

SUMMARY

The European Union (EU) has been involved in negotiating two major trade agreements with its main partners since 2013:

- ◆ **The Trade in Services Agreement, or TiSA**, which originated in March 2013 by the USA and Australia following failed talks during the WTO Doha Development Round. The agreement involves 23 parties (50 states), mostly members of the Organisation for Economic Co-operation and Development (OECD), with the aim of facilitating economic integration for the services industry. This planned agreement is being developed with the goal of becoming multilateral, and even replacing the **General Agreement on Trade in Services or GATS dating back to 1994, which lays the international framework that applies in principle to all service activities¹** as governed by WTO regulation;
- ◆ **The Transatlantic Trade and Investment Partnership (TTIP)**, a planned bilateral agreement between the European Union (EU) and the US, which was also initiated in 2013. It involves a broader scope as it aims to “provide for a progressive and reciprocal liberalisation of trade and services” between the EU and the USA.

The two planned agreements endeavour to set the international framework for digital trade. However, assessing the importance of digital trade remains difficult, as it involves both a business sector (production of digital goods and services) and a **method for distributing services and goods** (online distribution or e-commerce). **Furthermore, provisions on the digital arena can have an impact across all sectors** as they govern access to digital services as well as companies' scope for processing data for their business operations. **The digital arena is multifaceted, so any draft agreements do not have a “digital section” as such, but the different issues raised can be seen across the various sections.**

The planned TiSA has the greatest implications for the digital economy, given the vast range of provisions laid out in the draft agreement, and also the possibility that it will eventually become a multilateral deal within the WTO framework.

However, the fact remains that these **two planned agreements are set against the backdrop of a fast-growing digital economy and an exponential increase in data flows: international data flows increased 45-fold over the decade from 2005 to 2014. Europe-US data flows are particularly vast, and the taskforce has estimated that they equate to 9.5% of digital data flows within Europe.**

¹ Apart from services “supplied in the exercise of governmental authority” i.e. services that are supplied neither on a commercial basis, nor in competition with one or more service suppliers e.g. activities that are part of a social security system, healthcare services or education, which are not supplied at commercial conditions.

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In addition to actual data flow volumes, the composition of these data movements is a key factor in assessing the challenges and implications of the trade agreements currently being negotiated. In this respect, the taskforce thinks that **60% of world digital flows consist of personal data.** This figure is particularly significant as **there is a real difference in approach between the EU and the US. The US believes that personal data protection measures are trade barriers that should be removed, by recognising the concept of free data flow.** The US attributes this aim of having the concept included in the TiCS and the TIPP (like the Trans-Pacific Partnership or TPP) to its belief that there are “several barriers” to digital trade. **However, the taskforce’s research highlights that there are few real barriers, apart from regulation on personal data protection.** The movement of personal data is admittedly strictly legislated by European regulation, but remains free as shown by the existing derogation measures and the *Privacy Shield* data protection framework².

The commercial nature of the two planned agreements means that the implications of current and future data use (whether personal or not) must be considered, as big data is “the new black gold”³.

In view of the size of the European Union market (more than 500 million inhabitants) and its standard of living, the **EU must analyse the economic benefits it could reap from these agreements by giving up its leeway to promote local value creation, whether totally or partially, that currently results from the analysis and processing of European data.**

From a macro-economic standpoint, **research carried out in both Europe and the US cannot reliably assess the potential positive impact of free data flow or the presumed negative effects of restricting data processing location to Europe only.**

Against this backdrop and in view of the major challenges and implications of data use questions, **the taskforce analysed the technical and legal feasibility of physical data storage and processing location in Europe. It concluded that:**

- ◆ **The EU has sufficient storage capacity** in its territory to host and process current personal data flows from European citizens for the purpose of their processing in the US;
- ◆ **Without changing the law, data storage location on EU territory would be legally possible, particularly for personal data.**

As regards the impact of this data storage location, the taskforce concluded that:

- ◆ **Among suppliers of hosting or storage services, data location would have an impact primarily on public cloud service suppliers (mainly American);**
- ◆ **Companies that use these digital services are mostly opposed to data storage location** as they believe it raises technical⁴ and financial issues. While technical constraints and limitations may be an obstacle, the taskforce does not think that this type of measure would lead to a significant increase in the financial expense for companies that use digital services;
- ◆ **Digital start-ups** are in favour of free data flow on principle, but **do not feel under threat by a potential relocation of some data processing;**

² Aimed at replacing the *Safe Harbor* system, which ensured easier transfer of European personal data to US companies.

³ In 2012, the Boston Consulting Group valued personal data collected in Europe in 2011 at €315bn, and estimated that use of these data could create a further €1,000bn in value added each year out to 2020.

⁴ Inability to transfer and hence use data from different countries within the same group; loss of economies of scale related to the use of consolidated IT solutions across all subsidiaries of the same group.

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- ◆ French and European hosting companies see data location as an opportunity to stand out from the existing, primarily US, service offering;
- ◆ While the **installation of new data centres** means substantial direct, albeit one-off, investment, **the potential benefits look limited, particularly in terms of job creation**. Furthermore, the main digital players, and in particular American parties, anticipated and took steps to prepare for the CJEU's decision that the *Safe Harbor* decision was invalid, ramping up their investment to roll out a personal data storage service in European territory.

The potential benefits of data storage and processing location are still difficult to assess at this stage, but the **consequences of potential legal recognition of the free data flow principle in future agreements must be assessed on one hand against the backdrop of the power balance between the EU and the US in the current negotiations, and on the other hand in view of the need for the EU to be able to regulate its own data flows.**

The power balance between the EU and the US looks unfavourable to the EU which, unlike its US counterpart, is embarking on negotiations without having a prior digital strategy. Over the past 15 or so years, the US has developed a real digital policy, based on free data flow, which led to the conclusion of the Trans-Pacific Partnership on 4 February 2016 (TPP)⁵, whereby: (i) each Party shall allow the cross-border transfer of information by electronic means, "including personal information"; (ii) no Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory⁶. Conversely, the **EU does not have a comprehensive strategy based on a digital common market** at this stage. The **European Commission only launched the plan to build a digital single market in June 2015, which is likely to cover the same areas as those under discussion in trade negotiations**⁷. At this stage, **digital issues have only been discussed as an incidental matter during the latest bilateral trade agreements negotiated by the European Union. This lack of a European-wide strategy is also reflected in the European Council's mandates to the Commission, where digital issues are not mentioned**⁸.

Moreover, the USA has a substantial competitive advantage in this sector, that the enshrinement of the free data flow principle would automatically strengthen. The EU is admittedly the leading services exporter worldwide, but digital services trade is very broadly dominated by the **US, which exports 1.6 times more digitally intensive services towards the EU than it imports. Entirely digitalised commercial transactions** (particularly internet services or data processing), **are also very clearly dominated by US players with exports almost 14 times higher than imports in 2012**⁹. **This imbalance de facto sets into context the existence of any real digital trade barriers.**

Looking at the need to be able to regulate data flows, **the taskforce believes that the current international legal framework set by the GATS allows for real and adequate regulation depending on data type** where any measures taken do not set up a disguised trade barrier:

⁵ Agreement reached between Australia, the sultanate of Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the USA and Vietnam.

⁶ In the TPP, "computing facilities" means "computer servers and storage devices for processing or storing information for commercial use".

⁷ For example, initiatives involving data ownership, free data flow and the creation of a "European cloud".

⁸ Only the European Parliament voted in favour of non-location, while asking the European Commission to explicitly recognise in the TiCS that data protection and the right to privacy are not trade barriers, but fundamental rights.

⁹ Source: August 2014 report on digital trade by the United States International Trade Commission.

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- ◆ **personal data protection is a legitimate purpose for supervision of data flow in the GATS;**
- ◆ **a member can also protect data that is in its “essential security interests”** as outlined in Article XIV bis. In this respect, protection measures can be taken unreservedly regardless of the type of data;
- ◆ **sensitive data or data relating to business secrecy or intellectual property, if they do not involve national security, could also be protected under article XIV of the GATS, and the list of exceptions is not exhaustive¹⁰.**

Overall, **potential benefits of the legal recognition of the principle of free data flow and non-location are not confirmed, and the risk of consolidation of the American dominant position is particularly high, so the taskforce recommends:**

- ◆ **opposing the inclusion of any provision that allows for the overall binding principle of free data flow** for commercial use. This type of provision would not provide a direct benefit for European players (see above) and no real barrier to digital trade has been identified between the various parties involved in the TiSA negotiations. As such, it would become the new international standard and restrict states' ability to regulate on the basis of the general exceptions outlined in Article XIV of the GATS;
- ◆ **supporting the introduction of a provision recognising the right to regulate and introduce new regulations in a binding article** on domestic regulation in the core text of the TiSA;
- ◆ **opposing the introduction of the principle of banning data processing and storage location;**
- ◆ **excluding personal data protection measures from the scope of the agreements.**

Lastly, beyond the challenges and implications of the digital economy, it is also important to remember that maintaining leeway to regulate, particularly based on “territorial” criteria, is also necessary to avoid compromising any potential tax measures taken on a French or European basis. **The taskforce therefore believes that trade negotiations, particularly via the potential recognition of the principles of free flow of data and non-location, should not prevent national tax laws and international treaties being adapted to meet the challenges raised by the digital economy.**

¹⁰ Any planned measures must comply with the necessity test and the principle of good faith outlined in the GATS, as is the case for personal data.