

**Protecting Consumers and Competition
in a New Era of Transatlantic Trade**

**Keynote Address by FTC Chairwoman Edith Ramirez¹
Trans Atlantic Consumer Dialogue
Multi-Stakeholder Dialogue on the Transatlantic Trade and Investment Partnership**

**Brussels
October 29, 2013**

I want to thank TACD for inviting me to participate in this special annual meeting. I am happy to take my place in a long line of former FTC Chairmen and Commissioners who have met in Brussels and Washington with TACD and its member organizations and, in these meetings, found insight, new ideas, and a great deal of common ground. I am especially pleased to join so many other representatives of U.S. government agencies and officials from the EU to address the many challenges and, more importantly, opportunities that an increasingly global and connected marketplace presents for consumers of all nations. This morning, Mr. Mimica, the newly appointed EU Commissioner for Consumers, and I had a wonderful and productive conversation on just that topic – the first of many, I hope.

We are here, of course, to discuss trade between our countries and the impact a transatlantic free trade agreement could have on U.S. and EU consumers. Despite my agency's name – the Federal Trade Commission – we do not negotiate trade agreements. The Office of the U.S. Trade Representative, or "USTR," is in charge of that, and I'm pleased that its lead negotiator on the TTIP, Dan Mullaney, is with us today.

Although at the FTC we are not tasked with negotiating trade agreements, we are dedicated to the fundamental goals that underlie every successful free trade talk – the expansion

¹ As prepared for delivery.

of consumer choice and the cultivation of market competition. In fact, that is essentially a description of the FTC's mission: to protect consumers and to promote competition.

We advance this dual mission through a mix of strategies. We enforce the FTC Act and its broad prohibition on unfair or deceptive acts or practices and unfair methods of competition, as well as more than 50 other specific laws relating to subjects such as data privacy, telemarketing abuse, and financial practices. We conduct research and develop policy through hearings, studies, and conferences, and share our expertise and findings with domestic and international policymakers. And we work to educate consumers and businesses about their respective rights and responsibilities.

We also work closely with our colleagues at USTR and other U.S. agencies, providing technical input on proposed trade agreements, participating in capacity-building efforts, and helping devise international frameworks, such as the Asia-Pacific Economic Cooperation, or "APEC," cross-border privacy rules system. This privacy system allows information to flow freely among the 21 APEC economies – essential if international markets are to interact efficiently – yet still maintains strong privacy protections for consumer data – equally vital to maintain consumer confidence and participation in those markets. We are also involved in the ongoing Trans-Pacific Partnership negotiations.

The expansion of international trade has an undeniable and major impact on U.S. consumers and markets, so it is no surprise that the FTC's consumer protection and competition work touches on trade. And the impact of transatlantic trade on consumers is especially important. The U.S. and the EU share an economic relationship that is the largest in the world.²

² See Office of the U.S. Trade Representative, *European Union*, available at <http://www.ustr.gov/countries-regions/europe-middle-east/europe/european-union>.

The EU is the largest exporter to the U.S. after China, and Europe is the United States' second largest market for its exports.³ With technology drawing us all closer, U.S. and EU consumers are mingling more often in a common, increasingly cyber-marketplace. According to a March 2013 comScore report, eight of the top ten websites visited by UK consumers are based in the U.S., and the two most popular retail sites for European consumers are Amazon and Apple.⁴ In addition, the economic benefits from the TTIP are estimated to be substantial, potentially adding €19 billion a year to Europe's economy and €95 billion a year to the U.S. economy.⁵ That's equivalent to an extra €45 for a family of four in Europe and €655 per American family.⁶

The potential benefits from increased transatlantic trade for the U.S. and EU are thus massive and manifest. Equally clear to those of us at the FTC – and I know to many TACD members – is that transatlantic trade will continue to flourish and grow only if consumers on both sides of the Atlantic feel confident and empowered. I'd like to describe some of the FTC's work that, I believe, helps achieve that objective. I will focus on three areas that I know from your recent resolutions are of strong interest to TACD and its members: privacy and data protection, e-commerce, and competition.

Privacy and Data Protection

Let me begin by discussing what is, internationally and nationally, a central topic today: privacy and data protection. In the context of the TTIP, there is debate over whether data

³ See DG Trade, *EU Bilateral Trade and Trade with the World (United States)* (July 5, 2013), available at http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113465.pdf.

⁴ See comScore, Inc., *Europe Digital Future in Focus 2013* (Mar. 2013), available at http://www.comscore.com/Insights/Blog/2013_Digital_Future_in_Focus_Series.

⁵ See Center for Economic Policy Research, *Reducing Transatlantic Barriers to Trade and Investment: An Economic Assessment* (Mar. 12, 2013) (report commissioned by DG-Trade), available at http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf.

⁶ See *id.*

privacy provisions ought to be included in the negotiations or instead addressed in another context. Of course, TACD, among others, argues that data privacy issues should be left out of the TTIP. Given the importance of the free flow of data between our countries, I think it is safe to say that, whatever the vehicle for discussion, we should have a common understanding and workable mechanism to protect consumer privacy implicated in commerce between the U.S. and Europe. To that end, I would like to share some thoughts on consumer privacy in the transatlantic context.

Much is often made of the fact that privacy is a fundamental right in the EU while the Fourth Amendment of the U.S. Constitution is limited to governmental access to information. Likewise, there is no across-the-board, baseline commercial privacy law in the U.S., although the FTC and the Obama Administration have advocated for the adoption of such a law.⁷

These facts, however, paint an incomplete picture. The FTC vigorously enforces a range of sector-specific laws that govern how commercial actors handle consumer information involving finance⁸, children⁹, and in determinations of creditworthiness, insurance eligibility, employment, and housing.¹⁰ These targeted laws augment the FTC's general authority over unfair and deceptive practices,¹¹ which we have used to combat violations of consumer privacy.

⁷ See Fed. Trade Comm'n, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* 12-13 (Mar. 2012), available at <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>; The White House, *Consumer Data Privacy in a Networked World: A Framework For Protecting Privacy and Promoting Innovation in the Global Digital Economy* 35 (Feb. 2012), available at <http://www.whitehouse.gov/sites/default/files/privacy-final.pdf>.

⁸ Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809.

⁹ Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501-6506.

¹⁰ Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.*

¹¹ 15 U.S.C. § 45(a).

The FTC's track record in consumer privacy enforcement is unrivaled among data protection authorities around the world. The statistics bear this out. To date, the FTC has brought 134 spam and spyware cases, 108 Do Not Call cases against telemarketers, 97 FCRA lawsuits involving credit reporting problems, 47 data security cases, 44 general privacy lawsuits, and 21 actions under COPPA, our law mandating especially high standards of privacy protection when information involving children is involved. In my view, the FTC's strong record of enforcement against commercial concerns playing fast and loose with consumer data is an essential element of the United States' consumer privacy framework.

At the same time, the FTC has played a leading role in policy discussions concerning consumer privacy. For example, last year, we issued a landmark report that advocates privacy by design, simplified and meaningful choice over the collection and use of consumer data, and greater transparency.¹² Currently, we are undertaking a study of the data broker industry. And next month we will host a workshop on the privacy ramifications of the Internet of Things.

As the primary American consumer privacy agency, the FTC serves the important role of enforcing the U.S.-EU Safe Harbor framework that permits businesses to transfer personal data from the EU to the U.S. in a manner that is consistent with EU law.¹³ We know that Safe Harbor has received its share of criticism, especially lately. We've read the news reports, heard about the recent Parliamentary hearings, and reviewed TACD's data flows resolution, which echoes

¹² See Fed. Trade Comm'n, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* (Mar. 2012), available at <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>.

¹³ See generally Dep't of Commerce, *U.S.-EU Safe Harbor Overview*, available at <http://export.gov/safeharbor/>.

many of the criticisms that have been aired in recent weeks.¹⁴ Last week, we followed with interest the LIBE Committee's vote on the proposed data protection regulation. While the draft regulation includes many positive proposals, we also noted with concern both the provisions that may affect Safe Harbor and the provision limiting personal data disclosures required or requested by courts and administrative agencies outside the EU. We look forward to following the further discussions among the Parliament, the Council, and the European Commission as they seek common ground on the draft regulation.

Given the active debate over Safe Harbor right now, let me address head-on the contention that Safe Harbor isn't up to the job of providing protection for EU citizens' data in the commercial sphere. Let me start by emphasizing that the FTC is strongly committed to vigilant enforcement of Safe Harbor certifications. As the Safe Harbor program has grown over the past decade, so has the FTC's enforcement activity, and since 2009, we have brought ten Safe Harbor cases.¹⁵ When Safe Harbor was established, the FTC pledged to review on a priority basis

¹⁴ See Trans Atlantic Consumer Dialogue, *Resolution on Data Flows in the TransAtlantic Trade and Investment Partnership* 3 (Oct. 2013), available at <http://www.consumersinternational.org/media/1396104/tacd-resolution-on-data-flows-in-the-transatlantic-trade-and-investmemt-partnership.pdf>.

¹⁵ See *Myspace LLC*, No. C-4369 (F.T.C. Sept. 11, 2012), available at <http://ftc.gov/os/caselist/1023058/120911myspacecmpt.pdf>; *Facebook, Inc.*, No. C-4365 (F.T.C. Aug. 10, 2012), available at <http://www.ftc.gov/os/caselist/0923184/120810facebookcmpt.pdf>; *Google Inc.*, No. C-4336 (F.T.C. Oct. 24, 2011), available at <http://www.ftc.gov/os/caselist/1023136/111024googlebuzzcmpt.pdf>; *FTC v. Karnani*, No. CV 09-5276 DPP (C.D. Cal. filed June 9, 2011), available at <http://www1.ftc.gov/os/caselist/0923081/110609karnanicmpt.pdf>; *Collectify LLC*, No. C-4272 (F.T.C. Jan. 19, 2010), available at <http://www.ftc.gov/os/caselist/0923142/100119collectifycmpt.pdf>; *Directors Desk LLC*, No. C-4281 (F.T.C. Jan. 19, 2010), available at <http://www.ftc.gov/os/caselist/0923140/100119directorsdeskcmpt.pdf>; *ExpatEdge Partners, LLC*, No. C-4269 (F.T.C. Jan. 19, 2010), available at <http://www.ftc.gov/os/caselist/0923138/100119expatedgecmpt.pdf>;

referrals from EU member state authorities.¹⁶ With few such referrals received, we have pursued cases at our own initiative.

The FTC proactively looks for Safe Harbor violations in every privacy and data security investigation we conduct. In fact, that is how we came to identify the Safe Harbor violations we alleged against Google, Facebook, and Myspace in the last few years.¹⁷ These cases demonstrate both that the FTC will enforce Safe Harbor certifications and that companies that do not comply will pay a high price. The legally binding orders the FTC obtained against Google, Facebook, and Myspace require these firms to institute comprehensive privacy programs and subject the companies to ongoing privacy audits. Violations can result in hefty fines, such as the \$22.5 million civil penalty the FTC obtained from Google last year.¹⁸ The FTC orders against Google, Facebook, and Myspace will last for twenty years and, during that time, protect over a billion users worldwide, hundreds of millions of whom reside in Europe. That significant

Onyx Graphics, Inc., No. C-4270 (F.T.C. Jan. 19, 2010), available at <http://www.ftc.gov/os/caselist/0923139/100119onyxgraphicscmpt.pdf>; *Progressive Gaitways LLC*, No. C-4271, (F.T.C. Jan. 19, 2010), available at <http://www.ftc.gov/os/caselist/0923141/100119progaitwayscmpt.pdf>; *World Innovators, Inc.*, No. C-4282 (F.T.C. Jan. 19, 2010), available at <http://www.ftc.gov/os/caselist/0923137/100119worldinnovatorscmpt.pdf>.

¹⁶ See Letter from Robert Pitofsky, Fed. Trade Comm'n, to John Mogg, European Comm'n (July 14, 2000), available at http://export.gov/static/sh_en FTCLETTERFINAL Latest eg_main 018455.pdf.

¹⁷ See *Google Inc.*, No. C-4336 (F.T.C. Oct. 24, 2011), available at <http://www.ftc.gov/os/caselist/1023136/111024googlebuzzcmpt.pdf>; *Facebook, Inc.*, No. C-4365 (F.T.C. Aug. 10, 2012), available at <http://www.ftc.gov/os/caselist/0923184/120810facebookcmpt.pdf>; *Myspace LLC*, No. C-4369 (F.T.C. Sept. 11, 2012), available at <http://ftc.gov/os/caselist/1023058/120911myspacecmpt.pdf>.

¹⁸ See *United States v. Google Inc.*, No. CV 12-04177 (N.D. Cal. Nov. 16, 2012) (Order Approving Stipulated Order for Permanent Injunction and Civil Penalty), available at <http://www.ftc.gov/os/caselist/c4336/121120googleorder.pdf>.

outcome demonstrates that, in the FTC's hands, Safe Harbor is an effective and functioning tool for the protection of the privacy of EU citizens' data transferred to the United States.

We will continue to make Safe Harbor a top enforcement priority. In fact, we have opened numerous investigations into Safe Harbor compliance in recent months and have Safe Harbor matters in the enforcement pipeline. We also welcome any substantive leads provided to us, such as the complaints we received in the past month alleging a large number of Safe Harbor-related violations. We appreciate these and any other leads, including from civil society members of TACD, regarding noncompliance with this important program. You can expect to see more enforcement actions on this front in the coming months.

The FTC's support for the Safe Harbor program is an example of our broader commitment to interoperability among differing privacy regimes. Consumers benefit from the free flow of information across the globe, as TACD has recognized in its recent resolutions.¹⁹ Divergent privacy laws are a reality. Programs like Safe Harbor and the APEC cross-border privacy rules system help bridge the gap between such differing regimes, thus promoting the free of flow of information while promoting a consistently high level of consumer privacy protection. Any alternative approach, such as companies storing all personal data in local servers, could lead to a geographically fragmented Internet that would hamper the free flow of information and damage market function, perhaps critically.

Of course, today, all discussions about privacy take place against the backdrop of the revelations about the U.S. National Security Agency's surveillance activities, which I know have

¹⁹ See Trans Atlantic Consumer Dialogue, *Resolution on Data Flows in the TransAtlantic Trade and Investment Partnership 1* (Oct. 2013), available at <http://www.consumersinternational.org/media/1396104/tacd-resolution-on-data-flows-in-the-transatlantic-trade-and-investmemt-partnership.pdf>.

been the subject of discussions by European and U.S. leaders in recent days. In my view, it is healthy to have a vigorous debate on both sides of the Atlantic over how governments should balance national security and privacy. But that ongoing conversation should not be allowed to distort discussions about commercial privacy.

The EU itself has created national security exemptions in its existing data protection laws,²⁰ and the EC proposed such exemptions for government surveillance in its draft data protection regulation.²¹ The EU has therefore justifiably recognized the need to tackle these important issues separately when it comes to its member states' own national security. It cannot be right to take a different approach when it comes to Safe Harbor, by seeking to conflate the distinct issues raised by the use of personal data to advance private commercial interests on the one hand and to protect national security on the other.

I expect that many in this room have a different view. But I hope my remarks will prompt you to consider, or re-consider, the virtues of the Safe Harbor system. And whether or not privacy and data protection issues are addressed in the TTIP, this is clearly an area where we must work together to find practical solutions to promote both the free flow of data and strong consumer privacy protections.

²⁰ See Council Directive No. 95/46/EC of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, art. 3(2), 1995 O.J. (L 281), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML>.

²¹ See Proposed General Data Protection Regulation: Proposal for a Regulation of the European Parliament and Council on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data, art. 2(2)(a), 2012/0011 (COD), available at http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf.

Electronic Commerce

Let me turn now to electronic commerce. E-commerce, in all its new variants – mobile, consumer-to-consumer, and social – creates exciting new opportunities for consumers to engage in cross-border connections, commercial or otherwise. But it also poses challenges, as you have squarely identified in your recent e-commerce resolution.²² On both sides of the Atlantic, consumer protection agencies are looking at issues relating to online disclosures, such as blogging, online review sites, social media disclosures, and now, the phenomenon of “native advertising” – the practice of blending advertisements with news, entertainment, and other content in digital media, which the FTC will explore at a workshop on December 4th in Washington, DC. Consumers in our highly wired jurisdictions are facing similar problems, and there is great potential for the FTC to work with the European Commission and member state consumer authorities to develop appropriate enforcement and policy responses through the OECD, the International Consumer Protection Enforcement Network (ICPEN), and direct engagement, including increased cooperation on enforcement actions, something which TACD has also advocated.²³

Another issue on which TACD has developed recommendations and around which I see great potential for cooperation between the EU and the U.S. is the question of how to protect consumers and build confidence in mobile commerce and mobile payments. Last year, the EC sent an official to participate in the FTC’s workshop on mobile payments, and the FTC in turn provided staff comments in response to the European Commission’s Green Paper on online

²² See Trans Atlantic Consumer Dialogue, *Resolution: The Consumer Perspective on Addressing E-Commerce within the Transatlantic Trade and Investment Partnership* 3-4 (Oct. 2013), available at <http://www.consumersinternational.org/media/1402110/tacd-infosoc-resolution-on-e-commerce-in-the-transatlantic-trade-and-investment-partnership.pdf>.

²³ See *id.* at 1, 2, 3.

payments. Such engagement is the type of cooperation advocated by both the U.S.

Administrative Conference and President Obama.²⁴ It is my hope that the TTIP will facilitate continued robust exchange between international regulators on these issues.

Of course, it is nearly impossible to talk about e-commerce without mentioning cross-border Internet fraud. Fighting online fraud is the bread and butter of the FTC's consumer protection work, and it increasingly demands cooperation with our international counterparts. Ten years ago, in 2003, we were part of the international effort that produced OECD guidelines on protecting consumers from cross-border fraud and deception, such as pyramid schemes, foreign lotteries, and computer tech support scams.²⁵ The EU put many of these principles into its Consumer Protection Cooperation Regulation, which it adopted in 2004,²⁶ and the United States did the same in the U.S. SAFE WEB Act of 2006.²⁷

Since then, the FTC has worked directly with the European agencies and the European Commission to share information and intelligence both bilaterally and through international organizations such as ICPEN. One example is our recent case against Construct Data Publishers, a business directory operation that has attracted the attention of European regulators and the

²⁴ See Administrative Conference of the United States, Recommendation 2011-6: International Regulatory Cooperation (Dec. 8, 2011), available at <http://www.acus.gov/recommendation/international-regulatory-cooperation>; Exec. Order No. 13,609, 77 Fed. Reg. 26,413 (May. 4, 2012), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-05-04/pdf/2012-10968.pdf>.

²⁵ See OECD, *Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders* (2003), available at <http://www.oecd.org/dataoecd/24/33/2956464.pdf>.

²⁶ See Council Regulation (EC) No. 2006/2004 of the European Parliament and of the Council of 27 October 2004, 2004 O.J. (L 364) 1, available at <http://eur-ex.europa.eu/Notice.do?val=392361:cs&lang=en&list=392361:cs,&pos=1&page=1&nbl=1&pgs=10&hwords=&checktexte=checkbox&visu=#texte>.

²⁷ Pub. L. No. 109-455, 120 Stat. 3372 (2006) (codified in scattered sections of 15 U.S.C. and 12 U.S.C. § 3412(e)).

European Parliament.²⁸ In prosecuting this case, we are working closely with a number of European authorities to stop this company from continuing to trick small businesses around the world into paying for worthless listings on an obscure website. Many of our other cross-border fraud cases have also had European connections – defendants, evidence, and, of course, consumer victims. Indeed, over the past ten years, we have provided more than a million dollars in monetary redress to consumers in the European Union.

Despite these successes, I know there is more that we can do together to combat scams targeted at consumers, and that the more government authorities on both sides of the Atlantic work together, the more we will achieve. For many years, the FTC and European Commission attempted to negotiate a civil mutual enforcement assistance agreement on consumer protection cooperation. This agreement would have provided the FTC and counterpart consumer agencies in the EU with critical tools to exchange information, including personal information, and provide other investigative assistance in cross-border fraud cases, exactly the type of practical cooperation that can yield real concrete results for consumers in our respective jurisdictions.

Unfortunately, we ran into difficulties in the negotiations, and the EC suspended them in February 2012, in large part due to disagreements over the proper scope of data protection in mutual enforcement cooperation. Depending on how the draft EU data protection regulation develops, we may soon be facing even more obstacles to information sharing in the civil enforcement context. It is imperative that we overcome these impediments and move toward pragmatic arrangements that will allow us to engage in vigorous law enforcement consistent with strong privacy and confidentiality protections. In a global economy, effective consumer

²⁸ See *FTC v. Construct Data Publishers, a.s.*, No. 13-CV-1999 (N.D. Ill. filed Mar. 14, 2013), available at <http://www.ftc.gov/os/caselist/1323001/130320fairguidecmpt.pdf>.

protection depends on strong mechanisms for cooperation among international consumer protection agencies. I hope the TTIP negotiations can be used to help foster the creation of an environment for greater cooperation.

Competition

In our efforts to work out arrangements around e-commerce, perhaps we should pay more attention to our joint efforts to protect market competition. Competition is an area in which the U.S. and the EU have an extensive and impressive history of cooperation. The U.S. agencies tasked with this – the FTC and the Department of Justice – are parties to two important bilateral cooperation agreements with the EC, with the core agreement adopted in 1991, over twenty years ago.

Given the extent of trade between our jurisdictions, many important matters are reviewed simultaneously by competition agencies on both sides of the Atlantic. This cooperation with the EC is a necessity, enabling us to identify issues of common interest, improve our analyses, avoid inconsistent outcomes, and, most importantly, promote substantive and procedural convergence. Our staffs are on the phone almost daily, and have worked to ensure that our systems, though different, are interoperable. The experience that we have gained over the past twenty years through cooperation with the EC should serve as a model for the broader international community, and an example of the benefits of working together that, I hope, will inform broader joint coordination in the trade context.

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In closing, let me reemphasize that trade between the U.S. and EU will reach its full potential only if empowered consumers on both sides of the Atlantic can confidently navigate increasingly complex, international, and online markets. That is why this forum for discussion

between leading consumer advocates and the top negotiators of the TTIP is critical. I look forward to continuing to talk with all of you about how the FTC's approach to data privacy, e-commerce, and competition can inform your exploration of the consumer perspective on the TTIP.

Thanks again to TACD for inviting me to participate in this terrific program. While I must, unfortunately, miss the afternoon session, I would be pleased to take a few minutes now to respond to any questions you may have.