Coalition of Services Industries (CSI) Submission: Comments on U.S. Interests and Priorities for a Proposed U.S.-EU Trade Agreement Docket Number USTR-2018-0035

The Coalition of Services Industries (CSI) appreciates the opportunity to submit comments on negotiating objectives for a United States-European Union trade agreement. U.S. services trade and investment with the EU is robust. U.S. exports of services to the EU were an estimated $297 billion in 2017 and the U.S. services trade surplus with the EU was $65 billion.[1] The EU accounts for 70 percent of total U.S. FDI global outflows and is increasing. EU FDI in the U.S. is also important to the U.S. economy accounting for roughly 4.1 million U.S. workers in 2014.[2]

While the United States enjoys a services trade surplus with the EU and a leading edge in digital trade, this advantageous position is not guaranteed. Forced data localization requirements are on the rise globally and are a threat in the EU. In addition, governments, including the EU, have proposed unilateral tax measures that would discriminate against U.S. companies and violate treaties against double taxation. A U.S.- EU agreement could provide the opportunity to negotiate rules and market access commitments that could help to ensure the continuation of U.S. services trade surpluses with the EU. The negotiations also offer the opportunity to recognize both countries' mutual interest in digital trade and to draw from digital provisions of the USMCA. The U.S. and the EU should also establish a mechanism for both governments to deepen coordination on efforts to combat digital trade barriers in third country markets and to cooperate in regional and global digital trade negotiations.

I. GENERAL PRINCIPLES

CSI urges that any bilateral negotiation with the EU be consistent with negotiating objectives regarding services, investment, digital trade, transparency, regulatory cooperation, and enforcement set forth in TPA. This will ensure proper consultation with Congress and that due consideration is given to the congressionally mandated negotiating objectives. The negotiations should be carried out in a transparent and efficient manner that minimizes commercial uncertainty and enables trade and investment flows to continue to promote economic growth.

The U.S. should also ensure that any new services that emerge are protected from future discrimination. There should also be no cultural carve-outs, including no discrimination or investment restrictions in online services.

Full market access and national treatment should be granted for the provision of all services in all modes of supply, including digital products. U.S. suppliers of services should receive treatment no less favorable than that accorded to domestic and other foreign providers of services in European Union Member States.

Under the current EU regulatory regime, U.S. stakeholders often do not have the opportunity to comment on either the critical elements of proposed technical regulations and conformity assessment procedures contained in EU directives or the standards that may be used to fulfill directives' essential requirements.[1] U.S. firms are further disadvantaged by a lack of a voice in these regulations when the EU requires the supremacy of its standards in third country markets.[2] The bilateral negotiations should include transparency obligations that ensure stakeholders have the opportunity to review and comment on proposed measures. This includes establishing a joint regulatory coordinating mechanism within the framework of a U.S.-EU trade agreement, as well as establishing a regulatory cooperation framework outside of the agreement to strengthen transparency and stakeholder engagement.

The agreement should include a clarification that services will not be considered public utilities.

II. SECTOR SPECIFIC DISCIPLINES AND EU SERVICES MARKET ACCESS BARRIERS

The following paragraphs provide a sector specific discussion of disciplines that should be included and market access barriers that should be addressed in any U.S.-EU trade and investment agreement.

Financial Services: Negotiations should include the positive financial services provisions achieved in the USMCA, particularly those on the free flow of data and prohibition of data localization. They should also ensure that the financial services sector benefits from robust digital trade provisions, including provisions that protect against the transfer of technology and software source code. The financial sector also plays a key role in cyber security and should benefit from forward-looking provisions in this area. Unlike in USMCA, the financial services negotiations should ensure non-discriminatory treatment in government procurement. Disciplines in the financial sector should seek to discipline behind-the-border type measures, including priority sector lending.

Negotiations should follow the financial services commitments in the USMCA, providing for both market access and national treatment, to ensure a level playing field for domestic and foreign-based suppliers of electronic payment services (EPS) in both markets. Regulation should account for, and be respectful of, different business models, encouraging a diverse set of players in the payments space. This competition among players will not only result in greater consumer choice, but will also spur innovation, contributing to a more robust payments ecosystem that will allow all market participants to develop and supply a wide range of payment services with differing product features and value propositions.

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[1] Executive Office of the President, Office of the U.S. Trade Representative, "2017 National Trade Estimate," European Union, March 2017, https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2017/2017-national-trade-estimate, 140.

[2] Executive Office of the President, Office of the U.S. Trade Representative, "2016 National Trade Estimate," European Union, March 2016, https://ustr.gov/sites/default/files/2016-NTE-Report-FINAL.pdf, 141.

During the previous U.S. Administration, the European Commission and U.S. discussed the possibility of formally including a new framework for financial regulatory cooperation within the text of the Transatlantic Trade and Investment Partnership (TTIP) agreement.

There have been ample developments during the TTIP negotiations. For example, in the summer of 2016, the U.S./EU Financial Markets Regulatory Dialogue was revamped as the U.S./EU Financial Regulatory Dialogue. Also that summer, the EU's largest capital market and most vibrant financial center—the United Kingdom—voted to leave the EU. Further adding to the developments, the U.S. is also actively considering future trade and investment relationships with other economies, most notably the UK and Japan.

Industry and government should use the opportunity of multiple prospective new trade and investment agreements to explore the entire spectrum of options for deepening regulatory cooperation with the U.S.'s partners. There are a range of options for how improved regulatory cooperation is codified. One possibility, and noted above in the context of TTIP, would be to enshrine, within the text of a trade agreement, a joint regulatory coordinating mechanism. Another is to house regulatory cooperation outside of a trade agreement, in some ways comparable in nature to the existing U.S.-EU Regulatory Forum but with far more rigor regarding outcomes as well as stronger transparency and industry engagement. Independent of how it is done—within or outside of the trade agreement—improving on what the existing Regulatory Forum does is crucial. We therefore believe these options should be evaluated and discussed between industry and the respective governments in coming months.

The agreement should also set clear rules regarding how regulators will engage with applicants for a license, including timelines and fees. Bilateral negotiations should also explore how to deepen regulatory cooperation and coherence in "fintech" developments, complimenting multilateral and other bilateral efforts aimed at promoting cross-border financial technology development and growth.

Digital Trade and Information and Communications Technology (ICT): A U.S.-EU agreement should include binding provisions supporting cross-border data flows and prohibitions against forced data localization. Among other elements, the agreement should include:

- protection against discrimination and other trade restrictions for the full range of digital services and products
- commitments on cross-border services that apply across all modes of transmission, including the Internet
- provisions that promote transparency (including with respect to telecommunications licenses) and open data formats in government information
- prohibitions on data storage and data processing taxes, as well as prohibitions on applying taxation measures in a way that discriminates against digital services or is not technologically neutral
- prohibitions on requirements to disclose source code or algorithms or grant access to encryption technologies
- prohibitions on customs duties and formalities for digital products and transmissions

- a Digital Trade Working Group that enables the U.S. and EU to coordinate on regulatory and policy approaches and avoid significant divergences on digital policy issues
- enhanced coordination on security standards to prevent regulatory divergence and align national regulations with industry-supported international standards and best practices
- provisions encouraging parties to secure bilateral agreement under the U.S. CLOUD Act and EU e-Evidence Regulation for law enforcement requests to data; and
- disciplines to help ensure governments do not impose facilities-based or other unjustified and arbitrary requirements on providers of online services and applications.
- provisions that take a step forward in finding common regulatory approaches by establishing a commitment to refrain from applying consumer protection regulations to services offered to enterprises, whose terms are often different and set through negotiated contractual agreements.

In addition, a bilateral agreement with the EU should address the following measures or proposed measures that can or are creating digital trade barriers.

CSI supports the ***EU's Digital Single Market (DSM)*** overarching objective of easing impediments to digital trade across the EU but is concerned that implementation of the Directive may undermine this objective. The Commission and Member States should ensure that any directives or other measures taken under the DSM create an inclusive environment for innovative products and services originating within and outside Europe.

As the Commission and Member States continue to develop and put into place ***General Data Protection Regulation (GDPR)*** Guidelines and implementing measures, they should take care to consult carefully with stakeholders to ensure that those measures continue to foster growth of the Transatlantic Digital Economy while protecting privacy. In this regard, in March 2018, the European Commission circulated a draft proposal on cross-border data flows and data localization to be included in all future EU free trade agreements (FTAs) that raises serious concerns. The proposal includes an overbroad exception that would create the potential for third countries to impose unwarranted restrictions on data flows, such as data localization requirements, that do not improve privacy and data protection. To promote cross-border data flows, the Commission should avoid broad exceptions that other countries might use to justify measures that negatively impact data security and privacy.

Within the European Union, German telecommunications and publishing industries have argued for the creation of a "***data Schengen***" that would create an exclusively European data network that would allow data flows among EU member states.[3] While no "data Schengen" has been created to date, a German firm has fought domestically and internationally against industry and government policies that support cross-border data flows, and supported Germany's restrictive data localization requirements regarding software and cloud services.

CSI is concerned over the prospect that U.S. suppliers of online services and applications, ***"Over-the-Top" Providers,*** may be subject to heavy-handed *"**Over-the-Top" or "OTT**"* regulations that can impede their cross-border delivery. Such regulation may take the various forms including local presence, local data storage, and/or data retention requirements. Governments should reduce or streamline regulations, where appropriate, on OTT services to stimulate competition and greater investment in broadband infrastructure while enabling innovative new services to reach consumers. Additionally, governments should reduce or streamline regulations, where appropriate, on traditional services providers as markets become more competitive due to the introduction of new digital services and other technological changes. In many cases, the rationale behind these legacy regulations has become obsolete due to technologically driven changes to the marketplace.

In April, the European Commission presented the ***platform-to-business (P2B) legislation***. The initial proposal called for increased transparency in the relationships between online platforms and their business users. We encourage the United States to ensure that this legislation avoids creating market access barriers for U.S. firms.

In December, EU member states rejected a proposal to introduce a 3 percent ***Digital Services Tax (DST)*** beginning in 2020, on both large online marketplace and online advertising businesses regardless of where the business is established. That proposal would have required 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 (e.g., sale) of data collected about users and generated from users' activities on digital interfaces, where the user is in the EU.

The ***DST*** would have applied only to companies whose worldwide revenues reported for the relevant financial year exceeds 750 million Euros and whose taxable revenues obtained within the EU during the relevant financial year exceeds 50 million Euros. The net effect would result in a tax applied primarily to 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.

Despite the tentative rejection of an EU-wide tax, 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. 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.

Both the broader ***DST*** proposal and individual member state proposals on digital tax may violate commitments under the WTO's General Agreement on Trade in Services ("GATS") by discriminating against U.S. companies in favor of EU companies. More specifically, under the GATS, the EU has agreed to provide "national treatment" to services and service suppliers of other WTO Members in the economic sectors that are covered by the DST. This means that the EU may not discriminate against those services and service suppliers in favor of its own "like" domestic services and service suppliers. We urge negotiators to address and challenge these discriminatory efforts in advance of negotiations.

Express Delivery and Logistics: The agreement should provide the broadest possible coverage of market access and national treatment for delivery services to ensure that all participants, public or private, are permitted to compete based on competency rather than nationality or ownership. This includes the elimination of disparate treatment, in the areas of customs procedures, duties, taxes, charges, transportation regulation, and enforcement for competitive services.

Retail and Distribution Services: The agreement should provide full market access for retail and distribution services as well as national and most-favored nation treatment for all forms of distribution, including remote sales such as e-commerce, telephone, catalogue and direct selling channels. The agreement should protect retail and distribution rights in both single and multi-brand formats, with no limits on size, geographic location, or merchandise assortment.

Direct Selling: Bilateral negotiations with the EU should recognize the direct selling distribution-services system, through which companies outsource sales and sales-management services to independent contractors. This distribution system was recognized within the USMCA and would make for the appropriate baseline for bilateral negotiations with EU. In addition, negotiations should look to the definition of "direct selling" laid out in the USMCA in its entirety.

Trade Facilitation and De Minimis: Trade facilitation should be improved by harmonizing and simplifying the transatlantic customs clearance process, converging trusted trader requirements, creating common and reduced data elements for imports/exports, enhancing requirements for using electronic portals, and providing for binding advanced rulings for all shipments, including for express delivery shipments. Implementing best-in-class trade facilitation practices would benefit producers, consumers, and the broader economic interests of both parties.

There is also significant potential to further streamline transatlantic customs by raising the *de minimis* level for tax and duties in the EU from the current level of 150 euro for duties to a more commercially meaningful level thereby avoiding additional complications on low value imports and providing trade facilitation measures for legitimate traders. In addition, both parties should maintain informal clearance thresholds that ensure simplified clearance procedures for shipments above *de minimis levels*.

Goods Package: 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 increase overall risk for EU customers.

The current proposal includes burdensome requirement for a dedicated "responsible person for compliance information" that will significantly limit access to the EU marketplace for U.S. small businesses. More specifically, the manufacturers of all goods sold into the EU must appoint a person located in the EU to hold compliance documentation and who will likely be accountable for non-compliance more broadly with liability for sellers who offer a product where such Responsible Person has not been appointed. The requirement does not distinguish between types of goods, nor does it provide any waivers for SMEs or small volume sellers.

The Responsible Person requirement will hit U.S. resellers particularly hard because, in many cases, manufacturers of low-risk merchandise are not focused on the EU market and will therefore not appoint a Responsible Person, making resale into the EU virtually impossible. Furthermore, the Goods Package also states that a product can only be placed on the market if an "economic operator," established in the EU, becomes responsible for the product's compliance. The definition of an "economic operator" in the EU includes a "fulfilment service provider," which is someone that is merely responsible for a part of the distribution and supply chain of the product yet could be deemed to be the responsible person for compliance purposes. As a whole, the proposed legislation could be inconsistent with the EU's TBT obligations on conformity assessment measures, as well as having the effect of creating unnecessary obstacles to international trade.

Investment: High standard investment disciplines and investor protections should be included as well as transparent state-to-state and investor-state dispute settlement procedures based on the 2012 Model BIT.

The bilateral agreement should address the issue of non-payment of contractual obligations in Bulgaria.[4] Cyprus maintains significant restrictions on the foreign ownership of real property and construction-related businesses.[5]

Government Procurement: The agreement should provide comprehensive market access to public procurement for services, with low thresholds and substantive coverage of all public institutions and entities, committing the partners to remove any discrimination in bidding by any transatlantic businesses.

Legal Services: U.S.-based legal services face significant challenges in countries that require European Union or European Economic Area citizenship for full admission to the bar which are Austria, Belgium, Bulgaria, Cyprus, Greece, Hungary, Lithuania, Malta, and Slovakia.[6]

State-owned-and State-supported Enterprises: State-owned and state-supported enterprises (SOEs and SSEs) should be subject to the same disciplines, on the same basis, as other domestic and foreign enterprises, including parity of treatment with respect to regulation, licensing, transparency, business operations and public procurement. Subsidies for SOEs and SSEs should also be subject to disciplines in any agreement.

[1] U.S. Department of Commerce, Bureau of Economic Analysis "Table 2.3. U.S. Trade in Services, by Country or Affiliation and by Type of Service," Europe, October 19, 2018, https://www.bea.gov/itable/.
[2] Daniel S. Hamilton and Joseph P. Quinlan, "2017 Transatlantic Economy Study," *Center for Transatlantic Relations*, 2017, http://www.transatlanticbusiness.org/wp-content/uploads/2017/03/2017-Transatlantic-Economy-Study.pdf, 17. In 2014, the top five European employers in the U.S. were firms from the United Kingdom (1.1 million), Germany (672,000), France (574,000), Switzerland (461,000), and the Netherlands (416,000).
[3] Seiffert, Jeannette. 2014, February 20. "Weighing a Schengen zone for Europe's Internet Data." http://www.dw.com/en/weighing-a-schengen-zone-for-europes-internet-data/a-17443482.
[4] Executive Office of the President, Office of the U.S. Trade Representative, "2016 National Trade Estimate," European Union, March 2016, https://ustr.gov/sites/default/files/2016-NTE-Report-FINAL.pdf, 169.
[5] Executive Office of the President, Office of the U.S. Trade Representative, "2016 National Trade Estimate," European Union, March 2016, https://ustr.gov/sites/default/files/2016-NTE-Report-FINAL.pdf,. 169.
[6] Executive Office of the President, Office of the U.S. Trade Representative, "2016 National Trade Estimate," European Union, March 2016, https://ustr.gov/sites/default/files/2016-NTE-Report-FINAL.pdf, 167.