

Australia-European Union Free Trade Agreement
Europe Division
Department of Foreign Affairs and Trade
RG Casey Building
John McEwen Crescent
Barton ACT 0221
By email: a-eufta@dfat.gov.au

26 February 2016

Dear Sir/Madam

Submission on proposed Free Trade Agreement with the European Union

We welcome the opportunity to provide some comments on the proposed Australian Free Trade Agreement (FTA) with the European Union (EU).

As explained in greater detail below, Telstra operates significant infrastructure providing information and communications technology services in the EU, and employs over 400 staff across five EU countries. We believe there would be potential benefit for both our own business and those of many of our enterprise customers in a FTA that reduced trade barriers and are net trade enhancing. We reiterate our longstanding position that adequate consultation with Australian stakeholders requires not only obtaining input on trade barriers, but additionally requires engagement by the Department of Foreign Affairs and Trade (DFAT) with stakeholders like Telstra on the detail of the proposed trade agreement text as it develops.

Telstra's current commercial interests in the EU

Telstra and its subsidiaries currently trade directly in five EU member states: the UK, France, Germany, Sweden, and the Netherlands. Over 400 employees work directly for Telstra and its subsidiaries with the largest concentrations of staff in the United Kingdom (UK) and Sweden.

Over a period of 15 years, we have developed a significant business supplying telecommunications services to enterprise customers in the UK and several other EU countries. While much of the focus of this business is on providing services that leverage our extensive network in Asia to EU-based customers, we have steadily augmented our products with sophisticated managed services including data hosting and cloud products. For example, we own and operate a 11,150 m² (120,000 ft²) data centre in the London Docklands area, and we operate a smaller 1,400 m² (15,000 ft²) data centre in Woking in the UK. Further, Telstra provides connectivity into Europe via our own capacity on nine separate submarine cable systems. These assets are an integral part of our global connectivity and managed services products which we supply to multinational corporate customers and professional services firms.

More recently Telstra has augmented its EU business activity with intelligent video services provided by our subsidiary Ooyala and health analytics services supplied by our subsidiary Dr Foster. Both these businesses are innovation leaders in their respective industries.

Further, several key vendors to Telstra's Australian business are EU-headquartered companies, for example Ericsson of Sweden.

Experience of telecommunications regulatory arrangements in the EU

As DFAT is aware, domestic regulation of telecommunications services has been a focus of trade negotiations since the conclusion of the Telecommunications Reference Paper in the World Trade Organisation (WTO) General Agreement on Trade in Services (GATS). The EU has been a leader in advocating for telecommunications market liberalisation in WTO member states, particularly since several EU-based network operators such as Telefonica and Orange have extensive offshore investments. Market liberalisation is also of interest to EU-based telecommunications equipment vendors who benefit from increased domestic competition and consequent network builds.

As such, the EU generally, and the specific EU member states in which Telstra operates, feature well-developed domestic regulatory regimes. While the EU telecommunications regulatory system can be multi-layered and complex to navigate at times, we have not experienced discriminatory behind-the-border barriers. For example, most EU jurisdictions do not require a licence to operate telecommunications services, merely a notification to the relevant regulator.

Our view is that certain regulatory policy approaches adopted by the European Commission and some member states have discouraged investment and innovation by their domestic telecommunications carriers. It is important that, as with the telecommunications chapters in prior FTAs, the text should not require any change to settled regulatory principles in Australia. That said, Telstra does not believe there should be any difficulty in Australia and the EU agreeing the terms of a telecommunications chapter reflective of current regulatory arrangements in our respective jurisdictions. We note that the content of such telecommunications chapters is relatively settled, as reflected in Australia's FTAs with the US, Singapore, Korea, Malaysia, Chile, ASEAN and Japan. The Trans-Pacific Partnership Agreement (TPPA) features a novel addition in the form of mobile roaming provisions: Telstra would welcome the opportunity to engage with DFAT on the potential inclusion of roaming provisions in the FTA with the EU.

Intellectual property

Telstra expects that intellectual property will be a major interest of both parties in the proposed FTA. Telstra supports the inclusion of an IP Chapter as part of any Australia-EU FTA, and we look forward to an opportunity to review and comment on the relevant text.

General business and investment regulation

We have not experienced difficulties in the EU with foreign investment limits or financial transfers to fund our activities or repatriate earnings. Tax arrangements are transparent with generally clear precedent and guidelines for operation. Like all businesses operating in both the UK and mainland Europe, Telstra is closely following developments in respect of the UK's membership of the EU.

Human resource mobility

As a company operating in multiple countries Telstra is exposed to restrictions on human resource mobility. It is important that we have the flexibility to move employees in key technical and management roles between jurisdictions, particularly as we win new customers and grow our business in the EU. On occasion these moves need to be executed quickly in order to serve our customers. Inter-jurisdictional transfers also provide a valuable learning experience for our employees and are an important retention tool for young Australian staff in particular, who otherwise would typically leave their Australian employer when embarking on their offshore working experience.

The recent trend we have observed in the EU is a steady tightening of national policies with regard to allowing non-EU personnel to work in the EU. We recognise that this may be reflective of heightened political sensitivities in the region to migration policy, however the FTA negotiation enables settled rules to be put in place for Australian nationals (and vice-versa). Telstra's experience with transferring staff into the UK has been uniformly positive to date, however we are concerned that at the end of the 5 year UK working visa period there appears to be no facility to obtain any further extension. Further, the UK Government is removing concessions that were in the past extended to Australian nationals.¹ We are beginning to work through similar issues in our mainland European operations and are keen to engage further with DFAT on this aspect.

Cross-border data transfer

As DFAT will be aware, recently there have been increased sensitivities between the EU and the United States over the protections applicable to transfer of data between their respective jurisdictions or so-called 'Safe Harbour framework', following the *Schrems* decision of the European Court of Justice.² The immediate concerns appear to have been resolved with agreement of a replacement framework,³ however the new 'Privacy Shield' arrangements remain to be fully disclosed and ratified, and this will continue to be a contentious topic.⁴

We support measures to enable the free flow of data across borders, subject to appropriate protections. In some instances there may be compelling security or privacy reasons for governments to require data to be held onshore, but there is also a real risk that mandatory data localisation regulation can be used as a protectionist measure.

Telstra would welcome the inclusion of provisions in the proposed FTA providing for freedom to engage in data transfer between Australia and the EU, subject to appropriate protections. We note that Article 14.11 in the Electronic Commerce chapter of the TPPA provides a template for such a provision. Further, we understand that financial services data was excluded and placed under a separate regime in the TPPA at the insistence of the United States, however we see no reason why financial services data should be subject to a separate cross-border transfer regime in the Australia-EU FTA.

¹ Thom Brooks, "Why is the UK ramping up costs for potential Australian migrants?" *The Conversation* 24 February 2016, <https://theconversation.com/why-is-the-uk-ramping-up-costs-for-potential-australian-migrants-54916>

² Case C-362/14, *Schrems v Data Protection Commissioner*, 6 October 2015, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=169195&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=125031>

³ European Commission - Press release, "EU Commission and United States agree on new framework for transatlantic data flows: EU-US Privacy Shield", Strasbourg, 2 February 2016, http://europa.eu/rapid/press-release_IP-16-216_en.htm

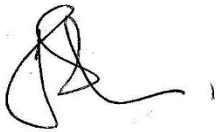
⁴ See, for example, David Meyer, "Here Comes the Post-Safe Harbor EU Privacy Crackdown", *Fortune* 25 February 2016, <http://fortune.com/2016/02/25/safe-harbor-crackdown/>.

Conclusion

We would welcome the opportunity to engage further with DFAT on all relevant aspects of the proposed FTA. Telstra considers it particularly important that, in areas of significant technical content and legal complexity such as telecommunications and intellectual property, DFAT should consult with stakeholders on the actual text of proposed agreements well in advance of the text being settled.

Should you require further information please contact Telstra's Group Manager Government Relations, Jamie Snashall, on (02) 6129 4649 or jamie.snashall@team.telstra.com

Yours sincerely,



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