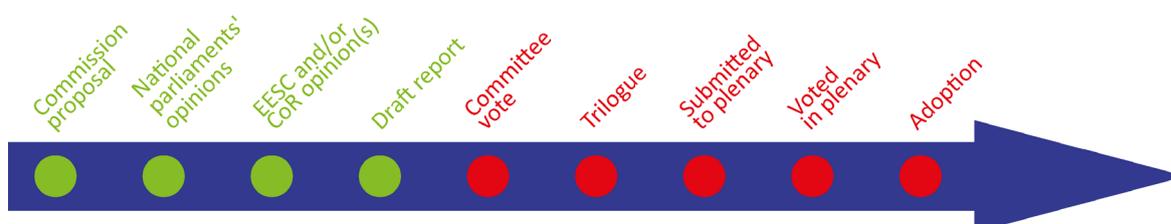


# Data Governance Act

## OVERVIEW

Data is a key pillar of the European digital economy. To unlock its potential, the European Commission aims to build a market for personal and non-personal data that fully respects European rules and values. While the volume of data is expected to increase dramatically in the coming years, data re-use is hampered by low trust in data-sharing, conflicting economic incentives and technological obstacles. As the first of a set of measures announced in the European strategy for data, the Commission put forward its proposed data governance act on 25 November 2020. It aims at facilitating (largely) voluntary data sharing across the EU and between sectors by strengthening mechanisms that increase data availability and foster trust in intermediaries. It establishes three principle re-use mechanisms and a horizontal coordination and steering board. While there seems to be considerable support for data governance rules, the appropriate approach remains fundamentally disputed. Issues have been raised concerning, for instance, the ineffectiveness of labelling and registration regimes to foster trust and data re-use, the uncertain interplay with other legislative acts, the onerous rules on international data transfers and the vulnerability of certain mechanisms to commercial exploitation. The co-legislators, the European Parliament and Council, are in the process of assessing whether the Commission's proposal presents an adequate response to the challenges identified and are working towards defining their respective positions.

<b>Proposal for a regulation of the European Parliament and of the Council on European data governance (Data Governance Act)</b>		
<i>Committee responsible:</i>	Industry, Research and Energy (ITRE)	COM(2020) 767 25.11.2020
<i>Rapporteur:</i>	Angelika Niebler (EPP, Germany)	2016/0340(COD)
<i>Shadow rapporteurs:</i>	Miapetra Kumpula-Natri (S&D, Finland) Nicola Danti (Renew) Damian Boeselager (Greens/EFA, Germany) Elena Lizzi (ID, Italy) Dace Melbārde (ECR, Latvia) Maria Matias (The Left, Portugal)	Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
<i>Next steps expected:</i>	Committee vote	



## Introduction

Data is at the centre of the digital transformation. In combination with next generation connectivity and emerging technologies, notably artificial intelligence, it is expected to increase productivity, improve health and wellbeing and facilitate convenient public services. From an economic standpoint, it is set to increase/maintain competitiveness and enable digital trade. To unlock the socio-economic potential of data, while preserving European rights and values, Europe is breaking new ground with the 'world's most ambitious data governance architecture'.<sup>1</sup>

## Existing situation and vision

The European Commission has [identified](#) three primary constraints ('drivers'), which obstruct data sharing and ultimately suppress the swift development of a data economy: (i) low trust in data re-users, (ii) lack of appropriate data-sharing structures and processes, and (iii) technological obstacles (e.g. deficiencies in the interoperability, findability and quality of data). In the absence of EU action, data and data sharing are expected to grow, but disparities in data generation and data access would likely produce a range of drawbacks. These include (i) the consolidation of dominant market actors' power, (ii) untapped socio-economic potential, (iii) hampered cross-border innovation, and (iv) EU dependency on third countries.

Economically, Europe would stand to benefit from increased innovation and competitiveness. Since multiple actors can use the same data for a variety of purposes without functional impairment ('data as a non-rival good') and data aggregation may unlock economies of scale and scope,<sup>2</sup> this would materialise in efficiency gains for the industry and increased social welfare. According to a [study](#) commissioned by the Commission, the [data economy](#) was estimated to be worth over €324.86 billion at the end of 2019, which accounted for approximately 2.6 % of the EU-27 gross domestic product (GDP). Consultants expect that the coronavirus-induced slow-down in 2020 will be followed by a rebound and a return to growth. By 2025, the data economy is expected to grow to between €432 360 and €827 089 billion, accounting for between 3.3 % and 5.9 % of EU-27 GDP.

## Council and European Council starting position

As early as March 2019, the European Council [concluded](#) on the need for a digital economy and placed special emphasis on the sharing and use of data. It followed this up in October 2020, with a [call](#) 'to build a true European competitive data economy, while ensuring European values and a high level of data security, data protection, and privacy. It stressed the need to make high-quality data more readily available and to promote and enable better sharing and pooling of data, as well as interoperability'. Meanwhile the Council expressly [called](#) on the Commission to 'present concrete proposals on data governance and to encourage the development of common European data spaces for strategic sectors of the industry and domains of public interest'.

## Parliament's starting position

The European Parliament has asked the Commission to unlock the potential of the data economy in several resolutions, including in [January](#) and [March](#) 2016. Following publication of the Commission [data governance act](#) proposal, Parliament adopted its March 2021 resolution on the [European strategy for data](#). Therein, Parliament 'supports the creation of a data governance framework and common European data spaces, which should be subject to EU rules and cover transparency, interoperability, sharing, access, portability and security of data, with a view to enhancing the flow and re-use of non-personal data or personal data that is fully [General Data Protection Regulation] GDPR-compliant and securely [anonymised](#) in both industrial and public environments and across and within specific sectors'. Subsequently, Parliament welcomes the classification and certification of intermediaries, supports the EU-wide approach to data altruism and encourages the Commission to facilitate a data sharing culture and voluntary data sharing schemes, whilst advocating compliance with consumer and data protection rights.

## Preparation of the proposal

### Context and preparatory actions

The proposal is the result of a stepwise refinement of early policy visions aimed at anticipating and shaping Europe's digital future. Leaving aside the policy process related to [open data](#), the Commission drew particular attention to the untapped potential of a data(-driven) economy with its 2014, 2017 and 2018 communications [Towards a thriving data-driven economy](#), [Building a European Data Economy](#) and [Towards a common European data space](#). In 2021, the Commission presented its communication on a [European strategy for data](#), containing a policy and investment package aimed at building a 'single European data space', i.e. a single market for data. In other [words](#), it aims 'to enable Europe to become the most attractive, secure and dynamic data-agile economy in the world – empowering Europe with data to improve decisions and better the lives of all its citizens'. As the first of a set of measures announced in the Data Strategy, the Commission put forward the [Data Governance Act](#) (DGA) proposal on 25 November 2020. Both the proposal and the overarching strategy integrate with Europe's [2030 Digital Compass](#). The Commission drew on extensive evidence from studies, stakeholder consultations and workshops for the preparation of the DGA proposal.<sup>3</sup>

### Impact assessment

In the [impact assessment](#) accompanying the proposal, the Commission identifies the problem (see 'existing situation and vision' section), specifies the objectives and singles-out a proportionate policy option based on quantitative and qualitative evidence. Ultimately, the Commission opted for a mix of lower and higher intensity regulatory interventions to stimulate data sharing:

- **Mechanisms for enhanced re-use of public sector data:** The proposed regulation provides for a set of harmonised basic conditions under which public authorities may allow the re-use of data subject to the rights of others.
- **A certification/labelling framework fostering trust in data intermediaries:** The proposal would establish a **voluntary** certification/labelling mechanisms, for compliant data intermediaries offering B2B data-sharing services or personal data spaces.
- **Measures facilitating data altruism:** Organisations that seek to perform activities facilitating data altruism would have to comply with authorisation criteria and seek authorisation before launching their operations. The authorisation would be **compulsory**, and would be handled and issued by a designated national authority.
- **Mechanism to coordinate and steer horizontal aspects of governance:** A European Data Innovation Board would be created as a formal expert group, to coordinate efforts in Member States and at European level to support data-driven innovation, to lower transaction costs and prevent further sectoral fragmentation.

The (revised) [impact assessment](#) received a [positive opinion with reservations](#) from the Regulatory Scrutiny Board, after the initial impact assessment had received a negative opinion. An [EPRS initial appraisal of the impact assessment](#) found that the Commission drew its conclusions from reliable data and analyses, but held that the proposal was not fully coherent with the preferred policy option identified in the impact assessment. By opting for a compulsory notification regime for data-sharing services, instead of a voluntary certification regime, the Commission aims to leverage the benefits of a compulsory regime, while limiting the regulatory burden on the market players. As regards measures facilitating data altruisms, the Commission opted for a voluntary registration mechanism, instead of a compulsory authorisation framework, to reduce the administrative burden.

### The changes the proposal would bring

The proposal is subdivided in eight chapters and contains 35 articles as well as 46 recitals. It establishes three principle data governance/re-use<sup>4</sup> mechanisms, respectively in chapters ii-iv.

## Interplay with adopted and prospective initiatives

Pursuant to article 1(2) and recital 3 DGA-COM,<sup>5</sup> the draft legislation does not affect the validity or applicability of certain sector-specific Union law, such as the [General Data Protection Regulation](#), the [Copyright Directive](#), the [Open Data Directive](#) or the [e-Commerce Directive](#), and any other sector-specific Union legislation that organises the access to and re-use of data. It may be developed, adapted and complemented by future sector-specific legislation, such as the envisaged legislation on the European health data space.<sup>6</sup>

## Re-use of certain data held by public sector bodies (chapter ii)

Chapter ii determines a set of harmonised basic conditions under which public sector bodies may allow the re-use of data, which is subject to the rights of others, e.g. personal data, data protected by intellectual property rights or trade secrets (article 3(1)). Due to these third party rights, such data cannot be made freely available as open data. By imposing rights-preserving sharing-conditions (articles 4-6 and recital 5) as well as institutional (article 7) and organisational requirements (article 8), the Commission aims to encourage the exploitation of data whose re-use is currently inhibited. Provisions under this chapter do not create the right to re-use such data, but provide for conditions under which the re-use of such data **may** be allowed (see articles 3(3) and 8(3)).

**Sharing conditions:** Notwithstanding strict exceptions, public sector entities that decide to make data available for reuse are prohibited from entering into exclusive arrangements or otherwise restricting the availability of data to the detriment of third parties (article 4 and recital 9). Where exclusive rights may be granted, strict purpose and necessity-related (article 4(2)), procedural (article 4(3) and (4)), temporal (article 4(5)) and transparency (article 4(6)) requirements apply. These requirements curb 'the risk that powerful players in the market get exclusive access to the data'.<sup>7</sup>

Public sector bodies that make data available for re-use under national law, should lay down and publish the conditions upon which re-use would be allowed (article 5(1)). These conditions shall be non-discriminatory, proportionate and objectively justified (article 5(2)). Public sector bodies may also impose obligations to ensure the compliant and orderly reuse of data (article 5(3)-(5)) as well as verify any processing results and prohibit its use where this would jeopardise third party rights and interests (article 5(5)). Where such organisational and technical measures cannot facilitate the rights-preserving re-use of data (article 5(3)-(5)), the public sector body shall support re-users in seeking consent from data subjects and/or permission from the legal entities (article 5(6)).

The DGA proposal imposes additional restrictions on the transmission of data that is destined for a third country. The Commission proposes to regulate both the emission of data from a public body to a natural/legal person who intends to transfer the data to a third country (article 5(9)-(11) and recital 19) and the subsequent transfer of emitted data to a third country (article 5(12)). According to article 5(10), public sector bodies may only transmit commercially confidential data or data protected by intellectual property rights to a re-user who intends to transfer the data to a third country under certain conditions. Similarly to the adequacy mechanism in the GDPR, the Commission may enable the free flow of data by adopting an implementing act, where it considers that the level of protection of intellectual property and trade secrets within a third country is essentially equivalent to that ensured in the European Union (article 5(9)). Alternatively, protected data may be transferred if the re-user complies with the EU intellectual property regime as well as the EU laws on commercial confidentiality, even after the data is transferred to the third country and if the re-user accepts the jurisdiction of certain courts within the EU (article 5(10)).

**Institutional and organisational requirements:** Member States are required to set up an interface for data re-users, i.e. a 'single information point', and to designate, establish or contribute to the establishment of bodies that would support those public sector bodies in charge of granting or refusing re-use (articles 7 and 8 and recital 21). The single information point shall channel requests for re-use as well as the respective responses and provide information to (potential) re-users. The supporting bodies shall provide authorities sharing data with technical and organisational support.

## Requirements applicable to data sharing services (chapter iii)

Chapter iii imposes obligations on providers facilitating the sharing of personal and non-personal data. It aims to increase trust in sharing of data and lower transaction costs linked to business-to-business (B2B) and consumer-to-business (C2B) data sharing by creating a (presumably) compulsory notification regime for data sharing providers. Similar to the voluntary certification/labelling scheme envisioned in the impact assessment, enhanced trust may lead to 'further efficiency gains, time savings, increase of the client base and data transactions and therefore increase of revenues, allowing data intermediaries to scale up but also other stakeholders in the value chain'.<sup>8</sup> Unlike a certification mechanism, this notification procedure does not require any explicit decision or administrative act by the competent authority for the provision of such services (recital 30) and thereby allows data activities to start upon notification.

Specifically the provision of the following data sharing services would be subject to a notification procedure (article 9(1) and recitals 22-24):

- intermediation services between data holders which are legal persons and potential data users (likely to include industrial data spaces)
- intermediation services between data subjects (that seek to make available their personal data) and potential data users (likely to include [Personal Information Management Systems](#))
- Services of data cooperatives that support individuals or small and medium-sized enterprises to negotiate terms and conditions for data processing.<sup>9</sup>

According to recital 22, certain services and providers, such as cloud services and data brokers, are excluded from the scope. Furthermore, these rules do not apply to not-for-profit entities whose activities consist only in seeking to collect data for objectives of general interest, made available by natural or legal persons on the basis of data altruism (article 14 and recital 22).

Any provider of data sharing services shall submit a notification including the information set out in article 10(6) to a designated competent authority (article 10(1)). Upon notification, the provider may start the activity subject to the conditions laid down in this chapter (article 10(4)). The Commission shall keep a register of providers of data sharing services (article 10(9)).

To increase trust in such data-sharing services, it is necessary to set out harmonised requirements related to the trustworthy provision of such data sharing services (recital 25). Article 11 imposes trust-building requirements on the provision of data sharing services, including (1) neutrality obligations (see recital 26 for details), (2) restrictions on the use of metadata by providers, (3) fair, transparent and non-discriminatory access to services for data holders and data users, (4) restrictions on data reformatting, (5) the implementation of anti-fraud and anti-abuse measures, (6) reasonable service continuity, (7) the implementation of safeguards against unlawful data access or transfers, (8) a high level of security for the storage and transmission of non-personal data, (9) procedures to safeguard compliance with competition rules, (10) fiduciary duties, where intermediation services facilitate the exercise of data subjects' rights, and (11) information duties.

A designated competent authority (article 12) shall monitor and supervise compliance with the requirements stipulated in chapter iii, notably articles 10 and 11 (article 13(1)). The competent authority shall have the power to require the cessation of the breach of article 10 or 11. In this regard, the competent authorities shall be able to (a) impose dissuasive financial penalties which may include periodic penalties with retroactive effect; and (b) require cessation or postponement of the provision of the data sharing service (article 13(4)). Natural and legal persons shall have the right to lodge a complaint against a provider of data sharing services (article 24).

## Data altruism (chapter iv)

The Commission sees strong potential in the use of data made available voluntarily by data subjects or other data holders without seeking (financial) reward, for purposes of general interest (recital 35).

The 2020 [online consultation on the European strategy for data](#) revealed that 87 % of the respondents considered that there are insufficient mechanisms for altruistic data sharing and 83.3 % saw a need for enabling mechanisms. Consequently, the Commission aims to introduce a labelling and monitoring framework for data altruism organisations that perform activities related to such voluntary data sharing in the general interest (articles 16 and 2(10)). This is supposed to increase trust in the operations of registered organisations and thereby stimulate increased data-sharing on a data holder level (recital 36). Trust is expected to emerge where the labelling and monitoring scheme ensures that altruism organisations process data in compliance with the stated preferences and for truly altruistic purposes, as opposed to (surreptitiously) for commercial purposes.<sup>10</sup>

An entity may refer to itself as a 'Data Altruism Organisation recognised in the Union' if the competent national authority (article 20) approves its (voluntary) registration request (articles 15, 16 and 17). Pursuant to article 16, in conjunction with article 2(10), organisations qualify for registration if they (a) are a legal entity constituted to meet objectives of general interest; (b) operate on a not-for-profit basis and independent of any entity that operates on a for-profit basis; (c) perform activities related to data provided for purposes of general interest without seeking a reward ('data altruism'). Presumably, such organisations may be operated by public sector organisations, NGOs and other private sector organisations.<sup>11</sup> Local representation requirements for non-EU services safeguard accountability without disrupting existing markets (articles 17(2) and (3)).

Organisations entered into the register would become subject to enforceable (article 21) transparency obligations (article 18) and protective duties (article 19). A designated national authority (article 20) would monitor and supervise the compliance of registered entities with the conditions laid down in chapter iv (article 21). The competent authority would have the authority to require cessation of the breach (article 21(4)) and may remove the organisation from the register and revoke its right to refer to itself as 'Data Altruism Organisation recognised in the Union'. Natural and legal persons would have the right to lodge a complaint against recognised data altruism organisations (article 24).

## European Data Innovation Board (chapter vi)

The Commission proposes the creation of a European Data Innovation Board (EDIB) that would facilitate the exchange of national practices and promote standardisation as well as interoperability with the aim of lowering transaction costs and preventing further sectoral fragmentation (article 27). The envisioned EDIB would take the form of a formal expert group and consist of the representatives of competent authorities of all the Member States, the European Data Protection Board (EDPB), the Commission, relevant data spaces and other representatives (article 26(1)). Since the envisioned coordination mechanism requires particular expertise and a specific composition, the Commission rejected the idea of bringing its functions under the remit of the EDPB.<sup>12</sup>

## Advisory committees

The European Committee of the Regions [decided](#) not to issue an opinion. The European Economic and Social Committee adopted an [opinion](#) on 27 April 2021. It generally [endorses](#) the Commission's approach, but recommends that a 'European property right for personal data' should be recognised.

## National parliaments

The deadline for the submission of [reasoned opinions](#) on the grounds of subsidiarity expired on 23 February 2021. The upper houses of the German and Czech Parliaments have provided opinions. The [Czech Senate](#) considers that many provisions should be specified and clarified in the course of the legislative procedure, e.g. the DGA's interplay with rules on personal data protection. The [German Bundesrat](#) emphasises that a high level of data and consumer protection must be maintained. As regards **the re-use of publicly held data**, it raises concern that the proposed obligation on public authorities to support the data exchange (article 5(6)) may conflict with the GDPR requirement of [freely given consent](#). It welcomes the regulations of data trusts, presumably

referring to **intermediation services** between data subjects and data users (article 9(1)(b)), but calls for further investigation of how their neutrality may be ensured and effectively enforced. The Bundesrat also expresses doubts whether the combination of notification procedure and ex-post monitoring sufficiently strengthens confidence in data intermediaries. Since citizens generally have no way of checking the quality of the service, a mandatory authorisation procedure should be put in place, comprising a compliance-check with neutrality, security and service continuity standards. Regarding the regulations on **data altruism**, the Bundestag admonishes that the proposed introduction of a dedicated label (article 15(3)) may gradually divert confidence from 'merely' GDPR-compliant organisations to those carrying the label (arguable).<sup>13</sup> Additionally, it contemplates whether the purpose limitation on data altruism ('purposes of general interest', article 2(10)) should be narrowed to include non-commercial purposes alone.

## Stakeholder views

### Interplay with legislative acts

**GDPR:** The [Centre for Information Policy Leadership](#) (CIPL), a law firm-based think tank with industry leaders such as Google, Amazon and SAP among its members, advocates for a risk-based interpretation of the GDPR and considers that the proposed DGA should be aligned with this understanding. [MyData Global](#), a non-profit organisation that, inter alia, recognises human-centric personal data management services based on the '[MyData operators](#)' scheme, considers that definitions should be aligned with the GDPR and that individuals should be able to delegate their data related rights to data cooperatives (see article 9(1)c and recital 24). Digital rights advocacy groups [Access Now](#) and [European Digital Rights](#) (EDRi) would prefer to exclude personal data from the scope of the DGA, or increase data protection safeguards. The [German Federal Government](#) demands amendments to and clarifications of definitions, guidance on the GDPR-compliant implementation of public sector data sharing (chapter ii), the exploration of further safeguards to ensure that intermediation services subject to article 9(1)(b) do not follow misaligned – potentially GDPR-obstructive – incentives (chapter iii), and guidance on how data altruism organisations could provide GDPR-compliant tools for obtaining consent (chapter iv). For all data re-use mechanisms, the European Data Protection Board (EDPB) and the European Data Protection Supervisor (EDPS) [jointly recommend](#) clarification and specification of concepts and their building-blocks, as well as a closer and more explicit integration with the GDPR. They repeatedly raise the re-use mechanisms' (in)compatibilities with the principle of [purpose limitation](#) and the adverse effects of data-related monetary transactions (fees/remuneration). For cases of personal data sharing (article 9(1)(b)) and personal data altruism (chapter iv), the data protection authorities recommend replacing the proposed notification and registration regimes (of almost 'declaratory' nature) with regimes that 'provide more checks and safeguards for the data subject, including on crucially important data protection aspects', for instance, codes of conduct or certification mechanisms.

**Other legislation:** [DIGITALEUROPE](#), the [German Federal Government](#) and other actors consider that the relationship with the wider legal framework, including [Regulation 2018/1807](#) on the free flow of non-personal data, the [Open Data Directive 2019/1024](#), the [Trade Secrets Directive 2016/943](#) and the [ePrivacy Directive 2002/58/EC](#), requires clarification. Particularly, the German Federal Government wonders how publicly held trade secrets may be re-used in practice, without jeopardising the very integrity of the right, i.e. without terminating its protective effect, as a result of an (unconditional) disclosure (see recital 11). The [EDPB and EDPS jointly](#) point out that the scope of the public data re-use mechanism extends to personal data pursuant to proposed article 3(1)(d) and thereby overlaps with that of the Open Data Directive (ODD), which may also apply to publicly held personal data pursuant to Article 1(2)(h) ODD (see recital 7). Both the German Federal Government and the data protection authorities raise concerns that re-use of publicly held statistical data might contradict the core principle of [statistical confidentiality](#). Practically, this may erode trust in the confidential processing of data provided for statistical purposes and ultimately call into question the power of statistical offices to prescribe the disclosure of data.

## Fundamental concerns regarding data-reuse mechanisms

The [EDPB and EDPS](#), the [German Federal Government](#), [MyData Global](#), [SMEunited](#) and other actors call for the clarification of key concepts and recommend several amendments. In the words of SMEunited, 'to ensure that the opportunities created are effectively used, clear regulations are needed to eliminate ambiguities and create legal certainty'. Depending on how the co-legislators view and potentially resolve alleged inconsistencies with existing legislation (see section 'interplay with legislative acts'), this may already fundamentally affect the scope and functionality of data governance mechanisms. Cutting across all governance mechanisms, the [German Federal Government](#) proposes to privilege scientific research undertakings.

**Re-use of publicly held data (chapter ii):** Stakeholders mainly criticise the adequacy of certain requirements and their insufficient conduciveness for a data economy. The [Information Technology Industry Council](#) (ITI), a trade association that represents high tech – including big tech – companies, believes that open government data is a tremendous source of economic growth and supports an 'open by default' principle. Both the [ITI](#) and the [CIPL](#) advocate that the conditions for re-use should be established at Union level to ensure harmonisation, instead of leaving it to public sector bodies to decide on the conditions (article 5(1)). Likewise, both the [ITI](#) and the [CIPL](#) suggest amending article 5(4)(a) to enable the use of private sector technology as a secure processing environment. While the [CIPL](#) cautions that vesting public authorities with the power to verify processing results and prohibit its re-use (article 5(5)) may provoke chilling effects. The [ITI](#) proposes to narrow the scope of potential prohibitions to 'clear violations of other's IP rights, sensitive commercial information, trade secrets or privacy' (emphasis added). The [German Federal Government](#) is particularly concerned that the obligation to take administrative decisions on re-use requests (article 8(3) and (4)), may culminate in granting individuals and companies a right to data re-use. Since this may entail substantial practical consequences, a clear rejection of this notion, or an impact assessment, appear necessary. Additionally, it demands guidance on the practical implementation of the envisioned data sharing mechanisms and conditions. [DIGITALEUROPE](#) considers that the re-use provisions should not cover data licensed to government bodies by commercial actors, as it would disincentivise public-private collaboration. The [Stiftung Neue Verantwortung](#), a think tank specialised in public policy at the intersection of technology and society, recommends including benchmarks and key performance indicators (KPIs) centred on the FAIR data principles (Findability, Accessibility, Interoperability, and Re-use), to promote high impact data sharing, rather than maximising the amount of data that is emitted.

**Data-sharing services (chapter iii):** Stakeholders raise fundamental concerns regarding the adequacy and conduciveness of the notification regime and the ex-post monitoring system. As mentioned above, the [EDPB and EDPS jointly](#) consider that the almost 'declarative' proposed 'vetting' regime (article 10) does not sufficiently protect data subjects and may not increase the level of trust. In the same vein, the [German Federal Government](#) and the [German Bundesrat](#) expressed their concern on the conduciveness of the envisioned notification procedure to a higher level of trust. Conversely, various actors advocate moderating or clarifying the compliance obligations under article 11, for instance the [fiduciary duty](#) (article 11(10)), the [protective and security measures](#) (article 11(7)-(8)) and the [restrictions on the re-use of metadata](#) (article 11(2)).

The [European data protection authorities](#), the [German Federal Government](#), [ITI](#), [MyData Global](#) and others call for a clearer description and delineation of data sharing services within the meaning of chapter iii. [MyData Global](#) emphasises the 'absolute necessity of including interoperability between the data sharing services as a foundational principle in the Data Governance Act' so that data intermediaries form a network, instead of isolated silos. Similar to telecom operators, energy providers or banks, MyData Global envisions interoperable, but competing, providers that together provide global-level connectivity through shared standards and roaming arrangements. It contends that the European Data Innovation Board should be complemented 'by another governance body focusing on the more tactical and operational aspects of enabling data sharing and interoperability between the data sharing service in practice' ('Data Exchange Board'). The [European Consumer](#)

[Organisation](#) (BEUC) considers that there is foremost a need for efficient and strong enforcement of existing rules, before the development of new data intermediaries are stimulated.

**Data altruism (chapter iv):** Uncertainties range from the scope to the functioning of data altruism mechanisms. The [EDPB and EDPS](#) raise similar concerns regarding the proposed (optional) labelling and registration procedure, as regards the notification regime in the data sharing context. They suggest 'a more systematic inclusion of accountability and compliance tools for the processing of personal data as per the GDPR, in particular the adherence to a code of conduct or certification mechanism'. [DIGITALEUROPE](#) is unclear how for-profit organisations can access the data collected by registered data altruism organisations. [BEUC](#) is concerned that the term 'data altruism' nudges the consumer into allegedly 'ethical' behaviour, which may not be justified in the specific case at hand.

Additionally, the [EDPB and EDPS](#) and the [German Federal Government](#) would prefer a clearer delineation of data altruism (chapter iv and article 2(10)) from personal data sharing through intermediaries (articles 9(1)(b) and 14). The [German Federal Government](#) notes that it is unclear whether data altruism organisations only provide third parties with data, or whether they process data in the general interest themselves. The [EDPS and EDPB](#) consider that consent requirements (article 2(10)) merit clarification, notably in relation to the GDPR consent requirements, and that an 'exhaustive list of clearly defined [data processing] purposes should be provided in the proposal' (article 2(10) and recital 35). The [CIPL](#) holds that the concept of data altruism should not be limited to consent as regards personal data processing (article 2(10)), but extended to include other legal bases as grounds for data processing. [DIGITALEUROPE](#) suggests defining 'general interest' to include research and innovative uses undertaken by companies, such as the development of new products and services. In addition, [BEUC](#) calls for clarifications of this term, not least so that consumers can invoke the [Unfair Commercial Practices Directive](#) against deceptive practices. The [German Bundesrat](#) finds the applicability of data altruism rules on public authorities unclear.<sup>14</sup>

## Concerns regarding international transfers

The proposed rules applicable to (formerly) **publicly held data** intended for international transfers (article 5(9)-(13)) raise particular concerns among multi-national tech corporations, such as [IBM](#), and their trade association, [ITI](#). The [ITI](#) is especially concerned about the proportionality of the suggested measures, which may restrict the flow of non-personal data outside the EU, although they do not pose the same risks to fundamental rights as personal data. Drawing on experience gained from similar rules under the GDPR, such an adequacy-like transfer mechanism (article 5(9)) could create a considerable workload for all actors involved and may become a bottleneck for the transfer of non-personal data, therefore defeating the proposal's aim of incentivising data re-use. [IBM](#) holds 'that adequate IP arrangements are already in place and thus, may not require additional decisions by the European Commission under the DGA'. The [Center for Data Innovation](#), a non-profit think tank that promotes public policies designed to enable data-driven innovation, suggests that the Commission should allow all transfers to non-EU countries by default, unless the Commission designates a country as insufficiently safeguarding legitimate EU interests. [ITI](#) calls for clarification of the alternative transfer requirements applicable in the absence of an adequacy-like decision (article 5(10) and recital 16). The [German Federal Government](#) calls for clarification of the [interplay](#) with World Trade Organization obligations (General Agreement on Trade in Services (GATS)), and the [EDPB and EDPS](#) warn against consistency issues with the GDPR.

## Concerns regarding oversight and coordination

The [European data protection bodies](#) and [Access Now Europe](#) consider that data protection authorities (**DPAs**) should be designated as the main competent authorities to advise on and supervise compliance with the rules on data governance (articles 7, 12 and 20), at least insofar as personal data is concerned. The [EDPS and the EDPB](#) argue that this approach would prevent complexity for digital players and data subjects, match the expertise of DPAs and ensure a more

consistent application of the proposal across Member States. Similarly, the [European data protection authorities](#) recommend reaffirming the **EDPB's** competency to provide the European Commission with advice on 'data protection matters and the development of consistent practices related to the processing of personal data' (Article 70 GDPR). The [CIPL](#) considers that the proposal should clarify that DPAs are 'the sole regulators responsible for all matters regarding personal data'.

## Concerns regarding liability

Additionally, stakeholders believe liability implications merit more attention. As regards the **re-use of publicly held data** (chapter ii), the [German Federal Government](#) raises the question of who bears responsibility for unlawful data processing if the consent obtained with the support of the public sector body did not meet the requirements and was thus unlawful (article 5(6)). Similarly, the issue of liability arises where the obligation to secrecy is breached (article 5(8)). [DIGITALEUROPE](#) holds that 'a re-user should not be liable if information is leaked due to a failure or malfunction of the secure processing environment provided and controlled by the public sector'. As regards **data sharing services** (chapter iii), [MyData Global](#), raises the point that the (allegedly excessive) fiduciary duties (article 11(10) and recital 26) expose intermediation services to private lawsuits. [Insurance Europe](#), the European insurance and reinsurance federation, notes that clear liability rules would enable data holders and users to assess and decide whether liability insurance is needed.

## Academic and other views

One [commentator](#) considers that 'the EU's approach is world-leading and aspirational, but divorced from institutional reality to a degree that evokes wilful negligence'. He is particularly concerned that the combination of fiduciary duties, compliance obligations and (theoretical) access to justice, would practically fail to reign-in commercial interests and related harms. Since key conflicts surrounding data rights remain unresolved, fiduciary duties are tethered to indefinite concepts, rendering them ineffective, and court systems are not practically accessible to everyone (access-to-justice gap), the disciplinary effect of the DGA framework would prove insufficient. He is concerned that the draft act is preoccupied with 'convincing' the public to trust data systems, rather than designing systems that would 'earn' trust. It appears that the commentator sees more potential in collective and relational approaches to data rights (see [data trusts](#)).

Conversely, other [commentators](#) believe that **data intermediaries** would preserve key public interests, including those related to data protection and competition, since they are subject to a neutrality requirement, which functions as a safeguard against misuse and vertical integration (e.g. self-preferencing). However, the success and sustainability of data sharing services under the DGA may be hampered by legal uncertainties and pressure from less regulated competitors under the proposed [digital markets act](#). Their success would also depend on the establishment of standards, their capability to find alternative revenue streams and the uptake by the market. Another [expert](#) clarifies that the GDPR provisions on joint controller liability, notably Articles 26(3) and 82(4) GDPR, may impede the emergence of data intermediaries, as this may expose intermediaries to the risk of having to take responsibility for actions of data re-users – notably where intermediaries act like data brokers.

As regards **data altruism**, one [expert](#) deplores that the proposal does not moderate the strict GDPR requirements. Why organisations would (voluntarily) subject themselves to additional compliance requirements without being able to pursue for-profit activities, which would not necessarily be excluded under the GDPR, appears questionable. Furthermore, the commentator calls into question whether the recognition of 'data altruism organisation' would be able to foster more trust than the 'GDPR gold standard'. If this were true, unregistered organisations may suffer a loss of confidence in the face of those registered, despite being 'gold standard' compliant.

Critical views have been [reported](#) as regards the [rules applying to](#) (formerly) **publicly held data** intended for international transfers (article 5(9)-(13)). The proposed regulation has stirred

controversy over its potential to create [data localisation](#) requirements. Others consider that the act does not create new barriers but rather new opportunities (data is released from silos).

## Legislative process

In the European Parliament, the DGA has been assigned to the Committee on Industry, Research and Energy (ITRE), which has appointed Angelika Niebler (EPP, Germany) as rapporteur. The EU co-legislators are now working towards defining their positions.

On 26 March 2021, the rapporteur tabled her [draft report](#), which is now under discussion in committee. In the context of **re-use of publicly held data**, it proposes a European single information point, offering a searchable electronic register of data, is made available in national single information points (article 8(2b) DGA-Parl), i.e. a register of registers. It proposes to replace the concept of **data-sharing services** by data intermediaries and to provide data intermediaries with a right to refer to themselves as 'data intermediary recognised in the Union', on the condition that competent authorities have confirmed their compliance with notification and data sharing obligations (article 9(2a) DGA-Parl). The draft report clarifies that the Commission register of data intermediaries shall be public (article 10(9) DGA-Parl). Additionally, it stipulates that data intermediaries may provide supplementary services and that intermediaries must ensure interoperability with other data sharing services (article 11(1)4a and (6a) DGA-Parl). The competent authority shall confirm compliance of data intermediaries upon request (article 13(6a) DGA-Parl). As regards **data altruism organisations**, the draft report specifies information requirements for cases in which data is processed outside the Union and stipulates that the organisation must ensure that rights holders can withdraw their consent or permission easily and in a user-friendly way (article 19(1)b and (2a) DGA-Parl). Finally, the draft report suggests including the European Union Agency for Cybersecurity (ENISA) and a representative of the Data Innovation Advisory Council (DIAC) as members of the **European Data Innovation Board** (article 26(1) DGA-Parl). The DIAC is envisioned as a subgroup of the Board, comprised of representatives from industry, research, standardisation organisations and other relevant stakeholders (article 26(2) DGA-Parl).

On 19 May 2021, the Portuguese Presidency of the Council of the EU tabled its third [compromise proposal](#). Concerning the **re-use of publicly held data**, the compromise proposal appears to suggest that the de-anonymisation of personal data would preserve its protected nature and enable public authorities to emit data in a compliant manner (article 5(3)(a) DGA-Council). In this context, public sector bodies would have to impose confidentiality obligations and prohibit re-users from re-identifying data subjects (article 5(5a) DGA-Council). Concerning data intended to be transferred outside the EU, the Presidency proposes to narrow down the cases in which the Commission may adopt adequacy-like decisions and accentuates the alternative transfer mechanism (article 5(10) and (10a) DGA-Council). Similar to the ITRE draft report, the compromise proposal suggests replacing the term '**data sharing service provider**' with 'data intermediation service' (article 2(2a)). 'The purpose of this change is to make it clear that these new actors do not share data themselves but only provide an intermediation service to entities wishing to engage in data sharing.' Additionally, it clarifies that data intermediation services may provide supplementary services, must take reasonable measures to ensure interoperability with other intermediation services and must maintain a record of intermediation activities (article 11(4a), (6a) and (12) DGA-Council). In the exercise of their monitoring duties, competent authorities must inform providers within 30 days where they find that services are non-compliant (article 13(3) DGA-Council), and may only impose the cessation of services under strict circumstances (article 13(4)b DGA-Council). According to the compromise proposal, Member States must put organisational and/or technical arrangements in place to facilitate **data altruism** and may introduce national policies in support of this (article 14a DGA-Council). The text suggests clarifying that the entry into the Commission register – as opposed to merely in national registers – is a prerequisite for an organisations' right to label themselves as recognised in the Union (article 15 DGA-Council). In comparison to the ITRE draft report, the Presidency's text suggests further narrowing information duties concerning data processing outside

the EU (article 19(1)b DGA-Council). Like the ITRE draft report, it provides for the easy withdrawal of consent and permissions, but additionally obliges data altruism organisations to furnish tools for obtaining consent or permissions from rights holders (article 19(1)b and (2a) DGA-Council). Finally, it prescribes the establishment of specific sub-groups within the **European Data Innovation Board** (article 26(1a) DGA-Council).

## EUROPEAN PARLIAMENT SUPPORTING ANALYSIS

Dalli H., [Data Governance Act](#), Initial Appraisal of a European Commission Impact Assessment, EPRS, European Parliament, February 2021.

## OTHER SOURCES

[European data governance \(Data Governance Act\)](#), European Parliament, Legislative Observatory (OEL).

## ENDNOTES

- <sup>1</sup> S. McDonald, [A Novel, European Act of Data Governance](#), Centre for International Governance Innovation, 15 December 2020.
- <sup>2</sup> For details see [Business-to-Business data sharing](#), Digital Economy Working Paper 2020-05, JRC121336, European Commission Joint Research Centre, 2020, p. 4 and pp. 12-16.
- <sup>3</sup> For details see Annex 1, Item 4, and Annex 2 of the Impact Assessment on DGA, [SWD\(2020\) 295 final](#), European Commission, 25 November 2020, pp. 64-73.
- <sup>4</sup> In the broad sense, i.e. not confined to the meaning of article 2(2) DGA-COM.
- <sup>5</sup> Unless otherwise provided, articles and recitals refer to the DGA proposal (DGA-COM).
- <sup>6</sup> On the relationship with the proposed data act, the digital market act and the digital services act, see Impact Assessment on DGA, [SWD\(2020\) 295 final](#), European Commission, 25 November 2020, pp. 6-7.
- <sup>7</sup> Impact Assessment on DGA, [SWD\(2020\) 295 final](#), European Commission, 25 November 2020, p. 25.
- <sup>8</sup> [Impact assessment supporting study](#), European Commission, November 2020, p. 103.
- <sup>9</sup> For details see [Impact assessment supporting study](#), European Commission, November 2020, p. 40, and R. Gellert and I. Graef, [The European Commission's proposed DGA](#), TILEC Discussion Paper 2021-0006, 25 March 2021, p. 9-10.
- <sup>10</sup> Impact Assessment on DGA, [SWD\(2020\) 295 final](#), European Commission, 25 November 2020, pp. 27-28.
- <sup>11</sup> Impact Assessment on DGA, [SWD\(2020\) 295 final](#), European Commission, 25 November 2020, p. 27.
- <sup>12</sup> See Impact Assessment on DGA, [SWD\(2020\) 295 final](#), European Commission, 25 November 2020, p. 29.
- <sup>13</sup> Similarly, W. Veil, [Datenaltruismus: Wie die EU-Kommission eine gute Idee versemelt](#), CR-online.de Blog, 1 December 2020.
- <sup>14</sup> Impact assessment on DGA, [SWD\(2020\) 295 final](#), European Commission, 25 November 2020, p. 27: 'At the core of both options is the wish to ensure that data altruism mechanisms (operated by public sector organisations, NGOs and other private sector organisations) are truly altruistic.'

## DISCLAIMER AND COPYRIGHT

This document is prepared for, and addressed to, the Members and staff of the European Parliament as background material to assist them in their parliamentary work. The content of the document is the sole responsibility of its author(s) and any opinions expressed herein should not be taken to represent an official position of the Parliament.

Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy.

© European Union, 2021.

[eprs@ep.europa.eu](mailto:eprs@ep.europa.eu) (contact)

[www.eprs.ep.parl.union.eu](http://www.eprs.ep.parl.union.eu) (intranet)

[www.europarl.europa.eu/thinktank](http://www.europarl.europa.eu/thinktank) (internet)

<http://epthinktank.eu> (blog)



First edition. The 'EU Legislation in Progress' briefings are updated at key stages throughout the legislative procedure.