



September 19, 2024

VIA EMAIL

The Honorable
Chairman Jason Smith
Ways & Means Committee
House of Representatives
Washington, DC 20515

The Honorable
Ranking Member Richard Neal
Ways & Means Committee
House of Representatives
Washington, DC 20515

Re: Trade Subcommittee Hearing on Protecting American Innovation by Establishing and Enforcing Strong Digital Trade Rules

Dear Chairman Smith and Ranking Member Neal:

On behalf of the Software & Information Industry Association (SIIA), we write to convey views regarding the protection of American innovation through U.S. leadership and enforcement of strong digital trade rules, as will be discussed at the Trade Subcommittee hearing on September 20. We ask that this letter be included in the record of the September 20 hearing.

SIIA is the principal trade association for the software and digital information industries worldwide. Our members include nearly 400 companies and associations reflecting the broad and diverse landscape of global digital content providers and users in academic publishing, education technology, and financial information, along with creators of software and platforms and companies specializing in data analytics and information services.

In this letter, we describe the importance of digital trade to U.S. economic and security interests, and how it benefits companies of all sizes; we explain how USTR has undermined U.S. interests by abandoning long-held positions on digital trade; and we look at how these actions have further exposed U.S. companies to discriminatory regulations and enforcement in the European Union (EU).

Digital Trade is Essential for U.S. Economic and National Security Interests

No economy anywhere benefits more from digital trade than the United States.¹ According to a report by the Bureau of Economic Analysis, the U.S. digital economy in 2021 accounted for \$3.7 trillion of gross output, \$2.41 trillion of value added (equal to 10.3 percent of U.S. gross domestic product, or GDP), \$1.24 trillion of compensation, and 8 million jobs.² In 2022, the numbers were even higher, including supporting 8.9 million jobs and generating \$1.3 trillion in compensation.³

In light of this productivity, U.S. companies also saw the highest exports of services on record, which has resulted in a sizable services trade surplus⁴ fueled mostly by an explosive growth in the export of digitally-enabled services.⁵ And this growth in the export of digital goods and services ripples through to sports and entertainment, pharmaceuticals, agriculture, transportation, and auto manufacturing.

Aggressive enforcement of existing digital trade rules also benefits companies of all sizes. A recent report from the International Trade Commission shows that small- and medium-sized enterprises (SMEs) make up fully 25 percent of digital sales and a third of digital purchases.⁶ But these companies, by their nature, have smaller goods and service offerings, and the burden on them from having to comply with an array of domestic and foreign rules and regulations can often be overwhelming. And while the growth in digital trade offers them an unparalleled opportunity to reach new customers in far-flung areas of the globe, there are reasons to believe that foreign trade barriers are negatively impacting their ability to do so.⁷

Our success at home has engendered envy abroad. The success of the U.S. tech industry has led the EU to adopt a protectionist and discriminatory approach that disproportionately aims to undermine this success in a misguided effort to bolster their own domestic companies. Sound digital trade rules are important not only to our economy, but to our national security. That security depends on robust engagement with other countries in an effort to shape the rules of the road for the digital economy. Democratic values and norms, respect for individual liberty, free enterprise, and an open and free internet must underpin the global rules of the digital economy of the future. If the U.S. fails to lead this effort, nations with authoritarian instincts, including China, will be only too happy to fill that void.

¹ Although there is no single definition of what specifically digital trade is, it is broadly accepted that it encompasses trade in goods and services that are digitally ordered and/or delivered. *Digital Trade – Key Messages*, OECD Policy Issues. Available at <https://www.oecd.org/en/topics/policy-issues/digital-trade.html>

² Highfill, Tina and Surfield, Christopher, “New and Revised Statistics of the U.S. Digital Economy, 2005-2021,” U.S. Department of Commerce, Bureau of Economic Analysis, November 2022. The report can be access at <https://www.bea.gov/system/files/2022-11/new-and-revised-statistics-of-the-us-digital-economy-2005-2021.pdf>

³ “How Big is the Digital Economy in 2022?” U.S. Department of Commerce, Bureau of Economic Analysis. Infographic available at <https://www.bea.gov/resources/multimedia/how-big-digital-economy-2022>

⁴ The White House, *What Drives the U.S. Services Trade Surplus? Growth in Digitally-Enabled Services Exports*, June 10, 2024. Available at <https://www.whitehouse.gov/cea/written-materials/2024/06/10/what-drives-the-u-s-services-trade-surplus-growth-in-digitally-enabled-services-exports/>

⁵ *Ibid.*

⁶ United States International Trade Commission, *Digital Trade in the U.S. and Global Economies, Part 2*, August 2024, Publication Number: 4485, at 1. Available at <https://www.usitc.gov/publications/332/pub4485.pdf#page=45&nameddest=Bullet3>

⁷ *Id.*



USTR's Policy Shift is Damaging U.S. Economic and National Security Interests

Unfortunately, recent actions by the United States Trade Representative (USTR) to abandon long-held U.S. positions on digital trade and weaken its enforcement of existing rules have made this scenario a real possibility. Among those actions are USTR's abrupt decision last fall to abandon digital trade negotiations at the World Trade Organization (WTO); precipitating the collapse of discussions around trade in Indo-Pacific Economic Framework for Prosperity (IPEF) negotiations; and the inexplicable omission of references to numerous digital trade barriers faced by U.S. companies overseas, particularly in the EU, in the 2024 National Trade Estimate (NTE). These policy shifts bode poorly for both our economic and security interests.

Officially, USTR has explained its abrupt change in policy as necessary to provide "space" for domestic policy debates about the goals of U.S. digital regulation. But that argument misunderstands foundational international trade rules and how they interact with U.S. domestic law. First, the national treatment rules, also referred to as rules on non-discrimination, prohibit members of the WTO from discriminating against companies or goods and services originating in *other* WTO member countries. In other words, they have *nothing* to do with domestic legislation in the U.S. aimed at American companies. Second, as the Committee is surely aware, when writing legislation to implement trade agreements, Congress always includes language ensuring that, if there is a conflict between trade agreement provisions and U.S. law, U.S. law prevails.

Along those same lines, it is worth noting that other countries appear perfectly capable of both legislating at home while engaging actively in global trade negotiations. Countries like Australia, the UK, and Canada, among others, have all recently agreed to international commitments on data transfers while simultaneously passing high standard domestic privacy laws. The same is true for the EU.

USTR's Actions Have Exposed U.S. Businesses to Discriminatory Laws and Enforcement Action And The EU's Approach is Not Working

The reluctance of USTR to engage on digital trade reflects a disturbing trend away from supporting U.S. business interests in the EU in the face of a raft of now-enacted legislation. The Digital Markets Act (DMA), the Digital Services Act (DSA), the AI Act, and the Data Act, were all enacted for the purpose of discriminating against U.S. companies. Making matters worse is that other jurisdictions, including Canada and the United Kingdom, are following the EU's example by passing their own discriminatory legislation, creating myriad additional potential trade barriers for U.S.-based firms to overcome.

Equally as troubling is that in some instances, the EU appears to be using its digital rulebook to impose seemingly random and exorbitant fines on U.S. firms. And in most cases, there is no requirement that the Commission prove any actual harm. Rather, it will usually suffice to merely allege that a harm "may" have occurred.⁸ Moreover, the Commission concedes that part of the reason for collecting these sometimes exorbitant fines is to raise additional revenue. In announcing a recent decision, it reasoned that "fines imposed on companies found in breach of EU antitrust rules are paid

⁸ Heather, Sean, *Europe's Cash Grab: Arbitrary Fines Harm American Companies and Workers*, U.S. Chamber of Commerce, August 29, 2024. Available at <https://www.uschamber.com/international/europes-cash-grab>

into the general EU budget [and] therefore help finance the EU and reduce the burden on taxpayers.”⁹ No one disputes that the EU has a right to enforce its own laws, but arbitrarily fining U.S. companies as a means to generate revenue for itself merits greater pushback from Congress and the administration than what we have seen to date.

A recent report by former Italian Prime Minister Mario Draghi—which was commissioned by the EU Commission, no less—makes clear that other jurisdictions should be wary of blindly trying to emulate the EU’s approach to digital regulation. Among other things, it found that as a result of the EU’s wide-ranging, ill-defined, and heavy-handed tech legislation, its technology sector is struggling to keep up with its U.S. competitors; its overall productivity is low and its economic growth anemic.¹⁰ More specifically, Mr. Draghi found that “the EU’s regulatory stance towards tech companies hamper innovation: the EU [] has around 100 tech-focused laws and over 270 regulations active in digital markets across all Member States. Many EU laws take a precautionary approach, dictating specific business practices *ex ante* to avert potential risks *ex post*.”¹¹ The report deemed reversing this trend an “existential challenge” for Europe.¹² And that sentiment appears to be shared by others. The CEO of a Dutch startup, for example, commented that “Draghi is right in his analysis, especially around issues such as merger control and innovation, but unfortunately the EU is part of the problem. Thus far it has mostly brought us silly cookies and AI warnings.”¹³

While this primarily is an issue for the EU to figure out, the report makes plain that overly aggressive European policies attacking innovative companies have had very serious, albeit unintended, consequences that should give anyone pause, in the U.S. or elsewhere, toying with the idea of trying to import these same European-style regulations. And it underscores the importance of the U.S. government, including USTR, aggressively engaging with their foreign counterparts to mitigate the harmful effects that these regulations have on the ability of American companies to compete abroad.

Under both Republican and Democratic administrations, digital trade has been a bipartisan strategic priority for the United States as a way to protect our national security and economic interests, and advancing the values of democratic countries. For all of those reasons, it is essential that the U.S.

⁹ *Commission fines Apple Over €1.8 billion Over Abusive App Store Rules for Music Streaming Providers*, EU Commission Press Release, 4 March 2024. Available at https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1161

¹⁰ Draghi, Mario, *The Future of European Competitiveness, Part A | A Competitiveness Strategy for Europe*, European Commission, September 2024. Available at https://commission.europa.eu/document/download/97e481fd-2dc3-412d-be4c-f152a8232961_en?filename=The%20future%20of%20European%20competitiveness%20%20A%20competitiveness%20strategy%20for%20Europe.pdf

¹¹ *Id.*, 4. (Italicization added.)

¹² Draghi, *supra* note 5, 1.

¹³ See Groen, Jitse, Founder and CEO of Just Eat. Tweet available at <https://x.com/jitsegroen/status/1834142680718193058>



reassert its global leadership role in trade, both when it comes to drafting the rules of the road for the future rules-based trading system, as well as enforcing the rules already in place.

Respectfully submitted,

Paul Lekas
Senior Vice President, Global Public Policy

Morten C. Skroejer
Senior Director, Technology Competition Policy