



December 10, 2018

Mr. David Weiner  
Deputy Assistant U.S. Trade Representative for Europe  
Office of the United States Trade Representative  
Ref: Request for Comments of Negotiating Objectives for a  
U.S.-European Union (EU) Trade Agreement  
Docket Number USTR 2018-0035

**Re: Negotiating Objectives for a Trade Agreement with the European Union**

Dear Mr. Weiner:

The Software & Information Industry Association (SIIA) appreciates the opportunity to comment on negotiating objectives for a trade agreement with the EU. It is in the interests of the industries that SIIA represents and the country as a whole for an agreement to be concluded with the EU. Should an accord be reached with the EU, it would also strengthen the ability of the United States and the EU to shape Chinese trade and investment policies. Should the United States succeed in creating new agreements with Japan and the United Kingdom as well, that would strengthen the U.S. position vis a vis China additionally.

**About SIIA**

The Software & Information Industry Association (SIIA) is the principal trade association for the software and digital information industries. The more than 800 software companies, data and analytics firms, information service companies, and digital publishers that make up our membership serve nearly every segment of society including business, education, government, healthcare and consumers. As leaders in the global market for software and information products and services, they are drivers of innovation and economic strength – software alone contributes \$425 billion to the U.S. economy and directly employs 2.5 million workers and supports millions of other jobs. For more information, please visit the SIIA Policy Home Page at [www.siiia.net](http://www.siiia.net).

**SIIA Joins Multi Trade Association Letter Urging Administration to Make Digital Trade a Priority in Negotiation with the EU, Japan, and the UK**

On November 6, 2018, SIIA, together with 29 other trade associations, sent a letter to Ambassador Robert E. Lighthizer urging the Administration to make digital trade a priority in its negotiations with the EU, Japan, and the UK. <sup>1</sup> SIIA reiterates that request. It is crucial to ensure the non-discriminatory treatment of digital products, including new and innovative products, and to promote global digital trade by both the United States and the EU reiterating support for the World Trade Organization Customs Duty

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<sup>1</sup> SIIA Website, Multi Association Letter to USTR in Japan, UK and UK FTAs, released November 9, 2018  
[http://www.siiia.net/Portals/0/pdf/Policy/Multi-  
Assoc%20Letter%20to%20USTR%20on%20Digital%20Trade%20in%20Japan%20EU%20UK%20FTAs.pdf?ver=2018-  
11-09-103114-697](http://www.siiia.net/Portals/0/pdf/Policy/Multi-Assoc%20Letter%20to%20USTR%20on%20Digital%20Trade%20in%20Japan%20EU%20UK%20FTAs.pdf?ver=2018-11-09-103114-697)

Moratorium on Electronic Transmissions. And although forced technology transfer is not a problem in the U.S.-EU trade and investment context, it would have helpful precedential value to include a provision in a U.S.-EU trade agreement banning forced technology transfer. The U.S. and the EU could also lead by committing to promote paperless trading, including the use of customs forms in electronic format. In this context, SIIA endorses again the digital and intellectual property rights negotiating objectives in the 2015 Trade Promotion Authority (TPA) Act (Public Law 114–26—June 29, 2015). SIIA also endorses the digital trade and intellectual property rights chapters in the United States Mexico Canada Agreement (USMCA), including the financial services chapter, which includes important financial data cross-border data flows commitments. In this context, it is especially important to ensure that it is possible to use diverse electronic signature and authentication methods to allow transactions through secure online payment systems. SIIA testified positively before the United States International Trade Commission on November 15, 2018 on the digital trade and intellectual property provisions found in the USMCA. <sup>2</sup>

### **Brookings Institution Report Key to Understanding the Value and Importance of Transatlantic Data Flows**

SIIA's views on the importance of digital trade have been informed, in part, by a groundbreaking 2014 Brookings Institution study that SIIA supported. The study is entitled "The Importance of the Internet and Transatlantic Data Flows for U.S. and EU Trade and Investment." <sup>3</sup> While the numbers in the report are out of date, the framework for studying the economic value of cross-border data flows for trans-atlantic services trade and investment remains valid. The report provides numbers on digitally deliverable services exports; digitally deliverable services used in the production of goods and services exports; and, digitally deliverable services that are delivered via U.S. companies located in Europe and vice versa.

In 2012, U.S. digitally deliverable services to the EU were worth \$140.6 billion and represented 72 percent of services exports to the EU. <sup>4</sup> In 2017, U.S. services exports to the EU were an estimated \$239.8 billion. Assuming that digitally delivered services represented 72% of those exports again (a conservative estimate), digitally deliverable services exports to the EU were worth \$172.6 billion. Recall also that in 2017, as in 2012, the United States had a services surplus with the EU. In 2017 it was \$51.3 billion with digitally deliverable services exports responsible for almost \$40 billion of that surplus. Digitally deliverable services include financial services, highlighting the importance of including a financial data flow commitment in an agreement with the EU.

The Brookings report provides analysis and numbers on how "digitally deliverable services are key inputs into the production in the U.S. and the EU of goods and services for exports." <sup>5</sup> As the United States seeks to close the trade deficit with the EU in goods trade, cross-border data flows will increase in importance. SIIA pointed to this phenomenon in the car sector in its November 15, 2018 testimony to USITC.

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<sup>2</sup> SIIA Website, SIIA Testimony to USITC re: USMCA, released November 1, 2018

<https://www.siiia.net/Portals/0/pdf/Policy/SIIA%20Testimony%20to%20USITC%20re%20USMCA.pdf?ver=2018-11-01-100710-170>

<sup>3</sup> Brookings Institution Website, Report Released October 14, 2015, Joshua P. Meltzer

<https://www.brookings.edu/research/the-importance-of-the-internet-and-transatlantic-data-flows-for-u-s-and-eu-trade-and-investment/>

<sup>4</sup> Brookings Report, page 12

<sup>5</sup> Brookings Report, page 17

*McKinsey estimates that, today, software represents 10% of a typical car's value. By 2030, it could be 30%. Not only that, cars are rapidly becoming more "connected" and soon there will be many autonomous vehicles on the market. The United States is well positioned to take advantage of this development so the protection in USMCA for software and the cross-border data flow provisions could well become more important for U.S. auto exports to Mexico and Canada in coming years. The Internet of Things is also accelerating the importance of data in selling physical products. The number of connected devices in the world, for example, is expected to triple from 23 billion in 2018 to 75 billion in 2025. Indeed, data flow provisions with respect to goods trade will probably become just as important as, for instance, rules-of-origin, in a future USMCA renegotiation or any future trade negotiation for that matter.*

Digitally deliverable services supplied through foreign affiliates are important as well. The Brookings report notes: "In 2011, U.S. foreign affiliates in Europe delivered \$312 billion worth of digitally deliverable services and European businesses in the U.S. provided \$215 billion worth of digitally deliverable services."

6

Both the United States and the EU are at the forefront of developing AI, 5G, Quantum Computing, distributed ledgers, and other emerging technologies. Continued seamless transatlantic cross-border data flows will accelerate the development of these and other emerging technologies.

### **USMCA and Digital Trade with the EU**

SIIA considers that the U.S. government can draw from USMCA digital trade provisions to negotiate with the EU. Such commitments will be important in ensuring continued EU market access for innovative American firms and in establishing a model elsewhere in the world. It is true that the EU position is that privacy (intimately related to cross-border data flows) cannot be subject to a trade negotiation, but the U.S. should nonetheless strive to come to an agreement providing for a positive cross-border data flow commitment. The U.S. should also push back against a highly likely EU request for a cultural carve-out. There should be an effort to establish closer U.S.- EU cooperation on both digital and intellectual property rights issues vis a vis third countries. See below for some issues that should be reflected in an agreement with the EU.

**Affirmative Data Flow Obligation:** This is a key ask as so much is derived from this obligation, for instance the interoperability idea. Cross-border data flows means two things in this context. First, the ability to transfer data (personal or non-personal) across borders. Second, the ability to store and/or process data locally or internationally. Modern digital trade chapters normally describe this provision as an obligation not to mandate the use of local computing facilities. Both of these obligations are needed in trade agreements because a country could permit cross-border data flows but still mandate local data storage and/or processing, thereby effectively reducing the value of permitting cross-border data flows. For example, some countries require that copies of data stay within their nations even though the data is also moved abroad for processing and storage there.

This affirmative obligation is needed to facilitate e-commerce and cross-border data flows, remove unjustified barriers to trade by electronic means, and ensure an open, secure and trustworthy online environment. The EU will most likely want to work off language it has developed, which reads: "Nothing in this agreement shall affect the protection of personal data and privacy afforded by the Parties' respective safeguards." It is essential for the U.S. government to find a way to limit this principle so that

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<sup>6</sup> Brookings Report, page 17

enforcement of legitimate privacy rules cannot be used to distort trade or discriminate against foreign competitors.

**Interoperability:** There should be a commitment on both sides to ensuring that there are mechanisms available to the private sector to transfer personally identifiable information. The USMCA's Article 19.8:6 provides for a useful template in this regard. There are already 4,000 plus companies in the world's largest data transfer mechanism, the EU-U.S. Privacy Shield so this should be possible. And although the EU will insist that privacy cannot be subject to bargaining in a trade agreement, a formula should be found to make it clear that laws and regulations, including those involving privacy, should not be discriminatory or a disguised means of limiting trade. There should also be a mutual commitment to make the APEC CBPR system more widely adopted as the USMCA's Article 19.8:6 does. The agreement should establish procedures that companies can use to demonstrate that they are in compliance with EU rules and regulations on conditions for onward data transfers, and that these procedures should not be a disguised means of discrimination.

**Financial data:** Financial data should be included in an agreement with the EU. The USMCA's Chapter 17 on financial services provides for a useful template in this regard. Regulatory cooperation in financial services should be addressed in any future agreement and discussions on market access and on regulatory cooperation should be closely linked.

**Proprietary Software, Encryption Keys, and Data:** There are many different business models in the digital trade space. For example, software code development through open source or through copyright/patent protection are equally legitimate from an SIIA perspective. The parties should not establish requirements that force suppliers to share source code, encryption keys, and/or proprietary algorithms. Businesses should be free to choose the business model that works for them. That goes as well for companies that invest in curating data, including scientific data. Such companies have an interest in protecting proprietary data and should be able to do so. For instance, the agreement should clarify that policies related to government data or publicly funded research should neither diminish protections for proprietary data or content nor the incentive to engage in private sector publishing reporting on that research. Recent open access proposals ("Plan S") by several member state research agencies could risk undermining these incentives and erect significant barriers and unnecessary obstacles for digital publishers and information providers.

On behalf of SIIA, I would like to thank you for the opportunity to comment. Please do not hesitate to contact us if you believe we can be of further assistance.

Sincerely,



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