alert systems and information sharing regarding illegal privacy practices;
- Reference should also be made to existing consumer protection international cooperation networks, such as ICPEN (International Consumer Protection and Enforcement Network) to which several TISA Parties belong.
- It would be important to develop cooperation between national enforcement authorities of the signatory members.

The draft article contains an alternative proposal of Colombia and Switzerland. It is linked to article 6, a of the transparency annex. If supported, it should be revised because it says that Parties should answer to queries presented through the contact points. It should be mentioned that it would be without prejudice to the provisions proposed by the EU in the transparency annex that **allows Parties to reply to this queries without being obliged to give access to draft laws and regulations.** This is important as it is a solid safeguard to **avoid any regulatory chill effect that could arise from abuses of the notice and comment system.** Indeed, the notice and comment system is notably used in the US and is problematic because it can paralysed the regulatory process by making it impossible for

¹³ See the [joint BEUC and EDRI letter to EU Commissioner Malmström of 10 June 2016](#)

regulators to introduce new regulations. NGOs in the US have warned about this problem¹⁴. In the EU, when a regulation is proposed a consultation is open to all interested persons (meaning anybody) too but the difference is that there is no obligation to reply to the comment.

Article 13: National security interest

This article is concerning as it contains a joint proposal of the US and Mauritius. This proposal is designed to protect the right of a Party to take any action it deems necessary to protect its security interests. It is concerning because it could lower citizen's data protection if it is used as a too far reaching **security clause**. Indeed, it could be used to circumvent data protection safeguards for national security reasons.

Article 14: Definitions

The definition of "**personal information**" is in line with the EU General Data Protection Regulation. However, to better protect consumer we recommend to detail it as follow: 'personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

For the rest of the definitions please refer to the previous analysis done by Burcu Kilic and Tamir Israel on the previous leaks published by WikiLeaks¹⁵.



For more information about BEUC
position on TiSA and trade:

- [Factsheet on TiSA](#)
- [Position Paper on TiSA](#)
- [Factsheet on consumers and modern trade](#)

¹⁴ See the analysis of Public Citizen: <https://www.citizen.org/documents/oira-delays-regulatory-reform-report.pdf>

¹⁵ See the [analysis of Burcu Kilic and Tamir Israel](#)



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