

Restarting Transatlantic Trade Dialogue

Requests 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.) Trust on both sides needs to be re-established quickly and with priority

- Partners that share same values
- Discussions, negotiations, agreements versus imposing unilateral measures
- Strengthen US & EU as leading economies

2.) Protectionism on the rise – all trade tariffs and sanctions need to be jointly reviewed and revised where possible

- According to the annual "Trade Barriers Report" by the European Commission **"protectionism has become ingrained in international trade relationships"**. The report suggests that the ongoing Covid-19 health crisis has 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 Austria and the EU also implemented **anti-dumping-tariffs and foreign investment screenings**.
- As exports are an integral part of Austria's economy and given that the US are Austria's second largest export partner, a **strong commitment to multilateralism and free trade is important**.
- If sanctions have to be imposed, it would be desirable that they are consistent and coordinated between the US and the EU. Business that is legitimate under EU law should also be recognized as legitimate by US law.
- These 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 dollars (i.e., North Stream 2, Iran, etc.).

3.) Digital business is of fundamental importance for US & EU

a) Privacy Shield

- **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. In practice, it has been proven difficult to implement the required adjustments in negotiations with US providers particularly because of contradicting national US law (CLOUD Act).
- Further, usage of US provider setting cookies (social media platforms) is challenged with the Austrian and other European Data Protection Authorities. This has a severe impact on e-business.
- In the interest of transatlantic trade relationships, the European Commission has to **work on a new regime for data exchange**, which unlike Privacy Shield and its predecessor Safe Harbor meets the requirements of European data privacy regulations.

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**.
- The end of negotiations could set the scene for an escalating trade dispute as European officials stated that they would come up with a **new proposal on EU level if no deal was achieved with the United States**.
- Meanwhile Austria's new "**Digitalsteuergesetz 2020**" has come into effect. The law subjects online advertisers which accumulate 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 American tech companies and therefore constitutes a potential breach of European tax law, the Trump administration threatened to issue retaliation measures against Austria. Under the Biden administration, there is still a threat against Austria to increase tariffs.
- The European Commission plans to introduce a proposal for a **Digital Levy** in Summer 2021 that would be separate to an OECD agreement on tax reform. Any Digital Levy introduced by the EU should only implement measures that have received multilateral support at the OECD and should not create new

barriers to economic recovery by inadvertently inhibiting cross-border trade, investment, or economic growth.

c) Communications Platform Act

- The recently rendered Communications Platform Act (*Kommunikationsplattform-Gesetz*) is part of the legal package against hate on the internet (*Hass im Netz*). It obligates foreign platform operators to name a local representative who may act as authorized representative for the company. The Hate on the Net Act stipulates various obligations for platform operators to prevent hate speech. Violations thereof may lead to fines which may be enforced via the local representative. Any proceedings with regard to the deletion of content may also be dispatched with such representative. The new provisions are relevant for US providers.

4.) Trade & Investment USA ↔ Austria, from a legal perspective

- **Travel and corporate migration barriers:** Barriers for corporate staff to enter the US and conduct work in the subsidiary of an Austrian HQ company need to 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.
- **Administrative formalities** related to the application of Austrian anti-wage and social dumping legislation need to be revisited and streamlined. 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:** Revise barriers and limitations of foreign technologies incorporated into new products produced in the US (i.e., US plant of an Austrian company).
- **Investments:** The recently passed "**Investitionskontrollgesetz (InvKG)**" requires foreign investors to get a permission by the Austrian ministry of economics if they intend on acquiring a 10 % percent share or higher of 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 25 % threshold for regulatory approval applies to investment in firms active in a broad range of critical infrastructures, critical technologies, critical inputs, as well as firms with access to sensitive data and media companies.

- In contrast to previous regulations, the new InvKG does not only apply to direct investments but **also regulates indirect investments**.
- The law is going to **intensify political control** over foreign investments in Austrian companies operating in sensitive sectors and is, therefore, also likely to impede American investments in Austria.
- Early experience with the InvKG indicates that it **creates a substantial administrative burden in transactions** which evidently do not give rise to a negative impact on security or public order. This is because the definition of "critical" industries in the InvKG is very broad. In order to cut red tape, it may make sense to identify "critical" sectors more precisely (as is the case e.g., in Germany).
- Likewise, 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 provides 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, the review authority was limited to foreign investments which provided control of the US firm.
- Despite these expansions of CIFUS jurisdiction the longstanding US policy to welcome foreign investment in accordance with national security stays intact.
- The US paycheck protection program should persist for US companies with foreign majority shareholders.
- 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. 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 dialogue with our corporate client base, we often hear that the level playing field between the EU and its main trading partners (like the US) is an essential requirement. Otherwise objectives of the **Green Deal** might be met technically by merely relocating some economic activities outside the EU while not making any 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 carbon trading mechanism or ESG related financial regulation) is needed, otherwise calls for instruments like carbon border tax will become louder.

5.) 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 state 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.
- The OECD has released Blueprints on **Pillar I and Pillar II**, advancing the BEPS (Base Erosion and Profit Shifting) initiative to address the tax challenges arising from the digitalization of the global economy. Particularly with a view to the newly proposed nexus and profit allocation principles under Pillar I, a **uniform local implementation and interpretation in all states** is considered essential. The Biden administration has proposed a new approach for Pillar 1 and Pillar 2 at the OECD. These proposals differ in significant ways from what has been discussed at the OECD and may be seen as an effort by the US to move other countries to raise their corporate tax rates. The OECD should continue to work towards reasonable and principle-based reforms to current international tax rules, and tax policy and tax competition should remain sovereign rights for countries.
- Within the EU framework, a mandatory tax dispute resolution mechanism has recently come into force meant to help multinational businesses avoid burdensome court proceedings in cross-border tax matters. In relation to 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.
- 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 costs 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.

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American Chamber of Commerce, Austria