



The Flow Of Data Across Borders: A BIAC Trade Policy Perspective

This paper provides a BIAC business perspective to the OECD, and its Trade Committee in particular, on the impact of restrictions on cross-border data flows. It then sets out recommendations for the OECD to consider to address the negative impacts of such restrictions.

Data-driven innovation and data analytics are key features of the 21st century, with potential to enhance growth and job creation in developed and developing economies. The flow of data across borders is now a central part of global value chains and a major requirement for a wide range of manufacturing and services industries. Strategic business development depends on the ability to analyze large data sets. The efficient management of global investment portfolios requires that data move freely across borders. Data flows are an integral part of modern logistic systems and electronic customs procedures. In summary, data flows are the basis of today's digitalized economies and are important to consumers and business, including start-ups, SMEs and large corporations.

BIAC members have expressed serious concerns about the negative impacts of data localization and other restrictions on data flows, and believe that existing and newly proposed trade disciplines should be used to address these restrictions. Forced localization measures are not the right answer to data security issues and will damage the potential that the digital economy can deliver for both citizens and business. Furthermore, forced localization in multiple jurisdictions would likely lead to greater rather than lower security risks. BIAC therefore requests the OECD to take decisive action to gather evidence on these measures and their effects on trade, to raise awareness of the importance of data flows and to promote best practices that allow for the needed cross-border flow of data and that address concerns for security and privacy.

Understanding data flows

A recent ECIPE study¹ of the patterns of flows in data around the world highlighted two important facts. First, the providers of data services account for a large proportion of data usage. These include telecoms, sound recording, data processing and hosting, and web portal services.

A second aspect of data flows, highlighted by ECIPE, is the importance of services that flow between affiliates of multinational corporations including financial planning, human resource and administration, and bookkeeping, among others. A detailed analysis using the World Bank Trade in Services (TIS) database shows that services transactions between related enterprises absorb a data share almost equal to the data-producing industries. Furthermore trade in services between related enterprises are spread widely across developed and emerging economies.

The United Nations Conference on Trade and Development (UNCTAD) estimates in its 'Information Economy Report' that about 50 percent of all traded services are enabled by the technology sector, including by cross-border data flows, with the role of ICT applications and services expanding across the entire value chain².

Data flows across borders will only accelerate as more devices come online in the era of the Internet of Things (IoT). It is estimated that by 2019, 3.9 billion people, over half of the population of the world, will be connected to the internet³. It is also estimated that over the next five years, approximately 10.2 billion new connected devices (including tablets, watches, phones, sensors, etc) will come online – nearly double the number of devices in existence today. Many of these devices will transmit user data for processing across borders .

Data Localization and other policies impacting on the transfer of data

BIAAC members have identified forced localization policies in manufacturing and services sectors as a troubling trend of recent years. Such policies are a disproportionate response and more trade restrictive than necessary. Recent studies calculate that such policies would reduce global trade by \$93 billion annually.

BIAAC emphasizes the need for policies that promote best practices for the development of innovative products and services. Limiting data movement will increase costs, reduce the business competitiveness across the globe and fragment the internet. The objective of promoting cross border data movement is widely shared by technology and broader business groups in the US, Europe and Japan.

As underlined in the conclusions from the Swedish National Board of Trade in 2014 and 2015, localization barriers are the most intrusive form of data protection regulation. As highlighted in their 2015 report localization demands should not be allowed⁴ . Trade policy could be a tool in this regard to include disciplines against this type of requirements while at the same time also respecting data privacy and security regimes.

Governments can and should respond to the proliferation of data localisation by enforcing existing trade rules and establishing new international trade disciplines that would restrict such measures. Research evidence shows that failure to do so will result in losses in terms of economic development and investment⁵. Trade

1 Van der Marel, Erik, 2015, Disentangling the Flows of Data: Inside or Outside the Multinational Company? ECIPE Occasional Paper no.07/2015.

2 UNCTAD Information Economy Report 2015: Unlocking the Potential of E-Commerce for Developing Countries, March 2015.

3 <http://www.cisco.com/c/en/us/solutions/service-provider/visual-networking-index-vni/index.html>.

4 Swedish National Board of Trade 'No Transfer, No Production: A Report on Cross-border Data Transfer, Global Value Chains, and the Production of Goods', 2015

5 At a macro level ECIPE found that proposed or enacted data legislation could reduce GDP by between -0.2% and -1.7%. The impact on overall domestic investments was also considerable, ranging from -0.5% to -4.2%. The study also found there were significant welfare losses. For the citizens these amounted to \$63 billion for China and \$193 billion for the EU. The loss per worker for India was equivalent to 11% of the average monthly salary, and almost 13% in China and around 20% in Korea and Brazil.

agreements can establish a framework of rules for digital trade that ensure key inputs are not arbitrarily impeded by governments requiring data to be stored locally⁶.

Data localization requirements, which go beyond the exemptions of Article 14 of the General Agreement on Trade in Services (GATS), run counter to trade liberalization and a more open global trade environment that are core objectives of the World Trade Organization (WTO) Agreements and plurilateral and bilateral trade and investment agreements.

Appropriate measures to deal with privacy and security of data flows

Policy initiatives should not unduly restrict the movement of data within firms, including SMEs and multinationals or between related enterprises. Binding Corporate Rules are examples that show the transfer of personal data inside the firm is already regulated in many countries. Flows of data between non-affiliated firms have also increased. This has resulted in the development of standard contractual clauses based on consent and agreement to facilitate the transfer of data to third parties. Governments could take into account these existing initiatives to avoid unnecessary regulation and legislation.

Building higher levels of trust and enforcing security is important for consumers and business. Businesses of all sizes along the value chain need to comply with applicable regulations related to data and consumer protection⁷. New framework agreements are likely to provide stronger obligations on companies to protect personal privacy and involve robust monitoring and enforcement⁸. Governments have a responsibility to ensure that data protection regulations strike the right balance between protecting the fundamental rights of individuals and enabling data to flow across borders. The OECD can play an important role in providing clear guidelines in this regard.

A major survey⁹ showed that the majority of people (71%) accepts that providing personal information is part of modern life. Respondents believe that the responsibility to keep data safe is shared between companies (67%), individuals themselves (66%) and public authorities (55%).

Companies can work with governments across borders to take reasonable steps to protect their customers and citizens including the development of data encryption, securing data integrity, and avoiding security breaches among other technological solutions to achieve this goal. However, governments also have responsibilities to develop laws and regulations that are a proportionate response.

⁶ The chapter on electronic commerce in the recently negotiated TPP provides one example of commitments with the objective to ensure that companies and consumers can access and move data subject to privacy safeguards.

⁷ In complying with applicable regulations there may be conflicting requirements from different jurisdictions.

⁸ For example the new framework for transatlantic data flows, known as the 'EU-US Privacy Shield'

⁹ Survey carried out by the global research group TNS Opinion and Social Network in the 28 Member States of the European Union in February – March 2015. 27,980 respondents from different social and demographic groups were interviewed face-to-face at home in their mother tongue on behalf of the EU Directorate General for Justice and Consumers.

Conclusions:

The flow of data across borders is essential for businesses of all sizes and consumers in a digital world characterized by rapid technological change. Companies can develop technological solutions and processes to better protect data and comply with regulations that guide how to handle personal data. Citizens need to consider what information they make available and better understand privacy settings. Building higher levels of trust of consumers and compliance with laws and regulations, on data protection and security, is essential. Governments have particular responsibilities in this regard, formulating policies that support these objectives. It is clear that data localization measures are not the right answer to data privacy and security issues and are a disproportionate response. Such policies are more trade restrictive than necessary and will damage the potential that the digital economy can deliver for both citizens and business.

BIAC recommendations to the OECD

Going forward, we commend the OECD for its ongoing work analyzing the impact of cross-border data flow regulation from a trade policy perspective, and its potential impact on international business. In light of this and further analysis, we call on the OECD to:

1. Gather and develop evidence on the adverse effects of forced localization and other measures that restrict cross-border data flows.
2. Highlight to governments the impact of data localization and other restrictive measures on international trade and investment.
3. Provide guidance to governments to support an effective response to the proliferation of data localization – including enforcement of existing trade rules and establishment of additional international trade disciplines to restrict such measures.
4. Raise awareness, among ICT and non-ICT industries, on the importance of data flows for business operations in global value chains (GVCs).
5. Work with governments and business to identify best practices in policy formulation that allow for the needed cross-border flow of data and that address concerns for security and privacy.
6. Promote policies among governments that enable the open flow of business data to end unnecessary rises in operational costs and to support business models that rely on data flows.

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