

Thank you very much for consulting DG TRADE on this very important reform proposal and for your availability and willingness to discuss our concerns. This is a very extensive proposal, with serious ramifications for trade and we need to ensure that the appropriate balance is achieved. DG Trade thanks you for the additional comments and revisions of 19th December, but we consider that they do not adequately address our concerns. DG Trade therefore must give a negative opinion to this inter-service consultation.

#### Detailed Comments

1. Implementation of international agreements involving exchange of personal data

We have serious concerns that the draft Regulation would make it impossible for the EU to sign and implement international agreements involving the exchange of personal data and we note that no derogation is provided for the exemption of such agreements from the strict third-country transfer provisions. In addition, with regard to adequacy assessments, changes in the draft Regulation compared to the previous directive will make it more difficult to confirm that the level of protection offered in third countries is adequate. Specifically, the EU has entered into a mutual recognition agreement on Secure Trade with the US, under the framework of the Transatlantic Economic Partnership, which involves the exchange of company information between customs authorities in order to exempt such companies from extremely stringent security procedures and facilitate trade. The provisions of the draft Regulation could make the signature and implementation of the agreement - and agreements like this – impossible.

2. Representative obligation imposed on non-established controllers whose activities are directed to EU data subjects:

The EU has taken significant commitments in a large number of services sectors for the supply of services cross-border from operators established in third countries, both in the context of the OATS and in the context of bilateral Free Trade Agreements. We are concerned that the obligation to appoint a representative could be interpreted as an obligation to have a commercial presence in the EU, as defined in Article XXVIII(d) of the GATS, thus invalidating all our cross-border commitments. We understand that a similar requirement exists in Directive 95/46/EC; however, it was not enforced by Member States. Further, we consider that the scope of application of this requirement is considerably expanded in the draft Regulation: its application is now predicated on the controller directing its activities to EU data subjects - which is interpreted very widely - rather than on using equipment situated in EU territory as provided in the Directive. According to the GATS, WTO members can adopt measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATS] including those relating to . . . the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts." This exception, however, is restricted by a necessity test, which imposes on WTO members an obligation to ensure that the methods used to achieve their aims are the least trade restrictive. We have serious concerns that the representative requirement, as currently set out in the draft Regulation, would fall this test.

Recital 15, as currently drafted, does not provide any comfort that the requirement would

not have an extremely wide application, including to operators who do not necessarily intend to attract EU customers. Further, it does not distinguish between entities with substantial operations in the EU and those who only occasionally transact with EU clients. Given that the cost of having an EU representative is a fixed one, we do not believe that this is proportionate.

### 3. Impact on EU trade

The proposal is likely to have a significant negative impact on EU cross border trade. The legislative proposal should be accompanied by an assessment of such impact.