Developers Alliance Feedback To The European Commission's Consultation "A Renewed Trade Policy For A Stronger Europe"

Developers Alliance welcomes the opportunity to provide its contribution to the consultation on the review of the EU's trade and investment policy.

1. Software development doesn't stop at political and geographical borders.

In every area of their digital business, software developers rely on global trade. Software solutions are developed in a collaborative environment, often at a global level. Developer businesses participate alongside platforms and digital ecosystems operating at a global level. Developers also rely on open source software from both inside and outside the EU. Growth of the EU digital economy is underpinned by the free-flow of data within the Digital Single Market, but also by the data flows with the EU's major trading partners.

Preserving the openness of the EU economy is key for the future of software developers in the EU. Startups and SMEs need the appropriate environment to grow and to expand their operations outside the Single Market. As the Consultation Notice rightly underlines, trade is particularly important for Europe's digital SMEs.

The "Open Strategic Autonomy" approach balances on a very thin line between the openness of the EU economy and the geopolitical strategic agenda for more resilience, protection and promotion of EU values and standards. The risk of turning to protectionism is high, as shown by political statements and the recent tendencies of policy and regulatory proposals (more obvious in the digital area).

Protectionism and mercantilism are the wrong solution to increase the competitiveness of the EU economy at a global level. This approach will definitely undermine the EU's innovative entrepreneurs, especially those in the software sector. Restrictions in the trade of digital tools, data, expertise and on cross-border collaboration on international projects will seriously inhibit developer success. In turn, barriers to digital trade will cut-off markets for EU digital goods, many of which compete in segments where scale and scope are critical for success.

2. The Single Market policies and regulations have a critical role in supporting (or not) the EU as a strong player in international trade.

It is important that the EU is "speaking with one voice to represent a market of 450 million consumers". It is equally important for the EU to represent an efficient Single Market, as a solid source of welfare, economic growth, innovation and job creation.

There's a strong need to address the fragmentation, barriers and weaknesses that still remain in the Single Market, as constantly requested by small businesses. This was acknowledged by the recent European Council conclusions of 1 and 2 October 2020. But the legislative agenda set by the European Commission doesn't properly tackle these issues. The digital transformation of the EU economy in the recovery process after COVID-19 crisis should be driven by policies that drive technological change and innovative entrepreneurship. These should support ambitious digital entrepreneurs to scale up utilizing available technology and services and by attracting investment. Instead, important regulatory proposals stemming from the digital agenda indicate a focus on a rent seeking approach and wasting effort and significant financial resources to replicate digital infrastructure that already exists elsewhere.

The EU's internal market policies have raised concerns with trading partners before, and upcoming legislative proposals regarding digital markets could worsen the situation by attracting retaliatory measures. Moreover, the tendency to impose an extraterritorial character

for certain regulations risks unintended negative consequences for the EU. The flawed implementation of the General Data Protection Regulation, both at the Single Market level and at the international level, should serve as an important lesson. The current legal uncertainty of transatlantic data flows is a direct negative result, affecting not only large tech companies, but virtually all European companies from diverse sectors, many of them being SMEs.

Developers need the ability to build scale within an open Single Market as a springboard for expansion internationally. A fragmented EU market means that digital entrepreneurs will never reach the scale needed to compete with international rivals, and regulations which add burdens or barriers to digital exports needlessly abandon lucrative markets with otherwise low barriers to entry.

3. EU's digital trade rules should address barriers and foster opportunities for the benefit of software developers businesses.

- **Cross-border Data Flows, Data Protection**

Data and information flows are essential for modern economies. Digital markets, more than any other, are increasingly international in scope. Increasing protectionist measures and the disproportionate approach regarding data protection and privacy are raising significant barriers impeding companies of all sizes to operate cross-border. Provisions in bilateral and regional free trade agreements that prohibit disproportionate and discriminatory restrictions on data flows represent useful tools to enable the flow of data across borders.

As mentioned above, the invalidation of the Privacy Shield disrupted transatlantic data flows, and created legal uncertainty for thousands of companies. In an immediate reaction, the Developers Alliance, together with sixteen other trade associations, signed a joint industry letter urging U.S. and European regulators to swiftly begin negotiations in order to set a solid legal framework for transatlantic data transfers. The letter was sent to European Justice Commissioner Didier Reynders, U.S. Secretary of Commerce Wilbur Ross, and European Data Protection Board Chairwoman Dr. Andrea Jelinek.

Despite the Court's upholding of Standard Contractual Clauses (SCCs) as a valid transfer mechanism, companies are still facing the burden of proof of GDPR compliance for each of their operations involving cross-border data transfers. The case-by-case assessments whether the legal framework of the third countries (not only the US) ensures an "adequate" level of protection, "essentially equivalent" to that within the EU. If not, the companies are obliged to provide "additional safeguards" besides those offered by the SCCs. Small businesses cannot rely on other valid transfer mechanisms, such as the binding corporate rules (BCRs), or the limited derogations provided by art. 49 of GDPR, thus operating under constant legal uncertainty.

The ripple effects of the Schrems II are illustrated by the reactions of the Swiss Federal Data Protection and Information Commissioner and the Israeli Privacy Protection Authority.

We commend the European Commission's engagement in finding a solution together with the US counterparts. It remains our belief however, that due to GDPR's enabling language, future litigation is likely to invalidate all practical transfer mechanisms. The resulting digital isolation of the EU developer community will leave many with no choice but to abandon their projects or leave the EU in search of larger markets.

It is important to acknowledge that the root cause stems from the GDPR itself.

Solutions should be also found in the context of Brexit. A disruption of the EU-UK data flows will affect many EU businesses.

Data localization need not be just a purposeful protectionist measure, but can also be an unintended consequence of legal uncertainty for data transfers across jurisdictions. Forcing companies to store and/or process data locally reduces economic growth and induces costs that ultimately will be transferred to consumers. In the case of small businesses, data

localisation constrains their abilities to expand their operations cross-border and to benefit from international cooperation. The isolation imposed by data localization is drastically reducing the opportunities provided by the open nature of the internet.

- **Privacy, Security, Interoperability and Open Standards**

Privacy and cybersecurity standards are increasingly important in ensuring not only regulatory compliance, but also trust in technological solutions and digital services that are traded across jurisdictions. Regulatory coordination and cooperation on different levels in these areas can have a positive impact on international digital trade, but also on the process of internet governance. The EU should promote rules on digital trade that are principles-based and technology neutral, and support an interoperable, unfragmented internet economy.

International cooperation on cybersecurity is essential in building resilience and trust for those states addressing shared threats, but also in avoiding disproportionate trade restrictions. The context of application of TBT rules is key. Bilateral and multilateral trade negotiations should seek pragmatic solutions based on industry and market-driven cybersecurity standards. This approach will combat the tendency of states to unilaterally impose highly restrictive cybersecurity measures on the grounds of national security and open the path to a broader understanding and eventual commitments within the WTO framework.

The development of emerging technologies, such as artificial intelligence (AI), Internet of Things (IoT), augmented reality (AR), virtual reality (VR), blockchain, robotics, or quantum computing, can be supported by common approaches, based on industry best practices and voluntary standards. Trade negotiations should facilitate access to open public data, which can foster the development of AI and other emerging technologies, with significant positive economic and social impact.

With reference to AI, the work within the OECD represents a good basis to ensure convergence for an approach supporting innovation and safeguarding human rights and democratic values. The OECD Principles on AI are inspired by the common vision of the G20 countries of a "responsible stewardship of Trustworthy AI". The EU should further seek to work together with like-minded states for a coherent regulatory landscape in the Western world.

Enhanced cross-border interoperability is crucial for the development of e-commerce, and especially of e-commerce payment systems. Interoperable solutions for access to appropriate Application Programming Interfaces (APIs), open banking, or instant payments, will support innovation and competition, helping innovative businesses to offer new and accessible financial services to consumers. Likewise, support for electronic contracts and electronic signatures and authentication solutions is critical for the digitization of the larger economy (bringing along the efficiencies and resilience it supports). Finally, open standards and interoperable solutions play an important role in leveraging small businesses access to public contracts. Governments can play a key role in both supporting local businesses and helping them digitize their processes for greater efficiency and competitiveness.

- **Intellectual Property**

Innovative advantage depends on the development and use of proprietary technology, but also of open source software.

Trade negotiations should address industry concerns related to the transfer of source code, algorithms, or encryption keys as a condition to operate in a certain jurisdiction. Compromising encryption technology by governments requests to access encrypted data significantly increases the risks to cybersecurity but also to intellectual property.

Requirements that impede open source software (OSS) development should also be addressed. These can arise, for example, from technical requirements for product certification.

***