

The European Commission Communication “Building a European Data Economy”

Fostering investment and innovation towards a European Data-driven economy

Executive summary

AmCham EU’s members share the Commission’s goal of a building a Digital Single Market of the next generation where connected machines and objects enable huge benefits for the economy and society. The data economy, and its benefits, requires significant and sustained private and public sector investment and innovation. The Commission should adopt a legislative proposal establishing the principle of free flow of data, making clear that regulatory obstacles to the free flow of data in the Union, both in national legislation and public procurement rules, are generally impermissible. Furthermore, AmCham EU does not see the need for introducing new policies in the emerging data economy to tackle identified “emerging issues”. Contractual solutions are sufficient to ensure parties’ interests are protected. While the data economy is still nascent, premature and overly-prescriptive intervention may chill, rather than encourage, innovation.

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AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €2 trillion in 2016, directly supports more than 4.5 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

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Introduction

On 10 January 2017, the European Commission published a Communication on measures for “Building a European Data Economy.” AmCham EU’s members (comprising about 150 companies from a broad range of sectors) share the Commission’s goal of a European digital single market of the next generation, where connected machines and objects enable huge benefits for the economy and society. As companies that are already actively engaged in building Europe’s data economy, we look forward to collaborating with the Commission to grow that economy in ways that work for all stakeholders. This paper forms the basis for that dialogue by setting out AmCham EU members’ initial thoughts on the Communication.

The shift towards a European “data-driven economy” is critical in every sector represented by AmCham EU, including consumer services, financial services, energy, healthcare, agriculture, manufacturing, logistics transport information technology and more. With data, a farmer can grow crops more sustainably; a hospital can deliver improved care for patients; and factories can better ensure supply matches demand. Even businesses that have historically used information only sparingly – machine tool producers, for example – now collect and use data (about how the tools are used, when they are used, by whom, etc.) to continuously improve their products and operations.

In its Communication, the Commission estimates that the “data economy” could grow to EUR 643 billion – or more than 3% of EU GDP – by 2020. This value will flow to employees through high-paid jobs; to Member States, through tax revenues; and to European businesses, through new efficiency savings and higher rates of production. We welcome the Commission’s recognition of these benefits and its commitment to ensuring that this fast-developing market will continue to succeed.

The “shift to data” and realisation of the benefits envisaged under the Commission’s Communication will not happen by chance, however. The data economy, and its benefits, requires significant and sustained private and public sector investment and innovation. In considering whether new policies are needed in the emerging data economy, we urge the Commission to bear in mind the need to incentivise this investment and innovation as a priority.

Free flow of data (Commission Communication Point 2)

As companies whose businesses span across the world and support our customers including in Europe, we strongly support the principle of free movement of data across the world – subject to existing and future safeguards regarding the security of transfer of such data. In that context, we also strongly support a free flow of data within the EU. We regret that the decision has been taken at this stage to refrain from a legislative proposal, underscoring this principle. We urge the Commission to adopt a legislative proposal establishing the principle of free flow of data and making clear that regulatory obstacles to the free flow of data in the Union, both in national legislation and public procurement rules, are generally impermissible. Pending on the implementation of a legislative proposal, considering that data localisation requirements create barriers to competition within the internal market, we encourage the Commission to actively enforce the EU rules in this area, including from the competition law perspective.

Restrictions on the flow of data within Europe (and around the world) strike at the heart of the digital single market. While data localisation measures may be justified in extremely limited circumstances (e.g. highly confidential government data), their impact on the growth of the European data economy is generally negative: they fragment the single market and raise costs for the deployment of cross-border data economy services. Such measures have a particular impact on the infrastructure underlying the data economy – such as cloud services – because these services require major investments which cannot feasibly be made on a country-by-country basis. This impacts further on the wider economy by hindering innovation and competition for new products and services, as new start-ups may struggle to have quick and affordable access to the necessary cloud infrastructure to support their business models.

We also want to address a common misconception: data localisation measures do not just create impediments for ICT companies. By restricting location of data storage and processing, data localisation requirements also make it difficult for enterprises across Europe, large and particularly small, in every sector, to benefit from new technologies that enable them to more efficiently and cost-effectively store and analyse data in other Member States.

Reinforcing Europe's commitment to the free flow of data also has value outside of Europe. At a time when data localisation measures are becoming increasingly popular internationally, the EU should be an example of a market without internal barriers to the flow of data, and should stand globally as a leader in this area. Europe should be positioned as a place to attract new and innovative businesses.

Data access and transfer (Commission Communication Point 3)

The Commission Communication raises important questions about the data economy, such as the parties that will have “access” to such data; the legal frameworks to protect such data and incentivise its creation; and “ownership” of data. We agree that these issues need to be carefully considered but we also believe that the data economy today is functioning well, with a high degree of innovation and competition.

For the last several years, machines – from tractors to production lines to airplane engines – have generated increasingly significant volumes of data. This data, in turn, has enabled better services and more follow-on innovation by the producer, which feeds into the supply chain and creates opportunities for new suppliers adding further value to the end customers too. In this context, using arms-length contracts, companies have access to data without significant problem – and the “data economy” has emerged on this basis.

Today, companies determine issues around technical data through contracts with their customers, suppliers, researchers and other counterparties. These contracts are negotiated by organisations that have a deep understanding of the context in which data will be developed, shared and exploited. The resulting arrangements reflect that context – which can vary from an airline leasing a jet engine, and sharing the data generated by the engine with the manufacturer of the engine, to a third-party analysing data generated by an assembly line, to an academic researcher reviewing data pulled from the energy grid to develop dynamic grid management algorithms.

The sheer variety of scenarios involving technical data in B2B dealings are best handled by bespoke contractual arrangements – not by one-size-fits-all rules. Today's legal framework has delivered, and continues to deliver, pan-European innovation and economic growth in industries that are data-reliant.

In the last half-decade, throughout all sectors of the European economy, industrial generation of data has expanded dramatically. This explosion of data has generated new demand for products and services to help firms manage and derive use from these new data streams. Markets for the sale of industrial equipment capable of generating relevant data are typified by fierce competition. The growing market for systems to help firms handle and make sense of this growing data cache is likewise fast-growing and competitive.

These results are the fruit of investment (enabled by predictability of law and flexibility of contracts) and open markets. Machine-generated data is often built up through large investments in product design, manufacture, and distribution (for example, aircraft engines, which generate telemetry data, are extremely costly to design, build and distribute). As a result, parties may wish to maximise their investment by retaining sole access to data generated about how their product works.

The Commission has rightly recognised in its Communication that for the data economy to grow, industry players – in some cases, and depending on the circumstances – will need to prevent disclosure of data in order to lawfully protect themselves against competitors. Unique solutions require time and investment, and these investments are undermined if competitors can easily glean strategies or technology from data disclosed to third parties, without commensurate effort on the competitors' part (leading to so-called 'free-riding').

In particular, we call the Commission's attention to the conditions laid down by antitrust case law. The conditions on which an entity can be required to share its assets with other entities, including intellectual property and infrastructure, have been developed through many years of case law. AmCham EU believes that antitrust enforcement has proven to be an effective way of striking a balance between protecting investments and encouraging competition and is concerned about any initiative that could mandate sharing of important assets such as data without regard to these conditions.

We also encourage the Commission, in considering data economy policies, to remain sensitive to the need to preserve companies' ability to use different business models and to recognise the importance of an economy that provides for a variety of incentives for investment and innovation.

More specifically, in response to the Commission's specific proposals in the Communication:

- *Guidance on incentivising businesses to share data.* We welcome the Commission's intent to mitigate divergent national laws, and agree that non-binding guidance could be a useful vehicle for this purpose.
- *Fostering development of Application Programming Interfaces (APIs).* We completely agree with the Commission's assessment about the importance of APIs in today's data economy. APIs enable developers and third parties to build new services on top of organisations' data. Our members routinely release APIs in order to create ecosystems or platforms for third parties to access and use datasets. At the same time, our members also enable organisations to manage and secure these APIs. We encourage further guidance and tools to be released for the purpose of assisting public-sector organisations that wish to create new platforms and ecosystems to open up public datasets for a broader range of uses. At the same time, we encourage sharing best practices for both public and private sector organisations on developing, managing and securing APIs.

- *Default contract rules.* We question the value of default contract rules. The data economy spans virtually every sector, from hospitals to agriculture; no single contract template is likely to be applicable. It may be better for the Commission to monitor developments in particular sectors where concerns about specific practices or imbalances in negotiating power are identified, and once understanding the needs, starting a broad stakeholder dialogue on how to remedy.
- *Access for public interest and scientific purposes.* We appreciate that certain types of statistical or aggregate data could be useful for authorities or public sector organisations. However, this interest should be balanced with taking into account the investments that underlie the relevant data. Therefore, we believe access to such datasets should be negotiated through contracts, depending on the dataset and relevant situation on a bespoke basis, rather than being mandated through law.
- *Data producer's right.* AmCham EU member companies both create the machines that collect data and produce the data itself. From a systematic perspective as well as from our experience, we believe that contractual solutions are sufficient to ensure both parties' interests are protected. Any consideration of a prospective data producer's right should consider extremely carefully the potential impacts on the still nascent data economy.
- *Access against remuneration.* AmCham EU views this rule with concern, as – even with remuneration – it would revoke a company's discretion over whether or not to share data. This could put investments at risk. A system based on agreed contracts between parties, that contain negotiated terms specific to the circumstances – as exists today, underlying the fast-growing data economy of the last several years – is sufficient and would be more flexible.

Given the rapid pace of change in the “data economy”, we also encourage the Commission to avoid pre-judging the outcome of these consultations, or proposing “fixes” where problems have yet to be identified. Instead, we encourage the Commission to approach these consultations with an open mind. The data economy is still nascent; premature and overly-prescriptive intervention may chill, rather than encourage, innovation.

Liability (Commission Communication Point 4)

We understand the Commission's decision to further study whether new rules are needed to handle issues relating to liability in connection with the “data economy” (particularly in the context of the Internet of Things). It is important that no “gaps” in liability exist for consumers and we agree that identifying fault in the connected device economy may at times be difficult given the number of different hardware and software suppliers involved in individual products. However, contract terms are the best way to handle liability issues, as they provide predictability and certainty for businesses engaged in the supply chain.

Portability, interoperability and standards (Commission Communication Point 5)

The Commission is right to emphasise the importance of competition to the data economy; competition is a powerful driver of innovation. At the same time, we urge the Commission to exercise caution before moving to propose new data portability measures. The new data economy is still forming, and it is far from clear that the market is failing to provide sufficient interoperability or data

portability. Indeed, there are a number of productive industry efforts already underway to foster interoperability, including and particularly in the context of international standards bodies.

Furthermore, the General Data Protection Regulation's portability requirement has yet to be implemented; while that rule applies to personal data, its implementation may produce learnings that could be relevant for non-personal data as well. However, it is too early to have any certainty on the right way forward.

At this stage, AmCham EU believes that the best way to address these issues is contractual. In any event, any rules or standards which might be adopted on interoperability or portability should be proportionate and carefully consider any adverse effects.

That said, we welcome the Commission's recognition of existing standards processes. The Commission's commitment to further promoting and progressing ongoing and future standards-based initiatives would be helpful.

Experimentation and Testing (Commission Communication Point 6)

We agree with the Commission that new proposals could have complex and unexpected effects on the fast-growing data economy. For that reason, to the extent that the Commission puts forward concrete proposals, trial runs, for connected and automated mobility or other innovative technologies, would be welcome.

In addition to testing new technologies, we also encourage the Commission to consider whether certain rules and regulations need to be updated, harmonised or removed in order to better enable the data economy. A "REFIT" process of these rules and regulations with the data economy in mind may make sense in certain contexts.