

Position Paper – Data Strategy

The EU's Data Strategy

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The Data Strategy – Key aspects and necessary complementing measures

We support the idea that the European Union needs an overarching data strategy in order to achieve the benefits of the Single Market and avoid fragmentation. The data strategy should be complemented by robust funding to enable innovation in the EU and improve competitiveness of European businesses. Support and funding for digital technologies must not be cut in the EU budget, AI and 5G must become central elements of a New Deal and all new Regulation should undergo a fitness check for SMEs and innovation readiness (developing and bringing forward innovation should not be stifled by e.g. documentation requirements if other measures can be implemented to achieve e.g. transparency). In order to boost the data economy, the Data Strategy can be an important trigger. The GDPR was a first step for EU-wide unified rules and high standards but the review has shown that there are still many practical issues and that a common understanding, a harmonized interpretation is yet to be achieved. New legal enablers for data use should now be advanced via the sectorial data spaces for instance. As the nature of data is extremely diverse and complex, we do not think that a “one-size fits all strategy” (as with the GDPR) is suitable to achieve that goal. Given the differences across industries, sectors and consumers, targeted measures are more likely to be successful in the beginning.

It is our default position that every measure taken under the Data Strategy should aim to improve the possibilities for data use and data sharing. The proposed sectorial data spaces will be a good first step to achieve that goal. For the data spaces to work they will need a clear regulatory framework and, where necessary, new standards. As already stressed above, we believe that one “single common EU data space” would not lead to innovation; a competitive and sectorial approach is the right step and we welcome that the Data Strategy focuses on that. One harmonized approach across different industry sectors might also be too complex. We would prefer to start with “meaningful content clusters” within sectors and develop standards for those data, as this leaves sufficient flexibility to evolve. In order to achieve a comprehensive Data Strategy, we are in favour to build upon already existing rules and regulations related to data in general (e.g. GDPR, competition law) as well as sector specific frameworks (e.g. for the

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finance sector MiFID II /MiFIR, SFTR). The EU should focus on improving data quality and making Open Data Spaces interoperable throughout the EU. Data sets should be provided by public institutions (Open Government Data) first.

General Aspects:

— In Bitkom's view, the European Union needs an overarching data strategy in order to achieve the benefits of the Single Market and avoid fragmentation. We are strongly in favour of a harmonized approach to speed up the processes with the use of innovative technologies to avoid lagging behind in the uptake of innovation and new technologies in comparison with Asia or the US.

— In general, we welcome the EU's plans to create data spaces for strategic sectors. A sector focused approach can achieve better harmonized standards as well as interoperability across sectors. To achieve this, the framework has to be developed in a coherent way where all sectorial approaches can fit together. With regard to all regulatory actions in the field of data and data protection we want to stress the necessity of coherence. New regulation should always undergo a compatibility check with existing regulation. The current discussion surrounding the ePrivacy Regulation shows that (if not amended) there will be massive difficulties in defining the scope of application of the GDPR and the potentially upcoming ePrivacy Regulation. Companies also face legal uncertainty around anonymising personal data. Providing more legal certainty through EDPB guidelines and a standardised industry approach, which includes a risk-based view to the anonymization of data, is a key factor to incentivise more data sharing and usage.

The EU's approach to data sharing, whether B2B or B2G, should remain rooted in a voluntary nature, while obligatory approaches to vertical sectors can be justified only if there is a clear market failure and is proportionate (following the "criteria" mentioned in the EU data strategy). There is need for the right balance between data accessibility and contractual rights of companies: An unconditional claim to data access or a corresponding obligation to grant data access must be rejected. The principle of freedom of contract generally ensures sufficient access to data. Through this factual assignment of data to the data producer, the data producer has the necessary control right over the data, which can be controlled by means of contract law. Data can be made available to any interested party under an agreement which ensures companies that invested in the production and/ or collection of data not to expect economic disadvantage. This approach ensures a proportionate balance between making data accessible to the public while ensuring the rights of the companies that invested in the production of data. Contracts should therefore still be the fundamental way for businesses to share data, even if the law specifies or further clarifies data usage rights. In this context, the terms "public interest" data and "data for

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common good" must not lead to obligations for enterprises to open up data. In any case, adequate compensation for businesses needs to be ensured, in order to achieve long-term sustainable cooperation between private and public sector, based on a narrow, clearly defined and harmonised purpose (for which an ongoing dialogue with all relevant stakeholders about the relevant types of data is crucial), to preserve legal certainty for all contractual parties involved.

Bitkom's members are strongly aware of their responsibility in handling data and are often front runners when it comes to data-driven innovation. Many companies and sectors have already committed themselves to responsible data handling beyond the legal requirements by means of ethical guidelines or Codes of Conducts.

As strong data protection is already in place in the European market we now need an innovation-friendly data policy, which is essentially characterised by self-determined, contract-based data handling. We are convinced that the necessary precondition for efficient data management is, in particular, the promotion of free and fair competition between all market players, in which companies can develop their own ideas and use data-based applications, irrespective of their size. An appropriate balance must be struck between the interests of the data producer and the data user. In addition to the mere mass of data, the disclosure of high-quality data sets, as envisaged by the EU Commission, should also be promoted. Bitkom already stressed the improvement of an Open Data approach by public sector with regard to the consultation on the national level (German Data Strategy).

It is our strong view that an obligatory cross-sectoral data access will stifle innovation instead of promoting it. The innovative capacity of industrial companies should be strengthened by targeted incentives for using and sharing data, but not by horizontal regulatory intervention. Moreover, it is hardly possible to specify such claims with regard to the regulatory object "data" on an abstract and general level. We also see a need for clarifications whenever policy measures include regulatory action regarding data and see the need for a more clear definition of "data". In our view, it is important to develop a classification of data. We would propose the following differentiation:

- Source of data: 1) data created by private persons 2) Data created by companies, especially non-personal data (check GDPR: is it useable), and also: retail (C2B) vs wholesale data (B2B)
- Data quality: has the "raw" data been "upgraded" by someone (e.g. in order to structure, apply standards, developed according to logic etc.

- Data pricing: free versus commercial data/data which can be monetised
- Pooling of data: fees for making the data readable/ available
- Availability: for free/fee/user fee etc.

I. Section 1 of the Consultation

1. New Data Portability Rights

The Commission has surfaced the idea of “enhancing the portability right for individuals under Art. 20 of the GDPR, giving them more control over who can access and use machine-generated data”. The GDPR considers any data that has the potential of identifying someone as personal data; Art. 20 already contains a portability right over such data but many aspects are still not clear. New data portability rights should only be introduced if their implementation will work in practice and should not duplicate existing rights. We believe that facilitating portability in a practical way for individuals, including direct portability from service to service, is the key for this right to achieve its full potential. Industry players have been engaged in creating an open ecosystem of direct portability between service providers. The Data Transfer Project is an example of a successful industry-led initiative in this space.

2. New Data Access Rights

The Strategy talks about a new data access right “if a market failure in this sector is identified/can be foreseen, which competition law cannot solve”. Any change in the regulatory framework with regard to such data access needs to be carefully tested before regulatory action is taken. Mandating access to data can take away the very incentives of innovation. Business, which produces and commercializes data, must still be possible within the EU, to provide incentives for companies to stay innovative and develop new data related services. While we support the idea to make data more available, other issues have to be taken into consideration as well: sustainability, innovation, trade secrets, risk prevention, fair competition, data quality and sufficient incentivization to invest into data quality, responsibility and liability - particularly given that EU companies are competing on a global scale. Requiring a company to share the fruits of their labour can deter investment and economic growth.¹ Companies will only invest in

¹ Elaborations on the open questions and issues to be solved can be found in our Position Paper on the 10th Amendment to the German Competition Act: <https://www.bitkom.org/Bitkom/Publikationen/Bitkom-Stellungnahme-zur-10-GWB-Novelle> (german)

the collection and analysis of data if they expect this investment to have an economic or competitive advantage. If such an advantage cannot be achieved or is at risk because e.g. collected data must be shared with competitors, the companies will stop or limit the investment or the collection of the data (free-rider problem). No company would invest in the production of data if it simply had to make the results of these efforts available to the competition free of charge.² This would counteract the political strategy of the Commission to become the leader in the data economy and would further prohibit the sharing of data between companies. Therefore, companies should be allowed to “upgrade” raw data, develop products/services on these data and ask for fees/charges. Otherwise, such an approach would send negative incentives towards data collection/standardization and product developments: e.g. “commercialization of data” should be allowed. To facilitate data sharing amongst companies, we see the need for a new enabling environment supported by data infrastructures. Compensation for data providers will also always be needed for data access rights. As recommended by the EU Commission, the contribution of data to the public should be incentivized for example by providing a fee. The fee needs to be reasonable and shall be proportionate to the value which the data represents to the purchaser/user.³

We disagree with the statement that there are currently challenges regarding the allocation of the rights to data coming from smart machines or devices. Wherever the data is personal, the individual should be in control and be able to decide who does what with the data in line with GDPR. When it comes to non-personal data, contractual solutions between actors are operating well in practice today. Further, the existing legal framework, including contract, intellectual property, and competition law should serve for parties to address any issues with usage rights.

3. General Data Literacy

We agree with the Commission that more public data should be available for the common good. However, we note that data itself is not the sole enabler of innovation. The skills (to be able to make the most of data by using a given computational tool or technology) and the awareness around digital technologies play a

² The data sharing obligations in the PSD2 have shown that the data sets that need to be shared have to be clearly defined and specific business cases where focused on when the legislation was drafted.

³ The value of data depends primarily on its usefulness for a business model or on the possibility of gaining usable and affordable information from it. When measuring the value of data, particular attention should be paid to whether the further processing of data creates significant added value for the customer. If considerable commercial values can be achieved through the use of data, this can be taken into account in the price calculation for data. This approach has been established by the Court of Justice of the European Union (CJEU), as the price must be commensurate with the economic value of a service rendered (among other things CJEU, judgment of 14 February 1978, case 27/76 - United Brands).

critical role in digital transformation. We fully support the view that data literacy should be at the centre of European efforts on digital transformation. Organizations need to truly upskill their talent in critical areas such as AI, ML, data analytics, and cloud computing. Such tools and technologies already exist in the market. Still, they're not achieving their full potential within EU organizations due to skills and awareness gaps, among others.

4. Data Spaces

The Strategy proposes the development of common data spaces in strategic industry sectors. Access to open data has a positive impact on the economy and society at large. These initiatives could be further encouraged, but we stress the need to make participation in the data spaces voluntary, access open to all players and non-discriminating.

The development and adoption of the envisaged data spaces can and should be implemented in phases. For example, the data spaces can begin with creating open data environments, including government data released under open data licenses, to develop a culture of data sharing and free exchange among participants. Data enables companies to refine their business models, to improve and individualize their offers or to develop completely new business models. Therefore, data needs to be made available to as many interested parties, business models and application scenarios as possible (generally, on a contractual basis, as stresses above). Especially certain types of start-ups depend on the availability of data.

II. Section 2 of the Consultation

1. Data Governance

Data governance mechanisms coupled with legislation could aid with the governance of these data spaces, provided they facilitate open and transparent decision-making processes for stakeholders and contribute to helping the marketplace within the sectors listed in the EU data strategy e.g. through promoting common data formats. Moreover, pan-European legislation for data spaces could be helpful against any push at national level towards data localisation measures. However, a horizontal approach to legislating governance should be of a high-level and address compatibility and participatory issues around data spaces, while also clarifying the scope and avoid prescriptive horizontal rules that may not be fitting for certain vertical sectors. Standardisation and technical measures will greatly contribute to address the use of data across data spaces for these sectors, for instance by improving interoperability. More data interoperability al-

so means more data portability between companies, which in turn can enable more data sharing between businesses. We agree with the Commission's observation that data interoperability and the high quality of data is important to ensure an easy exchange of data in the market. Barriers to entry the market with the aim of building obstacles to competition need to be addressed. Ensuring high quality data is also a must as only high-quality data brings high value for multiple parties. Low quality data on the other hand leads to ill-informed decisions, contains risks for the data user / purchaser and should also not be "mixed" with high quality data sets. This would reduce the overall quality of the data and increase costs. Furthermore, data must be provided in a structured and machine-readable format in order to gather and process data from different sources in a coherent manner.

2. Standardisation

We agree that standardization is a good way to respond to interoperability challenges around data sharing and data reuse. However, we note that 1) there's plenty of existing standards on data formats, models etc. 2) it is essential to anchor any European efforts into existing international standards and the work done by well-established standardization bodies (to which Member States are part of) such as ISO. Standards at a national level create market barriers and fragmentation, thus must be avoided. In addition, we support the aim to harmonize the description of industrial data (=metadata), so that data sets, including their usage possibilities, speak the same language not only with regard to their format when being offered for sharing on data spaces. However, although we support efforts to use standards as a tool for improved data transfers and interoperability, standardization that is too strong can also block innovation. Particularly in an agile domain such as IoT, it is vital to allow players to also experiment with new methods for data encoding, transmission, etc. for the sake of progress. Standardization should be applied for mature existing offerings and should always be aimed for, while at the same time encourage innovation at early stages without imposing the burden of standardization.

3. Data intermediaries

We welcome the focus on data management and data trust models. Practical examples of this should be established promptly together with the business community or the data trust models currently being developed, where they offer new practicable approaches. Existing market solutions are in place to support consumers in the assignment of rights and access, the handling of their data, to observe and, if necessary, to rely on them. Once the data spaces are established,

they can be enhanced by enabling private exchanges of B2B data, perhaps facilitated by neutral data intermediaries.

4. Identification of high-value datasets

We agree that the public sector data has several advantages: significant potential for re-use in new products and services and help address societal challenges in many areas. Therefore, we support the Commission's efforts to improve access, where appropriate, to this data and its interoperability. There should also be an ongoing dialogue with all relevant stakeholders to define the high-value datasets

5. Self-/co-regulatory context of cloud computing

The Consultation calls for the identification of "problems in the context of the current functioning and constitution of the market for cloud services in Europe". We are of the view that several issues need to be addressed: The lack of public procurement rules fit for cloud services prevents public sector organizations from taking full advantage of cloud-based innovation. Cloud public procurement frameworks should take into account the following principles:

- **Multi-tenant Cloud environments:** The use of commercially-available versions of cloud services should be supported to the highest possible extent. When imposing bespoke requirements in tenders, the potential implications on costs and efficiency of cloud services need to be taken into account.
- **Shared responsibility:** In cloud environments, customers bear responsibility for their content, applications built on top of the cloud infrastructure, and specific configurations; while CSPs remain responsible for, and must have the ability to protect and maintain the services and the overall multi-tenant environment.
- **Contractual framework:** Typically terms of services have been developed with a deep understanding of how these services operate in practice and factoring in their constant technological evolution and innovation. The contractual framework needs to be limited in scope and cater for shared services and facilities, which is a fundamental aspect of cloud ecosystems.

The proliferation of standards at a national level creates market barriers, especially for smaller players and should be avoided. We welcome the creation of a "Cloud Rulebook" that compiles existing regulatory frameworks and industry-recognized standards that will help customers to navigate their risk assessments and due diligence as they plan their transformation to the cloud. In this context,

we are supportive of the idea of setting-up a cloud services marketplace but oppose any measures at EU or national levels that may impose barriers for market access.

Levels of protection with cloud: While the level of protection is already high, further advancements are required mainly in the areas of: a) Extending encryption technologies to data being in use / in memory b) Add end-to-end encryption where possible c) Consistently implementing customer lockbox / consent requirements before data is accessed d) Agreements between EU and other jurisdictions (e.g. US) needed to strongly regulate cross-border access and activities, including safeguards with regard to user rights, transparency etc..

Problems / risks of the current cloud market: Asymmetry in power between customer and CSPs in negotiations, e.g. high efforts and time are required to agree regulatory compliant contracts with CSPs in the financial sector. Therefore, we support the EU's work designing "Voluntary Standard Contract Clauses" to facilitate future negotiations. Also, it is very difficult to procure/adopt new and innovative cloud solutions, as it takes a long time to ensure that these new services are regulatory compliant. Often, new solutions are not meeting regulatory expectations right from the start.

We stress that the approach to strengthening Europe's cloud infrastructure should be inclusive, open and based on trust and credentials. Moreover, transparency, interoperability and open source are in our view key principles that should underpin this approach.

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.