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Global Digital Trade I: Market Opportunities and Key Foreign Trade Restrictions; Institution of Investigation and Scheduling of Hearing	Investigation No. 332-561

PRE-HEARING BRIEF OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

Pursuant to the request for comments published by the International Trade Commission in the Federal Register at 82 Fed. Reg. 10,397 (Feb. 10, 2017), the Computer & Communications Industry Association (CCIA)[1] submits the following pre-hearing brief.

I. Introduction

As the Internet continues to grow into a key driver of cross-border trade in both goods and services, Internet-enabled commerce becomes more and more vital to U.S. economic interests. Cross-border e-commerce accounted for 10 to 15 percent of total global e-commerce in 2014 at revenues of $80 billion, and could grow to as much as $350 billion in revenue in 2025.[2] Given U.S. leadership in innovation and high-technology industries, facilitating the export of Internet-enabled products and services promises substantial gains across the wider economy. As the McKinsey Global Institute noted in 2011, 75% of the value of the Internet

[1] CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. Our members employ more than 750,000 workers and generate annual revenues in excess of $540 billion. A list of CCIA members is available at https://www.ccianet.org/members.

[2] Bas van Heel *et al*., *Cross-Border E-Commerce Makes the World Flatter* (BCG Perspectives, Sept. 2014), https://www.bcgperspectives.com/content/articles/transportation_travel_tourism_retail_cross_border_ecommerce_makes_world_flatter/.

accrues to traditional, non-Internet-centric businesses through productivity gains and easier access to foreign markets.[3]

II. Benefits of Digital Trade

Today, digital trade encompasses more than just accessing media or content through online platforms. Businesses small and large, in both developed and developing countries, rely on the services and software of digital platforms to access new markets, reach underserved communities, and realize efficiencies at a global scale.[4]

Internet platforms and providers do more than export services to users abroad. They now also enable small and medium-sized U.S. business to participate in the global marketplace. Small businesses and craftspeople located across the U.S. can use platforms like eBay and Amazon to sell their goods worldwide without the need for brick-and-mortar presences abroad. Data shows that from 2010 to 2014, small and medium-sized businesses on eBay who sought out international markets and customers grew 57% faster than those that did not.[5] An array of online payment processors and emerging digital currencies allow the same small firms to handle transactions globally, and global Internet advertising networks enable them to target potential customers in markets they would not be able to otherwise access.

Larger companies can similarly take advantage of cloud platforms and globally distributed computing resources to analyze vast quantities of data and improve provision of remote services to customers worldwide, with benefits visible across industries, from manufacturing and retail to finance and healthcare. Examples include Unilever, which can see real-time reports on the status of its goods on shelves around the globe; Boeing, which can find

[3] Matthieu Pélissié du Rausas *et al*., *Internet matters: The Net's sweeping impact on growth, jobs, and prosperity* (McKinsey Global Institute, May 2011), http://www.mckinsey.com/insights/high_tech_telecoms_internet/internet_matters.

[4] *See generally A Cloud for Global Good* (Microsoft 2016), https://news.microsoft.com/cloudforgood/.

[5] *2015 US Small Business Global Growth Report* (eBay Main Street, 2015), https://www.ebaymainstreet.com/sites/default/files/2015-us-small-biz-global-growth-report_0.pdf

and diagnose problems with aircraft mid-flight for immediate repair upon landing; and Tesco, which uses software to analyze weather forecasts and remotely adjust refrigeration temperatures to reduce waste from food spoilage in its stores.[6]

III. Barriers to Digital Trade

As robust cross-border data flows and trade in digital goods and services increasingly contribute to the overall growth of the broader economy, barriers to digital trade are harmful to more than just Internet-enabled commercial activity. Restricted data flows, forced technology standards and localization requirements, and unbalanced intermediary liability regimes also impose substantial costs and barriers to entry on economic sectors that may not traditionally be considered part of the technology industry, but which now rely on cloud services and Internet platforms to reach new customers, promote efficiency, and reduce overhead.

Restricted Data Flows

Cross-border data flows are the lifeblood of global digital trade. Policies that restrict data flows, either directly through data and infrastructure localization requirements or indirectly for national security or other purposes, negate the productivity gains and efficiencies enabled by Internet platforms and cloud computing.

Explicit data localization rules have been proposed or implemented in countries including Russia, China, India, and Indonesia, among others. Russia's 2014 law is fairly demonstrative of regimes of this type—it requires all operators that process the personal data of Russian citizens to use databases located exclusively in Russia, and to disclose the address of these data centers to Russian authorities for inspection. The European Center for International Political Economy (ECIPE) predicts that due to productivity losses associated with these policies, the Russian

[6] *See* Daniel Castro & Alan McQuinn, *Cross-Border Data Flows Enable Growth in All Industries* (ITIF 2015), http://www2.itif.org/2015-cross-border-data-flows.pdf.

economy would shrink by 286 billion rubles (equivalent to $5.7 billion or -0.27% of GDP). Further, investment would drop by -1.41% or 187 billion rubles.[7] These losses also reflect lost export opportunities for U.S. service providers.

Less explicit restrictions on cross-border data transfers also have significant consequences for Internet-enabled businesses. However well-intentioned, data security and protection regimes without the clarity, certainty, and flexibility necessary for responsible and reliable cross-border data transfers effectively serve as indirect localization requirements and barriers to digital trade.

For example, the European Union's current Data Protection Directive and its successor, the General Data Protection Regulation, generally bar transfers of Europeans' personal data to countries that do not have "adequate" data protection regimes. Bilateral agreements and other complex mechanisms to facilitate data transfers have historically been struck to satisfy the ill-defined adequacy requirement, but these have been challenged in recent years, most notably in the Court of Justice of the European Union's 2015 decision invalidating the European Commission's adequacy determination for the EU-U.S. Safe Harbor framework.

The invalidation of the Safe Harbor would have had a significant impact on the EU's economy—to the tune of 0.8% to 1.3% of its GDP[8]—if a successor framework for transatlantic data transfers, the EU-U.S. Privacy Shield, had not been negotiated and implemented last year. But the Privacy Shield is already the subject of legal challenges in the EU, as are alternative

[7] Matthias Bauer *et al*, *Data Localisation in Russia: A Self-imposed Sanction* (ECIPE, June 2015), http://ecipe.org/publications/data-localisation-russia-self-imposed-sanction/.

[8] *The Economic Importance of Getting Data Protection Right: Protecting Privacy, Transmitting Data, Moving Commerce* (European Centre for International Political Economy (ECIPE) for the U.S. Chamber of Commerce, 2013), https://www.uschamber.com/sites/default/files/documents/files/020508_EconomicImportance_Final_Revised_lr.pdf .

mechanisms called Standard Contractual Clauses, meaning companies that rely on transatlantic data flows continue to operate under a cloud of legal and economic uncertainty.

Technology Requirements

Digital trade and innovation are also threatened by onerous technology requirements specific to particular countries. Such measures restrict trade in services for ostensibly legitimate national security or public policy objectives, but often amount to protectionist measures that are vaguely construed, inadequately articulated, and thus nearly impossible to satisfy. For example, China's recent counter-terrorism and cybersecurity laws require that certain network technology products and services be "secure and controllable" and subject to security examination.[9] Not only are these requirements unclear, but they differentiate China's market for digital goods and services to make entry unappealing for foreign enterprises unwilling or unable to bear the costs of compliance.

Vague Regulatory Imperatives and Inconsistent Liability Rules

Regulation, however well-meaning, can function as a barrier to digital trade when the imperatives of the regulation are vague or open-ended, and penalties are assessed on Internet platforms for non-compliance. This type of regulation or judicial outcome chills innovation and investment in innovative Internet platforms, which ultimately harms businesses and end-users who benefit from digital platforms.[10]

Specifically, making Internet platforms or hosting companies liable for third-party content beyond their control, which is nearly impossible to effectively police and imposes huge compliance costs on platform companies, threatens investment and innovation online and

[9] *See* Eva Dou, *Untangling China's Cybersecurity Laws*, Wall St. J. China Real Time Report (June 3, 2016), http://blogs.wsj.com/chinarealtime/2016/06/03/untangling-chinas-cybersecurity-laws/.

[10] Josh Lerner, *The Impact of Copyright Policy Changes in France and Germany on Venture Capital Investment in Cloud Computing Companies* (Analysis Group 2012), http://www.analysisgroup.com/uploadedfiles/content/news_and_events/news/2012_eu_cloudcomputing_lerner.pdf.

ultimately harms the consumers and businesses that rely on the platforms.[11] Europe's ill-conceived "right to be forgotten" is just one example of a difficult to implement regulation that has imposed huge costs on incumbent search engines, and if such regulation was applied to other information intermediaries, would limit innovation in the marketplace to those companies who could afford the massive compliance costs.[12] The current discussion of a heightened "duty of care" as part of the European Commission's Digital Single Market initiative is similarly troubling. Requiring online intermediaries to monitor, filter, and screen potentially billions of posts, tweets, comments or files on their systems—if implemented—would have similar negative effects across a broad swath of digital companies. This is no longer just a theoretical discussion, as Germany's Minister of Justice recently proposed a new draft law that would levy heavy fines on companies for failing to quickly respond to reports of illegal content or hate speech.[13]

Digital trade policy should also promote liability rules that encourage the export of Internet services. Research demonstrates that clear, unambiguous regulations encourage investment and innovation on the Internet by venture capitalists.[14] Laws that limit the liability of online intermediaries for content posted by their users like Section 512 of the Digital Millennium Copyright Act and Section 230 of the Communications Decency Act have led to a thriving Internet industry in the United States. In contrast, U.S. companies have faced some challenges

[11] Daniel O'Connor, *The Digital Single Market and A Duty of Care: Preserving the Transatlantic Legal Foundation of a Thriving Internet*, Disruptive Competition Project, July 9, 2015, http://www.project-disco.org/competition/070915-the-digital-single-market-and-a-duty-of-care-preserving-the-transatlantic-legal-framework-for-a-thriving-internet/.

[12] Liam Tung, *Google details troubles it and others face meeting right to be forgotten reque*sts, ZDNet, Aug. 1, 2014, http://www.zdnet.com/article/google-details-troubles-it-and-others-face-meeting-right-to-be-forgotten-requests/.

[13] *See* Davey Alba, *Germany's Flawed Plan to Fight Hate Speech by Fining Tech Giants Millions*, Wired, Mar. 18, 2017, https://www.wired.com/2017/03/tech-giants-cant-bear-weight-battling-online-hate/.

[14] Matthew Le Merle *et al*., *The Impact of U.S. Internet Copyright Regulations on Early-Stage Investment: A Quantitative Study* (Booz & Company 2011), http://www.booz.com/media/file/BoozCo-Impact-US-Internet-Copyright-Regulations-Early-Stage-Investment.pdf; *see also* Josh Lerner, *The Impact of Copyright Policy Changes on Venture Capital Investment in Cloud Computing Companies* (Analysis Group 2011), http://www.analysisgroup.com/uploadedfiles/content/insights/publishing/lerner_fall2011_copyright_policy_vc_investments.pdf.

abroad when attempting to enter new markets due to legal uncertainty and inconsistent liability rules.[15]

IV. Conclusion

Given the importance of digital platforms and online services to all cross-border trade in the 21st century, CCIA encourages the ITC to take a holistic view of digital trade barriers and their effect across the entire economy.

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[15] *See generally* Ali Sternburg & Matt Schruers, *Modernizing Liability Rules to Promote Internet Trade* (CCIA 2013), http://cdn.ccianet.org/wp-content/uploads/2013/09/CCIA-Liability-Rules-Paper.pdf.