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Obligations for data intermediation services under the Data Governance Act

Guideline

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These are the new obligations for data intermediation services under the Data Governance Act

I. Introduction

The **Data Governance Act (»DGA«)** is a fundamental pillar of the European data strategy. Its goal is to eliminate trust deficits and improve the availability and exchange of personal and non-personal data by having neutral third parties – data intermediation services – provide the necessary infrastructure and be regulated accordingly. In particular, startups and SMEs, which have limited financial and administrative resources, should be given the opportunity to participate in a non-discriminatory data exchange.

The DGA, which came into force on 23 June 2022, will take effect in the member states only after the expiry of the 15-month transitional period without an act of implementation by the national legislators. It will therefore also apply in Germany from 24 September 2023. Nevertheless, it is worthwhile to take a look at important provisions of the DGA before this date.

Of the 63 recitals and 36 articles of the regulation, especially Article 12 will be highly relevant, as it lists the conditions to which the provision of data intermediation services is subjected in a detailed but semi clear manner. However, the question of when a service is also a data intermediation service can only be answered – even if only to a certain extent – by taking an overall view of a large number of individual articles and recitals of the regulation.

The aim of this guide is to provide an initial, rough assessment of whether a data intermediation service is actually being provided in an individual case **(Chapter 2)**, and if so, which obligations this entails **(Chapter 3)** and what happens if the obligations are not met **(Chapter 4)**.

II. What is a data intermediation service?

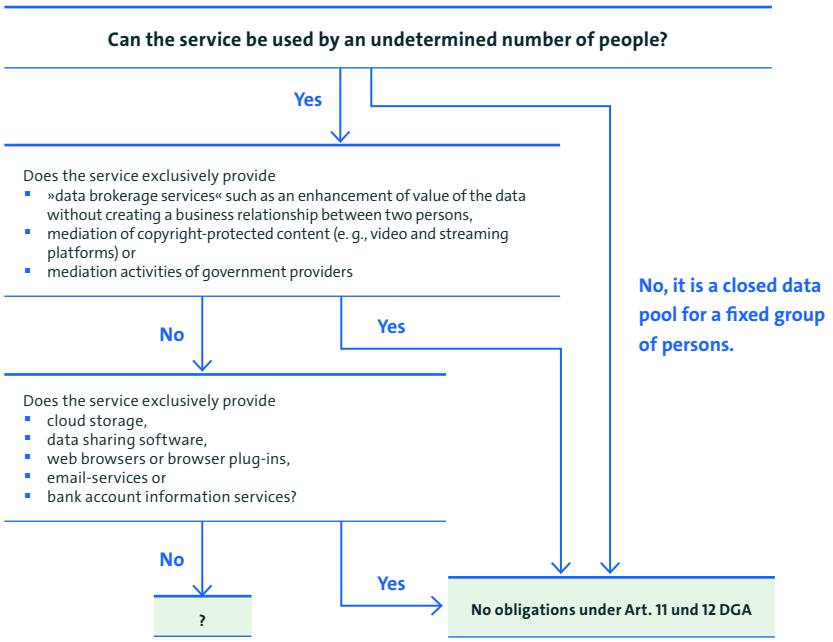
While the European Commission's proposal for the DGA consistently referred to »data sharing services«, the final version of the DGA uses the term »data intermediation service«. The final assessment of whether or not data intermediation services within the meaning of the DGA are provided is the responsibility of the service providers themselves, who accordingly also bear the risk for any misjudgement.

First of all, a reverse from Art. 15 shows that it is irrelevant whether the services offered are provided against payment or free of charge. It is also irrelevant whether a data intermediation service has its headquarters in a third country, as long as it offers its service within the EU.

But what is a data intermediation service? The starting point for answering this question is Art. 2 No. 11, which contains a – more than vague – definition of a data intermediation services. According to this provision, a data intermediation service is a service which aims to

- establish **commercial relationships**
- for the **purpose of data sharing**
- between an **undetermined number**
- of data subjects and **data holders** on the one hand
- and **data users** on the other,
- **through technical**, legal or other means.

In the further course of the same article, a negative delimitation is made by excluding specific services from the scope of Art. 11 and 12. Recital 28 also excludes some services from the coverage of the DGA. Summarizing these findings, the following decision path results:



Having reached this point, however, a clear distinction between data intermediation and non-data-intermediation is hardly possible. Yet, this distinction is of enormous relevance, since only those providers who fall under the term data intermediation services are affected by the wide-ranging regime of obligations set out in Articles 11 and 12.

An important characteristic of data intermediation services seems to be the **openness of their service**. This includes openness on the side of the data owner on the one hand and the data user on the other. Thus, services in which only one company makes its data available to a large number of data users also fall outside the scope of chapter 3 (this is disputed). In this context, relevant objective criteria for restricting access appear to be possible. For example, it is possible to create a data space for companies in the automotive industry, to which companies from outside this sector cannot gain access. However, access restrictions that go beyond this – such as the size of the company or its annual turnover – are discriminatory and therefore not permis-sible (see Chapter 3).

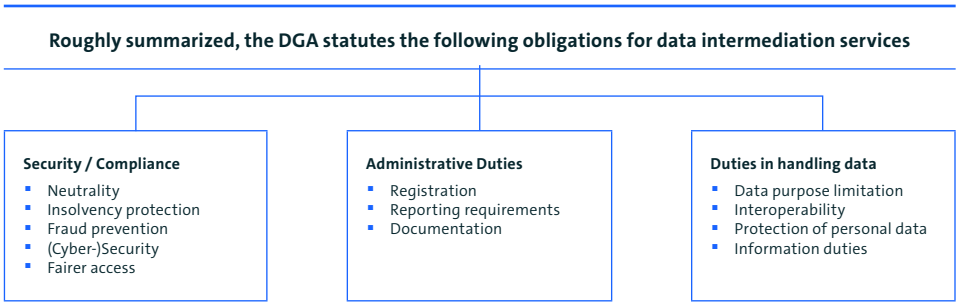
The **intermediary activity of the provider appears to be another essential characteristic** of data intermediation services. The DGA explicitly excludes cloud storage from the scope of the regulation. After all, those cloud services primarily provide storage space and only enable the exchange of data as a reflex effect. This leads to the conclusion that the exchange **activity must in any case be a main purpose** of the provider. Otherwise, services for which the exchange of data is only a means to an end would also have to comply with the list of obligations in Art. 11, 12, which would be disproportionate. Consequently, the data intermediation service acts first and of all as a **matchmaker** between the data owner and the data user. This is also shown by a brief look at Art. 12 lit. e), according to which services of the data intermediation service that go beyond the mere organization of data exchange – for example, support in anonymizing personal data – require prior separate permission from the data owner.

With this in mind, the question arises as to whether the European Union is finally risking a first binding definition for the term data space with the DGA. However, the DGA does not allow the confident thesis that »data intermediation service = data space«. Nevertheless, there is some good reason to assume that data pools, data spaces and data marketplaces are covered by Art. 11 and 12 of the DGA. The European Commission itself explicitly mentions data marketplaces as an example of application of the DGA.[1] After all, such services are often characterized by a high degree of openness for an undefined group of persons and provide a suitable infrastructure in the form of a platform to create an orderly environment for the exchange of data between two or more persons. It remains to be seen whether the national legislators will risk a more precise definition when transposing the DGA into national law or when enforcing it.

1 ↗ Data Governance Act explained | Shaping Europe's digital future (europa.eu).

III. What are the obligations of a data intermediation service?

Since the DGA does not claim priority over the provisions of the General Data Protection Regulation (GDPR), the provider of data intermediation services must comply with the basic principles of data protection law. Furthermore, other statutory restrictions on data exchange, the provisions of competition law, intellectual property law and the law on the protection of trade secrets shall remain unaffected by the provisions of the DGA.[2] The obligations for data intermediation service are therefore not limited to Art. 11 and 12!



These has the following consequences for data intermediation services:

- **Neutrality:** To ensure that the provider of data intermediation services is indeed a neutral third party and not at the same time a data owner or user, a legally separate company must act as an intermediary between the players.[3] Data intermediation services are also subject to a prohibition on coupling, in that they are prohibited from granting a »quantity discount« to data owners and users simply because they use several data intermediary services from the same provider or from companies affiliated with it.[4]

- **Insolvency protection:** If insolvency proceedings are opened for the assets owned by the service provider, the Service Provider shall ensure that data owners and data users continue to have unhindered access to the service and data.[5]

- **Fraud prevention:** The provider of data intermediation services shall establish mechanisms that prevent fraudulent or abusive access to its service.[6]

- **(Cyber-)Security:** In order to optimally protect non-personal and competition-related data from unauthorized access, the provider must take »necessary measures« to ensure an »appropriate level of security«.[7]

2 Rec. 18.
3 Art. 12 (f).
4 Art. 12 (b).
5 Art. 12 (h).
6 Art. 12 (g).
7 Art. 12 (l).

The provider is also under an obligation to take adequate measures to prevent the unlawful disclosure of such data.[8] This inevitably leads to the provider having to ensure the legal conformity of the transactions of the individual users and consequently to monitor them.

- **Fair access:** Access to the data intermediation service must be fair, transparent and non-discriminatory – also with regard to its pricing – which is likely to play into the hands of start-ups and SMEs.[9]

- **Registration:** Anyone seeking to offer data intermediation services must register this with the competent authority, which is specified in Art. 13 DGA, before commencing their intermediation activities. It remains to be seen who this will be on the national level.[10]

- **Reporting requirements:** Should a third party succeed in gaining unauthorized access to the data provided by the data owner, the provider of the data intermediation service must inform the data owner of this without hesitation.[11]

- **Documentation:** The provider must document its data intermediation activities in a comprehensible manner.[12] However, the DGA does not specify the extent and scope of this documentation obligation.

- **Data purpose limitation:** Following the GDPR, the DGA also follows a strict purpose limitation principle: The provider of data intermediation services may only use the mediated data for the purposes for which the data is also accessible to the other data users.[13]

  Metadata generated during the use of the services may also only be used by the provider for the further development of the service or for other valid reasons, such as cyber security. When requested, the metadata shall be made available to the respective users of the services.[14]

- **Interoperability:** To enable smooth transmission of data between different data intermediation services and to avoid lock-in effects, the provider must ensure a standardized format for all data.[15] The provider is also denied converting data from data owners into other formats without their permission.[16]

8 Art. 12 (j).
9 Art. 12 (f).
10 Art. 11.
11 Art. 12 (k).
12 Art. 12 (o).
13 Art. 12 (a).
14 Art. 12 (c).
15 Art. 12 (i).
16 Art. 12 (d).

- **Protection of personal data:** In order to comply with the provisions of the GDPR, the provider of data intermediation services must take appropriate measures to ensure that the transfer of personal data complies with EU law and national data protection regulations.[17] In the event that personal data is used by the provider in a third country, this third country must be named to the data subject.[18]

- **Information duties:** The provider must always act in the interest of data subjects and inform them of all information in a manner that is as transparent, concise, comprehensible and easily accessible as possible.[19]

However, providers of data intermediation services that have already offered their services when the DGA came into force, i. e. on 23 June 2022 or before, do not need to comply with this catalogue of obligations until 24 September 2025.[20] At this point in time, it is not also yet clear how exactly these obligations will be defined and monitored by the responsible supervisory authorities.

IV. What are the penalties for violating these obligations?

The DGA gives data intermediation services the benefit of the doubt and intervenes only when violations of Art. 11 and 12 are brought to their attention. First, Art. 14 provides for a fairly cooperative and provider-friendly solution: If the authority with which the provider has registered its service under Art. 11 detects a violation of the above obligations, it is incumbent on the provider to issue a statement on the matter within 30 days. If the authority is nevertheless convinced of a breach of the obligations, it may take necessary measures to put an end to the violations.

The sanctions regime initially refers to »dissuasive financial penalties« or the initiation of judicial proceedings for the imposition of fines, without specifying a maximum. As a last resort, Art. 14 (4) (c) provides for the complete discontinuation of data intermediation services in the event of multiple and serious violations. The provider must then be removed from the list of approved data intermediation services maintained by the European Commission.

Since Art. 12 – as shown in Chapter 3 above – also imposes data protection obligations on the data intermediation service. The relationship between the competent authorities under Art. 14 DGA and the national data protection authorities of the Member States in the event of a (potential) GDPR violation remains open for now.

17 Art. 12 (j).
18 Art. 12 (n)
19 Art. 12 (m).
20 Art. 37.

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