

Developers Alliance's Position On The Proposal For A Regulation On European Data Governance (Data Governance Act)



Founded in January 2012, the Developers Alliance is a global industry association that supports software developers as entrepreneurs, innovators, and creators.

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I. General Remarks On The Objectives And The Approach

1. The proposal represents one of the first legislative measures under the European Strategy for Data. It is intended to create a framework for facilitating access to public data and the sharing of data across the EU.

Data access and data sharing are among the prerequisites for software developers' business success. Therefore, we reiterate our support of an EU policy for building a data-driven and interconnected economy, by promoting the free-flow of data within the Single Market and beyond. The measures should balance the need for data protection with the promotion of data access. We welcome in particular those measures enabling ready access to public data and encouraging voluntary sharing of data.

2. We are intrigued by the declared objective of the proposal, "to underpin a new 'European' approach for data that would work as an alternative to an integrated platform model, dominated by Big Tech but potentially also by any other player with a high degree of market power".

Regulating on the basis of such an approach is flawed, as it ignores essential economic characteristics of digital data. It also reflects a limited appreciation of how services and products are built utilizing intangible assets such as data, information, and knowledge. For example, certain elements are ignored, such as the necessary investments in order to achieve economies of scale or that economies of scope lead to diminishing returns. Moreover, like other legislative proposals under the EU digital strategy, this proposal disregards the dynamics of digital markets and disruptive competition, as well as the added value created by the platform economy. With regard to the latter, the role of platforms as enablers of data-driven businesses is conspicuously left out. Many small businesses, including those of software developers, are flourishing within online platform ecosystems, offering high-value products and services, free or at affordable prices, based on data-driven business models enabled by those ecosystems.

Instead of focusing on data 'captured' by large platforms, we recommend tackling the deeper roots of the lack of competitiveness of the EU digital economy. Restrictions to the free flow of data are mainly caused by the legal uncertainty of the data protection and privacy legal framework. Without properly addressing these, it is very difficult, if not impossible, to enhance the EU Digital Single Market.

3. The impact assessment describes the vision of the proposed data governance framework as follows: "It would be built on a division of functions and the development of common European data spaces as collaborative ecosystems in which data would be usable by a broader range of organisations (public and private) based on a collective governance of data sharing." We fully recognize the importance of the measures proposed for enhancing access to public data. However, regarding data sharing among private entities, we note the absence of commercial incentives which are essential for the viability and success of any economic ecosystem.

Data intermediaries are presented as the solution to one of the main problem drivers - the lack of trust between private entities to initiate data sharing. Actually, the lack of trust rather indicates the reluctance of economic operators to share value and their competitive advantages. The lack of trust complements the legal uncertainty due to a fragmented implementation of the data protection framework and other privacy constraints. Data intermediaries are supposed to build up data marketplaces while being neutral in the data exchange that they accommodate. The same impact assessment recognizes though that “there is a risk that these neutral entrants may realise that it could be necessary to leave their neutral position and monetise the data exchanged through their service by offering added-value services in other markets”. The risk mentioned would only represent the natural tendency to profit, which is critical for economic efficiency. It is difficult to foresee a successful outcome of an artificial ecosystem where the promotion of inefficient entities for the distribution of value is imposed by regulatory intervention.

4. The impact assessment correctly identifies technical obstacles to data reuse, but it fails to provide concrete arguments on how the proposed regulation would properly address them. Issues related to interoperability are supposed to be overcome through the proposed mechanism “to coordinate and steer horizontal aspects of data governance”. This requires significant effort to develop technical standards across industries, which not only takes time but needs a bottom-up approach. Interoperability solutions should be developed based on use cases and must have incentives for different categories of stakeholders to get involved and to support the development and adoption of such standards.

5. Overall, the expected benefits for SMEs are not clear and the initiative is not offering ambitious digital entrepreneurs a promising perspective.

li. Specific Remarks On The Text

1. Definition of data intermediaries is necessary for legal certainty. The definition of ‘data sharing’ (art.2.7) makes reference to ‘intermediary’, and chapter III lays down requirements for ‘data sharing services’, but it is unclear whether these notions are referring to the same category of entities. Moreover, art. 9 refers to ‘data cooperatives’, which seems to be included in this category.

2. The provisions of the proposal, with special reference to those contained in Chapter II, are intended to complement Directive 2019/1024 on open data and the re-use of public sector information. Data held by public undertakings is excluded from the application of Chapter II of the regulation. The Directive 2019/1024 is of minimum harmonization and, for example, it is for the Member States to decide to apply its requirements to private undertakings, in particular those that provide services of general interest. Considering that the transposition date is 17 July 2021, it is recommended that the national measures adopted by this date should be considered for a possible limited extension of the scope of the regulation. We underline that data held by public undertakings in certain sectors (e.g. utilities and transport) has tremendous reuse potential.

3. The specific requirements for transfers to third-countries, specified by Art. 5 para 9-13, are clearly motivated by legitimate public security, public order, and other public policy concerns. However, the subsequent implementing and delegated acts should contain only proportionate measures, with respect to the EU commitments under the trade policy.

4. The fees for the public data access (art. 6) are in principle contradictory with the notion of open access. Public sector bodies should be allowed to impose only minimal charges, to strictly cover the costs of processing and delivering public services; the provision “shall be derived from the costs related to the processing of requests for re-use” is not offering the guarantee of a minimal amount.

5. The accessibility of public data is conditioned by the level of digitisation of public administrations, and the application of the one-stop-shop principle, which are uneven from one Member State to another. The experience of the implementation of the Single Digital Gateway is highly relevant in this sense. Important factors are also the quality of the datasets and the protection of personal data. Technical expertise is an absolute prerequisite, for example in applying specific personal data protection techniques or ensuring secure storage and processing. Due to the above-mentioned context, it is expected that the implementation of the regulation across the Member States will be inconsistent.

6. The notification regime for data sharing providers drawn up by Chapter III not only imposes unnecessary red tape but represents an artificial regulatory intervention aiming to (re)create markets, without a clear outcome. The impact assessment doesn’t provide conclusive evidence that this approach could be achievable. Data-driven ecosystems naturally created by the free market represent the sole viable ways to reap significant benefits of the digital economy.

7. The requirement for providers of data sharing services that are not established in the Union to appoint a legal representative in one of the Member States in which those services are offered, and their placement under the jurisdiction of the respective Member State (art. 10.3) could be interpreted as an indirect obligation for data localisation.

8. With reference to art. 14, which introduces an exception for “the not-for-profit entities whose activities consist only in seeking to collect data for objectives of general interest”, the activities excluded from the scope of chapter III should be clearly defined.

9. Concerning the provisions of Chapter IV on Data altruism, while we fully support the objective, we are skeptical if the proposed mechanism is the best option. As the Regulatory Scrutiny Board also noted, a voluntary public certification option could be proposed as an alternative.

10. The provisions regarding the European Data Innovation Board should better clarify its role, especially in relation to the Committee assisting the Commission in the implementation of the regulation, but also to national authorities or other bodies (e.g. standardization bodies).

11. Art. 30 on International access raises issues related to data localisation and disproportionate obstruction of data flows. The application of these requirements, corroborated with those of Art. 5 para 9-13 and Art. 10 para 3, should be carefully considered in the context of international trade.