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Speaking notes

Introduction

Our study uses legal techniques to interpret international trade law's impact on some features of EU data protection law. So far such analysis has been largely missing. Thus, we welcome the intention of the Commission to publish **a position on cross-border data flows in TTIP and TiSA** soon.

We realise how much the issue of cross-border flows of personal data divides industry and civil society but also policy makers.

Framing

In EU law, personal data are protected as fundamental right. In international trade law, regulating cross-border transfer of personal data is readily interpreted as a barrier to trade.

EU data protection law is designed to ensure that **the high level of protection of personal data continues** after it was transferred abroad.

Protecting personal data is an investment to **build trust in global information-driven markets**. EU data protection law does **not mandate data localisation** even though this may have factually become a prudent compliance strategy for enterprises.

Let me be clear, framing this discussion as a **stand-off between economic growth or fundamental rights in Europe** is not fully correct. In fact, investments in IT infrastructure in Europe are soaring because the trust in cross-border flows of personal data collapsed by events external to EU policy.

Setting the scene

I would like you to recall that the EU legislator **just finalised** a comprehensive reform which led to the adoption of the General Data Protection Regulation (GDPR). When the Commissioner, our host today was **relentlessly working** to make this reform a success. With the GDPR the EU legislator modernised and strengthened the rules on transfer of personal data to third countries.

International trade agreements to which the EU is or will become a party should be **consistent with all aspects of EU legislation on data protection**. Trade law should not become a venue for challenging the EU approach to the protection of personal data, thus undermining EU's global policy model and its legitimacy vis-à-vis its trade partners.

Major findings of our study

Legal issues do not arise directly in EU law. Our study concludes that EU's practice of regulating the transfer of personal data to third countries **would not be in conformity** with certain obligations in FTAs, especially Most-Favoured-Nation (MFN) Treatment.

A party's right to regulate, as recognised in free trade agreements, is subject to certain trade-conforming limitations and conditions. We cannot with sufficient legal certainty conclude that EU measures regulating the cross-border transfer of personal data would meet the formula of the general exceptions. For two reasons:

The **first** is a problem with an **ambiguous term in trade law**: It is not clear if a dispute resolution body accepts that the EU approach to cross-border flows of personal data is necessary to ensure compliance with laws or regulations relating to the protection of privacy.

The **second** problem is **home-made**: The Commission's practice of adequacy decisions may not meet the consistency requirement. Think of the EU-US Privacy Shield and that other countries may desire a similar arrangement that leads to an adequacy decision.

We find that the European Parliament **struck the right balance** in its resolutions on TTIP and TiSA when calling for a "a comprehensive, unambiguous, horizontal, self-standing and legally binding provision" excepting EU data protection law.

Additional commitments on free data flows or cross-border movement of information in future FTAs must fully except the EU approach to data protection and the regulation of cross-border transfers of personal data.

CETA's Financial Services Chapter, provides an example for **preserving a right to regulate** cross-border transfer of personal data, which could be a model for TTIP and TiSA.

Reference to privacy and data protection safeguards in FTAs **should not be linked to any qualitative conditions** (e.g. "necessary"), or to the principles and guidelines of international bodies if these would introduce a ceiling for the acceptable level of protection.

As a procedural safeguard, the **independent** European Data Protection Supervisor (EDPS) should issue opinions on the texts of FTAs that the EU plans to adopt (Article 8(3) Charter).

EU institutions should **commission a study into enterprise customers' preferences** in the outsourcing of IT services in order to build an evidence base supporting the fact that EU data protection law is valued and a competitive factor.

Adequacy assessments and decisions by the Commission must not grant differential treatment to some third countries and not to others. The Commission should adopt procedural rules and be impartial, thereby facilitating "**consistency of enforcement**".

Thank you.