Brussels, November 2020

BSA | THE SOFTWARE ALLIANCE'S COMMENTS ON THE REVIEW OF THE EU'S TRADE AND INVESTMENT POLICY

BSA | The Software Alliance ("BSA"),[1] the leading advocate for the global software industry, welcomes the opportunity to provide input on the consultation note "A renewed trade policy for a stronger Europe." The swift confirmation of Executive Vice-President Dombrovskis to lead the Trade portfolio sends a positive signal of the importance of trade at a time of economic distress caused by the Covid-19 pandemic. Under the 2015 'Trade For All' strategy, the European Union has implemented an ambitious and assertive trade agenda that led to the adoption of numerous trade agreements, and to strengthening the European Commission's ability to identify and address trade barriers across sectors and regions. Importantly, this approach also elevated Europe as a thought-leader on values-based policy and as a leading advocate for open trade and fair multilateralism on the global stage. Over the past five years, the world has continued to evolve. EU trade policy should accurately reflect today's and prepare for tomorrow's geopolitical, economic and social realities.

Data is a critical component of the modern digital economy – powering innovation and growth across the globe and enabling organizations to create new jobs, boost efficiency, drive quality, and improve output. Many companies and governments have engaged in a digital transformation to improve their efficiency and their ability to service their customers. The Covid-19 pandemic has accelerated this trend and has further highlighted the importance of digital technologies and the benefits of digital transition for governments, economies and societies across the globe.[2] Businesses across industry sectors are moving their operations online and engaging in / accelerating their digital transformation in part because of the measures (including social distancing) in place to mitigate the effects of COVID-19 on societies and economies.

Unfortunately, trade barriers and digital protectionism are growing at the very time that digital trade and connectivity are helping sustain economic activity and employment. A core foundation of digital

[1] BSA | The Software Alliance (www.bsa.org) is the leading advocate for the global software industry before governments and in the international marketplace. Its members are among the world's most innovative companies, creating software solutions that spark the economy and improve modern life. With headquarters in Washington, DC, and operations in more than 30 countries, BSA pioneers compliance programs that promote legal software use and advocates for public policies that foster technology innovation and drive growth in the digital economy.

BSA's members include: Adobe, Akamai, Atlassian, Autodesk, Bentley Systems, Box, Cadence, Cloudflare, CNC/Mastercam, DocuSign, Dropbox, IBM, Informatica, Intel, Intuit, MathWorks, McAfee, Microsoft, Okta, Oracle, PTC, Salesforce, ServiceNow, Siemens Industry Software Inc., Sitecore, Slack, Splunk, Trend Micro, Trimble Solutions Corporation, Twilio, and Workday.

[2] World Trade Organization, Information Note 'E-Commerce, Trade and the Covid-19 Pandemic,' 4 May 2020 https://www.wto.org/english//tratop_e/covid19_e/ecommerce_report_e.pdf

Avenue des Arts 44
1040 Brussels
Belgium

P +32 (0)2 274 13 10
W bsa.org
EU Register of Interest Representatives 75039383277-48

transformation is the ability for data to move seamlessly across borders. Digital trade represents an ever-growing part of today's global economy. It is estimated that 60% of global GDP will be digitized by 2022.[3] Across all sectors, companies in Europe and around the world are relying more than ever before on the ability to access data across international borders, to run and improve their internal operations and to connect with their value-chain and better service their customers.[4] By extension, the ability to leverage digital technologies will critically contribute to the EU's economic recovery, and help reach other stated Commission policy objectives such as SME empowerment, or the green transition. As the European Strategy for Data rightly points out "European companies operate in a connected environment that goes beyond the EU's borders, so that international data flows are indispensable for their competitiveness."[5]

From an enterprise software industry perspective, EU trade policy must reflect that digital economy increasingly enables goods and services trade, helps build resilience and recovery, and further transforms and grows European economy.[6] The software industry is fundamentally an enabler to all other sectors. By offering trusted and responsible software solutions to support their business clients' data-processing needs, enterprise software optimizes the use of digital technology to support and improve business operations, empowering other companies to focus on their core business and doing what they do best.

The EU must continue leading by example by strengthening its commitment to enabling the free flow of data and to continue resisting attempts to introduce data localisation measures or requirements. A European approach to the sharing, storing and processing of data must continue to be shaped according to Europe's values and based on the principle of openness. As the Commission starts to unveil its policy proposals on digital issues, it is critical that these hallmarks continue to unequivocally drive European policy making.

Our submission focuses on digital trade and the movement of data, recognizing the enabling role of digital technologies for all economic sectors and for Europe's COVID-19 economic recovery.

Question 1: How can trade policy help to improve the EU's resilience and build a model of open strategic autonomy?

Europe has a long tradition of openness within its borders and to the world, particularly in international commerce and trade, and in the movement and exchange of technologies, knowledge, and ideas. The EU's prosperity and international leadership position today is built upon this lasting commitment to the international flow of goods, services, and information. It is only fitting that Europe's upcoming trade and investment strategy as well as in its broader policy agenda preserve this important legacy.

Commission President Von der Leyen has set, in her political guidelines, the ambition for Europe to be fit for the digital age including by achieving technological sovereignty in some critical technology areas.[7] More recently, she expressed that "Europe must have [the capability] to make its own choices, based on

[3] FutureScape, 'Worldwide IT Industry 2019 Predictions, IDC, 2018,' https://www.idc.com/getdoc.jsp?containerId=US43171317
[4] See annex for examples.
[5] European Strategy for Data, COM(2020) 66 final, page 23.
[6] BSA Digital Trade Agenda 'Advancing Digital Trade – An Agenda for Accelerating Economic Growth and Innovation,' https://www.bsa.org/policy-filings/advancing-digital-trade-an-agenda-for-accelerating-economic-growth-and-innovation
[7] 'A Union that strives for more, My agenda for Europe,' https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf

its own values, respecting its own rules." [8] She placed free flow of data on equal footing with privacy cybersecurity and connectivity principles for building Europe's digital decade in her 2020 State of the Union address.[9] As the concept of (technological) sovereignty is being further defined at EU level, BSA agrees with President Von der Leyen's above definition and fully supports the components of 'open strategic autonomy' mentioned to in the consultation paper: stronger alliances with like-minded partners; a fairer and more sustainable globalization with strong and up-to-date multilateral rules; the diversification of supply chains; topped by a belief in "the opportunity of openness."[10]

BSA endorses this perspective. Openness must remain a guiding principle and is a prerequisite to a stronger and more resilient Europe. Trade policy can and must facilitate a balanced environment conducive to both an assertive approach to protecting European consumers and businesses invested in the region, and to digital transformation as an economic growth purveyor. Europe's resilience is closely linked to its ability to be part of global supply-chains and requires forward-looking digital trade chapters to be an integral part of the EU's trade and recovery agenda. Translated in digital economy terms, an open trade policy should among others:

- preserve the ability for companies to use the technology of their choice and not be required to use local technology;
- not require or pressure companies to transfer or disclose their technology—such as source code or trade secrets, including algorithms—as a condition for market access;
- support voluntary, internationally recognized standards, and refrain from imposing conflicting national standards on market participants;
- not impose data localization requirements or restrict cross-border data transfers as a market access barrier, and should promote interoperable frameworks to facilitate data transfers;
- adopt and maintain legal frameworks that protect personal information without allowing for unnecessary or disguised restrictions on trade;
- not undermine encryption in commercial products, and not impose restrictions on security technologies used to safeguard against intrusions.

Question 3: How should the multilateral trade framework (WTO) be strengthened to ensure stability, predictability and a rules-based environment for fair and sustainable trade and investment?

At a time of rising global protectionism, the WTO is an important convener to promote the virtues of multilateralism and forward-looking (digital) trade rules. The WTO must have robust and efficient enforcement tools and dispute resolution mechanisms. This would contribute to ensuring that members do not resort to overusing trade defensive measures such as tariffs and customs duties.

On digital trade particularly, the WTO has a stronger role to play. Over 160 countries have WTO services commitments, often covering cross-border supply of digital services. Between 2010 and 2020, there has been a sharp increase in regional negotiations on cross-border data transfers.[11] The WTO processes and

[8] 'Shaping Europe's digital future: op-ed by Ursula von der Leyen, President of the European Commission,' https://ec.europa.eu/commission/presscorner/detail/en/AC_20_260
[9] 'State of the Union 2020,' https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655
[10] See former Commissioner Hogan review launch address, https://ec.europa.eu/commission/commissioners/2019-2024/hogan/announcements/speech-commissioner-phil-hogan-launch-public-consultation-eu-trade-policy-review-hosted-eui-florence_en
[11] As of 2010, approximately 50 countries (including 21 APEC members, 34 OECD members and various TPP negotiating parties). As of 2020, over 100 countries (including WTO members engaged in the Joint Statement Initiative e-commerce negotiations, African economies engaged in

in particular the Joint Statement Initiative (JSI) on e-Commerce should elevate important digital trade principles, such as privacy, security and cross-border data flows. The EU commitment to the JSI negotiations sends a strong message to the world that openness and responsible use of data should go hand-in-hand.

BSA welcomes the ongoing EU engagement in Geneva where it is uniquely positioned to champion cross-border data policies that foster innovation, economic growth, and trust in the digital economy. Speaking both for its EU- and global-based member companies, and the thousands of EU manufacturers, service providers, and exporters that rely on global access to BSA member technologies, BSA strongly believes WTO members should commit to the prohibition of cross-border data transfer restrictions and data localization mandates. For purposes of business predictability and legal certainty, those commitments should be clearly enforceable, and should not be easily evaded. BSA encourages the European Commission to reinforce its leadership at the WTO and close cooperation with like-minded allies in advancing these important international norms.

Question 4: How can we use our broad network of existing FTAs or new FTAs to improve market access for EU exporters and investors, and promote international regulatory cooperation–particularly in relation to digital and green technologies and standards in order to maximise their potential?

Forward-looking digital trade rules are critical to job creation, economic competitiveness, diversification of sourcing and software-enabled innovations such as cloud computing, artificial intelligence, smart devices, and other emerging technologies. Companies of all sizes and across all sectors — from agriculture and manufacturing to financial services and health care — rely on smart digital trade policies suited to today's innovation ecosystem, including the ability to move data across borders. In ongoing and future bilateral, regional, and multilateral negotiations, forward-looking digital trade rules are critical. In this context, Free Trade Agreements (FTAs) are an important tool to promote European values and elevate standards globally, provided they also support a progressive framework that builds resilience and diversity of supply-chain and resist unjustified restrictions to the movement of data. Thus, robust digital trade provisions should reflect the transformative role of technology in supporting the growth of EU's economy and be built on four key principles of digital trade:

1) Permit the free flows of data across borders;
2) Prevent data localization mandates for storage or processing of data;
3) Protect algorithms, source code, and encryption keys;
4) Prohibit the imposition of tariffs or customs duties on electronic transmissions.

Trade agreements could also be used as another channel to promote regulatory cooperation between EU and third countries' data protection authorities to further the interoperability of privacy regimes. Regulatory cooperation mechanisms should not be about impeding the independence of the regulators, but rather foster best practices. Additional future-looking provisions on machine learning and data analytics, and on open government data would also contribute to a truly conducive environment for digital transformation. (See additional input in response to question 6.)

the African Continental FTA digital trade chapter negotiations, as well as the countries engaged in relevant negotiations in ASEAN, RCEP, the Pacific Alliance, and other bilateral and regional fora).

Question 5: With which partners and regions should the EU prioritise its engagement? In particular, how can we strengthen our trade and investment relationships with the neighbouring countries and Africa to our mutual benefit?

The EU collectively is among the strongest political and economic leaders on the global stage and its trade policy needs to account for the global reach of EU's influence. As mentioned above, the EU plays a critical role in elevating principles and reinforcing rules in the trade space. Its economic and trade weight also makes it a primary trading partners to numerous economies. With regards to digital trade, EU's engagement would therefore be welcomed across the board and BSA supports the rapid conclusion of ongoing negotiations with Australia and New Zealand including a strong and forward-looking digital trade chapter.

Moving forward and recognizing strategic, resources and timing considerations, BSA recommends that DG TRADE prioritizes the following markets:

- United Kingdom: The UK and the EU are each other's most integrated trading partners. In both economies, the software industry sustains economic growth rates, supports job creation, pays higher wages, and invests billions of euros/pounds in research and development. Software is at the forefront of data-driven innovations in service to all sectors and all levels of the economy, including farming, manufacturing, services, education, healthcare, banking, and finance. The EU and the UK stand to benefit from an ambitious digital trade agenda that preserves the ability of companies to transfer data across borders, strictly limits data localization requirements, and precludes the forced transfer of, or access to, software source code or algorithms. The absence of a digital trade chapter would heavily impact trade across the Channel, create legal uncertainty and might result in lower privacy protection for European consumers. Strong provisions on data flows are all the more important as, at present, it is unclear whether the EU will give privacy adequacy to the UK. In the absence of an adequacy decision, businesses will not be able to use the primary mechanism afforded by the GDPR to transfer of personal data outside the EU and into the UK. For detailed recommendations, please see BSA position paper 'Digital Trade in the EU-UK Free Trade Agreement' at: https://www.bsa.org/policy-filings/emea-digital-trade-in-the-eu-uk-free-trade-agreement
- ASEAN & APEC countries: Over the past two years, APEC and ASEAN countries have substantially ramped up their digital trade agenda, engaging in regional agreements with digital chapters as well as through bilateral negotiations, including with the EU and the UK. The Comprehensive and Progressive Trans-Pacific Partnership (CPTPP)[12] countries have agreed to prohibit localization requirements and cross-border data transfer restrictions and have committed to binding dispute settlement. The Digital Economy Partnership Agreement (DEPA)[13] reaffirms countries' existing commitments on data transfers and data localization. Digital trade and cross-border data flows are global in nature. In order to facilitate trade with APEC/ASEAN countries, the EU should consider supporting the emergence of a framework which enables consistency and interoperability amongst the nations. Such a step would facilitate greater market access and integration with the dynamic Asia-Pacific region, accelerate supply chain diversity, and strengthen digital trade given the strong e-Commerce chapters in these agreements.
- United States: The EU and the US remain to this day each other's most important partner, with the US representing 15.2% of the total EU trade in 2019 and the EU benefiting from a 153 billion

[12] CPTPP signatories are: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.
[13] The DEPA is a trilateral digital economy agreement among Chile, New Zealand, and Singapore.

euros trade surplus with the US.[14][15] Data transfers are a critical underpinning component of that relationship. The absence of a comprehensive EU-US trade agreement is impacting transatlantic trade to the extent that it maintains some level of friction and complexity in daily operations of exporters / imports on both sides; and the EU and the US in fact share a lot of similar or at least compatible digital trade provisions. The cornerstone of EU-US digital trade though is the movement of data. The EU and the US clearly share the same commitment to the importance of cross-border data flows, and to the importance of protecting privacy and security. While the objectives are shared, the approaches are different. A recent decision from the European Court of Justice[16] case led to the invalidation of the EU-US Privacy Shield, which was the primary transfer mechanism under EU law for over 5,300 companies—including over 250 with headquarters in Europe—to transfer personal data to the US. That case also creates uncertainty with regards to the robustness and durability of the second most used transfer mechanism, used by 90 percent of companies that transfer data internationally to some 180 countries.[17] The complexities of the privacy framework underpinning personal data flows creates a gordian knot that trade policy should look to help detangle as quickly as possible. Therefore, a digital trade agreement should be a top priority between the two economies, including robust digital trade provisions as outlined in our response to question 4, and complementing negotiations for an enhanced Privacy Shield that enables companies to operate on both sides of the Atlantic with trust and security, and without interruption.

Previous experience underscores how important multilateral cooperation is in countering coercive, distortive, and unfair trade policies in third countries. By aligning with like-minded countries and coordinating policy, trade and diplomatic efforts, Europe stands a much better chance in successfully addressing discriminatory market access barriers. For example, Europe should also increase cooperation with Japan and the United States through the "Trilateral Trade Ministers", an important cooperative mechanism that has a successful track record of reversing discriminatory policies in key markets, such as the Preferential Market Access Policy in India and a number of Chinese industrial and investment policies designed to disadvantage foreign companies.

Question 6: How can trade policy support the European renewed industrial policy?

COVID-19 has rapidly forced many aspects of public life to a remote environment for work, health services, and learning.[18] Trust online and digital transformation are more than ever before key enablers of a growing digital economy, across sectors and geographies. European industry directly provides 35 million jobs and more than 20% of the EU's total value-added. As the trade policy review consultation paper points out, one out of seven European jobs today depends on exports. A recent McKinsey report also estimates that Covid-19 could leave up to 59 million jobs at risk in Europe, equalling to 26 percent of total

[14] DG TRADE, top trading partners: https://ec.europa.eu/trade/policy/countries-and-regions/statistics/
[15] Eurostat: EU-US trade in goods: €153 billion surplus in 2019, https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20200311-1
[16] ECJ press release on Schrems vs. Facebook : https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-07/cp200091en.pdf
[17] BSA Statement on European Court of Justice Ruling on "Schrems II" Case, https://www.bsa.org/news-events/news/bsa-statement-on-european-court-of-justice-ruling-on-schrems-ii-case
[18] Eurofound estimates that teleworking might be the normal form of work for at least 30 percent of the working population in Europe during the COVID-19 crisis. 'Regulations to address work–life balance in digital flexible working arrangements,' 2 July 2020 https://www.eurofound.europa.eu/publications/report/2020/regulations-to-address-work-life-balance-in-digital-flexible-working-arrangements

employment in EU27.[19] Strengthening European industry and advancing its digitalization are critical to European trade, economy and employment.

In its New Industrial Strategy Communication, the European Commission sets important parameters for its renewed industrial policy including for the digital transition: "European industrial policy [must be] based on competition, open markets, world-leading research and technologies and a strong single market which brings down barriers and cuts red tape" while resisting "simplistic temptations that come with protectionism or market distortions."[20] The strategy also aims to "reinforce Europe's industrial and strategic autonomy." It is crucial to reconcile this objective with the following trade and market realities:

- European manufacturing is an export sector: it accounts for 80% of goods export;[21]
- It already benefits from digitalization to gain competitiveness, improve their services and products, and reach new markets, and it continues to further transform;[22]

The Industrial Strategy also stresses that standards and certification on one hand, and Intellectual Property on the other, can help boost competitiveness and strengthen Europe's tech sovereignty. Within the EU, intellectual property products have become one of the main drivers of investment, almost doubling between 2000 and 2016.[23] According to the European Patent Office, European companies and inventors account for largest share of filings, EU countries having filed more parents than the United States and China combined in 2019.[24] The top 50 companies filing over 70% of these patents are primarily headquartered in Germany, South Korea, the US, China, Sweden and the Netherlands and ranging across sectors.

These figures first show the dynamism of innovation in Europe. They also show that non-domestic companies are deeply vested in Europe's innovation, growth and competitiveness. The software industry itself was responsible for €1 trillion of total EU value-added GDP in 2016, with an increase of 9,9% from 2014, compared to overall GDP growth of 6% over the same period. Across the EU, work supported by the software industry through direct, indirect, and induced contributions represents 12.7 million jobs.[25]

Key trading partners, including the United States, Japan, Canada, Australia, New Zealand and Singapore are already integrating cutting-edge and ambitious digital provisions in new trade agreements. European trade agreements should include the foundations critical to Industry 4.0 and an innovative manufacturing sector. Any measure that would lead to discriminating or be otherwise restrictive to non-indigenous companies would *de facto* significantly hamper Europe's vibrant innovation eco-system. Several targeted initiatives in the digital field are unfortunately going in that direction and creating friction in the marketplace. Moreover, an industrial strategy based on a narrower, protectionist approach could trigger trade retaliation by major trading partners, who could erect similar barriers to European exports, particularly in machinery and high-end manufactured products, but also limiting the ability for European digital companies to grow and compete at a global level. From a trade perspective, the EU should continue to support voluntary, internationally recognized standards, and refrain from imposing conflicting national

[19] 'Safeguarding Europe's livelihoods: Mitigating the employment impact of COVID-19,' 19 April 2020 https://www.mckinsey.com/industries/public-sector/our-insights/safeguarding-europes-livelihoods-mitigating-the-employment-impact-of-covid-19?cid=soc-web#

[20] 'A New Industrial Strategy for Europe,' COM(2020) 102 final

[21] Eurostat 'Extra-EU trade in manufactured goods' https://ec.europa.eu/eurostat/statistics-explained/index.php/Extra-EU_trade_in_manufactured_goods

[22] Digital Economy and Society Index Report 2020 (DESI) https://ec.europa.eu/digital-single-market/en/integration-digital-technology

[23] 'Overview of the EU industrial sector' https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=11181

[24] EPO Patent Index 2019, https://www.epo.org/news-events/press/annual-results.html

[25] Software.Org, 'The Growing €1 Trillion Economic Impact of Software' https://software.org/reports/2018-eu-software-impact/

standards on market participants. European trade agreements should reflect core values of trust, transparency and market fairness by enabling the free flow of data, prohibiting forced technology transfers and ensuring technology choice and encouraging open digital architectures. Innovation can only strive if it is supported by the appropriate intellectual property framework, including for patents and trade secrets, copyrights, appropriate limitations on liability for technology providers for legal claims arising from conduct by third parties.

The EU's digital trade position already contains robust provisions, in alignment with like-minded partners. BSA recommends that DG TRADE considers additional future-looking provisions on machine learning and data analytics, and on open government data.[26] These types of provisions will help create a truly conducive environment for digital transformation; deliver many ambitions of both the Industrial Strategy and the Data Strategy; and contribute to Europe's attractiveness of foreign direct investment and talents.

Question 10: How can digital trade rules benefit EU businesses, including SMEs? How could the digital transition, within the EU but also in developing country trade partners, be supported by trade policy, in particular when it comes to key digital technologies and major developments (e.g. blockchain, artificial intelligence, big data flows)?

Digital technologies enable companies to run, improve and optimize their day-to-day operations including research and development; product design; logistics and supply-chain management. According the Digital Economy and Society Index (DESI) 2020, and prior to the Covid-19 pandemic, European enterprises were increasingly digitizing, but most SMEs are not yet using digital technologies.[27] Supporting cloud computing and digital technologies uptake by SMEs will enhance their ability to expand to new markets and make them more competitive and innovative on export markets. Trade policy can help that approach by focusing on the following actions:

- Reinforcing to European audiences the benefits of openness in both trade and internal market perspective;
- Continuing to promote robust digital trade rules internationally and to push back against rising digital protectionism in order to i.a. preserve the ability of companies including SMEs to transfer data across border; strictly limit data localization requirements; and preclude the forced transfer of, or access to, software source code or algorithms;
- Prohibit digital customs duties by agreeing on a permanent moratorium within the WTO;
- Considering additional future-looking provisions on machine learning and data analytics, by encouraging governments to share data sets in machine-readable and accessible forms for use by the public (see response to question 6 on open government data);
- Promote the development and use of Artificial Intelligence in a transparent, explainable and fair manner;
- Include technology choice provisions and encourage the widespread use of open architectures in key technologies, including cloud computing, Artificial Intelligence and 5G telecommunications;
- Shaping the development of investment and export controls to ensure they are narrowly tailored to address legitimate national security and human rights concerns while avoiding

[26] BSA Digital Trade Agenda 'Advancing Digital Trade – An Agenda for Accelerating Economic Growth and Innovation,' https://www.bsa.org/policy-filings/advancing-digital-trade-an-agenda-for-accelerating-economic-growth-and-innovation

[27] 38.5% of large companies relied already on advanced cloud services and 32.7% were using big data analytics.

unintended consequences that may undermine the competitiveness of innovative industries. Controls should be adequate, specific, and narrow, and they need to be developed and adopted at international level (Wassenaar list) as only then they will be effective. Foreign availability and open source nature of specific technologies should be also assessed to determine effectiveness of controls;

- Digitalizing operational trade activities by deploying new technologies (e.g. blockchain) for customs clearance activities and e-licensing initiative for export license applications submitted across the EU;
- Implementing EU-wide export licensing simplifications for dual-use items. This would create level playing field for EU exporters. Once simplifications are implemented, their effectiveness should be continuously measured and reviewed to identify any potential changes needed to ensure that solutions meet their objectives.

Question 11: What are the biggest barriers and opportunities for European businesses engaging in digital trade in third countries or for consumers when engaging in e-commerce? How important are the international transfers of data for EU business activity?

Cross-border data flows are essential to the global economy and to the digital transition. Covid-19 has further highlighted the importance of e-commerce and the benefits of digital transition for government, companies, and citizens. Many businesses are moving their operations online and are accelerating their digital transformation. Cross-border data flows support digital technologies that help companies access new markets (for instance through e-commerce channels), lower barriers to innovation and improve competitiveness, including for M-SMEs.

Companies can make the most of their data when they are not limited by location: data moving seamlessly across offices and locations means that colleagues based in different countries can work on common projects; a company can analyze data of its production facilities across different countries to improve production cycles, supply-chain and maintenance schedules, leading to better resource allocation and lower costs.[28] That is true for companies of all sizes and all economic sectors.

Reversely, restricting the movement of data, for instance through *de facto* localization requirements, creates unnecessary costs, difficulties and uncertainties that hamper business and investments:

- These measures hurt local companies by preventing them from accessing innovative technologies, which can preclude local industry from participating in global supply chains and accessing customers in foreign markets. For instance, they may require companies to set up additional processing and storage facilities locally, thereby duplicating infrastructure and increasing operating costs;
- Goods and services that use data in various phases of their lifecycles are more competitive if they can use data from around the world;
- In addition, because data transfer restrictions create a significant burden on the implementing country's overall competitiveness, they also undermine the country's attractiveness as a destination for investment and R&D;

[28] Casalini, F. and J. López González (2019-01-23), "Trade and Cross-Border Data Flows", OECD Trade Policy Papers, No. 220, OECD Publishing, Paris. http://dx.doi.org/10.1787/b2023a47-en)

- They may also lead to conflicts of laws as other countries may impose similar but contradictory requirements concerning the movement of data across border.

The EU should ensure that third countries are prohibited from requiring companies to transfer their technology, IP, production processes, or other proprietary information as a condition for accessing the market. It should also create instruments that allow its companies to protect source code and algorithms and ensure that they are not required to share those, or trade secrets. This could also be achieved by fostering innovative encryption products. Encryption is an important tool to protect privacy and security in the digital ecosystem. The EU should protect innovation in encryption products to meet consumer and business demand for product features that protect security and privacy while allowing law enforcement access to communications consistent with applicable law.

Strong privacy safeguards are not a luxury but a necessity to earning users' trust in a global digital economy and that governments should adopt legal frameworks that protect personal information without allowing unnecessary or disguised restrictions to trade. We are agnostic as to whether privacy in the context of data flows should be part of trade mechanisms as such, but governments do need to ensure that their privacy and cybersecurity regimes are compatible and interoperable. BSA welcomes the leading role that the European Commission is taking on the global scene to encourage international privacy best practices, convergence and interoperability of privacy systems. This is key to ensuring that businesses can operate under clear rules and are not unduly restrained in their ability to move data across border under the disguise of privacy or security concerns.

In the European legal framework, the EU General Data Protection Regulation (GDPR) provides a list of mechanisms that can be used by organizations to comply with the Regulation's general principles and specific requirements when transferring personal data outside the EU and EEA. Different organization types and business models require the use of different transfer mechanisms that are not interchangeable. It is important that businesses be able to continue using the full range of existing GDPR-compliant data transfer mechanisms, such as adequacy decisions and Standard Contractual Clauses (SCCs). These mechanisms are critical to support global data flows and are built with strong safeguards and accountability mechanisms. SCCs are the main transfer mechanism used by 90 percent of companies that transfer data internationally. They underpin transfers of personal data from the EU to some 180 countries, including Australia, Singapore, South Korea, Brazil, India, and Mexico.

Recent ECJ jurisprudence is creating legal uncertainty for businesses and consumers with regards to the robustness and sustainability of existing transfer mechanisms under the GDPR, primarily SCCs and Binding Corporate Rules.

EU Trade policy can play a decisive role in this respect. Most of the EU's digital provisions are strong and modern commitments i.a. against customs duties on electronic transmissions or on consumer protection. The current EU language on data flows in trade agreements is helpful in that it endorses binding trade commitments specifically focused on cross-border data transfers; it lists four types of measures that arguably constitute the primary means through which countries today often seek to limit cross-border data transfers; it underscores the trade-inhibiting impact that such measures can have.

However, the EU's position on data flows is not at the level of ambition at which it should be. It raises concerns due to the self-declaratory nature and potentially unlimited scope of exceptions with regards to privacy safeguards. The exception in the EU proposal can be invoked by a party as long as that party declares that a measure is "to ensure the protection of personal data and privacy." This broadly construed

exemption enables trading partners to potentially justify localization and data flow-impeding measures by self-declared restrictions based on privacy concerns. This position is also going against a general trend by like-minded countries of adopting more progressive digital chapters.[29]

The trade policy strategy must reflect that cross-border data flows, and the digital technologies they enable, are a cornerstone of EU's trade, growth and societal benefits in a modern economy.[30] Privacy can and must co-exist with economic prosperity and should be an important driver of the digital transformation. With the right privacy safeguards in place, international data flows enable digital transformation and economic growth. BSA strongly recommends that DG TRADE and other relevant Commission services work closely with Members States and European Parliament to update the EU's position on cross-border data flows to its forward-looking, open trade agenda. More specifically, revised language would ambition to exhibit strong legal enforceability, reflected in robust trade commitments and narrow exceptions. It should spell out a prohibition of data flows restriction and include derogations permitted in specified circumstances, in the case of measures "necessary" to achieve a legitimate objective.

For further information, please contact:
Isabelle Roccia
Senior Manager, Policy – EMEA
isabeller@bsa.org

[29] Some examples include USMCA, CP-TPP, DEPA, Singapore-Australia FTA and US-Japan Digital Trade Agreement.

Annex – Illustrative list of European examples of digital transformation relying on cross-border data flows

(**Italy**) **Lamborghini** has developed a state-of-the-art smart factory that uses IoT sensors and robots to boost collaboration between machines and employees on-site. The data that is collected and reported at every step of the manufacturing process can then be accessed from anywhere in the world thanks to the seamless transfer of data across borders allowing teams to control any aspect of the production cycle to drive efficiency and boost production volume.[31]

(**Sweden/Germany**) Electric car start-up **Uniti** has partnered with **Siemens** to create and utilize digital twins – virtual replicas of the electric cars they produce – allowing the company to optimize the engineering and production cycles, even across international boundaries. This technology also gives the company an edge by enabling it to make predictions about how the car will function in different kinds of conditions, helping this startup become an industry innovator.[32]

(**France**) French retail and food distribution leader **Casino Group** launched into the Cloud Computing market to implement and use new generation "data centers" within unused areas of warehouses and unused shop reserves. This activity enables the Group to produce income and make savings, especially thanks to the rental of free spaces and the supply of the necessary electricity for the functioning of the servers. Moreover, the installed servers generate heat which could be reused to heat up buildings. This green energy is managed by GreenYellow, the energy branch of Casino Group. Started in 2018, the ambition is to open around 5 sites each year by 2023.[33]

(**Germany**) Approximately 1,800 suppliers globally deliver over 30 million parts a day to **BMW**'s production facilities, reflecting the breadth and complexity of data transfers at just one company. Likewise, BMW's "Connected Distribution" delivery process uses geolocation and other vehicle-specific data to ensure that the 10,000 vehicles it produces daily are delivered effectively to its global customer base.[34]

(**Spain**) Retail giant **Inditex** is developing proprietary IT architecture to run the company's digital operations, improving its flexibility and scalability. Inditex currently sells in 202 markets through its online platforms and 7,000 stores in 96 markets. The group is expanding e-commerce platforms to every country in the world by 2020 and rolling out an integrated stock management system to combine inventories, purchasing, distribution and orders. The objective of these operations is to develop a completely integrated, digital and sustainable network of stores by 2020.[35]

(**Ireland**) Nutrition group **Glanbia** employs over 7,385 people across 34 countries and sells or distributes its products in over 100 countries. The company is growing its online channel in Europe, as well as to leverage digital capability on a global basis to drive growth, improve competitiveness and enhance

[31] KPMG, "Industry 4.0 Case Studies," https://home.kpmg/xx/en/home/insights/2018/11/industry-4-0-case-studies.html
[32] Siemens, "Automotive Case Study: Uniti Sweden," https://www.plm.automation.siemens.com/pub/case-studies/72219?resourceId=72219
[33] Launch of the first new-generation "data center" in a Cdiscount warehouse, https://www.groupe-casino.fr/en/launch-of-the-first-new-generation-data-center-in-a-cdiscount-warehouse/
[34] BMW, "Connected, flexible, autonomous: BMW Group expands use of innovative technologies in production logistics," https://www.press.bmwgroup.com/global/article/detail/T0287775EN/connected-flexible-autonomous:-bmw-group-expands-use-of-innovative-technologies-in-production-logistics?language=en
[35] Five features of Inditex's 2020-2022 digital transformation strategy, https://www.essentialretail.com/news/five-features-inditex-digital/

customer service. The company is now running 1,200 advertising, social media, digital and merchandising assets in over 30 countries across the world.[36]

(**France**) Luxury group **LVMH** manage 75 different brands spanning fashion, spirits and hospitality. The group employs 145,000 people across the world and reported sales of 42.6 billion euros in 2017. The group is using digital technologies and innovation across its brands to create value, enrich customer experience and attract new customers. Beauty stores Sephora are using smart mirrors to enable customers try on makeup using augmented reality. Spirits brand Moet Hennessy uses artificial intelligence to help customers create tailored tasting experiences. LVMH reports that profitability within digital is slightly higher than it is with brick-and-mortar assets. The group also expects profitability and grow rate will remain higher.[37]

(**Ireland**) Packaging company **Smurfit Kappa Group plc** is managing integrated, secure system of over 350 facilities and a global reach. Its innovation power runs on contributions from over 700 designers in 35 countries. The company also runs 25 centers around the world where customers can experience nearly 70,000 images from a variety of real retail shelves around the globe, to model and improve the category performance of their product, and evaluate the visibility and brand recognition.[38]

(**Germany**) **Zalando** is the largest European e-commerce platform, selling clothing and accessories from more than 1,500 retailers. Based in Berlin, the company is able to serve 31 million customers in 15 EU countries through a network of connected warehouses located in France, Spain, Germany, Italy, and Poland.[39]

(**Denmark**) Global shipping giant **Maersk** is creating solutions to digitize global trade, including a collaboration with IBM on blockchain to build trust and transparency in global supply chains while boosting efficiency. The solution will help manage and track the paper trail for tens of millions of shipping containers across the world by digitizing the supply chain process from end-to-end, ensuring transparency and the highly secure sharing of information among trading partners. When adopted at scale, the solution has the potential to save the industry billions of dollars.

(**The Netherlands**) Dutch architecture firm, **Office of Metropolitan Architecture (OMA)**, is using cloud-based collaboration tools between its offices in Rotterdam, New York, Hong Kong, Beijing, Doha, Dubai and Brisbane. This allows the firm to drive efficiency in their design process and to expand their ability to propose solutions to their public and private clients in Europe and international markets.[40]

(**France**) In January 2019, retail multinational **Carrefour**, which operates in more than 30 countries, announced it was turning to AI to better manage its supply chain in general - and inventories in particular – with the goal to reduce food waste and overstock. A large amount of information gathered from Carrefour stores around the world are being used to "train" the AI system the retailer is deploying. Once

[36] Glanbia annual report 2019, https://www.glanbia.com/~/media/Files/G/Glanbia-Plc/2020/annual-report/Glanbia-Annual-Report-2019.pdf
[37] Day one of LVMH at VivaTech, https://www.lvmh.com/news-documents/news/day-one-of-lvmh-at-vivatech-24th-may-2018/
[38] Every 25 seconds one of our innovation tools is used across 35 countries in 3 continents, https://www.smurfitkappa.com/ie/innovation/tools
[39] Zalando to Expand International Logistics Network, https://corporate.zalando.com/en/newsroom/en/press-releases/zalando-expand-international-logistics-network-new-locations-paris-and. See also https://corporate.zalando.com/en/investor-relations/en/news-stories/zalando-wins-more-active-customers-in-2019
[40] Autodesk BIM 360 Design Expands Global Collaboration Options With Europe Data Center, https://adsknews.autodesk.com/news/bim-360-europe-data-center

enough information is collected, the system will be able to predict specific demand requirements. This will allow Carrefour to better serve its customers around the world.[41]

(**The Netherlands**) **Nutreco** is an international leader supporting livestock farming and aquaculture, which feed millions of consumers worldwide. AT&T helps connect each of their 200 locations in rural areas across Asia, Europe, Latin America, and North America. AT&T's global network empowers Nutreco employees to connect and collaborate securely, whether they are working in the company's Dutch headquarters or in a remote factory.[42]

EFTA/EEA examples

(**Norway**) **Yara**, one of the world's largest fertilizer producers, partnered with IBM to build a digital farming platform. Through the platform, which provides holistic digital services and instant advice to farmers across the globe, Yara and IBM aim to boost the efficiency, transparency, and sustainability of global food production. The initial focus of the joint work lies on farm and field data management as well as data-driven, joint innovation for farmers, which is already successfully launched in various markets across the world.[43]

(**Switzerland**) Logistics leading company **Kuehne + Nagel** launched its own online logistics platform to instantly optimize every shipment, based on the route, transit time and cost. It connects shippers to 20 countries, and can instantly compare sailing schedules and rates between 2,220 port pairs, 7,500 service loops and 54 underlying carriers; changing a process that took days into a matter of seconds without compromising on the service levels and competitive rates.[44]

[41] Carrefour turns to AI for demand forecasting, https://www.supplychaindive.com/news/Carrefour-grocery-AI-demand-forecasting/546188/
[42] AT&T Edge-to-Edge Technologies Provide Platform for Nutreco's Future Growth and Innovation, https://www.business.att.com/learn/customer-stories/nutreco.html
[43] Yara and IBM Launch an Open Collaboration for Farm and Field Data to Advance Sustainable Food Production, https://www.yara.com/corporate-releases/yara-and-ibmlaunch-an-open-collaboration-for-farm-and-field-data-to-advance-sustainable-foodproduction; and IBM, Yara and IBM, https://www.ibm.com/services/client-stories/yara.
[44] Kuehne + Nagel launches eShipAsia to meet the logistics needs of Intra-Asia shippers, https://newsroom.kuehne-nagel.com/kuehne--nagel-launches-eshipasia-to-meet-the-logistics-needs-of-intra-asia-shippers/