

TISA Annex on Electronic Commerce:
A preliminary analysis by the
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The purpose of this document is to critically examine a recently leaked version of the Trade in Services Agreement (TISA) Annex on Electronic Commerce and in particular to examine its potential impact on elements of domestic policy, from a public interest perspective. A comprehensive examination of the background, nature and objectives of TISA and of its relationship to its two regional sister agreements (the Trans-Pacific Partnership Agreement (TPP) and the Transatlantic Trade and Investment Partnership (TTIP), which cover similar ground and include many of the same parties) is beyond the scope of this document, which focuses on examining the substantive implications of the e-commerce annex.

It is useful at the outset, however, to briefly set out some more general features of TISA:

- Its purpose is to place a number of domestic issues under the purview of a new international regime.
- The agreement is being negotiated under conditions of utmost secrecy and with minimal to no input from public interest and civil society groups (in the absence of occasional leaks), while extensive input is being sought from representatives of the service industries.¹
- The unprecedented sweep and scope of TISA (and its sister agreements, TPP and TTIP) encompasses more areas of domestic technology-related law than any other trade agreement in history, and does so in a more comprehensive manner, imposing specific standards for subject matter historically only tangentially addressed in trade agreements, or left out of it altogether.
- The standards developed in TISA are being negotiated and established by what is described as a group of like-minded countries self-described as the “Really Good Friends of Services”, with the ultimate objective of incorporation into the broader global framework established by the General Agreement on Trade in Services (GATS) overseen by the World Trade Organization (WTO).² This will constitute a significant expansion of the extent to which domestic internet policy will be ceded to oversight by the WTO, and

1 <https://www.eff.org/deeplinks/2015/06/ten-un-experts-condemn-human-rights-costs-secret-trade-agreements>

the standards encoded in TISA are likely to have significant impact on jurisprudential developments at the international and national level.

Against this more general backdrop, the e-commerce annex, as currently proposed, will specifically impact on a range of critical areas of domestic internet policy, including Net Neutrality; open source licensing activities; privacy and spam; and general consumer protection and dispute resolution. Each of these is examined below.

1. Network neutrality and censorship:

Net neutrality obligations are typically addressed at network providers, and manifest in a prohibition on treating internet traffic similarly, without discrimination as to source, user, traffic type or service. It addresses harmful activity involving unjustifiably discriminatory impacts against specific network ‘ends’ (servers, protocols, services, end users, content, etc) and has its roots in the ‘best efforts’ and ‘end to end’ engineering principles which hold that data should be processed indiscriminately within a network. Conceptually, net neutrality is unified by an attempt to prevent such providers from acting as gatekeepers to downstream content and preventing harm to accessibility, innovation and expression. Problematic net neutrality activities that have been flagged to date can, for the sake of simplicity, be said to cover four distinct types of activity:

- a) blocking of access to specific sites, services or statements;
- b) favouring some types of network traffic or specific applications over others by prioritising its traffic or, alternatively, by slowing down or ‘throttling’ competing traffic;
- c) imposing economic disincentives on the use of specific types of end services; or
- d) imposing conditions on the types of end devices or services that can be attached to a network.

The draft e-commerce annex of TISA addresses net neutrality in a minimalistic, yet nonetheless problematic manner.

Article 8 sub-clauses 1(a) and (b) of TISA replicate one branch of the ‘Open Internet’ rules recently adopted by the United States Federal Communications Commission, a branch that is focused on protecting against the blocking of end user access to content and services, as well as the use of non-harmful end devices.³ Comparable prohibitions on blocking access to content are

2 Jane Kelsey and Burcu Kilic, “Briefing on US TISA Proposal on E-Commerce, Technology Transfer, Cross-border Data Flows and Net Neutrality”, 17 December 2014, <http://cdc-ccd.org/IMG/pdf/Briefing_on_TISA_E-Commerce_Final.pdf>.

3 FCC, *In the Matter of Protecting and Promoting the Open Internet*, FCC 15-24, 26 February 2015 [“FCC, Open Internet Rules”], paras. 15-19.

also evident in net neutrality frameworks in Canada,⁴ Brazil⁵ and Norway,⁶ for example. The imposition of this obligation is beneficial, in and of itself. Network providers are positioned to exert significant control over the types of content that can be reached by end users. This control can be used for discriminatory and unjustified purposes, harming downstream expression and innovation.

ISPs operate under powerful incentives to interfere with downstream content in such ways, including economic incentives arising from media convergence, provisioning incentives designed to drive down network investment costs and political incentives arising from pressure to censor content. Net neutrality as a principle protected by law is one that is rapidly evolving in many jurisdictions, and its full parameters are yet to be established. Unfortunately, TISA fails to effectively address existing net neutrality problems. It only meaningfully addresses the most egregious neutrality violations (those relating to blocking of access to content) and even here broadly exempts “reasonable traffic management”.⁷ Were its approach to become an international standard for neutral open access embedded as an international standard, it will be one that is incapable of meeting the net neutrality of today, let alone that of tomorrow.

TISA permits blocking of access for ‘reasonable traffic management’ purposes

Article 8 sub-clause 1 (a) imposes a prohibition on blocking access to content. This prohibition is subject to an undefined exception for “reasonable traffic management”, mimicking the FCC’s recently adopted Open Internet Rules (Norway adopts a comparable ‘reasonable traffic management’ exception).⁸ ‘Reasonable traffic management’ is a more permissive standard than that adopted by other jurisdictions, and may require changes to existing net neutrality frameworks. For example, Canada’s net neutrality framework obligates ISPs to justify any discriminatory traffic management practice by first establishing the need for it, and then demonstrating that it is narrowly

4 Telecom Regulatory Policy 2009-657, *Review of the internet traffic management practices of internet service providers*, CRTC File No.: 8646-C12-200815400, 21 October 2009, <<http://www.crtc.gc.ca/eng/archive/2009/2009-657.htm>>, para. 122.

5 Rebecca MacKinnon, Elonnai Hickok, Allon Bar and Hae-in Lim, “Fostering Freedom Online: The Role of Intermediaries”, UNESCO and Internet Society, 2014, <<http://unesdoc.unesco.org/images/0023/002311/231162e.pdf>>, pp. 78-79.

6 OECD, “Connected Televisions: Convergence and Emerging Business Models”, 4 February 2014, DSTI/ICCP/CISP(2013)2/FINAL, p. 40.

7 TISA, Article 8, sub-clause 1(a) allows providers to block access to content for ‘reasonable traffic management’ purposes. Sub-clause 1(b), which prohibits blocking of non-harmful devices from accessing networks, does not exempt ‘reasonable network management’.

8 FCC, Open Internet Rules; OECD, “Connected Televisions: Convergence and Emerging Business Models”, 4 February 2014, DSTI/ICCP/CISP(2013)2/FINAL, p. 40.

tailored to that need and is as minimally discriminatory and intrusive of end user experience as reasonably possible.⁹ Brazil's net neutrality framework also adopts a more rigid set of conditions under which traffic management might be acceptable – discriminatory treatment of traffic can only occur to meet “technical requirements essential to the adequate provision of services and applications” or to prioritise emergency services and even in such instances, it must be proportionate in its application.¹⁰ Both of these frameworks may need to be changed if TISA passes as is in order to account for its more permissive standard. Moreover, it is unclear how TISA's ‘reasonable traffic management’ exception will ultimately be interpreted by whatever oversight body is ultimately adopted to enforce its obligations.

A good example of shortcomings inherent in the breadth and vagueness inherent in the ‘reasonable traffic management’ exception can be found in a 2010 dispute between Level 3 communications (acting as a backbone internet provider in this instance) and Comcast (a major United States-based ISP). Comcast threatened to block Level 3 from accessing its customers if Level 3 did not accede to an unprecedented usage-based demand for fees in its peering arrangement.¹¹ The impetus for this demand was that Level 3 had recently become the primary backbone provider for Netflix.¹² Comcast defended its actions on ‘network management’ grounds, arguing that it needed to impose additional costs on Level 3 to account for the increased traffic load expected to come along with Netflix. However, it is highly unprecedented for such fees to be imposed in peering arrangements,¹³ and the result would ultimately have been to burden Netflix with special transit costs not borne by other online services, including other data-intensive services. Complicating matters and colouring Comcast's incentives was the fact that it was in the process of merging with NBC, a major US-based

9 Telecom Regulatory Policy 2009-657, *Review of the internet traffic management practices of internet service providers*, CRTC File No.: 8646-C12-200815400, 21 October 2009, <<http://www.crtc.gc.ca/eng/archive/2009/2009-657.htm>>, para. 43.

10 See Marco Civil, Art 9, informal translation from original Portuguese by Carolina Rossini: <https://www.publicknowledge.org/documents/marco-civil-english-version>

11 <http://www.engadget.com/2010/11/15/fcc-justice-department-look-to-prevent-comcast-from-hogging-nbc/>

12 <http://www.reuters.com/article/2010/11/30/us-comcast-level-idUSTRE6AS5XP20101130>

13 Comcast sought to impose usage-based costs onto Level 3 and, by extension, onto Netflix in its peering arrangement with the former. This is an unprecedented departure from practice. Peering has always been (and remains) predominantly on a no-payment basis. In fact, a recent OECD survey of more than 142,000 peering arrangements found that 99.5 per cent of these were on a no-cost basis: OECD, “Connected Televisions: Convergence and Emerging Business Models”, 4 February 2014, DSTI/ICCP/CISP(2013)2/FINAL, p. 38. See also: <http://www.engadget.com/2010/11/15/fcc-justice-department-look-to-prevent-comcast-from-hogging-nbc/>

broadcaster, when it decided to impose this unprecedented cut-off threat. Netflix is a direct competitor of NBC's prevailing broadcasting model and has even been described by some as posing an existential threat to it. The problem with a broad and undefined TISA exception is that it permits converged ISPs to justify what may well be anti-competitive incentives in a seemingly legitimate package: 'reasonable traffic management'. While the harm that can result to downstream innovation if ISPs were able to burden competitors in this way can be significant, such harms are excluded from the standard adopted by TISA.

TISA does not prohibit any technical and economic discrimination against downstream content

Article 8 sub-clause 1 (a) of TISA is also problematic because it only applies to situations where access to applications or services is blocked. It does not include situations where traffic is unjustifiably degraded or discriminated against in an economic sense. Yet the majority of net neutrality concerns relate to economic or technical discrimination against downstream traffic. While Article 8 sub-clause 2 of TISA does recognise that Parties should "endeavour" to avoid "unreasonable discrimination" by ISPs in the transmission of lawful network traffic. However, not only is 'reasonable discrimination' permitted (replicating the 'reasonableness' standard adopted by the FCC which, as stated above, is more permissive than those adopted by other jurisdictions such as Brazil and Canada) but there is no requirement for regulatory action here. 'Endeavour' does not implicate the state's law enforcement apparatus and may well preclude its use.

Due to these shortcomings, TISA's open access framework leaves open an entire universe of discriminatory and innovation-harming activity that traffic carriers can leverage and which regulators have found objectionable. These can include, but are not limited to: zero rating schemes that exempt ISP services from broader usage-based economic pricing (a number of Canadian wireless service providers were recently rebuked by the Canadian Radio-television and Telecommunications Commission (CRTC) for exempting their own data-intensive content streaming applications from their general mobile usage-based data pricing);¹⁴ throttling or otherwise degrading the speed or quality of competitors' traffic by means of technical measures (in one of the earliest and highest-profile net neutrality scuffles, the FCC found that Comcast had unlawfully discriminated against peer-to-peer traffic by slowing it down in an invasive and excessive manner);¹⁵ paid prioritisation of traffic from a particular provider (the FCC's Open Internet rules adopt an outright ban prohibiting any service from paying an ISP to speed up that service's traffic over that of others. Such paid prioritisation cannot be justified by traffic

14 Broadcasting and Telecom Decision CRTC 2015-25, *Part I Application by Mr. Benjamin Klass, and the Consumers' Association of Canada, the Council of Senior Citizens' Organizations of British Columbia and the Public Interest Advocacy Centre* 29 January 2015, CRTC File Nos.: 8622-B92-201316646 and 8622-P8-201400134, <<http://www.crtc.gc.ca/eng/archive/2015/2015-26.htm>>.

15 http://www.pcworld.com/article/149260/fcc_comcast.html

management purposes);¹⁶ and the unfair imposition of technical usage restrictions on end users who have exceeded monthly usage quotas (Germany introduced legislation banning this practice after Deutsche Telekom introduced a policy whereby the access speeds of end users were reduced to 384 kbps if a monthly usage limit is exceeded, while exempting Deutsche Telekom's own services from these restrictions).¹⁷

If it becomes the international standard for addressing open access or net neutrality harms, it will do so in a manner that is woefully deficient.

TISA service-blocking restrictions are far more permissive than most jurisdictions

With respect to the blocking of content, while the FCC's Open Internet rules (which appear to form the basis for this Article) permit the blocking of access to services or applications for 'reasonable network management' purposes, other frameworks adopt bright-line prohibitions out of recognition that blocking access is a serious and heavy-handed measure. The Canadian framework requires prior authorisation for any traffic management practice that would "block[] the delivery of content to an end-user" and holds that such approval will only be issued in "exceptional circumstances, as [it] involve[s] denying access to telecommunications services."¹⁸ Net neutrality laws or frameworks in Brazil and Norway also adopt bright-line prohibitions on the blocking (as opposed to unjustly discriminate degradation) of traffic. Norway's net neutrality framework includes a distinct "non-blocking" principle that is not subject to 'reasonable network management.'¹⁹ The Brazilian framework holds that "it is prohibited to block... the content of data packets" when providing internet connectivity.²⁰

While TISA does not grant ISPs the right to restrict connection of non-harmful devices to a network for 'reasonable network management' purposes (Article 8, sub-clause 1 (b)), this bright-line provision itself can be easily undermined in most anti-competitive contexts. For example, KT, a major Korean-based ISP, unilaterally blocked access to more than 24,000 Samsung connected televisions on its network in 2012 because Samsung refused to compensate it for anticipated higher traffic volumes these devices

16 FCC, Open Internet Rules, paras. 18 and 32.

17 Rebecca MacKinnon, Elonnai Hickok, Allon Bar and Hae-in Lim, "Fostering Freedom Online: The Role of Intermediaries", UNESCO and Internet Society, 2014, <<http://unesdoc.unesco.org/images/0023/002311/231162e.pdf>>, p. 80 and <<http://www.telecomengine.com/node/79864>>.

18 Telecom Regulatory Policy 2009-657, *Review of the Internet traffic management practices of Internet service providers*, CRTC File No.: 8646-C12-200815400, 21 October 2009, <<http://www.crtc.gc.ca/eng/archive/2009/2009-657.htm>>, para. 122.

19 OECD, "Connected Televisions: Convergence and Emerging Business Models", 4 February 2014, DSTI/ICCP/CISP(2013)2/FINAL, p. 40.

20 Marco Civil, Art 9.3, informal translation from original Portuguese by Carolina Rossini: <https://www.publicknowledge.org/documents/marco-civil-english-version>.

would generate.²¹ This would run afoul of TISA's bright-line prohibition on blocking non-harmful devices (Art 8.1 (b)), making the 'reasonable traffic management' exception unavailable to KT. However, KT could have achieved its objectives by blocking the specific services offered by Samsung's connected televisions instead of the devices themselves. This would have brought it within Art 8.1 (a) of TISA, permitting it to rely on the 'reasonable traffic management' exception, perhaps successfully given the ambiguities inherent in that standard.

TISA fails to restrict communication provider content and information censorship

TISA's blocking restriction as encoded in Article 8, sub-clause 1 (a) is further deficient in that it only applies to blocking of "access and use" of "services and applications". It fails, however, to prohibit blocking of access to *content*. Instead, Article 8, sub-clause 2 proposes a loose obligation on Parties to "promote" the ability of consumers to legitimately access and distribute information. Content-based censorship activities are, therefore, excluded from TISA's prohibition on access/use restrictions. This is a serious shortcoming in the overall net neutrality framework adopted by TISA. Internet service providers are in a position to seriously abuse their position as communications intermediaries in order to block access to downstream content. For example, in 2005, TELUS, a Canadian-based telecommunications company, unilaterally blocked its internet subscribers from accessing websites operated by its employees and critical of TELUS' position in an ongoing labour dispute.²² TELUS' claim was one often made by employers in the context of a labour dispute – that its employees were overstepping their bounds in calling out strike-breakers and calling for service disruptions.²³ What was atypical about this dispute was TELUS' ability to unilaterally prevent its employees from making their views heard to other employees and to TELUS customers in the midst of a labour dispute. Blocking of access to such content (which is covered by net neutrality frameworks in Canada, the United States, Brazil and Norway) appears to be permitted under TISA's Open Internet framework, which only regulates blocking of access or use of services and applications.

It is perhaps unsurprising that TISA's Open Internet framework reserves its most strenuous prohibitions for access to services and applications while retaining only weak protections for information and content access. Open access to commercial services and applications will be the top priority for the service industry that is the primary force behind TISA. However, as TISA can be anticipated to be the first internationally adopted net neutrality framework, potentially

21 OECD, "Connected Televisions: Convergence and Emerging Business Models", 4 February 2014, DSTI/ICCP/CISP(2013)2/FINAL, p. 39.

22 See: <http://www.nytimes.com/2005/08/01/business/worldbusiness/a-canadian-telecoms-labor-dispute-leads-to-blocked-web-sites-and-questions-of-censorship.html> and <http://www.cbc.ca/news/canada/telus-cuts-subscriber-access-to-pro-union-website-1.531166>

23 *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62 (Supreme Court of Canada).

overseen by the WTO or some other body or mechanism, its light treatment of content and information censorship is concerning.

TISA permits communications providers to block ‘unlawful’ and ‘illegitimate’ access

The prohibitions on access blocking imposed by TISA’s open internet/net neutrality framework only apply to ‘lawful’ and ‘legitimate’ access. The blocking prohibitions in Article 8, clause 1 only apply to applications and services that are not contrary to “applicable laws and regulations”, while the softer provisions in Article 8, clause 2 only encourage “legitimate” access to information and non-discriminatory access to “lawful” network traffic. The issue in this context is that communications carriers are generally not held liable for the activities of their end users (including illegal activities) and, as a result, should not be obligated to block access to illegal content in extreme circumstances.²⁴ Given the potentially sweeping impact of downstream censorship activities when carried out by communications providers, such criteria should at minimum be clearly set out in domestic legislation and subject to judicial control.²⁵

This framework is susceptible to a range of abuses and unintended consequences, many of which have been documented elsewhere.²⁶ Notably, a large coalition of civil society groups mounted an unprecedented dissent from an OECD policy document in part for precisely these types of concerns, including:

24 *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, Case C-70/10, [2011] ECR I-11959 (Court of Justice of the European Union); *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45 (Supreme Court of Canada).

25 *EMI Records Ireland Ltd & Ors v. UPC Communications Ireland Ltd & Ors*, [2013] IEHC 274 (High Court of Ireland); *Financial Intelligence Unit v. Cyber Space Ltd*, [2013] SCCA 2 (Seychelles Court of Appeal), paras. 16-17, 22.

26 These concerns have been voiced in many instances in the past. For some examples, see: Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/17/27, 16 May 2011, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf>; Civil Society Information Society Advisory Council to the OECD, CSISAC Statement on OECD Communiqué on Internet Policy-Making Principles, 28 June 2011, <http://csisac.org/CSISAC_Statement_on_OECD_Communique_06292011_FINAL_COMMENTS.pdf>; Joe McNamee, “The Slide from ‘Self-Regulation’ to Corporate Censorship”, European Digital Rights (EDRi), (2011), <https://edri.org/files/EDRI_selfreg_final_20110124.pdf>; Rebecca MacKinnon, Elonnai Hickok, Allon Bar and Hae-in Lim, “Fostering Freedom Online: The Role of Intermediaries”, UNESCO and Internet Society, 2014, <<http://unesdoc.unesco.org/images/0023/002311/231162e.pdf>>.

... the various qualifications within the text limiting access guarantees to 'lawful' content. This raised several concerns. First, it is not clear how and by whom 'lawfulness' will be determined, specifically with respect to content that is not inherently illegal, in that its legality is contingent on the applicability of exceptions. CSISAC members felt strongly that such determinations should be reserved to judicial authorities after a process of judicial review that complies with adequate due process standards. Second, in the context of discussion of access to lawful content in the networked environment, CSISAC members were troubled that the restriction to 'lawful' content could be read as a tacit endorsement for network-level filtering of internet communications.²⁷

The Manila Principles on Intermediary Liability, recently adopted by a group of experts from around the world, also recognise the harms that result when intermediaries are left to determine what is or is not lawful on their own accord and encode a number of critical safeguards to mitigate such harms.²⁸ Communications providers are often (and with increasing frequency) called upon to block access to material that might be unlawful but might, on the other hand, not be. This includes content that is allegedly defamatory or infringing of intellectual property rights, even though the ultimate determination of legality would require a careful assessment of competing interests and legal exceptions.

It could be used by ISPs to adopt excessively broad censorship approaches that are insulated from judicial safeguards since they are 'voluntary'.²⁹ For example, in Ireland a number of ISPs voluntarily adopted (under threat of lawsuit) measures to censor certain peer to peer file-sharing sites and, additionally, to ban users alleged to have infringed copyright.³⁰ Irish courts later confirmed that, in the absence of a court order, ISPs are under no obligation to block websites alleged to have infringed Irish copyright law.³¹ Indeed, the Irish ISPs' decision to block voluntarily user activity may have violated data protection laws, as it entailed the tracking of

27 Civil Society Information Society Advisory Council to the OECD, CSISAC Statement on OECD Communiqué on Internet Policy-Making Principles, 28 June 2011, <http://csisac.org/CSISAC_Statement_on_OECD_Communique_06292011_FINAL_COMMENTS.pdf>.

28 Manila Principles on Intermediary Liability, Principles 3 and 5 in particular: <<https://www.manilaprinciples.org/>>.

29 *Yahoo.com v. LICRA* (2006), 433 F.3d 1199, (United States 9th Circuit) (voluntary content removal, even under threat of legal sanction in the context of litigation, may not attract 4th Amendment protection).

30 <https://globalchokepoints.org/countries/ireland>

31 *EMI Records Ireland Ltd & Ors v. UPC Communications Ireland Ltd & Ors*, [2013] IEHC 274 (High Court of Ireland).

customer activity on the network.³² While a legislative framework was ultimately put in place in Ireland to facilitate judicially mandated ISP blocking of copyright-infringing sites, the judicial component of this framework is critical. ISPs are not well placed to judicially assess and balance the competing values inherent in censorship applications – even when a clear violation of the law has occurred.³³ Each new type of site must be properly characterised as ‘infringing’ by a court and the methods adopted to censor it must be carefully weighed to determine whether they are proportionate.³⁴ Yet Eircom’s decision to voluntarily block sites upon threat of lawsuit bypassed all of these protections and safeguards. Moreover, its voluntary adoption of an extreme remedy – disconnection of customers alleged to have infringed copyright – can severely and unjustifiably harm the ability of these individuals to participate in digital life as they are banned from online access.³⁵

Applying the same standard and approach against a backdrop characterised by content restrictions that are broader, vaguer and more diverse can legitimise a regime of international censorship by means of intermediaries – a far cry from the “open internet” Article 8 of TISA purports to further.

2. Open source licensing activities

Article 6 of TISA seeks to regulate conditions on the transfer or access of source code. It prohibits signatory governments from requiring a company to provide access to or transfer of software source code as a condition of service provision. Critical infrastructure is categorically

32 *EMI Records (Ireland) Ltd & Ors v. Data Protection Commissioner*, [2013] IESC 34.

33 *Twentieth Century Fox Film Corporation & Ors v. Sky UK Ltd & Ors*, [2015] EWHC 1082 (England and Wales High Court, Chancery Division), para. 60: “This case was, I think, much more complicated than it appeared to those seeking the s97A order. The fact that wholesale infringements of copyright are clearly taking place using Popcorn Time is true enough. However, it is nevertheless necessary to identify with precision the correct legal basis of the application. In the end, although I have rejected significant parts of the claimants' case, I am nevertheless satisfied that the court has jurisdiction under s97A of the 1988 Act to make a blocking order in this case.”

34 *Ibid.* See also: *Financial Intelligence Unit v. Cyber Space Ltd*, [2013] SCCA 2 (Seychelles Court of Appeal) and *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, Case C-70/10, [2011] ECR I-11959 (Court of Justice of the European Union).

35 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/17/27, 16 May 2011, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf>.

exempted from this prohibition. As with many other parts of TISA's e-commerce annex, this provision is ill-thought-out and is at once over- and under-inclusive. As noted by others, there are many situations other than in the critical infrastructure context in which it might be desirable from a public policy perspective, such as with consumer routers, whose lax security poses an ongoing issue for home networks.³⁶ An un-nuanced and categorical prohibition on requiring access to source code can prejudice transparency as well as the use of open source offerings in government contracting. A TISA state Party requiring publication of source code as an essential condition in a service proposal – a mechanism that would enhance public transparency in government services as well as encourage open source in general – could readily be construed as a violation of Article 6 by any service provider wishing to maintain their source code proprietary.

On the other hand, the prohibition in Article 6 is also under-inclusive. There could be good reasons to prevent a particular government from accessing source code for software used in critical infrastructure. To give just one example, a regulator may wish to impose audit obligations in order to check the filtering or monitoring capacities of Deep Packet Inspection equipment installed in a mobile or wireline service provider's network. This might be necessary to understand potentially privacy invasive or censoring network activities.

A more nuanced approach to regulating source code transfer or access obligations would eschew TISA's categorical prohibition and instead encode objectives or purposes under which it is or is not acceptable for such conditions to be imposed.

3. Privacy and spam

TISA's e-commerce annex includes two short provisions affecting the regulation of privacy and unsolicited electronic communications. These provisions are minimal in their prescriptive nature, allowing some latitude for TISA state Parties and hence reducing their potential for undermining existing state policies. However, they are minimal in nature and as such do little to advance the public interest. The annex also includes extensive provisions on cross-border data flows which have significant potential to negatively affect privacy.

Unsolicited commercial electronic communications

Article 5 of TISA calls on Parties to adopt measures regulating unsolicited commercial electronic communications. Article 5 appears to offer state Parties the option of adopting an 'opt out' approach (sub-clause (a): require suppliers of unsolicited commercial electronic messages to facilitate the ability of recipients to stop such messages) or 'opt in' (sub-clause (b): require consent of the recipient to receive commercial electronic messages) or adoption of 'other means' (sub-clause (c)). Currently, these three measures are presented as alternative options, leaving

36 Jeremy Malcolm, "TISA: Yet Another Leaked Treaty You've Never Heard of Makes Secret Rules for the Internet", 27 May 2015, <<https://www.eff.org/deeplinks/2015/05/tisa-yet-another-leaked-treaty-youve-never-heard-makes-secret-rules-internet>>.

signatories with significant latitude in how they choose to regulate electronic spam. An EU proposal to render sub-clauses (a) through (c) overlapping obligations would significantly strengthen the provision which, in its current form, only really requires state Parties to “provide for the minimisation of unsolicited commercial electronic messages” in any way they deem fit. If the EU proposal is adopted, however, a number of existing anti-spam regimes will need to be significantly overhauled to impose a prior consent obligation.

Moreover, TISA would cede a level of control over how key terms in spam control are internationally interpreted. While Article 5 expressly reserves to domestic governments how to define ‘consent’, it does not do so with respect to determining what granting end users the right to stop messages might mean in this context. TISA also adopts a definition of “unsolicited commercial electronic message”, currently formulated as follows:

... an electronic message which is sent for commercial and marketing purposes to an electronic address without the consent of the recipient or against the explicit rejection of the recipient, using an internet access service supplier ...

The definition of what constitutes ‘spam’ has been a splinter issue in historic domestic and international debates. In 2012, at the World Conference on International Communications (WCIT) the United States, United Kingdom, Canada and more than 50 other countries voted against a highly controversial treaty proposed by the Internet Telecommunications Union (ITU), a United Nations body tasked with regulating telecommunications at the international level.³⁷

The WCIT treaty proposal would have expanded the ITU’s governance to include oversight of several key areas of domestic law, including what constitutes ‘spam’. The ITU treaty proposed adopting the following provision on spam:

Member States should endeavour to take necessary measures to prevent the propagation of unsolicited bulk electronic communications and minimise its impact on international telecommunication services. Member States are encouraged to cooperate in that sense.³⁸

This measure was pointed to by member states as one of a handful of central issues for refusing to sign the WCIT treaty.³⁹ It was argued that ceding control of the definition of ‘spam’ or unsolicited communications to an international body such as the ITU would be used by countries to legitimise censorship activities.⁴⁰

Spam remains a serious global problem that needs to be addressed. Yet, as the experience of WCIT 2012 demonstrated, it is less than ideal for such internet content issues to be resolved on the international stage. TISA not only raises the same concerns by adopting a comparably vague definition of what constitutes spam, but it is even more proscriptive in its requirements than the WCIT-12 treaty proposal that several TISA member Parties refused to sign. While it is not known what oversight mechanism will ultimately be used to oversee and interpret TISA (many have suggested it will be the World Trade Organization), its inclusion of spam and other content in an international treaty in this manner raises many of the same concerns as were present at WCIT-12.

Privacy

Article 4 of TISA recognises the social and economic importance of privacy and data protection and obligates TISA member states to “adopt or maintain a domestic legal framework” for the protection of user privacy in electronic commerce. It takes no steps to establish any standards for privacy protection, but instead points to principles and guidelines set out by relevant international bodies as points of reference for measuring the legitimacy of domestic privacy legislation (Article 4 sub-clause 2). These would presumably include foundational regional privacy instruments that have formed the basis of most domestic privacy laws around the world.⁴¹ These include the Council of Europe’s Convention 108, the OECD’s Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, APEC’s Privacy Framework and associated Cross-Border Privacy Rules, and the European Union’s Data Protection Directive.

By pointing to other regional and international instruments as a point of reference for the content of privacy obligations, TISA interferes with the status quo in a minimal manner. It will likely allow the United States, for example, to avoid the introduction of comprehensive privacy legislation and continue relying on the loose and difficult to enforce framework put in place by the Federal Trade Commission for protecting some privacy harms.⁴² This framework relies

37 <http://www.forbes.com/sites/larrydownes/2012/12/17/no-one-mourns-the-wcit/>

38 <https://cdt.org/blog/making-sense-of-the-wcit-it%E2%80%99s-complicated/>

39 <http://www.fiercetelecom.com/story/us-refuses-sign-wcit-12-treaty-controversial-document-gives-itu-more-intern/2012-12-13>, “A number of issues led the U.S. delegation to its decision, [U.S. Ambassador and WCIT delegation lead] Kramer explained, among them differing views about spam, cybersecurity and internet governance.”]

40 <https://cdt.org/blog/making-sense-of-the-wcit-it%E2%80%99s-complicated/>,

41 Graham Greenleaf, “Sheherezade and the 101 Data Privacy Laws; Origins, Significance and Global Trajectories”, (2014) 23(1) *Journal of Law, Information & Science, Special Edition: Privacy in the Social Networking World*, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2280877>.

42 Electronic Privacy Information Centre et al, Letter to the President calling for progress on domestic privacy legislation, 24 February 2014, <<https://epic.org/privacy/Obama-CPBR.pdf>>. Graham Greenleaf and Nigel Waters, “Obama’s Privacy Framework: An Offer to be Left on the Table?”, (2012) *Privacy Laws and Business International Report*, No. 119 6, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2187234>. Sara Forden and Eric Engleman, “Obama Web Privacy Framework Boosts Chances for Rules”, Bloomberg Business, 24 February 2012, <<http://www.bloomberg.com/news/articles/2012-02-24/obama-web-privacy-framework-boosts-chances-for-rules-with-teeth>>.

heavily on self-regulation, with the FTC primarily limited to enforcing privacy protections only if companies voluntarily agree to adopt them.

Indeed, privacy is treated with far less urgency than other topics addressed by TISA. TISA's anti-spam regulations, for example, obligate member Parties to adopt "recourse against suppliers of unsolicited commercial electronic messages who do not comply" with TISA's spam-reduction obligations (Article 5, sub-clause 2). TISA's privacy chapter includes no obligation to provide for recourse against those who breach privacy laws, allowing member states to continue to rely on weakly enforceable frameworks.⁴³

Privacy erosion in transborder flows

TISA does weigh in heavily in one area of privacy and data protection – it adopts categorical prohibitions on any restrictions regarding transborder data flows. Indeed, TISA's e-commerce annex reserves some of its most prescriptive language for these prohibitions on transborder data flow restrictions. The primary vehicle for this prohibition is Article 2, currently entitled "Movement of Information" or "Cross-Border Information Flows". It holds that no Party may prevent the transfer, access, processing or storing of information outside that Party's territory if conducted in connection with a business. Article 2 sub-clause 5 further holds that Parties should not prevent foreign suppliers of services from transferring information across borders within internal networks. Article 9 imposes additional restrictions on data localisation. It holds that no Party may require a service supplier to use territorially localised computer facilities for processing and storage of data as a condition of supplying service to that country.

The cross-border flow of personal information is an important policy objective that must be facilitated in the inter-networked age. The benefits of the inter-connected world can only be fully realised when data can flow freely across borders. In addition, some countries use data localisation obligations as a means of imposing censorship, surveillance and other rights-infringing obligations onto service providers. In this sense, avoiding data localisation could enhance important values. At the same time, however, data localisation obligations can, in some instances, be of central importance to preserving privacy and freedom of expression. As in other instances, the data localisation prohibitions adopted by TISA's e-commerce annex lack the nuance necessary to navigate these distinctions.

TISA's various prohibitions on data localisation are absolute, subject only to an overarching exception in Article 14, which holds that nothing at all in the electronic commerce annex will prevent any Party from taking any action deemed necessary for protecting "its own essential security interests." Yet as stated above, there are many instances where data localisation is desirable. The European Union data protection regime, for example, employs restrictions on territorial data transfer as a means of ensuring that companies in recipient countries provide its

43 Canada's federal privacy law, for example, has been criticised for its weak enforcement region:

https://cippic.ca/en/news/digital_privacy_bill_improvements_flaws_and_gaps.

citizens an ‘adequate’ level of privacy protection.⁴⁴ It is not clear how these elements of the EU Data Protection Directive could be consistent with TISA’s prohibition on data localisation. Indeed, this outright ban on data localisation appears at odds with several international and regional privacy frameworks. The OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (OECD Privacy Guidelines), for example, permit data localisation obligations with respect to recipient countries that do not substantially observe the privacy protections found in the Guidelines and are unable to ensure a similar level of protection for received data.⁴⁵ It also permits data localisation obligations where these are proportionate to the risks presented by permitting transborder flows, taking into account the sensitivity of the data.⁴⁶

The approach evident in these international and regional data protection frameworks is a sensible one, in that it permits countries to block data transfers to other countries where privacy cannot be guaranteed. Yet TISA provides no leeway for such restrictions. This direct conflict in obligations in international standards is unusual, as many TISA Party states have also acceded to both the OECD Privacy Guidelines or to the EU Data Protection Directive, or both. It is all the more an issue as Article 4 of TISA’s E-commerce annex, which currently addresses obligations regarding privacy protection imposed onto TISA state Parties, expressly incorporates relevant international privacy instruments as reference points for assessing substantive privacy obligations. At the same time, TISA’s prohibitions on data localisation render it impossible to comply with core elements of these very frameworks.

Another serious concern that arises in discussions of data localisation arises from the increasingly common practice of state Parties to exploit their access to foreign data (as it transits through or is stored in their territorial boundaries) in order to spy on foreign individuals. Many states argue that domestic constitutional privacy protections simply do not apply to foreigners and, as a result, claim unfettered access to any foreign data that comes within their practical grasp.⁴⁷ A number of foreign intelligence agencies including the US National Security Agency (NSA), the UK Government Communications Headquarters (GCHQ), the Canadian Communications Security Establishment (CSE) and others are structured (legally and

44 Colin Bennett, “Geo-Politics of Personal Data”, *Harvard International Review*, 14 December 2012, <<http://hir.harvard.edu/archives/3016>>.

45 OECD Privacy Guidelines, Annex to Recommendation of the Council concerning Guidelines governing the Protection of Privacy and Transborder Flows of Personal Data (2013), C(80)58/Final, as amended by C(2013)19, 11 July 2013, section 17

46 OECD Privacy Guidelines, Annex to Recommendation of the Council concerning Guidelines governing the Protection of Privacy and Transborder Flows of Personal Data (2013), C(80)58/Final, as amended by C(2013)19, 11 July 2013, section 18

47 See discussion in: Craig Forcese, “Spies Without Borders: International Law and Intelligence Collection”, (2011) 5 *Journal of National Security Law & Policy* 179.

operationally) in a manner that wholly disregards the privacy of foreigners and permits them carte blanche with respect to the surveillance of foreign digital interactions.⁴⁸ This approach to digital surveillance occurs against a backdrop of cooperation among the agencies carrying it out that permits each to benefit from the more lenient data access elements of the other. Indeed, foreign intelligence agencies so highly value the ‘location’ of data that they actively attempt to strategically redirect digital traffic to friendly locations or jurisdictions so that they can ‘request’ or even directly access it.⁴⁹ The surveillance capacities that these various initiatives have produced are staggering in scope, and have attracted international criticism.⁵⁰

A result of these developments has been increased concern by individuals, businesses and governments regarding where their data is located. This has manifested in market pressures on electronic services whose business model is reliant on transborder data flows.⁵¹ Some such businesses are rising to the challenge by opening local data centres to cater to local data needs.⁵² Overall, TISA’s absolute and unconditional prohibition on data localisation requirements is not defensible. There are legitimate reasons for individuals, businesses or states to localise data. Government regulations that support such localisation in a reasonable manner that does not allow for anti-competitive or rights-infringing impacts should not be forbidden. States themselves should be permitted to require data localisation when contracting with services in order to protect highly sensitive citizen data from foreign intrusion. A restriction on data localisation that accounts for some of these nuances would perhaps be defensible. Unfortunately here, as elsewhere, TISA’s approach falls short.

4. Consumer protection and dispute resolution

Article 3 of TISA’s e-commerce annex obligates state Parties to adopt and maintain consumer protection laws that would regulate fraudulent and deceptive commercial activities. This

48 <http://news.nationalpost.com/full-comment/our-data-our-laws>

49 Ross Anderson, “Meeting Snowden in Princeton”, *Light Blue Touchpaper*, 2 May 2015, <<https://www.lightbluetouchpaper.org/2015/05/02/meeting-snowden-in-princeton/>>. Open Rights Group, “Chapter 1: Collect it All: Everyday Lives Turned into Passive Signals Intelligence”, *GCHQ and UK Mass Surveillance*, 11 March 2015, <https://openrightsgroup.org/assets/files/pdfs/reports/gchq/01-Part_One_Chapter_One-Passive_Collection.pdf>, p. 6.

50 UN High Commissioner for Human Rights, “The Right to Privacy in the Digital Age,” UNHRC, 27th Sess., UN Doc A/HRC/27/37 (2014); Boundless <http://www.theguardian.com/world/2013/jun/08/nsa-boundless-informant-global-datamining>

51 <http://www.nytimes.com/2014/03/22/business/fallout-from-snowden-hurting-bottom-line-of-tech-companies.html>

52 <http://www.cbc.ca/1.3096743>

provision raises many of the same interpretive issues as are raised by the anti-spam and net neutrality provisions of TISA to the extent that it will vest the TISA framework with an international standard-setting mandate that could be used to interpret what ‘fraudulent or deceptive’ means. This could rob domestic regimes from the ability to define these terms as necessary to adjust for domestic variability. While terms relating to deceptive or fraudulent commercial activities are well defined in many domestic regimes, they are not well defined internationally and can be used by some governments to justify and legitimise repressive censorship of political dissidents and civil society. In Tanzania, for example, concerns were raised that the government’s regulation of online ‘false’ or ‘deceptive’ information will be used to repress NGOs.⁵³ As with anti-spam laws, these types of concerns have historically militated against the adoption of content-based regulations at the international stage.

In addition to these more general concerns, sub-clause 5 of Article 3 raises specific concerns regarding a common and important feature of many consumer protection laws. This clause prohibits TISA state Parties from interfering with individual attempts to “mutually determine the appropriate methods for resolving disputes arising from their electronic commerce transactions... includ[ing]... online dispute resolution mechanisms.” A number of consumer protection frameworks have adopted prohibitions on the use of dispute resolution clauses in consumer contracts.⁵⁴ The impetus for such regulation is that such clauses are often unilaterally imposed into consumer contracts of adhesion and used to effectively prevent any access to the courts and, in particular, to class action mechanisms for adjudication of small claims in aggregate.⁵⁵

Yet Article 3.5 would appear to preclude the use of provisions guaranteeing access to the courts and to class action mechanisms, as this could constitute an interference with mutually determined dispute resolution mechanisms in spite of the reality that ‘agreement’ from consumers is in the form of a non-negotiable clause in a broader contract of adhesion.

53 <http://motherboard.vice.com/read/in-tanzania-activists-worry-a-new-law-will-land-them-in-jail-for-spam>

54 *Seidel v. TELUS Communications Inc*, 2011 SCC 15.

55 Pablo Cortés, *Online Dispute Resolution for Consumers in the European Union*, (New York: Routledge, 2011), pp. 186, 200. C. Dougherty, “Consumers May See New Limits on Mandatory Arbitration”, *Bloomberg Businessweek*, 21 May 2012, <<http://www.businessweek.com/news/2012-05-21/consumers-may-see-new-limits-on-mandatory-arbitration>>.

5. Conclusion

In sum, many elements of TISA's e-commerce annex may pose serious problems for domestic policy-making in areas of law that lie at the heart of online innovation, privacy and free expression. We note additional concerns regarding international taxation of e-commerce (found in Article 11) and general restrictions on local presence requirements (found in Article 9, for example). These other concerns are not explored in depth here, but have been highly controversial in other e-commerce contexts. Local presence is often a key element in assessing the applicability of domestic laws and protections to foreign companies. In the absence of a local presence obligation e-commerce companies could, therefore, insulate themselves from domestic laws (for better or worse). Cross-border duties and taxation of electronic services has also proven a controversial topic, with some claiming that digital service providers situated abroad attempt to bypass domestic tax structures applicable to competing services. These issues are not canvassed in depth below, but are flagged for potential future consideration.

Many of the specific standards adopted by TISA in its e-commerce annex are flawed in their objective or their implementation. This is not surprising given the highly secretive and cloistered manner in which TISA's provisions (and those of its sister agreements – the TPP and the TTIP) are being negotiated. Input from civil society and public interest groups in particular has been sparse, premised mostly on leaked and outdated texts, and greeted with hostility. Moreover, it remains to be seen how TISA will be implemented. If, as has been suggested, oversight of TISA's provisions will be vested in an international body such as the World Trade Organization, it will represent an unprecedented consolidation of online content and standards regulation at the international level. Concern over comparable consolidation at the ITU's World Conference on International Communications 2012 led several state Parties to vote against treaties proposed in that body. Many of these same state Parties are now seeking to consolidate oversight over key elements of online activity in a different world order. However, it is not clear at all how TISA proposes to address these issues without running into the same concerns that greeted the ITU proposals at WCIT 2012.