



Dr. Joseph Muscat
Prime Minister of Malta
President of the Council of the European Union
Office of the Prime Minister of Malta
Auberge de Castille
Valletta VLT 1061
MALTA

17 March 2017

Dear Prime Minister, *Dear Mr. Muscat,*

I am writing to you with regards to the EU's position on provisions on cross-border data flows to be included in future trade agreements, which we understand is currently under consideration by the Council.

BusinessEurope would like to emphasize the importance of cross-border data flows in global trade and their contribution to the economic growth and the competitiveness of a large number of industrial and services sectors. At the same time, we recognise the need to ensure the protection of data in this process. We believe that it is both possible and desirable to reach this balance in the context of the EU's position.

The EU is a major player in cross-border data flows and, therefore, should take the lead in establishing a high-standard for international rules in this area. This is particularly important given the worrying trend towards digital protectionism that we currently observe at global level. Provisions in the EU's trade agreements should help to effectively address barriers that our companies face when they trade and invest abroad, including investment limitations, forced data localisation measures and limitations on data transfers.

It is also clear to us that these provisions should be compatible with the EU General Data Protection Regulation. At the same time, if the intention is to establish a level-playing field for European companies, then we should also ensure that our trading counterparts will not be able to misuse what should be legitimate privacy exceptions for protectionist purposes.

The EU proposal recommends using an "anti-circumvention clause" as a way to allow limitations to data transfers for privacy reasons. Although we believe that this is an innovative approach, we are concerned because the "necessity" test is not included as a criterion. Therefore, it will be very difficult for the clause to get activated against a trading partner. This may result in a situation where claimants are left worse off in comparison to the existing provisions that apply in these situations under the General Agreement on Trade in Services (GATS).



Necessity tests preserve the freedom of governments to set and achieve regulatory objectives through measures of their own choosing, while at the same time discouraging governments from adopting or maintaining measures that are a means of arbitrary or unjustifiable discrimination, or a disguised form of protectionism.

Reinterpreting the concept of “necessity” and putting the burden of proof on the shoulders of companies will make it practically impossible to challenge measures that might effectively constitute an illegitimate barrier to trade. This is due to the fact that it is extremely difficult to demonstrate the measure is taken in bad faith and with protectionist intentions. We are afraid that this approach will have opposite results to what was the original intention of the EU, which is to tackle new forms of digital protectionism (as stated in the “Trade for All” Communication of the European Commission of October 2015). We are, therefore, asking for the European Commission and the Member States to reconsider their position and develop an EU proposal that is predictable and enforceable.

I thank you for your attention and hope that our views will be taken into consideration in your efforts to agree upon a global EU position on cross-border data flow provisions in the context of EU trade agreements.

Yours sincerely,

Markus J. Beyrer

Cc: Ms. Cecilia Malmström, European Commissioner for Trade