



Trade agreements and data flows

Joint hearing of the INTA and LIBE committees, European Parliament

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Dear Chairs and Honorable Members of the LIBE and INTA Committees, my independent institution, the EDPS, is not formally involved in the necessarily confidential negotiations on draft agreements which are underway.

However, we monitor developments closely and we stand ready to advise these committees and the other EU institutions on data protection related aspects of any policy, in line with our competences.

That's why I was pleased to accept the invitation of Mr Moraes and Mr Lange for inviting me to contribute to this important debate today.

I would like to share with you few main messages.

First, international data flows are a reality: a necessary motor for globalisation.

The EU has been until now a strong advocate of rules-based free trade; the European Parliament has a pivotal role in ensuring that it continues to do so.

So as a party to any agreement, the EU rightly requires these rules to be in full compliance with EU data protection law.

And the reform of this law yesterday passed by the Council as a general approach provides a once-in-a-generation opportunity to put international transfers on a clearer footing.

My second message is: fundamental rights and freedoms are non-negotiable.

As an independent data protection authority, I am very pleased to see the growing awareness among everyone in this room that data protection is an important concern when it comes to negotiating trade agreements such as the bilateral Transatlantic Trade and Investment Partnership (TTIP) or the multilateral Trade in Services Agreement (TISA).

So what about the state of play on privacy and data protection issues with regard to the current negotiations?

If we consider TTIP, and we build on the negotiating mandate adopted on 17 June 2013, initially held secret, then leaked and finally declassified on 9 October 2014, we can see that there are useful references to 'shared values' within the areas relevant for negotiations, such as human rights and fundamental freedoms, as well to the right of the EU and the Member States to adopt and enforce measures necessary to pursue legitimate public policy objectives.

However, we can also see that the text of mandate is not fully clear as to what extent the Commission has the mandate to negotiate provisions that may have an effect on data protection. One can argue that there is at least some room for negotiating in areas relevant to data protection. At the same time, there is no precise language in the mandate which would clearly state that the agreement would be without any prejudice to EU data protection law.

In particular, the mandate specifically covers *'Information and Communication Technologies'* and *'financial services'*, and aims to *'ensure the removal of existing NTBs'* (non-tariff barriers), and *'prevent the adoption of new NTBs'* (Art 25).

So, one can conclude that negotiators may explore solutions to impact indirectly on the EU legislators' powers to regulate the protection of personal data, including data transfers, or adopt any form of localisation rules (such as EU cloud initiatives).

Accordingly, concerns have been raised with regard to the risk that this may result in watering down existing data protection rules or in preventing the adoption of further data protection rules in the future ('the lock-in effect').

Against this background, Commission President Juncker has repeatedly made clear that fundamental rights, such as the rights to privacy and to the protection of personal data are in his view not negotiable.

And indeed, it seems there is no specific mandate to negotiate these rights.

Let me therefore very much welcome the President's statements.

At the same time, I'm available to cooperate proactively with the EU institutions, and to make our expertise available, so that we can more carefully double-check the extent to which certain provisions within TTIP or within TISA may be directly or indirectly relevant to influence the proper implementation of EU data protection rules.

For instance:

- the supervision of personal data processing activities by national data protection authorities, including on data flows to third countries and onward transfers;

- supervisory activities in the EU over mirror servers or law enforcement agencies' back doors;
- provisions on trade secrecy; and finally
- on the way in which the expected investor-to-state dispute settlement provisions in an agreement would work, its role in practice, and the legal effects of its decisions.

The LIBE Committee, in its Opinion on TTIP, already emphasised that there is a need for a comprehensive and unambiguous horizontal self-standing provision, based on Article XIV of the General Agreement on Trade in Services (GATS), that 'fully exempts' the existing and future EU legal framework for the protection of personal data from the scope of the agreement.

You have also raised the concern that Article XIV GATS in itself may not be sufficient to ensure that our data protection laws will not be prejudiced.

Finally, you specifically highlighted that, in order to ensure that the exemption clause is not circumvented, it should be made clear that there is no condition attached to it which would require consistency of the clause with other parts of the TTIP.

Your concerns confirm that even the precise wording of an innocent, apparently clear clause that excludes data protection from the scope of application of negotiating agreements is to be carefully double checked.

My third message to you is: the EU data protection framework facilitates data flows.

Current EU rules already provide for international transfers of personal data that might be necessary in a trade context, on condition that the country of destination is deemed to ensure an adequate level of protection.

As you know, the European Commission has adopted adequacy decisions for certain third countries, as well as sectoral adequacy decisions, such as the US Safe Harbor agreement.

For those cases where the third country does not ensure an adequate level of protection, or, in the case of business sectors which are outside of sectoral decisions, personal data may still be transferred lawfully if there are adequate safeguards.

Businesses are therefore able to devise Binding Corporate Rules governing transfers within multinationals or Standard Contractual Clauses, and indeed many have done so.

As well as the EDPS, the Article 29 Working Party - to which we contribute as full member, and to whom we are expected to provide soon the Secretariat - has been active in this field, developing these instruments, and also by deepening cooperation with APEC, the Asia-Pacific integration process, especially in the field of Binding Corporate Rules.

This is a demonstration of the commitment of European data protection authorities to facilitating international transfers and to promoting accountability.

My fourth message relates to the ongoing data protection reform and its approach of continuity and change

Globalisation has been one of the major drivers behind the reform of the EU's data protection framework, a process which achieved a long awaited milestone yesterday.

Chapter V of the General Data Protection Regulation is devoted to international transfers.

The consensus emerging is characterised by continuity and change.

'Continuity' because the main principles, such as the adequacy principle, have been maintained.

'Change' because many rules have to be clarified and where necessary simplified, though not at the expense of fundamental rights: Binding Corporate Rules, for example, will soon become an explicit part of data protection law.

Finally, 'change' also because the Reform will replace 28 national data protection laws with an EU Regulation setting down innovations like the one-stop-shop together with proximity.

The key now, as reform negotiations enter the final straight, is to ensure that these well-intentioned changes will work in practice, with a minimum of unnecessary red tape.

In my view, the EU data protection reform should continue to be the centre of gravity for all substantive data protection provisions: specific pieces of legislation including bilateral agreements should be fully consistent with our stable, coherent, transparent and consistent policies.

To what extent is adequacy consistent with international norms?

A brief word, if I may, about the adequacy principle.

An increasing number of third countries are preparing to update their national laws and they are looking to the EU for inspiration. We have a chance to be a model, particularly for emerging economies in South America, Africa and Asia.

What we require - the 'adequacy' system in the country of the recipients of the data - does not require 'equivalence': in other words, the EU is not requiring the existence of identical data protection safeguards in the country of destination.

The concept of adequacy indeed reflects respect for third countries' cultural and legal traditions, while ensuring an acceptable level of respect for the protection of the individuals as guaranteed by EU law, even when their personal data leaves EU territory.

These are long established norms, and even if Article XIV GATS have never been tested in the data protection field, I see the adequacy system in line with the premises of this Article.

As a rule of thumb, therefore, personal data protection rights should continue to be left out of any trade negotiations, and only be referred to by way of exemption, as set out in Article XIV.

This exemption must be clear and leave no room whatsoever for ambiguity.

A few final words on the EDPS commitment to be more proactive

I will continue to be available for consultation by Honourable Members of these Committees, and by the Commission and Council.

I want to help the EU forge stronger global partnerships, and not only with the US: partnerships which recognise the *ethical* imperative, as well as the legal obligation flowing from the Charter, of safeguarding the dignity of individuals in the face of globalisation and mass data collection.

That has been one of my three main pledges since my appointment as EDPS by the Parliament and the Council.

Such international partnerships of course include trade deals.

So I will continue to be proactive and constructive.

Further down the line, I may also consider publishing a more in-depth opinion on the matter, as EDPS did twice with the ACTA Agreement.

CONCLUSION

Some of you may recall that I called the digital chapter in ACTA 'a masterpiece of ambiguity' during the debates on this back in 2012.

That agreement was ultimately rejected by this House.

Similarly, the LIBE Committee in its comprehensive 2014 inquiry into 'Electronic Mass Surveillance of EU Citizens', sounded a clarion call to the Commission and Member States to be much more vigilant in addressing vulnerabilities in existing means for international transfer of personal information, notably Safe Harbour.

It is by no means inevitable that the current trade agreements on the table will follow the course of ACTA. Your scrutiny will be essential to ensuring that the interests of the European citizen are protected and upheld, and I remain available for any further contribution, and of course to answer any questions you might have.