

DATA GOVERNANCE ‘*THE EUROPEAN WAY*’

DATA SOVEREIGNTY, PRIVACY AND FUNDAMENTAL RIGHTS, OPENESS/SHARING

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DATA, GEOPOLITICAL ECONOMY AND LAW



DigEUCit

A DIGITAL EUROPE FOR CITIZENS

“Digital issues are no longer just technical matters. They are the battleground of technology, of values and narratives”. Josep Borrell (18.07.2022)

The “Brussels Effect” and the aim of digital sovereignty – from GDPR to the Data Governance Act

“State of play”: a mix of plural and low profile international governance, oligolistic private power and not clear paths at national level

Risk: a possible balkanisation due to different models of governance

The export of the European “human-centric model”: the Global Gateway (technical cooperation) and the framework for Digital Diplomacy 2022



Data is information Information is power

Data: non-rival asset → re-use potential

Impacts on the economy, on security and on individual rights – “D4SG” (data for social good)

Data “empowerment” (EU and citizens)

WHY OPEN?

impact of opening data

- ✓ Data economy value/2019 - € 400 billion
- ✓ Data access and sharing is estimated to generate social and economic benefits worth between 0.1% and 1.5% of gross domestic product (GDP) in the case of public-sector data, and between 1% and 2.5% of GDP (in a few studies up to 4% of GDP) when also including private-sector data

OECD (2019). "Risks and challenges of data access and sharing", in *Enhancing Access to and Sharing of Data: Reconciling Risks and Benefits for Data Re-use across Societies*, OECD Publishing, Paris, <https://doi.org/10.1787/15c62f9c-en>

- ✓ Asymmetry correction and challenge the dominance of “Big Tech”

Institute for Public Policy Research, ‘Creating a Digital Commons’, 2020, <https://www.ippr.org/research/publications/creating-a-digital-commons>

- ✓ Benefits beyond economy: better accountability, transparency, planning -
Ares(2020)3480073; SWD(2020)295
- ✓ Open Data Portal



Data in the EU – EU values and free market

- EU values (article 2 TEU)/Declaration on Digital Rights and Principles

Data: “good” or “service”?

- ✓ 5th freedom of the internal market?
- ✓ free flow within EU and across sectors

this may seem counter intuitive, since the freedom of the internet has been declining for 12 years

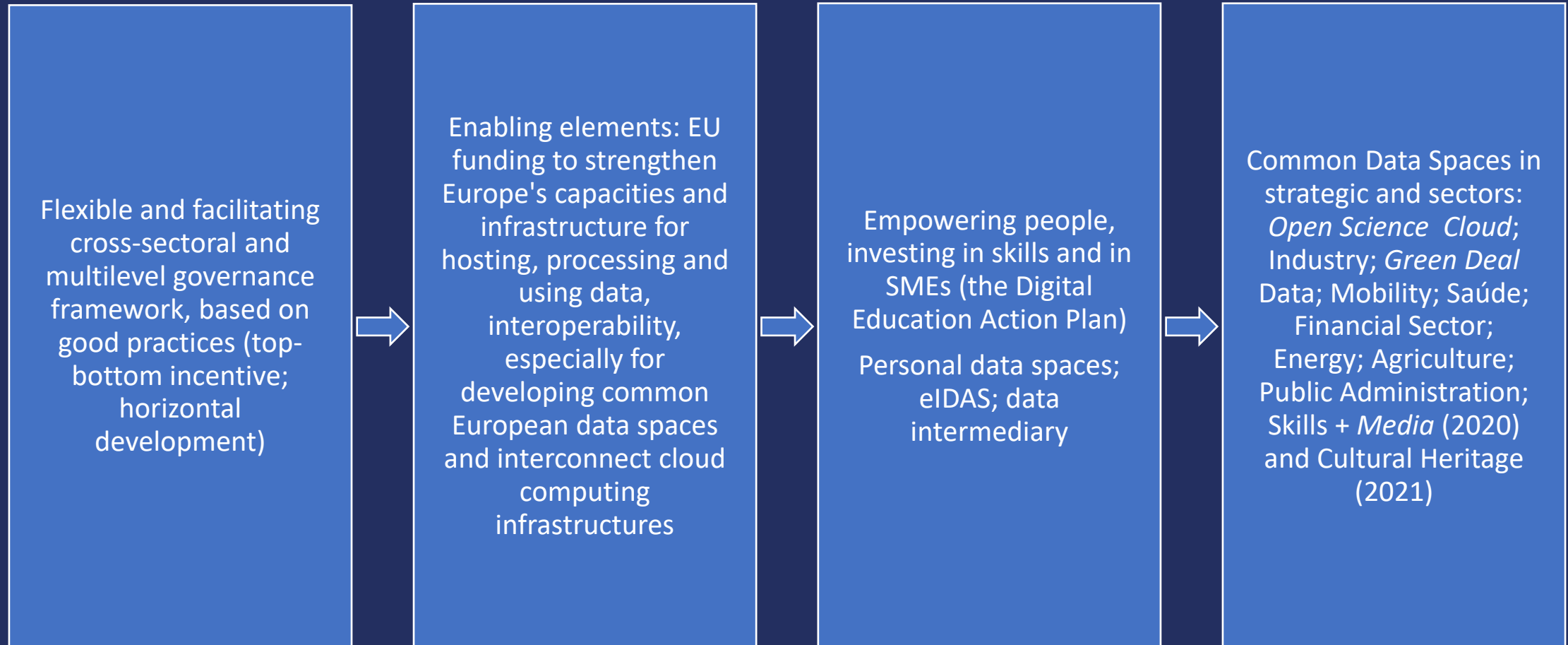
Freedom House (2022). *Freedom on the Net report.*
<https://freedomhouse.org/sites/default/files/202210/FOTN2022Digital.pdf>

- Instead of blocking, the EU is regulating

DATA LEGAL FRAMEWORK

- **Comunication “European Data Strategy”, COM(2020) 66 final**
 - **GENERAL DATA PROTECTION REGULATION (2016) – free flow with consent or legitimate interest**
 - **FREE FLOW REGULATION (2018)**
 - **OPEN DATA DIRECTIVE (2019)**
 - **DATA GOVERNANCE ACT (2022)**
 - **DATA ACT PROPOSAL**

European Data Strategy [COM(2020) 66 final] - Pillars



European Data Strategy



- **Overall objective:** promote the **free flow of data in the EU (GDPR; DGA)**
- Open data for **Public Sector Information (PSI) free or at cost for making them available (Open Data Directive; DGA)**
- Open/free **High-Value Data** - 6 HVD (Annex I to Open Data Directive: six thematic data categories: 1) geospatial; 2) earth observation and environment; 3) meteorological; 4) statistics; 5) companies and company ownership; and 6) mobility)
- **Sectoral data spaces** – 10 (Industry; Green Deal Data; Mobility; Health; Financial Sector; Energy; Agriculture; Public Administration; Skills + Media (2020) and Cultural Heritage (2021))
- One horizontal research data space (European Open Science Cloud) and OOPS (One and Only Principle System)

European Data Governance Model: European Data Strategy [COM(2020) 66 final]



FUNDAMENTAL PRINCIPLES

- Data owners' control;
- Multilevel governance;
- Respect for EU values;
- Technical robustness; interconnection and interoperability;
- Openness and sharing;
- Stakeholders participation

DATA GOVERNANCE

“data governance [is] the power relations between all the actors affected by, or having an effect on, the way data is accessed, controlled, shared and used, the various socio-technical arrangements set in place to generate value from data, and how such value is redistributed between actors.” (Michelli et al. (2020). “Emerging models of data governance in the age of datafication”)

Data governance is a spectrum ranging from macro-global/European to micro-enterprise/individual

Free-flow of data – GDPR; FFR

- Freedom of movement in the EU of personal data, with respect for GDPR (consent; legitimate interest)
- Freedom of movement in the EU for the reuse of non-personal data, in accordance with the principle of contractual freedom (FFR; DGA; DA proposal)
- Territorial location requirements are prohibited (exceptions, for reasons of public security, subject to the principle of proportionality)
- There is no right to portability of non-personal data; industry initiative is promoted through soft law (Commission Communication “Guidelines on the Regulation on a Framework for the Free Flow of Non-Personal Data in the European Union”, COM(2019)250 final)
 - Codes of conduct – SWIPO (Switching Cloud Service Providers and Porting Data) approved the “Common High-Level Principles”, the “Code of Conduct and transparency statement for Infrastructure as a Service” and the “Code of Conduct for Software as a Service” (with good practices and information for cloud service providers) approved «complaints» and «appeals forms and procedures» <https://swipo.eu/download-section/copyrighted-downloads/>



Data Governance Act (23.09.2023)

A mix of high and low-intensity legal framework

Fostering sharing
and re-use of PSI
– low/medium

Data intermediaries –
low/medium (neutrality;
equity; non-
discrimination;
transparency;
notification)

Data altruism –
medium/high
(objectives of general
interest; non-profit;
independent; registry
of recognised data
altruism organisation;
transparency)

Governance structure –
low/medium

Dimensions of Data Policy in the EU



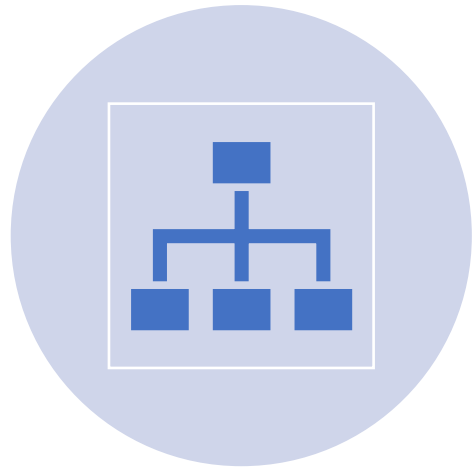
DATA SOVEREIGNTY

PRIVACY AND FUNDAMENTAL RIGHTS

DATA OPENESS / SHARING

COMPETITIVENESS

DATA SOVEREIGNTY



DATA OWNERS' CONTROL



GEOPOLITICAL DATA CONTROL

DATA OWNERS' CONTROL



GDPR (article 6/1/a and article 7/3 - no processing or use of data without the consent of the data subject or legitimate interest; article 17 - right to erasure and the “right to be forgotten” and; article 20 - right to portability of personal data; ‘right’ not to be subject to a decision based solely on automated processing, including profiling.



Data Act Proposal (COM/2022/68 final) – user access and sharing of machine generated data; right to switch data processor services provider



Data Governance Act – Reg. 2022/868 (article 5 – contractual freedom for re-use of protected non-personal data; - limits and conditions for the international transfer of highly sensitive data)

Data owners' empowerment

DGA - personal data spaces and data cooperatives;

eIDAS (“electronic IDentification, Authentication and trust Services”)

Present issue: “inverse privacy”

Promising evolution: “dynamic consent”

GEOPOLITICAL DATA CONTROL

https://www.eeas.europa.eu/eeas/digital-diplomacy_en

- **Territorial scope – the Union and beyond...**
 - ✓ **GDPR – Reg. 2016/679 (article 3 – establishment of the controller or the processor is located in the Union, regardless of whether the processing takes place in the Union or not; - data subjects are in the Union; any place where MS have jurisdiction; articles 44 to 50 – conditions and limits for international transfers of personal data**
 - ✓ **Free-Flow Regulation of non-personal data – Reg. 2018/1807 (article 2 – processing service provided to users in the Union, regardless of whether the service provider is established or not in the Union; - carried out by a natural or legal person residing or having an establishment in the Union for its own needs)**
 - ✓ **Data Governance Act – Reg. 2022/868 (article 11/3 and article 19/3– local legal representative for non-EU data intermediation services providers and recognized data altruism entities; article 31 – limits and conditions for international transfer of protected data)**
 - ✓ **Data Act proposal – restrictions and conditions on international transfers of non-personal data; B2B IoT data sharing; B2G data sharing**

EU Data and the World

- Personal Data: adequacy decisions; “Shrems rulings”
GDPR is the “gold-standard” – “Brussels Effect”
 - “data adequacy decisions”: Andorra, Argentina, Canada (for commercial organizations), Faroe Islands, Guernsey, Israel, Isle of Man, Japan, Jersey, New Zealand, Republic of Korea, Switzerland, the United Kingdom, and Uruguay. All data adequacy decisions exclude data exchanges in the law enforcement sector, except for the United Kingdom.
- Extra-territorial effects and territorialization (DMA, DSA, DGA, AI Act proposal; DA proposal)
- Restrictions and conditions for non-personal data flows to third countries (DGA) – respect for EU law
- Export controls for sensitive goods (should data be included?)
- Digital diplomacy framework

Privacy and fundamental rights

- European **Declaration on Digital Rights and Principles** for the Digital Decade (15.12.2022)
- **Privacy: ban the use of biometric identification** systems in the EU for both real-time and ex-post use, except in cases of severe crime and pre-judicial authorisation for ex-post use (EP amendment of AI Act proposal)
- **Access to data = Right to information** – Charter of Fundamental Rights (article 11)
- ✓ **Non-discrimination** - algorithmic systems are based on **adequate datasets** to avoid discrimination and enable human supervision of all outcomes affecting people's safety and fundamental rights (Declaration, article 9/c)

DATA OPENESS / SHARING

Access and re-use of public sector data – Free and FAIR (findable, accessible, interoperable, reusable) principles – Open Data Directive (free, non-discriminatory access)

High-value datasets – Implementing Regulation (UE)2023/138

Access and sharing of private sector data – between FRAND (Fair, Reasonable and Non-discriminatory) and STREAM (Sovereign, Trusted, Reusable, Exchangeable, Actionable, Measurable) principles – Data Act Proposal

European Data Spaces – European Data Strategy; Data Governance Act

COMPETITIVENESS AND FAIRNESS



Regulation 2021/694 - Digital Europe Programme «DIGITAL»

Decision 2022/2481 – Digital Decade 2030: sets the concrete digital targets based on four cardinal points (digital skills, digital infrastructures, digitalisation of businesses and of public services)

FAIR ACCESS FOR SMEs - Data Governance Act (article 6 – discount fees); Data Act Proposal (obligation of fair sharing upon big platforms)

Multi-Country Project in European Common Data Infrastructure and Services
Important Projects of Common European Interest (IPCEI) to implement the Next-Generation Cloud Infrastructure and Services;
European Digital Infrastructure Consortium (EDIC) to implement the European data spaces

FLAGSHIP Projects

Institutional governance

- European Data Protection Supervisor
- National Data Protection Supervisors
- **European Data Innovation Board** - expert group, (representatives of the competent authorities for data intermediation services and the competent authorities for the registration of data altruism organisations of all Member States, the European Data Protection Board, the European Data Protection Supervisor, ENISA, the Commission, SME Envoy, etc.)
- **National competent authorities for data intermediation services and for the registration of data altruism organisations**
- ENISA
- European Commission
- National courts and ECJ

Data Governance

The exact outcome is not yet clear – risk of regulatory competition and regulators “lock-in”

Flexible multilevel with a risk of differentiated capacities and fragmentation (Member State’s freedom to create or not new bodies; national penalties and enforcement)

Risk of conflict and overlapping of attributions in the areas of privacy, data protection, cybersecurity, network infrastructure, and competition

Challenges

- Diversity of *stakeholders* (interests, capacities, power)
 - Main stakeholders: data owners; data holders; data users; data intermediaries, etc.
 - Different nature: private/public, individuals/corporations, profit/non-profit, etc.
- Conflicting aims: openness/privacy; social value/private value
- Openness by design/privacy by design – Principle: “as open as possible, as closed as necessary”
- Value distribution: autonomy/freedom of contract; equity/social progress
- Imbalance G2B (Open Data Directive – free access/re-use) and B2G (Data Act proposal - emergency only and not to micro and small companies)
- Decentralised enforcement – risk of fragmentation
- One complex issue – distinguishing generated data and inferred data (for personal data – “Schufa” case - right to meaningful information v. trade secret of the processing algorithm; for non-personal the Data Act proposal is not clear)

Thank you!

Questions?