



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

In re:

Request for Comments on Negotiating Objectives
for a U.S.-European Union Trade Agreement

Docket Number USTR-2018-0035
83 FR 57526

**COMMENTS OF
INTERNET ASSOCIATION**

Internet Association (IA) represents over 40 of the world's leading internet companies.¹ IA is the only trade association that exclusively represents leading global internet companies on matters of public policy. IA's mission is to foster innovation, promote economic growth, and empower people through the free and open internet. In response to the opportunity to provide written comments on the consultation on trade negotiations between the European Union (EU) and the United States (U.S.), IA respectfully submits the following comments.

American digital laws and policies are central to America's economic success. Our technology leadership is the envy of the world, but depends upon – and was built by – the U.S. digital policy framework. We must actively promote this policy framework and diligently defend our digital laws at home and abroad to ensure future success.

For many years, the EU's digital policy framework has run in rough parallel to the U.S. framework, creating strong digital trade ties between our economies. Cross-border data flows between the U.S. and Europe are the highest in the world, and our exports of digital services are inextricably intermingled.² Over 60 percent of digitally deliverable services imported from the EU (including consulting, engineering, design, and financial services) are used in the production of American exports, and over 50 percent of digital services imported from the U.S. are used in EU exports.³

However, there are a number of current trends that are extremely concerning to the health of the transatlantic digital economy. The EU is threatening to adopt a Copyright Directive that splits away from the U.S. model, using copyright not to promote innovation but instead to limit market access by online services. A recent European Parliament proposal for platform-to-business regulation would create a series of heavy-handed regulatory mechanisms to blacklist certain commercial practices in the absence of any evidence of harm. Additionally, the proposed EU digital services tax appears to be intended to impose a financial burden only on successful U.S. companies and undermines the international tax system.

At the same time, there are key opportunities to work within the U.S.-EU trading relationship to establish strong digital rules and ensure that we are working together to raise standards in the rest of the world. For example, countries such as China, India, Indonesia, Russia, and Vietnam are adopting forced data localization policies and intermediary liability barriers that pose a fundamental threat to the free flow of information across borders. By establishing a clear rule against data localization and in support of the free flow of information, the U.S. and EU can work together to advocate against digital barriers in other regions. Similarly, by working together to protect and preserve transatlantic legal standards on

¹ <https://internetassociation.org/our-members/>

² <https://www.mckinsey.com/~media/McKinsey/Business%20Functions/McKinsey%20Digital/Our%20Insights/Digital%20globalization%20The%20new%20era%20of%20global%20flows/MGI-Digital-globalization-Full-report.aspx>

³ <https://www.brookings.edu/wp-content/uploads/2016/06/internet-transatlantic-data-flows-version-2.pdf>



notice-and-action frameworks, the U.S. and EU can provide a strong counterexample to foreign governments seeking to increase control over online speech and commerce. Moreover, we encourage the U.S. and the EU to finalize a bilateral agreement under the U.S. CLOUD Act and EU e-Evidence Regulation on law enforcement requests to data in conjunction with the U.S.-EU FTA negotiations.

In order to preserve and expand the internet's role as a driver of U.S. exports, economic development, and opportunity, USTR must use the U.S.-EU FTA talks to make open internet policies abroad a top trade priority. It must engage with the EU and continue to push back on market access barriers that threaten the internet's global growth and its transformation of trade. IA applauds the strong steps that USTR took in the USMCA to address new digital barriers, but recognizes that there is more work to do on a global basis to promote digital trade and counteract unfair foreign practices. The ability of U.S. businesses to reach 95 percent of the world's customers through U.S. internet services hangs in the balance.

KEY U.S.-EU TRADE CONCERNs

IA's recent filing to USTR on the National Trade Estimate (NTE) provides a more detailed summary of EU market access barriers.⁴ Of the many regulations and proposals identified in that filing, the three issues listed below are among the most concerning. IA encourages USTR to use the trade dialogues and negotiations to engage with European counterparts to raise strong concerns on all of the issues outlined in IA's NTE filing.⁵

Copyright Directive. Article 13 of the proposed Copyright Directive would narrow the existing EU copyright safe harbor for hosting providers in unpredictable ways across different member states, subjecting online services to incalculable liability risks and requiring the costly deployment of content filtering technologies to prevent the availability of certain types of content.⁶ This proposed requirement deviates from shared U.S. and EU norms that have been critical to the growth of the commercial internet. Service providers in the U.S. and elsewhere would be subject to a moving target in the EU for years to come. Larger providers would face critical liability risks, while smaller startups and entrepreneurs would be deterred from entering the market, given the difficulty of raising funds from venture capitalists that have consistently characterized such rules as strong impediments to investment.⁷

Digital Services Tax. In March 2018, the European Commission published a proposal to introduce a 3 percent Digital Services Tax (DST) on both large online marketplaces and online advertising businesses, irrespective of where the business is established. 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 of data collected about users and generated from users' activities on digital interfaces, where the user is in the EU. The proposed DST would apply only to companies whose worldwide revenues reported for the relevant financial year exceeds €750 million and whose taxable revenues obtained within the EU during the relevant financial year exceeds €50 million. As a result, the net effect is that the tax will be applied to primarily U.S. companies and it will become more expensive for U.S. companies of all sizes, not just those that surpass the thresholds to export goods and services to Europe. The DST violates the EU's commitments under the WTO's General Agreement on Trade in

⁴ https://internetassociation.org/files/ia_submission-for-ustr-national-trade-estimate-report-for-2019/

⁵ Ibid.

⁶ https://internetassociation.org/files/ia_letter-eu-copyright-directive_october-18-2018_trade/

⁷

<http://static1.squarespace.com/static/5481bc79e4b01c4bf3ceed80/t/5487f0d2e4b08e455df8388d/1418195154376/Fifth+Er>



Services by discriminating against U.S. companies in favor of EU companies, in contravention of the EU's agreement to provide "national treatment" to services and service suppliers of other WTO Members in the economic sectors that are covered by the DST. While the European Commission's DST failed to gain the required unanimous support from European finance ministers in December 2018 countries continue to advocate problematic compromise plans.

In early December, France and Germany advanced a narrower DST proposal focused on digital advertising, which would negatively affect a large number of U.S. companies. This proposal will be negotiated among EU member states in the first few months of 2019. As France and Germany move to make the target of digital taxes even more narrow, they further reveal that this is a discriminatory effort to single out particular companies rather than a bona fide effort to address a policy or legal gap. We urge negotiators to address and challenge these discriminatory efforts in advance of negotiations.

In addition to the new proposals, U.S. firms are still facing possible unilateral digital taxes in the UK, pending the outcome of OECD discussions. Italy has passed a unilateral digital tax that could be implemented at any time. The Spanish Parliament is currently debating a broader DST that is more in line with the first EU proposal. Finally, French finance ministers said in early December that France would implement a digital tax in 2019.

Platform-to-Business Regulation. The EU is actively considering a new regulation on "platform-to-business" (P2B) relations that would require online intermediaries to provide redress mechanisms and meet aggressive transparency obligations concerning delisting, ranking, differentiated treatment, and access to data.⁸ These rules would apply not just to marketplaces with business users but also to non-contractual relations between businesses and platforms. Among other obligations, online intermediaries would be required to "outline the main parameters determining ranking," including "any general criteria, processes, specific signals incorporated into algorithms or other adjustment or demotion mechanisms used in connection with the ranking." These and other obligations represent disproportionate requirements that are likely to create market access barriers for developers, platforms, and SMEs seeking access to the EU market. Unfortunately, the European Parliament has proposed to expand the scope and restrictiveness of the P2B regulation by increasing the types of platforms covered (including mobile operating systems), introducing 'choice screens' for default services, and exposing search engines to more requirements.

DATA FLOWS AND DIGITAL SERVICES

Cross-border data flows have grown 45 times larger since 2005 and are projected to grow by another nine times in the next 5 years as digital flows of commerce, information, searches, video, communication, and intracompany traffic continue to surge.⁹ The internet is the key medium for businesses to reach new foreign customers and to purchase software and services which allow them to improve productivity.

To encourage innovation and internet-led economic growth, negotiators should prioritize the following issues as key objectives for a new U.S.-EU FTA digital economy chapter.

Promote the free flow of information. The ability to transfer and access information across borders is critical to all economic sectors and when information is restricted, the economy and exports are hurt. Data flows contribute hundreds of billions of dollars to the global economy.¹⁰

⁸<https://ec.europa.eu/digital-single-market/en/news/regulation-promoting-fairness-and-transparency-business-users-online-internet-mediation-services>

⁹ <http://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/digital-globalization-the-new-era-of-global-flows>.

¹⁰ Ibid.



- The U.S.-EU FTA should prohibit governments from restricting the movement of information across the internet.

Prevent data localization. Requirements that force companies to manage, store, or otherwise process data locally or other policies that link market access or commercial benefits to investment or use of local infrastructure hurt businesses and consumers and threaten the open transnational nature of the internet.

- The U.S.-EU FTA should prohibit governments from requiring that data be stored or processed locally.

Protect privacy and consumers. Privacy and consumer protection are critical underpinnings of digital trade. Clear and interoperable rules on these issues will enhance consumer confidence in digital trade.

The E.U. General Data Protection Regulation is now in effect.¹¹ There is still considerable ambiguity in the text. Specifically, how E.U. data protection authorities choose to interpret the law will have a significant impact on companies' ability to operate in the E.U. and offer consistent services and products across the globe.

Privacy Shield is indispensable to many U.S. companies, the U.S. economy, and the U.S.-EU economic relationship. The program provides companies on both sides of the Atlantic with a mechanism to comply with data protection requirements when transferring personal data from the EU and Switzerland to the U.S. in support of transatlantic commerce. Its usefulness may be threatened by future court challenges and modifications arising out of the annual review process – such as potential restrictions on automated processing/profiling.¹² Standard Contractual Clauses (SCCs) may also be threatened by ongoing litigation.¹³ Significant challenges to these transfer mechanisms threaten the viability of billions of dollars in EU-U.S. data transfers.

IA is also concerned about measures in the ePrivacy Bill that would prohibit processing of all electronic communications data and metadata, except in very limited circumstances where there is explicit consent from all parties.

- The U.S.-EU FTA should ensure that enforceable privacy protections will apply to the digital marketplace. In addition, the U.S.-EU FTA should include mechanisms to promote compatibility between different privacy regimes, giving users and companies greater assurance that privacy will be protected on a cross-border basis.

Promote intermediary liability protections. Intermediary liability protections have enabled the development of digital platforms and the free flow of information. These protections ensure cloud and other internet services can host third-party content and communications without the service provider being considered the publisher or speaker. Intermediary liability protections enable features such as customer reviews, which have been essential to building customer trust for e-commerce businesses in the U.S. and EU. Without intermediary liability protections, internet services would not be able to function as open platforms for trade and communication.

The EU is increasingly deviating from transatlantic best practices in its approach to online content, including through a draft regulation on terrorist content online and through court rulings such as the

¹¹ <http://www.computerweekly.com/news/450295538/D-Day-for-GDPR-is-25-May-2018>

¹² <http://www.computerweekly.com/news/450302513/Slow-response-to-Privacy-Shield-EU-US-data-transfer-programme>

¹³ <https://www.law360.com/articles/846924?sidebar=true>



Delfi opinion (under which the European Court of Human Rights held a news site responsible for numerous user comments on articles, leading the news site to shut down its user comment system on certain types of stories).

- The U.S.-EU FTA should prohibit governments from making online services liable for third-party content.

Ensure encryption and source code integrity. Other countries require access to encryption keys or source code as a condition for letting technology imports into their market. Such measures, if left unchallenged, would compromise technology and hurt exports.

- The U.S.-EU FTA should prohibit governments from requiring access to encryption keys and source code as a condition for market access.

No customs duties on digital transmissions. Some countries have threatened to apply customs duties on digital products. World Trade Organization members have only agreed to a temporary moratorium on imposing such duties. The U.S.-EU FTA should ensure that governments cannot impose tariffs on the flow of music, video, software, e-books, games, and information as they move across borders. This will continue to benefit the creators, artists, and entrepreneurs who depend on online sales to get ahead.

- The U.S.-EU FTA should prohibit governments from imposing customs duties on digital transmissions.

No unnecessary regulation of online services. Foreign governments are seeking to limit market access by imposing complex and unnecessary licensing requirements on online services. This makes little economic sense. Unlike traditional public utility infrastructure, online service markets typically have no serious barriers to new market entrants and have low switching costs.

Ridesharing companies face two general categories of barriers that prohibit them from effectively competing across EU member states: market access restrictions and operational restrictions. While many of these restrictions may directly apply to drivers using ridesharing networks, they directly affect the provision of ridesharing companies' software application services by limiting the scale, raising the cost, undermining the efficiency, and eroding the quality that business models using these technologies can otherwise generate. These restrictions go beyond what is necessary to advance any legitimate public interest objective and instead serve to prevent competition with domestic traditional transportation providers.

- The U.S.-EU FTA should prohibit governments from imposing unnecessary or facilities-based regulatory and licensing or operational requirements on providers of online services and applications.

Non-discriminatory taxation of the digital economy.

- The U.S.-EU FTA should ensure that each government provides full non-discriminatory treatment to digital services and service providers of the other party, and does not apply taxation measures in a way that discriminates against digital services or is not technologically neutral.

Promote open government data. Small and large companies are increasingly using public data to build innovative commercial applications and services, improve their ability to navigate global markets, and build machine translation and image recognition systems that rely on access to text and images. By



releasing data in an open format that can be searched, retrieved, used, reused, and redistributed, governments can assist local companies in building these cross-border services.

- The U.S.-EU FTA should encourage the release of government data in an open and machine-readable format.

Establish a digital trade working group. U.S.-EU trade negotiations offer an important opportunity to recognize both countries' mutual interest and leadership in digital trade. To advance joint leadership regionally and globally, the parties should consider opportunities to further coordinate on addressing digital trade barriers, including in third country markets experiencing significant digital trade challenges.

- The U.S.-EU FTA should establish a Digital Trade Working Group, so that the U.S. and EU can coordinate on regulatory and policy approaches going forward, including when negotiating with third countries, and avoid significant divergences on digital policy issues.

INTELLECTUAL PROPERTY

The global economy is now intrinsically tied to the digital economy. As traditional industries like manufacturing, agriculture, and financial services embrace the internet for their operations and to export, it is more critical than ever to promote frameworks that are tailored for the digital environment. Future economic growth in nearly every sector is now reliant on internet innovations like cloud computing, artificial intelligence, machine learning, internet of things, computational analysis, text and data mining, and the use of snippets. Critical to these innovations are balanced intellectual property frameworks that support exporters.

As more exporters leverage the internet to trade goods and services and use a number of these innovative practices, copyright limitations and safe harbors, tailored for the digital environment, have become even more critical to the growth of the entire economy.

If implemented, Article 13 of the proposed Copyright Directive – read in conjunction with Recital 38 – would narrow the existing EU copyright safe harbor for hosting providers in unpredictable ways across different member states, subjecting online services to incalculable liability risks and requiring the costly deployment of content filtering technologies to “prevent the availability” of certain types of content.

This proposed requirement deviates from shared U.S. and EU norms that have been critical to the growth of the commercial internet. The internet is a vibrant and economically valuable platform in large part because of balanced intermediary liability laws, which permit users and small businesses to post material – such as videos, reviews, and pictures – online without being unduly exposed to liability for the content of that material. Both the U.S. (under Section 512 of the Digital Millennium Copyright Act) and the EU (under Articles 12-15 of the E-Commerce Directive) create a “safe harbor” that protects online services from being liable for what their users do, as long as the service acts responsibly, such as by taking down content after being given notice that it infringes copyright.

Negotiators should prioritize the following intellectual property issues that are essential for the digital environment as crucial objectives for a U.S.-EU FTA.

Promote innovation through protecting ‘fair uses’ of copyright material. A strict regime of strong copyright protection and enforcement – without limitations and exceptions like the ‘fair use’ of copyrighted material – would doom the internet economy. Web search, machine learning, computational analysis, text and data mining, and cloud-based technologies all involve making copies of copyrighted content without the explicit consent of the copyright holder. These types of innovative activities are possible under copyright law because of robust limitations and exceptions.



- The U.S.-EU FTA should require governments to adopt clear copyright limitations and exceptions, including fair use and text and data mining rules, to enable innovative uses of copyrighted material, including by commercial providers.

Copyright ‘safe harbors’ for online service providers. A ‘safe harbor’ system that protects the interests of copyright holders, online service providers, and users by imposing responsibilities and rights on each is important. Safe harbors are critical to the functioning of cloud services, social media platforms, online marketplaces, search engines, internet access providers, and many other businesses. A safe harbor system also provides incentives for service providers to cooperate with rights holders.

- The U.S.-EU FTA should require governments to adopt strong copyright safe harbors from liability for online service providers, modeled on the U.S. Digital Millennium Copyright Act system and the EU E-Commerce Directive that have been the cornerstones of U.S. and EU innovation and protection of rights holders for two decades.
- The U.S.-EU FTA should ensure that any changes to the EU Copyright Directive are consistent and coherent with the U.S. legal framework and do not harm the ability of U.S. cloud providers, online platforms, search engines, creators, and users to access the EU market.

Proportionality and due process in copyright enforcement. Copyright damage regimes – if not properly calibrated – can have a stifling effect on innovation and legitimate services, especially smaller providers and emerging services. Risks of significant damages can deter startups from developing new technologies, particularly when it comes to newer technologies such as machine learning and comprehensive digital media services that may not be squarely addressed by existing safe harbors and exceptions.¹⁴

- The U.S.-EU FTA should require proportionality and due process in copyright enforcement measures.

CUSTOMS/TRADE FACILITATION

E-commerce and online marketplaces seamlessly connect buyers and sellers across the Atlantic Ocean. Small- and medium-sized businesses that a generation ago would have faced insurmountable barriers to participating in international commerce and trade are turning to the internet to reach global consumers and suppliers. Today, nearly \$8 trillion is exchanged through global e-commerce annually.¹⁵ In addition, with the help of e-commerce and online marketplaces, small businesses grow up to four times faster than businesses that do not embrace the internet, create twice as many jobs, are 50 percent more likely to be exporters, and bring in twice as much revenue through exports as a percentage of sales.¹⁶

The European Commission introduced a pair of proposed regulations (collectively, the Goods Package) on December 19, 2017. The Goods Package includes a Proposal for a Regulation on Enforcement and Compliance in the Single Market for Goods (the Enforcement Regulation). The Enforcement Regulation is aimed at increasing enforcement of existing EU product legislation and advancing customer safety. However, as currently drafted, the Goods Package will do little to improve overall customer safety, and the unintended effects may actually increase overall risk for EU customers.

¹⁴ Ibid.

¹⁵ http://www.mckinsey.com/~/media/McKinsey/Industries/High%20Tech/Our%20Insights/Internet%20matters/MGI_internet_matters_full_report.ashx.

¹⁶ <https://internetassociation.org/wp-content/uploads/2016/07/Internet-Association-TISA-Intermediary-Liability-2-Page-Handout.pdf>.



Burdensome and complex customs procedures discourage or block online sellers altogether from these markets. In some cases, internet-enabled exporters are often unable to reach international customers because of outdated trade rules that do not accommodate package-level e-commerce exports.

- Negotiators should prioritize customs and trade facilitation issues as key objectives for a U.S.-EU FTA.

Establish de minimis thresholds consistent with U.S. level. E-commerce is powering trade by giving internet-enabled businesses the ability to find customers around the world. Unfortunately, burdensome, complex, costly, and time-consuming customs procedures make it difficult to ship products across borders in a cost-effective way. These barriers are so significant that they can prevent small businesses from exporting all together – as firms with small resources cannot afford to navigate these complex rules on their own. Establishing commercially meaningful de minimis thresholds are key to enabling an environment conducive to e-commerce because they simplify import requirements, reduce and make transparent import costs, and expedite customs clearance for e-commerce shipments.

- USTR should seek commitments in the U.S.-EU FTA that harmonize de minimis levels with the current U.S. standard.

GOVERNMENT PROCUREMENT

The U.S. and EU are engaged on advancing “cloud first” policies. Cloud computing has brought forth a new and more efficient means of managing government information technology resources. It has opened up avenues for modernization, innovation, cost savings, and improvements in cybersecurity. Commercial cloud computing in the public sector allows for the delivery of better citizen services, facilitates inter-agency collaboration for greater efficiency, results in faster deployment of mission-critical applications, allows for enhanced budget control, decreases spending on legacy infrastructure, and increases overall IT efficiency while contributing to sustainability.

Promote access to cloud services. Parties should take steps through the digital trade, procurement, and good regulatory practices chapters to promote widespread and non-discriminatory access to commercial cloud services.

- Given these numerous benefits, the U.S.-EU FTA should include first of its kind measures on implementation and maintenance of “cloud first” policies for all sectors. The inclusion of “cloud first” policies in the FTA would set an important precedent for other agreements being negotiated.

CONCLUSION

A U.S.-EU FTA represents a significant opportunity for the internet sector. Internet Association appreciates USTR’s focus on relevant digital trade, intellectual property, and customs and trade facilitation issues in the request for comments and looks forward to playing a meaningful role during the negotiations. Considering all of the current issues with the EU in the e-commerce economy, the proposed negotiations present the biggest opportunity to engage on these issues.

We urge USTR to give all affected stakeholders the opportunity to provide input into the negotiating process, including draft text. Increased openness and transparency in U.S.-EU trade policy is likely to lead to better outcomes and more legitimacy.