AmCham EU's response to the European strategy for data

Supporting document to the public consultation launched by the European Commission

American Chamber of Commerce to the European Union
Speaking for American business in Europe

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Skills and data literacy

Europe is facing an unprecedented shortage of workers and skills, and as the technological transition changes the way we work, we need to adapt the skillsets of the current workforce to meet new demands. Having a population with the right skills is fundamental to Europe's future growth and viability, its attractiveness for business and has a consequential benefit for society. The skills scarcity and experience gaps are evidenced by the fact:

- 40% of European employers have difficulty finding people with the skills they need to grow and innovate[1]; and

- Half of the EU population lacks basic digital skills.[2]

Providing a better match between the needs of business and the availability of both short-term and long-term skills will require a comprehensive, co-ordinated and joined-up strategy. This requires the involvement of numerous actors. Governments and industry need to work together and re-think current policies to equip the workforce and the broader population with the skills needed in a digitalised economy and society. The following actions are essential to adapt to the changing skills demand:

- **Invest in education, life-long learning and reskilling** to ensure our workforce is ready for the jobs of tomorrow. Vocational training, apprenticeships and corporate academies and work-ready certifications will continue to play an important role. Furthermore, systems should be developed that enable workers to expand their applied skills throughout their professional career beyond classic academic institutions; and

- **Better align education with in-demand skills** to best prepare citizens for the job market of tomorrow. Education in Science, Technology, Engineering and Mathematics (STEM) is crucial. However, emerging technologies such as AI require multi-disciplinary skills, and ethics, arts and creativity will be just as important. Therefore, governments should work with academic institutions to create curricula that meet the specific needs of a digital technology-powered economy, such as ethical training for engineers and technology training for lawyers or healthcare professionals.

The traditional path of education and training, work and retirement, is outdated, and career paths require flexibility and new approaches to labour market transitions. Business has a key role to play in upskilling and reskilling its workforce, but this should coincide with the support of public institutions for these efforts through the appropriate incentives. Also, curricula in all fields need a rethink to address digital literacy. One suggestion would be to introduce benchmarking of digital skills in the population in line with general literacy and numeracy.

Data access, sharing and portability

We welcome the Commission's goal to further incentivise data sharing. It will be crucial to focus policy efforts on voluntary approaches that remove legal uncertainties and increase trust for businesses to share their data. Although some companies have identified issues in specific sectors surrounding data quality, interoperability, and data sharing practices such as bundling access to data with other services. We believe that rules covering data access rights must not be intrusive and horizontal rules mandating data sharing must be avoided, as this could discourage investment and ultimately be detrimental to data sharing. In rare circumstances, undertakings may be required to provide access to private assets under a line of EU case law developed over decades. These criteria are being reviewed in the context of the Commission's ongoing antitrust reforms. In any case, we submit that these issues can and should be addressed in the antitrust context.

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[1] EPSC, 'The Future of Work', 2016, http://ec.europa.eu/epsc/publications/strategic-notes/future-work_en

[2] Ibid

Any intervention on data access must always undergo an analysis identifying a market failure before introducing any obligatory data sharing. Forced access rights could also conflict with GDPR obligations, as it is difficult to separate types of data and the various rights attached to them. Mandatory data sharing obligations when there is a 'public interest' element must be carefully balanced against the costs and risks this may incur.

We do not see any significant challenges regarding the allocation of the rights to data coming from smart machines or devices. Wherever the data is personal, the individual is in control and decides who has access to that data. When it comes to non-personal data, contractual solutions between actors are operating well in practice today. We would also point out that private sector investments to enhance data sharing and portability are incentivised by enabling policies which can help create an open environment.

Data portability should be incentivised, depending on contexts and taking into account intellectual property (IP) rights and trade secrets. Regarding personal data portability rights in particular, article 20 of the GDPR[3] already contains a comprehensive portability right over personal data.

Data spaces

We support the idea of building spaces in strategic areas where companies would be incentivised to share high quality data. We support a principles-based data governance model to provide adequate guidance on the general functioning of the data spaces, in particular regarding participation and basic rules on types of data to be pooled, common data formats etc, while keeping in mind the need for flexibility to adapt to the specificities of each strategic sector. It is recommendable to first assess how the data spaces work in practice before proposing any new legislation that could hamper the effectiveness of the data spaces.

Importantly, participation in the data spaces should be voluntary, and open to all companies regardless of the location of their headquarters. Rather than making a company's origins a criterion, we believe that participation should indeed be open to all actors which can provide technical capabilities, and which comply with European regulations and values. On data itself, the focus should be on the quality of data, not its geographical origins. The same principle should apply to the technologies and infrastructures that will support the data spaces: all market players should be welcome to provide them. The establishment of data spaces should never cannibalise or adversely affect existing, well-functioning markets that have created data-driven products that data spaces aspire to. Finally, the governance model should reiterate the Free Flow of Non-personal Data's ban on unjustified data localisation measures.

Standardisation

The interplay between data governance, technology and standards will be a key enabler to the smooth functioning of data spaces and to incentivising market players to share data. The focus should be on implementing existing standards and ensuring that new standards are technology-neutral, market-driven and globally relevant.

We agree that compatible data formats, shared data models and application programming interfaces (APIs) will facilitate data sharing. Nevertheless, we note that a lot of work is already underway in various standard setting organisations such as the World Wide Web Consortium (W3C) and International Organization for Standardization (ISO). As far as governments are concerned, their role should focus on supporting industry-driven standardisation efforts. We note that EU antitrust law sets out well understood principles governing the standardisation process, rules that are being reviewed and updated in the context of the Commission's ongoing

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[3] Article 20: Right to data portability, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32016R0679.

antitrust reforms. There is no need to impose a mandatory regulatory framework for these activities. Indeed, such a framework could well conflict with ongoing work to update the relevant antitrust rules.

Open data

We fully support the Commission's view that public authorities should make available a broader range of data which has significant potential for re-use and can benefit the general interest. We encourage the Commission to continue addressing barriers to open data including the compatibility of data sets, fragmented levels of open data policies by Member States and data quality. Public authorities can provide clarity on the legal rules but should not force the processing of data re-use.

We support the efforts to open up specific high-value datasets provided they are free of charge, in a machine-readable format and provided via an API. The interoperability and readability of these high-value data sets will be essential to increase their re-use.

We note that it is important to ensure that open data is distributed under a license that allows commercial reuse, and that derivatives (ie, the result of joining public data with proprietary) fall under the same license as the original dataset.

Cloud computing

We fully share the Commission's view that Cloud and edge infrastructures are essential to the implementation of the EU's data strategy, in particular for the building of common data spaces. However, general uptake of cloud computing by businesses is far from being a reality. We therefore agree with the need to strengthen capabilities in Cloud infrastructure in Europe, understanding that all actors are welcome to join this effort regardless of where their headquarters are located.

We strongly believe that businesses should remain free to work with the Cloud service providers of their choice, not having it imposed by government mandate. The Commission's proposal of a cloud services marketplace should above all be non-discriminatory and open to all Cloud service providers as long as they respect existing European rules. Further, procurement rules should be designed considering the fundamental characteristics of cloud computing services, eg, multi-tenancy, resource pooling, shared responsibility, and scalability.

We have long supported self-regulation in the Cloud and welcome the creation of a Cloud Rulebook compiling existing EU and national regulatory frameworks (including sectoral requirements), codes of conduct, certification schemes and industry-recognised standards to help companies as they plan their journey to the Cloud. A greater communication effort should be invested into raising awareness around the various codes of conduct.

In the data strategy we note that the Commission wants to 'facilitate the development of common European standards and requirements for the public procurement of data processing services.' Some clarification regarding this initiative would be useful, as there are concerns that such new standards or requirements for public procurement would force companies to adhere to self-regulatory activities.

We would also like to raise the general point that sector-specific regulatory requirements on Cloud usage can slow down the uptake of cloud computing. In the financial services sector for example, different interpretations of legislation and sectoral guidelines by regulators and Cloud users result in delays in cloud adoption.

International dimension

In its data strategy, the Commission rightly acknowledges that today's European companies operate in a connected environment that goes beyond the EU's borders, so that international data flows are indispensable for their competitiveness. Unhindered data flows can have great benefits for the region's economic growth and innovation. They can enhance citizens' education, work, healthcare, and overall well-being. They are also necessary for all businesses who want to have access to global markets, access the latest technological innovations, reduce costs, improve productivity and scale, and enable digital collaboration around the world.

Global cooperation is of crucial importance for a competitive European digital economy. European and international data flows are essential to cross-border trade and trade agreements need to tackle market access barriers effectively. As more countries adopt privacy laws, we need to avoid increased market fragmentation and move towards consistent global privacy principles. For example, the Commission should continue its work to ensure interoperability between the Asia-Pacific Economic Cooperation (APEC) cross-border privacy rules systems and Binding Corporate Rules (BCRs) under the GDPR.

Data flows within and beyond the EU need to underpin the Commission's goal to attract the storage and processing of data from other countries and regions to Europe. Diverse and robust data transfer mechanisms will play a key role in that regard. Adequacy decisions, such as for Japan, present an opportunity to increase trade. Obviously, adequacy of third countries provide businesses that rely on cross-border data flows the highest level of legal certainty. However, as not all countries follow the GDPR approach, alternative instruments and mechanisms, such as the EU-US Privacy Shield and standard contractual clauses (SCCs), continue to be essential for global trade. We call on the Commission to conclude swiftly an adequacy agreement with the UK following the country's exit from the EU. Additionally, AmCham EU consistently called for a review of the existing standard contractual clauses in order to ensure alignment with the GDPR.

The US CLOUD Act has been raised as an area of concern over compliance with EU data protection rules. Research has indicated that it is incorrect to assume that the US government's access to data in the Cloud is higher than that of other economies in Europe.[4] It also found the CLOUD Act compatible with international law, the GDPR, and the Council of Europe Cybercrime Convention No. 185.[5] We therefore support ongoing efforts to alleviate such concerns through an EU-US agreement that facilitates cross-border mutual access to electronic evidence and brings certainty to the European market. Awareness in this space would also help EU cloud users to make risk-based assessments, thereby promoting Cloud uptake.

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[4] 'Demystifying the U.S. CLOUD Act: Assessing the law's compatibility with international norms and the GDPR', *Hogan Lovells*, January 2019, https://www.hoganlovells.com/~/media/hogan-lovells/pdf/2019/2019_01_15_whitepaper_demystifying_the_us_cloud_act.pdf

[5] W. Maxwell, C. Wolf, 'A Global Reality: Governmental Access to Data in the Cloud. A comparative analysis of ten international jurisdictions. Governmental access to data stored in the Cloud – including cross-border access – exists in every jurisdiction', 23 May 2012, Updated 18 July 2012, https://www.hldataprotection.com/uploads/file/Revised%20Government%20Access%20to%20Cloud%20Data%20Paper%20(18%20July%202012).pdf