AmCham GERMANY

# Position Paper

## Facilitating legal certainty for international data transfers: Creating a digital transatlantic economic zone

**A position paper by the Digital Policy Committee at the American Chamber of Commerce in Germany (AmCham Germany)**

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# Preamble

The American Chamber of Commerce in Germany (AmCham Germany) is the voice of transatlantic business – an association of large, medium-sized and small companies and individuals based in Germany, Europe and the United States who are active in the transatlantic economic area and foster transatlantic relationships. AmCham Germany promotes global trade relations that are built on the strong foundation of the German-American partnership. This partnership is based on long-standing social, cultural and economic interdependencies and the common interests of our two countries. In addition, AmCham Germany advocates for transparent dialogue and is committed to transatlantic values. Central to this are freedom and human rights, democracy and the rule of law, free trade and competition. Companies active on the transatlantic level employ around 1.5 million workers in both economic areas.

# Introduction

As the world slowly recovers from the blows dealt to it by the COVID-19 pandemic, the geopolitical dynamics of digitalization as one of the key economic factors of the 21st century are gathering speed – powered by *the digitalization supercharger named* corona.

In the process, cracks have begun to emerge in a model that has shaped our lives for decades: the belief that democratic countries in the West were the most successful economic forces in the world and that a Western-style democracy would automatically lead to high standards of living. Today, we are increasingly seeing that autocratic countries are fully capable of competing with the West as equals. What's more, these economic systems can develop innovations and bring them to market faster than their political and economic rivals in the West. Digitalization is becoming a geopolitical power and prosperity factor.

This development has prompted increasing numbers of people to call for "digital sovereignty" – and not just in Europe. Such calls are primarily aimed at facilitating the ability of countries and societies to act on their own in digital space, that is to reduce lopsided dependencies.

This desire for digital sovereignty is increasingly fueling efforts to draw and enforce geographic and political boundaries in digital space, in the form of trade-policy measures, regulations or direct intervention in the Internet. Such measures include procurement regulations governing technologies from particular sources and the application of national access rules for digital services. However, these efforts pose a threat to opportunities to produce innovations and achieve high standards of living that are based on the largely free exchange of goods and services in large economic zones.

In light of the geopolitical shifts of power that have occurred on the global level, the EU and the United States must answer one question: What role will the West play as a result of these developments?

The need to advance political and economic collaboration for a forward-looking, free and rules-based world order is becoming more pressing with each passing day. AmCham Germany believes that the transatlantic relationship must be intensified and stabilized in light of its geopolitical dimension and must be energetically promoted on the political level. At the end of September 2021, the EU-U.S. Trade and Technology Council (TTC), a new forum that addresses critical trade, business and technology questions, held its first meeting and took a decisive step in this direction.

A consensus about many trade and technology policy issues already exists on both sides of the Atlantic. New opportunities for joint action are also being generated by the U.S. administration. This momentum must now be used to promote an open, values-based transatlantic economy. The reason is clear: The transatlantic economic relationship has enhanced the foundations of a rules-based world order for decades. This relationship underpins the high standards of living enjoyed on both sides of the Atlantic and reinforces Europe's place as a sovereign entity that is capable of acting on its own.

This is particularly the case with digitalization. The United States and Europe now have the opportunity to intensify their collaboration in this area and create a **joint digital transatlantic economic zone**. The incorporation of a values-based, institutionalized digital transatlantic economic zone into the digital partnership could pay off in many ways: It would strengthen mutual trust, better tap the social-welfare potential of digitalization and, finally, bolster the West's values on the global level.

**From now on, the EU and the United States should jointly define goals for transatlantic digitalization instead of simply coordinating their actions now and then.**

A digital transatlantic economic zone could act as a powerful counterforce to the challengers and their different set of values. Other technology powers, particularly China, have a completely different view of the digital transformation of the economy and, above all, of society. The EU and the United States must devise a joint digital-policy strategy in response to China. A digital transatlantic economic zone could act as a stabilizing force amid the shifting winds of geopolitics, serving as a model for furthering democracy as well as liberal values and ideals.

# Fields of action for a digital transatlantic economic zone

The creation of a digital transatlantic economic zone is now within reach, thanks to the revitalization of the transatlantic relationship and the initial momentum generated by the meeting of the EU-U.S. Trade and Technology Council (TTC) at the end of September. This possibility gives rise to three key questions: How would such an economic zone be structured? Which rules and freedoms would guide it? And who would constitute it?

The fundamental goal of such an economic zone should not be restricted to the elimination of direct or indirect trade barriers and the harmonization of regulatory conditions. Ultimately, it must also include a digital transatlantic domestic market that could serve as a port of call for other countries and regions, particularly emerging countries. Potential areas of agreement include mutual recognition of standards and harmonization of regulatory requirements in such areas as data protection, IT security, environmental protection and workplace conditions. This form of cooperation could also extend to joint approaches on export controls and reviews of investments.

Political actors on both sides of the Atlantic must determine which specific conditions for a digital transatlantic economic zone are to be defined. The work that must be done until we reach this point will involve tackling the latest challenges and taking a range of different steps to promote the creation of such an economic zone. AmCham Germany views the following fields of action to be a critical part of the process that will help intensify the collaboration in the area of transatlantic digitalization on its way to a digital transatlantic economic zone.

**Strengthen the Trade and Technology Council**

The joint EU-U.S. Trade and Technology Council (TTC) was announced as part of the U.S.-EU summit held in Brussels in June 2021. The first meeting of the TTC also served as an important

signal of the joint definition of initial collaboration. Political leaders and the transatlantic digital business community must now provide the best-possible support to the TTC and encourage its enhancement. Above all, trustworthiness and legal certainty must be created by defining joint regulations.

Regulations governing digital space like IT security legislation should be weighed in transatlantic terms and coordinated together from the very beginning. The TTC can play an active and intermediary role in this work. It can help eliminate differences in regulations and systematically develop a joint transatlantic understanding of digital regulation without calling specific legislative initiatives of both sides and, thus, the regulatory sovereignty of both partners into question. The TTC should also actively draw up a framework for a transatlantic digital domestic market. Solving critical differences that currently exist will be a major responsibility of the TTC. One central aspect of this work will be to initiate coordination activities before legislative processes have begun and not after they have ended.

The TTC should consider the global range of digital space from the very beginning. An effort that simply coordinates transatlantic goals will not be enough to globally cement values and regulations. The participation of interested third countries like Japan, Australia and Mexico can help to further solidify a rules- and values-based global economic order. Docking mechanisms must be created for the projects conducted by the TTC. This approach would enable interested countries to play an active role in the development of global standards from the start.

**Secure the transatlantic exchange of personal data**

A key to a successful digital transformation will be the legally certain exchange of personal data between our legal spheres. For this reason, the United States and the EU need a robust and legally certain follow-up agreement to the EU-U.S. Privacy Shield, a framework that addresses the data-protection problems identified by the European Court of Justice in its Schrems II ruling, in order to facilitate the long-term continuity of data streams between the EU and the United States. This is the only way that we can assure that the business community will not be paralyzed by legal uncertainty and that the privacy of citizens on both sides of the Atlantic will be protected.

The ability to resolve this fundamental conflict does not lie in the hands of companies on both sides of the Atlantic. The reason is clear: At its core, Schrems II is a data-protection, values-based ruling by the EU regarding the law of third countries over which companies have no direct influence. The situation affects German companies, companies based in the United States, and small and medium-sized enterprises to the same degree, particularly if these companies have employees or customers in the United States.

For this reason, AmCham Germany believes that something more than a “Privacy Shield 2.0” is needed. It calls instead for a far-reaching political solution that attacks the roots of the problem – the different standards related to and beliefs about government access authority.

Clear regulations governing access by law enforcement agencies and intelligence services to data should be created within the context of a uniform transatlantic data zone for personal data. These regulations should be uniform and legally certain. They should always be based on the principle of proportionality. The primary goal will be to create a balance among a wide field of interests. Over

the long term, joint consideration must be given to countries' security interests, data-protection and citizen rights interests and economic interests related to the transatlantic exchange of data. In addition to possible access by government officials to data, the primary aim will be to ensure individual legal protection.

**Trustworthiness as a regulatory standard**

As part of efforts to secure critical infrastructures like 5G and 6G networks, discussions are increasingly focusing on the "trustworthiness" of manufacturers and supplier companies. These discussions have moved beyond the stage of a purely political debate and become a real regulatory concept. As part of the IT Security Act 2.0, the German government included "trustworthiness" as a requirement governing the use of critical components by operators of critical infrastructures. The law also authorizes ministry-level prohibitions to be issued in cases of insufficient trustworthiness. This regulatory approach taken in IT security law amounts to an indirect trade restriction that could potentially impact the transatlantic relationship.

As part of the creation of a digital transatlantic economic zone, regulatory mechanisms governing mutual recognition and trustworthiness of companies based in participating countries should be developed. At the same time, innovation blockades should be counteracted through proprietary systems. Interoperability and interface openness should generate additional innovation momentum as a standard on both sides of the Atlantic.

**Safeguard value creation through industry data**

Value creation and innovation generated with industry data are critical issues to the European Union and the United States.

In the EU alone, the data economy is expected to nearly triple between 2018 and 2025 and reach a total volume of €829 billion. In the United States, connected vehicles are forecast to create incremental value of up to $400 billion in 2030[1].

The ingenuity of the transatlantic economy can be boosted by turning the close transatlantic collaboration into a value-generating digital transformation. Ongoing European projects like Gaia-X or the planned data space for mobility data could serve as examples of this approach and be integrated into this structure.

As an initial step, joint open public data spaces could be created for the purpose of facilitating value creation through exchanges of public data. Exchanges of non-personal data should be a key joint project that could solidify the pacesetting role in technology played by the transatlantic community.

[1] European Commission. Making the EU a role model for a society empowered by data, https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/european-data-strategy_de

**Use artificial intelligence as a key transatlantic technology**

Artificial intelligence (AI) will be a key driving force behind global digital change in years to come. In light of the geopolitical context as well as the potential and risks associated with this technology, AI must be jointly developed as a key transatlantic technology. Transatlantic principles and standards will therefore be a critical aspect of values-based, ethical AI.

A transatlantic board of AI experts, made up of political, business and scientific leaders in the EU and the United States, could promote the joint use of AI and the development of norms and ethical standards as an element of the digital transatlantic economic zone. Transatlantic collaboration initiatives among the research community, the business world and the public sector would strengthen exchanges of knowledge about AI. Initial practical projects could be developed by creating joint training labs, data spaces and real-world labs.

**Collaboration for more cybersecurity**

The increasing global wave of cyberattacks and attacks on government institutions, companies and entire democracies by third-country or privately financed organizations and individuals poses a threat to both our secure digital way of life and public safety and order. Transatlantic collaboration must also be expanded in the area of cybersecurity to erect a strong, dynamic line of defense that can repulse this threat. This effort must involve not just intense collaboration in the fight against cyberwarfare for the purpose of protecting critical infrastructures. It must also include more intensive government-led operations to fight cybercrime. A joint transatlantic cybersecurity initiative carried out under the umbrella of a digital transatlantic economic zone would heighten member countries' awareness of their own responsibilities. Such an initiative would help fight cybercrime and systematically thwart economic espionage.

This work could also delve into the much more complex question involving a unified response to government-initiated and coordinated cyberattacks. The large number of attack waves launched in the recent past shows that government-sponsored actors are increasingly attacking global infrastructures with digital weapons. A much stronger politically coordinated approach is needed. An approach that should extend beyond the much-discussed international-law aspects of such instruments, which are considered to be something less than an act of war when used but still have a strong impact on infrastructures and, thus, on citizens. This work would include both a coordinated public assignment of blame for such attacks and a jointly defined sanctions regime.

From a European perspective, more intense support would be welcome, also from the United States, for international agreements, including the signing of the Budapest Convention on Cybercrime, as a way of sending a signal to such countries as Russia and China.

**Transatlantic collaboration in semiconductors**

The semiconductor shortage being experienced by the United States and Europe has underscored the tremendous importance of sensitive supply chains and their geopolitical dimension. Governments around the world are working to help their industries with the research, design and production of microchips. As part of its infrastructure package, the U.S. government is planning to

invest huge sums of money and is searching for international agreements to secure critical supply chains.

The planning and construction of semiconductor production facilities are also an extremely costly and drawn-out process. The capital costs associated with the construction of a *fab* for semiconductors in the current 5nm range total about $20 billion, according to a new study.[2] As a result, such plants are not a feasible option to address short-term supply shortages. As far as the European Union goes, it primarily needs established and robust semiconductor technologies for industrial purposes (>10 nm). The European market for state-of-the-art semiconductors that are used in large numbers especially for communications technology is not large enough.

In light of this development, the European Union and its member states should not search for help with this temporary and critical shortage of microchips by themselves, should not focus on production of microchips without a business case and should not select individual technologies at the expense of others. The much more promising strategy for the short and medium term would be to focus on research, development and design of semiconductors, to concentrate know-how and available resources in a joint initiative with the United States and to take a technology-neutral approach.

AmCham Germany calls for intensified transatlantic collaboration regarding technology-neutral support of research and development of semiconductor technologies in both the United States and European Union.

[2] McKinsey & Company (August 2020): https://www.mckinsey.com/industries/advanced-electronics/our-insights/semiconductor-design-and-manufacturing-achieving-leading-edge-capabilities

# Conclusion and outlook

The political, commercial and social incremental value of a digital transatlantic economic zone is immense. Such a project is needed for a future-driven, resilient transatlantic partnership. A digital transatlantic economic zone would secure high standards of living, economic growth and innovation leadership over the long term. Revitalizing the transatlantic relationship and creating new partnership commitments like the TTC would open up new opportunities for partnerships between the United States and the EU. Political and business leaders on both sides of the Atlantic must now jointly seize these opportunities to tackle the challenges arising in digital space.

AmCham Germany and its members have many years of expertise in a wide range of commercial sectors. The members want to contribute the experience they have gained in the transatlantic economy to create a digital transatlantic economic zone. In doing so, they want to help initiate a new phase of the transatlantic relationship and commercial collaboration. A digital alliance on both sides of the Atlantic is the key to a strong partnership between the EU and the United States.

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**About AmCham Germany**
The American Chamber of Commerce in Germany (AmCham Germany) is the voice of transatlantic business. It promotes global trade relations that are built on the strong foundation of the German-American partnership. We actively support and promote the interests of our members through our networks in the business community, the world of politics and American chambers of commerce throughout the world. AmCham Germany facilitates intercultural understanding, collaboration and new investments through the principles of a transparent dialogue, free trade and a competitive and open economic climate.

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# Annex

**Shape sector-specific collaboration**

Sector-specific collaboration in the areas of sustainability, start-ups and innovation can tap social and commercial potential. Sector-specific partnerships produce synergies and reinforce the integration and resilience of the transatlantic relationship. Lighthouse projects in sector-specific areas can be jointly designed and carried out as a first step.

*Climate-change measures* – Climate change is a major global challenge that we face today. To meet this challenge, the transatlantic business community must act. A transatlantic appeal for sustainable digitalization with an inducement to further enhance a $CO_2$-negative digital economy should be launched for this purpose. On the one hand, digital technologies must be used for a sustainable world. On the other, $CO_2$ emissions created by the digital economy itself must be reduced as well. The closer that transatlantic collaboration is in the area of sustainability and the more frequently that digital technologies are used for this purpose, the greater the progress will be. Achievement of global sustainability goals is also tremendously important. In some areas (including healthcare and well-being), digitalization can make an important contribution and counteract increasing levels of social injustice.

*Banks & financial services* – The transatlantic financial sector is the world's most important and most capable. A joint framework for digital financial services and the exchange of financial data must be maintained and expanded so that the digital world can continue to count on a strong banking system and a wide range of financial services. In particular, transatlantic interfaces must be put into place, and the European Financial Big Data Cloud (FBDC) must be converted into a transatlantic ecosystem for financial data.

*Start-ups* – Inventiveness and creative company founders power economic growth and innovation on both sides of the Atlantic. This is particularly the case in the digital economy. Joint start-up financing programs and the development of transatlantic and globally focused start-ups can network and advance the national start-up community. Transatlantic start-up grants and a transatlantic incubator for start-ups would be two ways to do so. This effort should focus in particular on strategically important areas and key technologies to ensure that they remain competitive. The experience gained by the transatlantic business community in this area should be tapped in order to expand transatlantic start-up support.

*Healthcare* – The pandemic has underscored the need for multilateral collaboration in times of crisis. The success story of BioNTech/Pfizer illustrates the reasons why. Their joint vaccine program shows that innovation and digitalization in healthcare must be considered in transatlantic terms. For this reason, collaboration and research projects must be strengthened and digital applications in healthcare promoted, in such areas as joint solutions for diagnostics and precision medicine. Transatlantic collaboration on digital applications in the areas of diagnostics and precision medicine would result in faster care that is based on patients' needs. It would ease stresses borne by healthcare systems in the process.

*Mobility* – Our mobility is changing faster and faster as a result of digitalization and in a way that extends beyond national borders. By developing and implementing joint standards for autonomous vehicles and connected traffic, innovation-inhibiting standardization deficits can be reduced and prevented at an early stage. Innovations must also be actively supported. Transatlantic mobility data spaces will play a key role in this effort.

*Science, research and innovation* – World-class research will facilitate innovations and result in epochal changes and standards of living. To ensure that American and European research remains world class in the future, preeminent transatlantic research programs and other initiatives that are designed to facilitate knowledge transfers and a dialogue between American and European scientists must be energetically promoted. The development of various transatlantic sector-specific innovation hubs and a connected innovation ecosystem could support the (continued) development of key technologies as part of the digital transatlantic economic zone.