

Position Paper

Cross-border Data Flows and EU Trade Agreements

The cross-border transfer of data is increasingly important for German industry, especially in the expansion and development of Industry 4.0. Among other things, it is a prerequisite for cross-border e-commerce and a basic requirement for establishing and managing global value chains and production structures in an optimal way. Cross-border data flows allow real-time communications between machines, employees, warehouses and production sites. Moreover, in the era of big data, it is the data themselves that are increasingly becoming a commercially valuable production input, including in research and development (R&D). The cross-border transfer of data strengthens the “servicification” of industry – an essential component of Industry 4.0 and an important element for the future competitiveness of German enterprises.

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Thus the increase in state policies implementing the forced localization of data and ICT infrastructure is cause for concern. Studies do show that companies highly value the free-market opportunity to store and transfer data simply at the local level. Voluntary localization must not be restricted, nor should it be criticized. But mandatory regulations on storing data constitute a real trade barrier inflicting economic damage and in some cases amount to market closure. Owing to the huge importance of data and data transfers for all economic sectors and companies of every size, this is a problem that affects a large part of Germany industry.

- Forced localization impairs and impedes trade in Internet and digital services in particular. But the cross-border transfer of data is increasingly important for distribution in physical trade too.
- The global value chain cannot be effectively managed without the simple and time-efficient transfer of data. Accordingly, forced data localization curbs the willingness to invest.
- Forced data localization can significantly hinder R&D cooperation and new business models such as trade via 3D printing.
- Forced establishment or use of local data centres or other such facilities leads to considerable costs and efficiency losses.
- If data can be stored only in one region, the risk of cyberattacks resulting in data losses and inflicting economic damage may increase (because it can be neither mitigated nor spread through multiple storage).

Current trade law offers insufficient safeguards against digital protectionism. In all trade agreements, the EU should ensure that cross-border access to data as well as cross-border transfers and storage of data are guaranteed in principle. State-imposed restrictions with regard to the localization of data and ICT infrastructure should be strictly prohibited in the trade agreements. The European Commission is discussing with the member states a

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regulatory approach to digital data transfers in EU trade agreements. It proposes that cross-border data transfers and the free choice of location for the processing and storage of data be provided for in trade agreements only insofar as they are necessary for conducting business. The BDI rejects any such proviso or necessity test. Not only would this be unworkable; it would also create considerable legal uncertainty without contributing to data security or protection.

A high level of data protection is a fundamental prerequisite for digital trade. Trade agreements can offer an opportunity to export the EU's high data protection standards. They make it possible to commit trade partners to an adequate level of data protection. The provisions of the EU Basic Regulation on Data Protection must be neither undermined nor circumvented by trade agreements.

In free trade agreements, exceptions to prohibitions on data and ICT infrastructure localization are legitimate for the protection of privacy and national security. However, the BDI recognizes the danger of misuse for protectionist purposes. In narrowly tailored exceptions – which, in any case, must be clearly defined, non-arbitrary, non-discriminatory and transparent – there can be departures, on an individual basis, from the free exchange of data. The provisions should orient themselves towards Article XIV of GATS, acknowledge the importance of data protection as an EU fundamental right and maintain the effective safeguarding of the general guarantee of cross-border data transfer. The burden of proof that measures restricting cross-border data flows are legitimate and non-protectionist must lie with the governments that apply such measures. The goal of effectively curbing digital protectionism would not be achieved if the burden of proof were to lie with companies.

If these points are taken into account in current free trade negotiations, the EU can set gold standards for trade agreements, effectively curb digital protectionism and promote a high level of data protection.

We are the voice of German industry

The BDI is the umbrella organization of German industry and industry-related services. It speaks for 36 trade associations and more than 100,000 enterprises with around 8 million employees. Membership is voluntary.