



**U.S. CHAMBER OF COMMERCE**

**U.S. Chamber of Commerce Response:  
Public Consultation on the European Commission’s Proposed Data Act**

**September 2, 2021**

The U.S. Chamber of Commerce (“Chamber”) welcomes the opportunity to comment on the European Commission’s proposed *Data Act* (“Act”).

The Chamber is the world’s largest business organization, representing companies of all sizes across every sector of the economy. Our members range from small businesses and local chambers of commerce to leading industry associations and large corporations. We operate in all 50 U.S. states and in over 50 countries to promote free enterprise and advance American trade and investment globally.

The Chamber is a staunch advocate for stronger commercial ties between the United States and the European Union. According to an annual study jointly commissioned with AmCham EU, the U.S. and the EU are together responsible for one-third of global gross domestic product and transatlantic trade and investment supports more than 16 million jobs on both sides of the Atlantic.<sup>1</sup> The Chamber is also a leading business voice on digital economy policy, including on issues of artificial intelligence (“AI”), data privacy, data governance, cybersecurity, digital trade, and e-commerce. In the U.S., Europe, and globally, we advocate for sound policy frameworks that support economic growth, promote consumer protection, and foster innovation.

During the past two years, the Chamber has routinely engaged with the Commission on a range of digital policy priorities, including: European Strategy for Data, Digital Services Act, Digital Markets Act, European Health Data Space, and Digital Finance Strategy. Representing firms with significant investments across Europe, we share the Commission’s goal of modernizing and strengthening the European digital economy, building digital skills, and preparing Europe’s workforce and industrial base for a data-driven future. Our member companies are invested in these goals because they succeed as the EU’s economy thrives.

At the same time, we are concerned about how some policymakers describe the EU’s drive for “technological sovereignty.” We welcome a strategy that improves Europe’s

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<sup>1</sup> [https://www.uschamber.com/sites/default/files/transatlanticeconomy2021\\_fullreport\\_lr.pdf](https://www.uschamber.com/sites/default/files/transatlanticeconomy2021_fullreport_lr.pdf)

capacity to compete and attract investment, but caution against a protectionist approach that seeks to advantage European firms at the expense of fair competition from the U.S. and others. In striving to deepen and further integrate the single market for data, the EU must not shut itself off from cross-border data flows to or from the rest of the world. As the world's largest services exporter<sup>2</sup>, Europe's future competitiveness across all sectors depends on its ability to remain connected to and engaged with the global economy.

### **The Importance of Data in the Modern Economy**

Data is the engine that drives the modern economy, no matter the geography or the industry. Today, manufacturing, pharmaceutical development, retail, and personal services are as data-driven as the ICT sector. Europe's industrial leaders, exporters and international investors all rely on their continued ability to transfer data seamlessly to their clients, subsidiaries, and customers.

As the European Commission considers the Data Act proposal, 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 subsequent economic fallout only magnify the importance of the choices the EU faces. Done right, further integrating the European Single Market to encourage data to flow freely and securely will benefit workers, consumers, and businesses. Conversely, a "one-size-fits-all" approach to data sharing or policies that encourage data localization could undermine the case for future investments in Europe.

### **Principles for Data Sharing**

Stakeholders must be actively involved in the process to define what data will be shared by companies, governments, and individuals, as well as in setting the conditions for sharing that data. **We believe the sharing of data should generally be done only on a voluntary basis.**

Mandates that require companies to share data with either their competitors or governments would create clear threats to intellectual property and raise the prospect of damaging data breaches. Companies have a fiduciary responsibility to their shareholders to ensure their data remains safe and secure, and they face significant reputational risks when data breaches occur. Unfortunately, governments are even more routinely attacked by state and non-state actors intent on illegally accessing data. Therefore, mandating business-to-government data sharing would only increase the risks to privacy and confidential corporate data. Moreover, the Commission's

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<sup>2</sup> [https://www.wto.org/english/res\\_e/statis\\_e/wts2021\\_e/wts2021chapter05\\_e.pdf](https://www.wto.org/english/res_e/statis_e/wts2021_e/wts2021chapter05_e.pdf) See table A9

consultation is very vague on what “appropriate safeguards” would be in place for business-to-government data sharing. The Chamber welcomes additional clarification on this point. In addition, precisely what constitutes data to be shared with governments in the “public interest” must be clearly and narrowly defined in consultation with stakeholders.

Contractual freedom is paramount to enhancing data access and re-use and should remain the key instrument that underpins data sharing between private entities. There is currently no need for additional data licensing agreements, since several effective models already exist and have been widely adopted. Instead, facilitating data sharing by fostering the adoption of existing simple, intelligible, and affordable private contractual data sharing agreements can form global, consensus-based, industry-led standards that will further incentivize data sharing of all kinds, including business-to-business.

Mandating companies to share data with their competitors will disincentivize innovation and may damage the case for future investment in Europe. Why would a pharmaceutical manufacturer invest in increased R&D capacity in Europe if they are forced to share all of their confidential clinical trial data with their competition? Similarly, why would a manufacturer invest the time, money, and personnel into development of innovative new robotics or AI systems if they could simply re-use their competitors’ confidential processes? Moreover, such data sharing requirements would likely run contrary to existing EU competition laws which sensibly evaluate a companies’ hard-earned intellectual property as pro-competitive. This sort of conflict of law scenario must be avoided. While voluntary data sharing should be encouraged to leverage innovation happening around the world and across the economy, forced data sharing threatens to bring significant harms to the competitiveness of the European market.

The Chamber encourages the continuation of efforts to increase access to government held datasets for processing by the private sector. Reciprocity of voluntary 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. We welcome further attempts to incentivize such open government data initiatives.

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 increased voluntary data sharing (both

between businesses and between companies and governments) would bring to Europe. It is critical that this effort be built on contractual freedom, voluntary data sharing, and non-discriminatory approaches for the transfer of data. Overly burdensome data sharing architectures and governance mechanisms would ultimately stifle innovation and investment, dampen competition, and harm consumers.

### **Cloud Services Providers: Encouraging Market-based Competition and Industry-led Approaches**

Robust market-based competition exists in the cloud services sector across Europe. Companies have several different options of providers, and services providers compete to develop innovative new tools to win new clients and retain them. Additionally, the industry-led SWIPO (Switching Cloud Providers and Porting Data) initiative is working well. Moreover, programs like the EU Cloud Code of Conduct provide real-time and frequently updated rules of the road that are agreed to jointly by all cloud operators in Europe to ensure customer's privacy and trust.

It is not clear, therefore, what problem new government regulations would be solving for. Instead of rushing to implement new legislation, EU policymakers should support industry-driven efforts designed to guarantee portability for the purposes of creating market awareness and generating more trust in the cloud market.

### **Challenges with Data Localization Requirements**

On safeguards for the international transfer of non-personal data, the consultation seems to assume that additional requirements for storage and processing of certain types of data within Europe are needed. Such calls for increased data localization would undermine Europe's economic recovery and encourage protectionist voices in other markets to continue to limit data transfers from their own jurisdictions. Such requirements would significantly harm the growth prospects of European companies operating outside of the EU, in addition to limiting the kinds of innovation that are enabled by cross-border data flows, even within individual firms.

### **Differentiating Between Personal and Non-Personal Data**

The Data Act proposal suggests that non-personal data needs to be treated similarly to personal data, at least in an international context. This must be thoroughly considered, as the provisions of the EU's Charter of Fundamental Rights do not apply to non-personal data. Therefore, it is important that a diligent analysis of the different levels of risk pertaining to personal and non-personal data be carefully calibrated in any data-related policy.

Perhaps the Commission is trying to defend European commercial data from corporate espionage. If this is the primary focus of this proposal, it should be tailored to countries

where this risk is most prominent, rather than cutting off the transfer of non-personal data worldwide. For example, the Chinese government routinely requests commercial data gathered by Chinese firms in third countries. One can easily imagine a scenario where companies headquartered in European or allied countries which specialize in artificial intelligence, defense systems, or other critical technologies would find themselves specifically targeted by this sort of intelligence gathering. This poses clear risks to national security as well as to companies' trade secrets. Democratic societies with clear and enforceable boundaries between state security agencies and the private sector—such as Europe's allies across the North Atlantic region—should not be subjected to the same restrictions on data transfers as might be relevant for countries like China or Russia.

### **The Need for Transatlantic & International Cooperation on Data Transfers and Lawful Government Access to Data Requests**

We are encouraged that the European Union continues to work with the United States and other international partners to find lasting solutions to international data transfers in light of the *Schrems II* decision for personal data, including ongoing negotiations at the OECD, to develop common principles for government requests for access to data in democratic societies. If the EU were to implement the Data Act as initially contemplated in the Inception Impact Assessment, it would, however unintentionally, undermine the progress that has been made through those channels. This is a global problem that requires a global solution, and we urge the Commission to stay focused on these bilateral and multilateral efforts.

Separately, the Commission appears to be contemplating mandates that would require data processors to put in place technical restrictions that would prevent lawful government access to non-personal data requests by foreign governments. This would put companies in the untenable situation of having to choose which laws to break in order to keep providing services in multiple jurisdictions. Creating a process by which companies are forced to choose which national laws to break is not a viable solution. Before considering onerous new regulations in this field, the European Commission should instead continue to engage in the ongoing bilateral and multilateral discussions aimed at solving this international challenge.

The Chamber welcomes the launch of the U.S.-EU Trade and Technology Council (TTC), which includes a working group on data governance. The TTC should identify common approaches to encourage voluntary data sharing and develop shared principles to promote international data transfers, especially to democratic countries with robust protections for privacy and civil liberties. The TTC also can be a useful platform for the EU and U.S. to agree on common approaches to significant third country challenges, including the risk of corporate espionage or threats to citizens' privacy.

Effective stakeholder and legislator dialogues are essential to achieving positive outcomes, and we look forward to working with policymakers as the TTC develops.

**Conclusion**

The U.S. business community is proud of its longstanding and substantial contributions to the transatlantic commercial relationship, and the Chamber appreciates the opportunity to provide these comments. We support Europe’s drive to build a robust digital economy, and we look forward to continuing the dialogue on the Data Act and other important policy issues in order to foster economic recovery and boost the competitiveness of the digital economy on both sides of the Atlantic. Thank you for your consideration of our views.

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