

DIGITALEUROPE assessment of the Trans-Pacific Partnership (TPP) Provisions

Our recommendations for the Transatlantic Trade and Investment Partnership (TTIP) and the Trade in Services Agreement (TiSA)

Brussels, January 2016

KEY MESSAGES

On 15 October 2015, the Ministers of the 12 Trans-Pacific Partnership countries announced the conclusion of the TPP. DIGITALEUROPE congratulates the parties for finalising this strong partnership which includes for the first time horizontal and comprehensive disciplines related to the Internet and digital services and products – critical cross-cutting elements fit for the 21st century trade agreements we strongly wish to see included in a similar fashion also in the bilateral and multilateral trade agreements the European Union will enter into the near future.

Therefore, DIGITALEUROPE urges the European Institutions to seize this momentum for the global digital economy by implementing such key offensive digital trade principles in the TTIP and the TiSA in accordance with the Commission's new « Trade for all » Strategy which identifies them as a priority. Only a comprehensive and proactive approach to digital trade disciplines in implementing the new trade strategy will establish the European Union again as a frontrunner again in International trade policy and ensure competitive market access for European ICT companies. The priority issues for DIGITALEUROPE are free cross-border flow of data, prohibition on government forced (data) localisation, elimination of tariffs for ICT products and removal of non-tariff barriers in the ICT sector.

Below we would like to present to the European Commission, European Parliament and Member States our initial assessment of the TPP chapters that are of interest for the digital economy, including the scalability of the Digital Single Market on a global stage, and our key recommendations for the EU's trade agreements currently being negotiated and initiated, in particular for the TTIP and TiSA, negotiations.

ASSESSMENT OF THE TPP TEXT AND RECOMMENDATIONS FOR THE TTIP AND TiSA

I. National Treatment and Market Access for Goods – Chapter 2.

Article 2.20 in the TPP text requires all parties to join 1996 WTO Information Technology Agreement (ITA). We encourage the European Commission to go one step further and to require its future trade partners (notably in the TiSA and future bilateral negotiations) to join the new ITA concluded in December 2015.

II. Technical Barriers to Trade (TBTs) – Annex 8B ICT Products.

DIGITALEUROPE encourages the European Commission to address regulatory challenges to ICT trade in the TTIP and other 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 issued in February 2015 ICT industry recommendations for regulatory cooperation in the TTIP issued on February 2015. 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).

Key provisions in the TPP Annex 8B for ICT products :

A. ICT products that use cryptography

The universal use of ICT technologies has led to the ubiquitous presence of cryptography in ICT products and applications available today. DIGITALEUROPE believes that in order to offer the products with the highest security standards, the import, use and sale of products containing cryptographic capabilities should be largely unrestricted.

We fully support and encourage national security policies. Restrictions should not be applied to Information society services as they are delivered through an information infrastructure but are not in themselves critical infrastructure. We recommend a flexible, global approach based on global standards with conformity assessments that are based on mutual recognition to avoid redundant and burdensome testing and certification requirements. Regulations or restrictions touching upon commercial markets for products with encryption should be limited to the protection of truly « critical infrastructures » which could lead to catastrophic impacts on public safety, national security and the broader economy. Information society services are delivered through an information infrastructure but are not in themselves critical infrastructure. Restrictions should not apply to mass market products.

The TPP chapter on Technical Barriers to Trade bans TPP parties from requiring makers or suppliers of goods that use encryption for commercial applications (e.g. cell phones, game consoles or routers) to transfer or disclose proprietary encryption technology, production processes or other information to government or a domestic partner, or to partner with a domestic partner, or to use a particular type of encryption, as a condition of being able to make, import, sell, distribute or use these goods.

A separate provision bars any TPP party from prohibiting importation of « commercial cryptographic goods » (goods that implement or incorporate cryptography, sold to the general public).

Section A in TPP also included a carve-out for TPP parties who adopt or maintain requirements relating to access to networks that are owned or controlled by the Government, including those of central banks. DIGITALEUROPE would like to recommend a more precise definition of the scope, e.g. ICT systems or networks outsourced to private operators with a need of control based on national interest or security.

B. Electromagnetic Compatibility of Information Technology Equipment (ITE)

DIGITALEUROPE would recommend for the TTIP and future FTAs to go much beyond the provisions that are included in the TPP.

First, we believe that the scope should be extended to all IT products and not only to wired ITE. Secondly, we encourage parties to broaden their cooperation in the ICT sector and to look for (as stated in DIGITALEUROPE-ITI position paper) the alignment on common principles for technology standards; the acceptance of supplier's declaration of conformity ; the acceptance of e-labelling ; and the cooperation in the area of e-accessibility, e-Health and m-Health and Internet of Things.

Further, we would like to suggest parties to recognise and reaffirm the first steps already taken at multilateral level, notably with the ITA Committee's « Guidelines for EMC/EMI Conformity Assess Procedures » to simplify and align rules related to conformity assessment to enhance global trade in ICT products, and to encourage the adoption of similar guidelines to other technical areas.

III. Electronic Commerce – Chapter 14.

DIGITALEUROPE welcomes the general ambition of Chapter 14 on Electronic Commerce which sets entirely new international disciplines. These include notably the free flow of data across borders, commitments not to impose customs duties on digital products and content transmitted electronically, cooperation on cyber security issues, or prohibition of forced (data) localisation requirements (e.g. requirements to store data or establish local data centers within a country; requirements to transfer or allow access to source code as a condition for the import, distribution, sale or use of a software, or of products containing such software and protection of services delivered or performed digitally – including cloud based services).

We believe that these principles correspond well with the Commission's willingness to prioritise digital trade in services and to negotiate meaningful and future proof FTAs (incl. TTIP) and the TiSA by setting clear rules to prevent and tackle new forms of global digital protectionism, including forced data localisation or storage. We also encourage the Commission to continue to including the current regime for online intermediaries in accordance with the e-Commerce Directive and the FTA's with South Korea and Columbia/Peru, also in, in all pending and future FTAs.

As stated in the « Trade for all » strategy, digital trade is an offensive interest for the European Union and should be affirmed through strong commitments in ongoing and future negotiations.

Here under are the key provisions of the TPP that DIGITALEUROPE would suggest to adopt as a minimum in the TTIP and TiSA:

- Article 14.3 – Securing commitments not to impose customs duties on digital products and content transmitted electronically ;
- Article 14.4 – Ensuring non-discriminatory treatment of digital products transmitted electronically, and guaranteeing that these products will not face government sanctioned discrimination based on the nationality or territory in which the product is produced ;
- Article 14.6 – Adoption of Electronic Authentication and Electronic Signatures ;
- Articles 14.8 and 14.11 – Establishing requirements that support a single, global internet, including ensuring free cross-border data flows, consistent with Article 14 of the WTO GATS. The rules also require non-discriminatory treatment for service companies of other TPP countries, and prohibit quantitative limits on market access, or requirements to use a specific type of joint venture or corporate form. TPP parties will also permit free transfer of funds related to cross-border supply of a service. However, DIGITALEUROPE does not support the exclusion of financial institutions from this scope;
- Article 14.13 – Creating rules against localisation requirements that force businesses to place computer infrastructure, manufacturing or service facilities, in each market in which they seek to operate, rather than allowing them to offer goods made in sites or services from network centers that make better business sense ;
- Article 14.14 – Measures against unsolicited commercial electronic messages (SPAM) ;
- Article 14.15 – Ensuring close cooperation among parties to help businesses overcome obstacles and take advantage of e-commerce ; and promoting participation and transparency in the development of laws and regulations affecting the internet, including opportunities for public comment ;
- Article 14.16 – Cooperation on cybersecurity matters ;
- Article 14.18 – Ensuring that no party shall require the transfer of, or access to, source code of software owned by a person of another Party, as a condition for the import, distribution, sale or use of such software, or of products containing such software, in its territory. Exceptions to this principle should be motivated in regards to Article 14 of the WTO GATS and the scope of these exceptions clearly defined, notably the notion of « critical infrastructure » as already explained in point II. A. on ICT products that use cryptography.

IV. Telecommunications – Chapter 13.

Like for the computer and related services, DIGITALEUROPE seeks full market access and national treatment commitments in telecommunication services, which provide the infrastructure that supports the global digital economy.

DIGITALEUROPE shares the same ambition of Article 13.3 in the TPP related to the approaches to telecommunications regulations (« The parties recognise the value of competitive markets to deliver a wider choice in the supply of telecommunications services and to enhance consumer welfare, and that economic regulation may not be needed if there is effective competition or if a service is new to a market »).

Therefore, we would like to promote the key principles included in the TPP for the TTIP and the TiSA, such as:

- Article 13.4 - Reasonable and timely access to network for other suppliers than mobile service suppliers;
- Article 13.7 - Fair access to Government-controlled resources ;
- Article 13.22 - Transparency in rulemaking (e.g. stakeholders consultation) ;
- Article 13.8 - Suppliers freedom to innovate and fair competition ;
- Article 13.23 – Flexibility in the Choice of Technology ;
- Article 13.25 – Recognition of the importance of international standards for global compatibility and interoperability of telecommunications networks ; and promotion of those standards through the work of relevant international organisations ;
- Article 13.6 - Commitments on international mobile roaming to create new market access opportunities.

V. Intellectual Property – Chapter 18.

DIGITALEUROPE supports the principles set out in the chapter related to Intellectual Property in the TPP. In particular, firstly the TPP requires TPP parties to establish copyright safe harbors for Internet Service Providers (ISPs). These safe harbors allow legitimate ISPs to develop their business, while also helping to address Internet copyright infringement in an effective manner.

These safe harbors have contributed to the flourishing of Internet, entertainment and e-commerce industries in the world, including the success of millions of small businesses that depend on Internet services to reach global customers. TPP states that these safe harbors shall not be conditioned on any obligations on these ISPs to monitor content on their networks or systems. TPP also provides for safeguards against abuse of such safe harbor regimes. DIGITALEUROPE supports these principles., as reflected in the following articles:

- Article 18.3: Principles
- Article 18.4: Understandings in Respect of this Chapter
- Article 18.15: Public Domain
- Article 18.66 Balance in Copyright and Related Rights Systems
- Article 18.82: Legal Remedies and Safe Harbours

Secondly the IP chapter requires each TPP government to adopt or maintain appropriate laws, regulations, policies, orders, guidelines or decrees requiring its central government agencies to use only non-infringing computer software, and, if applicable, only use software as authorized by licence.

Thirdly regarding limitations and exceptions the agreement provides that each party “shall endeavor to achieve an appropriate balance in its copyright and related rights system” by means of limitations or exceptions consistent with the Berne 3-step test, including those “for the digital environment.” In adopting limitations and exceptions, parties should give “due consideration to legitimate purposes such as, but not limited to: criticism; comment; news reporting; teaching, scholarship, research, and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired or otherwise print disabled.” Finally, the TPP states that “a use that has commercial aspects may in appropriate circumstances be considered to have a legitimate purpose.”

Fourthly there are more detailed and robust requirements on trade secret protection than in TRIPS, such as an obligation to protect against unauthorized disclosures to or by state-owned enterprises (SOEs).

And finally in relation to IP enforcement TPP requires parties to provide criminal procedures and penalties for “unauthorized and wilful access to a trade secret held in a computer system”; unauthorized and wilful misappropriation; and/or fraudulent disclosure, or unauthorized and wilful disclosure, of a trade secret, including by means of a computer system. The IP chapter also includes new provisions on criminal aiding and abetting, counterfeiting of labels, and counterfeiting of packaging, as well as a new standard on cable and satellite piracy.

The text provides that enforcement procedures of the TPP shall be available to the same extent with respect to acts of trademark, copyright or related rights infringement in the digital environment. Each TPP party will also makes IP enforcement and remedies available equally against SOEs.

Border enforcement will be available against confusingly similar trademark goods, not just counterfeit or pirated goods.

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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 62 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>

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