



December 3, 2021

The Honorable Dianne Farrell
Acting Undersecretary of International Trade
International Trade Administration
U.S. Department of Commerce
1401 Constitution Ave NW
Washington, DC 20230
Via electronic mail to: TTC_SME@doc.gov

Subject: U.S.-EU Trade & Technology Council - Working Group 9 - Promoting SME Access to and Use of Digital Tools

Dear Madam Undersecretary:

As President and CEO of the Software & Information Industry Association (SIIA), it was a privilege to speak at the November 18, 2021 stakeholder session hosted by the U.S. Department of Commerce to discuss the U.S.-EU Trade & Technology Council (TTC) and methods to promote small- and medium-sized enterprises' (SMEs) access to the use of digital tools. I write to provide further thoughts on this topic and memorialize the input I shared during the session.

SIIA is the principal trade association for the software and digital information industries worldwide. Our members include over 450 companies reflecting the broad and diverse landscape of digital content providers and users in specialized content industries, academic publishing, education technology, and financial information, along with creators of software and platforms used by millions worldwide. This breadth gives us a unique vantage on the challenges that SMEs face in the United States and also in cross-border transactions and in foreign markets.

Working Group 9 has a critical opportunity to promote methods and regulatory solutions that will support SMEs and underserved communities' access to digital tools, in part by removing barriers to digital empowerment. The use of digital tools is a key enabler for SMEs to innovate, grow and compete. Its uptake among SMEs varies significantly across sectors and regions. Beyond training, education gaps and market entry barriers, SMEs face challenges regarding access to technologies, data, finance and other resources. We believe there are specific opportunities, embedded in strong democratic values, to increase access to digital tools and technologies for SMEs in both the United States and European Union (EU).

1. Foster a Regulatory Environment that Reflects the Unique Needs of SMEs

The importance of crafting regulatory solutions that recognize the unique needs of SMEs cannot be overstated. There is documented evidence¹ that one-size-fits-all approaches to privacy, for example, have hindered SME innovation with limited demonstrable benefits to consumer welfare. In general, we recommend the TTC explore tailored measures based on the scale and scope of the data collected and the size of enterprises with a focus on promoting innovation, enhancing consumer welfare, and creating a level playing field.

This is a theme SIIA has emphasized in discussions on developing a federal privacy law in the United States and in separate engagements with various states. It also requires attention as the TTC seeks to develop rules for cross-border commerce and the United States engages with EU counterparts on a wide range of legislative proposals on the digital economy.

We offer the following recommendations to foster a regulatory environment that reflects the unique needs of SMEs.

When considering annual or periodic filing requirements, tailor these to the size, scope, and resources of businesses, to reduce barriers to SME sustainability. It is one thing to require public companies to make annual filings with the Securities and Exchange Commission and foreign regulators, and drug companies to submit to pre-approval by the Food and Drug Administration before marketing drugs to consumers. It is quite another to require essentially the same level of reporting and disclosure of startups that cannot afford to slow-track innovation and hire a cadre of lawyers to pre-clear every step of the innovation cycle.

Create appropriate exemptions from overly burdensome and resource-intensive requirements for SMEs. SMEs currently face profound hurdles in complying with the GDPR. According to an EU survey commissioned in 2019, only half of small businesses feel they are compliant with the GDPR despite good faith efforts.² According to the study, many SMEs are faced with challenges complying with Article 6 of GDPR, which requires a legitimate and lawful ground and purpose for data collection efforts. Nearly 44% of all SMEs face a lack of clarity on what types of purposes are considered legitimate and lawful, which has resulted in additional, sometimes duplicative data consent requests to customers. This is a finding detailed in the 2019 EU Small Business Survey.

More than 5,000 European and American companies—the vast majority small- or medium-sized—have long relied on the Privacy Shield Framework to govern the transfer of personal data from the European Union to the U.S. In July 2020, the EU’s Court of Justice invalidated that framework in a case that’s become known as “Schrems II” – and thus launched a new era of legal peril for the vast daily transfer of transatlantic data. Large enterprises can afford the legal support to review and execute the now required standard contractual clauses. Not so for most SMEs.

¹ See GDPR.EU, [2019 GDPR Small Business Survey](#) (May 2019).

² *Id.*

Standard contractual clauses require American businesses to submit to the jurisdiction of a European regulator which increases burdens on SMEs wishing to enter the European market. They also create third party beneficiary rights in data subjects via contract, giving them private causes of action against businesses that allegedly mishandle their information. A small business cannot afford to litigate overseas. Executing new standard contractual clauses is expensive and challenging.

In the United States, various federal privacy proposals and state privacy laws³ include specific small business exemptions, based on size or scope of data collection efforts by the company. This approach would benefit sinking businesses that are trying to stay afloat in the midst of a myriad of new compliance and regulatory policies.⁴

Also instructive is the approach being taken in the United Kingdom (the UK). The UK is in the process of crafting data reforms⁵ to the UK GDPR, in an effort to clarify Article 6 and specify a concrete list of additional and alternate lawful grounds to process data, which will avoid the additional and redundant consent requests. We encourage TTC to review guidance by the UK and other countries to elaborate on what types of data processing purposes are considered lawful and would not require additional consent. This type of guidance will reduce unnecessary costs and data stagnation that disproportionately impact SMEs.

Provide SMEs with flexibility for compliance costs associated with developing and using AI technologies. The draft EU Artificial Intelligence Act is likely to raise costs disproportionately on SMEs, which would have a negative effect especially on EU-based SMEs. One study estimates that the Act, in its current form, will cost the EU economy \$31 billion over five years and investments are likely to be reduced by 20 percent. The Centre for Data Innovation estimates these additional costs to be between €193,000 - €330,000 for SMEs to install new quality management systems and €71,400 for SMEs to keep up with annual maintenance.⁶ In a similar vein, impact assessments focused on how AI technologies will be deployed make a lot of sense in principle, but we must take care to ensure that requirements on SMEs do not stifle the very innovation that the United States and the EU need to cultivate.

In short, we need tailored rules to support both commerce and consumers -- and SMEs need to be at the forefront of policymakers' agendas. As we have learned during the pandemic, small businesses require more flexibility now than ever before; therefore, a law that broadens its scope to expand the definition and provide leeway to include more small business exemptions would greatly benefit many sinking businesses that are trying to stay afloat.

³ The California Privacy Rights Act, Virginia Consumer Data Protection Act, and the Colorado Privacy Act include small business exemptions based on various business criteria: annual gross revenue, number of consumers or residents from whom you collect data, or whether more than half of all revenue generated is from selling or sharing personal information of consumers.

⁴ For example, a recent federal privacy proposal would establish a self-regulatory framework for compliance for SMEs, limiting the regulatory burden on those enterprises. See U.S. House Energy and Commerce Committee Republicans, [Discussion Draft](#) (Nov. 2, 2012), at Section 110.

⁵ UK Department for Digital, Media, Culture, & Sport, [Data: A New Direction](#) (Dec. 2020).

⁶ Benjamin Mueller, Center for Data Innovation, "[How Much will the Artificial Intelligence Act Cost Europe?](#)" (July 2021).

2. Ensure that the United States and the EU work together to foster diversity, equity, and inclusion (DEI).

SIIA's members are united in a shared belief that advancing DEI should be a critical core value for society and our individual organization. For too long, underlying inequalities, racial biases, and discrimination have plagued the United States and communities around the world, denying too many the ability to contribute to and reap the benefits of the innovation economy. Removing these barriers to elevate opportunities for all individuals to participate will lead to increased innovation. Research proves diverse organizations provide better business results and financial performance and will expand economic opportunity.⁷ Embracing a diversity of perspectives fuels innovation while connecting us closer to our customers and the communities we serve.

This view translates into the policy realm in many concrete ways for the TTC.

First, we should explore measures to increase access to high-speed broadband.

There is a wide digital access divide across the EU as 36 percent of the Central and Eastern European population lack connectivity, compared to roughly 19 percent in Western Europe. While there are similar problems in the United States, we are extremely pleased that Congress and the President have advanced the Infrastructure Investment and Jobs Act. The Act contains a first-of-its-kind investment in broadband build-out, deployment, equity, and affordability. The \$65 billion investment in broadband funding will boost competitiveness and job growth and work to enhance productivity. Once both the EU and the United States have established these broadband goals and determined the necessary spending, they could pursue joint agendas, including enabling network deployment, fostering demand for high-speed wireless and 5G adoption, and establishing open, interoperable standards for network privacy and security.

Second, we should develop joint U.S.-EU credentialing and apprenticeship programs to create a diverse, multinational workforce. We should work together to leverage the available resources of both sides to support cross-border education and training opportunities. We should create opportunities to learn and serve in both the public and the private sectors and *between* the public and private sectors through secondments or other programs. Critically, creating programs like these will generate greater diversity along the lines we focus on here in the United States and also foster a great sense of international cultural awareness that will pay dividends in the future.⁸

⁷ See, e.g., McKinsey & Company. Diversity Wins: Why Inclusion Matters (May 2020).

⁸ Another aspect of this is to facilitate science and technology research programs drawing from each other's population. On this point, we would urge the United States to confront the EU about restrictions in the Horizon Europe program that disadvantage U.S. candidates. Horizon Europe is an important program that can foster critical trans-Atlantic relationships to further democratically-aligned technology, while also advancing diversity of the trans-Atlantic technology workforce.

Third, we should explore ways to enhance education, including upskilling and continuing education, to foster a diverse, skilled and robust workforce for the digital economy in both the United States and the EU. We strongly recommend the United States and the EU consider methods that each can employ to advance education in their own jurisdictions and reduce barriers to allow participation by citizens of the other. Officials may consider convening best practices to promote a robust and dynamic, technologically literate workforce that is adaptable to the challenges of tomorrow.

3. Proceed with caution when proposing regulations on big tech, which can have ripple effects on SMEs.

There is renewed energy on both sides of the Atlantic to rein in “big tech” through myriad “pro-competition” legislative proposals. We urge caution with respect to these and, in particular, would call attention to the negative repercussions that arise for SMEs from targeted regulations on big tech companies.

While these proposals may be grounded in sentiment to uphold stronger, more meaningful individual rights and consumer protections and strictly geared toward penalizing highly capitalized tech companies, they are likely to have a significant waterfall effect on SMEs that use big tech products and services. Interoperability will be undermined, costs will rise, and ultimately it will be SMEs and consumers that bear the burden.

Earlier this year, the Connected Commerce Council -- representing more than 1600 U.S. companies -- raised concerns about sweeping legislative efforts designed to address competition. Many of these companies are SMEs. They raised concerns about the impact of such laws on interoperability and corporate viability.⁹ Digital platforms and tools, such as free or low-cost geolocation and mapping software, digital advertising, online marketplaces, social media, ride sharing apps, and financial and organizational software, play an integral role in SME activities. Connected Commerce Council noted that an estimated 11 million small businesses -- comprising 37% of businesses -- are in danger of closing without access to digital tools, particularly as many SMEs are already burdened by the financial and socioeconomic challenges of staying afloat in the midst of COVID-19.¹⁰

There are a number of proposals pending in the United States and in the EU that would have negative downstream effects on SMEs, especially those in the technology sector. The American Innovation and Choice Online Act (S.2992), introduced in October, is one example in the U.S. In Europe, the proposed Digital Markets Act would have a potentially greater problematic effect on SMEs’ ability to innovate and compete - running directly counter to the objectives of that legislation. We would be pleased to provide more information on specific legislative efforts to the extent this is of interest to the TTC.

⁹ See Connected Commerce Council at <https://connectedcouncil.org/>.

¹⁰ PYMNTS.com, “[Small Businesses Embrace Connected Commerce, Defend Big Tech In Antitrust Hearings](#)” (Feb. 2021).

4. Shape the democratic digital era through a culture of collaboration and implementation of “data free flow with trust.”

The TTC can be one of the most important forums for shaping a global model and consensus to promote democratic values across a healthy digital ecosystem in a world that is being transformed by technological advancement.

Data localization requirements have grown exponentially in recent years. Data localization requirements are “laws that require data related to the country’s citizens to be processed and/or retained in that country.”¹¹ While some of these requirements are embedded in national security concerns about the use of data, many of them are designed in a more protectionist manner to support local industry at the expense of outsiders. In essence, these policies represent a form of digital protectionism that ultimately serves those who would segregate the Internet and use technology to further anti-democratic ends. Localization requirements already are instilling a culture of tight control and censorship on free speech and expression, which run counter to democratic goals of promoting innovation and the free flow of ideas and commerce, longstanding bedrock values of the United States and the EU.

A recent study by the Information Technology & Innovation Foundation (ITIF) illustrates the significant negative effects restricting data flows has on a nation’s economy. It reduces the volume of trade; lowers productivity; and increases prices for downstream industries (to include SMEs) that rely on data.¹² ITIF also notes a particular negative impact on SMEs’ ability to access critical cybersecurity and cloud computing services, leading to vulnerabilities for SMEs as well as consumers and the broader digital ecosystem.

Moreover, data localization requirements pose a real threat to SMEs because they limit consumer choices, place burdens on new and emerging market entrants by adding to the costs disproportionately felt by SMEs and create a splintered global ecosystem. Data localization laws also limit the markets where products can be offered, create costly compliance burdens and result in “data islands” that prevent the sharing and use of low-risk data, instead of building tailored and nuanced solutions.¹³

We urge the TTC to explore methods to implement the principle of “data free flow with trust” as the G7 has formally endorsed earlier this year.¹⁴ The United States and the EU should lead by example and foster stronger commercial and cultural connections.

¹¹ Huddleston and Varas, American Action Forum, “[Impact of Data Localization Requirements on Commerce and Innovation](#)” (June 2020).

¹² Cory and Dascoli, ITIF, “[How Barriers to Cross-Border Data Flows are Spreading Globally, What They Cost, and How to Address Them](#)” (July 2021).

¹³ See, e.g., Fan and Gupta, “[The Dangers of Digital Protectionism](#),” Harvard Business Review (Aug. 30, 2018).

¹⁴ [G7 Trade Ministers’ Digital Trade Principles](#) (Oct. 22, 2021); see also [G7 Roadmap for Cooperation on Data Free Flow with Trust](#).

Conclusion

As President Biden told the United Nations earlier this year, we must, together, “Ensure a future where technologies are a vital tool to solving human challenges and empowering human potential, not a source of greater strife and repression.”

We understand the critical importance in building joint, strategic plans to strengthen the support for SMEs that are embedded in policies across the United States, European Union, and the global economy. We are well aware that this can be done by building on the U.S. and EU’s deep, shared interests, which are plentiful and promising. We look forward to continuing participation in the discussions with Working Group 9.

Sincerely,

Jeffrey A. Joseph

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