

A EUROPEAN STRATEGY FOR DATA

KEY MESSAGES

- We **support the development of Common European Data Spaces** in strategic sectors of the economy supported by a governance framework that encourages voluntary business-to-business (B2B) data access and sharing.
- Implementation of the strategy must **safeguard fair competition** so that equal conditions for all businesses are upheld within the data economy. Close monitoring of this strategy and existing law, such as the Platform to Business Regulation, is crucial in this regard.
- **Existing legal frameworks** (eg. intellectual property, privacy and competition) affecting B2B data sharing **should be evaluated and clarified** to facilitate voluntary data access and sharing.
- **Data sharing should be incentivised** through fair, simple, intelligible, secure, interoperable and affordable data sharing agreements that either monetise data providers participation or enable “give-and-take” schemes.
- An **industry-driven approach to standardisation** should be the basis to achieve greater interoperability and portability within the data spaces.
- The data spaces should be underpinned through **cloud infrastructure** that is **based on trust, openness, security, interoperability and portability principles** to build trust for market participants to share, store and process within the data spaces.
- Access to **“public interest” data could be incentivised** to enhance European research and competitiveness but requires careful assessment of the costs and benefits to ensure appropriate businesses compensation. A common understanding of what data is in the “public interest” would aid this.
- The potential to create and grant **mandatory data access rights** should **only be pursued if** the initial initiative to set up **Common European Data Spaces** proves to **fail** in achieving its objectives.
- Data itself is not the sole enabler of innovation. The **skills needed to extract value from data and the awareness around digital technologies will play a critical role** in Europe’s bid to lead in digital transformation.

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CONTEXT

BusinessEurope supports the Commission in its initiative to promote an overarching data strategy that enables Europe to lead in the global data economy by benefitting from the data it generates and by further digitalising its economy and societies (particularly in relation to enabling excellence and trust in Artificial Intelligence (AI) - see separate BusinessEurope paper). Encouraging voluntary data access and sharing through collaboration between businesses will further aid Europe's digital transformation and offer greater opportunities for all businesses through realising the benefits of data and innovation it powers. This will support a strong single market if fair and competitive conditions are set up for all players.

This also means delivering on European and Member State level investment promises to support infrastructure that will enable Europe to capitalise in the global data economy. That includes ensuring world-class connectivity in 5G and ultrabroadband represent key enablers for the digital economy. Particularly 5G, which will enable the rapid growth of the Internet of Things (IoT) and the enormous amount of data generated by IoT which will fuel resources for data analytics and AI.

The first step in this regard should be to create a cross-sectoral governance framework for data access and use that clarifies:

- What data is covered in each common European data space;
- How voluntary data sharing will be incentivised;
- How business-to-business (B2B) data sharing interacts with other applicable laws and practices (eg. intellectual property, privacy and competition) and how these can be clarified to facilitate voluntary data access and sharing;
- What infrastructure is necessary;
- How standardisation can aid these efforts.

This framework should also outline a clear review process from the outset to determine the economic and strategic success of each common European data space. The review process should assess whether the framework has aided greater voluntary data sharing between businesses within and across sectors. It should determine whether this has added value to Europe's digital economy. It should be up to the businesses themselves to decide whether to share elaborated data or not but this should in no way be discouraged.

Only if demonstrable market failures exist, should the Commission consider its plan for a Data Act that would carefully design and grant targeted mandatory data access rights. Before proposing a Data Act, a definition of what a market failure is in relation to this review process is needed so that it can be measured on this basis in the. The impact of safeguarding fair competition through implementing the data strategy is central in this regard.

As a key societal stakeholder, BusinessEurope outlines its reaction to the Commission's European Strategy for Data below.

1. GOVERNANCE FRAMEWORK FOR DATA ACCESS AND USE

We encourage the development of common European data spaces to aid voluntary data sharing in strategic sectors and domains of public interest, while respecting intellectual property (IP), data privacy and security requirements. Legislation could aid governance by creating structures that provide more legal certainty and technical feasibility to create encourage and facilitate B2B data sharing. At the same time, political intention to create and oversee these structures must be backed up by sufficient funding to ensure their success. Increased legal certainty and technical standards flanked by investments are the enablers for data spaces and the prerequisites to drive their use.

The envisaged common European data spaces should enable the Commission to ensure open and transparent decision-making processes for stakeholders who in turn widely understand the conditions of utilising them. This would create the conditions required to agree on common data formats and make it easier for 3rd parties to read and analyse data. It would also promote the formation of marketplaces within these sectors. But the greatest potential to release lies in enabling interoperability and portability to incentivise data sharing between different sectors. This could also aid the functioning of the Free Flow of Data [Regulation](#) by ending industry lock-in practices and by providing incentives to avoid national protectionist data localisation measures.

While participation in such spaces should remain voluntary, access should be non-discriminatory and open to all players after having assessed that they comply with existing EU rules and driving its economic growth.

Evaluation and mapping must be carried out on existing legislation to understand which legal frameworks apply to the Commission's objectives. This is particularly the case for data that may also be deemed a trade secret, carry an element of personal data with it or be security-critical. Any form of sharing must be legally clarified in this regard. By clarifying various rules that interact and as a result affect B2B data sharing, the EU can create the necessary base to facilitate greater voluntary data access and sharing, as well as ensure the portability of industrial data.

We believe that the initial governance framework that will be set up for voluntary B2B data sharing should be limited to non-personal data and anonymised personal data. The General Data Protection Regulation (GDPR) does not allow for large amounts of personal data to be accessed or shared and used by other businesses other than the reason it was originally collected for unless it can be anonymised. Companies also need greater legal certainty in this specific area through EDPB guidelines to incentivise more personal data sharing through anonymised means. As a result, policy makers must recognise that increasing the control of personal data for the individual is at the heart of the GDPR and so some legal limitations (eg. opt-in and opt-out) will continue to exist in relation to how far this data can be shared and accessed by 3rd parties. Further to this, business user access to personal data of their customers can be further restricted through the use of Application Programming Interfaces (API's). Specific oversight should ensure fair conditions for business users utilising API's.

We believe that IP rights of businesses taking part in the data spaces that this governance framework will create, should continue to be upheld throughout and remain duly protected. While we don't advocate drastic changes in the existing IP legal framework, a number of specific open questions in relation to data and IP protection remain open and could need guidance:

1. Database protection does not need a requirement for originality (as copyright does), rather a key requirement is that the database is the result of a "substantial investment". However, not all modern databases make substantial investments so it can be the case that eligibility for database protection, if shared, remains uncertain.
2. In relation to trade secrets, the secret information can be protected but protection of the data that supports it remains unclear.

Further clarity is therefore needed on how IP protection can be upheld when taking part in a common data space, this should also include guidance on how existing IP rules, duly harmonised at EU level, determine protection for derived and co-generated data. The EU should consider adopting a preferred set of open data licenses for open data sets posted in the common data spaces and also a set of model data sharing agreements that can also make it easier for individuals and organisations that want to share data to do so and are extremely relevant in the case of high-value datasets.

In relation to the application of competition rules, further guidelines on the relation of the new Block Exemption Regulation for joint production and commercialisation agreements with voluntary data sharing and pooling are needed. More generally, the approach taken across different Data Spaces should not generate imbalances between sectors, preventing firms from competing on an equal footing.

Other sector specific areas of law also need to be understood when creating sector specific data spaces. For example, sharing data within vertically integrated companies (e.g. energy), is hampered due to Article 16 on common rules for the internal market in electricity and gas which prevents sharing commercially sensitive information between transmission system owners and operators in the energy sector. Moreover competition law can be used to strengthen the functioning and governance of common European Data Spaces.

In addition to promoting regulatory harmonisation, the Commission should seek to prevent conflicting supervisory practices across Member States which limit the ability for businesses to share data across the EU. Recently, the COVID-19 pandemic illustrated different approaches taken to data protection within the EU, with some taking different views to EDPB guidance. This should be avoided if new rules are to be set.

INCENTIVISING DATA SHARING:

Incentivising more voluntary business-to-business data sharing is one of the most important issues of the data strategy to solve in order for it to be successful. Facilitating sharing through simple, intelligible, interoperable and affordable data sharing schemes/agreements, supported by consensus-based, industry-led standards and greater legal certainty which will incentivise secure data sharing and as a result innovation.

Public authorities can play a key role in improving and promoting the use of effective legal agreements and governance tools that facilitate access to data by all users. Business cooperation must also be encouraged through practicable competition law guidance. This should provide more legal certainty for companies wishing to develop new digital projects or enter into data cooperation.

The envisaged data spaces should not only provide a free give-and-take mechanism, where different sets of data are ultimately exchanged to the mutual benefit of participating parties, but monetisation schemes should also be available for those to take part that do not collect data in the first instance but wish to add worth to digitalisation of the economy on the whole through enabling the creation of a service provision from that data. The value of the outcomes that are achieved by using data should ultimately be considered. Many data holders will benefit from the outcomes of sharing their data, such as improved health and safety outcomes, improved supply chain outcomes. This would also further incentivise data holders to share their data sets with more players in the wider digital economy, rather than just those that also collect and collate data sets, which could surmount power between a small set of players instead of enabling greater competition. The establishment of data spaces should not adversely affect existing, well-functioning markets that have created data-driven products that data spaces aspire to. Updated rules in relation to block exemptions would also aid this. However, legislation to support this must ease access to funding of these data spaces. Corresponding rights of use and access to the original data provider should also be granted when data is placed in these data spaces.

ENSURING CONFIDENCE IN 3RD PARTIES:

Businesses will not share their data if they cannot ensure proper use of it by 3rd parties. Data sharing should be based on robust agreements that ensure its proper use throughout the chain of custody (eg. management, information security, privacy protection, regulatory compliance, IP protection etc.). Principles of transparency and responsibility in terms of the purpose for which the data is being used must be upheld throughout. The exchange and processing of data must appropriately reflect the interests of all stakeholders. Use of international standards on service level agreements and data sharing agreements that already exist could aid achieving this aim.

INTEROPERABILITY:

Standardisation can enable greater interoperability. The application of standard formats for processing data from different sources in a coherent and interoperable manner across sectors should be encouraged. It can reduce the costs and technical barriers associated with sharing and re-use of data. It can also include a number of different elements, such as the standardisation of data formats, transfer mechanisms (e.g. APIs) and security approaches.

Industry led, transparent standards setting should already be possible under the EU's existing standardisation framework without the need for policy makers to influence them. Instead, we should continue to follow a bottom-up industry-driven approach. It is also crucial to support sector-specific approaches where necessary to ensure interoperability matches the technical realities of that sector. Coordination of activities within Europe, as well as at the global level, will provide the framework to ensure:

- Prioritisation and co-ordination of standardisation needs, creation and updates;
- Targeting standardisation efforts to support data innovation without generating high database reorganisation costs;
- Funding to test draft standards in practice and develop tools to implement them early-on;
- Leverage existing international standards and the work done by well-established standardisation bodies (in which Member States play a part) such as ISO.

Digital standards are increasingly developed by global fora/consortia and other vehicles outside the traditional standards developing organisations. European companies and policy makers should engage to uphold European interests and values within the most influential structures.

THE CLOUD:

In order to ensure the success of the Data Strategy, Europe should support inclusive cloud infrastructures that support edge architecture and which are globally competitive. Implementing the "cloud rulebook" in support of setting up a cloud services market place by 2022 should not only grow the excellence of the European cloud market itself but also empower business users within it. This should be supported through safeguarding a competitive market and enabling more informed cloud provider choices.

The availability of trustworthy data infrastructure is an important prerequisite for promoting data access, sharing as well as the development of edge computing in Europe. This should rely on common governance and be based on trust, openness, security, interoperability and portability principles. In this regard, supporting a European cloud federation initiative (similar to Gaia-X) should contribute towards the EU's objective to establishing a future-facing cloud and edge computing market based on European values. Such an EU-cloud solution should be open to all cloud service providers who fulfil its requirements.

Efficient governance of these initiatives should support a competitive cloud market through guaranteeing that no vendor lock-in practices are taking place and that balanced, fair and transparent contractual conditions for all market players are being upheld. The existence of unjustified limitations to the use of cloud services (including data residency and lock-in practices) hinders business innovation, such barriers must be removed. Business users should have the right to know the location of their data and whether it can be kept within the single market.

This should ensure responsible data use that exploits its full innovative potential. Business users should benefit from a high level of cloud provider transparency in order to support business user risk assessments and due diligence procedures to enable them to make more informed cloud provider choices. Business users want to know where jurisdiction lies in case issues would arise (and whether they have control to keep that in the single market). They also want peace of mind to know that their IP assets aren't at risk.

As a result, key elements to include relate to:

- Whether data portability is supported (eg. does the cloud provider implement the EU code of conduct for data portability);
- Whether a request for data to be stored within the single market can be carried out (eg. due to jurisdictional, security and IP concerns) - BusinessEurope remains against [unjustified localisation](#) measures by law;
- Information on how secure data sharing practices (if any) are carried out and what the services they offer in general.

SKILLS:

Data itself is not the sole enabler of innovation. The skills needed to extract value from data using a computational tool or technology and the awareness around digital technologies play a critical role in digital transformation. We support the Commission view that data literacy should be at the centre of European efforts for digital transformation. Organisations need to truly upskill and continue to train their talent in critical areas such as AI, machine learning, data analytics, and cloud computing as they will be crucial for the future of Europe in the digital age.

PERSONAL DATA SPACES:

One of the goals of the data strategy is to strengthen the individual's control over his or her data. In this context, the role of data operators should be clarified and the tools to personal data portability improved in practice. When implementing such measures, it should be ensured that the control of the individual concerned does not imply disproportionate obligations on part of the company.

Personal data remains crucial to the digital economy and future innovation. Measures to facilitate personal data portability have already been taken by a number of businesses. Direct portability from service to service can give users more effective control over their data and also contribute to data-driven innovation through greater sharing and re-use. Joint industry efforts should enhance data portability, making data transfer between firms (data controllers), particularly as regards direct portability between services, more secure, easier and smoother as long as they remain compliant with existing privacy rules.

OPEN PUBLIC SECTOR DATA:

We support the Commission's view that public authorities should make available a broader range of data which has significant potential for re-use. We encourage them to continue addressing barriers to open public sector data including the compatibility of data sets, fragmented levels of open data policies by Member States and data quality. Public authorities can provide clarity on the legal rules but should not force the processing of data re-use.

We support the efforts to open up specific high-value datasets provided they are of charge, in a machine-readable format and provided via an API. The interoperability and readability of these high-value data sets will be essential to increase their re-use.

DOMAINS OF PUBLIC INTEREST:

The strategy promotes access to data by authorities or other businesses that are in the public interest. Access to public sector data can contribute significantly to enhanced European research and competitiveness in AI as well as provide examples of the innovative impacts of enhanced openness and collaboration. At the same time, a clear distinction should be made between raw data for the public interest and high quality, curated data, of which it could be in the public interest to share, but overwhelmingly serves another purpose.

This should continue to be supported through incentivising voluntary sharing (as described above for B2B cross-sectoral data sharing). However, we would like to highlight the effect this could have on the quality of data in the long term, as nobody will invest in generating high value data if they are to be made available for free once the public sector has received them. We believe a balance has to be made. Any action to revise current conditions and mandate data sharing for data deemed in the public interest would need careful evaluation to weigh the potential benefits against the associated costs for both the industry and public sector, and ensure that firms are compensated appropriately. For example, the sharing location data to 3rd parties requires considerable investment by the businesses taking part. Location data requires pre-processing, analysis and aggregation, including anonymisation and secure transmission in compliance with strict data protection requirements set out by the GDPR and the ePrivacy Directive. A fair compensation scheme should be considered to cover such additional investments that will arise.

At the same time, what is defined as “public interest” data and those that generate it differs across the Member States. But this should take a context-specific approach and therefore be assessed against a relevant set of criteria. What could be found as a common denominator through all situations however could be if the data directly links to the protection of physical health and safety of European citizens. In this context, the concept of “opening up data for the common good” also requires clarification before it can be legally defined. We call on policymakers to shape the criteria in a proportionate manner and through a continuous dialogue with all relevant stakeholders, including on the modalities of how the data is shared. The public sector also often provides data in a format that in many cases is not adequate for businesses to use. Further efforts to harmonise public data formats are therefore needed.

Caution should also be exercised when defining legislation that could expand “access options” to wider sets of public sector data. The re-use of public sector information (Open Data Directive) already applies to companies that are financed or controlled by the state. Depending on the measures planned for the implementation of the data strategy for the public sector, an extensive approach could lead to unjustified competitive disadvantages for the companies concerned. Applicability will need to be made clear between: the state and competitive companies supporting the state, who tend to have different economic objectives. We don't want to create a government monopoly of any sectoral data

2. A POTENTIAL DATA ACT

The creation of the Data Act (2021) as described (with the potential of creating and granting mandatory data access rights) should only be pursued if the initiative in relation to set up Common European Data Spaces fails to achieve its objectives on the basis of a review. This approach respects the necessary freedom of contract and business autonomy. At the same time, this also means creating a mechanism to measure fairness of the market to ensure that unfair practices through contractual means are not allowed and that national competition authorities ensure competitive business environment is upheld. Usually, competition law should address demonstrable market failures and whether such failures arise from anti-competitive behaviour or as a result of a merger/acquisition. An injunction to make certain data available is an existing remedy available to competition authorities.

However, we would like to note that, beyond data sharing itself, businesses, particularly SMEs, already directly experience issues in the rapidly developing data economy that may instead be solved by a Data Act. For example, digital platforms often provide access to their systems through the use of an Application Programming Interface (API's) and the access keys are provided at the sole discretion of the platform. This means that the opening/closing of these doors is decided only by that platform. Unequal conditions in the data economy can arise if no procedure or oversight is in place to ensure equal access to all players on such platforms. This is causing problems for data providers who must quickly implement technical conversion measures to continue offering its services, putting European companies at a disadvantage as there is no independent oversight to ensure equal access for all on these 3rd country platforms. Member States should safeguard fair competition in the provision of digital services. Regulatory sandboxing at EU level should be developed to test policy that can rapidly solve these access issues.

The Data Act could also enable a businesses user data portability right to ensure a competitive market allows data to be moved to other providers.

It will be beneficial to closely monitor the impact of the platform to business Regulation in this area to ensure unfair B2B contractual terms or practices do not arise in certain sectors. As will the use of out-of-court dispute resolution systems which should demonstrate that they are fast, cheap and easily accessible for SMEs to use.

CONCLUSION

BusinessEurope's response to this consultation is only a first step in the support which we aim to offer to all policy makers throughout this process to incentivise voluntary data sharing. This will take a great amount of holistic policy making to ensure its success, particularly in relation to the setting up of the common European data spaces. This should include monetarised and non-monetarised systems for data sharing. Standardisation could also play a role in making it technically easier. Privacy, IP rights and cyber-security should be protected throughout.

Only then could we conclude, following a review of the common European data spaces and governance framework, whether infrastructure building, standardisation and the clarification of existing law has enabled greater sharing between and within certain industrial sectors before determining whether further data sharing and access solutions are required.