

September 8, 2017

TO: Members, Subcommittee on Digital Commerce and Consumer Protection

FROM: Committee Majority Staff

RE: Hearing entitled “21st Century Trade Barriers: Protectionist Cross-Border Data Flow Policies’ Impact on U.S. Jobs”

I. INTRODUCTION

The Subcommittee on Digital Commerce and Consumer Protection will hold a hearing on Tuesday, September 12, 2017, at 10:15 a.m. in 2322 Rayburn House Office Building. The hearing is entitled “21st Century Trade Barriers: Protectionist Cross-Border Data Flow Policies’ Impact on U.S. Jobs.”

II. WITNESSES

- Victoria A. Espinel, President and Chief Executive Officer, BSA-The Software Alliance;
- Dean C. Garfield, President and Chief Executive Officer, Information Technology Industry Council;
- Morgan Reed, President, ACT-The App Association; and
- Jennifer Daskal, Associate Professor of Law, American University, Washington College of Law.

III. BACKGROUND

The Internet is an indispensable platform for international commerce, trade, communications, and data-sharing affecting U.S. businesses of all types and sizes. This technological phenomenon has been important not only for the technology companies which commercialized the World Wide Web nearly two decades ago, and disruptive startups which follow in their pioneering footsteps, but also for traditional industries such as manufacturing, retail, grocery chains, agribusiness, finance, marketing, insurance, energy, and health care, to name a few. Digital commerce and trade have been a boon to the U.S. economy, raising real U.S. GDP and contributing to an estimated 2.4 million new jobs.¹

¹ U.S. International Trade Commission, Digital Trade in the U.S. and Global Economies, Part 2, Publication No: 4485, Investigation No: 332-540, p.1, August 2014, <https://www.usitc.gov/publications/332/pub4485.pdf>

The U.S. economy has gained significant value from the Internet as well as tremendous benefits from global digital trade.² Digital trade includes Internet-enabled services like search, email and video chat, social media interactions, online retail and e-commerce orders, as well as services and applications for cloud computing, data processing and predictive analytics. For example, artificial intelligence, machine learning, and blockchain technologies are being developed in the U.S.³ Digital trade also “provides the means to enhance the productivity and overall competitiveness of an economy” by driving down the costs of data sharing, processing, and transactions, which allows businesses to connect seamlessly with customers, suppliers and other businesses around the globe.⁴ According to an International Trade Commission (ITC) report in 2014, U.S. domestic and international digital trade “resulted in an increase in U.S. gross domestic product (GDP) of 3.4-4.8 percent (\$517.1–\$710.7 billion in 2011).”⁵

The relative impact of global digital trade – namely in the form of cross-border data flows – is on the cusp to equal or exceed traditional goods, services and finance. According to one source, the economic impact of the Internet in 2016 would be \$4.2 trillion, making it the equivalent of the fifth-largest national economy.⁶ A report released in February 2016 by the McKinsey Global Institute, found the volume of global data flows grew 45-fold from 2005 to 2014, faster than international trade or financial flows.⁷ In the same McKinsey report, they found “[s]oaring cross-border data flows now generate more economic value than traditional flows of traded goods.”⁸

A. Cross-Border Data Flows

The free transfer of data across international borders – between and among countries all around the world – facilitates the free flow of information, goods, and services benefiting U.S. consumers and companies. Estimates from the ITC “show that total online sales of products and services for either all digitally intensive sectors totaled \$935.2 billion in 2012, or about 6.3 percent of U.S. GDP. . . [and] 30 percent of total online sales of products or services in 2012, \$296.4 billion, were delivered online.”⁹ The Bureau of Economic Analysis recently found exports of digitally enabled services totaled \$385.1 billion, representing 54.2 percent of total

² Digital trade is broadly defined as “U.S. domestic commerce and international trade in which the Internet and Internet-based technologies play a particularly significant role in ordering, producing, or delivering products and services. U.S. International Trade Commission, Digital Trade in the U.S. and Global Economies, Part 2, Publication No: 4485, Investigation No: 332-540, p. 29, August 2014, <https://www.usitc.gov/publications/332/pub4485.pdf>

³ <http://www.bsa.org/~media/Files/Policy/Trade/05222017BSANAFTAHandoutPress.PDF>

⁴ Rachel Fefer, et al., Digital Trade and U.S. Trade Policy, Congressional Research Service, p. 1, June 6, 2017.

⁵ U.S. International Trade Commission, Digital Trade in the U.S. and Global Economies, Part 2, Publication No: 4485, Investigation No: 332-540, p.13, August 2014, <https://www.usitc.gov/publications/332/pub4485.pdf>

⁶ Paul Zwillenberg, Dominic Field, and David Dean, Greasing the Wheels of the Internet Economy, Boston Consulting Group, February 2014,

https://www.bcgperspectives.com/content/articles/digital_economy_telecommunications_greasing_wheels_internet_economy/

⁷ James Manyika, et al., Digital globalization: The new era of global flows, February 2016

⁸ *Id.*

⁹ U.S. International Trade Commission, Digital Trade in the U.S. and Global Economies, Part 2, Publication No: 4485, Investigation No: 332-540, p.41.

U.S. services exports.¹⁰ Trade in digitally enabled services is growing faster than trade of other (non-digitally enabled) services.¹¹

And while “[g]lobal flows of data primarily consist of information, searches, communications, transactions, video, and intracompany traffic. . .[t]hey underpin and enable virtually every other kind of cross-border flow.”¹² For example, an important category of data flows are commercial data and services flowing between businesses (e.g., supply chain information, design information, personnel data). The Information Technology and Innovation Foundation (ITIF) highlighted this power of data flows in the manufacturing industry: “truck data at one worksite showed Caterpillar that some operators were not using the correct brake procedures on a haul road with a very steep incline. Retraining the operators saved the customer about \$12,000 on the project, and company-wide driver incidents decreased by 75 percent.”¹³ GE estimates its use of digital-design technologies has reduced the development of jet engines by at least half a year, and notes that each one percent reduction in fuel consumption it is able to extract from its engines saves airlines approximately \$2 billion per year.

The infrastructure and processes facilitating these data flows also support local businesses and smaller enterprises such as artists, contract workers, entrepreneurs, and app developers. Between May 2014 and 2016, according to the Bureau of Labor Statistics, the app economy alone added 110,000 new software application developer jobs to the U.S. workforce.¹⁴ Businesses are able to harness economies of scale to provide goods and services to their clients and customers in the most efficient manner because of the free flow of data. The ITC found total online “sales by SMEs [(small and medium-sized enterprises)] accounting for \$227.1 billion (24.3 percent)” in 2012.¹⁵ Online startups and SMEs stretch across the entire U.S., and all 435 congressional districts.¹⁶

B. Barriers to Cross-Border Data Flows

Despite the benefits of the free flow of information to an economy, as well as domestic companies and consumers, countries of varying stages of economic development have proposed or adopted cross-border data flow restrictions such as a “data residency requirement that confine[s] data within a country’s borders, a concept know[n] as ‘data localization.’”¹⁷ According to ITIF, data localization requirements “can be explicitly required by law or is the de facto result of a culmination of other restrictive policies that make it unfeasible to transfer data, such as requiring companies to store a copy of the data locally.”¹⁸ Other examples include

¹⁰ <http://www.esa.doc.gov/economic-briefings/new-bea-estimates-international-trade-digitally-enabled-services>

¹¹ Id.

¹² James Manyika, et al., Digital globalization: The new era of global flows, February 2016.

¹³ http://www2.itif.org/2015-atkinson-international-data-flows.pdf?_ga=2.211536149.1847784346.1504795847-1524292531.1504795847

¹⁴ https://actonline.org/wp-content/uploads/App_Economy_Report_2017_Digital.pdf

¹⁵ U.S. International Trade Commission, Digital Trade in the U.S. and Global Economies, Part 2, Publication No: 4485, Investigation No: 332-540, p.1.

¹⁶ https://actonline.org/wp-content/uploads/App_Economy_Report_2017_Digital.pdf

¹⁷ http://www2.itif.org/2015-atkinson-international-data-flows.pdf?_ga=2.211536149.1847784346.1504795847-1524292531.1504795847

¹⁸ Id.

requiring targeted categories of data (e.g., email, financial, human resources) be retained locally, or requiring government consent for certain data transfers. The European Union (EU) and its Member States are also considering proposals that would have a direct and significant impact on trade between the U.S. and EU. Based on 2014 estimates, the ITC estimates that decreasing barriers to cross-border data flows would increase U.S. GDP by 0.1 to 0.3 percent.¹⁹

A 2017 study from the European Centre for International Political Economy examined the consequences for GDP of these protectionist policies for several countries and found a negative impact in all cases: Brazil (-0.2%), China (- 1.1%), EU (-0.4%), India (-0.8%), Indonesia (-0.7%), Korea (-0.4%), and Vietnam (-1.7%).²⁰ This data demonstrates how important access to foreign markets is for countries of all sizes and political regimes.

C. Current Developments

There are multiple trade negotiations and dialogues that are expected set the stage for global digital trade and cross-border data policy moving forward.

1. NAFTA

When the North American Free Trade Agreement (NAFTA) – the trade agreement among the U.S., Canada, and Mexico – entered into force in 1994, the commercialized Internet, as we know it today, was nascent, growing from an academic resource to one of the largest and fastest sectors of the economy. The renegotiation of NAFTA holds tremendous potential for the digital economy, and impacted industries have advocated for digital trade and cross-border data flows to be a top priority in negotiations for a modernized, Internet-era trade agreement and all global trade discussions.

NAFTA re-negotiations among the three trading parties are currently underway, concluding two negotiating rounds thus far and anticipating a third round at the end of September 2017. In advance of the re-negotiations, the U.S. Trade Representative proffered NAFTA objectives on cross-border data flows, including the establishment of “rules to ensure that NAFTA countries do not impose measures that restrict cross-border data flows and do not require the use or installation of local computing facilities.”²¹

2. Privacy Shield

The European Union-U.S. Privacy Shield framework provides companies on both sides of the Atlantic Ocean with a data privacy mechanism to comply with EU data protection requirements.²² The Privacy Shield was finalized in July 2016, and today, it is used by over 2,400 U.S. companies.²³ Several thousand EU companies rely on the Privacy Shield

¹⁹ *Id.*

²⁰ <http://ecipe.org/app/uploads/2017/07/ECIPE-for-METI-JETRO-3.pdf>

²¹ <https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf>

²² On October 6, 2015, the European Court of Justice invalidated the Safe Harbor framework by the European Commission, the predecessor to the Privacy Shield which was adopted by the European Commission on July 12, 2016.

²³ <https://www.privacyshield.gov/welcome>

certifications to facilitate the transmission of such data to U.S. companies. More data moves between the two regions than anywhere else in the world.

In mid-September, the European Commission will undertake the first annual review of the Privacy Shield to ensure it is functioning effectively and providing sufficient safeguards of the EU privacy rules. Commerce Secretary Wilbur Ross expressed his commitment to the Privacy Shield framework at a meeting with the European data privacy authorities.²⁴ Acting Federal Trade Commission Chair Maureen Ohlhausen also expressed her support for the EU-U.S. Privacy Shield Framework.²⁵

IV. ISSUES

This hearing will give Members of the Subcommittee an opportunity to hear from industry experts on the frontlines of these issues about the potential impact on U.S. companies, both big and small, and the jobs, products, services and innovation they support.

The following issues may be examined at the hearing:

- The economic impact of the global digital economy, specifically the effect on U.S. companies, both big and small, and the jobs, products, services, and innovation they support.
- The effects and severity of nontariff cross-border data flow barriers on U.S. enterprise, particularly as they relate to U.S. jobs, competition, and cybersecurity.
- The impact on small and medium enterprises that do not have the resources to comply with a patchwork of international regulations on cross-border data flows.
- The challenges that companies face in the current international regulatory environment that could be addressed by on-going trade negotiations.

V. STAFF CONTACTS

If you have any questions regarding this hearing, please contact Melissa Froelich, Paul Jackson, or Bijan Koohmaraie of the Committee staff at (202) 225-2927.

²⁴ <http://www.reuters.com/article/us-eu-dataprotection-usa/eu-reassured-on-u-s-privacy-directive-source-idUSKBN16H2KH>

²⁵ <https://www.natlawreview.com/article/first-annual-privacy-shield-review-will-comprehensively-assess-framework>