

ICT INDUSTRY RECOMMENDATIONS FOR REGULATORY COOPERATION IN THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP

February 2, 2015

DIGITALEUROPE and ITI welcome greater momentum towards stronger transatlantic trade relations and we support the work of the European Commission and the Office of the U.S. Trade Representative over the last seven rounds of negotiations on the Transatlantic Trade and Investment Partnership (T-TIP).

As the digital economy and digital trade become fundamental elements of the global economy, provisions to support the development and growth of and trade in ICT goods and services, cloud computing, and e-commerce are critical elements of 21st century trade agreements. A key priority for the information and communications technology (ICT) industry is for the T-TIP to build upon commitments made in previous trade agreements that promote the growth of these key aspects of the digital economy, including ensuring that the digital ecosystem and the data that flows through it remain open to innovation and commerce globally. The T-TIP should also strive to sustain and enhance cooperation on the protection of intellectual property rights and create a climate in which innovators are encouraged to invest in the research, development, and commercialization of leading-edge technologies, and promote the dissemination of technologies and services. Another priority for our industry, and the focus of this paper, is for the T-TIP to include provisions that reduce excessive regulatory costs, unjustified regulatory differences, and duplicative or unnecessary red tape for ICT products.

We commend the Commission and USTR for seeking to address regulatory challenges to ICT trade in the T-TIP through an “ICT annex” in a regulatory/technical-barriers-to-trade chapter. This paper proposes specific technical provisions to be included in an ICT annex. DIGITALEUROPE and ITI believe inclusion of an “ICT annex” would substantially improve the environment for conducting ICT-related business on both sides of the Atlantic.

DIGITALEUROPE and ITI advocate including ambitious provisions in the T-TIP that address technical ICT issues to enable better cooperation, innovation, and long-term alignment between European and US industries. By ambitious, we mean not only removing tariffs and non-tariff barriers (NTBs), but also fostering mutual recognition and, where possible, alignment of regulations. A more harmonized and compatible transatlantic market would have a positive effect on market growth by increasing the competitiveness of our industries and reducing their costs. It would also help to promote internationally recognized technology standards, helping both sides engage with third countries.

As we enter the eighth round of negotiations, we urge negotiators to focus on transparency and cooperation in technical regulations, standardization, e-accessibility, e-labelling, e-health, conformity assessment, imports of commercial products with encryption, and the Internet of Things, issues which already have mutual support from industry. We believe these issues form the foundation for a tremendous opportunity for the T-TIP to set the gold standard and fortify the global rules-based trading system.

1. REGULATORY TRANSPARENCY

Transparency is key to the ease of doing business and the facilitating trade across borders. The T-TIP should expand on current World Trade Organization (WTO) language to improve the notification of measures that affect trade. Communication between regulators and businesses on objectives and explanation of new regulatory requirements are central to eliminating regulatory uncertainty. To this end, notification should be made and industry input should be considered as soon as possible, even when changes are made to national requirements that are based on international standards. The T-TIP should seek ways to make global stakeholder comments, as well as explanations of how stakeholder comments were addressed, available publicly. Moreover, voluntary measures endorsed by governments should also be notified, as they often become *de facto* market requirements.

2. SETTING GLOBAL RULES ON TECHNICAL REGULATIONS

There is arguably no more effective way to deny market access to technologies than through the use of technical regulations that act as specific technology mandates, which are not performance based. Locking in technology through regulation impedes innovation and denies consumers the benefits of new, more advanced ICT goods and services. Although clearly counterproductive in the long run, some governments in emerging markets erroneously believe that technical regulations requiring the use of domestic technologies can accelerate their economic development.

Unique country-specific technical regulations can be burdensome, especially for small- and medium-size businesses, and become quickly outdated as technology evolves. They should only be used in situations where no other options (e.g., global standards/specifications -- see below) are available to achieve legitimate objectives, such as ensuring adequate protection of health, safety, or the environment. Even more rare is the case where a technical regulation needs to mandate a particular technology to achieve legitimate regulatory objectives. These mandates easily promote vested domestic interests seeking protection from competition, and therefore should be avoided.

The WTO Agreement on Technical Barriers to Trade (TBT), to which both T-TIP parties are signatories, disfavors prescriptive technical regulations, but its relevant provision is too general to be effective in reducing the increasing use of technology mandates in emerging markets.¹ There have been attempts to establish “good regulatory practices” (GRP) or principles of regulatory reform² but they have not had much traction among governments and thus little positive effect.

¹ Art Article 2.8 of the TBT Agreement simply states: “Wherever appropriate, Members shall specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics.”

² See, e.g., “APEC-OECD Integrated Checklist on Regulatory Reform: A Policy Instrument for Regulatory Quality, Competition Policy and Market Openness” (APEC/OECD); “APEC Information Notes on Good Practice for Technical Regulation” (September 2000); “Principles and Features of Good Practice for Technical Regulation,” APEC Sub-Committee on Standards and Conformance.

Accordingly, we believe the EU and US should develop and promote more robust (TBT+) *global* principles to minimize the development and use of technical regulations, especially prescriptive ones.

3. ALIGNMENT ON COMMON PRINCIPLES FOR TECHNOLOGY STANDARDS

Global Standards/Specifications: DIGITALEUROPE and ITI strongly advocate recognition in T-TIP that global and voluntary, industry-driven ICT standards/specifications, adhering to WTO TBT principles and criteria, are developed by a variety of organizations. If these criteria are met, then there should be no need to discriminate among the various sources of such standards.

We recommend that in T-TIP the transatlantic governments provide a strong preference for Global Standards/Specifications to address policy challenges and for the purpose of regulation.

Global Standards/Specifications must be developed in accordance with the following set of principles: openness; transparency; inclusiveness; consensus; coherence; effectiveness; global relevance; and impartiality, with an adequate public comment or consultation opportunity.

Applying a preference for Global Standards/Specifications will provide for fair competition, avoid market distortions and stifling of innovation. In addition, Global Standards/Specifications will not give preference to the characteristics or requirements of specific countries or regions at the detriment of the needs in other countries or regions.

DIGITALEUROPE and ITI strongly advocate a clear statement in T-TIP that when governments regulate, they should prefer Global Standards/Specifications. When such standards/specifications are not available, governments should use **Conforming Standards/Specifications** that are consistent with the following principles, which are based on the WTO TBT Committee Decision: openness; transparency; non-discrimination; consensus; avoidance of unjustified conflict or duplication with Global Standards/Specifications; relevance; impartiality; and due process.

When governments regulate, it should be clearly articulated and justified (health, safety, environment, national security).

4. ACCEPTANCE OF SUPPLIER'S DECLARATION OF CONFORMITY

Worldwide, the ICT industry has a proven track record in providing safe, high quality, state-of-the-art products. The industry has worked closely with government groups and other formal standards setting bodies to develop internationally recognized standards in areas such as product safety and electromagnetic interference for a wide range of products (e.g., computers, monitors, storage devices, and telecommunications equipment). Nearly all governments that regulate in these areas have adopted some form of these international standards, and this alignment has greatly facilitated global trade. However, the proliferation of unique regulations in the areas of testing and certification requirements to show conformance with such international standards is now seriously diminishing their benefits. Many of these national conformity assessment requirements cause repetition of tests that have already been performed and thus provide no additional benefit to customers or to societies. Redundant testing and certification increases customer costs, limits choice, and delays market entry—in many cases, by weeks or

months, which is significant given the rapidly development and marketing/sales cycle of ICT products.

A successful model for overcoming these regulatory hurdles is reliance upon a declaration of conformity by suppliers and effective post-market regimes (including surveillance and enforcement) which together offer a more flexible, trade-friendly method to meet regulatory objectives. The Supplier's Declaration of Conformity (SDoC) model has been used for a wide variety of products in the US, EU, and in many other countries.

DIGITALEUROPE and ITI recommend that the T-TIP look to further explore where SDoC can be implemented in the context of their bilateral trade relationship as an effective means to ensure that products meet regulatory requirements while minimizing delays and impediments to market access. More broadly, we believe our respective governments should advocate for international adoption of SDoC, where appropriate, to help stop the proliferation of unique and unnecessarily burdensome regulatory requirements.

5. COOPERATION IN THE AREA OF E-ACCESSIBILITY

The ICT industry has a leading role in developing and implementing accessible solutions based on globally-recognized standards. The sector continues to develop and deliver improved accessible solutions to the market, improving mainstream products and broadening the range of targeted solutions. Competition and voluntary action have led to the provision and improvement of general usability as well as specific e-Accessibility features.

In order to maximize cooperation and coordination on ICT accessibility, DIGITALEUROPE and ITI recommend that the EU and US enter into a mutual recognition agreement focused on public sector procurement policy. Further, a T-TIP agreement should reiterate both parties' support for continued use of Supplier's Declaration of Conformity as the method for reporting accessibility compliance. The combination of these approaches will help drive further innovation and competition in ICT accessibility, and ensure the availability of a wide range of products at affordable prices.

6. ACCEPTANCE OF E-LABELLING

The role of conformity marking (e.g. CE mark in the EU; FCC mark in the US) is to indicate that the product is in compliance with all regulatory requirements and safe to use, as well as to assist Market Surveillance authorities in verifying this. The purpose of e-labelling is to allow manufacturers to electronically display conformity marking or other relevant information on radio or other ICT equipment either on an integral screen or to convey this information by another method, rather than affixing it on the product.

In the framework of T-TIP, DIGITALEUROPE and ITI propose the negotiators discuss the opportunity of adopting a harmonized framework (guidelines/regulation) towards e-labelling.

There are numerous benefits of e-labelling for both customers and industry that highlight the importance of alignment on this topic:

- Higher visibility of regulatory markings and assisting fraud prevention for Market Surveillance authorities.
- Better design flexibility, faster time to market, and reduced costs for manufacturers.

- Increased transparency on global regulatory and compliance information and the possibility of updates if required.
- Better access to information for users with disabilities, such as visual impairments.
- Promote innovative digital technologies for meeting legal requirements in Europe.

T-TIP should push for promotion and alignment of e-labelling via the adoption of the same legal requirements, without extending the compulsory content of labeling beyond what is currently required by legislation/directives. The US has already begun acceptance of e-labelling in its telecom requirements and the ICT industry hopes that this model will continue to be successful and to grow. Industry believes that T-TIP should also support allowing the use of e-labelling in the EU, so that manufacturers placing products on either market can equally benefit from this option. An overall e-labelling framework should also allow for flexibility in alternative labelling options

7. ACCESS IN COMMERCIAL MARKETS FOR PRODUCTS WITH ENCRYPTION

The universal use of ICT technologies has led to the ubiquitous presence of cryptography in ICT products and applications available today. Almost all ICT products and technology areas, from the Internet of Things to tablets, smartphones, computers, software, operating systems, networks, and smartcards, contain encryption. In transport, banking, education, commerce, home automation, healthcare, enterprise and consumer processes, in all aspects of everyday life, encryption is a key mechanism to ensure the integrity and security of hardware, software, and networks and confidentiality of data and users' activities. The vast majority of consumer, enterprise, and public sector ICT environments use cryptography for email and database security, data transfer, service provisioning, banking, online payments, transport, e-health, energy (including smart grids, smart meters, and smart cities) and many more similar applications. Consumers also use encryption in most of their electronic activities undertaken in their daily lives to ensure security and privacy. Governments use encryption to provide secure services online and ensure integrity of internal operations. In fact, only very few ICT products and services available today operate in the digital world without the use of encryption.

A commitment to the unrestricted import, use, and sale in commercial markets³ of products with cryptographic capabilities will ensure European and US consumers and businesses access to the best products and technologies available in the global marketplace for security and privacy in and across a variety of ICT products and systems. In addition, access to leading-edge technologies that use encryption is one of the best defenses against cybersecurity attacks and online crime, fraud, and theft. In short, a global and cooperative approach to cryptography policy will create an environment in which consumers and businesses have trust in the digital economy, which is fundamental to increased Internet and e-commerce use.

Overview of our T-TIP recommendations related to cryptography:

- Because encryption technology is now used in nearly all everyday, commercial ICT products commonly used and traded globally, industry requests a provision which specifies that the import, use, and sale of products containing cryptographic capabilities should be largely unrestricted.
- In the narrow circumstances where regulation is justified, we recommend a flexible, global approach based on global standards with conformity assessments that are based

³ Commercial are all business transactions which do not relate to government or military (government procurement).

on mutual recognition to avoid redundant and burdensome testing and certification requirements.

- Any such limited regulation of encryption technologies, if justified, should be transparent, reasonable, respect intellectual property rights, not require or favor a specific technology, and be applied in a non-discriminatory manner.⁴

8. COOPERATION IN THE AREA OF E-HEALTH and M-HEALTH

Electronic and mobile health technologies (e-health and m-health) present an opportunity that enables healthcare professionals, working together with patients and technology providers, to personalize treatments and care, improve the ability to diagnose and track diseases, promote patient engagement, become more efficient, and understand individual and population health more effectively.

The regulatory frameworks within and across both sides of the Atlantic should be designed to leverage the value to be derived from big data in the e-health and m-health space by maximizing the possibility for data sharing between organizations and across borders (i.e., by prohibiting local data server requirements or barriers to data flows). In supporting this objective, the deployment and meaningful use of Electronic Health Records (EHRs) is crucial; without them, healthcare systems will lack the ability to generate big data analysis for research and treatment through the aggregation of individual patient health data in standardized formats – including data collected through remote patient monitoring technologies.

Like e-health, m-health supports a variety of health-related services along the continuum of care, from mobile access to EHRs to telehealth, telecare, and online medical education, creating an ecosystem that can integrate existing monitoring devices with mobile platforms to collect information that can help manage chronic diseases.

In order to ensure the benefits of e-health and m-health, DIGITALEUROPE and ITI propose the adoption of internationally recognized standards for interoperable (common vocabulary and format) EHRs and m-health solutions. DIGITALEUROPE and ITI believe that the interoperability of EHRs with information collected via m-health services – particularly on high-priority health conditions through the appropriate use of remote monitoring technologies – will be essential to improve the quality, safety, and efficiency of care while seeking to improve citizens' inclusion and engagement.

We also encourage the convergence of regulatory frameworks for e-health and m-health technologies, thereby ensuring greater predictability for industry on both sides of the Atlantic.

The T-TIP presents an opportunity to create the framework required to enable cross-border availability of m-health services and therefore provide all stakeholders, including physicians, companies, and app developers, with the optimal regulatory environment allowing the market to be more competitive and innovative for health and care related technologies while accelerating deployment of essential e-health tools.

⁴ These principles are consistent with and derived from the World Semiconductor Council's Encryption Principles, which both the European Union and the United States agreed to abide by and promote to other governments.

9. COOPERATION IN THE AREA OF 'INTERNET OF THINGS'

The world is in the midst of a dramatic transformation from isolated systems to Internet-enabled devices that can network and communicate with each other and the cloud. The term 'Internet of Things' (IoT) describes an ecosystem populated by sensors that connect smart devices and applications, which collect, share, and manage data within a global network of users, systems and services. The IoT is rapidly becoming reality, driven by the convergence of increasingly connected devices.

The IoT is pushing manufacturing and automation industries to new levels of service and process integration, driven by ICT technologies. The emergence of a sustainable IoT requires close collaboration between the various stakeholders in the ecosystem and seamless interoperability between their systems.

T-TIP should recognize that voluntary, industry-led globally-relevant standards are a key enabler of ICT interoperability. These standards should also be given full consideration by any global or regional standards-setting fora focusing on the Internet of Things.

DIGITALEUROPE and ITI look forward to working with EU and US negotiators to provide additional details regarding the recommendations above for an ICT annex in the T-TIP.