TISA Negotiations: Yes To ECommerce,Data Flows, No To IPR,Data Protection?

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After two years of negotiations, the draft Trade in Services Agreement (TISA) stands at 17 horizontal and sector specific

proposals, negotiators told Intellectual Property Watch after the

25 December Geneva round of negotiations. The sector specific

annexes of the agreement, sources confirm, include one on telecommunication and one all ecommerce aspects.

12月25日日內瓦回合談判後，談判者對 IPW透露，經過兩年的談判，服貿協議草案（TISA）維持在17的水平和部門具體建議。

消息證實，該協議部門具體的附件，包括電信及所有電子商務方面。

TISA is intended to open up markets for trade in services addressing issues like market access, national treatment and exemptions.

Tisa 旨在開拓貿易市場，處理市場進入（開放）、國民待遇和最惠國待遇問題。

With infrastructure and content issues included in the treaty talks between 23 World Trade Organization members meeting outside the WTO, questions have been raised about including data protection, currently under review in the European Union, and internet provider liability and intellectual property rights protection. Data protection would be unharmed, and intellectual property would not be touched at all, say the parties in Brussels and Bern.

與包括世界貿易組織之外滿足23世貿組織成員之間的條約談判的基礎設施和內容的問題，提出了問題有關，包括數據保護，目前正在審查在歐洲聯盟和互聯網服務提供商的責任和知識產權保護。數據保護是無恙，以及知識產權不會在所有被感動，說在布魯塞爾和伯爾尼當事人。

Given “surprises” from earlier trade negotiations, only public scrutiny of texts might lay concerns to rest. Considerations by the negotiators themselves about potential contradictions

in texts of the general and sectorial parts illustrate that close scrutiny is necessary. Viviane Reding, rapporteur of the European Parliament for TISA, has pushed for a new EP monitoring group, a novelty for a trade agreement.

TISA 是美國、澳洲、歐盟簽定的服務協議

因為服務跨國界 所以需要多邊協議

**Plurilateral BandAid to WTO Miss**

**內容是WTO談判尚未包含之所有服務協議（承諾事項）**

**TISA negotiations started in 2012 under joint chairmanship of the United States, Australia**

**and the EU, convening the “really good friends” to conclude a comprehensive trade in**

**services agreement not possible in the WTO, they agreed.**

**With services becoming ever more important – and evermore crossborder – the plurilateral**

**agreement should include obligations with regard to most-favoured nation treatment, market access, national treatment, according to the Swiss State Secretariat for Economic Affairs.**

**Export subsidies like the setting up of “centres providing infrastructure in order to support IT**

**or software experts” (an example given among others by the Swiss delegation) could be limited, the Swiss delegation explained in a document its delegates presented at the most**

**recent round.**

**在美國及澳洲積極倡議下，「真正之友」會商後認為服務業自由化不應受制於杜哈談判僵局而停滯不前，爰決定另起爐灶推動一個以複邊（plurilateral）方式洽簽之服務業自由化協定。**

**自2012年初起，「真正之友」[[1]](#footnote-1)成員在瑞士日內瓦進行密集討論，並於同年年底就未來談判架構達成共識，協定名稱暫定為「服務貿易協定」（Trade in Services Agreement，簡稱「TiSA」）。**

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and the EU, convening the “really good friends” to conclude a comprehensive trade in services agreement not possible in the WTO, they agreed.

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or software experts” (an example given among others by the Swiss delegation) could be

limited, the Swiss delegation explained in a document its delegates presented at the most

recent round.

**Work Done, Work Ahead**

**目前協議已有的部分 與沒有的部分**

The December 2014 negotiation round was number 10, according to the EU, nine according to

Canada, and at least 14, said Switzerland.

Annexes now exist on financial services, telecommunication, ecommerce,

all modes of

transport, professional services, delivery services, direct selling, governmental contracts on

services, environmental services, energy services and patient mobility, according to the EU

Commission. Patient mobility was controversial and opposed at least by the EU.

The group of negotiators has expanded from 16 to 23 parties, according to updated lists. This

includes, besides the original convenors, Canada, Chile, Colombia, Costa Rica, Hong Kong,

Iceland, Israel, Japan, Liechtenstein, Mexico, New Zealand, Norway, Pakistan, Panama,

Paraguay, Peru, South Korea, Switzerland, Taiwan and Turkey. China and Uruguay have

indicated interest in joining, negotiating parties report. Both the EU and Switzerland

confirmed they are supportive of China’s joining.

What has also changed over the two years can be qualified as a kind of ACTAeffect.

The

failure of the notorious AntiCounterfeiting

Trade Agreement (ACTA) in Europe and

Switzerland and, one might add, a petition to stop the USEU

TransAtlantic

Trade and

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Investment Partnership (TTIP) supported by over a million EU citizens, have also resulted in

TISA documents being made available online, at least to some extent. But so far TISA has not

been included in the transparency initiative just announced by new EU Trade Commissioner

Cecilia Malmstroem for TTIP.

Telecom Chapter, Allowing for Access to Competing Networks

The telecom chapter did cover, the Commission explained, “all regulatory issues typical to

this sector: access to networks, independence of regulator, nondiscriminatory

management

of frequencies, universal services, number portability.”

The most recent negotiation session on telecommunications had focused in particular on the

market access offers, obligations for major suppliers and transparency in the international

mobile roaming. In effect, one expert from the EU explained to *Intellectual Property Watch*,

the issues were similar to access rules laid out in the EU Telecom package, allowing

competitors to interconnect and use existing networks.

But hidden in the many pages lie some sensitive issues. “Forced localization” and “free flow of

data” are two with regard to ecommerce

and telecom. “Governments should not require ICT

service suppliers to use or establish any local infrastructure, as a condition for the supply of

services,” an initial text innocently reads. Yet service localization has developed much more

into a menace to some national industries with the revelations of Edward Snowden about

massive surveillance.

Brazil in a first reaction declared platform service providers would have to keep data national

(in Brazil), and some EU countries like Germany for a while talked about a German or

Schengen routing.

Localization also has another aspect, slightly overlooked as experts like Pierre Sauvé, director

of external programmes and academic partnerships at the World Trade Institute (WTI) in

Bern, have underlined for some time now: the issue of taxation of crossborder

services in

the digital colonies of large USbased

platforms.

With the inclusion of obligations to not obstruct providers of transfers of data, more generally

labelled as free flow of information, another topic contentious at least in Europe is on the

table: the issue of privacy.

Hot Potato Data Protection

Reding, the former European Commission vicepresident

pushing for data protection and now

a member of the Parliament and rapporteur for TISA, warned in an International Trade

Committee (INTA) debate: “What is been discussed as part of ecommerce

chapter, according

to our sources, it seems that the United States have made proposals which include rules on

data flows specifically aimed at creating exemptions to privacy and data protection. You know

the position of this house and my position,” Reding told her former colleague in the Cabinet,

“and you can imagine that this will not go through.”

Reding has pushed to broaden Malmstroem’s transparency initiative to TISA and to publish

the negotiating mandate and the “regulatory chapter.”

Is the concern that data flow provisions will inevitably also touch data protection valid? No,

claims the Commission, which underlined that only one of the participants had “proposed two

provisions that should ensure free data flows and prohibit requirements to store data locally.”

The Commission also underlined, according to that participant, that “such provisions should

be without prejudice to data protection requirements.”

The general “exception clauses” of the WTO General Agreement on Trade in Services (GATS)

on data protection would apply to it, moreover, and the “EU has asked for further clarification

on these proposals and made it very clear that it cannot and will not agree to any language

that could potentially prevent the EU from enforcing its own data protection standards,” the

Commission said.

The GATS data protection standards, which include an exemption for future data protection

measures “not inconsistent with the provisions of this Agreement,” according to the

Commission, so far has “never led to any WTO country, either formally or informally,

challenging EU rules on data protection,” it said. But the Commission acknowledged that it

will have “to analyse very carefully how any data transfer obligations in TISA interact with

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that existing exception.”

The “devil in the details,” for example, might hide in yet another general exception, the one

on national security. This, one expert observer told *Intellectual Property Watch*, could “empty

the substance of the data protection exemption.” The party hinted at, the United States, did

not get back on a request for this story.

TISA and the Detail Devils

Without publication of much more information on TISA, conspiracy theories – correct ones

and incorrect ones – will continue to flourish, which is only natural when observers have to

consider an ecommerce

chapter, confirmed to include content issues but declined to have

any mentioning of liability for content and platform providers.

How much the devil lies in the details – even for the negotiators themselves – is illustrated

perfectly by a Swiss presentation on potential overlaps and contradictions in the general and

sectorial parts of the draft text.

“In the annex on professional services, foreign shareholding requirements are mentioned in

the form of a prescription not to limit participation of foreign capital and effective control in

supplying services through commercial presence (article 5),” the Swiss delegation noted, and

added that in the draft texts on electronic commerce and telecommunication services the

prescription was not mandatory and read as “’shall endeavour’ or ‘should allow full

participation’ (Article 1 of the general provisions).”

With open questions remaining on most, if not all chapters, closure of negotiations in 2015 as

somewhat envisaged, is seen as too ambitious by many, but negotiators only give themselves

a short break to restart addressing open issues on 913

February in Geneva. Depending

whose calendar you believe, it is round 10, 11 or 15.

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