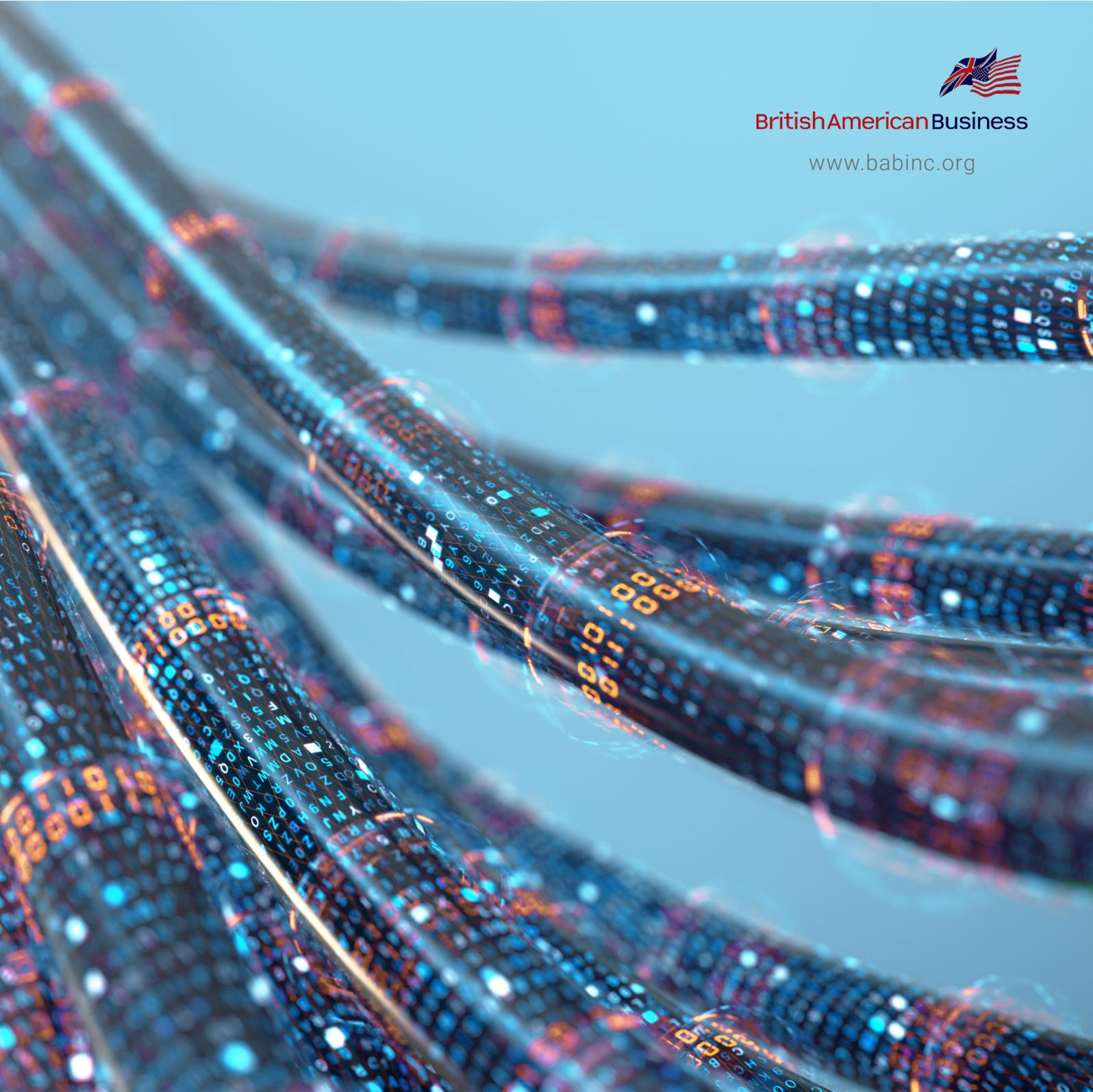




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*Briefing Paper*

# **Data Flows That Work for Transatlantic Business**

*Principles for a new data transfer mechanism between the U.S. and the UK*

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# Introduction

The topic of transatlantic data transfers has been an issue of importance to the British-American business community for almost a decade. It has been a top priority dating back to 2015, when the BAB Policy Steering Committee listed transatlantic data flows as one of the key priorities in BAB's annual Policy Agenda.<sup>1</sup> That year, BritishAmerican Business (BAB) took a prominent role in supporting efforts made by the United States (U.S.) and the European Union (EU) in safeguarding personal data transfers across the Atlantic.

Prior to that, BAB had also been an advocate for the inclusion of a robust data chapter in the negotiations for a comprehensive U.S.-EU Transatlantic Trade and Investment Partnership (TTIP), a position that the group maintained during the talks for a U.S.-UK Free Trade Agreement (FTA) started in 2020. The group also closely monitored the impact to the community of the invalidation of the Privacy Shield in 2020 and has supported efforts by the U.S. and the EU to update or replace Privacy Shield ever since.

With the UK's departure from the EU, the British-American business community has had to embrace an additional dimension of complexity in the efforts made toward a new transatlantic data flows mechanism. From the start of the UK's departure from the EU, BAB called for and eventually welcomed the Adequacy Decision that the EU adopted for the UK in 2021,<sup>2</sup> a crucial decision, particularly for the many American firms with operations across Europe. The UK has incorporated the EU's GDPR into UK law. However, the UK is not a member of the European Union anymore, therefore not bound to or part of any new arrangement being established between the U.S. and the EU.

While the British-American business community welcomed the ambition of the UK Government to set out an independent, modern, and forward-thinking approach to data,<sup>3</sup> the group also emphasized that the UK's ambition must also reflect existing arrangements, such as the EU-U.S. discussions or the EU's Adequacy Decision in future approaches to data.

Today presents an opportunity and challenge for the U.S. and the UK: to mirror U.S.-EU efforts for a post-Privacy Shield mechanism in a way that does not compromise the important UK-EU data transfers arrangement, yet embraces new thinking for a modern, and forward-thinking approach to data.

This short BAB Briefing Paper has been produced as a result of, and update to BAB's ongoing work on the issue. It provides a background to the importance of data flows and states where things stand on the issue for the U.S. and the UK in a wider transatlantic context. It offers principles and recommendations for governments to include in future thinking and work toward a U.S.-UK data flow mechanism that works for transatlantic business.

## The Importance of Free-Flowing Data

In a recent briefing<sup>4</sup> co-organised by BAB and the British-American Parliamentary Group (BAPG), companies of various sizes across different industries re-emphasized the importance of data to their businesses and the communities they operate in.

The ability to transfer data across borders, with no legal risk, is vital for transatlantic companies of all sizes and across all industries, from financial services to manufacturing. Data transfers are not purely a tech industry issue. Data flows now contribute more to global growth than the trade of goods.<sup>5</sup> In 2019, digitally-enabled trade – which is underpinned by the use of data – was estimated to be worth \$800 billion and \$1.5 trillion globally.<sup>6</sup>



In the transatlantic corridor, data transfers between the U.S. and EU are worth an estimated \$7.1 trillion.<sup>7</sup> The UK is the biggest trading partner of digitally-enabled services for the U.S., accounting for 23% of exports,<sup>8</sup> or \$48.8 billion (£39 billion). Not only that, but pre-2021 data showed that it accounted for a third of U.S. imports of digitally-deliverable services from the EU. UK digital services exports have grown by 56% from 2006 to 2017, to \$34.8 billion (£27.8 billion).<sup>9</sup>

Any disruption to data flows would have an immediate direct impact far beyond the tech sector and would affect Small and Medium-sized Enterprises (SMEs) disproportionately. SMEs lack the resources to understand and comply with complex legal and regulatory frameworks that larger companies might have. The ability to 'go digital' and tap into new markets is often critical for small businesses as it allows them to grow and expand, serve a wider customer base, and reduce costs. Data localization measures can in fact raise the cost of hosting data by 30 to 60 percent.<sup>10</sup>

The importance of data transfers has been especially highlighted in the context of the COVID-19 global pandemic. During the pandemic, the exchange of medical data has been key to developing treatments and to procuring and making them available around the world. The unprecedented speed at which COVID-19 vaccines were developed required global collaboration and sharing of vaccine research and personal data.<sup>11</sup> Furthermore, clinical trials were conducted across the world in the EU, U.S., Africa, and South America. Without this free flow of information, it is likely that the development of vaccines would have been significantly delayed and the economic decline caused by COVID-19 prolonged. A recent study estimated that each additional month of delay in the approval of the vaccine could have caused €70 billion in damage to the EU economy alone.<sup>12</sup>

## Where We Are Today

In July 2020, the Court of Justice of the European Union (CJEU) declared the Privacy Shield invalid. The Privacy Shield is an agreement between the U.S. and the EU that allowed thousands of companies to transfer personal and non-personal data between the two jurisdictions in a legally compliant way. Similar to a decision taken in 2015 on the predecessor to the Privacy Shield, Safe Harbor, the CJEU decided that the Privacy Shield is not a valid mechanism for transferring personal data from the EU to the U.S.<sup>13</sup> The CJEU agreed with concerns that the framework did not provide sufficient protection to the data of European citizens, given the breadth of U.S. data collection powers authorized in the U.S. electronic surveillance laws and the lack of redress options for EU citizens.<sup>14</sup> At the time of invalidation, over 5,300 companies were using Privacy Shield.

Since that decision was taken, there have been intense negotiations to construct a successor to Privacy Shield that would comply both with U.S. and EU legislations, with the hope that an agreement was to be achieved by the end of 2021.

The UK, now a non-EU country and therefore not part of the U.S.-EU discussion, announced in August 2021 that it would prioritize reaching a new data adequacy partnership with the U.S.<sup>15</sup> Talks have already started, with no formalized structure to date.

At the same time, in June 2021, the EU adopted two Adequacy Decisions to allow cross-border data flows between the UK and EU (for both commercial and law enforcement purposes). The decisions are valid for four years and then will need to be renewed or renegotiated.

Meanwhile, for over half a year, between the CJEU decision in 2020 and the EC Adequacy Decision in 2021, companies sending data from the UK to the U.S. could only rely on Standard Contractual Clauses (SCCs) or, for a much smaller number of companies, on costly and time-consuming Binding Corporate Rules (BCRs).

## Principles for a new Data Transfer Mechanism Between the U.S. and the UK

Both the current Adequacy Decision and the use of SCCs and BCRs enable transatlantic companies to operate. Yet, they also pose a risk: in the case of Adequacy, the EU may revoke it should it feel the UK diverges too much from EU rules. SCCs and BCRs are viable solutions, but may not work best for every company.

Therefore, a pragmatic long-term solution is needed that allows for the U.S. and the UK to reach a post-Privacy Shield agreement that reflects and integrates both the work being done between the U.S. and the EU and the need for frictionless data flows between the UK and the EU.

As part of the vital discussion within the business community and government stakeholders on both sides of the Atlantic, various suggestions have been made for the U.S. and particularly the UK to find ways to address the existing complexity, ranging from the UK creating its own codes of conduct or certification schemes to the inclusion of the UK in a future U.S.-EU agreement in some form.

The British-American business community feels that the most important step should be for the UK and the U.S. to formally begin bi-lateral negotiations for a data transfer agreement as soon as that is

possible. With the U.S.-EU talks ongoing, negotiations between the U.S. and the UK can be informed by the talks between the U.S. and the EU, yet also embrace specific UK ambitions outlined in its data reform. There is also the opportunity for talks between the U.S. and the UK to similarly inform U.S.-EU talks.

We understand that any solution will require careful trade-offs between partners. However, we feel there is a set of core principles that should inform future thinking and work as the U.S. and UK conduct negotiations.

1. A new U.S.-UK data transfer mechanism must ensure the highest data protection standards possible, while allowing for transatlantic companies to innovate and access global opportunities.
2. A new U.S.-UK data transfer mechanism must avoid data localization measures which are highly detrimental to all digital trade, and to the services industries on both sides of the Atlantic in particular.<sup>16</sup>
3. A new U.S.-UK data transfer mechanism must not compromise the UK-EU Adequacy Decision.
4. Any new data transfer mechanisms must not add unnecessary burdens on companies. Having too many different regulatory options for transferring data risks creating confusion and can artificially increase complexity and fragmentation.
5. A new U.S.-UK data transfer mechanism should offer legal certainty and avoid the inclusion of sunset clauses.
6. Negotiations for a new U.S.-UK data transfer mechanisms should offer a structured process for business to engage and offer input.
7. A new U.S.-UK data transfer mechanism should inform, embrace and support multilateral efforts to improve global data transfer standards. The WTO Joint Statement Initiative or the OECD trusted government access negotiations offer opportunities to set a global standard for the trusted transfer of data across borders and to bring certainty and economic opportunity.<sup>17</sup>

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