

U.S. Senator Maria Cantwell

Opening Statement at Senate Commerce Committee Hearing titled “The Invalidation of the EU-US Privacy Shield and the Future of Transatlantic Data Flows”

Witnesses:

The Honorable Noah Phillips, Commissioner, Federal Trade Commission

Ms. Victoria Espinel, President and Chief Executive Officer, BSA – The Software Alliance

Mr. Neil Richards, Koch Distinguished Professor in Law, Washington University School of Law

Mr. James Sullivan, Deputy Assistant Secretary for Services, International Trade Administration, U.S. Department of Commerce

Mr. Peter Swire, Elizabeth and Tommy Holder Chair of Law and Ethics, Georgia Tech Scheller College of Business, and Research Director, Cross-Border Data Forum

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Cantwell: Thank you, Mr. Chairman, and thank you for holding this hearing. Also, thank you for your leadership on the Helsinki Commission. I certainly appreciate your hard work in both of those roles in trying to solve and resolve these issues between the United States and the European Union. So, I also want to thank our colleagues Senators Cardin and Shaheen for also working on that Helsinki Commission and these important issues.

The decision by the European Court of Justice earlier this summer makes it abundantly clear we need to have a new agreement between the United States and Europe to address the transatlantic data flow. It must be a top priority by the Biden Administration. We must ensure the continued free flow of commercial data between the United States and Europe. When I think about the Mexico Free Trade Agreement and getting the digital provisions in there, this is something that is now the norm. This is not an obscure thing, it is going to become more and more and more about trade and figuring out trade. Trade is digital. So, a lot is at stake.

The US and EU digital trade is worth more than 300 billion annually, including more than 218 billion in US exports to Europe. A very important export issue. And every business that exports and imports and has a presence or investment in the US and Europe will face difficulties if there are barriers to cross-border data transfer. In all, more than 1 trillion in US-European trade is at risk. With the invalidation of the Privacy Shield agreement, we now have lost the most straightforward legal tool for transferring data from the EU to the US, and this is a particular problem for small and medium sized businesses. It also puts some of our largest and more sophisticated companies at a disadvantage and casts doubt on the protection of their digital services and what they provide.

Europe in the United States have had a long history of working together, and to address our global challenges in security issues at the same time, we must redouble those efforts. We must continue to work closely to defend our shared values for democracy and the rule of law, and I want to see the US and Europe working together on these very important national concerns, trade and technology, so that we can continue to improve economic opportunities and avoid moves towards protectionism.

We need to start by coming together on protecting data but we also, also must increase bilateral cooperation on a broad digital agenda: 5G, 6G, a regulatory framework for artificial intelligence, autonomous vehicles, cybersecurity disinformation standards. So I support the European proposal to create a US-European Technology Council for dialogue. Maybe the commission, the Helsinki Commission and others can help on this.

We can work together in multilateral organizations like OECD and the G7 to confront the challenges from China and Russia, so that we can more focus on what the standards are for the next generation of technology and to assure for the proper protection of intellectual property. This must be our larger goal. If we fail to increase our cooperation on digital issues, our economy will suffer the consequences. The flow of data between the United States and Europe is especially critical to 5,000 plus tech companies in the state of Washington, which generate more than 2.8 billion in digital export. So, equally important here today are the privacy issues that we are still working on as a committee.

These are important issues, so we don't want consumers left behind. We want them to have control over their personal privacy data. We want, at the state and federal level, to make sure that we have the right safeguards in place for consumers, so I guarantee you the United States and European citizenry are on the same page. These are the concerns that we all share. That the US may have, at a government level, a bulk collection of intelligence information that might violate those privacy rights.

So, we have to work hard to resolve this issue of the Privacy Shield and work hard on privacy legislation next year. So thank you, Mr. Chairman. I look forward to working with you and resolving the issues between us on our two bills and certainly, we've made progress. It's a very hard issue, but the digital world is not going away. So, we have to not only pioneer it, but pioneer the laws and safeguards that go along with it. Thank you very much.

Q&A With Witnesses:

Cantwell: Thank you, Mr. Chairman. Well this has been very helpful, I think, and again, appreciate the opportunity for the hearing, Mr. Chairman, and the witnesses. Mr. Richards, I'm struck by this issue of trust and distrust because I think so much of that in practically every issue but clearly this one is a thorny one, and so we do have to figure out a way to build trust, again because we're in a digital age, and this won't be the last issue or the last time we have to address this. This is going to continue far into the future. This is the era that we live in. And so, I appreciate you mentioning our efforts here in the Senate and our colleague Senator Schatz's effort on duty of loyalty, too, because I think that plays into trust and the environment.

On those factors that you mentioned, appropriate safeguards, rights, and enforcement, Mr. Richards I'm interested in this larger--that's a good framework, very important framework. And I believe in that framework, I think that is the essential aspect of the framework. But over here, somewhat out of control of Senator Wicker and I, is government surveillance. And I want to hear what, Mr. Richards, you say, and other people say about how we build trust on tackling our most important national security issues.

So it's almost like industry now is going to be hamstrung. We can fix these issues, appropriate safeguards, rights, and enforcement, but over here is going to be this large issue about data gathering by the government. And I want us to figure out how we're going to move forward. So two examples, Senator Collins and I worked with the former Secretary of Homeland Security Jay Johnson to implement overseas borders. That was hard because you're basically doing border security at overseas airports, but no one wanted to turn over—the United States was not going to get access to European, or whatever country we were in, data but yet we had to figure out a system where we were both going through potential security risks on our own data. We figured that out. I know for example on some of the national security issues, there is alliance on software. I'm pretty sure both in Europe and the United States, there are foreign countries working together on software security. So we figured it out.

So Mr. Richards, what do you think those security surveillance issues are, that really aren't even within our committee jurisdiction, but that we have to figure out how to build trust on so that we can resolve those issues so that we don't have business in the digital era hung up on digital trade, because basically our two governments can't figure out how to work together? And if we can't figure out how to work with the Europeans, I got news for you, we got problems. Like, we have got to figure out how to work with the Europeans and to figure this out. So Mr. Richards, do you have a thought on that?

Mr. Richards: I do, Senator. I mean obviously this is a very difficult problem. The question you asked me, solve international surveillance cooperation in less than two minutes. But I'll give it my best shot. I think some of the other speakers, some of my co-panelists, mentioned the importance of privacy protections flowing with the data, and also the importance, I think Commissioner Phillips mentioned this, the importance of countries with shared values having shared protections. And I think it absolutely should be possible. Now I realized that in Washington, "should" is often a very dangerous word. But I think that it should be possible for countries in the EU and the United States, the country of my birth, the United Kingdom, with shared commitments to the rule of law, shared commitments to free expression and privacy and democracy, shared strategic and economic interests, to cooperate, to extend rights of redress to each other's citizens the way the United States government did with the passage of the

[Judicial] Redress Act amending the Privacy Act of 1974 in order to try and save Privacy Shield in the spring of 2017. I think extension of rights, and also cooperation, a coalescing on what those privacy protections that should travel with the data is. Unfortunately, the United States used to be the leader on commercial privacy in the early 1970s. It sort of abdicated that to Europe, and now the GDPR Fair Information Practices model that the Europeans have is the emerging global market. But if the US cooperated on that as well, I think it could go a great deal towards solving the broader problems of international cooperation on surveillance.

Cantwell: I just want to follow up. I actually think we might be able to achieve that. But then, what are we going to do about the fact that we don't control--well, Senator Wicker and I do have votes on this in the larger body, but we don't control these agencies and we certainly don't control executive orders, and with a presidential executive order, all we can do is fight it, and say that we think it's too broad. So how-- I'm an agreement, we can solve our commercial issues, I just don't know if we're still—if the commercial industry is still going to get tethered to, you know, a national policy by an executive branch that thinks that, you know, we need to go further. Personally, I think we need way more transparency on the FISA Court. These are--we blurred the line in the Patriot Act, and we just, we've got to do more due diligence here. Thank you, Mr. Chairman.