



**Testimony of Ryan Radia
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Before the Joint Economic Committee of the United States Congress

Hearing: The Need for U.S. Leadership on Digital Trade

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Chairman Paulsen, Ranking Member Heinrich, and Members of the Committee, thank you for giving me the opportunity to testify before you today. My name is Ryan Radia. I am research fellow and regulatory counsel at the Competitive Enterprise Institute (CEI),¹ where I focus on adapting law and public policy to the unique challenges of the information age. CEI is a nonprofit, nonpartisan public interest organization dedicated to the principles of limited constitutional government and free enterprise. CEI has supported trade liberalization through analysis and advocacy for over 25 years.²

At this critical juncture for international trade and Internet commerce, the United States must maintain its historic role as the global leader in efforts to promote free trade and open markets. This leadership is especially important in the information economy. In the U.S. technology sector, half a million businesses collectively employ over 11 million Americans and generate \$1.6 trillion in annual economic output.³ This sector's global reach is extensive: U.S. tech firms export over \$300 billion annually in products and services, supporting over 800,000 American jobs.⁴ Therefore, it should, come as no surprise that public policies inhibiting the unfettered flow of digital services between the United States and the rest of the world threaten consumers, workers, and innovation.

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1. See, e.g., James M. Sheehan, *Two Years after NAFTA: A Free Market Critique and Assessment* (Competitive Enter. Inst. 1995), <https://cei.org/studies-issue-analysis/two-years-after-nafta-free-market-critique-and-assessment>; Matthew C. Hoffman, *Walking Through NAFTA: A Critical Examination of the North American Free Trade Agreement*, Competitive Enterprise Institute, 1993. CEI has also joined with free-market organizations in recent years to emphasize the importance of free trade to American prosperity. Coalition Letter, *Open Letter to Congress: Free Trade Is Essential to American Prosperity*, September 22, 2016, <https://cei.org/sites/default/files/L16%2009-22%20Trade%20Coalition.pdf>.
 2. My biography and writings are <https://cei.org/expert/ryan-radia>. Wade Burkholder, CEI Research Associate, assisted with the preparation of this testimony.
 3. CompTIA, *Cyberstates 2018: The Definitive National, State, and City Analysis of the U.S. Tech Industry and Tech Workforce*, at 9–11 (2018), https://www.cyberstates.org/pdf/CompTIA_Cyberstates_2018.pdf.
 4. CompTIA Tech Trade Snapshot, *Imports and Exports of Tech Products and Services*, at 1 (May 2018), <http://trade-partnership.com/wp-content/uploads/2018/05/CompTIA-Tech-Trade-Snapshot-2018FINAL1.pdf>.

Tariffs and non-tariff barriers to trade can and do undermine free trade in the digital marketplace. In my testimony, I wish to focus on another set of policies that threaten digital trade: governmental regulations regarding privacy, copyright, and antitrust. Of particular importance in the regulatory arena is the European Union (EU), whose member states collectively represent America's single largest trading partner in goods and services.⁵ EU residents play an especially influential role in the information economy, with roughly 430 million Internet users residing in EU member states.⁶ As such, Facebook has more European users than American users,⁷ while Google's popularity as a search engine among Europeans exceeds that among Americans.⁸

Although most major U.S. technology companies consider EU residents to be a core aspect of their user bases, the European Union's approach to regulating the information economy differs from the approach of U.S. policymakers, in some cases dramatically. A complete overview of EU regulation of the technology sector is beyond the scope of my testimony, but I wish to focus on three areas of EU regulation that pose a particularly large threat to the free flow of digital goods and services between the United States and the European Union: (1) privacy; (2) copyright; and (3) antitrust.

EU Privacy Regulation and U.S. Internet Companies

On May 25, 2018, the EU's General Data Protection Regulation (GDPR) entered into force, marking perhaps the most significant policy change in EU history regarding how data collection is regulated.⁹ The GDPR applies to any company that processes or controls data on EU "data subjects," no matter where the company is domiciled or has a physical presence.¹⁰ The GDPR purports to affirm "digital rights" for EU persons by requiring companies to, among other things, provide users all their data in a machine-readable format and delete a user's data at his or her request.¹¹ While the GDPR does not distinguish between online and offline data collection, high-tech and financial services companies will bear the brunt of complying with the regulation.¹²

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5. U.S. trade in goods and services with the European Union totaled \$1.16 trillion in 2017, including \$528 billion in exports and \$629 billion in imports. *See* U.S. Census Bureau and U.S. Bureau of Economic Analysis, *Monthly U.S. International Trade in Goods and Services, April 2018*, at 26 (June 6, 2018), https://www.census.gov/foreign-trade/Press-Release/current_press_release/ft900.pdf.
 6. Of the approximately 510 million residents of EU households, 85 percent have Internet access. Eurostat, *Internet access and use statistics - households and individuals*, 2016, <https://goo.gl/bxKV9P>.
 7. David Ingram, "Exclusive: Facebook to put 1.5 billion users out of reach of new EU privacy law," Reuters (Apr. 18, 2018), <https://www.reuters.com/article/us-facebook-privacy-eu-exclusive/exclusive-facebook-to-put-1-5-billion-users-out-of-reach-of-new-eu-privacy-law-idUSKBN1HQ00P>.
 8. Robinson Meyer, "Europeans Use Google Way, Way More than Americans Do," *The Atlantic* (Apr. 15, 2015), <https://www.theatlantic.com/technology/archive/2015/04/europeans-use-google-way-way-more-than-americans-do/390612/>.
 9. EU General Data Protection Regulation (in effect on May 25, 2018), <https://gdpr-info.eu/>.
 10. *See* GDPR ch. 1, art. 3.
 11. *See id.* ch. 3, arts. 17–20.
 12. Ryan Radia & Ryan Khurana, "European Union's General Data Protection Regulation and Lessons for U.S. Privacy Policy," *OnPoint* No. 245, Competitive Enterprise Institute, May 23, 2018, <https://cei.org/content/european-unions-general-data-protection-regulation-and-lessons-us-privacy-policy>.

The GDPR entered into force less than one month ago, but the regulation has already resulted in several notable changes for Internet users in the EU and around the world. The recent onslaught of privacy policy updates and mass emails from Internet companies is perhaps the most widespread result of the GDPR's implementation.¹³

Yet, the regulation's less noticeable implications for Internet users may well prove to be far more significant in the long run. In particular, the GDPR has changed how many companies, including U.S. companies, interact with EU users—and, in some cases, all of their users. Failing to comply with the GDPR may entail a fine of up to €20 million (\$23.16 million) or 4 percent of a firm's global revenue, whichever is greater.¹⁴ This risk, along with the uncertainty surrounding many of the regulation's provisions, has led many U.S. firms to simply stop allowing EU subjects to access their platforms and services.

For instance, the major American media company Tronc (formerly Tribune Publishing), which owns major news outlets including the *Chicago Tribune*, *Los Angeles Times*, *New York Daily News*, and *Baltimore Sun*, began blocking access to European users almost immediately after the GDPR entered into force.¹⁵ A&E Networks, which owns several television channels, followed suit.¹⁶ Even several firms outside the United States—such as Ragnarok Online, a South Korean massively multiplayer online role-playing game—have also responded to the GDPR by blocking European users.¹⁷

Some firms responded to the GDPR's implementation by shuttering their doors entirely. For instance, Klout, an Internet analytics firm that enabled thinkfluencers to gauge the effectiveness of their social media presence (“nextification”), ceased operations on May 25, 2018, the day the GDPR became effective.¹⁸ And the GDPR has resulted in several independent American video game developers temporarily or permanently shutting down their Internet gaming platforms in EU member states.¹⁹

13. J.D. Biersdorfer, “Why All the New Terms of Service?” *New York Times*, April 30, 2018, <https://www.nytimes.com/2018/04/30/technology/personaltech/why-all-the-new-terms-of-service.html>.

14. GDPR, ch. 8, art. 83.

15. Adam Satariano, “U.S. News Outlets Block European Readers over New Privacy Rules,” *New York Times*, May 25, 2018, <https://www.nytimes.com/2018/05/25/business/media/europe-privacy-gdpr-us.html>.

16. *Id.*

17. Emma Kidwell, “Ragnarok Online Shutting down European Servers after 14 Years,” *Gamasutra*, April 25, 2018, https://www.gamasutra.com/view/news/317050/Ragnarok_Online_shutting_down_European_servers_after_14_years.php.

18. Will Oremus, “Klout Is Shutting Down Just In Time to Not Reveal How Much It Knew about Us,” *Slate*, May 10, 2018, <https://slate.com/technology/2018/05/klout-is-dead-just-in-time-of-europes-gdpr-privacy-law-thats-not-a-coincidence.html>; *see also generally* <https://twitter.com/ProfJeffJarviss> [last visited June 18, 2018].

19. *See, e.g.*, Alice O'Connor, “Loadout Shutting down this Month ahead of GDPR,” *Rock Paper Shotgun*, May 9, 2018, <https://www.rockpapershotgun.com/2018/05/09/loadout-shutting-down-because-of-gdpr/>; IO Interactive, “Hitman Absolution Service Message,” accessed June 20, 2018, <https://www.ioi.dk/hitman-absolution-service-message/>.

As EU member states implement local GDPR laws and begin to bring enforcement actions, the GDPR may ultimately result in U.S. firms erecting digital walls to deny access to EU residents on an unprecedented scale.²⁰ This disruption in digital trade risks not only denying EU residents the benefits of accessing American platforms and content, but also depriving U.S. firms of revenues generated from serving European users. This may in turn hurt U.S. consumers: many tech firms can deliver their services at a trivial marginal cost, but a declining user base means there will be fewer customers from which tech firms are able to recoup their high fixed costs.²¹ Consumer choice will suffer as a result, especially if firms find that it no longer makes economic sense to offer advertiser-supported content and services.

Many U.S. firms will continue serving EU subjects in spite of the GDPR's implementation, to be sure. Because the GDPR requires firms to obtain express consent from EU users before using their data for the purpose of delivering individualized advertising, however, the millions of Europeans who have grown accustomed to accessing U.S. platforms and services at no monetary cost may soon end up paying out of pocket for products they traditionally considered to be "free." For instance, *The Washington Post* recently began offering a "Premium EU Subscription" to users who decline to consent to the company sharing their information with third parties.²² This subscription costs 50 percent more than the *Post's* traditional online subscription, which includes personalized ads.²³ Some EU residents might prefer to pay for ad-free subscriptions in any event, but to the extent that such business models make sense, several companies offer them already.

For U.S. firms that elect to comply with the GDPR's mandates, the ensuing costs could be significant. According to estimates from EY (formerly Ernst & Young) and the International Association of Privacy Professionals, the average Fortune 500 company has spent \$16 million to comply with the GDPR over the past two years.²⁴ Brian Donohue, head of Pinterest's Instapaper unit, wrote in April 2018 that he "underestimated the scope of work and it was not possible to complete by the deadline, this was the required alternative."²⁵

20. Just before the GDPR's implementation date, only seven of the EU's 28 member states had passed GDPR implementation acts. David Meyer, "Most Member States Won't Be Ready for GDPR," *The Privacy Advisor*, International Association of Privacy Professionals, April 24, 2018, <https://iapp.org/news/a/most-member-states-wont-be-ready-for-gdpr/>.

21. Ronald Coase, a Nobel Prize-winning economist, discussed the political challenges entailed in regulating information-age industries characterized by declining marginal costs in a 2004 interview with CEI founder Fred L. Smith, Jr. Competitive Enterprise Institute, *Declining Marginal Cost Industries in the Global Information Age* (CEI Event, May 7, 2004), http://www.cei.org/pdf/DMC_transcript.pdf.

22. Lucia Moses, "The Washington Post Puts a Price on Data Privacy in its GDPR Response — and Tests Requirements," *Digiday* (May 30, 2018), <https://digiday.com/media/washington-post-puts-price-data-privacy-gdpr-response-tests-requirements/>.

23. *Id.*

24. See Mehreen Khan, "Companies Face High Cost to Meet New EU Data Protection Rules," *Financial Times*, November 19, 2017, <https://www.ft.com/content/0d47ffe4-ccb6-11e7-b781-794ce08b24dc>.

25. "GDPR: Tech Firms Struggle with EU's New Privacy Rules," *BBC News*, May 24, 2018, <https://www.bbc.com/news/technology-44239126>.

Compliance costs may grow larger still as EU member states enact GDPR legislation in the coming years, especially if ambiguities in the regulation are clarified to extend its scope to U.S. firms that control or process EU user data to a limited extent. For instance, GDPR Article 27 provides that firms are not required to hire a data protection officer if their processing of data on EU subjects is “occasional” and “does not include, on a large scale, processing of special categories of data.”²⁶ Because defining the terms “occasional” and “large scale” is up to EU member states, even small U.S. firms that handle a relatively limited volume of data on EU residents may end up subject to the full brunt of the GDPR’s mandates. Time will tell.

The GDPR also has implications for competition and entry into the global information economy, in which U.S. firms have been the most successful globally to date. As many commentators have noted, under the GDPR, companies that operate platforms with high worldwide adoption will likely benefit from the regulation. Major technology businesses such as Facebook and Google already employ and retain extensive teams of lawyers, privacy professionals, and engineers. Their would-be rivals, in contrast, face substantial capital constraints regarding compliance costs.

Whereas Facebook and Google were able to upset once-powerful incumbents such as Myspace and Yahoo! on a relatively modest budget, tomorrow’s innovators with brilliant new ideas may struggle to unseat today’s incumbents due to regulations such as the GDPR that did not exist 15 or 20 years ago.²⁷ According to a recent report in *The Wall Street Journal*, addressing the GDPR’s imminent implementation, “[s]ome advertisers are planning to shift money away from smaller providers and toward Google and Facebook.”²⁸ And as *The New York Times* recently reported, major developing countries such as Brazil and Argentina are considering privacy regulations based on the European approach.²⁹

Regardless of one’s views on how governments should regulate how consumer data is used, shared, and protected, the GDPR will undoubtedly have a significant effect on the flow of digital trade between the United States and the European Union. As the U.S. Senate and House of Representatives consider enacting domestic privacy legislation,³⁰ U.S. lawmakers should carefully

26. GDPR ch. 4, art. 27.

27. Adam Thierer, How Well-Intentioned Privacy Regulation Could Boost Market Power of Facebook and Google, Technology Liberation Front, April 25, 2018, <https://techliberation.com/2018/04/25/how-well-intentioned-privacy-regulation-could-boost-market-power-of-facebook-google/>.

28. Sam Schechner & Nick Kostov, “Google and Facebook Likely to Benefit from Europe’s Privacy Crackdown,” *Wall Street Journal*, April 23, 2018, <https://www.wsj.com/articles/how-europes-new-privacy-rules-favor-google-and-facebook-1524536324>.

29. Daisuke Wakabayashi and Adam Satariano, “How Facebook and Google Could Benefit from the G.D.P.R., Europe’s New Privacy Law,” *New York Times*, April 23, 2018, <https://www.nytimes.com/2018/04/23/technology/privacy-regulation-facebook-google.html>.

30. See, e.g., Balancing the Rights of Web Surfers Equally and Responsibly Act (BROWSER) Act, H.R. 2520, 115th Congress, 2017; Social Media Privacy and Consumer Rights Act of 2018, S. 2728, 115th Congress 2018; Customer Online Notification for Stopping Edge-Provider Network Transgressions (CONSENT) Act, S. 2639, 115th Congress, 2018.

examine the repercussions of the GDPR, including its effects on small businesses, market entry, and business models that depend on personalized advertising.

Instead of mimicking the EU's privacy regime or seeking to impose even more stringent rules on tech companies, it is imperative that American policymakers consider the tradeoffs that restricting data collection would entail for consumers. Reshaping the information economy through privacy regulation may come at a steep price. Just as U.S. leadership has helped steer the world toward freer trade and open markets, the United States should lead by example on privacy, and resist calls to adopt an overly precautionary approach that might endanger the freedoms that have enabled U.S. firms to connect the world through platforms that can help improve the lives of billions of people.³¹

EU Digital Single Market and U.S. Creative Works

EU residents, like consumers worldwide, regularly watch movies, television shows, and streaming video content. The U.S. continues to lead the world in its creative industries, including not only Hollywood's venerable film studios,³² but also America's television and streaming video companies.³³ These companies distribute their content through a diverse array of business models, reflecting consumers' growing preference for watching video programming over streaming Internet platforms.

The EU has long pursued regulations governing how content owners make their programming available in various ways to EU residents of different member states.³⁴ Existing EU regulations require content providers to allow EU consumers who have purchased content in their home country to allow those consumers to access that content while traveling elsewhere within the EU on the same terms as if they were still in their home country.³⁵

31. For a discussion of the precautionary principle and privacy, see Adam Thierer, "Privacy Law's Precautionary Principle Problem," *Maine Law Review*, Vol. 66, No. 2 (2014), pp. 471–476, <https://www.mercatus.org/system/files/05-Thierer.pdf>.

32. Although film studios based outside the United States have enjoyed growing revenues and output in recent years, Hollywood's major film studios and their partners continue to generate the lion's share of the global box office. *See, e.g.*, Michael Cieply, "Hollywood Works to Maintain Its World Dominance," *New York Times*, November 3, 2014, <https://www.nytimes.com/2014/11/04/business/media/hollywood-works-to-maintain-its-world-dominance.html>; Phil Hoad, "Hollywood's Hold Over Global Box Office—63% and Falling," *The Guardian*, April 2, 2013, <https://www.theguardian.com/film/filmblog/2013/apr/02/hollywood-hold-global-box-office>.

33. For a discussion of U.S. streaming video platforms' global dominance, see Reinhardt Krause, "Netflix Takes on Media Giants as Video Streaming War Goes Global," *Investor's Business Daily*, March 8, 2018, <https://www.investors.com/research/industry-snapshot/netflix-fights-media-giants-in-global-video-streaming-war/>.

34. *Cf.* Regulation 2018/302, which encompasses non-audiovisual goods and services, "addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market." *Regulation (EU) 2018/302* (approved February 28, 2018; in effect on December 3, 2018), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018R0302>.

35. European Commission, "Digital Single Market: EU Negotiators Agree on New Rules Allowing Europeans to Travel and Enjoy Online Content Services cross Borders," news release, Europe.eu, February 7, 2017, http://europa.eu/rapid/press-release_IP-17-225_en.htm.

But ongoing EU efforts to promote a “digital single market,” though admirable on many levels, threaten to foreclose content owners’ ability to engage in pricing diversity, tailor content packages on a country-by-country basis, and effectively enforce intellectual property laws. Although parity across EU member states with respect to taxation and regulation is generally a laudable objective, mandating that all copyright owners that distribute audiovisual works—including U.S. companies from movie studios to Internet video platforms—treat all EU subjects in an identical manner may well cause some EU residents to pay *more* for online content than they would otherwise. Such a requirement might also undermine the incentive of U.S. firms to invest in creating original programming, especially content aimed at suiting the tastes of European audiences.

Moreover, given the wide variance among EU member states in terms of purchasing power, as well as in preferences, language, and culture, many content owners and distributors currently tailor their streaming video offerings based on the unique characteristics of audiences in each EU member state.³⁶ Despite the long-term trend of economic convergence within the European Union, among the EU’s 28 member states, GDP per capita in 2017 (adjusted for purchasing power parity) ranged from \$21,686 in Bulgaria to \$106,373 in Luxembourg, with an EU average of \$40,890.³⁷

If the European Union’s goal of achieving a digital single market ends up prohibiting content owners from offering customized packages of streaming video programming to residents of the EU’s diverse member states, many of these consumers will likely suffer.

In addition, given the high fixed costs and trivial marginal costs of distributing video content over the Internet, American consumers who enjoy films and shows that Europeans also consume will suffer indirectly, as U.S. content companies will invest less in producing creative works due to the lower potential total revenue.

The United States should lead the way in affirming the freedom of creators and distributors to experiment with creative arrangements for streaming video over the Internet without prescriptive licensing terms dictated by centralized regulatory bodies.

EU Antitrust Law

The European Union, like the United States, enforces a set of laws designed to prevent companies from engaging in anticompetitive conduct that harms consumers.³⁸ But the EU’s recent history of antitrust enforcement suggests a bias against leading American technology companies.

On several recent occasions, the European Commission, which enforces EU antitrust law, has taken extremely punitive actions against U.S. technology firms based on questionable theories of competitive harm. For instance, in 2009, the European Commission levied a \$1.26 billion fine

36. See, e.g., Ashley Rodriguez, “This Is the Cheapest Place in the World to Get Netflix,” Quartz (June 3, 2017), <https://qz.com/996248/this-is-the-cheapest-place-in-the-world-to-get-netflix/>.

37. International Monetary Fund, World Economic Outlook Database: WEO Data by Countries, April 2018 Edition, <http://www.imf.org/external/pubs/ft/weo/2018/01/weodata/index.aspx>.

38. Compare 15 U.S.C. §§ 1–38 to Consolidated Version of the Treaty on the Functioning of the European Union arts. 101–109.

against Intel, the leading U.S. semiconductor chip maker, for allegedly disadvantaging its rival AMD.³⁹ In 2013, the European Commission levied a \$732 million fine against Microsoft for allegedly failing to abide by a four-year-old settlement regarding the promotion of browsers other than Microsoft's Internet Explorer to users of the company's Windows operating system.⁴⁰ And in 2017, the European Commission levied a \$2.7 billion fine against Google for allegedly disadvantaging rivals in its shopping comparison service's search results.⁴¹

Although EU regulators maintain that these antitrust enforcement actions arose not out of bias against U.S. firms but because of meritorious complaints of anticompetitive conduct, there is ample cause to be skeptical of this claim. This month, the Initiative on Global Markets at the University of Chicago Booth School of Business polled a panel of leading academic economists with a diverse set of ideological perspectives on the question of whether the EU "often uses its antitrust powers to protect EU-based firms from international competition, rather than to promote greater competition in European markets."⁴² Although a plurality of the economists surveyed were uncertain about the question, when weighted for confidence, 32 percent of the economists agreed or strongly agreed with the statement—compared to 25 percent who disagreed or strongly disagreed with it.⁴³

Several economists have criticized the EU's approach to dominant technology firms, which tends to target companies that succeed in gaining and maintaining a considerable share of a particular market through innovation and progress. Some commentators have attributed this tendency to the EU's historical desire to combat concentrated economic power regardless of its form—without regard to whether a firm that allegedly gains "too much" concentration faces a meaningful threat of disruptive entry from newcomers or fails to serve its consumers more effectively than its rivals.⁴⁴

Perhaps not coincidentally, high-tech innovation in the European Union lags behind the comparatively dynamic information technology sectors in the United States, Asia, and many parts of the developing world. According to the Digital Evolution Index published by the Tufts University Fletcher School in late 2015, "fifteen European countries have been losing momentum since 2008 in

39. David Meyer, "Intel Scores Victory (for Now) in Fight Against \$1.3 Billion Fine," *Fortune*, September 6, 2017, <http://fortune.com/2017/09/06/intel-eu-antitrust-fine-cjeu/>. Intel has challenged this fine, which remains subject to pending litigation before the EU's General Court. *Id.*

40. James Kanter, "European Regulators Fine Microsoft, Then Promise to Do Better," *New York Times*, March 6, 2013, <https://www.nytimes.com/013/03/07/technology/eu-fines-microsoft-over-browser.html>.

41. Daniel Boffey, "Google Appeals against EU's €2.4bn Fine over Search Engine Results," *The Guardian*, September 11, 2017, <https://www.theguardian.com/technology/2017/sep/11/google-appeals-eu-fine-search-engine-results-shopping-service>. Google has appealed the fine. *Id.*

42. IGM Forum, *Antitrust and International Competition*, June 13, 2018, <http://www.igmchicago.org/surveys/antitrust-and-international-competition-2>.

43. *Id.*

44. See, e.g., Simon Tilford, *Is EU Competition Policy an Obstacle to Innovation and Growth?* Center for European Reform, 2008, https://www.cer.eu/sites/default/files/publications/attachments/pdf/2011/essay_competition_st_20nov08-1359.pdf.

terms of their state of digital evolution.”⁴⁵ The United States, by contrast, belongs to the “stand out” category of nations considered by the index.⁴⁶

Antitrust enforcement poses plenty of challenges of its own without governmental bodies employing it as a means of achieving competitive parity with other countries’ technology sectors. U.S. leadership in competition law is increasingly important, especially as developing countries work to craft and implement their antitrust regimes.

Thank you for the opportunity to testify before the Committee, and I welcome your questions.

45. Bhaskar Chakravorti, *Is Europe In A Digital Recession?* Fletcher School at Tufts University, October 28, 2015, <https://www.weforum.org/agenda/2015/10/is-europe-in-a-digital-recession/>.

46. *Id.*