AmCham EU
SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Feedback response

Regulation on a framework for the free flow of non-personal data in the EU (COM 2017(495))

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

It has long been demonstrated that data localisation obligations fragment the Single Market, limit competition and raise costs for the deployment of cross-border data economy services. Not only does data localisation impact the providers of such services, including the scaling-up and cross-border development of start-ups in Europe, it also makes it difficult for all companies across Europe to benefit from new technologies that enable them to more efficiently and cost-effectively store and analyse data.

We welcome the European Commission's proposal for a Regulation which establishes the principle of the free flow of non-personal data in the EU. We particularly support measures limiting data localisation requirements and increasing transparency around Member State practices. In a Single Market that's increasingly digitised, data should not be stopped at national borders.

We believe that several key provisions could benefit from clarifications for the Regulation to effectively achieve its objective to remove unjustified data localisation requirements in the EU.

Article 2 – Scope

The Regulation applies to data localisation measures that are based on reasons other than the protection of personal data as covered by the GDPR. This significantly limits the scope of the proposal. The proposed Regulation assumes in Recital 10 that Regulation (EU) 2016/679 prohibits Member States from restricting or prohibiting the free movement of personal data within the Union for reasons connected with the protection of natural persons with regard to the processing of personal data. But in practice, some data localisation measures, such as those governing health and HR data for example, would not be covered at all except in relation to non-personal data like machine data or aggregate numbers (metadata). It also raises the issue if, how and at what cost data can be unbundled, for example a connected appliance generates data that is linked to the driver/user of the appliance.

Article 3 – Definitions

It should be clarified that public procurement rules are covered by this Regulation (only the Staff Working Document mentions public procurement rules). The definitions of "draft acts" and "data localisation requirement" cover "administrative provisions", but public procurement rules are not explicitly mentioned and it is not clear if they are understood as "administrative provisions". Recital 4 doesn't mention public procurement either. Also, the definition of "data localisation requirement" covers laws and administrative provisions of the Member States, but it is not clear if laws and other rules adopted by regional or local authorities are also covered. This is important in the context of data localisation requirements in regional and local public procurement rules. We therefore propose to add "including public procurement tenders," after "administrative provisions of a general nature" in the definition of "draft act".

Article 4 - Free movement of data across borders within the Union

The draft Regulation prohibits measures which require that data be either stored/further processed in a specific territory or which prevent storage/further processing in a territory, unless justified on grounds of public security. Although it is very positive that there is only one exception limited to public security, a definition of public security would still be helpful so that it doesn't lead to a broad interpretation and expansion of this exception to categories like "public interest" or "public policy".

We fully support the review of existing localisation requirements and the transparency obligations on Member States regarding justified data localisation measures, set up by Art. 5.3. and Recital 14.

Also, we believe that enforcement mechanisms are a key element of the draft Regulation. It is positive that the draft Regulation creates an obligation for Member States to notify the Commission of any draft act which introduces a new data localisation requirement or makes changes to an existing data localisation requirement, using the procedures from the Transparency Directive. In practice, this notification procedure will need to be extremely robust and give clear blocking powers to the Commission to guarantee its effectiveness.

In order to ensure compliance, consideration should be given to the creation of a structure under which third parties can notify the Commission of unwarranted data localisation requirements, requiring the Commission to act within a reasonable time-frame.

Article 6 - Porting of data

Considering efforts on the market to provide data portability solutions in a data economy that is still in development, we believe that the best way to address portability issues is contractual. Indeed we support the view that portability is best ensured via industry-led initiatives and not via mandatory rules, thus codes of conduct facilitated by the Commission seem the most suitable approach. The one-year deadline for service providers to implement these codes of conduct seems particularly short, considering the time that is usually needed for the drafting of such codes of conduct.

Conclusion

AmCham EU calls for a swift adoption of this draft Regulation by the Council and the European Parliament. Ensuring strong monitoring and enforcement mechanisms will be particularly critical to the success of the proposal. On the contrary, extending the scope of exceptions beyond the grounds of justified public security would strongly limit the framework's effectiveness.