

Policy Brief

Data Sharing in the Digitised Economy

19 September 2019

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Introduction

Data lies at the core of most digital business models, and it has become a vital production factor of the digital economy. Pairing data with an innovative idea and sector-specific knowledge has the potential to vastly improve existing products across industries, and even has the power to create entirely new types of services and products. The current debate on data sharing, access to data and the productive use of data is therefore crucial to setting Germany and Europe on a path towards a vibrant digital economy.

The challenge for policy makers consists in reconciling the often conflicting interests in obtaining, analysing and using data by different stakeholders. Suggestions on shaping data rights range from a completely free access to data (with corresponding obligations to grant data access) on the one side to new, exclusive rights for data through data ownership or data protection for all types of data (not only personal data) on the other side. A fair balance between such positions needs to take into account a variety of factors: the protection of personal data, the protection of intellectual property and trade secrets, stimulating digital innovation, developing the data economy in Europe and maintaining fair competition in digital markets. This summary of a recent Bitkom paper on data rights in the digitised economy aims to provide a brief overview of some interests at stake, the existing regime, and finally outlines the Bitkom position.¹

Structuring the debate

There is no silver bullet for data-sharing regulation. One horizontal regulation for data sharing cannot serve as an appropriate solution for the wide variety of data being processed and used in an equally diverse set of industries with completely different characteristics. Rather, the discussion should be differentiated and structured, and solutions adapted depending on the answer to questions such as: Is there non-personal data (for instance data on products, animals, machines or the environment) or personal data (Art.4 para.1 GDPR) at stake? What is the data needed for? In which context and for what purpose is an exchange of data necessary? How are conflicting interests balanced

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¹ Find the full paper (in German) here: <https://www.bitkom.org/Bitkom/Publikationen/Rechtsfragen-digitalisierten-Wirtschaft-Rechte-Daten>

best?

Furthermore, the discussion should take into account the content of data, the context of data processing, the technical prerequisites for data exchange and the respective sector in which data is collected. In a nutshell, the discussion should focus on specific and adapted solutions for predefined areas only (an example for this approach in practice would be Article 6 of Regulation No. 715/2007 on access to vehicle repair and maintenance information).

Existing data rights

- Specific protection rights for data only exist with regard to data protection of personal data and protection of trade secrets. Moreover, data rights can be part of legal protection of property. In other words, the extraction and utilisation of data and information is lawful, as long as no opposing rights have to be observed (for example by reason of data protection or protection of intellectual property). Apart from this there are non-exclusive usage and access rights in special areas, coupled with corresponding duties for the data-holder. The duty to grant access is an intervention in entrepreneurial freedom, which is why access is only being forced under very specific circumstances.
- In general, applicable law follows the principle of contractual freedom and allows for collection, purchase, usage and transmission of data based on contractual agreements.

Interests at stake

- Sandboxes: Companies are interested in a broad and preferably unrestricted access to data pools, since ideas for new business models or innovative use often emerge while structuring and analysing datasets. For developing these new models, companies would need the ability to operate and process data freely and without risk of sanctions, preferably in a regulatory sandbox.
- Personal data sovereignty: With regard to personal data, individuals must be able to decide how and with whom they want to share their data to maintain their individual data sovereignty.
- Incentives to invest: Companies will only invest in their capacities for collecting and analysing data if they can obtain a competitive edge or make a profit out of this activity. If they are forced to share data with competitors, these incentives may disappear and consequently investment could cease. Companies with large data pools should not influence market decisions in their favour or exclude smaller actors from entering a mar-

ket. Established players should not ring-fence their business to protect themselves from new, data-driven models.

Bitkom position

- Build on applicable law: While there are gaps in the legal framework, existing rules do cover companies' practical and basic needs. To apply these rules better, known difficulties (e.g. the correct interpretation of GDPR) should be tackled, and open data initiatives be facilitated.
- Data access should be based on contractual agreements and thus should be the result of negotiations between different parties and of a voluntary data exchange. A contract can address all specificities such as category and type of data, duration and technical requirements for access, data quality and remuneration. It works in practice, and new business models for data sharing are already emerging.
- Legally enforced access to data is only acceptable under specific circumstances: to fix evident market failure and abuse of market dominance, to fill in evident gaps in the legal framework, or to secure the functioning of digital infrastructure (for example autonomous driving). Legislative action for these purposes must focus on an exactly defined scope and be limited to the specific issue addressed.

Bitkom represents more than 2,700 companies of the digital economy, including 1,900 direct members. Through IT- and communication services alone, our members generate a domestic annual turnover of 190 billion Euros, including 50 billion Euros in exports. The members of Bitkom employ more than 2 million people in Germany. Among these members are 1,000 small and medium-sized businesses, over 500 startups and almost all global players. They offer a wide range of software technologies, IT-services, and telecommunications or internet services, produce hardware and consumer electronics, operate in the digital media sector or are in other ways affiliated with the digital economy. 80 percent of the members' headquarters are located in Germany with an additional 8 percent both in the EU and the USA, as well as 4 percent in other regions of the world. Bitkom promotes the digital transformation of the German economy, as well as of German society at large, enabling citizens to benefit from digitalisation. A strong European digital policy and a fully integrated digital single market are at the heart of Bitkom's concerns, as well as establishing Germany as a key driver of digital change in Europe and globally.