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

In re

Request for Comments and Notice of a Public Hearing on Negotiating Objectives for a U.S.-European Union Trade Agreement	Docket No. USTR-2018-0035

COMMENTS OF
THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)

Pursuant to the request for comments published by the Office of the United States Trade Representative (USTR) in the Federal Register at 83 Fed. Reg. 57,526 (Nov. 15, 2018), the Computer & Communications Industry Association (CCIA) submits the following comments on negotiating objectives for a United States-European Union trade agreement. CCIA represents technology products and services providers of all sizes, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. CCIA members employ more than 750,000 workers and generate annual revenues in excess of $540 billion.[1]

I. INTRODUCTION

CCIA welcomes the opportunity to provide comments on negotiating objectives for a potential U.S.-EU trade agreement. USTR should seek a holistic trade agreement with the EU to reduce barriers and encourage investment across the economy. USTR is strongly encouraged to make digital trade a priority in these negotiations with the EU.[2] Failure to do so would be a significant missed opportunity, given the contribution of Internet and technology firms to the transatlantic trading relationship and importance to the U.S. economy.

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[1] A list of CCIA members is available at https://www.ccianet.org/members.

[2] In November 2018, CCIA joined a broad coalition of other industry groups encouraging USTR to include strong digital trade commitments in its plans to enter into trade negotiations with Japan, the UK, and the EU. The letter notes that the Administration would miss an opportunity with three of our most important trading partners if it omitted digital trade from the negotiations. *See* Industry Letter to U.S. Representative Lighthizer on Digital Trade (Nov. 6, 2018), *available at* http://www.ccianet.org/wp-content/uploads/2018/11/Multi-Assoc-Letter-to-USTR-on-Digital-Trade-in-Japan-EU-UK-FTAs.pdf.

In setting its negotiating objectives, USTR should build off positive achievements in the recently-signed U.S-Mexico-Canada Agreement (USMCA).[3] The USMCA text should serve as the basis for negotiating priorities for the digital trade chapter, improving on areas where more can be done to further digital exports.[4] Consistent with USMCA, USTR should also continue to promote copyright provisions aligned with U.S. law.

The U.S. approach to a transatlantic trade agreement should reflect the increasing importance of Internet-enabled trade to the global market and the need to remove barriers presented by recently enacted, or pending EU regulations on the digital economy. CCIA's comments make the following recommendations for U.S. trade priorities with the EU: uphold long-standing copyright frameworks that provide protections for online intermediaries; protect copyright limitations and exceptions necessary for next-generation technologies; encourage investment by providing regulatory certainty to online intermediaries for third-party content; enable cross-border data flows and discourage data localization mandates; discourage regulations that artificially distinguish aspects of the Internet economy for the purpose of additional regulation; discourage unjustified taxation of U.S. digital services; encourage customs rules that reduce barriers to trade; and encourage measures to secure digital trade and promote cybersecurity.

II. STRENGTH OF TRANSATLANTIC DIGITAL TRADE AND RISK POSED BY RISING PROTECTIONIST POLICIES

The transatlantic trading relationship is strong.[5] The United States exported $632.7 billion of goods and services to the EU in 2017, a 4.9 percent increase from 2016.[6] Digital trade

[3] OFFICE OF THE U.S. TRADE REP., United States-Mexico-Canada Agreement Text (2018), https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/united-statesmexico [hereinafter "*USMCA*"]. *See also* OFFICE OF THE U.S. TRADE REP., *Summary of Objectives for NAFTA Renegotiation* (Nov. 2017), https://ustr.gov/sites/default/files/files/Press/Releases/Nov%20Objectives%20Update.pdf.

[4] For instance, the agreement falls short in fully remedying the imbalance between *de minimis* levels of Canada and Mexico and the United States. *See* Industry Letter to USTR on De Minimis in USMCA (Nov. 6, 2018), *available at* http://www.ccianet.org/wp-content/uploads/2018/11/2018-11-Business-Association-letter-on-USMCA-de-minimis.pdf.

[5] *See* CENTER FOR TRANSATLANTIC RELATIONS, *The Transatlantic Economy 2018, Annual Survey of Jobs, Trade and Investment Between the United States and Europe* (2018), *available at* https://archive.transatlanticrelations.org/wp-content/uploads/2018/03/TA2018_FullStudy.pdf, at vii ("Despite transatlantic political turbulence, the U.S. and Europe remain each other's most important markets. Eurozone growth of 2.5% in 2017 exceeded U.S. growth of 2.3%, and both economies are set to maintain robust growth in 2018. Transatlantic trade gaps have narrowed. The transatlantic economy generates $5.5 trillion in total commercial sales a year and employs up to 15 million workers in mutually 'onshored' jobs on both sides of the Atlantic.").

is a significant component of this relationship, with the U.S. relying on EU markets to deliver digital and Internet services.[7] The U.S exported $185 billion in digitally-enabled services to the EU in 2016.[8] In 2017, U.S. exports of telecommunications, computer, and information services to the EU alone were $16.3 billion, which is more than 70 percent of U.S. exports of these products worldwide.[9]

These gains are threatened by rising trade barriers in the EU.[10] As part of the Digital Single Market initiative, the EU is currently negotiating a vast number of regulatory proposals addressing subjects including copyright, data privacy, telecommunications, and taxation. Common to most proposals is a focus on regulating principally U.S.-based online platforms such as search providers, social media, and online marketplaces. CCIA agrees with USTR's assessment in the 2018 National Trade Estimate Report on Foreign Trade Barriers (NTE Report) that the "well-intentioned goal of creating a harmonized digital market in Europe, if implemented through flawed regulation, could seriously undermine transatlantic trade and investment, stifle innovation, and undermine the Commission's own efforts to promote a more robust, EU-wide digital economy." USTR has raised these concerns in its annual NTE Report in recent years.[11]

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[6] BUREAU OF ECONOMIC ANALYSIS, *Europe - International Trade and Investment Country Facts*, https://apps.bea.gov/international/factsheet/factsheet.cfm?Area=399 (last visited Dec. 10, 2018) [hereinafter "*BEA Europe Country Facts*"].

[7] *The Transatlantic Economy 2018*, *supra* note 5, at x ("The U.S. and Europe are each other's most important commercial partners when it comes to digitally-enabled services. The U.S. and the EU are also the two largest net exporters of digitally-enabled services to the world.").

[8] *Id.*

[9] *BEA Europe Country Facts*, *supra* note 6.

[10] CCIA has documented this trend in numerous comments over the years in proceedings with USTR. *See, e.g.*, Comments of CCIA, In re Request for Public Comments to Compile the National Trade Estimate Report on Foreign Trade Barriers, Dkt. No. 2018-0029, filed Oct. 30, 2018, *available at* http://www.ccianet.org/wpcontent/uploads/2018/10/CCIA-Comments-to-USTR-for-2019-NTE.pdf [hereinafter "*CCIA Comments for 2019 NTE*"]; Comments of CCIA, In re Request for Public Comment for 2018 Special 301 Review, Dkt No. 2017-0024, filed Feb. 8, 2018, *available at* http://www.ccianet.org/wpcontent/uploads/2018/02/CCIA_2018-Special_301_Review_Comments.pdf.

[11] OFFICE OF U.S. TRADE REP., 2018 National Trade Estimate Report on Foreign Trade Barriers (2018), *available at* https://ustr.gov/sites/default/files/files/Press/Reports/2018%20National%20Trade%20Estimate%20Report.pdf at 197-200 [hereinafter "*2018 NTE Report*"]; OFFICE OF U.S. TRADE REP., 2017 National Trade Estimate Report on Foreign Trade Barriers (2017), *available at* https://ustr.gov/sites/default/files/files/reports/2017/NTE/2017%20NTE.pdf at 178-182; OFFICE OF U.S. TRADE REP., 2016 National Trade Estimate Report on Foreign Trade Barriers (2016), *available at* https://ustr.gov/sites/default/files/2016-NTE-Report-FINAL.pdf, at 177-79.

Unfortunately, USTR's concerns are now a reality. While there have been regulations that encourage trade within the EU,[12] many restrict global commerce and close off the EU market for U.S. services. A trade agreement between the United States and the EU should work to reduce the burden caused by these regulations, and discourage further action that disproportionately closes the market for U.S. Internet exporters.

III. RECOMMENDATIONS FOR NEGOTIATING PRIORITIES

A. Uphold long-standing copyright frameworks that provide protections for online intermediaries for user-uploaded content.

Intermediary liability protections for Internet service providers, such as the copyright safe harbors found in Section 512 of the Digital Millennium Copyright Act, have been critical to growing the U.S. digital economy by providing business certainty to U.S. investors and innovators.[13] USTR noted in 2017 that the United States "seeks . . . the commitment of our free trade agreement partners to continuously seek to achieve an appropriate balance in their copyright systems, including through copyright exceptions and limitations."[14] The United States should commit to upholding these commitments in the intellectual property chapters of its FTAs, continuing with any trade agreement with the EU.

This is relevant as the controversial updates to EU copyright law previously referenced are expected to be finalized in the coming months, which will have a detrimental impact on Internet services exporting to the EU and to the EU's own startup community. EU officials have not hid the fact that their intended targets for these proposals are U.S. tech companies.[15] The proposed Copyright Directive disrupts settled law protecting intermediaries by weakening established protections from U.S. Internet services in the 2000 EU E-Commerce Directive, and by imposing an unworkable filtering mandate on hosting providers that would require automated "notice-and-stay-down" for a wide variety of copyrighted works. If adopted, the Directive would dramatically weaken these long-standing liability protections, which suggests that most

[12] Press Release, *CCIA Welcomes Political Agreement On The Free Flow Of Data In The EU* (June 20, 2018), https://www.ccianet.org/2018/06/ccia-welcomes-political-agreement-on-the-free-flow-of-data-in-the-eu/

[13] Matthew Le Merle *et al.*, *The Impact of Internet Regulation on Early Stage Investment* (Fifth Era 2014), http://www.fifthera.com/s/Fifth-Era-report-lr.pdf.

[14] OFFICE OF THE U.S. TRADE REP., *The Digital 2 Dozen* (2017), https://ustr.gov/sites/default/files/Digital-2-Dozen-Updated.pdf.

[15] Matt Schruers, *EU Copyright Changes Poised to Upset Critical Internet Policies*, DISRUPTIVE COMPETITION PROJECT (Oct. 18, 2018), https://www.project-disco.org/intellectual-property/101818-eu-copyrightchanges-could-upset-internet-policies/ (citing that in defending the bill after a preliminary procedural defeat, one parliamentary backer of the bill removed any doubt about this focus, claiming "the ones [firms] that are reacting are mostly the ones we are targeting, which are the GAFA," referring to prominent U.S. companies).

modern service providers may be ineligible for its protections. The Directive would eliminate protections that limit online services' liability for misconduct by those services' users and require proactive filtering by service providers.[16] In these and other respects, the Directive would sharply conflict with Section 512 of the DMCA and Article 20.89 of the recently signed USMCA.

Like U.S. law, EU law presently contains an explicit provision stating that online services have no obligation to surveil users, or monitor or filter online content.[17] Online services have invested heavily in developing international markets, including Europe, in reliance on these provisions. Under Article 13 of the proposal, the Directive now implies that online services must procure or develop and implement content recognition technology. The decision to compel affirmative filtering of all Internet content, including audiovisual works, images, and text, based on that content's copyright status, is alarming and profoundly misguided. Moreover, the Directive provides no specifics for what filtering mechanisms a hosting provider must implement, effectively empowering European rightsholders to dictate U.S. services' technology in potentially inconsistent ways across Europe. Until the CJEU eventually addresses the question, affected hosting providers can expect inconsistent rulings and injunctions from lower courts in different countries.

The text is currently under negotiation in trilogue. If the final EU reform does include these provisions, there would likely be a corresponding increase in risk for U.S. platforms doing business in the EU, resulting in significant economic consequences for the U.S. digital economy, which depends on the EU market. Furthermore, there is likely to be a ripple effect on the rest of the world, given the EU's international influence. By effectively revoking long-established protections upon which U.S. services relied when entering European markets, the new Directive would limit U.S. companies' investments for the benefit of EU rightsholders, establishing a market access barrier for many U.S. services and startups.

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[16] The European Commission submitted its proposal to the European Parliament and the European Council in September 2016. *See* Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, COM (2016)593. In September 2018, the European Parliament adopted its own position, creating a broad neighboring right for press publishers and undermining European intermediary protections. *See* Press Release, *European Parliament, Parliament Adopts Its Position on Digital Copyright Rules* (Sept. 12, 2018), http://www.europarl.europa.eu/news/en/press-room/20180906IPR12103/parliament-adopts-its-position-ondigital-copyright-rules. The European Council adopted its position in May 2018.

[17] *Compare* 17 U.S.C. § 512(m)(1) (2012) *with* Directive 2000/31/EC art. 15(1).

B. Protect copyright limitations and exceptions necessary for next-generation technologies.

USTR should include commitments to balanced copyright law present in U.S. law that provide for limitations and exceptions in its negotiating objectives with the EU. This includes provisions such as fair use, exceptions to circumvention of mandated technological protection measures (TPMs), and other allowances such as those needed for text and data mining across the EU.

Congress intended that the U.S. trade agenda promote balanced copyright when it granted Trade Promotion Authority (TPA) in 2015. TPA provides that the principal negotiating objectives of the United States should include promoting intellectual property in a way that "facilitates legitimate digital trade."[18] Committee reports from both chambers of Congress contained identical language elaborating on this mandate, specifically recognizing that trade agreements should "foster an appropriate balance in copyright systems, inter alia by means of limitations and exceptions consistent with the internationally recognized 3-step test."[19]

A flexible copyright regime is necessary for the continued growth of the digital economy. Principles such as fair use have been a cornerstone of U.S. copyright law from the beginning, and industries that rely on this right are a significant contributor to the U.S. economy and exports.[20] CCIA released a report last year on the economic contribution of fair use industries which found that these industries account for 16 percent of the U.S. economy and generate $5.6 trillion in annual revenue.[21] Fair use is also critical to activities central to new areas of innovation and cutting edge technology such as artificial intelligence and text and data mining.

Mandated TPMs are a frequent inclusion in U.S. trade agreements. However, corresponding statutory exceptions to these anti-circumvention measures are not always reflected. As included in the USMCA, there should be exceptions to anti-circumvention that are consistent with 17 U.S.C. § 1201, including § 1201(f) on reverse engineering and interoperability, in providing limitations and exceptions to TPMs.[22]

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[18] Section 102(b)(5)(A)(ii) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015.

[19] Senate Report 114-42 at 17, *available at* https://www.congress.gov/114/crpt/srpt42/CRPT-114srpt42.pdf; House Report 114-100 at 45, *available at* https://www.congress.gov/114/crpt/hrpt100/CRPT-114hrpt100-pt1.pdf.

[20] *See* CCIA, *Fair Use in the U.S. Economy* (2017), http://www.ccianet.org/wp-content/uploads/2017/06/FairUse-in-the-U.S.-Economy-2017.pdf.

[21] *Id.*

[22] *USMCA*, *supra* note 3, at art. 20.H.11.

The promotion of a balanced copyright regime in a trade agreement is especially critical as the EU is poised to update its domestic copyright regime in a way that will significantly disrupt U.S. service exports' ability to conduct business in the EU. The EU is currently considering a proposal that would drastically upset the balance in favor of EU rightsholders at the expense of U.S. exporters. The Copyright Directive contains multiple provisions that present a barrier including a neighboring right in the form of a link tax, and fails to harmonize exceptions and limitations across the EU.

The Directive does not go far enough in its exception for text and data mining under Article 3 of the current text. The only beneficiaries of this exception are research organizations and cultural heritage institutions, and the application is narrow in scope.

The "neighboring right" under the Copyright Directive, which would be a more expansive, EU-wide version of previous German and Spanish efforts, is progressing.[23] A link tax is likely to become a reality as per the adopted positions of the European Council and the European Parliament, in May and September 2018 respectively.[24] Of note, the European Parliament's amended text, as adopted in September, provides that publishers of press publications and news agencies become beneficiaries of the rights provided by Article 2 and 3(3) of the EU Infosoc Directive for the digital use of their press publications by "information society providers." The text also states that "the listing in a search engine should not be considered as fair and proportionate remuneration."[25] If this provision is implemented across all Member States, there is a significant possibility that U.S. services will leave the market. USTR cited the link tax as a barrier to trade in its 2018 NTE Report, accurately noting that these measures

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[23] *See* Comments of CCIA, In re 2018 Special 301 Review, Dkt. No. USTR-2017-0024, filed Feb. 8, 2018, at 6-8.

[24] EUROPEAN COMMISSION, Joint Statement by Vice-President Ansip and Commissioner Gabriel on the European Parliament's vote to start negotiations on modern copyright rules (Sept. 12, 2018), *available at* http://europa.eu/rapid/press-release_STATEMENT-18-5761_en.htm; Copyright in the Digital Single Market, Amendments adopted by the European Parliament on 12 September 2018 on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM (2016) 0593 – C8-0383/2016 – 2016/0280(COD) (Sept. 12, 2018), *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2018-0337+0+DOC+PDF+V0//EN.

[25] *Id*. at recital 32.

"impose finance and operational burdens on U.S. firms that help drive traffic to publishing sites."[26]

The neighboring right is also in violation of EU's international commitments. As CCIA has explained in previous proceedings, restrictions on the ability to quote news content violate Europe's international commitments.[27] Article 10(1) of the Berne Convention provides: "It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries." As TRIPS incorporates this Berne mandate, compliance is not optional for WTO Members.

Any trade agreement with the EU should ensure that copyright law is not expanded in such a way that will limit innovation to the benefit of EU rightsholders. The copyright provisions must include relevant limitations and exceptions consistent with international obligations.

C. Encourage investment by providing regulatory certainty to online intermediaries for third-party content.

Internet services need regulatory certainty to operate abroad. Numerous conflicting liability regimes undermine this certainty and unpredictable liability rules for online 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. digital trade exports.[28] The United States and the EU should work to reduce uncertainty and achieve consistency in liability rules among countries.[29]

At a time when the EU is actively seeking to undermine the ability for U.S. services to operate in the European market, it is critical that the U.S. continues to negotiate for consistent, clear liability frameworks for U.S services. A European Commission proposal on regulating

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[26] *2018 NTE Report*, *supra* note 11 at 199-220; *See* OFFICE OF THE U.S. TRADE REP., *Key Barriers to Digital Trade* (Mar. 2018), https://ustr.gov/aboutus/policy-offices/press-office/fact-sheets/2018/march/2018-fact-sheet-key-barriers-digital.

[27] *CCIA Comments for 2019 NTE*, *supra* note 10.

[28] *See* CCIA, *Modernizing Liability Rules for Digital Trade* (2018), *available at* http://www.ccianet.org/wpcontent/uploads/2018/07/Modernizing-Liability-Rules-2018.pdf.

[29] In the USMCA, the U.S. was successful in not only obtaining protections for U.S. online intermediaries in the copyright context, but also wisely including safeguards from liability for third-party content not concerning copyright. Any U.S. trade agreement going forward should contain these same commitments. *See USMCA*, *supra* note 3, at art. 19.17.

terrorist content could increase the burden on service providers to monitor and filter content.[30] The proposal would do the following: impose a legally binding one-hour deadline for content to be removed following a removal order from "national competent authorities"; create a new definition of terrorist content; impose a duty of care obligation for all platforms "to ensure that they are not misused for the dissemination of terrorist content online" with a requirement to take proactive measures "depending on the risk of terrorist content being disseminated" on each platforms; and impose strong financial penalties up to 4% of global turnover in case of "systematic failures to remove such content following removal orders".

The regulation would also authorize Member States to ultimately impose unspecified "proactive measures" directly on hosting providers, and would require providers to deliver regular reports to national authorities on the implementation of these measures. Companies would also be required to proactively disclose to law enforcement any evidence of terrorist content and violations, which importantly shift the function of law enforcement investigation from government to private actors. This would also implicate potential conflicts of law between the United States and the EU, notably the U.S. Electronic Communications Privacy Act (ECPA).

CCIA supports the EU's goal of combating terrorist content online and notes that hosting services remain committed to this goal. However, the one-hour removal deadline, coupled with draconian penalties and a broad implementation of mandated proactive measures across the Internet, is likely to incentivize hosting services to suppress potentially legal content and public interest speech, thereby chilling freedom of expression online. Other Member States have proposed or adopted similar legislation imposing additional burdens on intermediary sites for unlawful content, to little effect.[31] However, the EU's proposal goes further than any national legislation and presents a significant threat to U.S exporters. If implemented, the regulation

[30] Proposal for a Regulation of the European Parliament and of the Council on Preventing the Dissemination of Terrorist Content Online, COM (2018) 640 final (Sept. 12, 2018), https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-preventing-terrorist-content-online-regulation640_en.pdf.

[31] Germany adopted the Act to Improve the Enforcement of Rights on Social Networks (the "Network Enforcement Law" or "NetzDG") in June 2017. The NetzDG law mandates removal of "manifestly unlawful" content within 24 hours, and provides for penalties of up to 50 million euros. Unlawful content under the law includes a wide range of content from hate speech to unlawful propaganda. Beschlussempfehlung und Bericht [Resolution and Report], Deutscher Bundestag: Drucksache [BT] 18/13013, http://dip21.bundestag.de/dip21/btd/18/130/1813013.pdf (Ger.). Unofficial English translation available at https://medium.com/speech-privacy/what-might-germanys-new-hate-speech-take-down-law-mean-for-techcompanies-c352efbbb993.

could create a complex web of conflicting and impractical requirement that could undermine the coordinated U.S.-EU effort to fight against terrorist content online.

More generally, this proposal reflects a regulatory strategy that sometimes characterizes EU digital regulations, in that it imposes a burden that may be feasible for the largest firms in industry, but would be functionally impossible for smaller firms to comply with. A more dynamic regulatory strategy, which recognizes that firms' abilities to shoulder compliance burdens vary with firm size, would yield better results.

This is another iteration of the EU's increasing deviation from transatlantic best practices in its approach to online content regulation. In 2015, the European Court of Human Rights in the *Delfi* opinion held a news site responsible for multiple user comments on articles.[32] This led to the site shutting down its user comments section on certain stories.

To address these challenges, a U.S.-EU trade agreement should include clear intermediary protections modeled on Article 19.17 of the USMCA. Absent suitable intermediary liability protections for third-party content, many U.S. services may be unable to enter European markets.

D. Enable cross-border data flows and discourage data localization mandates.

Cross-border data flows are critical to digital trade and forced data localization mandates make it difficult for U.S. exporters to expand into new markets. The is especially true for transatlantic data flows. Research shows that the cross-border data flows between the United States and the EU are "by far the most intense in the world – 5% higher than data flows between the U.S. and Asia in absolute terms, and 400% higher on a per capita basis."[33] The United States should work to remove barriers to cross-border data flows and discourage data localization mandates in a trade agreement with the EU, building off strong commitments in the digital trade chapter in USMCA.

These negotiations present an opportunity to grow digital trade and USTR should be ambitious in its negotiating objectives with respect to data flows and localization barriers, especially with the rise in localization barriers around the world. Within the EU, many Member States have localization requirements that represent trade barriers. The think tank ECIPE has "identified 22 data localization measures where European Union Member States impose

[32] Delfi AS v. Estonia, Eur. Ct. H.R. 64569/09 (2015).
[33] *The Transatlantic Economy 2018*, *supra* note 5, at 34.

restrictions on the transfer of data . . . The most common restrictions target company records, accounting data, banking, telecommunications, gambling and government data. In addition, there are at least 35 restrictions on data usage that could indirectly localize data within a certain Member State."[34] The EU took a positive step to removing such barriers with its newly adopted Regulation on the Free Flow of non-personal Data in the EU which will apply as of May 2019.[35]

It is unfortunate that this understanding of the importance of free flow of data to innovation is not reflected under current trade priorities of the EU. The EU's proposed text for trade agreements to facilitate cross-border data flows and digital trade includes provisions that would increase the likelihood of data localization rather than reduce barriers.[36] CCIA would urge USTR to seek commitments that go beyond this proposed text, and work to obtain stronger commitments that would enable cross-border trade.

Any free trade agreement should also recognize the importance of interoperability of data transfer regimes, and provide U.S. industries with clear requirements for transfer of data outside the EU. Trading partners should work towards common solutions to achieve interoperability between differing privacy and data transfer regimes. This includes the preservation of the EU-U.S. Privacy Shield agreement, which is a critical mechanism through which companies can legally transfer data of EU citizens across the Atlantic for commercial purposes.[37] Over 4,100

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[34] ECIPE, *Unleashing Internal Data Flows in the EU: An Economic Assessment of Data Localization Measures in the EU Member States* (2016), http://ecipe.org/wp-content/uploads/2016/12/Unleashing-Internal-Data-Flows-in-the-EU.pdf.

[35] Recognizing the threat that numerous, conflicting national data localization laws such as those supported in France and Germany pose to the Digital Single Market, the Commission proposed a draft regulation on free flow of non-personal data within the EU and a political agreement was reached in June 2018. The regulation aims to remove national mandated data localization laws within Member States.

[36] Christian Borggreen, *How the EU's New Trade Provision Could End Up Justifying More Data Localisation Globally*, DISRUPTIVE COMPETITION PROJECT (May 14, 2018), http://www.project-disco.org/europeanunion/051418eus-new-trade-provision-end-justifying-data-localisation-globally/ ("The risk, as recently highlighted by the European Parliament, is that third countries will justify data localisation measures for data protection reasons. Unfortunately, the European Commission's proposed text will encourage exactly that. Its article B2 states that "each Party may adopt and maintain the safeguards it deems appropriate to ensure the protection of personal data and privacy." This is essentially a carte blanche for non-EU countries to introduce data protectionism under the guise of "data protection". It doesn't even require that countries can demonstrate that such laws are necessary and done in the least trade restrictive way, as under existing international trade law, which the EU has long been a party to.").

[37] The agreement is under threat due to pending court cases. While the Privacy Shield represents an important step forward in protecting customer data, its existence may be threatened in the future by court challenges or modifications made during future annual reviews. Any significant challenges to the Privacy Shield may threaten the viability of EUU.S. commercial data transfers in the future. To date, two legal challenges have been filed at the lower court of the CJEU. While one challenge was dismissed for lack of standing, the other remains pending. Julia Fioretti & Dustin Volz, *Privacy Group Launches Legal Challenge Against EU-U.S. Data Pact: Sources*, REUTERS (Oct. 20, 2016), http://www.reuters.com/article/us-eu-dataprotection-usa-idUSKCN12Q2JK; Julia Fioretti, *EU-U.S.*

companies are now certified under the Privacy Shield.[38] The U.S.-EU trade agreement should endorse the Privacy Shield and other transfer mechanisms to promote compatibility between different privacy regimes, granting certainty to users and companies that their privacy will be protected on a cross-border basis.

The agreement should also encourage bilateral agreements under the U.S. CLOUD Act and the proposed EU e-Evidence Regulation concerning law enforcement requests for data. As CCIA has noted previously, a sustainable transatlantic framework for law enforcement access can strengthen user rights and due process, and mitigate risks of conflict of law problems in cross-border data access cases.[39]

E. Discourage regulations that artificially distinguish aspects of the Internet economy for the purpose of additional regulations that pose market access barriers.

The EU is increasingly targeting major U.S. firms under the guise of regulating "platforms." USTR should discourage sector-specific measures and work to ensure U.S. Internet services aren't disproportionately shut out of the EU market.

The EU is finalizing negotiations on a new regulation on "platform-to-business" (P2B) relations that would require online intermediaries to provide redress mechanisms and meet transparency obligations concerning delisting, ranking, differentiated treatment, and access to data. These rules would apply to all online intermediation services facilitating the initiation of direct transactions between these services' business users and consumers. Some of the regulation's provisions would also apply to online search engines, and would govern non-contractual relations between businesses and platforms. Among other obligations, online intermediaries would be required to "outline the main parameters determining ranking and the reasons for the relative importance of those main parameters as opposed to other parameters." These and other obligations represent burdensome requirements that could create market access barriers for intermediation services, large and small, seeking access to the EU market. They could make it much harder for multi-sided businesses to strike the right balance between the

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Personal Data Pact Faces Second Legal Challenge from Privacy Groups, REUTERS (Nov. 2, 2016), http://www.reuters.com/article/us-eu-dataprotection-usa/eu-u-s-personal-data-pact-faces-second-legalchallenge-from-privacy-groups-idUSKBN12X253?il=0; Daniel Felz, *Challenge to Privacy Shield Dismissed By EU General Court*, ALSTON & BIRD (Nov. 29, 2017), https://www.alstonprivacy.com/challenge-privacy-shield-dismissed-eu-general-court/.

[38] Privacy Shield Framework, https://www.privacyshield.gov/list (last visited Dec. 10, 2018).

[39] Press Statement, *CCIA Calls for an EU-U.S. CLOUD Act Framework Agreement* (Nov. 7, 2018), *available at* https://www.ccianet.org/2018/11/ccia-calls-for-an-eu-u-s-cloud-act-framework-agreement/.

interests of their various users while preserving their own interests in, for example, brand protection.

The European Parliament has unfortunately proposed to expand the scope of the P2B regulation by covering more types of platforms including mobile operating systems, banning certain forms of vertical integration, introducing 'choice screens' for default services, and imposing additional requirements on search engine services. CCIA strongly encourages USTR to engage with their EU counterparts to address these barriers in advance of trade negotiations.

CCIA also recommends that a U.S.-EU trade agreement prohibit governments from imposing facilities-based regulatory and licensing or operational requirements on providers of online services and applications.

F. Discourage unjustified taxation of U.S. digital services.

In negotiations with the EU, USTR should push back strongly on proposals that seek to disadvantage American companies. An alarming trend among foreign countries is the singling out of the U.S. digital economy for additional taxation. Unfortunately, the EU is at the forefront on these measures. Based on inaccurate estimates, the EU asserts that digital services fail to pay adequate taxes and should be subject to additional taxation.[40] In its proposals released in March, the European Commission introduced an "interim tax on certain revenue from digital activities."[41] This controversial digital services tax (DST) would be set at 3 percent of companies' gross revenues from making available advertisement space, intermediation services, and transmission of user data.[42]

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[40] The DST proposal relied on a study that suggests that digital businesses in Europe only pay an effective tax rate of 9.5 percent, compared to traditional companies who pay a corporate tax rate of 23.2 percent, as evidence that digital services do not pay sufficient taxes. This estimate is not accurate, and the EC's characterization of the study has been disputed by the study's own authors. The estimates that the EC relies on come from studies produced by ZEW and PwC. The author of this research, Professor Christoph Spendel, has repeatedly criticized the EC's characterization of the finding of the report to support a proposed Directive to tax predominantly American digital firms. PwC, *Understanding the ZEW-PwC Report, 'Digital Tax Index, 2017'* (June 2018), *available at* https://www.pwc.com/us/en/press-releases/2018/understanding-the-zew-pwc-report.html.

[41] Proposal for a Council Directive on the Common System of A Digital Services Tax on Revenues Resulting from the Provisions of Certain Digital Services, https://ec.europa.eu/taxation_customs/business/companytax/fair-taxation-digital-economy_en.

[42] Specifically, the DST proposal would require each EU Member State to impose a tax of 3 percent on gross revenues obtained in that Member State resulting from the provision of any one of the following services: (a) placing advertising on a digital interface, where the advertising appears on a user's device in the EU; (b) making available a multi-sided digital interface that allows users to find and interact with other users, and which may facilitate the provision of underlying supplies of goods or services directly between users where a user is located or based in the EU; and (c) the transmission (e.g., sale) of data collected about users and generated from users' activities on digital interfaces where the user is in the EU.

The DST is clearly, and disproportionately, aimed at U.S. tech companies.[43] Many of the targeted U.S. companies are mentioned by name in an internal Commission document.[44] The DST may therefore violate the EU's commitments under the WTO's General Agreement on Trade in Services by discriminating against primarily U.S. companies in favor of EU companies. Under GATS, the EU agrees to provide national treatment to services and service suppliers of other WTO Members in the economic sectors that are covered by the DST. This means that the EU may not discriminate against those services and service suppliers in favor of its own "like" domestic services and service suppliers.

At the December meeting of the European Finance Ministers, officials declined to adopt the DST as proposed, due to an alternative proposal presented by Germany and France. While the new proposal is narrow in scope and only applies to advertising revenue, it appears even more disproportionately targeted at activities where U.S. companies excel. EU Member States are expected to negotiate this new proposal in early 2019.

As European officials narrow the target of the digital tax, they further reveal their discriminatory motives to single out particular companies rather than address a policy goal or legal gap. Echoing the characteristics of a bill of attainder, the effort singles out a group of companies for discriminatory treatment. CCIA urges USTR and other U.S. officials to address these harmful market access barriers in advance of negotiations.

Further, the alternative proposal from France and Germany does not prevent individual Member States from moving forward with their own interim tax rules that are broader than the DST. U.S. firms are still facing possible unilateral digital taxes in the United Kingdom, pending the outcome of OECD discussion. Spain, UK, Italy, and France have all announced their intent

[43] The DST discriminates against US digital firms in the following ways: (a) the DST thresholds — at least $750 million in global gross revenue and at least $50 million in EU gross revenue — are designed to capture Google, Facebook, Amazon, eBay, Uber, Airbnb but few EU firms; (b) the revenues subject to the proposal DST are defined to capture business models of US firms but not EU digital firms; and (c) the proposal allows value added taxes and similar taxes to be subtracted from 'taxable revenue' in calculating the base from the 3 percent imposed which would increase the tax base since the United States does not have value added taxes. *See* Gary Clyde Hufbauer & Zhiyao Lu, *The European Union's Proposed Digital Services Tax: A De Facto Tariff*, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS (June 2018), *available at* https://piie.com/system/files/documents/pb18-15.pdf at 7.

[44] European Commission, Taxation of Digital Activities in the Single Market (Feb. 26, 2018), https://www.politico.eu/wp-content/uploads/2018/02/taxation-of-digital-economy-2.pdf.

to move ahead with, or have already introduced, national proposals if an EU proposal cannot be adopted.[45]

Instead of interim approaches such as the DST, countries should endorse an international, collaborative approach that considers all aspects of the global economy, supporting work at the OECD for a long-term solution.

G. Encourage customs rules that reduce barriers to trade.

Improvements can be made with respect to customs and certification rules to facilitate electronic commerce.

The EU Value Added Tax (VAT) system for e-commerce has consistently been identified as a nontariff trade barrier. Unfortunately, the EU's proposal to address some of these complexities also places burdens on non-EU merchants. The EU has decided to remove the current low value threshold for imports from non-EU countries (22 euros), meaning that VAT is due on all transactions. This means that low value shipments from non-EU merchants to EU consumers will also be subject to the same lengthy customs process (including VAT collection) as high-value items, leading to considerable lead times. The only way a non-EU merchant will be able to access the EU market at equal speed as his EU competitors is to find an EU intermediary and sign up to the one-stop-shop through that intermediary. However, even in that case, the non-EU merchant will be required to charge and remit the standard VAT rate applicable in the country of the customer. In addition to the cost of complying with all different VAT rates in Europe (more than 150), non-EU merchants will be disadvantaged as they cannot apply the reduced or zero rates applicable in certain product categories.

Another barrier is posed by two EU legislative proposals referred to collectively as the "Goods Package."[46] If implemented, the proposal would significantly limit access to the EU marketplace for U.S. small businesses. The goal of the proposal is aimed at consumer safety, but will have unintended effects on electronic commerce and online sellers. Under the current draft proposals, there is a requirement for a dedicated "responsible person for compliance information." Manufacturers of all goods sold in the EU must appoint a person located in the EU to hold certain compliance documentation. The requirement does not distinguish between types

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[45] Italy has passed a unilateral digital tax, set to be implemented at any time. The Spanish Parliament is debating a broader DST aligned with the original EU DST proposal. French finance ministers stated in early December their plans to implement a digital tax in 2019.

[46] Proposal for a Regulation on Enforcement and Compliance in the Single Market for Goods (Goods Package), https://ec.europa.eu/info/law/better-regulation/initiatives/com-2017-795_en.

of goods, nor does it provide any waivers for these requirements to small and medium-sized enterprises (SMEs) or small volume sellers. It will hurt U.S. resellers in particular, as manufacturers of goods that aren't directed at the EU market will likely not designate a dedicated person.

To further encourage trade and advance the global understanding[47] that customs duties cannot be placed on flow of digital music, video, software, electronic books, games, and information as they cross borders, a U.S.-EU trade agreement should prohibit governments from imposing customs duties on digital transmissions.

H. Encourage measures to secure digital trade and promote strong cybersecurity.

The products and services that facilitate digital trade must be technologically secured. The United States and the EU should continue efforts to promote regulatory cooperation and international standards for securing products and services. A trade agreement should also follow the USMCA in calling for risk-based cybersecurity measures, as the more effective approach than prescriptive regulation.[48]

A U.S.-EU trade agreement should also contain commitments to promote strongly encrypted devices and connections. Specifically, a trade agreement should prevent countries from compelling manufacturers or suppliers to use a specified algorithm or to provide access to a technology, private key, algorithm specific, or other cryptographic design details.[49] A growing number of countries have implemented or are considering laws that mandate access to encrypted communications through provisions such as mandated facilitated access, technical assistance, compliance with otherwise infeasible judicial orders, or even transfer of source code as a condition of access to markets. These measures are technically and economically infeasible to develop and implement.[50]

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[47] The World Trade Organization members have agreed to a moratorium on custom duties on electronic transmissions since 1998, renewing the moratorium at every Ministerial Meeting since. U.S. trade agreement must continue to support this global norm.

[48] *USMCA*, *supra* note 3. This is timely as the European Commission continues to negotiate a new regulation that may impose mandatory certification schemes. Cybersecurity, Digital Single Market Policy, European Commission, https://ec.europa.eu/digital-singlemarket/en/cyber-security (last updated Apr. 16, 2018).

[49] Bijan Madhani, *Digital Issues in NAFTA: Cross-Border Data Flows and Cybersecurity*, DISRUPTIVE COMPETITION PROJECT (June 15, 2017), http://www.project-disco.org/21st-century-trade/061517-digital-issues-in-nafta-cross-border-data-flows-and-cybersecurity/.

[50] Harold Abelson *et al.*, *Keys Under Doormats: Mandating insecurity by requiring government access to all data and communications*, Computer Science and Artificial Intelligence Laboratory Technical Report, MIT-CSAIL-TR-2015-026 (July 6, 2015), http://dspace.mit.edu/bitstream/handle/1721.1/97690/MIT-CSAIL-TR-2015-026.pdf.

IV. CONCLUSION

The transatlantic trade relationship is critical to U.S. economic security, and digital trade is a central component of that relationship. A free trade agreement that can safeguard this relationship from political risk should be a high priority. With the rising number of non-tariff and market access barriers in the EU directed at U.S. Internet firms, it is critical that any U.S.-EU trade agreement include a comprehensive digital trade chapter and clear innovation-oriented rules in an intellectual property chapter.

Respectfully submitted,

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