SWEDEN
INTERNATIONAL
CHAMBER OF COMMERCE

Ann Linde
Minister for Minister for EU Affairs and Trade

Mikael Damberg
Minister for Enterprise and Innovation

Regeringskansliet
103 33 Stockholm

Stockholm, 1 juni 2018

Re: ICC calls on EU Member States to increase ambition on cross border data flows in EU trade agreements

Dear Ministers,

On 9 February 2018, the European Commission (EC) presented a long-awaited proposal for cross-border data flows in trade and investment agreements to the EU Trade Policy Committee. The International Chamber of Commerce (ICC), the world's largest business organisation with a network of over 6 million members in more than 100 countries, welcomes the EC's efforts and underscores the need for horizontal provisions for cross-border data flows that support digital transformation.

Cross-border data flows are indispensable to global trade (final and intermediate goods, services, and agriculture products) and contribute significantly to growth and job creation by permitting business operations for companies of all sizes. At the same time, they allow access to a wider variety of goods and services, eventually of better quality and more competitively priced. The benefits of enabling and facilitating cross-border data flows are, therefore, global and reach consumers and companies alike.

We note that digital protectionism by some trading partners is on the rise in various guises. One form is to introduce data localisation requirements that inhibit the cross-border flow of personal and non-personal data and render transactions, as described above, more costly and less efficient. This is why international norms are so important.

ICC welcomes and supports the EC's intention to confirm that such norms apply in trade agreements and at the same time to commit to high standards for the protection of personal data and privacy.

ICC is however concerned that as drafted the European Commission proposed text "Horizontal provision for cross-border data flows and for personal data protection (in EU trade and investment agreements)" permits – perhaps unintentionally – unjustifiable and

disproportionate limitations to legitimate cross border data flows under Article B2. It is unclear as to whether the "safeguards it deems appropriate" would also include measures contrary to commitments taken by the parties under Article A, that prohibit data localisation requirements and legitimate cross-border data transfers.

Our understanding is that the last sentence of Article B, paragraph 2 ("Nothing in this agreement shall affect the protection of personal data and privacy afforded by the Parties' respective safeguards") may be interpreted as a carve-out. Should this be the case, countries seeking to introduce protectionist measures could cite data protection in their own country as an excuse to set up new data localisation requirements. This would be entirely contrary to the purpose of these horizontal provisions, eliminating any possibility to contest them. It is important to ensure that legitimate concerns regarding privacy and data protection are not misused to justify protectionism.

In this context, ICC calls on the European Union to adopt a trade negotiating position that reflects the following principles:

- Digital trade chapters in trade agreements should include provisions governing data flows both into and out of the EU. In the case of personal data this should be possible in full respect of data protection laws. Trade agreements should not be used to challenge or circumvent EU privacy rules. Neither the WTO rules nor any modern trade agreement (including the recently agreed Comprehensive and Progressive Agreement for Trans-Pacific Partnership) poses a challenge to the EU rules.

- Adequacy decisions and other transfer means such as standard contractual clauses and binding corporate rules constitute the avenue for outbound international transfers of personal information out of the EU, ensuring the principle when personal data is transferred abroad, the protection travels with the data.

- While reciprocal adequacy decisions are welcomed, they do not provide investors with sufficient investment confidence for EU-based data processing beyond the scale of the European market, since adequacy decisions can be unilaterally revoked and cannot address a broader set of digital market access barriers in third countries. Thus, adequacy decisions are complementary to, but never substitutes of, trade agreement disciplines on data flows. Such trade agreement disciplines should ensure "reciprocity" when it comes to workable transfer mechanisms of personal data in compliance with both parties' data protection laws.

- The need for data flows in the digital economy is a given. Regrettably, language in current texts such as the EU-Japan revision clause Article 8.8.1, ("The Parties shall reassess the need for inclusion of an article on the free flow") implies, in this context, a question on the need for data flows – this is effectively similar to questioning the

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need for digitization of European and Japanese economies that would be supported by data transfers.

- Cyber security and confidentiality of business data should be seen as enablers for the free flow of data in a secure environment. Cyber security rules should not be used as artificial barriers to trade by individual governments. Forced disclosure of source-code as a condition for market access should not apply to civilian use of ICT.

ICC is a strong supporter of open, rules-based trade and considers trade negotiations as opportunities to advance the global economy while assuring that the privacy policy objectives are not at risk from digital trade chapters in free trade agreements. Failure to obtain effective trade commitments against unjustified data localization measures and for legitimate data flows under the applicable rules and based on reciprocity conditions, would seriously impact the value of any trade agreements moving forward. ICC encourages the Council to ensure that the proposed provisions of Article A are not undermined on the basis of Article B, unless effective safeguards are put in place.

Yours sincerely,

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Secretary-General, ICC Sweden