bitkom

At first sight

Data Governance Act

Starting Point

Building on the European strategy for data as well as the expert report on business-to-government data sharing, the Commission published its first legislative proposal for the data economy. The objective is clear: Enabling the data-driven economy with a particular focus on innovation. The EU has recognised that data will reshape the way we produce, consume, live and needs to be tackled ambitiously. The Data Governance Act addresses four principal questions: How and by whom can public data be accessed? What role is there for data intermediaries and who can become one? How can data altruism be enabled? What is the Data Innovation Board's role?

Assessment

Done right, the European Commission's proposal has the potential to be an important step towards a European data economy but there is a long and winding road ahead. The data economy is a dynamic space with existing and evolving business models, partnerships and initiatives on the provider and user side. Policy-makers are dealing with developments that are in constant flux. Rather that pursuing a top-down legalistic approach, policies should enable a bottom-up approach by moderating and bringing together these ecosystems by understanding how they work and by harmonising technical standards to ensure interoperability.

Most importantly

- **Don´t disrupt what´s working well**
  Data sharing is not a new phenomenon but should be expanded, facilitated as well as simplified. Depending on the sector, intermediaries can be an important piece in the puzzle but they are part of a larger ecosystem. It should be reconsidered whether their structural separation makes sense given that added services can incentivise the use of an intermediary and distinguish them from competitors.
- **Be precise in scoping**
  It should be clearly set out what data intermediaries are exactly and what rules apply specifically for them. Otherwise, the rules risk legal uncertainty for services that receive datasets based on contractual agreements and process data for a clearly defined purpose.
- **Ensure quick authorisation**
  Making public data available in a harmonised and clear manner will potentially be another huge benefit of the proposal. Given that in the proposal competent authorities have to give consent to data sharing, a risk-based approach should be implemented coupled with clear deadlines to avoid bottlenecks.

Bitkom-number

85 percent
of companies see great importance of data for their business (according to a study by Bitkom Research).

Position Paper

Bitkom Comments on the Data Governance Act

February 2021

If done right, the European Commission's initial proposal on the Data Governance Act (DGA) has the potential to be an important step towards a European data economy. While previous discussions about the use of data have focused primarily on the important topic of data protection, there is an increasing awareness for the innovative potential of data, which is why we welcome that the DGA addresses all types of data (personal, non-personal, government sector and specific data sets). In order to accelerate the digital transformation of European economies, the data economy has to be enabled with a clear and harmonized framework. For that, existing regulations - sector specific and others - need to be carefully assessed to determine which rules are fit for purpose, which need amending and which should be developed into a broader rulebook for the EU's data economy. It should also be highlighted that the aim is not to have a single integrated data space but to connect various initiatives for data sharing – also across different domains – on a technical level to ensure their interoperability.

While the DGA can only be a step in this direction, we welcome the initiative and aim to comment based on the following 12 principles and the detailed comments below:

I. Regulatory Framework: Enable innovation-friendly data economy

Strong data protection is already in place in the EU's Digital Single Market (DSM). Now, it needs to be complemented with innovation-friendly data policies based on self-determined and contract-based data handling. We are convinced that the necessary precondition for efficient data management is the promotion of free and fair competition between all market players, in which companies can develop their own ideas and use databased applications irrespective of their size. An appropriate balance must be struck between the legitimate interests of the data producer and the data user. In addition to big data exchange, sharing of high-quality data sets on a voluntary basis should also be promoted (as envisaged by the European Commission). The success of data intermediaries as well as data altruistic organizations is depending on an enabling framework that further incentivises data sharing while avoiding a crippling corset of regulation that could have adverse effects on intermediary services.

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II. Data spaces: Taking different setups and structures into account

The DGA is laying the groundwork for the development of common data spaces in strategic sectors. While we believe that data intermediaries and data altruism can expand data sharing, we are also convinced that different frameworks, setups and governance structures need to be the future basis for these data spaces (vertical approach). By narrowing the scope, the DGA will avoid restricting other possible setups of data spaces. The DGA should also take initiatives such as GAIA-X / the upcoming European Alliance for Industrial Data and Cloud and the European Cloud Federation into account (e.g. with regard to the conditions set out for data sharing intermediaries who use/ offer underlying Cloud infrastructure) to actively build a coherent framework on the basis of existing initiatives – avoiding building parallel rules.

III. Specify definition and scope: Be aware of sector specificities

There are many ways of exchanging and sharing data with various established models in place. The regulation has to be clear what form of data transmission it intends to regulate. Unclear definitions and scope will lead to undermining existing and necessary data sharing models, some of which are already widely used. Existing rules need to be re-assessed to determine which already build a functioning framework for specific sectors and where additional regulation is needed.

Different sectors have different ways and needs for exchanging data. The proposal is fully aware of these specificities and intends to outline general and horizontal rules for data intermediaries. In the course of further negations, industries should not be lumped together but rather interoperability between domain be ensured. Moreover, data intermediaries are only one model for sharing data which can have clear benefits for specific applications but is part of a larger landscape. While it should be thought what strategic advantages data trustees can bring in specific sectors (such as health or research), entrepreneurial freedom and an innovation friendly framework have to be maintained.

IV. Access to public data: Building a comprehensive, coherent and systematic framework

Access to data in the public sector has a positive impact on the economy and society at large. Existing initiatives should be further encouraged by the DGA. In order to tap the greatest possible potential from open government data, close cooperation and networking of all actors involved is required, i.e. between data providers and data consumers. Many relevant public actors are not yet connected in a comprehensive and systematic way. An intensified exchange between open government data entities

throughout Europe is necessary for making better use of existing offers. Furthermore, without an understanding on the required formats and some standardization with regard to data the improved accessibility of data will fall short of the objective. The DGA should also address the issue that different standards at a national level – in some cases even at a federal level - create market barriers and fragmentation, thus must be avoided in favour of standards developed within European standardisation organizations (while also keeping existing international standards in mind). In addition, we support the aim to harmonize the description of 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.

V. Interoperability and data transfer: Balance Standardization and Agility

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 encouraging innovation at early stages without imposing particular standards.

The multitude of (technical) possibilities for data provision leads to a very heterogeneous data offer as well as to different usability of data. In order to facilitate access and use of sensitive open government data, there is a need for harmonised and standardised technical implementation. Standardisation is essential, particularly with regard to the formats and systems used. The European Data Innovation Board can play a key role for the purposes of advising the European Commission on relevant (cross)-sectoral standards that can reduce technical barriers to data sharing in a time efficient way. To that end, we stress that the new European Data Innovation Board should closely cooperation with European and international standardisation bodies (see further details on the setup of the EDIB below). Public administration needs to address relevant issues, such as the collection and processing of data, early on when IT systems are procured.

VI. Framework for data intermediaries: Focus on what is actually needed in the market

In general, we support the EC's aim to incentivize voluntary data sharing by establishing a horizontal framework for data intermediaries that can lead to trust and a more competitive environment among service providers. Data intermediaries can help building a new and trustworthy framework for data exchange in the EU. We welcome that the proposed rules focus on trust and neutrality for intermediaries.

However, the framework should not impose a restrictive regulatory corset for data intermediaries more than what is necessary to ensure neutrality and trustworthiness. The foreseen notification for providers of data sharing services envisages various obligations and includes costs for compliance, development (creation of own entity) and potential violations and thus creates administrative burden but lacks incentives in return: An imminent positive effects, specifically on smaller players in the market with regard to scale, are not the logical consequence from this proposal. There is neither a certification or public register foreseen that could help raising transparency or interest of industry or public sector into data intermediary services that have notified themselves in accordance with the proposal.

With regard to the conditions set out for data intermediary service providers, the overarching goal should be to enhance trust and uptake of these services, but continue to allow innovative use cases. While we agree that the neutrality of data intermediary service providers is key, we believe the notion of "structural separation" between the data sharing service and any other services provided needs to be clarified: e.g. it is common practice that data market places offer today analytical tools for companies to enrich/analyze their data alongside the possibility to share it then with other interested parties through the intermediation service. If the provision of analytical tools "on top" were to be prohibited under the proposal, existing intermediary service providers would be stripped away from possibilities to differentiate themselves from competitors by offering additional services and would become "sharing-only" intermediaries. While we fully agree that intermediaries should not use the data exchanged for any other services, businesses should still have the possibility to make use of additional services offered by intermediary services when using these platforms.

VII. Framework for Data Altruism: Make it work by providing legal basis

In principle, we recognize the objective set out in the DGA with regard to Data Altruism as sensible. For the objective of successfully facilitating the processing of personal data for altruistic purposes, the EU Commission should create an exception in the GDPR or at least a privilege for this purpose and should also create a separate legal basis for the training of algorithms for artificial intelligence applications in that context. The EU Commission could further define and clarify that a later change of purpose in the context of further processing needs a compatibility check but no separate authorization. With regard to the European consent form for data altruism, the DGA should provide for the option of regulating criteria for other consent forms that deviate from the DGA´s proposed consent form. This should include a

certification process in order to adequately take into account the complexity of different sectors and developments in the future.

VIII. Allow for free flow of data: Improve legal certainty

The data economy requires clear rules and legal certainty when it comes to exchanging and sharing data. The GDPR has established a legal framework for personal data, but more certainty is needed with regard to non-personal and mixed data sets. The reality actually is, that the Data Protection Authorities are defining almost every kind of data as personal data: The temperatures of railway points are collected by railway companies to avoid iced points. In case of a railway accident the temperature in relation to the accurate time can be linked to the name of the operator at the switch tower, who was in charge at that time and did not sprinkle the anti-freeze agent, even though the link to the individual could be severed from the data set.

As it was established in the Free Flow of Data regulation, free flow of data inside the EU should be guaranteed by default and only restricted in very rare and clearly defined exceptional cases. Moreover, friction for data flows with judiciaries outside the EU should be as little as possible.

IX. IP: Shielding provisions and their implementation require legal clarity

The DGA introduces the need for the European Commission to adopt “IP adequacy decisions”. We urge the European Commission to take into account long-standing international agreements such as the Berne Convention or the TRIPs agreement that have brought together a number of like-minded countries on IPR protection. Against this background, more clarity from the European Commission is required on data transfers to third countries under the DGA in case there is no such adequacy decision, and when such adequacy decision is needed, which countries will be assessed in priority and how long the process for adopting adequacy decisions for the types of data covered by the DGA will be.

X. A streamlined enforcement structure: Avoid bureaucratic overload

There is a risk that the proposed model of competent authorities checking and authorizing data sharing for a clearly defined purpose is creating a bottleneck. The data economy is agile and dynamic, therefore quick decision-making and clear competencies are required. It could be considered to set up a risk-based model for which applications of data sharing explicit consent has to be asked for. In order to achieve legal certainty, there should be clear procedures and deadlines to facilitate quick and reliable decisions. Bureaucratic overload and uncertainty should be avoided at all times. In order to ensure a level playing field for all companies, regardless of

their country of origin, consistent oversight and harmonized interpretation across Europe is needed.

XI. Connect with existing rules and initiatives: Building a coherent framework

Enabling the data economy is a moving target. There are many ongoing initiatives, proposals and projects in parallel. The DGA should take into account ongoing initiatives, such as Gaia-X and the upcoming Cloud Federation, when it comes to addressing for instance rules on interoperability. The Data Innovation Board can be an excellent opportunity to bring together data experts with different backgrounds and actively include experience from industry stakeholders, be open and inclusive to any company operating in Europe and taking into account developments at international level. Active involvement of industry stakeholders should be an integral part of the Board, in the same vein as it is e.g. in the European Commission or EDPB. In that regard, it is unclear how and in what sense "relevant data spaces" will be involved as part of the Board. With regard to the GDPR, it should be examined whether there are provisions under the GDPR which stand in the way of setting up data intermediaries.

XII. Ensure strategic foresight: Take future developments into account

Given that the handling of data is becoming a competitive factor, for instance when it comes to the further development and establishment of current technological developments such as blockchain and artificial intelligence, negotiators should find ways to make data accessible in a harmonised, unbureaucratic, agile, user friendly, secure and data protection compliant manner. The Data Governance Act can be instrumental in driving an important paradigm shift towards embracing the potential of data for the common good along the principles of openness, participation and transparency.

XIII. Detailed comments on the Provisions of the Data Governance Act

a. Scope and Definitions

Bitkom welcomes that the DGA sets out harmonized requirements for data sharing services in order to ensure data exchange between different players and in this way strengthen the trust of market players in data sharing. Especially in market constellations where mutual trust in data sharing is low, data intermediaries and other data platforms and networks can provide real added value for the data economy as a whole.

However, the current proposal seems to be covering existing B2B European platforms, already developed by private players, and through which data is collected from several types of stakeholders (clients, suppliers notably), centralised and

processed to allow the provision of value added services (predictive maintenance for instance), especially in the context of Art. 9 and 10. The proposal does not clarify that existing platforms and initiatives for data sharing would not automatically have to fulfil the requirements of the provisions but they would only need to comply if they chose to register at a data intermediary.

If existing platforms were included in the scope of the DGA and would always need to fulfil the obligations under Art. 10, they would be made subject to very stringent obligations, such as: notification (de facto authorisation) by authorities, requirement to comply with predefined data governance terms and conditions, obligation to unbundle the operation of the platform from the rest of the digital activities, the prohibition to use the data for other purposes than the to put them at the disposal of data users, etc. (Art. 11).

Such existing platforms, developed by private players based on very significant private investment, involving a significant risk, and requiring massive convincing efforts, should not be made subject to such stringent obligations. This would de facto remove any incentive from the private side to innovate and develop additional platforms. This could have very stifling effects, especially considering the scarcity of B2B platforms in the EU.

With regard to scope and definition of the intermediaries, it should be made even clearer a data controller that makes data accessible should not be covered by Art. 9 et seq. In this respect, the scope of application could be specified by a definition of intermediary that also contains a negative delimitation, i.e. that also determines who should not be considered an intermediary.

The success of data intermediaries as well as data altruistic organizations is depending on an enabling framework that further incentivises data sharing while avoiding a crippling corset of regulation that could have adverse effects on intermediary services. To achieve that aim the development of data spaces must aim at building a framework were existing platforms and initiatives can be offered, and, where possible, be linked via interoperability and common standards – a network instead of a single platform or structure.

b. Open Exchange Environment

The Data Governance Act envisages an open exchange environment for data. For that Data providers should be able to define the own terms of use. We should explore the possible to draw from existing mechanisms under the law to build such a framework: Analogous to open software self-licensing, open data exchange ecosystems could be established. Such a framework would be based on legal protection which we know from copyright law for software for instance. Currently, a similar system unfortunately does not exist for (sensor/ non-personal) data. Whether the Database Directive will apply is currently still debated which leads us to the current system where legal protection of such data sets is fragmentary which means that each party must enter into a civil contract with every other party, to protect the data from leaving this closed ecosystem. We encourage the EU Commission, the Council and the European Parliament to further the debate in this context to explore new frameworks that will protect the interests of "data producers" which furthering an open exchange environment.

c. Recital 11

Recital 11 states that, depending on the case in question, personal data should be completely anonymized before being transmitted so that it is definitely impossible to identify the data subjects. Recital 19 also mentions something similar.

From our point of view, the requirement would narrow the frame for data sharing too much. In the healthcare industry and in the healthcare environment, for instance, it has to be taken into account that a complete anonymization of data is not always possible without jeopardizing the purpose of using such data e.g. for training purposes in the context of AI applications. In other words, the data could then become useless for purposes of developing certain AI-enabled healthcare applications. Therefore, we suggest finding alternative regulatory concepts precisely for those constellations in which the purpose of using data is not the re-identification of individuals, but rather a plurality of data points is required, for example, to be able to recognize patterns through AI. This could be done by allowing users of data pools for AI purposes to subject themselves to legally binding, strict self-restrictions, i.e., to agree not to use data from data pools for the purpose of AI training for purposes of re-identifying individuals, and to take appropriate technical-organizational measures to protect such data from third parties, which are required by data protection law anyway, even if users of such data were still within the scope of lawful purpose limitation.

Furthermore, there are still legal uncertainties with regard to the standards for anonymization of data.

d. Recital 14

Recital 14 could be clarified to make it clearer whether this recital addresses the reuse of data outside the public sector or the reuse of certain data in third countries.

e. Recital 26

Harmonized and clear requirements for data sharing services and data intermediaries can be helpful in order to ensure data exchange between different stakeholders in the ever growing ecosystem of the data economy. Especially where mutual trust in data sharing is low, data intermediaries can provide real added value for the data economy. However, it is important to emphasize that there are already many well-functioning models of data exchange in many industries today, based on fair contractual arrangements. Therefore, it is important that regulatory requirements support existing initiatives and create further incentives for data sharing. Recital 26 provides a number of requirements which could be detrimental to that goal, because existing services could no longer be offered: for example while it is reasonable that data collected by the data intermediary should not be reused for other services, it should still be possible for data intermediaries to offer additional services for shared use, such as data preparation services like quality, interoperability, commercial presentation (metadata), and statistical analysis. SMEs in particular, lacking own expertise, are often dependent on appropriate analysis tools to make their data attractive to other companies in the first place. Moreover, these additional offerings also represent a differentiation factor, which data intermediaries can use to distinguish themselves from the competition in the market.

f. Art. 2 Nr. 10

Art. 2 No. 10 references "purposes of general interest such as scientific research purposes or improving public services" in the context of the definition of data altruism. From our point of view, it should be specified that research and development of commercial products and services in medical technology and the health care industry are also included, since the wording used does not exclude a narrow interpretation with regard to the restriction to "non-profit" science and research conducted at universities. It should be noted that it is in the highest public interest, especially but not only in times of a pandemic, to ensure the supply of the population with products and services developed and manufactured by the health

care industry, including the medical technology industry, and effectively distributed through its distribution channels.

g. Art. 5 No. 11

Art. 5(11) requires that the risks of re-identification of data subjects based on anonymized data be taken into account. In this respect, it would need to be clarified how such risks can be identified and assessed at all.

h. Art. 15

Art. 15provides for a register of data altruistic organizations to be maintained both at national level (para. 1) and at Union level (para. 2). However, in order to be eligible for registration and the associated possibility to call themselves a "data altruistic organization recognized in the Union" (para. 3), the organizations must meet extensive requirements pursuant to Art. 16 et seq.
The proposed requirements impose a considerable (additional) administrative burden on organizations that already process large amounts of data for research projects and already comply with the demanding criteria of the GDPR. It is precisely those companies that do not want to expose themselves to these additional requirements that must fear being assessed as less trustworthy in the future. This in turn leads to difficulties in accessing data for their own research purposes.

i. Art. 22

Art. 22 provides for the introduction of a European Data Altruism Consent Form. This is a form to be defined by the EU Commission, which according to paragraph 2 is to be modular so that it can be adapted to specific sectors and for different purposes. We welcome that the EU Commission recognizes that a sector-specific approach as well as differentiation according to different purposes is necessary. Nevertheless, we doubt that this will do justice to the current and also future complexity. For example, even within sectors, very specific cases may be distinguished, and future purposes may not even be apparent at the time the EU Commission defines such a form. We therefore suggest that, in addition to the consent form, criteria for other consent forms to be developed should also be defined and appropriate certification procedures established.

Furthermore, Art. 22 (3) stipulates that a consent form must allow consent given to be revoked in accordance with the GDPR. We take this as an opportunity to point out conflicts with medical device regulations that arise when individuals revoke their consent to use data in the context of machine learning, thereby changing the data basis for AI systems applied in medical devices (Art. 10 (8) MDR obliges the

manufacturer to keep the technical documentation for at least 10 years after the last product covered by the declaration of conformity has been placed on the market). This would be solved either by limiting the effects of revocation in cases to be defined, or by creating an independent legal basis for such cases.