

TPP Holds Major Potential For Digital Services And Commerce

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Notwithstanding its title, the electronic commerce chapter (Chapter 14) of the Trans-Pacific Partnership includes commitments that apply well beyond traditional e-commerce to a wide range of digital communications and trade affecting nearly every sector of the economy. Although variations on some of these commitments can be found in prior U.S. free trade agreements or other international instruments, the chapter includes several novel commitments, including on cross-border data transfers, forced localization of computing facilities, and compelled disclosure of software source code.

While these commitments are subject to important carveouts, exceptions and limitations, and businesses will want to consider these limitations carefully as they evaluate the TPP's potential impact, the chapter should help discipline laws and other measures in TPP countries that increasingly threaten to impede online services and commerce. As businesses across all sectors increasingly rely on digital services and cross-border data transfers to compete abroad, the e-commerce chapter commitments may end up being among the most important in the TPP for many companies — especially since violations of these commitments may be challenged by TPP governments (“parties”) pursuant to the TPP's dispute settlement mechanism set out in Chapter 28.

Key Commitments

Some of the key commitments in Chapter 14 are as follows:

Cross-Border Electronic Data Transfers

Article 14.11 requires each TPP party to allow the cross-border transfer of information, including personal information, by electronic means, “when this activity is for the conduct of the business of a

covered person.” “Covered person” is defined broadly to mean an investor of a party (but excluding an investor in a financial institution — see below) or an “investment,” as defined in Chapter 9, and any service supplier of a party as defined in Chapter 10. Article 14.11 allows a party to adopt or maintain a measure inconsistent with this obligation only “to achieve a legitimate public policy objective,” provided that such a measure is not applied in a manner that constitutes “arbitrary or unjustifiable discrimination or a disguised restriction on trade” and “does not impose restrictions on transfers of information greater than are required” to achieve the legitimate objective. Especially in light of the rapid growth in big data analytics and “Internet of Things” devices across many industries and sectors, Article 14.11 should provide important protections for companies that rely on data collection and analysis to compete effectively.

Forced Localization of Computing Facilities

Under Article 14.13, no party may require a “covered person” to use or locate computing facilities (i.e., “servers and storage devices for processing or storing information for commercial use”) in that party’s territory as a condition for conducting business in the territory. This commitment is subject to the same exception language as described in the preceding bullet. According to the United States Trade Representative, this is the first U.S. free trade agreement ever to include an explicit commitment against forced localization of computing facilities; it should provide a strong basis to discipline data and data center localization proposals that cloud computing suppliers and their customers increasingly face in many regions of the world.

Transfers of Source Code

Article 14.17 prohibits any party from requiring the transfer of, or access to, software source code as a condition for the import, distribution, sale or use of such software, or products containing such software, in the party’s territory. However, this commitment applies only to “mass market” software (a term that is not defined), and does not apply to software used for “critical infrastructure” (also not defined). This commitment does not preclude (1) requirements to provide source code pursuant to a “commercially negotiated contract[;]” or (2) a party from requiring the modification of source code “necessary for that software to comply with laws or regulations which are not inconsistent with” the TPP. As businesses increasingly rely on proprietary software innovations to gain a competitive edge, this commitment should help protect against disclosure requirements that could put these investments at risk. According to the USTR, the TPP is the first U.S. trade agreement to include such a commitment.

Customs Duties on Electronic Transmissions

Article 14.3 prohibits parties from imposing customs duties on cross-border electronic transmissions, including content, between persons of the various TPP countries. This commitment largely follows the moratorium on e-commerce customs duties agreed among World Trade Organization members in 1998, which businesses and consumers have relied upon for years to facilitate digital commerce. Article 14.3, however, does not preclude parties from imposing internal taxes, fees or other charges on “content transmitted electronically,” provided such measures are imposed in a manner consistent with the TPP.

Nondiscriminatory Treatment of Digital Products

Article 14.4. prohibits a party from providing less favorable treatment to digital products, and the creators and owners of those digital products, of other parties than it accords to “other like digital products.” (The determination of whether two products are “like products” has a long history in WTO

jurisprudence.) Subsidies, grants and broadcasting are all excluded from this commitment.

Access to and Use of the Internet for Electronic Commerce

Article 14.10 includes a general recognition by the parties of the benefits of consumers being able to access and use online services and applications of their choice, and to connect the devices of their choice to the Internet. This text largely reflects the “open Internet” principles enshrined in U.S. law and practice. Notably, however, this article does not include enforceable commitments, and even the agreed principles are “[s]ubject to applicable policies, laws and regulations.”

Beyond these provisions, the e-commerce chapter addresses several other issues, including methods of electronic authentication and the validity of e-signatures; maintenance of laws on online privacy, consumer protection, and spam (“unsolicited commercial electronic messages”); the benefits of “paperless trading,” and other matters. Certain of these provisions impose obligations on the parties, while others merely require Parties to “endeavor” to adopt or implement them.

The entire chapter falls within the scope of the dispute settlement provisions of Chapter 28. Although the e-commerce commitments are not covered by the investor-state dispute settlement (“ISDS”) provisions of Chapter 9, a government measure that violates a commitment in the e-commerce chapter might also violate an investment commitment in Chapter 9, and to that extent be subject to ISDS.

Additional Limitations

In addition to the commitment-specific limitations and exceptions already discussed, the e-commerce provisions are subject to additional limitations that apply to the entire chapter. These include:

Exclusion of Government Procurement and Government Data Processing

Article 14.2.3 excludes from the scope of Chapter 14: (a) government procurement, and (b) information “held or processed by or on behalf of a Party, or measures related to such information, including measures related to its collection.” These could be significant exclusions and might, for instance, allow TPP governments to require that processing or storage of government data occur on domestic computing facilities.

Exclusion of Financial Institutions/Financial Services

Under Article 14.1, the term “covered person” excludes “financial institution[s]” and any “cross-border financial service supplier of a Party” as defined in Chapter 11 (Financial Services). These and related provisions are broadly seen as excluding financial institutions from the scope of Chapter 14. Instead, financial institutions will be forced to rely on the commitments specifically applicable to financial service suppliers set forth in Chapter 11 and other chapters of the TPP.

Incorporation of GATS Exceptions

Chapter 14 commitments also must be read in conjunction with the General Exceptions in Chapter 29. For example, under Article 29.1.3, paragraphs (a), (b), and (c) of Article XIV (General Exceptions) of the WTO’s General Agreement on Trade in Services are incorporated by reference into the TPP. These GATS paragraphs permit measures necessary to protect public morals or maintain public order; protect human, animal, or plant life or health; or to secure compliance with laws or regulations that are not

inconsistent with the GATS.

National Security Exception

Under Article 29.2(a), nothing in the TPP, including Chapter 14, precludes a party from applying measures that “it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.” Historically, security exceptions based on similar text often have been considered to be largely self-justifying, under the view that they can be invoked by a Party whenever “it considers” the exception to apply. This could make it difficult for parties to challenge measures that facially violate one or more Chapter 14 commitments, but which a party justifies as necessary to protect national security.

Finally, the commitments set forth in Chapter 14 do not apply to any nonconforming measures (i.e., measures that do not conform to commitments set forth in the TPP) identified by a party. Article 14.18 also provides that Malaysia is exempt from the commitments in Article 14.4 (nondiscriminatory treatment of digital products) and 14.11 (cross-border data transfers) for two years, while Vietnam is exempt from both of these commitments, and from Article 14.13 (forced localization of computing facilities), for two years.

Given the sheer number and potential scope of these exceptions, companies will need to analyze them carefully to evaluate how the e-commerce chapter commitments might impact their operations in any given TPP country. The fact that these commitments discipline measures impacting digital trade and commerce to a significantly greater extent than any prior trade agreement, however, means that many businesses that rely on cross-border digital services and data transfers will likely benefit substantially from the adoption of the e-commerce chapter by TPP countries.

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