

# DIGITALEUROPE contribution to the European Parliament's Working Document on 'A Digital Trade Strategy for the European Union'

Brussels, 19 September 2017

## KEY MESSAGES

DIGITALEUROPE congratulates the Rapporteur - Member of the European Parliament Marietje Schaake - on the main principles presented in her Working Document 'A Digital Trade Strategy for the European Union'.

While our continent is going through a digital transformation, the European Institutions made digital a top priority for Europe. A complementary strategy to the Digital Single Market on the global front is now critically needed.

As the leader in trade in services, the European Union must take leadership and set up the digital 'standard' in its free trade agreements (FTAs) before others do. America is negotiating a new NAFTA deal and the Asia-Pacific (minus the US) is expected to move along with the TPP. Digital trade is on the agenda of both trade agreements, while the EU is dragging feet, despite being in negotiations for trade deals with those same countries, bilaterally or plurilaterally. Discussions at the World Trade Organisation (WTO) on the matter have started to follow up on the success of the Information Technology Agreement (ITA), an historic tariff-busting agreement which has significantly contributed to the digital transformation of our society and our industries. An EU digital trade strategy should build on that, and strongly stress that as a matter of priority the EU will safeguard the correct implementation of the trade commitments in the area of ICT of its trading partners – for instance, an appropriate implementation of the ITA agreement. The EU needs to urgently adopt a position on a digital trade strategy that promotes the growth of digital technology goods and services, cloud computing, telecoms and e-commerce, including ensuring that the digital ecosystem and the data flows through it remain open to innovation, new services and commerce globally.

The EU has to build support for a digital global economy and remove unjustified barriers. Protectionism is on the rise, affecting European Industry. European exporters reported a 10% increase in the number of trade barriers they encountered in 2016 alone<sup>1</sup>. G20 countries are maintaining the highest number of trade barriers with Russia, Brazil, China and India on top of the list.

DIGITALEUROPE would like to present some views to help the European Institutions achieve these objectives at the WTO, in bilateral and plurilateral FTAs, and at the G7 and G20 level.

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<sup>1</sup> European Commission, DG Trade, Report on Trade and Investment Barriers 2016.

## VIEWS

### 1. In 2017 no data, no trade

We are of the opinion that trade agreements are not the appropriate vehicle to discuss specific data privacy and data protection rules, but trade agreements are the right tool to discuss trade in services and the exchange of data. The European Union (EU) committed, in its 'Trade for all' strategy (October 2015), to leverage the principles of the European Digital Single Market at an international level. Eighteen months later, the Commission has only partially delivered on its engagement and published a new horizontal digital trade chapter in the framework of the EU-Mexico FTA. A provision on data flows is still missing, temporarily replaced by a placeholder. This is quite unfortunate as data flows are at the core of digital trade. Without the transfers of data, there's simply no trade in a digital world.

The European Digital Industry is fully committed to the protection of personal data. However, by inserting a full carve-out without any conditions as proposed in the EP TiSA resolution and the original DG Trade "concept paper", we would offer our trading partners an open mandate to introduce protectionist measures and online censorship by abusing the privacy exception. Europe would be left with no legal remedy and legitimate data protection will be misused to engage in data protectionism. Equally important to transferring data outside of Europe is the possibility of transferring data to Europe, otherwise companies will be forced to move their operations. Many countries around the world are currently adopting new privacy rules, which gives the European Commission opportunities to promote similar transfer mechanisms to the rules allowing for international data transfers in the new European General Data Protection Regulation<sup>2</sup>.

We have recently seen 15 EU Member States encouraging Vice-President Timmermans, who heads the Commission Project team working on a concept note for data flows in trade agreements 'to urgently present a concrete and ambitious text proposal for an EU position on data flows'. The current conditions of the GATS Article 14 bis offer an appropriate basis to find a right balance between legitimate data privacy rules and the possibility for businesses to transfer data.

Whatever barrier to the Internet exists in Europe or outside, it has a huge impact on the whole international value chain as everything is connected. Trade has become incredibly sophisticated with technology, and so has the many protectionist digital measures adopted around the world. Digital protectionism has risen up the last five years as the biggest threat to global trade rules agreed on in the past, as the interpretation of those rules is subject to where we put the threshold between a legitimate exception like privacy, consumer protection or national security, put in place sometimes for intrusive surveillance or online censorship.

The EU should continue to reaffirm its opposition to digital protectionism and elevate the elimination of forced localisation as a European and global priority.

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<sup>2</sup> See DIGITALEUROPE letter addressed to Vera Jourová, Commissioner for Justice, Consumers and Gender Equality, on 'Exchanging and protecting personal data in a globalised world'  
[http://www.digitaleurope.org/DesktopModules/Bring2mind/DMX/Download.aspx?Command=Core\\_Download&EntryId=2424&language=en-US&PortalId=0&TabId=353](http://www.digitaleurope.org/DesktopModules/Bring2mind/DMX/Download.aspx?Command=Core_Download&EntryId=2424&language=en-US&PortalId=0&TabId=353)

There is an economic rationale to ensure data can be transferred: 2014 data showed that excluding intra-EU trade, EU Member States exported 506.6 billion EUR and imported 372 billion EUR in digitally-enabled services, resulting in a surplus of approximately 134 billion EUR for these services. Digitally-enabled services trade represented 56% of all services exports to non-EU countries and 52% of all services imports from non-EU countries<sup>3</sup>.

## 2. Online Platforms and Services, robust intermediary liability protection rules

In its 'Trade for all' Strategy, the Commission committed to use FTAs to set good rules for e-commerce. Online platforms have been playing an increasingly central role in our lives and have proven to be beneficial for consumers, businesses and the economy, as they drive innovation, create new markets, and increase consumer choice whilst lowering costs and prices. Their activities contributed to around EUR430bn to the European Union economy in 2014. They proved to be extremely valuable when it comes to creating new markets for EU SMEs and startups, often with reduced entry barriers and costs of transactions, therefore allowing them to grow more quickly. There shouldn't be a single definition of platforms as all platforms are different, depending on the specific market they compete in. However, we encourage data and platform interoperability. Businesses and consumers must be able to switch platforms. Platforms must compete on the merits of their service to businesses and consumers<sup>5</sup>.

A digital trade chapter should include intermediary liability protections for the digital economy recognised in EU legislation long ago and implemented already in the EU-South Korea FTA (KOREU). Due to the extraordinary volume of communications processed by online services, intermediaries should have no general obligation to monitor their users or to be made liable for hosting information or activity they were not aware of. Where possible, international coordination and harmonisation of notice-and-takedown procedures should be promoted to limit legal uncertainty, without prejudice to the core principles of intermediary liability protection. We request a provision extending long-established European protections of intermediaries in FTAs which would also strengthen freedom of speech and access to information globally.

## 3. Market access and regulatory cooperation

Trade agreements are an opportunity to look at innovative cooperation in partnering countries, notably in the areas of Internet of Things, Artificial Intelligence, eHealth, talents, and digital infrastructure.

DIGITALEUROPE fully supports the affirmation of the Rapporteur that for any future digital trade strategy, we need to create an 'enabling environment' for its development, where there's no space for local content requirements, barriers to investment, or slow and unpredictable processes. We request a provision that bans forced localisation or local content requirements for unjustified purposes.

<sup>3</sup> Jessica R. Nicholson, 'ICT enabled services trade in the European Union', ESA Issue Brief #03-16, US Department of Commerce, Economics and Statistics Administration, August, 31 2016.

<sup>4</sup> European Commission, 'A Digital Single Market Strategy for Europe', May 2015 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0192&from=EN>

<sup>5</sup> For more information, please see 'DIGITALEUROPE's response to the public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy', 18 December 2015, [http://www.digitaleurope.org/DesktopModules/Bring2mind/DMX/Download.aspx?Command=Core\\_Download&EntryId=1085&language=en-US&PortalId=0&TabId=353](http://www.digitaleurope.org/DesktopModules/Bring2mind/DMX/Download.aspx?Command=Core_Download&EntryId=1085&language=en-US&PortalId=0&TabId=353)

Furthermore, we strongly advocate a clear statement in trade agreements that when Governments regulate, any technical requirements and specifications should be based on global standards and the development hereof should be based on the principles recognised by the WTO in the field of standardisation and fully endorsed by the EU and the Digital Single Market, namely coherence, transparency, openness, consensus, voluntary application, independence from special interests and efficiency ('the founding principles').

DIGITALEUROPE encourages the European Institutions to address regulatory challenges to ICT trade in trade agreements through an « ICT annex » in a regulatory/technical barriers to trade chapter. In this regard, we invite the European Commission and European Member States to refer to the DIGITALEUROPE and ITI paper<sup>6</sup> issued in February 2015 ICT. This paper proposes specific technical provisions to be included in the ICT annex such as : regulatory transparency, global rules on technical regulations, alignment on common principles for technology standards, acceptance of Supplier's Declaration of Conformity (SDoC), access in commercial markets for products with encryption, and cooperation in several innovative areas (e-accessibility, e-labelling, e-health and m-health, internet of things).

The outcomes of the ICT Dialogues between DG Connect and its counterparts should be promoted and included in our bilateral deals.

Finally, we insist on the need for a discipline in a digital trade chapter for a fair and equal access to public procurements for EU companies in partnering countries.

#### 4. Cooperation on cybersecurity, protection of source code and promotion of commercial encryption

While technology has offered enormous opportunities to our global societies, it has also created new challenges and vulnerabilities. Industry and modern economies rely on their ICT infrastructure and connected value chains for their daily operations and economic growth. Recent worldwide cyberattacks such as 'Wannacry' and 'NotPetya' reported in every headline, need an international cooperation and global rules to ensure the security of the cyberspace and a safe and reliable Internet for businesses and consumers<sup>7</sup>.

The universal use of ICT technologies has led to the ubiquitous presence of cryptography in ICT products and applications available today. In addition, access to leading-edge technologies that use encryption is one of the best defences against cybersecurity attacks and online crime, fraud and theft. In short, a global and cooperative approach to cryptography policy will create an environment in which consumers and businesses have trust in the digital economy, which is fundamental to increased Internet and e-commerce use.

Any cybersecurity requirement should avoid forced transfer or review of intellectual property (IP), such as source code; for commercial/civilian sale and use of ICT solutions such obligations should be avoided at all. In fact, disclosing such IP decreases security because source code access makes it easier to compromise a program.

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<sup>6</sup> See 'ICT INDUSTRY RECOMMENDATIONS FOR REGULATORY COOPERATION IN THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP', DIGITALEUROPE – ITI, 2015.

[http://www.digitaleurope.org/DesktopModules/Bring2mind/DMX/Download.aspx?Command=Core\\_Download&EntryId=901&language=en-US&PortalId=0&TabId=353](http://www.digitaleurope.org/DesktopModules/Bring2mind/DMX/Download.aspx?Command=Core_Download&EntryId=901&language=en-US&PortalId=0&TabId=353)

<sup>7</sup> For more, see Global Information and Communications Technology (ICT) Industry Statement 'Recommended Government Approaches to Cybersecurity', June 2012 <https://www.itic.org/dotAsset/69ec38f0-e17b-44df-9ac3-6fa9052c743c.pdf>

Disclosing source code increases vulnerability of the access to them and can be very dangerous as it may fall in hands of undesirable elements in some specific situations, defeating the very specific purpose.

Finally, we request a provision which specifies that the import, use and sale of products containing cryptographic capabilities should be largely unrestricted. Any restriction, if justified, should be transparent, reasonable, respect intellectual property rights, not require or favour a specific technology and be applied in a non-discriminatory manner<sup>8</sup>.

## 5. Telecoms as an enabler

In addition to a new horizontal digital trade chapter, we are also supporting an 'upgraded' telecoms chapter which would reflect that telecoms services are an enabler for the uptake of the digital economy. Mirroring the provisions of the GATS on the access and use of local networks, removal or reduction of the burdens for obtaining licences and red tapes, prohibition of foreign equity caps, prohibition of obligation to create joint ventures to operate on a local market and guarantees of confidentiality, and access to the dispute settlement system in both respective territories. There should also be an obligation of non-discrimination and transparency for spectrum assignment and allocation. While pursuing the objective of open internet for consumers, it is of outmost importance that Net Neutrality rules do not prohibit the development of 5G / Internet of Things and Industrial Internet by interfering with specialized services and Quality of Service for industrial applications such as autonomous driving, remote surgery and machine type communication broadly.

Finally, a modern digital trade approach must not favor old technologies over new ones. Including a future-proof dimension will prevent third countries to favor domestic services by discriminating against European services.

## Conclusion

DIGITALEUROPE agrees and supports the three overarching principles presented by the Rapporteur in her working document: an EU digital trade strategy should ensure a fair market access for EU businesses outside, create tangible benefits for consumers around the globe, and achieve global norms while at the same safeguarding EU fundamental rights. While our historic trade partners are now engaging in discussions on digital trade in various regional trade agreements, there's an urgent need for the EU to leverage the principles of the Digital Single Market and to deliver on an ambitious digital trade strategy, including provisions on data flows and against forced localisation and a chapter on telecoms services, to set the global standard. Rules in FTAs should serve the purpose of laying the groundwork for WTO rules on these commitments that will be subject to the very valuable enforcement mechanisms the WTO provides. The EU should be at the forefront of working together with WTO members to craft rules that will be of benefit to the whole trading system and of facilitating their eventual adoption by the entire WTO. The EU should stand ready for the 11<sup>th</sup> WTO Ministerial Conference in Buenos Aires later this year to start the discussions on what is probably the greatest trade opportunity and the greatest trade challenge of this decade.

DIGITALEUROPE commends the European Parliament for its work on this initiative and remains committed to working with its Members to find solutions to these challenging, but nonetheless important questions.

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<sup>8</sup> For more information, please see 'DIGITALEUROPE Views on Encryption', 15 July 2016, [http://www.digitaleurope.org/DesktopModules/Bring2mind/DMX/Download.aspx?Command=Core\\_Download&EntryId=2241&language=en-US&PortalId=0&TabId=353](http://www.digitaleurope.org/DesktopModules/Bring2mind/DMX/Download.aspx?Command=Core_Download&EntryId=2241&language=en-US&PortalId=0&TabId=353)

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## 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 in total 25,000 ICT Companies in Europe represented by 61 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

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**Austria:** IOÖ

**Belarus:** INFOPARK

**Belgium:** AGORIA

**Bulgaria:** BAIT

**Cyprus:** CITEA

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

**Estonia:** ITL

**Finland:** TIF

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

**Germany:** BITKOM, ZVEI

**Greece:** SEPE

**Hungary:** IVSZ

**Ireland:** TECHNOLOGY 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