

# Fostering Transatlantic Trade Dialogue

## Requests and Comments from the American Chamber of Commerce, representing 300 corporate members, including US subsidiaries as well as Austrian companies with investments in the United States

In our ongoing efforts to strengthen US/Austrian trade relations and to position Austria as an attractive business location for our members, AmCham has identified the following priorities:

### 1.) Reducing Protectionism – all trade tariffs and sanctions need to be jointly reviewed and revised where possible

- According to the last annual "Trade Barriers Report" by the European Commission (2020), **"protectionism has become ingrained in international trade relationships"**. The report suggests that the Covid-19 health crisis increased the usage of tariffs and sanctions and, therefore, constitutes a real threat to free global trade and commerce.
- In response to the previous US administration's foreign trade policy, the EU and Austria implemented **anti-dumping-tariffs and foreign investment screenings**.
- A **few of the punitive trade measures** bilaterally imposed during the Trump administration's tenure by the United States and the EU **have since been rolled back**. In October 2021, the Biden administration agreed on the lifting of trade barriers for steel and aluminum, while the EU cancelled tariffs imposed on iconic US export goods (*inter alia*, motorcycles and jeans) and shelved another round of punitive tariffs, **making way for a slow process of normalized trade relations**, having earlier that year been kicked-off by a four month freeze to retaliatory tariffs in the Airbus and Boeing subsidy disputes between the two blocs.
- As exports are an integral part of Austria's economy and given that the United States are Austria's second largest export partner, a **strong commitment to multilateralism and free trade is important**. Consequently, talks between the Biden Administration and European representatives on the reduction of tariff barriers should continue or, ideally, be intensified.
- If **sanctions** have to be imposed, it would be desirable that they are consistent and coordinated between the United States and the EU. This concerns, in particular, "secondary sanctions", which pose an open or, due to their partial lack of clarity, latent threat to trade companies, especially for those doing business in USD (*i.e.*, Iran).

- The recent systematic effort in responding to the invasion of Ukraine by Russia serves as **a useful blueprint for further cooperation in the area of aligned sanctions** between the United States, the EU and other international partners.
- It is noteworthy that **significant divergences still exist between the (legal) business environments of the US and Europe**. Consequently, particular emphasis has to be placed on the American Chamber of Commerce's longstanding call to both executive and legislative bodies for business that is legitimate under EU law to also be recognized as legitimate by US law and vice versa.

## 2.) Digital business is of fundamental importance for the United States & the EU

AmCham advocates **clear and mutually acknowledged** rules on data protection, digital tax and internet content to secure and foster US-EU/Austrian digital business.

### a) Lack of agreement on cross border data flows between the EU and the United States

- **Invalidity of EU-US Privacy shield:** On 16 July 2020, the European Court of Justice struck down the major EU-US data flow agreement "Privacy Shield" as it does not meet European standards for data transfers.
- The decision led to an increase in the usage of **standard contractual clauses (SCCs)** that are already widely used by major American companies like Facebook or Google and that the CJEU has declared valid if they provide a sufficient level of protection. On top, effective contractual, organizational and in particular, technical measures need to be implemented and agreed in order to prevent – or at least mitigate the risk of – any potential access rights by US authorities not in line with GDPR.
- In practice, it has been difficult to implement the required adjustments in negotiations with US providers particularly because of contradicting national US law (FISA, Patriot Act, EO 12333, CLOUD Act).
- As a result, usage of US providers for any IT services, in particular, cloud or third party cookies, is frequently challenged with the Austrian and other European Data Protection Authorities, mainly driven by the non-profit NGO "NOYB" (founded by *Max Schrems*). This has a severe impact on e-business.
- In the interest of transatlantic trade relationships, the European Commission has to work with the United States on a **new regime for data exchange** that - unlike Privacy Shield and its predecessor Safe Harbor - meets the requirements of GDPR as well as CJEU's concerns.
- The EU and the United States recently agreed on relevant key and pre-conditions for a new EU-US data transfer agreement. The **ongoing negotiations should be**

**accelerated** as much as possible in order to **enable the EU Commission to re-issue the required adequacy decision on certified US recipients.**

**b) Trade dispute over digital economies – back to negotiations**

- In June 2020, the United States withdrew from global digital tax negotiations with the European Union that aimed at **creating a new framework for the taxation of major technology firms.** This was a setback to some companies, as the legal certainty to be potentially derived from such a project would have significantly lowered administrative burdens.
- In a welcome step come July 2021, the EU set aside its plans to produce a **new proposal for a digital tax on EU level** after the G20 Finance Ministers' Agreement on a Global Minimum Tax, thereby eliminating the necessity for important economic zones, such as the EU and US, to impose their own, territorially limited, rules (see item 4 for details).
- Meanwhile Austria's new "**Digitalsteuergesetz 2020**" has come into effect on 1 January 2020. The law subjects online advertisers accumulating an annual revenue of EUR 750 million worldwide and EUR 25 million in Austria, to a 5 % tax rate. As the law effectively only targets major US tech companies and potentially breaches European tax law, the US administration threatened to issue retaliatory measures against Austria. Fortunately, the issue was resolved in October 2021, when Austria and a number of other countries agreed to abolish their digital service taxes come the **implementation of new OECD-agreed digital taxation rules** (see item 4 for details). In return, the US stayed the implementation of any retaliatory measures.
- This **process of mutual concessions towards barrier reduction** for digital business is needed and should be extended to other policy areas to accelerate the creation of innovation-friendly conditions in the EU, US and beyond.

**c) Communications Platform Act**

- A third important area of development in the area of Digital Business is the introduction of **EU regulations and directives on the matter of Digital Services** and national legislation concerning **takedown duties and transparency procedures** for digital businesses that provide communication services. Examples thereof are the Digital Services Act on the EU level and the Communications Platform Act on the Austrian level (*Kommunikationsplattform-Gesetz*). The Digital Services Act could come into force next year.
- Both legislations aim at holding certain big communication platforms that provide digital communication services accountable for the **timely prevention, identification and deletion of hate speech**, fake news and other content violating

individual rights or constituting a misdemeanor or felony. US providers are particularly affected by the newly implemented provisions, as they **have to appoint a local authorized representative** for the company that may be held accountable through fines imposed and to whom proceedings regarding deletion may also be dispatched. Providers are also required to have effective and transparent procedures to remove illegal content. **Violations have to be removed by the provider of the service within 24 hours** of receipt of any notification as to their existence. These new requirements create significant administrative and cost burdens for companies as well as substantial insecurity, as there are almost no cases that have reached the courts thus far. Consequently, we **advocate for clear guidance by the authorities** in terms of practical implementation of these obligations, as the costs of risk hedging potentially far outweigh any benefits to consumers of digital communication services.

### **3.) US-Austrian business environment opportunities and risks - a regulatory perspective**

#### **- Investments**

- The Austrian "**Investitionskontrollgesetz (InvKG)**" requires foreign investors to obtain a permission by the Austrian Ministry of Economic Affairs if they intend on acquiring a 10 % percent stake or higher in an Austrian company in a "particularly sensitive economic sector". The catalogue of particularly sensitive sectors includes "critical energy or digital infrastructure, water supply, military technologies, but also research and development of pharmaceuticals and vaccines." A higher, namely 25 % threshold, for regulatory approval applies to investment in enterprises active in a broad range of critical infrastructure, critical technologies, critical inputs, as well as firms with access to sensitive data and media companies. This is a significant investment hurdle.

In contrast to previous regulations, the InvKG does not only apply to direct investments but **also regulates indirect investments**. The law has **intensified political control** over foreign investments in Austrian companies operating in sensitive sectors and may therefore also affect American investments in Austria.

- Likewise, in the US, the **review authority of the "Commission on Foreign Investment in the United States (CIFUS)" was extended** by the "Foreign Investment Risk Review Modernization Act (FIRRMA)" in February 2020. Under FIRRMA, CIFUS now has review authority over foreign direct investments that provide the investor with **material access or substantive decision-making rights related to a US firm with critical technology, sensitive data or critical infrastructure**. Prior to FIRRMA, review authority was limited to foreign

investments which provided control over the US firm. Despite these expansions of CIFUS jurisdiction, the longstanding US policy to welcome foreign investment in accordance with national security remains intact, whilst, nonetheless also constituting a costly and time-intensive process that should be streamlined as much as possible.

- AmCham advocates a development in regulatory practice under both regimes that avoids foreign direct investment rules to **create a substantial administrative burden and delays in transactions** between the United States and Austria that do not give rise to a negative impact on security or public order. In order to cut red tape, it may make sense to identify "critical" sectors more precisely (as is the case e.g., in Germany) and to **provide for a means of obtaining fast-track clearance** in cases where a full review clearly is not necessary.

- **Travel and corporate migration barriers**

- Barriers for corporate staff to enter the US and conduct work in the subsidiary of an Austrian HQ company should be streamlined and revised. Administrative barriers to the application of existing Austrian fast-track programs for highly skilled employees, intra corporate transferees and assignees should be addressed and removed. Furthermore, **competent authorities must be strengthened in personnel in order to cope with applications** in a timely manner. In addition, Austria should be included in the country eligibility list for the US Customs and Border Protection (CBP) Global Entry Program, easing the entry into the US by means of pre-travel clearance.

- **Administrative formalities:**

- The exchange of experts within international corporations requires quick and reliable processes and a reduction of the number of evidentiary documents to be submitted at the immigration authorities' discretion.

- **Product Innovation:**

- A revision of the **barriers to and limitations of foreign technologies** able to be incorporated into new products produced in the US (i.e., US plant of an Austrian company) is long overdue and should be addressed as a matter of urgency not to stifle innovation in the long run.

- **The European Green Deal:**

- The EU with its **Green Deal** has been taking concrete steps to align its economy with the 2050 climate neutrality target over the last few years, creating many

new challenges for businesses across a wide spectrum of industries. Multiple legislative avenues are being pursued to enforce these targets – from the **EU emissions trading system (EU ETS)** to financial market regulation and corporate disclosure using the EU taxonomy. In its 2020 State of the Union, the Commission also published an **emissions reduction proposal for 2030** of 55% of carbon emissions (vis-à-vis 1990 levels), concretizing the path towards climate neutrality on the road to the 2050 target, creating obligations for the EU-institutions, EU member states as well as businesses and private individuals down the line. A **level playing field between the EU and its main trading partners** (like the United States) is an **essential requirement**. Otherwise, objectives of the Green Deal might be formally met by means of technical workarounds, merely relocating some economic activities outside the EU while not making any effective difference on a global scale.

- AmCham has pointedly made **multilateralism and free trade** priorities. Greater and **timely alignment in the area of climate policy and its implementation** (such as through a carbon trading mechanism or ESG related financial regulation) is needed, otherwise calls for instruments such as a carbon border tax will become louder and risk fragmenting the business environment and complicating the green transition both administratively and financially.

- **Challenges in energy, resource provision and logistics:**

- Incited by **the current crude oil and gas energy insecurity** through the Russia-Ukraine crisis in Europe for both consumers and gas-dependent industries alike, the need for a strategy to turn to alternate sources of energy and heating is a pressing matter. Europe has sought to confront this challenge by expanding existing imports of liquefied natural gas (LNG) from the United States and Qatar as well as increased imports from Azerbaijan. Closer cooperation between Austria, its partners in the EU and the United States is necessary so that **Austria's high dependence on Russian oil and gas exports may be lowered** and Russian oil and gas imports may be phased out by 2027 as the Austrian government intends.
- Concerning **critical resource provision**, a strong international stance has to be taken in order to prevent the inaccessibility of certain resources for industry and manufacturers at large. **International trade has to be protected**, trade routes secured and strategic interests asserted. In this regard, Austria should seek to be a strong advocate of such initiatives in the EU and the United States should strive to use its capabilities in an effective manner. This is **imperative to strengthen local and global industrial activity**.

- In order to resolve the current backlog in logistics, speed up the energy transition and ensure that strategic resources are provided to key producing industries in a timely manner, political steps need to be taken to **speedily implement the European Commission's proposal on energy independence** published in May 2022 that suggested to invest EUR 210 billion into the energy transition until 2027. In addition, **logistics networks need to be enabled** to deal with the delivery backlog of vital components and resources delayed due to COVID mandates and accompanying restrictions as soon as possible.

#### 4.) Tax Law

- The **current double taxation treaty between the US and Austria** provides for a 5 % withholding tax on profits distributed (dividends) to a parent company resident in the other jurisdiction while no such withholding tax applies in most cases on dividends to an EU resident parent company (in accordance with the EU Parent Subsidiary Directive). A reduction of this withholding tax to 0 % under the US/Austria tax treaty would eliminate the current **tax leakage for inter-company dividends between Austria and the US**. Such change was already proposed and foreseen in the negotiations to revise the US/Austria tax treaty a few years ago, but these negotiations seem to have been put on hold. Austrian and US businesses would welcome to see these negotiations continued and closed soon.
- In October 2021, a large member majority of the OECD/G20 Inclusive Framework reached political agreement on taxation reform in digitization and minimum global business taxes (Pillars I and II). **Pillar I** addresses tax challenges from the digitization of the economy, aiming to shift taxation rights to the jurisdictions where a business's revenues are generated by selling (digital) products. **Pillar II** involves setting a global minimum tax at a 15% rate for companies with a gross revenue of more than EUR 750 million. Especially concerning the wide-ranging implications of Pillar I **uniform local implementation and interpretation in all participating OECD members** is essential.
- Consequently, In December 2021, the European Commission published a **proposal for a directive to introduce a 15% global minimum taxation** for large corporate groups based in the EU (in line with Pillar II rules). These activities of the Commission are an important incentive to push for uniform interpretation in the OECD forum. The publication of an Austrian law to implement the new rules domestically is eagerly awaited in autumn of 2022 and should be used to lead the EU implementation drive.
- Currently, the US pendant to the EU proposal, the **levy on global intangible low-taxed income (GILTI)**, applies to the offshore income of American-based companies



at a 10.5% rate. However, these measures does not operate on a jurisdiction-by-jurisdiction basis. Therefore, they **undershoot the OECD's 15% global minimum target** tax rate (Pillar II) and their unequal application across different jurisdictions is not in line with the priority of uniform interpretation, which is central to businesses represented by AmCham. Federal lawmakers have **proposed changes to GILTI**, which would better align it with the 15% OECD target tax rate, but the legislation is stalled in Congress. The absence of such legislation will likely result in (a) complications with the overall multilateral process and (b) give the European Commission reasons to resurrect its own digital levy. Furthermore, this would **increase the level of tax compliance work** and result in an **additional tax burden** for US-owned multinational groups. Urgent action thus needs to be taken by Congress in passing **appropriate changes to GITLI** (bringing it in line with the OECD's Pillar II), in order to ensure US businesses to remain competitive in a changing and complex taxation environment. A **"White List" for exempt jurisdictions** also needs to be included to create legal certainty for businesses.

- Within the EU framework, a **mandatory tax dispute resolution mechanism** ("*EU-Besteuerungsstreitbeilegungsgesetz*") came into force in Austria in September 2019. This legislation is meant to help multinational businesses avoid burdensome court proceedings in cross-border tax matters. In the United States, the introduction of new **dispute prevention and resolution measures, especially in the field of transfer pricing**, would likewise help to mitigate the risk of double taxation and eliminate tax uncertainty. Having identified this urgent need for reforms, we call upon legislators and the current administration to propose such a bill.
- Similarly, the Austrian income tax regime provides for a tax incentive for certain **R&D activities** carried out within Austria: A taxpayer is entitled to a cash premium in the amount of 14 % of the cost of a qualifying R&D project, even if this taxpayer is in a loss situation. This incentive is **considered attractive by many businesses for developing IP or carrying out R&D activities** within Austria. It would be desirable if the US could implement a similar variant of this system.

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American Chamber of Commerce, Austria