

Schreiber / Pommerening / Schoel

New Data Governance Act

A Practitioner's Guide



Schreiber / Pommerening / Schoel
New Data Governance Act

New Data Governance Act

A Practitioner's Guide

by

Kristina Schreiber
Patrick Pommerening
Philipp Schoel

2023



Published by

Nomos Verlagsgesellschaft mbH & Co. KG, Waldseestraße 3-5, 76530 Baden-Baden, Germany,
email: vertrieb@nomos.de

Co-published by

Verlag C.H.Beck oHG, Wilhelmstraße 9, 80801 München, Germany,
email: bestellung@beck.de

and

Hart Publishing, Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, United Kingdom,
online at: www.hartpub.co.uk

Published in North America by Hart Publishing,
An Imprint of Bloomsbury Publishing 1385 Broadway, New York, NY 10018, USA
email: mail@hartpub.co.uk

ISBN 978 3 7560 0316 7 (NOMOS Print)

ISBN 978 3 7489 3705 0 (NOMOS ePDF)

ISBN 978 3 406 80472 4 (C.H.BECK)

ISBN 978 1 5099 6996 8 (HART)

First Edition 2023

© Nomos Verlagsgesellschaft mbH & Co. KG, Baden-Baden 2023. Overall responsibility for manufacturing (printing and production) lies with Nomos Verlagsgesellschaft mbH & Co. KG.

This work is subject to copyright. All rights are reserved, whether the whole or part of the material is concerned, specifically those of translation, reprinting, re-use of illustrations, broadcasting, reproduction by photocopying machine or similar means, and storage in data banks. Under § 54 of the German Copyright Law where copies are made for other than private use a fee is payable to »Verwertungsgesellschaft Wort«, Munich, Germany.

Preface

The EU's digital strategy is gathering pace. Especially in the last year 2022, a large number of new "Digital Acts", generally EU regulations, have been submitted in draft form or have already been adopted. As an elementary act of the data strategy, which is part of the EU's digital strategy, the Data Governance Act (DGA) has been published in the Official Journal of the EU on 3.6.2022 and entered into force on 23.6.2022. From the EU's perspective, the DGA contains key instruments that are intended to support data processing which is beneficial to the general public and to enable a lively exchange of data in the EU internal market. The focus is on data owned by public sector bodies, on data intermediation service providers as new players in the data economy, and on strengthening trust in data altruism organisations. All of this is to be accompanied by a European Data Innovation Board.

The DGA contains a number of new rights and obligations for companies, private individuals and the public sector. New business models and new companies can form within the structures of the DGA. Public authorities and other organisations must submit to the obligations of the new EU regulation.

But will the DGA be able to achieve its lofty goals? Will it actually promote the further processing of data in the hands of public bodies, enable the emergence and use of data intermediation services, and strengthen trust in data altruism organisations? Critical voices have already been raised after the publication of the first drafts and have not fallen silent even with the enactment of the final legal act. Some of the criticism is justified: For example, obligations of public bodies to provide data have been omitted and the challenging relationship to the EU General Data Protection Regulation has not been clarified. The latter remains "unaffected" and thus applicable in parallel. Those subject to the standards must face the challenge of complying with both legal acts.

We are convinced that the DGA can nevertheless make a significant contribution to improved data usage. A very decisive element for its success in this regard is an understanding of the rights and obligations it contains. Only those who know what rights they have, what requirements the DGA places on new business models, and what obligations public sector bodies must now comply with, will be able to implement and use these instruments.

We have therefore tackled the project of an introductory volume to the DGA with a great deal of commitment and pleasure, and have compiled the present explanations in many hours of text evaluation, reading and discussions, always with our practical experience from legal consulting for various projects of data-using companies in mind. We are particularly pleased to be able to publish this work in English. This will enable our thoughts on the application of the DGA and its practical benefits to be understood and used throughout the EU. We are convinced that the potential of the DGA only has a chance to be exploited and to unfold in the market, in the data economy, if there is a fundamental and broad-based understanding of the new regulation. We hope to be able to make a contribution here with this introductory volume.

Preface

Against this background, we were very pleased to be able to implement this project with the outstanding editorial team of Nomos Verlag, above all Dr. Marco Ganzhorn and Mr. Christoph Krampe. This Practitioner's Guide is embedded in a highly practice-relevant, comprehensive and valuable series of introductory volumes, handbooks and commentaries on the various new legal acts of the EU digital strategy which are published by Nomos Verlag in cooperation with Verlag C.H.Beck and Hart Publishing.

You now have a concise introduction to the DGA available even before the DGA becomes applicable in all EU Member States. We hope that for many this introduction can be the basis for an initial understanding of and access to this new act. This Practitioner's Guide not only deals with the Articles of the DGA itself, but also elaborates on the adjacent challenges for the use of the instruments of the DGA, up to the legal protection against authority decisions based on the DGA. We deliberately do not comment on the individual Articles, but focus on the different areas of application and present them in their respective contexts. This introductory volume provides guidance not only to companies that may use the DGA for new business models. Public authorities and other public bodies can also use the work to review their own data provision or even to develop concepts if they are designated as competent bodies under the DGA. This applies equally to the members of the European Data Innovation Board to be formed. Where implementation and action in national law is still important, even though it is an EU regulation, we focus on the rules in Germany as an example.

We would like to express our sincere thanks to the everlasting support of the publishers, especially Dr. Marco Ganzhorn and Mr. Christoph Krampe. Without this incredible support, it would never have been possible to publish this introductory volume in this quality and, above all, at such speed.

We would further like to express our gratitude for the support we received in organizing and, in particular, proofreading this work, without which we would not have been able to produce the manuscripts so quickly. Our assistants Katharina Oschwald and Natascha Baldsiefen as well as our research assistants Antonia Unkelbach and Anselm Auer deserve special mention. Many thanks to all of you for your precise and patient support!

We are already looking forward to supplementing this Practitioner's Guide in due course with the second pillar of the EU data strategy, the Data Act, which will complete the work: While the DGA focuses on public bodies and independent actors in the data economy, the Data Act will deal with commercial data processors and regulate, among other things, the use of machine data, usage data and the conclusion of contracts on data use. The EU Commission's draft and the proposed amendments by the European Parliament and the Council, which are currently subject of the trilogue negotiations, could be adopted in the course of this year 2023, or at any rate in 2024. Until then, we hope to be able to offer helpful support with this work for all companies and authorities that are affected by the instruments of the DGA, obligatory or entitled. We welcome all comments on potential improvements, discussions and, of course, references to helpful sections – just mail us under kristina.schreiber@loschelder.de.

Cologne, May 2023

Kristina Schreiber

Patrick Pommerening

Philipp Schoel

Contents

Preface	V
Abbreviations	XI
General bibliography	XV
Glossary	XVII

CHAPTER 1 THE DATA GOVERNANCE ACT

A. Introduction	1
B. History of origins	2
C. Data strategy of the Commission	2
D. The Commission's digital strategy	5
E. Relationship to data protection law	6
F. Relevance for the practice	7

CHAPTER 2 RE-USE OF DATA FROM PUBLIC SECTOR BODIES

A. Introduction	10
B. Addressees of the Regulation: public sector bodies	10
I. Definition	11
II. Counter-exception	14
C. Data and actions included	15
I. Data included	16
II. Acts included	18
D. Principle: prohibition of exclusivity	19
I. Exclusive arrangements	19
II. Permissible exclusive arrangements	21
E. Conditions for re-use	23
I. Public notice	23
II. Content requirements	24
III. Protection of data subjects and data holders	24
F. Fees	28
G. Support, information and procedures	28
I. Competent authorities for the norm addressees	28
II. Single information points for users	29

Contents

CHAPTER 3
DATA INTERMEDIATION SERVICES

A. Introduction	32
B. Registration and recognition as a data intermediation services provider	33
I. Data intermediation services	34
II. Notification of data intermediation services	42
III. Recognition as a data intermediation service	49
IV. Fees	50
C. Requirements for data intermediation services	50
I. Purpose and organisational separation (Art. 12 lit. a DGA)	51
II. Prohibition of combined offers (Art. 12 lit. b DGA)	52
III. Restricted use of metadata (Art. 12 lit. c DGA)	52
IV. Requirements for the conversion of data formats (Art. 12 lit. d DGA) ..	52
V. Restrictions on the combination of services (Art. 12 lit. e DGA)	53
VI. Requirement for transparency and non-discrimination (Art. 12 lit. f DGA)	53
VII. Prevention of fraud and abuse (Art. 12 lit. g DGA)	54
VIII. Continuity in the case of insolvency (Art. 12 lit. h DGA)	54
IX. Ensuring interoperability (Art. 12 lit. i DGA)	55
X. Prevention against unlawful access to data (Art. 12 lit. j DGA)	55
XI. Information of users (Art. 12 lit. k DGA)	56
XII. Ensuring security (Art. 12 lit. l DGA)	56
XIII. Fiduciary relationship (Art. 12 lit. m DGA)	56
XIV. Consent and permission tools (Art. 12 lit. n DGA)	57
XV. Log records (Art. 12 lit. o DGA)	57
XVI. Compliance with competition law	57
D. Competent authorities of the Member States	57
I. Organisation	58
II. Requirements for the competent authorities of the Member States	58
III. Tasks	59

CHAPTER 4
DATA ALTRUISM

A. Introduction	64
B. Recognition as a data altruism organisation	66
I. Data altruism organisations	66
II. Register of recognised data altruism organisations	66
III. Conditions for registration	68
IV. Legal consequences of the registration	74
C. Requirements for recognised data altruism organisations	74
I. Transparency requirements	75

Contents

II. Specific requirements to protect the rights and interests of data subjects and data holders	77
D. European consent form	81
E. Additional national arrangements	84

CHAPTER 5
INTERNATIONAL DATA TRANSFER

A. Addressees of the provisions	85
B. Third-country transfer	86
I. International transfer	86
II. Governmental access	87
III. Admissible compliance with administrative and judicial decisions	87
C. Protective measures	89
D. Requirements for public sector bodies and re-use beneficiaries under Chapter II	90
I. Obligations of public sector bodies and rights of the Commission	90
II. Obligations of the re-users	91

CHAPTER 6
LEGAL PROTECTION AND PENALTIES

A. Legal protection	93
I. Legal protection for re-users, data intermediaries and data altruism organisations	94
II. Legal protection for data donors in favour of altruism organisations	97
III. Legal protection for competitors	97
IV. Interest groups	100
B. Penalties	101
I. Obligation of the Member States to lay down rules on penalties	101
II. Obligations of the DGA subject to penalties	102
III. Conditions for penalties	103
IV. Level of penalties	103

CHAPTER 7
THE EUROPEAN DATA INNOVATION BOARD

A. Introduction	105
B. Composition	106
I. Task of the Commission	106
II. Members of the European Data Innovation Board	106
III. Organisation	108

Contents

C. Tasks	109
I. Development of consistent practices	109
II. Development of consistent guidelines	110
III. Standardisation	110
IV. Guidelines on ‘common European data spaces’	112
V. Facilitation of cooperation	113
VI. Other tasks	113
Annex: Data Governance Act	115
Index	175

CHAPTER 1 THE DATA GOVERNANCE ACT

A. Introduction	1
B. History of origins	4
C. Data strategy of the Commission	8
D. The Commission's digital strategy	19
E. Relationship to data protection law	23
F. Relevance for the practice	29

Bibliography: Hennemann/von Ditfurth, 'Datenintermediäre und Data Governance Act', *NJW* 2022, 1905; Hornung/Schomberg, 'Datensouveränität im Spannungsfeld zwischen Datenschutz und Datennutzung: das Beispiel des Data Governance Acts', *CR* 2022, 508; Richter, 'Europäisches Datenprivatrecht: Lehren aus dem Kommissionsvorschlag für eine „Verordnung über europäische Daten-Governance“', *ZEuP* 2021, 634; Schildbach, 'Zugang zu Daten der öffentlichen Hand und Datenaltruismus nach dem Entwurf des Daten-Governance-Gesetzes', *ZD* 2022, 148; Schmitz, 'Digitale-Gesetze-Strategie – Agilität oder „Act“ionismus?', *ZD* 2022, 189; Schwartmann/Benedikt, 'Datenaltruismus ohne Anreiz? Die aktuelle EU-Datenregulierung im Praxisccheck', *RDV* 2022, 59; Streinrötter, 'Datenaltruismus', *ZD* 2021, 61; Tolks, 'Die finale Fassung des Data Governance Act – Erste Schritte in Richtung einer europäischen Datenwirtschaft', *MMR* 2022, 444; Veil, 'Data Governance Act IV: Dataismus' (*CR-online Blog*, 7.12.2021) <<https://www.cr-online.de/blog/2021/12/07/data-governance-act-iv-dataismus/>> (last accessed: 4.5.2023; cited: Veil Data Governance Act IV: Dataismus).

A. Introduction

The **Data Governance Act**, or DGA, was published as Regulation (EU) 2022/868 **1** in the Official Journal of the EU (OJ 2022 L 152, 1) on 3.6.2022. Officially, it is called the Regulation on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act).

The DGA entered into force on 23.6.2022 and applies from 24.9.2023 (Art. 38 DGA). **2** As an **EU regulation**, the DGA is applicable in each Member State (Art. 288(2) TFEU). The addressed entities, obligated parties as well as beneficiaries, may and must therefore comply with the requirements of the DGA as of 24.9.2023 without any further **national implementation act**. However, there is a special feature for the DGA: Some of the provisions directly address the Member States, which must therefore first bring about changes and adjustments in the national system before the DGA is also brought to life for entities organised under private law. However, this has to be done by 24.9.2023 – if implementation is delayed, the EU Commission could initiate violation proceedings. The only exception is for data intermediation services that have already provided data intermediation services as of 23.6.2022: They do not have to comply with the obligations under Chapter III DGA until two years later, from 24.9.2025 (Art. 37 DGA).

With its 38 articles, the DGA aims to improve the conditions for data sharing and data transfer in the internal market and to create a harmonised framework for data exchange as well as to establish basic requirements for **data governance**, i.e. a system of regulation and organisation of data handling (rec. 2 DGA). The DGA focuses on three regulatory areas:¹ **3**

¹ Cf. also Hennemann/Ditfurth *NJW* 2022, 1905 mn. 3.

Chapter 1 The Data Governance Act

1. Re-use of data held by public sector bodies
2. Provision and use of data intermediation services
3. Altruistic use of data

B. History of origins

- 4 The Data Governance Act is part of the first pillar of the European data strategy 2020.² Together with the Data Act³ (DA for short), which is currently being planned, the DGA is intended to create the regulatory basis for an internal market for data and shape Europe's digital future.
- 5 The starting signal for the legislative process was given with the Commission's **proposal for a Regulation** of 25.11.2020⁴ (DGA Proposal). Since the publication of the proposal, the DGA has faced a variety of criticisms.⁵ In particular, the EU legislator has been accused of failing to balance the goal of a thriving data economy across the Union with the implications for data protection.⁶ Coupled with a lively activity of the EU legislator, the danger of incoherent and dysfunctional results is identified.⁷
- 6 Nevertheless, starting from its original draft version, the DGA has only **undergone minor adjustments and amendments** in the further legislative process. Based on the report of the Committee on Industry, Research and Energy under the rapporteur *Angelika Niebler* of 22.7.2021,⁸ the first reading in the European Parliament took place in April 2022. Prior to this, the Parliament and the Council had already provisionally agreed on a Regulation text,⁹ which was adopted at the first reading.¹⁰ The final version of the Regulation was signed by the Presidents of the European Parliament and the Council on 30.5.2022 and the Commission accepted all amendments on 1.6.2022.¹¹
- 7 20 days after **publication** in the EU Official Journal on 3.6.2022, the DGA entered into force on 23.6.2022. It will become applicable throughout the Union on 24.9.2023 (Art. 38 DGA).

C. Data strategy of the Commission

- 8 As part of the EU Commission's **data strategy**, the DGA is embedded in Brussels comprehensive digital strategy. In its Communication of 19.2.2020 on a European data strategy¹², the Commission outlines policies and investments to help build an efficient, innovative data economy aligned with European values, fundamental rights and rules

² COM(2020) 66 final.

³ COM(2022) 68 final.

⁴ COM(2020) 767 final.

⁵ Partly almost polemical Veil Data Governance Act IV: Dataism.

⁶ Tolks *MMR* 2022, 444 (449).

⁷ Richter *ZEUP* 2021, 643 (633 et seqq.).

⁸ Committee Doc. A9-0248/2021.

⁹ Parliamentary Doc. PE703.098.

¹⁰ Parliamentary Doc. T9-0111/2022.

¹¹ SP(2022) 281.

¹² COM(2020) 66 final.

C. Data strategy of the Commission

by 2025.¹³ According to the Commission, it is important to harness the potential of the growing amount of existing data for social and economic well-being by improving **access to data and promoting responsible data use**.¹⁴

The Commission's vision is a **single European data space**, i.e. an internal market for data, in which both personal and non-personal data are secure, companies can easily access the data they need and (re-)use it in compliance with applicable law (across industries) – regardless of where it is stored in the EU.¹⁵ In addition, there should be free and secure data traffic with **third countries**, meaning that the European data space should be accessible to data from all over the world.¹⁶

Based on identified problematic areas in the European data economy, the policy measures and financial support planned in the data strategy are divided into **four pillars**:

1. First and foremost, a cross-sectoral governance framework for **data access and data use** is to be created that avoids inconsistent approaches in the various sectors and the Member States in the internal market.¹⁷ The DGA also serves to implement this objective, so that the European legislator has already taken a first step in implementing its strategy by adopting the DGA. Other key measures in this first pillar are the Data Act mentioned above and an implementing act on high-value datasets (HVD), which is intended to supplement the Open Data Directive (EU) 2019/1024 (hereinafter: Open Data Directive).

The **Data Act** was launched by the EU Commission with its proposal for a Regulation on harmonised rules for fair access to and use of data from 23.2.2022.¹⁸ As a horizontal measure, the DA – like the DGA – addresses different actors in the data economy across sectors.¹⁹ The relationships of the actors, in particular their rights and obligations, are to be regulated uniformly throughout the Union in order to promote data sharing, to distribute the added value from data more fairly and to increase the overall availability of data.²⁰ The European Parliament adopted the EU Commission's proposal on 14.3.2023, the Council on 17.3.2023, both with some partly contradictory amendments.²¹ On 29.3.2023, the first trilogue negotiation took place. It would be possible for an agreement to be reached before the summer break.

The implementing act on **high-value datasets** is also still being drafted. The committee procedure started on 30.10.2019.²² In cooperation with the Committee on Open Data and Re-use of Public Sector Information, in which all Member States are represented, the EU Commission is preparing a list of high-value datasets held by public sector bodies or public undertakings in certain categories, such as geospatial,

¹³ COM(2020) 66 final, 1 et seq.

¹⁴ COM(2020) 66 final, 4 et seq.

¹⁵ COM(2020) 66 final, 4 et seq.; rec. 2(1) DGA.

¹⁶ COM(2020) 66 final, 4 et seq.; rec. 2(2) DGA.

¹⁷ COM(2020) 66 final, 12.

¹⁸ COM(2022) 68 final.

¹⁹ COM(2020) 66 final, 12.

²⁰ COM(2020) 66 final, 13 et seq.; COM(2022) 68 final, 2 et seq.

²¹ Parliamentary Doc. T9–0069/2023; Council Doc. 2022/0047(COD).

²² Refer to <<https://ec.europa.eu/transparency/comitology-register/screen/meetings/CMTD%282019%291260/consult?lang=en>>.

CHAPTER 3 DATA INTERMEDIATION SERVICES

A. Introduction	1
B. Registration and recognition as a data intermediation services provider	6
I. Data intermediation services	7
1. Definition	8
a) <i>Establishment of commercial relationships</i>	9
b) <i>Enabling data sharing</i>	15
c) <i>Provider's intention to enable data sharing</i>	18
d) <i>Openness to an undetermined number of users</i>	22
2. Exceptions	24
a) <i>Data broker services</i>	25
b) <i>Services related to the Internet of Things</i>	27
c) <i>Services for the intermediation of copyright-protected content</i>	28
d) <i>Certain services provided by public authorities</i>	31
e) <i>Data altruism organisations</i>	34
f) <i>Other exceptions</i>	37
3. Categories of data intermediation services	38
a) <i>Relevance</i>	39
b) <i>Characteristics of certain data intermediation services</i>	42
II. Notification of data intermediation services	47
1. Obligation to notify	48
2. Notification in the Member State of the main establishment	51
3. Legal representative in case of establishment in third country	53
4. Notification procedure	58
a) <i>Content of the notification</i>	59
b) <i>Confirmation of notification</i>	75
c) <i>Changes and deregistration</i>	78
5. Commission register	79
III. Recognition as a data intermediation service	82
IV. Fees	88
C. Requirements for data intermediation services	89
I. Purpose and organisational separation (Art. 12 lit. a DGA)	90
II. Prohibition of combined offers (Art. 12 lit. b DGA)	95
III. Restricted use of metadata (Art. 12 lit. c DGA)	97
IV. Requirements for the conversion of data formats (Art. 12 lit. d DGA)	98
V. Restrictions on the combination of services (Art. 12 lit. e DGA)	100
VI. Requirement for transparency and non-discrimination (Art. 12 lit. f DGA)	103
VII. Prevention of fraud and abuse (Art. 12 lit. g DGA)	104
VIII. Continuity in the case of insolvency (Art. 12 lit. h DGA)	105
IX. Ensuring interoperability (Art. 12 lit. i DGA)	108
X. Prevention against unlawful access to data (Art. 12 lit. j DGA)	110
XI. Information of users (Art. 12 lit. k DGA)	112
XII. Ensuring security (Art. 12 lit. l DGA)	113
XIII. Fiduciary relationship (Art. 12 lit. m DGA)	117
XIV. Consent and permission tools (Art. 12 lit. n DGA)	119
XV. Log records (Art. 12 lit. o DGA)	120
XVI. Compliance with competition law	121
D. Competent authorities of the Member States	122
I. Organisation	123
II. Requirements for the competent authorities of the Member States	125
III. Tasks	131
1. Supervision of data intermediation services	132
2. Enforcement of the requirements of the DGA	134
3. Cooperation of authorities	139

Chapter 3 Data intermediation services

Bibliography: Beise, 'Datensouveränität und Datentreuhand', *RD* 2021, 597; Berberich/Kanschik, 'Daten in der Insolvenz', *NZI* 2017, 1; Bile, 'Datenvermittlungsdienste nach DGA', *ZD-Aktuell* 2022, 01286; Falkhofen, 'Infrastrukturrecht des digitalen Raums. Data Governance Act, Data Act und Gaia-X', *EuZW* 2021, 787; Große-Ophoff/Voget, 'Shared Data with Limited Access. Ein Einblick in das japanische Datenrecht im Vergleich mit nationalen und europäischen Regelungsregimen', *GRUR* 2022, 1192; Hartl/Ludin, 'Recht der Datenzugänge – Was die Datenstrategien der EU sowie der Bundesregierung für die Gesetzgebung erwarten lassen', *MMR* 2021, 534; Hennemann/von Ditzfurth, 'Datenintermediäre und Data Governance Act', *NJW* 2022, 1905; Paal/Kumkar, 'Die digitale Zukunft Europas. Europäische Strategien für den digitalen Binnenmarkt', *ZfDR* 2021, 97; Richter, 'Europäisches Datenprivatrecht: Lehren aus dem Kommissionsvorschlag für eine „Verordnung über europäische Daten-Governance“', *ZEUP* 2021, 634; Savary, 'Regulierung von Gatekeeper-Plattformen', *RD* 2021, 117; Schreiber, 'Zu neuem Glanz erwacht: Die Interoperabilität', *ZD* 2022, 357; Specht-Riemenschneider/Blankertz, 'Lösungsoption Datentreuhand: Datennutzbarkeit und Datenschutz zusammen denken', *MMR* 2021, 369; Spindler, 'Schritte zur europaweiten Datenwirtschaft – der Vorschlag einer Verordnung zur europäischen Data Governance', *CR* 2021, 98; Steinrötter, 'Gegenstand und Bausteine eines EU-Datenwirtschaftsrechts', *RD* 2021, 480; Tolks, 'Die finale Fassung des Data Governance Act. Erste Schritte in Richtung einer europäischen Datenwirtschaft', *MMR* 2022, 444; Veil, 'Data Governance Act II: Datenmittler' (*CR-online Blog*, 11.10.2021) <<https://www.cr-online.de/blog/2021/10/11/in-der-datenschutzrechtlichen-todeszone-der-data-governance-act-teil-ii/>> (last accessed: 4.5.2023; cited: Veil Data Governance Act II: Datenmittler).

A. Introduction

- 1 One of the central objectives of the DGA is to facilitate the exchange of substantial amounts of relevant data in order to make existing **data resources more usable**.¹ The European Commission places high hopes in data intermediaries that offer services on the market that enable data holders and data subjects to share their data with potential data users and facilitate data users' access to the desired data. The European Commission expects more frequent data sharing and improved data access to lead to **innovation** in a wide range of applications (including in the general interest) and to **increase the overall societal welfare**.² The regulatory framework for these so-called data intermediation services is contained in Chapter III of the DGA (Art. 10–15 DGA).
- 2 The European legislator is counting on data intermediation services to play a key role in the data economy. It hopes that data intermediation services providers will contribute to an efficient pooling of data and facilitate **bilateral data sharing** between different players in the data economy (rec. 27 DGA). This is primarily a future project: The market for data intermediation services is only emerging and it is difficult to estimate how the market will develop in the future.³ In 2020, the market for data intermediation services was estimated to comprise 150 organisations, including only a few larger companies, but also many small companies with less than 100 customers.⁴
- 3 The European legislator hopes that the regulatory framework of the DGA will produce a **well-functioning market** for data intermediation services. The provision of data intermediation services is expected to contribute to the exchange of significant amounts of data between data holders or data subjects on the one hand and data users on the other hand, in particular based on voluntary agreements. The Regulation does not create any rights to access or obligations to share data for data intermediation

¹ COM(2020) 767 final; Hennemann/v. Ditzfurth *NJW* 2022, 1905; Richter *ZEUP* 2021, 634 (639).

² SWD(2020) 295 final, 1 et seq.; Richter *ZEUP* 2021, 634 (639).

³ Richter *ZEUP* 2021, 634 (646); Paal/Kumkar *ZfDR* 2021, 97 (125 et seq.).

⁴ SMART 2019/0024, 43; Richter *ZEUP* 2021, 634 (646).

B. Registration and recognition as a data intermediation services provider

services providers.⁵ The European legislator relies on a market solution, according to which the regulatory framework should correct market failures and provide incentives for private actors to overcome the obstacles that have so far prevented more frequent data sharing and produce flourishing data markets.⁶ In addition, the legislator intends, by regulating the market for data intermediation services, to prevent existing tech giants, which have already accumulated significant market power in various digital markets, from entering the data intermediation services market and offering data intermediation services without facing significant competition.⁷

The European legislator expects the DGA to form, and data intermediation services provider to offer, nothing less than a ‘novel, “European” way of data governance’ (rec. 32 DGA) in a data economy characterised by **autonomy and sovereignty** of its actors and not being subject to the logics of a few dominant companies.⁸ The DGA aims at increasing trust in data sharing by establishing appropriate mechanisms that enable data holders and data subjects to exercise control over data that relates to them, and in order to address other barriers to a **well-functioning and competitive data-driven economy** (rec. 5 DGA).

In this context, specialised data intermediation services that are independent from data subjects, data holders and data users are intended to have a facilitating role in the emergence of new data-driven ecosystems independent from any player with a significant degree of market power, thereby allowing fair, **non-discriminatory access to the data economy** for undertakings of all sizes, including in particular small and medium-sized enterprises and start-ups with limited financial, legal or administrative means (rec. 27 DGA). In particular, data intermediation services are to play a central role in the creation of common European data spaces, i.e. ‘purpose- or sector-specific or cross-sectoral interoperable frameworks of common standards and practices to share or jointly process data for, inter alia, the development of new products and services, scientific research or civil society initiatives’ (rec. 27 DGA), such as the European Health Data Space (EHDS), which is currently being created at EU level.⁹

B. Registration and recognition as a data intermediation services provider

Art. 10 DGA subjects all data intermediation services within the meaning of Art. 2 no. 11 DGA to a notification procedure which enables the competent authorities of the Member States to supervise data intermediation services providers, to monitor and verify compliance with the requirements of the DGA for data intermediation services and to sanction any violations.

⁵ Große-Ophoff/Voget *GRUR* 2022, 1192 (1195).

⁶ Richter *ZEuP* 2021, 634 (660 et seq.).

⁷ SWD(2020) 295 final, 16 et seq.; Richter *ZEuP* 2021, 634 (646); see also Savary *RDi* 2021, 117 (123).

⁸ See also Steinrötter *RDi* 2021, 480 (485).

⁹ COM(2022) 197 final.

Index

Bold numbers refer to chapters, normal ones to margin numbers.

- Access 2 41
 - fair and non-discriminatory 3 5
- Access claim 2 5
- Access, international 5 7
- Access procedure 7 37
- Account information service provider 3 37
- Activity report 4 60 et seqq.
 - minimum information 4 61 et seqq.
- Adequacy decision
 - third-country transfer 5 24
- Administrative act 6 4 et seq., 15
- Administrative data 2 1, 4
- Anonymisation 2 72 et seqq.
- Application
 - date of 1 2
 - direct 1 2
- Application for registration
 - crossing the border 4 29 et seq.
 - data altruism organisation 4 27 et seqq.
 - details 4 28
 - legal protection 6 6 et seq.
- Application for re-use 2 95
- Authority, competent
 - data altruism organisation 4 15 et seqq., 52
 - Data Innovation Board 7 10, 39 et seqq.
 - data intermediation service 3 122 et seqq.
 - legal protection 6 1 et seqq.
 - supervision 6 20
- Authority representatives 7 43
- Bodies governed by public law 2 7, 11 et seqq.
 - lending 2 12
 - special rights 2 12
- Business models, data-driven 1 14
- Central information point, inventory 2 96
- Certification
 - data intermediation service 3 49 et seq., 82 et seqq.
- Change of purpose 2 79
- Circumvention actions 2 47
- CLOUD Act 5 15
- Combination of services 3 100 et seqq.
- Combined offers 3 95 et seq.
- Commercial confidentiality 2 28 et seq.
- Commercial relationship 3 9 et seqq.
- Commercially confidential data 2 26 et seqq.
- Commercially sensitive data 7 27
- Competent body 2 88 et seqq.
 - consent 2 91
 - support 2 90
 - tasks 2 90
- Competition
 - compliance 3 121
 - distortion 3 103
 - market foreclosure 3 103
- Competitive relationship 6 24 et seq.
- Competitive relevance 2 29
- Competitor
 - data altruism organisation 6 28 et seqq.
 - data intermediation service 6 23 et seqq.
 - lawsuit 6 21
 - legal protection 6 21 et seqq.
- Confidential information 2 71
- Confidentiality 2 26 et seqq., 83
 - legitimate interest in 2 29
 - statistical 2 31
- Confirmation of registration, data intermediation service 3 75 et seqq.

Index

- Conflict of interest, data intermediation service 3 94
- Connecting Europe Facility 7 31
- Consent 2 91, 4 43, 73, 81 et seqq., 88
 - broad consent 4 86
 - withdrawal 4 82
- Consent form 4 81 et seqq.
 - Data Innovation Board 7 42
 - requirements 4 84
 - structure, modular 4 83
- Consolidated tape providers 3 37
- Consulting, data intermediation service 3 44
- Consumer protection associations 6 32
- Contracting authority 2 8
- Corona data donation app 4 2
- Cybersecurity 7 37
 - Data Innovation Board 7 26
- Data
 - commercially confidential 2 26 et seqq.
 - definition 1 27, 3 29
 - held by public sector bodies 2 1 et seqq., 35 et seqq.
 - highly sensitive 5 26
 - national security 2 23
 - particularly protected 2 1 et seqq., 25 et seqq.
 - producer 2 37
 - public defence 2 23
 - public security 2 23
 - re-use 2 1 et seqq., 38 et seqq.
- Data access 1 11 et seq.
- Data Act 1 4, 11 et seq., 18
 - objectives 1 12
- Data altruism 4 1 et seqq., 13
 - application exclusion 4 38 et seq.
 - Data Innovation Board 7 24
 - national arrangements 4 90
- Data altruism organisation 4 4,
6 et seqq., 12 et seqq.
 - activity 4 32
 - activity report 4 60 et seqq.
 - application for registration 4 27 et seqq.
 - commercial activity 4 34 et seq.
 - competent authority 4 15 et seqq.
 - competitor 6 28 et seqq.
 - data donor 6 19
 - data intermediation service 3 34 et seqq.
 - data intermediation services provider 4 37
 - data protection requirements 4 66 et seqq.
 - duty to inform 4 67 et seq.
 - erasure 4 50, 54
 - fine 6 18
 - functional separation 4 40 et seq.
 - label 4 7, 53
 - legal entity 4 33
 - legal protection 6 3 et seqq., 14 et seq., 18
 - logo 4 53
 - market conduct rules 6 30
 - national register 4 23
 - obligation to keep records 4 57 et seqq.
 - penalties 6 44
 - processing principles 4 69 et seqq.
 - public authorities 4 37
 - register 4 9 et seqq., 14, 26
 - registration 4 26
 - registration requirements 4 31 et seqq.
 - requirements 4 55 et seqq.
 - supervision 4 17 et seqq., 6 19
 - transparency 4 56 et seqq.
 - trust 4 10
 - Union register 4 14, 24
- Data altruistic activity 4 32, 62
- Data broker 3 25 et seq.
- Data cooperative 3 45
- Data donation 4 5
- Data donor, legal protection 6 19 et seq.
- Data economy in the single market 7 28