CCIA Recommendation on U.S.-EU Trade & Technology Council: Incorporating Stakeholder Input within International Regulatory Cooperation

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The Internet and technology sector is supportive of efforts to leverage the new U.S.-EU Trade & Technology Council (TTC) as a platform for transatlantic dialogue to address key digital priorities and diverging approaches to tech regulation. This paper highlights the importance of international regulatory cooperation efforts like the TTC and the critical role of robust multi-stakeholder engagement to the TTC's long-term prospects. It sets forth what we hope will be a useful framework for analyzing and determining the most effective methods for incorporating stakeholder input into the TTC.[1]

Importance of International Regulatory Cooperation and Multi-stakeholder Input

International regulatory cooperation (IRC) is an important tool for improving regulatory quality, reducing the likelihood of creating trade barriers or unnecessary regulatory differences, aligning regulation with shared principles and values, avoiding unintended consequences or conflicts with broader foreign policy objectives, building trust and expertise among regulators, and deepening understanding of trends in regulatory governance to inform current and future approaches to policymaking.

Governments often benefit from IRC during the pre-regulatory stage when rules and other legal instruments and policies are under development: it is easier for multiple jurisdictions to align common approaches when designing regulations from the beginning than to do so when rules are already enacted and in effect. During the pre-regulatory stage, governments can consider the range of policy making approaches – not just traditional regulation – including observation, suasion, education, self-regulation, co-regulation, and experimental regulation; stakeholders can help identify which tools are likely to be appropriate and effective for a given issue. This is especially important for regulations relating to the digital economy due to the pace of innovation and technological change in the tech sector.

Critical to achieving successful IRC outcomes is inclusion of open and transparent processes that gather and carefully <u>consider input from the full range of interested stakeholders</u> (e.g., labor, businesses and trade associations, civil society groups, academia). Where provided frequent and meaningful opportunities to do so, stakeholders can provide important data,

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recommendations, and other contextual information about the necessity, feasibility and prioritization of proposals based on industry-specific experiences and historical perspectives.

This includes input on:

- how proposals should be structured (e.g., what type of IRC mechanism would work best in a particular context, how to avoid issues encountered during prior attempts at IRC);
- the potential level of economic impact of specific proposals;
- the impact of a proposal on other regulatory objectives and policy priorities, such as trade or national security;
- relevant activities in other jurisdictions, standards developing organizations, and regional, plurilateral, and multilateral fora; and
- the likelihood of achieving successful outcomes.

Stakeholder input should be collected on the full scope of IRC processes and throughout the lifecycle of IRC activities. IRC can take place with regard to specific regulations, in anticipation of future regulatory activity, and in respect of good regulatory practices in general. IRC can include the full range of tools that can be used, individually or in combination, across the entire policymaking lifecycle.[2]

Stakeholder input can help develop common priorities, perform gap analyses, facilitate joint regulatory planning, support ex post review, and inform the optimal structure of IRC activities.

Potential IRC Opportunities Presented by the TTC

The TTC presents an historic opportunity for the United States and the European Union to develop a robust bilateral IRC framework in the technology space. The framework should incorporate best practices for IRC with a view towards driving effective global digital regulations, standards, and policies that are consistent with international trade rules, transatlantic policy principles, and democratic values.

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[2] For example:
- Engaging in joint scientific and technical research;
- Holding discussions with counterparts in other jurisdictions to identify regulatory and non-regulatory alternatives;
- Recognizing a trading partner's regulation as equivalent;
- Recognizing the results of a conformity assessment in another jurisdiction;
- Signing memoranda of understanding or other agreements with counterparts in other jurisdictions to collaborate on a more regularized basis;
- Engaging in whole-of-government regulatory cooperation efforts with other jurisdictions, whether through trade agreements or other mechanisms;
- Promoting and encouraging cooperation between governmental and private sector bodies responsible for standards development and conformity assessment, market surveillance, and enforcement;
- Encouraging accreditation and conformity assessment bodies to participate in cooperation arrangements that promote the acceptance of conformity assessment results (mutual recognition arrangements) and recognizing such arrangements;
- Entering into government-to-government mutual recognition agreements; and
- Participating actively in the work of internationally-recognized standards bodies, regulator-to-regulator fora, intergovernmental organizations, and relevant non-governmental fora, and leveraging that work as a basis for regulation, where relevant, effective, and appropriate.

The TTC structure should seek to leverage the strong political will that exists on both sides to make this endeavor a success, by building a structure that includes: high-level, regularized engagement from the White House and agency leads, the European Commission, the U.S. Congress, and the European Parliament; regularized and frequent meetings of the Working Groups; and road maps for each Working Group that contain clear objectives, deliverables, and timeframes.

The goals of the TTC Working Groups should include achieving meaningful outcomes in a number of key areas:

- improving the ability of everyday people to participate in and benefit from the digital economy, including through expanded broadband access, digital inclusion, digitally-driven sustainability, technological accessibility, and gender equity in the transatlantic digital ecosystem;
- steering proposed regulations in the U.S. and EU towards shared values like due process, regulatory dialogue, and the rule of law, and away from discriminatory outcomes that risk depriving businesses and users of basic privacy, security, and intellectual property protections;
- empowering the U.S. and EU to work together with other like-minded countries to counter the rise of techno-authoritarianism and digital protectionism, while ensuring that proposed regulations do not inadvertently undermine national security or strengthen the position of authoritarian rivals; and
- unlocking new growth opportunities for small businesses and startups, and empowering such businesses to grow and enter new markets through increased access to digital tools and exporting technologies.

Such outcomes are consistent with the objectives of enhancing market access, driving a strong and inclusive economic recovery, and creating high-paying, high-skill jobs in the digital economy and beyond.

Finally, and importantly, structuring the processes to include robust stakeholder engagement can help all parties seize the advantages of the TTC and address factors that have complicated previous IRC efforts. The two governments can look to previous examples of IRC for models of stakeholder engagement that could be incorporated into the TTC process.

Potential Application of Archetypes for IRC Stakeholder Engagement to the TTC

There are myriad ways for governments to obtain and process input from interested stakeholders to support IRC activities. This section sets out three paradigms for stakeholder engagement, ranging from more basic levels of engagement on one end of the spectrum to what is essentially a public-private partnership model on the other.

Importantly, governments can deploy one or more of these archetypes simultaneously, and can employ different stakeholder engagement models for different types of IRC.

The optimal stakeholder engagement model(s) for a given IRC activity necessarily depends on a variety of context-specific factors.

The goal should be to use the engagement model that maximizes transparency and meaningful consideration of stakeholder input and is also most effective and appropriate for a given context, including taking into account existing bilateral, regional, or multilateral efforts.

Archetype 1: <u>Governments consult with stakeholders</u>.

Overview: Under this approach, consultation is accomplished through one or more of the following mechanisms:

(a) providing public comment periods of sufficient length (i.e., a minimum of 60 days) and at junctures during the IRC process when governments can carefully consider the comments and revise proposals, including at a stage prior to the implementation of specific obligations stemming from a given regulation;

(b) holding regulator workshops with interested stakeholders to discuss IRC structures, general policy direction, and specific proposals; and

(c) holding open sessions on the margins of government-to-government meetings to provide readouts and solicit input from stakeholders.

The latter approach was often utilized by the EU and the United States in the Transatlantic Economic Forum, the U.S.-EU High Level Regulatory Cooperation Forum, and the Transatlantic Trade and Investment Partnership. APEC also holds stakeholder sessions on the margins of certain meetings, although such sessions are not always open for all stakeholders to participate.

Potential application to the TTC: The U.S. and EU could both have the ability to request a consultation or provide questions on a digital measure that the other jurisdiction has proposed or enacted. The recipient of this request should agree to approach the request in good faith and give full and sympathetic consideration to the concerns of the requesting party. If the parties are unable to arrive at a satisfactory resolution of a matter through these consultations, the dispute should be elevated to a higher-level political leader. As the TTC develops, additional mechanisms, both formal and informal, should be developed for resolving disputes between the parties.

Further, there should be a meaningful opportunity for stakeholders to provide input into the agendas and discussions of the various TTC Working Groups, which should include the relevant regulators on both sides. One possible model could be the industry-facilitated stakeholder events feeding into the EU-U.S. Information Society Dialogues.

Archetype 2: <u>Governments give stakeholders a formal advisory role in the IRC process</u>.

Overview: Under this approach, governments create joint stakeholder working groups to provide input into IRC structures and processes and at various stages of IRC initiatives as specific policy proposals are being debated and developed. They may assign specific tasks to the Working Groups to develop recommendations or work products that the governments would then consider.

In terms of composition, the Working Groups may be open for any interested stakeholder to join and make contributions, or governments may develop procedures for selecting Working Group members to ensure a balance of interests and sufficient expertise to enable the Working Group to provide relevant input that is responsive to the needs of the respective governments. The Canada-U.S. Regulatory Cooperation Council has adopted the former approach with some success.

Potential application to the TTC: In the case of the TTC, ten Working Groups have been announced: Technology standards cooperation; Climate and green tech; Secure supply chains, including semiconductors; ICT security and competitiveness; Data governance and technology platforms; The misuse of technology threatening security and human rights; Export controls; Investment screening; Promoting SME access to and use of digital technologies; and Global trade challenges.

The EU and U.S. could establish private sector advisory groups – each co-chaired by an EU and a U.S. national – to provide feedback to their respective Working Group at every stage of the IRC process, from determining the Working Group agenda and developing roadmaps for particular projects, to providing comments on specific proposals.

Because issues will often overlap among the Working Groups, the two sides could also establish a committee of advisory group chairs that would meet with the governments on a regular basis or as needed. The committee of chairs would provide overall direction, ensure coordination among the Working Groups and advisory groups on cross-cutting topics, and monitor the work, including with respect to meeting deadlines and understanding relevant domestic and international developments that might be important to specific work streams.

It may also be helpful for members of the European Parliament and U.S. Congress and key committee and personal staff to have a formal liaison role with the committee of chairs. Legislative actions could potentially be helpful to IRC work, but they could also derail it. Consequently, ensuring coordination and information-sharing on the substance, process, and timing for such actions will be key for creating conditions that maximize the chances of achieving successful IRC outcomes, as well as working with allies and through international institutions to multilateralize them, as appropriate.

Archetype 3: Governments work together with the private sector on IRC activities.

Overview: Under this type of approach, public and private sector officials work collaboratively to develop joint approaches to common policy challenges. This may involve the creation of new entities or mechanisms; more commonly, public and private sector officials can work through existing entities or mechanisms. Globally-recognized standards bodies (e.g., 3GPP, ISO/IEC JTC 1, W3C, IEEE, OASIS, ITU-T, ASTM International) are one such avenue. Certain activities in intergovernmental and other multi-stakeholder fora (e.g., the OECD's Global Partnership on AI, the International Civil Aviation Organization, the IoT Security Policy Platform) are another. The work product developed in such bodies/entities/fora/mechanisms can then be incorporated by both sides into the relevant domestic legal instruments.

In this context, work should take place in entities that are open, transparent, impartial, and consensus-based, ensure a balance of interests, and otherwise follow the relevant WTO criteria. Such entities will have built-in and time-tested processes, for managing public and private sector engagement, including procedures for ensuring that drafts are available for comment and substantive comments are addressed, and for developing consensus.

Potential application to the TTC: As an initial step under the TTC, for instance, each Working Group and mirror advisory group could develop a joint planning document, which would:

- contain a jointly-agreed list of priorities where there would be a significant economic and social/environmental impact and an above average probability of reaching transatlantic consensus (whether through achieving policy convergence or interoperability);
- map the landscape of data, legislation, regulations, standards, conformity assessment schemes, and other instruments of relevance to the Working Group scope and reach agreement on the foundational documents and most appropriate fora;
- identify gaps that could be filled by joint EU-U.S. public and private sector work in the appropriate fora;
- develop a road map for each activity, including estimated timeframes;
- determine how any instruments developed outside the legislative or regulatory process would be subsequently referenced, adopted, or otherwise adhered to in each jurisdiction. This would preferably be achieved through existing administrative mechanisms but, in the alternative, through legislative/regulatory vehicles with a high probability of adoption within a reasonable timeframe; and
- craft a plan for internationalizing jointly-developed approaches, where appropriate.

Where possible, industry should try to find transatlantic agreement on the design of new standards, developed through consensus-based processes, which could then be proposed to governments. And IRC activities should seek to incentivize collaboration among standards bodies to help achieve transatlantic coherence.

Before finalizing the joint planning document, the Working Group and advisory group chairs would consult with TTC leadership and the committee of chairs, as well as any relevant regulators and the legislative representatives on both sides. This would facilitate coordination, ensure that plans are feasible from both a substantive and timing perspective, and enable the Working Groups and their advisory committees to elevate issues to senior political leadership in cases where implementation of an initiative has stalled during the applicable domestic process.

Framing Questions

As set out above, robust stakeholder engagement is crucial for the success of international regulatory cooperation activities, including those that will take place under the TTC. As illustrated in this paper, there are a range of approaches to stakeholder engagement that could be applied to IRC activities, and they can be tailored to take account of context-specific factors and to achieve the best results. As the United States and the EU contemplate how to structure the TTC, including how best to incorporate stakeholder engagement, it may be helpful to explore the following questions with governmental and external stakeholders:

1) What stakeholder engagement approaches could be utilized in the TTC?

2) What are the strengths and weaknesses of each approach, based on both general and bilateral experience?

3) What factors should the EU and U.S. use in the TTC to determine which approach(es) to employ in specific contexts?

4) How and when can stakeholder engagement opportunities best be used to identify potential areas of digital policy convergence in the TTC, both ex ante and ex post?

5) How can stakeholder engagement mechanisms be institutionalized on both sides so that the TTC can be effective for the long-term?

6) What areas of flexibility can be identified under the legal and policy regimes of both sides to incorporate the maximum amount of stakeholder engagement in the TTC work?

7) One of the first areas for stakeholder engagement will be to identify early on a limited subset of areas in which visible progress can be made fairly quickly. The greatest danger is an agenda so comprehensive that it becomes unmanageable; triaging between areas where meaningful progress can be made quickly as opposed to those requiring a longer-term timeline will be crucial. What are some potential areas for early wins?

8) What existing multi-stakeholder entities or fora can be leveraged to provide input into TTC processes?