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BSA | THE SOFTWARE ALLIANCE'S EVIDENCE ON DIGITAL TRADE AND DATA

SUBMISSION TO THE HOUSE OF COMMONS' INTERNATIONAL TRADE SELECT COMMITTEE

Introduction

BSA | The Software Alliance (“BSA”)¹ is the leading advocate for the global software industry. Its members are among the world’s most innovative companies, creating software solutions that spark the economy and improve modern life. Software is a crucial part of the UK economy. According to a 2018 study, the UK’s software industry supports €85.8 billion in direct value-added GDP (increasing 31.5 percent over two years), 700,000 jobs, and distributed €37.1 billion in wages.²

At a time of economic distress in many regions of the world, including the United Kingdom, international trade is a beacon for recovery. An ambitious digital trade agenda will address the geopolitical, economic, and social challenges of today and tomorrow. BSA supports the UK’s forward-looking efforts to champion a modern digital trade agenda at bilateral, regional and multilateral levels. In view of the increasingly digital nature of trade, we welcome the opportunity to provide evidence to the House of Commons’ International Trade Committee.

Key BSA messages

- Digital technologies increasingly enable goods and services trade, help build resilience and recovery at home, and further transform and grow the economy.
- Trade barriers and digital protectionism are growing around the world at the very time that digital trade and connectivity are helping sustain economic activity, employment and social well-being.
- A primary objective of the UK digital trade agenda must be to preserve the ability of UK businesses to seamlessly transfer data across borders.
- The UK must also champion forward-looking digital trade rules at the multilateral level.
- Domestic policy and trade policy should support one another in reaching digital trade’s full potential.

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, 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 Software.Org, “The Growing €1 Trillion Economic Impact of Software” <https://software.org/reports/2018-eu-software-impact/#united-kingdom-acc>

What are the main barriers faced by UK businesses engaging in digital trade?

Digital economy represents an ever-growing part of today's global economy. It is estimated that 60% of global GDP will be digitized by 2022.³ Businesses increasingly adopt digital technologies to run and improve their internal operations and to connect with their value-chain and better service their customers. From healthcare and manufacturing to agriculture and retail, software-powered digital technologies are becoming an integral part of how companies design, create, and export new products and services; enhance business processes and increase productivity; reach new customers; manage their supply-chain and engage in research and development.⁴ For example, 30% of UK businesses use cloud computing solutions (by comparison to an average of 18% in the EU).⁵ In 2019, it was estimated that Artificial Intelligence could bring a 22% boost to the UK economy by 2030.⁶

A core foundation of digital trade – and of digital transformation domestically – is the ability for data to move seamlessly across borders.⁷ In the enterprise context, data comes in various, sometimes cumulative, categories, primarily: operational data generated by machine processes, non-personal data and personal data, structured and unstructured data. The nature of the data is an important determination to set the right framework for protecting, processing and transferring data.

Unfortunately, trade barriers and digital protectionism are growing around the world at the very time that digital trade and connectivity are helping sustain economic activity, employment and social well-being. The World Trade Organization (WTO) has reported that some 80 countries have imposed export and other trade restrictions in reaction to the COVID-19 epidemic, in addition to a growing number of digital trade barriers that impact the movement of information across borders.

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

A primary objective of the UK digital trade agenda must be to preserve the ability of UK businesses to seamlessly transfer data across borders and to champion this approach at a multilateral level. Stable arrangements help decrease compliance costs and legal uncertainty for economic operators (see below). These arrangements include modern cross-border data transfer provisions in trade agreements. Outside of the trade realm, they also include data protection mechanisms that enable

³ FutureScape "Worldwide IT Industry 2019 Predictions, IDC, 2018" <https://www.idc.com/getdoc.jsp?containerId=US44403818>

⁴ Global Data Alliance, "Jobs in every sector depends upon data flows" <https://globaldataalliance.org/downloads/infographicgda.pdf>

⁵ UK country Profile, EU Digital Economy and Society Index 2020 https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=66933

⁶ Artificial intelligence in the United Kingdom: Prospects and challenges, McKinsey Global Institute, 2019 <https://www.mckinsey.com/~media/McKinsey/Featured%20Insights/Artificial%20Intelligence/Artificial%20Intelligence%20in%20the%20United%20Kingdom%20Prospects%20and%20Challenges/Artificial-intelligence-in-the-United-Kingdom-VF2.ashx>

⁷ Primer on 'Cross-Border Data Transfers & Data Localization,' Global Data Alliance <https://www.globaldataalliance.org/downloads/02112020GDAcrossborderdata.pdf>

trusted transfers of personal data. Under the UK Privacy Act 2018, based on the EU General Data Protection Regulation, the two main instruments currently available to businesses are country-specific adequacy decisions and standard contractual clauses (SCCs).

The United States and CPTPP countries collectively are among the main trading partners for the UK.⁸ The UK has rolled over adequacy decisions from the EU's own adequacy findings for all EU and EEA countries and all 11 EU adequacy to Third Countries.⁹ However only three are CPTPP countries.¹⁰ The UK and the EU are also each other's most integrated trading partners.¹¹ The recently agreed Trade and Cooperation Agreement is an important step forward to preserve seamless EU-UK data flows post-Brexit. It also provides an interim solution for personal data transfers from the EU/EEA to the UK, in the absence of an adequacy decision at this stage. A recent study shows that the aggregate cost to UK companies of no adequacy decision could range between £1 billion and £1.6 billion.¹² It might also lead to a reduction in EU-UK trade, especially digital trade; reduced investment (both domestic and international); and relocation of business functions, infrastructure, and personnel outside the UK.¹³ It is, therefore, imperative for businesses to have a toolbox of available mechanisms to support international data transfers in order to leverage the benefits of digital trade globally.

[What opportunities does digital trade present for UK businesses?](#)

Across all sectors, companies in the UK 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. It is estimated that 75% of the value of data transfers accruing to traditional industries like agriculture, logistics, and manufacturing.¹⁴ These sectors are also primary contributor to UK exporting success: goods account for 53% of total exports; in 2020, 46% of all UK manufactured goods were exported to European countries combined, 14% were exported to the US alone. Digital trade – and digital technologies that enable it – must be addressed as supporting UK growth and competitiveness across all economic sectors.

[What approach\(es\) should the UK take to negotiating digital and data provisions – including those concerning the free flow of data, protection for personal data, net neutrality, data localisation, and intellectual property– in its future trade agreements?](#)

The UK digital trade agenda must reflect that digital economy increasingly enables goods and services trade, helps build resilience and recovery, and further transforms and grows the economy. The UK should continue to work towards modern digital trade provisions in its bilateral and plurilateral agreements. This will serve as a critical example for other countries that look to adopt a digital trade agenda and will set an important precedent for future trade negotiations around the world.

⁸ The UK's independent trade policy: Global Britain? <https://commonslibrary.parliament.uk/the-uks-independent-trade-policy-global-britain/>

⁹ Andorra, Argentina, Canada (commercial organisations), the Faroe Islands, Guernsey, Israel, Isle of Man, Japan, New Zealand, Switzerland, and Uruguay

¹⁰ Canada, New Zealand, and Japan.

¹¹ Matthew Ward, "Statistics on UK-EU Trade," *House of Commons Library*, Briefing Paper Number 7851, December 16, 2019, <https://researchbriefings.files.parliament.uk/documents/CBP-7851/CBP-7851.pdf>

¹² New Economics Foundation and UCL European Institute, "The Cost of Data Inadequacy: The economic impacts of the UK failing to secure an EU data adequacy decision" https://www.ucl.ac.uk/european-institute/sites/european-institute/files/ucl_nef_data-inadequacy.pdf

¹³ Ibid.

¹⁴ Internet matters: The Net's sweeping impact on growth, jobs, and prosperity, McKinsey Global Institute, 2011

https://www.mckinsey.com/~media/McKinsey/Industries/Technology%20Media%20and%20Telecommunications/High%20Tech/Our%20Insights/Internet%20matters/MGI_internet_matters_full_report.ashx

At a time of rising protectionism across the world, it is particularly important to promote strong privacy safeguards and international data flows as pillars of the data economy, and to resist attempts to introduce data localization measures or requirements. Trust and confidence must be a foundation of today's digital economy and trade, which benefits companies of all sizes and across all industry sectors. A core foundation of digital transformation is the ability for data, including personal data, to move seamlessly across borders. Across all sectors, UK organizations are relying more than ever before on the use of modern digital technologies and on the ability to access data across international borders. By extension, the ability to leverage digital technologies will critically contribute to the UK's economic recovery post-COVID. It is important that the UK maintains its international data flows regime so it allows for several options for seamless cross-border data flows across key jurisdictions for the UK economy, and that businesses be able to continue using the full range of existing data transfer mechanisms that support global data flows and are built with strong safeguards.

The UK will set important global precedents as it actively engages on digital trade rules and trust-based governance at global level. It should look to maximize interoperability with existing tools and encourage interoperability among data privacy regimes around the world.

The UK's involvement in international conversations such as the World Trade Organization Joint Statement Initiative on e-commerce is also appropriate as a group of over 80 countries negotiate a new rulebook for e-commerce. 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, the UK stands a much better chance in successfully addressing discriminatory market access barriers. The UK should therefore strive to play a thought-leadership role as the global conversation on multilateral digital trade rules and convergence of privacy regimes continues.

[What does the UK-Japan Agreement indicate about the UK's approach to digital trade and data provisions in future trade negotiations?](#)

BSA supports the UK's forward-leaning posture in digital trade negotiations, as reflected in the outcomes that it has been able to negotiate with Japan and in its commitment to addressing high priority issues, such as cross-border data transfers and data localization, in the WTO Joint Statement Initiative on e-commerce and digital trade.¹⁵

BSA also welcomed the inclusion of robust and forward-looking digital trade provisions in the UK-Japan Comprehensive Economic Partnership Agreement. That agreement supports core features of the digital environment – cross-border data transfers, personal information protection, mechanisms to promote interoperability among privacy law frameworks, transparent access to government information, and consumer protection and choice online. The agreement also prohibits or limits certain digital trade barriers, including data localization mandates, customs duties on software and

¹⁵ See e.g. Remarks by UK Ambassador Julian Brathwaite, *WTO joint initiative on e-commerce* (2020), at <https://www.gov.uk/government/speeches/uk-statement-for-joint-initiative-on-e-commerce-plenary-session> (referencing UK's digital trade proposals and proposal to create a negotiating "small group" specifically focused on cross-border data and data localization issues, given that, "the free flow of data is an essential component of cross-border trade, and this is even more important in the context of COVID-19," and that "[p]rogress will need to be made in these areas if we are to realise our shared objective of agreeing rules that unlock the extraordinary economic potential that a truly global digital economy promises." See also, Remarks by International Trade Secretary Liz Truss, *TheCityUK speech: Liz Truss highlights importance of digital, data and services trade* (Nov. 2020), at <https://www.gov.uk/government/speeches/thecityuk-speech-liz-truss-highlights-importance-of-digital-data-and-services-trade> On the same day, Liz Truss (UK International Trade Secretary) (underscoring for an economy as dependent on services exports as the United Kingdom, the "anti-data localization [provisions and provisions] protecting the free-flow of data" are among the most impactful in the recent UK-Japan agreement, as well as other recent trade agreements, such as the USMCA and the CPTPP.)

other electronic transmissions, and unreasonable measures that mandate the disclosure of proprietary source code and algorithms as a condition of market access. The cross-sectoral application of data localization and data transfer rules, including to the financial sectors, is also an important feature of this agreement.

Finally, BSA welcomed the creativity and willingness of UK negotiators to address new digital trade issues, as reflected (for example) in Article 18.18 (“Emerging Technology Dialogue) May 2020 UK proposal in the EU-UK trade negotiations.¹⁶ We hope that the United Kingdom will carry this ambitious posture on digital trade matters forward in the UK’s other digital trade negotiations.

[What approach should the UK take towards renewing the WTO’s moratorium on customs duties on electronic transmissions?](#)

Many countries around the world, including the UK, have benefited from an unprecedented period of growth and innovation powered by the software-enabled digital economy and undergirded by the WTO Moratorium on Customs Duties on Electronic Transmissions (Moratorium) – an agreement in place since 1998 among the WTO membership not to impose customs duties on cross-border electronic transmissions.

At the WTO, several countries – including India, Indonesia, South Africa, and Sri Lanka – have suggested that the WTO Moratorium should end in an era of increasing digitization of the economy. This view has been premised on arguments that digitization of the economy has resulted in lost opportunities to collect customs duties on imported products, or that the erection of tariff walls on electronic transmissions will benefit protected “infant” industries in developing countries.

At a time of great economic uncertainty, it would be reckless to experiment with unprecedented and untested customs legal concepts that depart radically from international trade and customs law principles and practice in place for over a century. BSA therefore encourages the UK to support an extension of the Moratorium and seek to make it permanent.

[What objectives should the UK have when negotiating digital and data provisions during its accession to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership \(CPTPP\)?](#)

The UK stands to benefit from an ambitious digital trade agenda that preserves the ability of UK 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. BSA welcomes the UK’s request to launch accession negotiations to CPTPP. Accessing to CPTPP will bring benefits of such provisions not only to UK citizens, but also to service providers and manufacturers that rely on data analysis, AI, and cloud computing services to grow, in particular in industries with a high-technology competitive advantage. UK businesses will also benefit from data analytics that allow them to reach more customers and improve both efficiency and cybersecurity, by pooling and analyzing large amounts of data from around the world.

In view of the above, BSA recommends that the UK considers the following guiding objectives for 21st century digital trade agreements:

¹⁶ See *Draft Working Text for a Comprehensive Free Trade Agreement Between the United Kingdom and the European Union* (May 2020), at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886010/DRAFT_UK-EU_Comprehensive_Free_Trade_Agreement.pdf

- **Free Movement of Data Across Borders:** In view of the importance of cross-border data flows to the modern economy, governments should not use privacy or security policies as disguised market barriers. Governments must refrain from imposing barriers to cross-border transfer of data. Recognizing that a government may determine it necessary to adopt or maintain measures for legitimate domestic public policy purposes, privacy or cyber-related measures must not discriminate against foreign service providers, must be narrowly tailored to achieve specific policy objectives, and must not constitute a disguised restriction on trade.
- **No Localization Requirements:** No matter the sector, governments must not use data localization requirements as a market access barrier. For example, a government should not require a data center to be built inside its borders as a condition for doing business in its territory. As a general principle, governments must not require, as a condition of doing business, a service provider use or locate computing facilities in its territory. In any event, privacy or cyber-related measures must not discriminate against foreign service providers, must be narrowly tailored to achieve specific policy objectives, and must not constitute a disguised restriction on trade.
- **New Services:** Governments should ensure that robust market access commitments cover both existing services, as well as those that may emerge in the future. Innovative new digital services should be protected against future discrimination, and trade agreements should not become obsolete as markets evolve and technology advances.
- **Online Services:** To promote growth of internet-based services, governments should ensure that internet intermediaries are protected against liability for unlawful content posted or shared by third parties.
- **Electronic Authentication and Smart Contracts:** To facilitate trade, governments should allow electronic authentications and signatures to be utilized in commercial transactions. In addition, governments should recognize the use of “smart” contracts and other autonomous machine-to-machine means for conducting transactions, such as blockchain.
- **No Customs Duties on Electronic Transmissions:** Governments should not impose customs duties on either the telecommunications value of electronic transmissions or the value of the information being transmitted.
- **Encryption:** Governments should not undermine the use of encryption in commercial products by imposing restrictions on security technologies used to protect data in transit or at-rest. Governments should not mandate how encryption and other security technologies are designed or implemented, by imposing requirements to build in vulnerabilities or ‘back doors’ or otherwise requiring the disclosure of encryption keys.
- **International Standards:** Governments should adhere to the legal disciplines of the WTO Technical Barriers to Trade, as updated and revised in subsequent agreements. This is a key area for technology companies that have participated in voluntary standards-setting processes. When standards are developed through voluntary, industry-led processes and widely used across markets, they generate efficiencies of scale, and speed the development and distribution of innovative products and services.
- **Cybersecurity:** Governments should seek to strengthen the foundations of digital trade and innovation by advancing mutually beneficial approaches to cybersecurity. First, governments should build upon previous negotiating experience. Second, governments should encourage the mutual adoption of a voluntary, standards-based, outcome-focused cyber risk management framework to drive the adoption of stronger cybersecurity measures by both government and industry stakeholders.
- **State-owned enterprises:** Governments must not favor their state-owned enterprises through discriminatory regulation or subsidies.
- **No Forced Technology Transfer:** Governments should be prohibited from conditioning market access on the forced transfer of technology to persons in their territories. Likewise,

governments must not require disclosure of trade secrets or source code as a condition of market access. These prohibitions should not, however, operate to impede legitimate security testing and research. Such provisions should be based on previous negotiating experience and should clarify the legitimacy of security testing and research.

- **Copyright Rules:** Governments should ensure they have copyright laws that provide meaningful protections for rights holders, as well as safeguards to foster the Internet's continued growth as a platform for free expression, innovation, and digital commerce. Governments should provide online service providers with safe harbors from liability for infringing, or otherwise unlawful, content posted by third parties. In addition, software companies should be able to develop world-class software-enabled data analytics solutions that power innovations in artificial intelligence. To that end, relevant rules and policies should be sufficiently flexible to permit commercial text and data mining of all lawfully accessible content.
- **Trade Secrets:** Governments should adopt or maintain civil and criminal causes of action and penalties for theft of trade secrets.
- **Government Use of Legal Software:** Governments should adopt or maintain laws and other measures obliging central government agencies to use only non-infringing software, and that such software be only authorized by the relevant license for both the acquisition and management for government use.
- **Technology Promotion in Government:** Governments should promote the use of innovative technology in their operations involving the provision of services to citizens.
- **Procurement:** Procurement rules should be changed to reflect the 21st century needs of governments.
- **Choice:** Companies and government agencies should be free to use the technology of their choice, and not be required to purchase and use local technology.

[What domestic and international law is relevant to the Government's approach to digital trade?](#)

As noted above, a wide range of sectors benefit from the opportunities that digital trade presents, whether by supporting import/export operations and facilitating trade, or by enabling seamless movement of data, allowing operators to leverage the benefit of digital technologies to operate and innovate cross-border and access new markets. From an enterprise software industry's perspective, several policies areas play a critical role in reaching digital trade's full potential. We provide elements of reflections on a selection of areas below.

Data privacy: As indicated above, a robust international transfer regime should be a cornerstone of today's trust-based digital economy. The UK Privacy Act provides solid foundations for an international transfers regime as it recognizes the importance of the free flow of personal data with strong safeguards, and provides tools for organizations to legally transfer personal data abroad. The UK Government should prioritize the interoperability of the UK Privacy Act transfer mechanisms with other mechanisms used in leading global privacy frameworks. In other words, it is important that the UK recognize the use of existing global mechanisms that meet the UK's standards rather than requiring the use of new UK-only mechanisms. The UK should also consider expanding its existing adequacy decisions to additional important trading markets such as the United States, Honk Kong, Singapore and India.

Cybersecurity & International standards: Cybersecurity plays a key role in building resilience and trust online as organizations of all sizes must constantly keep up with the evolving cyber threat landscape.

Domestic policies and international cooperation should aim to reduce cybersecurity risks (for instance by safeguarding IT systems, sensitive data, and networks), leverage common solutions such as internally recognized standards and innovative practices to improve efficiency, increase security, and meet organizations' needs. Although businesses, private citizens, and government agencies all share responsibility for enhancing cybersecurity, governments play a primary role in advancing global standards, regulations, and market incentives. The UK can play a global leadership role to expand and harmonize efforts to strengthen cybersecurity through robust public-private collaboration and broad-based international cooperation, as well by promoting above-mentioned provisions on standards, source code and encryption in particular.

E-authentication: Digital enablers of trade in tangible goods and services are vital to removing bureaucratic barriers to trade. Securing recognition of e-authentication and expansion of paperless trading should therefore be a priority in trade negotiations, while parties to FTAs should seek to take account of international standards and practices around encryption, authentication and electronic signatures to ensure continued interconnection with the broader global economy. The UK should seek to use its digital trade policy to advance the mutual recognition and adoption of paperless trading and e-signatures, allowing greater efficiencies and helping reduce trade costs across global supply chains. The UK should seek to build off the WTO Trade Facilitation Agreement to simplify, modernise and harmonise export and import processes and seek to encourage countries to implement its provisions, especially relating to paperless trade.

Open Data: Access to data, as the recent UK National Data Strategy states, is key to UK economic recovery from COVID-19, and to supporting job creation and efficiency gains across all sectors. Ensuring that quality data is available and accessible is key to helping businesses develop innovative business practices as well as new products, tools and solutions that can be deployed across the country, to increase their competitiveness on global markets and to attract foreign investments. To unlock the value of data across the economy, the UK should establish a policy framework that: enhances access to high value government data; makes it easier for organizations to voluntarily share their own data; and promotes the development and use of privacy-enhancing technologies that enable data collaboration in ways that align with the public's expectation of privacy.

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