



**Mr. Phil Hogan**

European Commissioner for Trade  
European Commission  
Rue de la Loi 200  
1049 Brussels  
BELGIUM

27 April 2020

Dear Commissioner, dear Phil,

I would like to address this letter to you on the issue of horizontal provisions for cross-border flows of personal and non-personal data in EU trade and investment agreements, which have been proposed in the context of the negotiations for an agreement on e-commerce in the framework of the World Trade Organisation (WTO), as well as in bilateral trade negotiations with partners such as Mexico and Australia.

Data flows are a key enabler for the development of innovative, high quality, goods and services across the board. This involves all sectors in the economy – from traditional manufacturing to information technologies and from banking to agriculture. It is also a source of employment and growth. Therefore, access to data is critical in order to fulfil the objective outlined in the recent European Commission Communication on *“shaping Europe’s digital future”* for the EU to become a leader in the area of digital economy, which *“...requires that every citizen, every employee, every business person has a fair chance, wherever they live, to reap the benefits of our increasingly digitised society”*. Trade policy is particularly relevant in this respect, as it can not only help the EU ensure valuable access to data but also promote EU standards in the digital sphere.

During the global COVID-19 pandemic we experience more than ever before the crucial role of data flows across borders in keeping our citizens, institutions and markets connected, as you rightfully pointed out in your recent address to the virtual G20 Trade Ministerial.

In this regard, BusinessEurope supports the inclusion of dedicated provisions on cross border data flows and data protection in the EU’s trade agreements and has openly shared its views on the proposal of the European Commission on several occasions. We are calling for provisions that are ambitious in terms of enabling the flow of data across borders, effectively tackling issues of data localisation while, at the same time, ensuring the protection of personal data and privacy. However, we have also expressed our deep concern that the proposal that the EU is using in the context of various trade negotiations is not optimally achieving this objective.

More concretely:

1. If we take as an example the wording in Article 5 of the proposal of the Digital Trade Chapter in the on-going negotiations with Australia, it is strong in terms of ensuring cross border data flows by avoiding practices with effects similar to trade



bans, for instance, restrictions such as data localisation requirements. However, additional restrictive measures should also be explicitly addressed. Those concern, for instance, mandatory source code deposits, and national requirements demanding the granting of a special purpose business license for ICT equipment to be allowed to generate data (e.g. for autonomous driving).

2. Article 6 of the same proposal on the protection of personal data and privacy provides that “each party may adopt and maintain the safeguards it deems appropriate to ensure the protection of personal data and privacy”. If misused, this provision can effectively undermine the objective to ensure cross-border data flows provided in Article 5. There are no safeguards that the exception concerning personal data protection can be misused for protectionist reasons by some of our trading partners and, hence, effectively result in localisation requirements for personal data. This means that personal data originating from third countries which abuse the exception would be barred to flow to the EU. Article 6 should, therefore, specify that a party may adopt and maintain safeguards it deems appropriate to ensure the protection of personal data “in full compliance with the commitments of Article 5”. At a time when we observe a sharp rise in the adoption of protectionist measures globally, it is critical that the EU takes this into consideration when it negotiates trade deals.

We are convinced that a more balanced approach can be found. For instance, we particularly welcome provisions to ensure the right of the EU and its partners to adopt legislation in the area of data protection. However, data protection legislation should not be arbitrary. It should be proportionate and should not be used to promote purposes beyond the protection of personal data. Furthermore, such legislation should include data transfer mechanisms, such as – but not limited to – binding corporate rules or standard contractual clauses, which are included in the EU’s General Data Protection Regulation (GDPR). It is important that these principles are included in the European Commission’s proposal.

Earlier in this letter we referred to the role of the EU’s trade policy to shape global rules, also in the area of digital economy. The current negotiations in the WTO for a plurilateral agreement on e-commerce are the right window of opportunity to advance this objective globally and we urge the EU to approach the issue of cross-border data flows with a constructive and open mind.

Similar opportunities are presented in the context of the EU’s bilateral Free trade Agreements. For instance, the EU and Japan have included a placeholder in the Economic Partnership Agreement (EPA) stating that they will reassess the need to include provisions on cross-border data flows within three years after the entry into force of the Agreement. We call on the European Commission to take the necessary steps towards the negotiation and adoption of such provisions as soon as possible. We would also like to emphasise the importance of agreeing on a enabling framework for cross-border data flows between the EU and the UK, in the context of the future EU-UK Trade Agreement.



BusinessEurope remains committed to advancing an ambitious, yet balanced, approach to cross-border data flows, taking into account legitimate privacy and public policy objectives. Thanking you for your attention, we will be happy to discuss further with you on this important matter.

Yours sincerely,

Markus J. Beyrer