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EXECUTIVE SUMMARY

How to Build Back Better the Transatlantic Data Relationship: Executive Summary

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The Problem

Cross-border data transfers—involving both personal and non-personal data—enable firms to engage in transatlantic commerce and allow governments to conduct regulatory oversight, investigate crimes, protect national security, and more. The European Union's (EU's) General Data Protection Regulation (GDPR) was supposed to bring a more predictable and harmonized approach to data protection within the EU and provide a range of tools for firms to transfer EU personal data overseas. Instead, transatlantic data flows have become more difficult and more complex.

For the second time in recent years, the European Court of Justice last summer invalidated the framework that governs transatlantic transfers of EU personal data—the EU-US Privacy Shield—because it found that U.S. laws did not sufficiently protect data about EU citizens when stored in the country. That decision, known as *Schrems II*, not only invalidated the Privacy Shield, but also exposed other methods of transferring data across borders, including standard contractual clauses (SCCs) and binding corporate rules (BCRs), to further legal challenges, leaving firms with few viable options. Policymakers need to quickly reconcile the EU's data protection laws with U.S. surveillance policies and practices because the current stalemate makes transatlantic data transfers increasingly difficult, if not impossible, and if left unresolved it will lead to de facto data localization at great economic cost.

Why Transatlantic Data Flows Matter

Data flows are an integral part of digital trade—responsible for millions of jobs on both sides of the Atlantic in a diverse array of industries, including manufacturing, transportation, financial services, and insurance. For example, a quarter of the manufacturing sector's inputs are digital services, as firms leverage data-intensive technologies like cloud computing, additive manufacturing, generative design, sensor networks, data analytics, and machine-to-machine (M2M) devices to design, fabricate, transport, service, and use products. For example, Volkswagen, Europe's biggest automotive manufacturer, uses cloud computing to gather and analyze data from its factories in the United States, Mexico, and Europe to increase efficiency and productivity and share information across systems and suppliers.

Restrictions on cross-border data flows also complicate other regulatory obligations. For example, financial services providers need access to data to comply with anti-money-laundering, know-your-customer, risk-mitigation, and consumer-protection requirements, and to maintain internal standards on cybersecurity and fraud prevention. Likewise, the health-care sector increasingly

uses data and analytics to improve care, develop new treatments, and lower costs. For example, life sciences companies like Johnson & Johnson and Pfizer share real-time data to track and manage their supply chains, monitor operations at production facilities, and ensure they comply with relevant security, privacy, and safety requirements. Moreover, transatlantic data flows are essential to the clinical trials involved in modern drug discovery: Over half of the clinical trials taking place in Europe also have at least one site in the United States.

Restrictions on transatlantic data flows disproportionately affect start-ups and small and medium-sized enterprises (SMEs) by disrupting their ability to find and serve customers on both sides of the Atlantic. In fact, tight restrictions make EU digital markets inaccessible to all but the largest firms that have the resources to navigate the regulatory complexity. As a result, EU businesses are unable to leverage many emerging U.S.-based digital services—the types of productivity-enhancing services that businesses typically turn to in a bid to outcompete their rivals—which puts EU startups and SMEs at a disadvantage relative to their foreign competitors.

Many consumer Internet services, including search, email, and social networks, also are negatively impacted by de facto data localization. For example, transatlantic data flows are necessary for many single-sign-on services that allow users to authenticate to a variety of Internet services, as well as online advertising that supports users' access to no- and low-cost services. These limitations will lead to EU users having a markedly different Internet experience than that of non-EU users. In addition, firms seeking customers in other markets will find online advertising more expensive, less effective, and less likely to reach customers in foreign markets.

How to Address the Issue

Transatlantic data flows have faced a decade of turmoil—but the situation has never been as dire as it is now. Policymakers urgently need to cooperate on solutions because without swift political intervention the frayed transatlantic digital relationship could be irrevocably severed. Policymakers should take the following steps:

- **Negotiate a new Privacy Shield:** The EU and United States should initiate both short-term and long-term initiatives to build a durable and comprehensive data protection framework—a new Privacy Shield—that manages the interests of their firms, their governments, and most importantly, their societies. Ideally, the EU would offer a short-term solution to provide immediate relief to firms and sectors sharing data for critical economic and social purposes during the COVID-19 pandemic. For the long term, policymakers should work toward an agreement that codifies their commitments, especially around government access to data and restrictions on data localization.
- **Build new data-transfer mechanisms under GDPR:** After the *Schrems II* decision, there are serious questions about the viability of using SCCs and BCRs to transfer EU personal data to the United States. The GDPR no longer provides a broad, varied, and accessible tool kit for firms to transfer personal data out of the region. The EU should accelerate efforts to enact codes of conduct and certification schemes to provide a broad, flexible set of legal tools for firms from different sectors to manage data reasonably and responsibly under GDPR.

- **Improve transatlantic law enforcement cooperation:** Electronic evidence is needed in around 85 percent of criminal investigations, often from other jurisdictions. Policymakers should conclude negotiations that began in September 2019 to improve transatlantic access to electronic evidence for law enforcement investigations. That entails building upon the existing EU-U.S. Umbrella Agreement, the EU-U.S. Passenger Name Records Agreement, and the Terrorist Finance Tracking Programme.
- **Build a transatlantic agenda based on "digital realpolitik":** The EU has often pushed other countries to harmonize their approaches to digital issues with Europe's policies. This expectation to align precisely with the EU has created a roadblock to building global consensus and cooperation around these issues. Rather than pursue an unrealistic push for harmonization, U.S. and EU policymakers should focus on cooperation around their genuine shared values—ones that stand in stark contrast to those of authoritarian digital powers such as China and Russia—thereby allowing them to focus on areas of strategic concern around data and technology, including artificial intelligence, electronic identity systems, and cybersecurity.

Read the full report: itif.org/transatlantic-data.

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