DATA GOVERNANCE ACT

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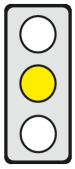
KEY ISSUES

Background: Increased data sharing promises benefits for the economy and society. At the same time, individuals, companies and the public sector are reluctant to share their personal and non-personal data.

Objective of the Regulation: The Commission wants to facilitate the sharing of data within the EU.

Affected parties: Data holders and users, data sharing service providers, data altruism organisations, public sector



Pro: (1) The set-up of mechanisms for the re-use of specific public sector data may rightly enhance the availability of that data for potential data re-users

(2) The EU label for data altruism entities still allows for innovative data altruism approaches apart from the relative restrictive approach the Commission proposes.

Contra: (1) As the Regulation only encourages but does not oblige public authorities to make data available, the success depends on the willingness of Member States to do so.

(2) The vague provisions on providers of data sharing not only create legal uncertainty but also induce risks for regulatory arbitrage.

The most important passages in the text are indicated by a line in the margin.

CONTENT

Title

Proposal COM(2020) 767 of 25 November 2020 for a **Regulation on European data governance (Data Governance Act)**

Brief Summary

- **Context and objectives**
  - The Data Governance Act establishes [Art. 1 (1)]
    - a legal regime for the re-use of specific data held by the public sector,
    - a notification and supervisory regime for providers of data sharing services, and
    - a framework for entities that collect and process data for altruistic purposes.
  - The Data Governance Act shall contribute to the establishment of a common European data space, i.e. "a Single Market for data in which data could be used irrespective of its physical location of storage in the Union" [Recital 2; see cep**PolicyBrief** on the EU Data Strategy].

- **Legal regime for the re-use of public sector data**
  - The Public Sector Information Directive ["PSI Directive, (EU) 2019/1024, *see cep**Study***]
    - in general, covers personal and non-personal data held by public sector bodies and public undertakings,
    - encourages – not: obliges – Member States to make personal or non-personal data held by public sector bodies and public undertakings publicly available,
    - sets standards for low-cost access to such data, and
    - limits arrangements for exclusive access to such data by a small number of companies only.
  - The proposed Data Governance Act covers a set of public data that is outside the scope of the PSI Directive. It covers personal and non-personal data held by public sector bodies that is protected on grounds of commercial or statistical confidentiality, intellectual property or personal data protection (hereinafter: "specific public sector data"). Data held by public undertaking is outside the scope of the Data Governance Act. [Art. 2 No. 11, Art. 3 (1)]

  Re-use of specific public sector data
  - The Data Governance Act
    - encourages, but does not oblige public sector bodies to make specific public sector data available [Art. 3 (3)];
    - prevents public bodies from granting exclusive rights on the re-use of such specific public sector data, unless necessary for the provision of products or services in the general interest; in that case exclusive right may be granted for no longer than three years, provided that the scope of the public task is made public and subject to review [Art. 4];
    - demands that conditions for the re-use of specific public sector data be made public, non-discriminatory, proportionate, objectively justified and do not restrict competition [Art. 5 (1) and (2)].
  - The Data Governance Act allows for fees, which must be non-discriminatory, proportionate, objectively justified

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and must not restrict competition. Public sector bodies may, however, incentivise the re-use of specific public sector data for non-commercial purposes or for small and medium-sized companies (SMEs). [Art. 6]

– Member States must establish single information points that merge information on the conditions and fees and that receive requests for the re-use of specific public sector data, which they transmit to the relevant public sector bodies [Art. 8 (1), (2)].

Conditions for re-use of specific public sector data

– In order to preserve confidentiality and data protection, public sector bodies may allow the re-use of specific public sector data only if [Art. 5]
  - personal data has been anonymised or pseudonymised and commercially confidential information deleted,
  - data is re-used in a "secure processing environment" controlled by the public sector body, which may include the condition to use the latter's physical premises,
  - they can verify the results of data re-use and ban the use of such results when necessary to protect third parties' rights or interests.
– In remaining cases, public sector bodies shall be supportive in seeking permission from natural or legal persons respectively whose rights or interests are affected by re-uses, if such support does not cause "disproportionate costs" [Art. 5 (6)].

► **Data sharing services**

– Data sharing services consist of data sharing intermediation [p. 7, Recital 22, 23 and 24, Art. 9 (1)]
  - between data holders (legal persons) and data users (legal and natural persons), e.g. through the establishment of bilateral or multilateral exchanges, platforms or databases; Recital 22 also includes natural persons as potential data holders,
  - between data holders (natural persons) and data users (legal and natural persons), i.a. by providing the technical means or by exercising the rights that the data holder enjoys under the GDPR (e.g. the personal data portability right);
  - in the form of a data cooperative; these are entities that can, i.a., negotiate on behalf of its members – natural persons, small and medium-sized companies – the terms and conditions for the use of their members' data.
– Data sharing services fall out of the scope the Regulation, when [Recital 2]
  - data sharing takes place between a limited number of data holders and data users,
  - the services are offered by a cloud service provider,
  - the services do not establish a direct relationship between data holders and data users (e.g. data brokers).
– Providers of data sharing services must be established in the EU or appoint a legal representative in a Member State in which they offer their services [Recital 27, Art. 10 (3)].
– Before starting their business, providers of data sharing services must notify their services to a competent authority. The notification allows them to provide the services in all Member States. [Art 10 (1), (4) and (5)]
– Providers of data sharing services must, inter alia, [Art. 11]
  - be neutral as regards the data exchanged, i.e. they must not use such data for non-intermediation activities,
  - legally separate the data sharing services from other services they provide (separate legal entity),
  - ensure fair, transparent and non-discriminatory procedures for access, including prices,
  - act in the best interest of natural persons when facilitating the exercise of their rights ("fiduciary duty"), and
  - ensure compliance with competition law through the establishment of "procedures".
– Member States must designate one or more authorities that check whether providers of data sharing providers that have their main establishment in that Member State comply with the requirements [Art. 12 and 13].

► **Data altruism**

– Data altruism consists of natural persons consenting to the use of their personal data or legal persons permitting the use of their non-personal data for general interest purposes, e.g. scientific research, and without seeking a reward [Art. 2 No. 10].
– Legal entities that support purposes of general interest and operate on a non-profit basis can
  - register as "data altruism organisations" with their competent national authority and
  - refer to themselves as "data altruism organisations recognised in the Union" (EU label).

  They must carry on data altruism activities in a legally independent structure, separated from their other activities. The registration is valid in all Member States. [Art. 15–17]
– Data altruism organisations must be established in the EU or appoint a legal representative in the Member State where they intend to collect data for altruistic purposes [Art. 17 (2) and (3)].
– Data altruism organisations must, i.a.,
  - keep records of all natural and legal persons that process data they hold as well as the purpose, date and duration of such processing [Art. 18 (1)],
  - inform the data holders about the general interest purposes for which they allow the processing of data and about any data processing in third countries [Art. 19 (1)], and
  - ensure that the data holders' data are used solely for the envisaged general interest purpose [Art. 19 (2)].
– The Commission may adopt implementing acts to adopt a "European data altruism consent form", which shall

be adaptable to specific sectors and purposes. The consent form shall make it easier to collect consent for data altruistic activities from natural and legal persons across Member States. [Art. 22 (1) and (2)]

- **Transfer of non-personal data to third countries**
  - Public sector bodies, data re-users, data sharing service providers and data altruism organisations [hereafter: data actors] must take all reasonable measures to prevent transfers to third countries of or access to non-personal data held in the EU, if that creates a conflict with the EU or relevant Member States law [Art. 30 (1)].
  - Decisions by courts or administrative authorities from third countries that require data actors to transfer or give access to non-personal data may only be recognised or enforceable if based on an international agreement – such as a Mutual Legal Assistance Treaty [MLAT] – between the EU or a Member State and the third country. Such agreement must be in place before the entry into force of the Regulation. [Art. 30 (2)]
  - If data actors are the addressees of a decision by a court or an administrative authority in a third country and compliance with it would risk putting them in conflict with EU or Member States law, third country transfers or access shall only be possible, if, in particular, [Art. 30 (3)]
    - the third country's legal system requires the reasons and the proportionality of the decision to be set out,
    - objections to transfers or access by addressees are reviewed by a court of the third country, and
    - such court has powers to take into account the legal interest protected by the EU or the Member State's law.

Statement on Subsidiarity by the Commission

According to the Commission, data must be able to flow easily through EU-wide and cross-sectoral value chains to allow for rich and diverse Big Data pattern detection or machine learning. This requires common EU rules.

Policy Context

The Data Governance Act was announced in the European Data Strategy [COM(2020) 660, see cep**PolicyBrief**]. It complements the General Data Protection Regulation [(EU) 2016/679, see cep**PolicyBrief**], the Directive on the re-use of public sector information [Directive (EU) 2019/1024] and various sector specific pieces of legislation. In 2021, the Commission wants to publish another legislative proposal – the Data Act –, which addresses whether substantial rights on access to data should be granted, removed and/or amended and, if so, under which circumstances.

Legislative Procedure

25.11.2020 Adoption by the Commission
Open Adoption by European Parliament and Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Directorates General:	DG Connect
Committees of the European Parliament:	ITRE (leading), Rapporteur: Angelika Niebler (EPP, Germany)
Federal Germany Ministries:	N.N.
Committees of the German Bundestag:	Committee on Economic Affairs and Energy (leading)
Decision-making Mode in the Council:	Qualified majority (acceptance by 55% of Member States which make up 65% of the EU population)

Formalities

Competence:	Art. 114 TFEU (Internal Market)
Type of Legislative Competence:	Shared competence (Art. 4 (2) TFEU)
Procedure:	Art. 294 TFEU (ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

Data, whether personal or non-personal, is often a non-rival good: The same data can be used by numerous data users at the same time and for numerous purposes. Furthermore, data production often profits from economies of scale, which implies that the cost of production of data units decreases with their amount. These two features inherent to data illustrate its enormous potential for society in using, re-using and sharing it. As a consequence, the efforts by the Commission to tackle barriers for the use, re-use and sharing of data are generally welcome.

The set-up of mechanisms for the re-use of specific public sector data may rightly enhance the availability of that data for potential data re-users. First, the general prohibition to grant exclusive rights on the re-use of such data ensures that the data may be used for several use cases instead of only the ones envisaged by a single data re-user. This safeguards the potential for innovation and limits the creation of data bottlenecks. Second, prescribing anonymisation techniques and a secure processing environment is necessary to avoid mistrust on the part of rights holders

which may otherwise limit the provision of data to the public sector or by contractually excluding its re-use. Third, creating national single information points for potential data re-users interested in specific public sector data lowers their search costs and improves the findability of valuable data.

However, as the Regulation only encourages but does not oblige public authorities to make data available, the success of this initiative **depends on the willingness of Member States to do so.** Establishing the necessary mechanisms in a proper way may be difficult due to the variety and amount of public sector bodies and data involved.

Businesses often do not share their data as they do not fully trust potential data users, do not easily find them or must cope with technical difficulties. Consumers are often uncomfortable sharing their personal data with others as they cannot adequately assess the – positive or negative – consequences of such decision. Data sharing service providers may, if perceived as neutral and transparent brokers, act as trust enabler between data holders and data users, lower search costs and tackle potential asymmetries between the negotiating positions of individuals and those seeking access to data. Data sharing service providers, thus, could in fact encourage data sharing and the Commission's attention for this is to be welcomed. However, the Regulation contains three disputable aspects:

First, **the vague provisions on providers of data sharing services** are highly unclear as to their scope. While the focus of the Commission lays on B2B and C2B data sharing scenarios, the provisions suggest other scenarios as well and contradict each other, e.g. on who may be the data holder and potential data users. Furthermore, it is not clear which of the services shall encompass which type of data, e.g. personal vs. non-personal, and the exemptions to the scope of these specific requirements are only tackled in a recital. Thus, the provisions do **not only create legal uncertainty but also induce risks for regulatory arbitrage.**

Second, the provisions for data sharing providers should not be mandatory. The notification requirement and the conditions to conduct the intermediation business will increase costs for data sharing and, thus, may even discourage it. It would be sufficient to create a certificate or label for voluntary compliance by providers with the Regulation. As such, data holders and users can choose whether they want to do business with providers adhering to the proposed regime or whether they want to rely on other providers. This solution would also keep the barriers to enter the data sharing services markets low, which is still in its infancy.

Third, it should be highlighted that B2B data exchanges – facilitated by the data intermediaries – could qualify as anti-competitive information exchanges and, thus, infringe Article 101 TFEU prohibiting anticompetitive agreements. The current lack of guidance as to what is relevant to consider a data exchange as a forbidden agreement, if not addressed by the Commission through an ad hoc amendment of the Horizontal Cooperation Guidelines, could run against the aim of increasing of B2B data sharing [see cep**Input**].

The Commission proposes a **voluntary EU label for data altruism entities** that fulfil the requirements of the Regulation. Any such entity is, in future, free to decide whether it wants to apply for the label or not and any data holder is free to choose between those labelled entities or other non-labelled entities. This is to be welcomed insofar as it **still allows for innovative data altruism approaches apart from the relative restrictive one** – e.g. non-profit and legal separation requirement – **that the Commission proposes.** In any way, such label should not be made compulsory for any entities performing data altruism activities.

The proposed regime on transfers of non-personal data to third countries is to be welcomed as it points to Mutual Legal Assistance Treaties (MLATs) as the best solution to prevent conflicts of law. Those can arise when companies are addressed by third country judicial or administrative orders to provide data, the compliance with which leads to infringing EU or national non-personal data protection law. MLATs are a balanced solution as they establish the criteria, under which the foreign third country orders are enforceable under EU or national law but require the compliance of the third country order with such criteria to be scrutinised by the judicial authority of a Member State.

Legal Assessment

Legislative Competence of the EU

The regulation is rightly based on the internal market competence (Art. 114 TFEU).

Subsidiarity and Proportionality with Respect to Member States

Unproblematic

Summary of the Assessment

The set-up of mechanisms for the re-use of specific public sector data may rightly enhance the availability of that data for potential data re-users. However, as the Regulation only encourages but does not oblige public authorities to make data available, the success depends on the willingness of Member States to do so. The vague provisions on providers of data sharing not only create legal uncertainty but also induce risks for regulatory arbitrage. The EU label for data altruism entities still allows for innovative data altruism approaches apart from the relative restrictive approach the Commission proposes.