



**Computer & Communications
Industry Association**
Tech Advocacy Since 1972

April 30, 2019

Ms. Lisa R. Barton
Secretary to the Commission
U.S. International Trade Commission
500 E Street S.W. Washington, DC 20436

Re: Investigation No. 332-569

Dear Ms. Barton:

Pursuant to the request for comments published by the U.S. International Trade Commission (ITC) in the Federal Register at 84 Fed. Reg. 4, 854 (Feb. 19, 2019), the Computer & Communications Industry Association (CCIA) submits the following written comments regarding trade-related barriers affecting exports of U.S. small and medium-sized enterprises (SMEs) to the United Kingdom.

CCIA has filed these comments electronically and will submit eight true paper copies to the ITC prior to the deadline listed in the Federal Register. Thank you for your consideration of these comments.

Respectfully submitted,

/s/ Rachael Stelly

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Before the
Office of the United States International Trade Commission
Washington, D.C.

In re

U.S. SME Exports: Trade-Related Barriers
Affecting Exports of U.S. Small- and
Medium-Sized Enterprises to the United
Kingdom

Investigation No. 332-569

**COMMENTS OF THE
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)**

Pursuant to the notice issued by the U.S. International Trade Commission (USITC) and published in the Federal Register at 84 Fed. Reg. 4, 854 (Feb. 19, 2019), the Computer & Communications Industry Association (CCIA) submits the following written comments regarding trade-related barriers affecting exports of U.S. small and medium-sized enterprises (SMEs) to the United Kingdom.

I. Introduction

SMEs are strong contributors to global digital trade flows. The Internet is characterized by low barriers to entry, and empowers startups to reach new markets and users around the world. As stated in a Brookings Institute paper, the Internet “gives SMEs access to services as inputs, which increase the productivity of all SMEs and their ability to compete in overseas markets.”¹ A McKinsey report found that SMEs using the Internet grew twice as fast as SMEs that did not use Internet services.² Research conducted by eBay shows that 97 percent of eBay-enabled small businesses export abroad, compared to only 1 percent of traditional businesses. This is widespread, with 61 percent of these small sellers reaching customers on four or more continents. Data collected through the Future of Business survey³ shows how social media platforms enable exports from small and medium-sized businesses. According to the data, 6.75

¹ BROOKINGS INSTITUTE, *Using the Internet to Promote Services Exports by Small- and Medium- Sized Enterprises* (2015), available at https://www.brookings.edu/wp-content/uploads/2016/06/Internet-WP_WEB-Final.pdf.

² MCKINSEY GLOBAL INSTITUTE, *Internet Matters: The Net’s Sweeping Impact on Growth Jobs and Prosperity* (2011), <https://www.mckinsey.com/industries/high-tech/our-insights/internet-matters>.

³ The survey is a joint collaboration from the World Bank, the OECD, and Facebook.

percent of U.S. small and medium-sized businesses (SMBs) on Facebook engage in international trade, compared to 4.33 percent of SMBs not on Facebook.⁴

A defining aspect of the current U.S.-UK trade relationship is services enabled by, and products that utilize, Internet services and information and communications technology (ICT) business-to-business services essential for companies with global value chains.⁵ To illustrate, “digitally deliverable” exports to the UK account for 23 percent of U.S. exports and 29 percent of U.S. imports from the EU.⁶ In 2017, the United States exported \$5.2 billion in telecommunications, computer, and information services alone to the UK.⁷ Both countries also have strong e-commerce markets.⁸ Many of the firms contributing to these numbers are SMEs.

However, these gains are threatened or diminished by rising barriers to digital trade in the UK posed by proposed or existing regulatory frameworks. CCIA’s submission identifies the following barriers that SMEs and startups face when exporting goods and services to the UK market: (1) content regulation that threatens innovation and free expression online; (2) intellectual property laws with broad penalties that harm innovation; (3) proposed digital taxation that will ultimately be passed on to consumers and small firms; (4) market access barriers for communications providers; (5) disruptions to cross-border data transfers and uncertainty regarding transatlantic data flows; and (6) *de minimis* levels that do not reflect the needs of the current e-commerce market.

II. Proposed Content Regulation Threatens Innovation and Free Expression

Internet services need regulatory certainty to operate abroad. Numerous conflicting liability regimes undermine this certainty and unpredictable liability rules for online

⁴ See MERCATUS CENTER, *Policy Brief: Businesses on Facebook and the Propensity to Export: The United States* (Feb. 2019), available at https://www.mercatus.org/system/files/mcdaniel_and_parks_-_policy_brief_-_digital_platforms_small_and_medium-sized_businesses_-_v1_0.pdf.

⁵ CCIA supports the Administration’s announcement of its intention to enter into negotiations on a potential free trade agreement with the UK. A free trade agreement that addresses many of the barriers outlined in CCIA’s comments will benefit digital firms of all sizes, and strengthen the U.S.-UK economic relationship.

⁶ CENTER FOR STRATEGIC & INTERNATIONAL STUDIES, *Where the Money Is: The Transatlantic Digital Market* (Oct. 12, 2017), <https://www.csis.org/blogs/future-digital-trade-policy-and-role-us-and-uk/where-moneytransatlantic-digital-market> (defining “digitally-enabled services” as “business, professional, and technical services, royalties and license fees, insurance services, financial services, and telecommunications that are largely enabled by information technologies”).

⁷ U.S. DEPT. OF COMMERCE, Bureau of Economic Analysis, United Kingdom - International Trade and Investment Country Facts (last updated Dec. 19, 2018), <https://apps.bea.gov/international/factsheet/factsheet.cfm?Area=327>.

⁸ CENTER FOR STRATEGIC & INTERNATIONAL STUDIES, *Fueling the Ecommerce Boom in U.S.-UK Trade* (Nov. 2, 2017), <https://www.csis.org/blogs/future-digital-trade-policy-and-role-us-and-uk/fueling-ecommerceboom-us-uk-trade>.

intermediaries represent a considerable barrier to international Internet commerce. Guaranteeing minimum standards for the protection of Internet services from liability for third-party content is critical to promoting U.S. SME exports. The Office of the U.S. Trade Representative (USTR) recognizes that limiting non-IPR civil liability of online platforms for third-party content is a key pillar of U.S. trade, including it as a negotiating priority for the announced U.S.-UK Trade Agreement.⁹

Currently, there are protections for online intermediaries in the UK under the E-Commerce Directive. The UK government has recently stated that, even in the event of a “no deal” Brexit scenario, the UK policy approach will “continue to align with the provisions contained in the Directive, including those on liability of intermediary service providers and general monitoring.”¹⁰ However, some reports suggest that the UK may look to change its law and depart from the E-Commerce Directive.¹¹

A recent proposal threatens to significantly disrupt the current intermediary liability regime and deter market access for SMEs. In April, the UK government presented the Online Harms White Paper (“White Paper”) to Parliament which outlines an unprecedented new approach to regulating content online.¹² The White Paper is incredibly wide-ranging, and includes a number of vague, untested ideas. The degree of uncertainty will have a chilling impact on U.S. and UK business development and exports. Research shows how uncertainty in a

⁹ OFFICE OF THE U.S. TRADE REP., United States-United Kingdom Negotiating Objectives (Feb. 2019), available at https://ustr.gov/sites/default/files/Summary_of_U.S.-UK_Negotiating_Objectives.pdf at 6 (“Establish rules that limit non-IPR civil liability of online platforms for third-party content, subject to the Parties’ rights to adopt non-discriminatory measures for legitimate public policy objectives or that are necessary to protect public morals.”).

¹⁰ Guidance on the E-Commerce Directive in the Event of No Deal (Jan. 9, 2019), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/770119/Guidance_on_the_eCommerce_Directive_in_the_event_of_no_deal.pdf.

¹¹ *UK Could Rethink Social Media Laws After Brexit, Says Minister*, THE GUARDIAN (Mar. 14, 2018), <https://www.theguardian.com/media/2018/mar/14/uk-could-rethink-social-media-laws-after-brexit-says-minister>; U.K. Committee on Standards in Public Life, *Intimidation in Public Life*, Review by the Committee on Standards in Public Life (2017), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/666927/6.3637_CO_v6_061217_Web3.1_2_.pdf (“The government should seek to legislate to shift the balance of liability for illegal content to the social media companies away from them being passive ‘platforms’ for illegal content. Given the government’s stated intention to leave the EU Single Market, legislation can be introduced to this effect without being in breach of EU law. We believe government should legislate to rebalance this liability for illegal content, and thereby drive change in the way social media companies operate in combating illegal behaviour online in the UK.”).

¹² Sec. of State for Digital, Culture, Media & Sport, and the Sec. of State for the Home Dep., *Online Harms White Paper* (Apr. 2019), [hereinafter “*Online Harms White Paper*”], available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793360/Online_Harms_White_Paper.pdf.

policy environment on intermediary liability deters early-stage investment in new startups.¹³ It will also undermine the ability of SMEs to leverage online platforms to reach new customers in the UK.

The proposed strategy would designate an independent regulator to enforce yet-to-be-determined policies and codes of conduct that set new standards for the duty of care regarding a firm's required treatment and responsibilities for a wide variety of online content. The "online harms" these new policies would target include both lawful and unlawful content, including everything from "serious violent" content to "interference with legal proceedings" and "inappropriate" content accessed by children.

Companies that "provide services or tools that allow, enable or facilitate users to share or discover user-generated content, or interact with each other online" will be in scope of the new regulatory framework, regardless of size.¹⁴ This includes SMEs. The White Paper specifically notes: "These services [targeted by the new regulatory framework] are offered by a wide range of companies, including start-ups, and SMEs, and other organisations such as charities"¹⁵ as "harms can occur on small platforms as well as big ones."¹⁶ While it's suggested that the new regulatory regime would assist start-ups and SMEs in fulfilling their obligations under the new rules, and emphasizes the need for proportionality, the measures contemplated in the White Paper are significant and it is unclear whether the substantial burdens will be offset by this assistance.

The White Paper does not go into specifics on the new burdens associated with fulfilling the new duty of care for every type of 'harmful' online content, but contemplates mandates including proactive filtering and other measures to police a wide variety of user-generated content. Faced with these penalties, smaller companies that do not have the extensive resources to proactively monitor or conduct human review necessary to make independent judgments on

¹³ Matthew Le Merle *et al.*, *The Impact of Internet Regulation on Investment* (Fifth Era 2016), available at <http://www.fifthera.com/perspectives-blog/2016/1/7/report-the-impact-of-internet-regulations-on-investment> (finding that 71% of investors are uncomfortable investing in internet businesses where the intermediaries could be held liable for third party content or actions, and that 62% of investors are uncomfortable investing in digital content intermediary businesses that would be required by law to run technological filters on user-uploaded content).

¹⁴ The proposal goes on to clarify that the two main types of online activity that "can give rise to the online harms in scope or compound their effects" include services that enable "hosting, sharing and discovery of user-generated content (e.g. a post on a public forum or the sharing of a video)" and facilitation of public and private online interaction between service users (e.g. instant messaging or comments on posts). *Online Harms White Paper*, *supra* note 12, at 49.

¹⁵ *Id.* at 49.

¹⁶ *Id.* at 55.

all content uploaded to their platforms will rely on filtering tools that are not always accurate at only targeting unlawful content. Especially with the broad range of ‘harmful’ online content in the proposal, human review will be required and even then, it’s not clear what would be permitted under the various codes of practice. The White Paper also presents vague and untested ideas regarding duty of care. For example, it is suggested that platforms would have to determine ‘foreseeable’ harm and act accordingly.¹⁷

The penalties contemplated are concerning and include “disruption of business activities” that would allow the regulator to force other online services to block the targeted companies’ availability or presence online, ISP blocking, and senior management liability extending to criminal liability.¹⁸

III. Intellectual Property-Related Barriers

A. The EU Copyright Directive

As the UK remains a member of the EU at this time, they are obligated to implement the Copyright Directive into national legislation. The new EU Copyright Directive presents significant consequences for innovation and free expression online, and will deter U.S. investment in the EU and the UK for smaller service exports.¹⁹ The new requirements under Article 17 (previously Article 13) introduced new obligations on information service providers regarding third-party content that drastically depart from international norms and U.S. law. Under the new obligations, online intermediary services are liable for the content uploaded on their platform unless the service provider has sought authorization from the owner of the content (for all copyrighted content in existence); made best efforts to ensure the unavailability of specific works; and acted ‘expeditiously’ to remove and prevent future uploads of content upon

¹⁷ *Id.* at 54 (“The duty of care approach will also mean companies must improve their understanding of the risks associated with their services and take effective and proportionate steps to mitigate these risks. These steps should be in keeping with the codes of practice set down by the regulator. When assessing compliance, the regulator will need to consider whether the harm was foreseeable, and therefore what is reasonable to expect a company to have done.”).

¹⁸ *Id.* at 60 (“[I]t may be appropriate to force third party companies to withdraw any service they provider that directly or indirectly facilitate access to the services of the first company, such as search results, app stores, or links on social media posts.”).

¹⁹ CCIA has raised concerns with the Directive in multiple proceedings before the U.S. ITC and Office of the U.S. Trade Representative. *See, e.g.*, Comments of CCIA, 2019 Special 301 Reporting, http://www.cciagnet.org/wp-content/uploads/2019/02/CCIA_2019-Special-301_Review_Comment-2.pdf; Comments of CCIA, 2019 National Trade Estimates Report, <http://www.cciagnet.org/wp-content/uploads/2018/10/CCIA-Comments-to-USTR-for-2019-NTE.pdf>.

receipt of a notice from the rightsholder.²⁰ To comply, companies will have to deploy filtering tools to proactively identify and remove all content from their platforms. The larger Internet platforms that host user-generated content have devoted significant resources to developing tools that proactively identify and remove known copyrighted content, and invested in large human review teams. However, these tools are not always effective. Further, the adoption of these significant measures is impractical for smaller firms.

The ‘protections’ included for SMEs towards the end of the negotiations will do little to protect startups and emerging Internet services. Under the final text, only Internet services that have existed for less than three years and have less than five million unique visitors to their website are exempt from the filtering obligations.²¹ These parameters do not reflect the nature of online interactions, where one viral instance could lead to well over five million new visitors in a short amount of time, bringing the new firm into the full scope of the Directive and its filtering obligations.

Final implementation of the EU Copyright Directive will depend on the Brexit process, according to a spokesperson for the UK’s Intellectual Property Office, who also noted that the UK supports the goals of the EU Copyright Directive.²²

B. Expansive Injunctive Relief

The UK provides for broad injunctive relief remedies for intellectual property infringement. In the copyright context, courts have liberally granted injunctive relief against Internet service providers to block websites hosting infringing content pursuant to § 97A of the Copyright, Designs & Patents Act, starting with the 2011 case of *Twentieth Century Fox v British Telecommunications Plc.* [2011 EWHC 1981 (Ch)]. Concerns regarding broad injunctive relief for patent infringement claims are also present when operating in the UK. By contrast,

²⁰ EU Copyright Directive, Article 17, 4(a)-(c).

²¹ EU Copyright Directive, Article 17, 6.

²² *UK Approaches on EU Copyright Reforms Depends on Brexit*, OUT-LAW (Apr. 1, 2019), <https://www.out-law.com/en/articles/2019/april/uk-eu-copyright-reforms-brexite/> (“The government has supported the goals of the EU Copyright Directive throughout its negotiation, wanting to see fairer rewards for creators in the online ecosystem, while protecting the rights of users and ensuring a thriving digital economy . . . While the final Directive is not perfect, it is an important modernisation of the copyright framework for the digital age. It will help to ensure that creators are more fairly rewarded for the use of their works online. . . . The UK’s ability to implement the Directive into domestic law will be influenced by the wider context of our departure from the EU . . . If the UK does implement this measure, any changes will need to be subject to a full and thorough consultation and robust impact assessment. The government will work with interested individuals and businesses to ensure these proposals are implemented in a way which works for the British economy and which strikes an appropriate balance between the interests of the affected parties[.]”).

U.S. copyright law provides injunctions against intermediaries in specific circumstances. *See* 17 U.S.C. § 512(j). Similarly, injunctions granted pursuant to U.S. patent law are guided by a multi-element test designed to account for, *inter alia*, irreparable harm to the rightsholder. *See eBay v. MercExchange, Inc.*, 547 U.S. 388 (2006).

C. Uncertainty Regarding the Unified Patent Court

The Unified Patent Court (UPC) presents an opportunity to provide business certainty for startups and SMEs regarding patent protection across the EU. The UPC is currently held up in national courts.²³ However, once ratification is achieved by all UPC members, Brexit still poses uncertainties which deters investments by SMEs in the UK.

IV. Taxation of Digital Services

An alarming trend among foreign countries is the singling out of the U.S. digital economy for additional taxation. U.S. technology firms are increasingly the target of these unprecedented “digital services taxes” (DST) around the world. Many European countries have decided to move forward with an interim tax on an industry comprised mostly of U.S. digital exporters, while also pushing international institutions to globalize this taxation. In November 2018, the UK government announced that it would introduce a new digital services tax in April 2020.²⁴ While the proposal purports to have a non-discriminatory intent, the practical effect of the tax will be that a handful of U.S. companies will contribute the majority of the tax revenue.

While these tax proposals are currently drafted to target large U.S. firms, often these costs get passed on to consumers and businesses that use the online services targeted by these discriminatory taxes. SMEs use services targeted by these taxes and will be subject to higher costs associated with utilizing these services.²⁵

²³ Legislation implementing Germany’s ratification of the UPC is currently held up in German courts on constitutional grounds.

²⁴ The UK’s DST would be a “narrowly-targeted” 2% tax on the UK revenues of digital businesses that are considered to derive significant value from the participation of their users. The tax would be applied to specific digital business activities, which the government considers derive significant value from users and the business activities in scope with the following: “the provision of a social media platforms, “search engine” or “online marketplace.” UK Digital Services Tax Consultation (Nov. 2018), *available at* <https://www.gov.uk/government/consultations/digital-services-tax-consultation>.

²⁵ *See* DELOITTE, *Taj publie une etude de l’Impact economique du projet de loi pour la taxation du numerique* (Mar. 22, 2019), <https://taj-strategie.fr/taj-publie-etude-de-limpact-economique-projet-de-loi-taxation-numerique/>.

V. Market Access Barriers for Communication Providers

SMEs rely on fair and transparent public procurement regimes. They also rely on consistent, pro-competitive regulation of business-grade whole access and nondiscrimination by major suppliers. For example, even in the United States there is no adequate regulation on bottlenecks in access layers, particularly in the business data service market. The UK market has seen greater competition, with regulation and legal separation requiring the main national operator to provide wholesale/leased access and treat all of its customers equally. Furthermore, the regulator is legally required to carry out detailed market reviews regularly and to impose regulatory remedies where an operator (major supplier) is found to have significant market power.

VI. Cross-Border Data Restrictions and Uncertainty Over Future of U.S.-UK Data Flows

Restrictions on cross-border data transfers can discourage smaller firms from exporting abroad due to regulatory uncertainty and costs of compliance. As countries consider new privacy legislation, interoperability of different regimes should be strongly encouraged by regulators as necessary for digital trade and protecting privacy. The EU's General Data Protection Regulation (GDPR) went into effect last year, and was implemented into UK law under the Data Protection Act 2018. Since that time, some U.S. services have stopped operating in the EU over uncertainties regarding compliance.²⁶ If the UK intends to maintain GDPR compliance following Brexit, as expected pursuant to the EU Withdrawal Act (2018),²⁷ it is critical that there remain clear rules for U.S. exporters offering services in the UK. It is also critical that there remains a valid mechanism for companies to legally transfer the data of UK citizens following the UK's exit from the EU in the same manner as the U.S.-EU Privacy Shield.

VII. *De Minimis* Levels for Low-Value Shipments

SMEs benefit from high *de minimis* thresholds by reducing compliance burdens and making low-value shipments easier. The current *de minimis* level for exports to the UK is 135

²⁶ James Sanders, *To Save Thousands on GDPR Compliance Some Companies Are Blocking All EU Users*, TECH REPUBLIC (May 7, 2018), <https://www.techrepublic.com/article/to-save-thousands-on-gdpr-compliance-some-companies-are-blocking-all-eu-users/>; *US Small Businesses Drop EU Customers Over New Data Rule*, FT (May 24, 2018), <https://www.ft.com/content/3f079b6c-5ec8-11e8-9334-2218e7146b04>.

²⁷ Dept. for Digital, Culture, Media & Sport, *Guidance, Amendments to UK Data Protection Law in Event the UK Leaves the EU Without a Deal* (updated Apr. 23, 2019), <https://www.gov.uk/government/publications/data-protection-law-eu-exit/amendments-to-uk-data-protection-law-in-the-event-the-uk-leaves-the-eu-without-a-deal-on-29-march-2019>.

GBP, compared to the U.S. level of \$800. The discrepancy between UK and U.S. levels is a barrier for e-commerce exports.

VIII. Conclusion

As the United States evaluates its trading relationship with the UK post-Brexit, trade barriers to digital services should be identified and discouraged. The proposed trade negotiations for a free trade agreement were welcomed by industry, and USTR's negotiating objectives laid out ambitious goals for the digital trade chapter.²⁸ The USITC report should identify areas of concern so that they will be addressed in future trade discussions.

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²⁸ OFFICE OF THE U.S. TRADE REP., United States-United Kingdom Negotiations, Summary of Specific Negotiating Objectives (Feb. 2019), https://ustr.gov/sites/default/files/Summary_of_U.S.-UK_Negotiating_Objectives.pdf.