



U.S. CHAMBER OF COMMERCE

Comments on the European Commission's Consultation on the European Strategy for Data

May 2020

The U.S. Chamber of Commerce welcomes the opportunity to provide the European Commission with comments on its European Strategy for Data.

The U.S. Chamber of Commerce (“Chamber”) is the world’s largest business federation, representing the interests of more than three million enterprises of all sizes and sectors. The Chamber is a longtime advocate for strong commercial ties between the United States and the European Union. According to a recent Chamber study jointly commissioned with AmCham EU, the U.S. and EU are jointly responsible for more than one-third of global gross domestic product, and transatlantic trade and investment supports 16 million jobs on both sides of the Atlantic.¹ The Chamber is also a leading business voice on digital economy policy, including on issues of data privacy, cross-border data flows, cybersecurity, digital trade, artificial intelligence, and e-commerce. In the U.S. and globally, we support sound policy frameworks that promote data protection, support economic growth, and foster innovation.²

Introduction

Data is the engine that drives the modern economy, no matter the geography or the industry. As the European Commission develops its Strategy for Data, policymakers have a critical opportunity to craft an approach that: boosts Europe’s digital and data-driven competitiveness, improves its attractiveness to foreign investors, and facilitates strong economic growth. The COVID-19 pandemic and economic crisis only magnify the importance of the choices the EU faces. Done right, integrating the European Single Market to encourage data to flow freely and securely will benefit workers, consumers, and businesses across Europe. Conversely, a “one-size-fits-all” approach to data sharing, or a focus on regulating first and asking questions later, will not yield the desired outcomes.

¹ U.S. Chamber of Commerce & AmChamEU, [The Transatlantic Economy 2020](#).

² U.S. Chamber of Commerce, [Data Privacy](#).

One overarching question raised by the issuance of the Data Strategy is: Has the European Commission already determined there is a need for additional regulation to govern issues like data sharing and data portability? If so, on what evidentiary basis was this decision made? These fundamental questions are left unanswered by the Data Strategy paper, suggesting they have been avoided in favor of a bias for regulation.

Additional questions raised by the Data Strategy for U.S. companies invested in Europe include:

- What kinds of data are to be shared, with whom, in what format, and under what conditions?
- Which data sharing mechanisms will be voluntary, and which are foreseen to be subject to potential mandatory sharing requirements?
- What guidelines will shape the Commission's proposals for any data that might be subject to mandatory sharing?
- How will competition and intellectual property (IP) concerns be addressed as and when proprietary data is shared, and under what conditions?
- What potential changes to EU trade secrets protection are foreseen, if any, and under what conditions?
- How will data sharing requirements work within the context of the General Data Protection Regulation?
- What types of data will be subjected to new portability requirements?
- What new types of government data will be made available to businesses and under what circumstances?
- Will any new regulatory requirements around data sharing be layered on top of existing rules, especially for highly-regulated industries like financial services? Or will new rules replace existing ones?
- What perceived market failures or other concerns is the EU trying to correct by pursuing a new European cloud? Will companies be excluded from this process, or discriminated against, on the basis of their national headquarters?

Understanding Europe's Push for "Technological Sovereignty"

Representing companies that are heavily invested in Europe and for whom the EU represents a major market, the Chamber shares the Commission's goal of advancing the European digital economy, building digital skills, and preparing Europe's workforce and industrial base for a data-driven future. In short, our member companies are invested in these broad goals because they thrive as the EU's economy thrives. We do, however, have concerns with how some policymakers are describing Europe's digital ambitions in terms of striving for "technological sovereignty." While

we welcome a strategy that aims to improve European capacity to compete and attract investment, we caution against an approach that places Europe on a protectionist path set on advancing national champions. It is essential that the EU's push to deepen the single market for data not mean shutting the EU off from cross-border data flows to or from the rest of the world. Europe's future competitiveness across all sectors depends on its ability to remain connected to and engaged with the global economy.

Given the urgent need for investment and capacity building to create opportunity and jobs in light of the current economic downturn, we encourage the EU to pursue a policy of "technological resilience." Such an approach would emphasize cooperation with like-minded international partners and the private sector on measures that promote traditional European and American values and principles such as support for open markets, respect for the rule of law, data protection and privacy, and respect for individual rights. Europe and the United States share common challenges when faced with non-market economy competition financed by illegal state subsidies and built upon forced technology transfers. The EU's Data Strategy should build common, industry-led, standards for data flows, data sharing, and the digital economy. Only by working together can the U.S. and Europe effectively respond to the challenges from China and others who aim to use data and illegal subsidies to unfairly compete while disrespecting their citizens' privacy rights.

In addition to this focus on international cooperation, the EU should ensure that winners and losers are determined not by political favoritism but by open and competitive markets. The EU should focus on policies that encourage and reward innovation, including by maintaining and strengthening incentives for innovation and foreign investment. These initiatives must not come at the expense of Europe's values and longstanding support for open trade and investment.

Key Questions for Consideration

- **What kinds of data are to be shared? With whom? When? In what format? On a voluntary or mandatory basis?**

In order for the Data Strategy to be successful, additional clarity is needed on what kinds of data are to be shared, with whom, when, and in what format. Stakeholders should be involved in defining which data will be shared by companies, governments, and individuals, as well as setting the conditions for sharing the data. **From a business perspective, the sharing of data should generally be done only on a voluntary basis.**

Contractual freedom is paramount to enhancing data access and re-use and should remain the key instrument that underpins data sharing. Facilitating data sharing through simple, intelligible, and affordable private contractual data sharing agreements can form global, consensus-based, industry-led standards to further incentivise data sharing of all kinds, including B2B data sharing.

We urge the Commission to develop a clear and concise framework that enables and incentivizes innovation, continues to promote inward investment, and balances critical societal objectives with the benefits that a single market for data would bring to Europe. It is critical that this effort is built on contractual freedom, voluntary data sharing, and non-discriminatory approaches for the transfer of data. The Chamber welcomes further clarification and consultation regarding how data will be transferred, stored, processed, and used in Europe. Overly burdensome data sharing architectures and governance mechanisms for business would ultimately stifle innovation and investment, dampen competition, and harm consumers.

Any horizontal legislation on data governance should be of a high-level and focus on addressing compatibility and participatory issues around data spaces. Moreover, while these data spaces will be populated by stakeholders such as businesses, research institutions, individuals, and governmental entities, the scope of the law should clarify what type of data will feed into the data spaces. Clarifying the scope will be especially important when pursuing a legislative approach to data governance for vertical sectors. We urge a collaborative approach, working in tandem with industry, to outline processes that provide flexibility and legal certainty. This will encourage data sharing without the need to mandate it.

Further, the EU should prioritize the reciprocal nature of data sharing in order to incentivize voluntary private sector participation. The European Data Strategy is a unique opportunity to improve access to government-held datasets. Reciprocity of data sharing between the private and public sectors will unlock significant potential for businesses to access data that is critical for research and innovation, boosting competitiveness for all companies that operate in Europe. The Commission itself notes that facilitating such access is in line with longstanding EU policy dating to the 2003 Directive on the re-use of public sector information.

➤ **What perceived market failures is the Commission trying to address by implementing a “European Cloud Services Marketplace”?**

The Data Strategy states that, over the course of the next several years, the EU plans to invest in a “High Impact Project on European data spaces and federated cloud infrastructures,” by funding infrastructures, data-sharing tools, architectures and

governance mechanisms for thriving data sharing and Artificial Intelligence ecosystems.

There is limited information regarding what perceived market failures would be addressed through the establishment of a government-led EU cloud initiative. Policies and regulations targeted at the private market economy must stem from a need to correct actual market failures. Moreover, in keeping with the EU's international trade obligations, companies must not be subject to discrimination or excluded from participating in the development of these systems based on the location of their corporate headquarters. U.S.-based companies, that often employ thousands of Europeans, provide essential cloud services to European firms of all sizes—as has clearly been demonstrated during the COVID-19 lockdown—and they should continue to have a seat at the table.

Private firms also have established a strong track record of implementing clear and effective codes of conduct and high standards of data protection that ensure data privacy. These practices should continue to be industry-led as they ensure customers have access to the information they need to make informed decisions about which cloud services provider to do business with. A cooperative approach where policymakers work with business—instead of an overly prescriptive regulatory regime—will better serve the European market in the years ahead.

➤ **Relationship with the *General Data Protection Regulation***

While the Commission references the *General Data Protection Regulation* (“GDPR”) throughout the Strategy, greater attention should be paid to how it might clash with a future framework on data sharing. As written, GDPR serves as a unified data protection framework equally applicable across the Single Market. In practice, however, derogations by member states and divergent interpretation and enforcement by national data protection authorities have fragmented the EU's data protection landscape. A future framework on data sharing should incorporate the lessons learned from GDPR's shortcomings and find ways to address existing bottlenecks it may pose.

Data Spaces and Sector-specific Case Studies

The creation of sector-specific data spaces will encourage innovative uses of data and economic dynamism—assuming they are used efficiently and designed to enable data sharing on a voluntary basis, and such sharing does not raise competition concerns that can arise from industry collaboration. Sharing data on an interoperable basis is critical to enable different businesses and government agencies to actually use

the information. Data spaces also should maintain an open architecture—and be open to market competition for the cloud services needed to operate them. Importantly, the protection of trade secrets and intellectual property rights, especially for data shared in these new data spaces, will be essential to maintaining a competitive environment.

For heavily regulated industries like financial services and industrial manufacturing, data spaces must not be subject to additional or conflicting regulations. Overly complicated regulations should also be avoided so that data-driven start-ups will be able to comply and benefit from these ambitious projects. Put simply, a one-size-fits-all regulatory approach for these industries will undermine European competitiveness and depress economic growth and job creation across the Single Market. Instead, sectoral regulators must be empowered to clarify and ease requirements wherever possible to encourage and enable data sharing.

Development and adoption of the contemplated data spaces can and should be implemented in phases. For example, the project can begin with creating open data environments, including government data released under open data licenses, to develop a culture of sharing and free exchange among participants.

Harmony between how privacy demands and data sharing interests are balanced will be important. For example, in the mobility space, sharing anonymized data about trips taken by car, bike, or other means with governments could have clear societal benefits such as improving traffic patterns, addressing urban planning concerns, and encouraging new transit options. However, it is imperative that this data be effectively aggregated and anonymized to prevent personal data, like home or office locations, from being discoverable. Companies that use a privacy-by-design business model must not be disadvantaged by participating in these data sharing regimes. Here again, effective partnership between the private sector and policymakers will be essential as the mobility data space is designed and implemented.

Similarly, data sharing and cross-border data flows must be co-facilitated. For example, health and life sciences manufacturers also rely on cross-border data flows and would benefit significantly from a well-designed European health data space. These companies rely heavily on sharing clinical trial data and multijurisdictional research for drug discovery and health-related innovation. Cross border data flows facilitate much of the basic and applied research that is critical to the successful development of novel therapies, medicines, and vaccines. This work has taken on even greater importance in light of the COVID-19 pandemic, and governments should maintain and enhance incentives to facilitate the development of technological solutions.

While the Data Strategy paper acknowledges the importance of cross-border data flows, it also suggests restrictions on such data flows may be imposed to support not just the EU's values (including data privacy) but its "strategic interests." This is a concern, as the EU's "strategic interests" are not defined in the Strategy.

The Data Strategy paper refers to private sector data in ways that suggest that the EU might decide to designate data for public use at some point in the future. For example, compulsory disclosure of data collected during clinical trials and long-term research projects would come at a significant expense to life sciences companies and would, however unintentionally, have a deleterious effect on future R&D in Europe. Data sharing in the health sector—as in other sectors—should be strictly limited to a voluntary basis.

Put simply, obligations to share data on a mandatory basis must be avoided. Broad and vague allusions to public interest without further definition are likely to discourage participation in the data spaces, particularly by commercial entities. What defines "public interest" should be specific to the sector, follow a context-specific approach, and be assessed against a clear set of criteria. We call on policymakers to shape these criteria in a proportionate manner and to allow for an ongoing dialogue with all relevant stakeholders.

Risk of Undermining European Trade Secrets Protections and Intellectual Property Rights

The Data Strategy mentions plans to "evaluate the IPR framework with a view to further enhance data access and use (including a possible revision of the Database Directive and a possible clarification of the application of the Trade Secrets Protection Directive as an enabling framework)." This raises serious concerns about the EU weakening its IP protections. Effective IP protection has been the driving force behind substantial R&D investments that have enabled major technological advancements, and the creation of new therapies and vaccines. Protecting IP has also ensured Europe's leading role in the arts, music, and culture. Without adequate incentives and effective enforcement of intellectual property rights, manufacturers and content producers would be likely to focus less of their R&D in Europe. The Chamber seeks to understand the Data Strategy's impact on companies' ability to protect proprietary data, and we urge close consultation with the private sector before any revisions to the IP system are contemplated.

International Approach

The Chamber welcomes the Commission's commitment to address restrictions on data flows, such as data localization, in the context of bilateral trade negotiations and at the World Trade Organization ("WTO"). The ability to move data across borders is essential for businesses of all sizes and sectors. Policies that would restrict data flows constitute market access barriers that diminish businesses' ability to innovate and adopt digital technologies while reducing the availability of cloud services in a market. We encourage the Commission to embrace high-standard provisions on digital trade, such as those outlined in the *United States-Mexico-Canada Agreement* and the *United States-Japan Digital Trade Agreement*. The Chamber believes that, if replicated in the EU's bilateral agreements and in the WTO's Joint Statement Initiative, these provisions will effectively inhibit data localization and protectionist policies without undermining data privacy standards.

We further encourage the EU to reinforce and broaden GDPR's international data transfer regime as persistent legal uncertainty is undermining this core element of the regulation. GDPR includes a toolkit of legal mechanisms that organizations may use to engage in international data transfers, including adequacy decisions, standard contractual clauses ("SCCs"), binding corporate rules ("BCRs"), and codes of conduct and certifications. Still, more work must be done to ensure that this toolkit functions in practice, including reinforcing those mechanisms subject to legal challenge—including the EU-U.S. Privacy Shield and SCCs—and making full use of all the tools available under Chapter V of the regulation, such as certifications and codes of conduct. Without functioning data transfer tools, GDPR serves as a *de facto* requirement to localize EU personal data, an outcome with serious economic and trade ramifications, including for Europe's ability to reach foreign markets.

Conclusion

In light of the COVID-19 pandemic and the urgent need to revitalize our economies, it is especially important that Europe's data sharing provisions encourage international medical research projects, promote public-private partnerships to boost mobility and transport efficiency, and bolster advanced manufacturing and the provision of financial services across borders.

The U.S. business community is proud of its longstanding and deep contributions to the transatlantic commercial relationship. American companies are eager to help Europe succeed in its endeavors to build a robust digital and data-driven economy, and we look forward to continuing our engagement with the Commission to drive that future success. Thank you for your consideration of our views.

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EU Transparency Register: 483024821178-51