BUSINESSEUROPE

POSITION PAPER

19/04/21

The Data Governance Act (DGA)

KEY MESSAGES

- We **support the creation of a European model** that promotes data sharing and re-use within and across key sectors. This should clarify how sharing and re-use of data can take place and how data that has **other rights attached to it will be protected.** Businesses need to understand how data can be voluntarily shared whilst upholding those rights.
- We **support the growth of public sector data access spaces** and encourage all Member States to adopt these practices.
- We **support fair, transparent and non-discriminatory procedures** to instil a competitive market and enable providers to make data available in a neutral way.
- We **support the ability to grant IP adequacy decisions** to allow public sector data to flow internationally, however, require **more legal certainty** on how the Commission would measure and grant such adequacy.
- We **support measures that will reduce technical costs** of data sharing and re-use through supporting interoperability and data portability principles.
- While we **support the growth of a new framework of "data sharing intermediaries"** that seek to enable fairer and more neutral data access, we require a **more precise definition** of this new entity to clearly understand: who will qualify, whether application is mandatory, what services they can offer, what are their liabilities and how their assurance levels can be evaluated and guaranteed.
- We look forward to more information on the **Data Act** and how it will be coherent with the GDPR, other sector specific legislation and the DGA. The Commission should safeguard a **fully coherent framework** of shared principles to ensure a fair European data economy.

  We **support the rapid development of a new European data altruism consent form** to lighten administrative burdens and offer more legal certainty to businesses attempting to gain data subject consent. However, we believe that the co-legislators should include this in the DGA itself instead of waiting for a further implementing act to be adopted.

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THE DATA GOVERNANCE ACT

CONTEXT

The global amount of data that we generate is rapidly increasing. From 33 zettabytes in 2018 to a predicted 175 zettabytes by 2025. This represents a 530% increase in just 7 years. By 2025, the global data economy is estimated to be worth EUR 829 billion or 5.8% of EU GDP. If Europe can harness the data it generates effectively, it will represent a significant economic growth enabler and has the ability to answer some of Europe's greatest challenges while improving its day-to-day societal conditions.

However, BusinessEurope recognises three stumbling blocks that Europe must overcome in order to incentivise voluntary data sharing, access and re-use so that the benefits from the data it generates can be fully utilised:

- **Technical:** data sets have been created without the ideas of interoperability and data portability necessarily born in their mind. Intended lock-in practices are also common. Therefore, data often remains technically unusable. This means that businesses willing to be more open with their data are sometimes: technically hindered from sharing or reusing it; or the costs in making the data interoperable and portable represent a too high barrier to overcome.

- **Legal:** most data usually has one if not several legal regimes that apply to it. This means that willing businesses cannot share or permit access as freely as they may wish. If the data has a personal element to it, the GDPR, which limits data access in the interests of the data subject's privacy, would apply. The intellectual property rights attached to any data and how existing IP frameworks coincide with the practice of data sharing or access also need to be fully understood. In some instances, closer data collaboration and data sharing can also raise competition and anti-trust forward.

- **Economic:** in respect of the free market economy in which we function, the freedom of contract and business autonomy are vital. Data sharing should remain voluntary. While many businesses already choose to share or permit re-use of data, more can, and needs, to be done to incentivise them to do so. This means facilitating benefits in kind for data providers. At the same time, it means offering data on fair, reasonable and non-discriminatory terms. Ensuring a competitive data economy itself is also crucial in this respect.

Benefits of the Data Governance Act:

Addressing the above challenges is why BusinessEurope supports the need for the Data Governance Act, it creates a European model that promotes data sharing and re-use within and across sectors. It clarifies how it will apply to situations where data rights exist and how that data can still be voluntarily shared whilst upholding those rights. This includes building on existing government access regimes and encouraging others to adopt similar practices. It seeks to reduce costs of data sharing through supporting interoperability and data portability. It aims to grow a framework of data sharing intermediaries that can enable fair and neutral data access. In turn, this should incentivise greater data sharing in the market and increase data availability for Europe to capitalise on.

Concerns with prospective and existing legislation:

We understand the Commission intends to bring forward further Regulation in this policy area by the end of 2021. The *"Data Act"* intends to go further than the DGA. Potentially, it will look at rules surrounding the right conditions for better control and conditions for data sharing. As a result, business remains confused as to how this proposal will relate to the pending *"Data Act"*. In the interests of Better Regulation, we believe it would be more proportionate to review the full effects of the Data Governance Act to ensure a coherent and proportionate framework that would include the *"Data Act".* We should determine first whether the Data Governance Act achieved its objective of increasing data availability in the market, particularly if the *"Data Act"* is to question existing policy surrounding access rights. We look forward to learning more as to how the Commission aims to ensure coherence and better clarify the scope of both initiatives.

This initiative should not confuse how existing laws, such as the General Data Protection Regulation (GDPR), should be implemented. When personal data is involved in a data set, there is a link between this proposal and the GDPR itself. We should be cautious to avoid conflict or overlapping with the principles of such existing European legislation, including sector specific legislation in preparation (eg. implementing Directive 2019/944).

As a key societal stakeholder, BusinessEurope outlines its reaction to the Commission's proposal for a Data Governance Act, below:

1. PUBLIC SECTOR DATA SHARING:

The public sector has a broad range of data that if re-used could offer great economic and societal benefits for Europe. Health, transport, climate and official national statical data all represent areas where if shared more greatly by the public sector, could allow companies to bring novel or real-time solutions forward for society to benefit from. This grants real possibilities to truly become smarter with the use of our infrastructure, support a wider circular economy and improve the health and prosperity of our citizens.

That is why we agree that Chapter II should aim to create a mechanism for re-using public sector data that is otherwise conditional with respect to the rights of others. In the interests of legal certainty, we agree that the re-use of such data should continue to apply only to data falling outside of the Open Data Directive. We also agree that while the Data Governance Act should not create actual rights to re-use or access such data (Article 3(3)), Member States should be mandated to set up single contact points to aid business requests of identifying and attempting to access such data (Article 7&8).

We are also supportive of the measures intended to incentivise re-use of certain categories of public sector data (Article 5) and the prohibition of exclusive arrangements (Article 4) which otherwise restrict the full possibilities public sector data could offer society. However, we are concerned that the proposal leaves it open to each public sector entity to decide on which conditions they can deem data available for re-use, potentially creating fragmentation across the single market. We would prefer harmonised conditions at Union level to determine which type of public sector held data is in scope. We highly encourage specific solutions to be brought forward by public sector bodies to ensure data subjects consent in situations where personal data is involved (Article 5(6)). This continues to represent a barrier from fully utilising public sector data for the benefit of society. At the same time, while we agree that while confidential information (whether

commercial or otherwise) should not be disclosed as the result of re-use (Article 5(8)), it should also not act as a barrier to re-use of other parts of the data set that could potentially benefit a solution.

We are also supportive of the need to encourage more public sector data sharing through charging fees (Article 6). After all, while the data is under control of the public sector the reason for its generation can often be due to the efforts of a private rights holder. At the same time, these must be non-discriminatory, proportionate, justified and do not restrict competition. Therefore, we strongly support the need to (at least) follow "state aid rules" (Article 6(4)) to ensure that no room is left for public sector bodies to charge lower fees for their own domestic companies compared to others located around the single market. There should also be further clarity around the methodology public sector bodies will use to calculate whether to make data available for lower or no cost at all for SMEs. We aim to achieve a fully flowing digital single market with opportunities for all.

We also stress that the mechanism for requesting the re-use of public sector data under the DGA must not require time-consuming investigative work by companies and create administrative burdens. Economic actors must be able to efficiently make use of public sector data to develop or innovate their solutions and services. Granting or refusing public sector data should be done within a reasonable time and should not become a bottleneck for innovation under the DGA.

In relation to the re-use of public sector data in international data flows, we understand the Commission wants to include further requests for companies before that data could flow outside of the single market. While we strongly support the protection of European intellectual property across the globe, we caution the impact this could have in delivering solutions to European problems. European companies cooperate with global partners and may benefit from their services if choosing to share European public sector data.

Therefore, while we support the initiative to grant IP adequacy decisions to allow such data to flow internationally (Article 5(9)) we would need to understand what criteria the Commission would use to make such assessments and grant decisions. How would Article 5(10) exist alongside Article 5(9): does this mean that no undertaking can even take place in relation to using public sector data with a 3rd country without an existing IP adequacy decision? Would specific administrative steps be involved for the various types of data that will be covered by the DGA? Policy makers should consider existing long-standing international IP agreements and treaties that already exist (eg. WIPO, TRIPs and the Berne Convention).

In any case, the *principle of reciprocity* in ruling international data flows of public sector data with non- EU countries is crucial to guarantee a level playing field and the adherence to European values and IP protection.

2. DATA SHARING SERVICES:

We have continuously encouraged the setting-up of common European data spaces to incentivise voluntary data sharing in strategic sectors while respecting intellectual property (IP), data privacy and security requirements. However, this proposal leaves the creation of such data spaces to the private sector and does not seem to prioritise any key sectoral areas. Instead, the governance, legal guidance, technical feasibility and encouragement of business-to-business data sharing is left to so-called "trusted data intermediaries". The Commission intends to support trust in the European data market through setting out the conditions of existence of these new players. After following the

certification process laid down in this proposal, they will be responsible for facilitating more B2B data sharing.

However, more legal clarity is needed in relation to how this Act relates to existing private data sharing services on the market. For example, many specific data sharing apps already exist to aid routine administrative tasks, will they be permitted to continue, or do they need to be certified to offer any data sharing services in Europe from now on?

We believe that those qualifying under Article 9 are free to apply to become a "trusted intermediary" by fulfilling Article 10 & 11. In this sense, we agree that the DGA encourages certain businesses to become "trusted intermediaries" (as explained under Recital 22). Of course, once an application is made the full responsibilities of the DGA should apply. This allows the market to determine their success while supporting a fair, competitive and neutral data economy. Otherwise, Article 9 could specifically carve out technologies that happen to function based on "data sharing" and instead only cover services that not only offer the technology, but also attempt to bring together and foster new data sharing relationships between legal entities. While Recital 22 demonstrates the notion of such actors, a more precise definition of "data sharing intermediaries" is needed to clearly understand: whether application is mandatory, who will qualify, the services they can offer the market, their liabilities and how their assurance level can be evaluated and guaranteed.

Moreover, it is not clear from the text in Article 9(1)(a) whether technology providers must also notify the technology when it enables the data intermediary "through technical or other means" to provide its intermediation services. We caution against imposing disproportionate and burdensome notification procedures on administrative bodies and businesses alike and question the value of notifying all means used by an intermediary to deliver its services. Limiting the scope to well-defined services and to lighten the notification process may be better suited for the purposes of boosting the uptake of new trusted data intermediaries.

Otherwise, we agree that data sharing services falling under this legislation can only be viewed as "trusted" if they fulfil the conditions of Article 11. Particularly to offer fair, transparent, non-discriminatory procedures and prices (Article 11(3)). This should incentivise data holders and users to take part, although this should not prevent the emergence of new value-added services that could further help users' companies to manage their data in an effective way. In this context, our suggestion would be to take existing initiatives, such as Gaia-X, into account. This initiative has already prioritised key sectoral areas where European companies have started cooperating in defining common voluntary technical standards, principles and values. To ensure fair competition, we also support the need to ensure intermediaries are prohibited from using the data for anything other than to provide their service (Article 11(1)). We also support the need for interoperability to be supported by the data sharing service (Article 11(4)) to make it technically feasible for a wide range of sectors to take part. Trusted intermediaries should also inform "data users" about the metadata they collect and make them available to "end users". Moreover, "data sharing intermediaries" should be able to guarantee a high level of security not only for storage and transmission of data (as per Article 11) but also for processing.

We welcome any support that data sharing services could offer businesses in terms of obtaining lawful and explicit consent from data subjects where personal data is involved, but question the need to specify the jurisdiction(s) where data use will take place (Article

11(11)). This could hinder re-use possibilities of the data itself and seems to go beyond the GDPR.

While we understand that competent authorities will monitor the compliance of "trusted data intermediaries" we remind that incentivising data sharing through trusted service providers will rely on the attractiveness, quality and security of the services they offer and whether they work with ease to lower data transferring costs in practice. This control of quality should also be periodically monitored and reviewed. Recommendations or guidance by the Commission, in cooperation with data users in the market, could then be agreed to improve the services of these trusted providers.

Chapter VI creates the "European Data Innovation Board". This should in no way overlap the tasks of the European Data Protection Board (EDPB) which is responsible for coordinating national data protection authorities enforcement of the GDPR. We would nevertheless support a consistent cross-sector approach on data sharing and access agreements in relation to public, private sector data and would encourage the inclusion of industry stakeholders in the new European Data Innovation Board.

Finally, we want to highlight the importance of and encourage the principle of business-to-business data portability, which should be built-in to new data infrastructure as a default to the benefit of Europe's data economy. This would increase customer trust and reduce entry barriers to the single market. This should enable business users to choose whether they share their data via an intermediary or directly between two firms.

3. DATA ALTRUISM:

Businesses continue to invest in enhancing data portability to make data transfer between data controllers to achieve direct portability between services in line with the GDPR. Further support from data altruism organisations to aid data subject consent in granting access to their data for a public interest is welcome.

We also welcome the development of a new European data altruism consent form (Article 22). However, we believe that co-legislators should simply include this in the DGA itself instead of having to depend on an implementing act to be adopted by the Commission. This should also take the opportunity to clarify who is liable for what in this process of gaining consent through assistance of the altruism organisation. It would lighten the administrative burden and legal certainty of all companies but especially SMEs to have such a European harmonised consent form in place as soon as possible.

Furthermore, the creation of a secure federated digital identity system via the upcoming Commission proposal is of crucial importance. This system shall be non-profit and create a fully-fledged digital ID, recognised by the Commission through which users shall access online services. Such system would grant users a control over their data, allowing them to swiftly manage the consent they provide and properly enforce their rights, such as portability and their right to be forgotten. We call for an ambitious federated Digital ID proposal which is aligned with the DGA and the GDPR.

CONCLUSION

We share the Commission's ambition for Europe to foster more availability and re-use of public sector, business and personal data in Europe. We believe that the success of this

initiative will lie in whether it can lower existing technical, legal and economic barriers to data sharing through trusted intermediaries that support interoperability and portability. We should remember the reason why we are trying to incentivise more data sharing: it is not about the possession of data alone but to increase trust in data sharing and foster fair competition in the data economy.

We aim to spread opportunities across Europe to benefit its own societies and economy. In this sense, we already cooperate with many regions around the world to our own benefit. Europe's data economy is part of the wider global economy and benefits from international cooperation. Although we should not be naïve - we are in a global data competition and the "winners" will advance greatly in key strategic technologies, such as AI. We need fair and competitive legal frameworks to globally lead in these fields.

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