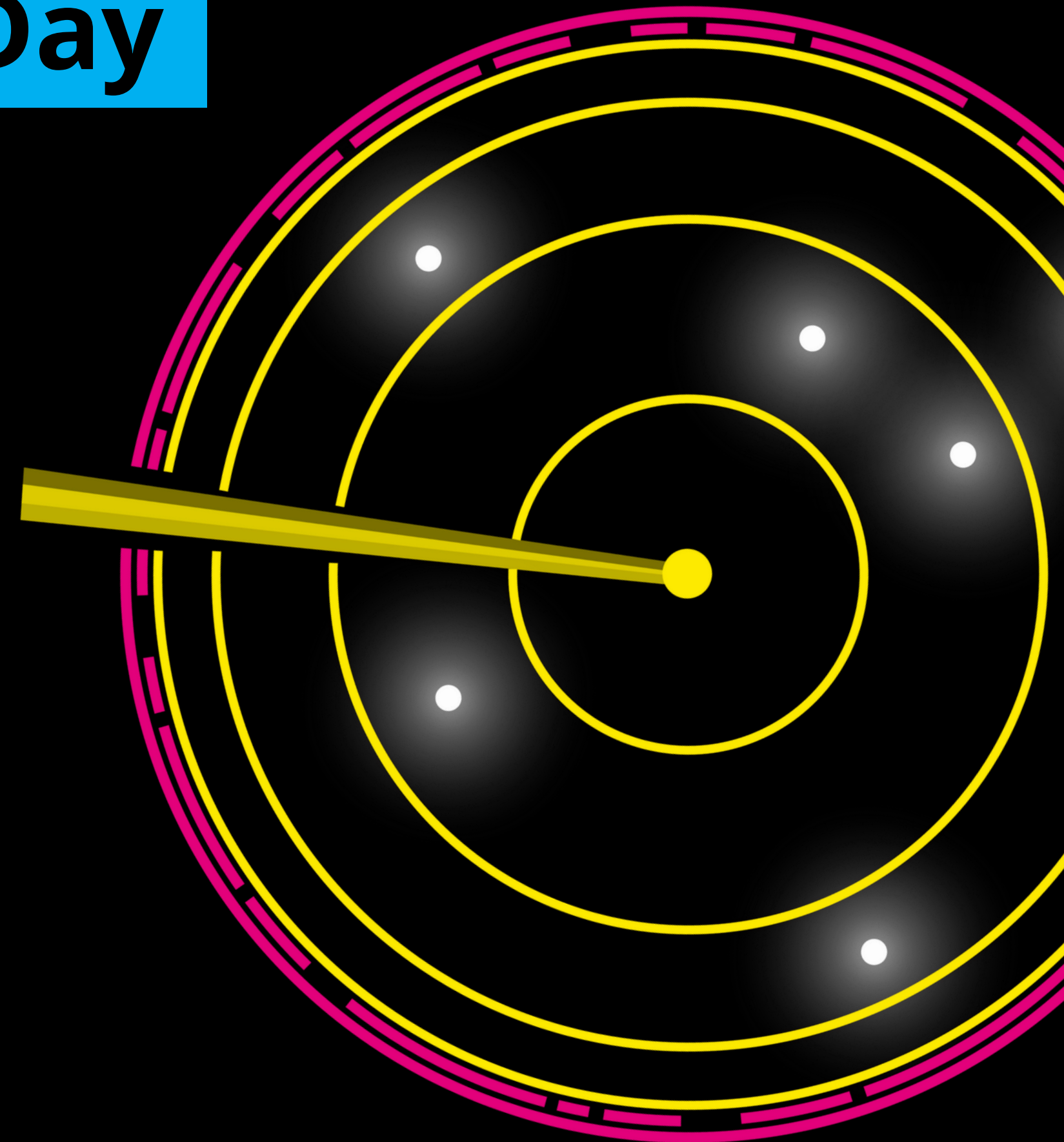


Data Spaces Discovery Day

October 19, 2023 | Vienna

Data Governance Act & the IDS
Legal Framework: Making data
spaces legally compliant

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Data Governance Act & the IDS Legal Framework: Making data spaces legally compliant



Introduction

- *"Making data spaces legally compliant"* is a complex task, considering the following challenges:
 - The new EU regulatory framework for data is increasing,
 - the interplay with existing (EU and national) legislation such as data protection laws, competition laws, or regulations on intellectual property is not quite clear and
 - the legal dimension is only one layer in data spaces that needs to be aligned with the functional and organizational layers.
- Bad news: We will not solve this task today...
- Good news: We are on it, let's discuss some of the topics today!

EU Regulatory Framework - New regulations provided by the European Strategy for Data

Data Governance Act - A new concept for data intermediaries

IDS Legal Framework - Elements of a data space legal framework

EU Regulatory Framework

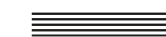
New regulations provided by the European
Strategy for Data

01



EU Regulatory framework

New regulations – Overview



As part of the EU digital strategy and strategy for data the Commission has proposed **new regulations**:

Data acts package

Data Governance Act (DGA)

- » Applicable as of **September 24, 2023**.
- » Reuse of data by public sector bodies; **framework for data intermediation services** + voluntary registration of entities that process data made available for **altruistic purposes**.
- » European Data Innovation Board.

Data Act Proposal (DA-E)

- » **Proposed February 2022**, legislative procedure ongoing. Will become applicable 20 months after the entry into force (20 days after publication).
- » Rules regarding the use of **data generated by Internet of Things (IoT) devices** such as
 - » obligations of developers and manufacturers of products to facilitate the **user's access** to data
 - » facilitating **switching of data processing services**, introducing safeguards, and interoperability standards

Digital Services package

Digital Markets Act (DMA)

- » Entered into force on **May 2, 2023**.
- » Regulating internet corporations/gatekeepers (e.g., social media platforms, search engines)
- » Prohibits practices that make it **difficult for users to use non-gatekeeper providers**

Digital Services Act (DSA)

- » Will enter into force on **February 16, 2024** (some provisions apply earlier)
- » Protection against illegal content and for users' rights. Applies to intermediary services (e.g., internet access providers, cloud services)
- » Regulations on **liability, handling of illegal content**, provision of a notice-and-takedown procedure, and **regulation of online platforms**

AI strategy

AI Act Proposal (AIA-E)

- » **Proposed April 2021**, legislative procedure ongoing (trilogue has begun, adoption expected early 2024, likely transition period: 18-24 months (effect: late 2025/early 2026).
- » EU framework for **regulating AI (risk-based approach)**; applies to providers and users of AI.

EU Regulatory framework

New regulations – DGA and Data Act



According to the Commission the **Data Governance Act (DGA)** and the **Data Act (DA)** are key pillars of the European strategy for data.

While the Data Governance Regulation creates the processes and structures to facilitate data, the Data Act clarifies who can create value from data and under which conditions.

Data Governance Act (DGA)

- » Applicable as of **September 24, 2023**.
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- » **Framework for data intermediation services** and voluntary registration of entities that process data made available for **altruistic purposes**
- » European Data Innovation Board

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Data Governance Act (DGA)

A new concept for data intermediaries



02

Data Governance Act

Introduction



The **Data Governance Act (DGA)** regulates the following **topics**:

- Reuse of public sector data that is subject to certain protections
- Rules for data intermediaries
- Introduction of concept of data altruism
- Creation of a European Data Innovation Board

The **new category of “*data intermediation services*”** introduced by the DGA is likely the **most relevant topic from a data space perspective**.

Data intermediaries under the DGA will function as **neutral third parties** that cannot monetize the data they intermediate (e.g., by selling it to another company or using it to develop their own product based on this data) and will have to comply with **strict requirements to ensure this neutrality** and avoid conflicts of interest.

Data Governance Act



Data intermediation services – Definition (1)

To understand the **definition of “data intermediation services”** under the DGA, Articles 2 (11), 10, and 12 DGA should be read as systematically related and together.



The definition in **Article 2 (11) DGA** contains **different elements** to define a “*data intermediation service*”. Services covered by the DGA are those that aim:

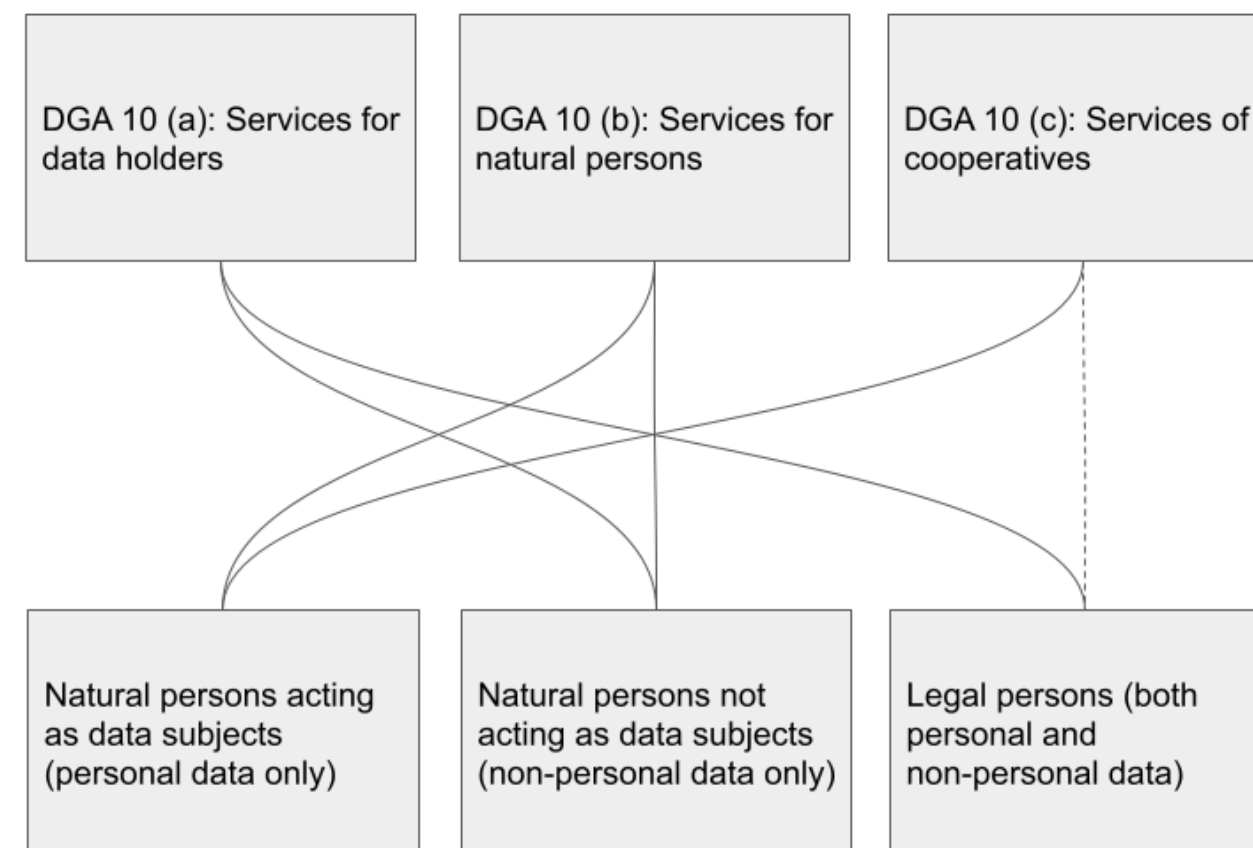
- “to **establish commercial relationships** for the purposes of data sharing”
- “between an **undetermined number** of data subjects/data holders and data users”
- “**through technical, legal or other means.**”

Data Governance Act



Data intermediation services – Definition (2)

Article 10 DGA further describes the data intermediation services subject to the notification procedure and the obligation to comply with **Article 12 DGA**.



Article 12 DGA contains several conditions the providers must comply with, such as

- the data intermediated cannot be used for anything else than making it accessible for data users,
- intermediation services must be provided by a dedicated legal person,
- fair access to intermediary services, including pricing and interoperability requirements.

Data Governance Act



Data intermediation services – Open questions (1)

Even if the definition and the expressed exceptions of “data intermediation services” in the DGA seem to allow a general determination of the relevant services, the **definition of the DGA is broad** and gives room for **interpretation**.

Selected questions (see IDSA Position Paper: Reflections on the DGA and Data intermediaries):

Article 2 (11) vs Article 10 DGA

- Even though Article 10 DGA defines certain categories of “data intermediation services” and therefore seems to serve as an additional specification, its definition is even broader than Article 2 (11) DGA.
- This could lead to the interpretation that the general definition is the sole determining factor for “data intermediation services”. Does that mean that every data intermediary according to Article 2 (11) DGA needs to comply with Article 12 DGA?

Article 2 (11) DGA: “undetermined number of data holders/data users”

- The determination of the requirement of “openness” of the data intermediation services as defined in Article 2 (11) DGA is not clear.
- Should data intermediation services in data spaces that are provided to a limited group of data holder/data users (the participants) only and governed by contractual relationships (e.g., associations, memberships, cooperatives) should be qualified as “closed groups” in the meaning of Article 2 (11) (c) DGA and are therefore out of the scope of the DGA?

Data Governance Act



Data intermediation services – Open questions (2)

General scope and application

- The concept of data intermediaries isn't new which means, that there **already exist different definitions and understandings** of data intermediaries as well as **different business models**.
- For example, the **glossary developed by the Data Spaces Support Centre (DSSC) – like the IDS glossary** - contains a number of different intermediaries that do not necessarily clearly map onto the DGA definition in Article 2 (11) DGA.
- Also the recent "Science for policy" report from the **European Commission's Joint Research Centre** provides a a **wider definition** of "data intermediary" than the legal definition in the DGA.
- The future interplay between existing concepts and rules on data intermediaries and the new DGA rules needs to be clarified to develop the future landscape of data intermediaries in Europe.

IDS Legal Framework



Data intermediation services – IDS intermediaries

From an **IDS perspective** there are different roles relevant for the discussion on intermediation services: The **IDS Reference Architecture Model (RAM)** defines basic roles in a data space in four categories:

- Core Participants,
- **Intermediaries**,
- Software Developers and
- Governance Bodies.

In the **category of the intermediaries**, it distinguishes between

- data intermediaries and
- service intermediaries.

The data intermediaries as described in the RAM are “[...] responsible for the execution of the data exchange on behalf of the Data Owner or User respectively. [...]”, while the Service Provider “[...] is a platform operator providing metadata on services, the services itself (i.e. app including computing time as a trustee), or both.[...]”.

Therefore, the definition of intermediary roles in the IDS RAM and the data intermediaries described in the DGA can **not be clearly mapped**. Also intermediaries in IDS are regulated by applicable policies and the **relationship between the two regimes**, the IDS framework for data intermediaries and the DGA framework need to be further investigated to ensure compliance with the DGA, if applicable (see open questions and IDSA Position Paper).

Data Governance Act

Data intermediation services – Perspective



Further investigation and guidance

- So far there is no specific guidance from the EU on the open questions and to determine the scope of the DGA rules on data intermediaries requires a **case-by-case assessment**. The topic should be further investigated and more guidance from the EU on this is required.
- The **European Data Innovation Board (EDIB)**, instantiated by the DGA, will play a fundamental role in giving further guidance on this topic. Following the EU Commission's approach and the current legislation it will support the EU Commission in issuing guidelines on how to facilitate the development of common European data spaces as well as identifying the relevant standards and interoperability requirements for cross-sector data sharing (see Articles 29 and 30 DGA).

New opportunities

- From a **business perspective**, the impact as well as the potential of the DGA concept for intermediaries should be assessed.
- For data space organizations the role of a "data intermediation services provider recognized in the Union" can be of **strategic interest**. Joining the DGA framework as an EU recognized intermediary means to become officially part of the EU data market infrastructure.
- The concept of EU recognized intermediaries can also be an interesting opportunity considering **inter data spaces interoperability**.
- It can also be used as a **reference model** to improve the internal trust regime by adopting certain requirements of the DGA in data space policies.

Data Governance Act



Data intermediation services – Recent publications

We assume that the “community” will continue to discuss this topic and that we will see **further publications** soon.
To name just a few:

- **IDSA Position Paper:** Reflections on the DGA and Data intermediaries, <https://internationaldataspaces.org/publications/position-papers/>



- **KU Leuven**, White Paper on the Definition of Data Intermediation Services, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4589987
- “Science for policy” report from the **European Commission’s Joint Research Centre (JRC)**, Mapping the landscape of data intermediaries, <https://publications.jrc.ec.europa.eu/repository/handle/JRC133988>

IDS Legal Framework

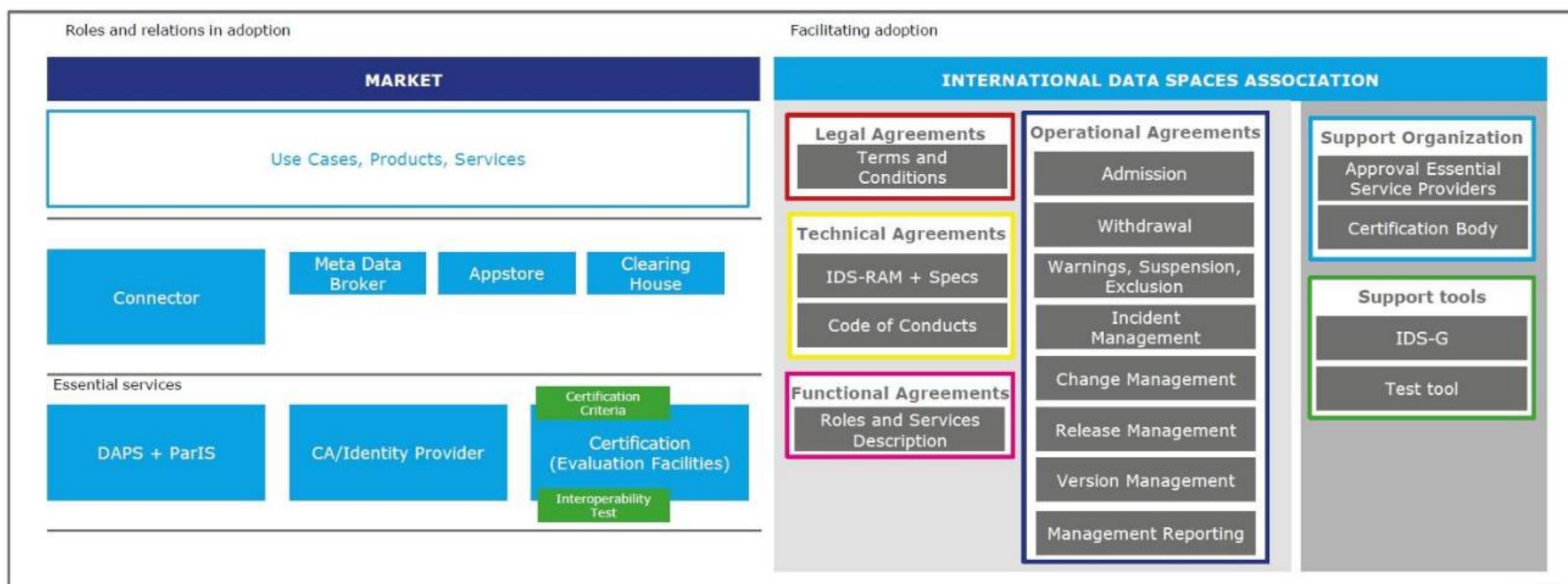
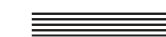
Elements of a data space legal framework



03

IDS Legal Framework

Overview



Agreements documented in rule book

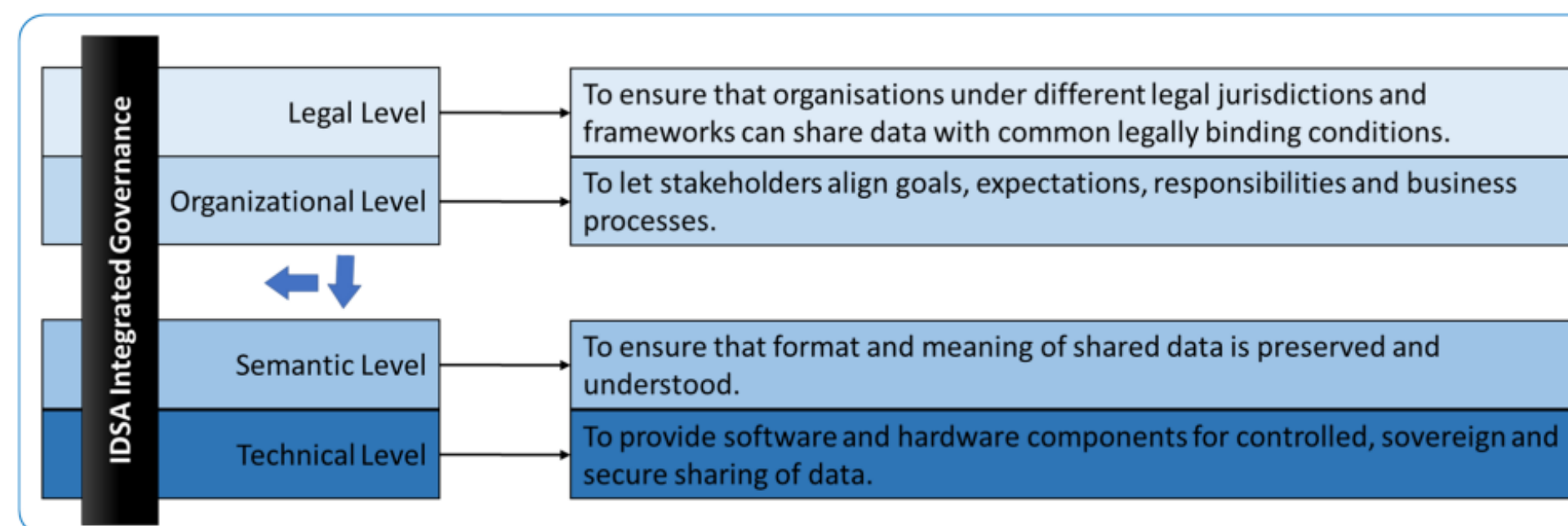
IDS Framework (Source: IDSA Rulebook)

IDS Legal Framework

Interoperability – Key for compliance



- Based on the European Interoperability Framework (EIF) as developed by the European Commission there are **four levels of interoperability**:



IDSA layered functional model as aligned with the European Interoperability Framework <https://internationaldataspaces.org/wp-content/uploads/IDSA-Position-Paper-Governance-for-Data-Space-Instances-Aspects-and-Roles-for-IDS-Stakeholders.pdf>

- According to the National Interoperability Framework Observatory (NIFO) '*legal interoperability is about ensuring that organizations operating under different legal frameworks, policies and strategies are able to work together*'.
- Legal interoperability covers the broader environment of **laws, policies, procedures and cooperation agreements** needed to allow the **seamless exchange of information and reusability of data** between different individuals, organizations and across jurisdictions.

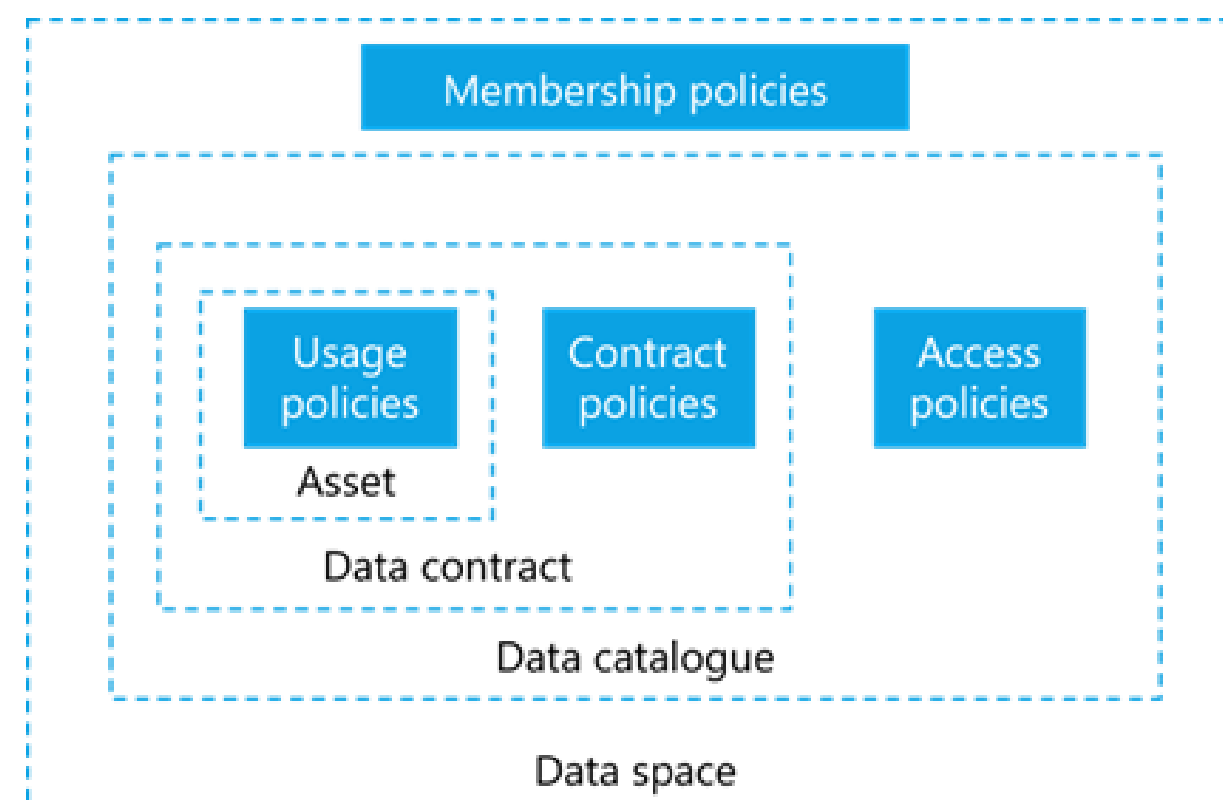
IDS Legal Framework

Legal agreements and policies (1)



As there is no EU or national law on 'data sharing': Data spaces operate based on different types of agreements and policies.

According to the IDSA Rulebook different policies are attached to the data itself and are applied to all participants in a data space as a governed entity.



Different policies in Data Spaces (Source: IDSA Rulebook)

IDS Legal Framework

Legal agreements and policies (2)



To allow a legal framework based on **policies**, the question comes up: **Is a policy a legal agreement? How does a policy become legally binding?**

A policy may be a legal agreement or become legally binding if

- the policy itself contains the essential terms and the parties agree by offer and acceptance (legal agreement) or
- the policy contains technical requirements and is referred to by a legal agreement concluded between the parties.

In both scenarios the content of the policy becomes legally binding and can be used to regulate data usage control and enforce usage restrictions.

That means in conclusions: At some point there will always be a legal agreement between the parties, either based on or involving the relevant policy.

IDS Legal Framework

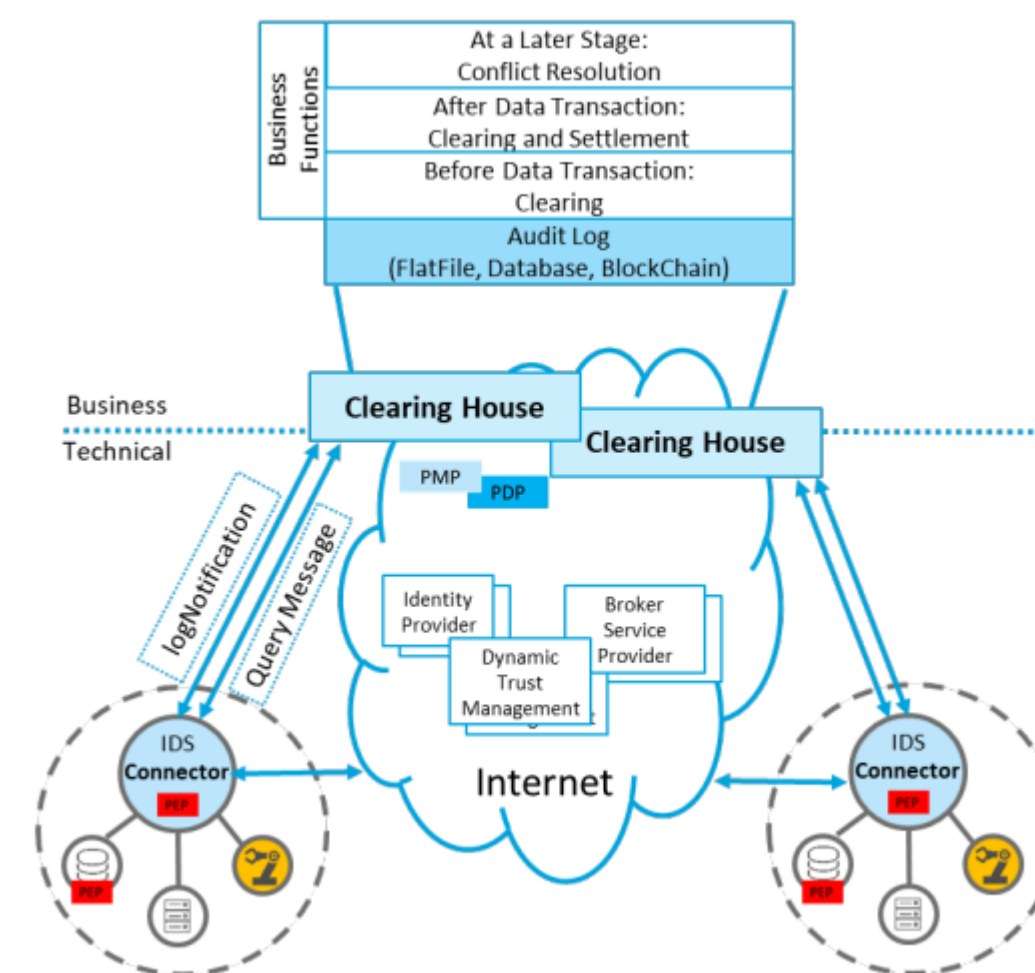
Legal agreements and policies (3)

Compliance requires **monitoring and enforcement**. What are possible governance instruments in a data space to monitor and enforce compliance with policy rules and/or legal agreements?

To help the parties to monitor and ensure compliance with their policies and legal agreements, the role of a neutral intermediary and maybe also mediator can help.

The IDS Clearing House acts as an Intermediary in the IDS ecosystem. This means that the IDS Clearing House mediates between a Data Provider (DP) and a Data Consumer (DC), making sure both parties meet their contractual obligations.

The IDS Clearing House provides two basic functions for all financial and data exchange transactions taking place in the IDS ecosystem: clearing and settlement on the basis of transaction logging.



Logic and functions of the IDS Clearing House (Source: IDSA Whitepaper, Specification: IDS Clearing House)

IDS Legal Framework

IDSA Task Force Legal Framework



- Even though IDSA's focus is on technology and governance, legal topics are on the radar and IDSA has established the IDSA Task Force Legal Framework.
- Quarterly meetings to discuss certain legal topics and current activities
- Focussing on two main activity fields

Activity field I („Public Voice“)

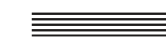
- Creating contact on legal domain and contribution to public discussions / consultations
- Potential outcome: Position papers, impulse papers, articles, social media posts etc.

Activity field II („Tasks & Solutions“)

- Identification and solution of specific tasks related to legal domain.
- Outcome: Support of IDSA working groups and projects, working papers, templates etc.

IDS Legal Framework

IDSA Task Force Legal Framework



- To allow for a focused an efficient outcome on different legal topics, the task force has subgroups.

Compliance,
ethics &
regulatory
framework



- Data Protection, Security, Competition Law; international data sharing
- EU Data Strategy (e.g. DGA, DMA, DSA, DA-E, AI-E)
- Ethics (e.g. ethical assessments and guidelines)

Contracts, legal
interoperability
and data usage
control



- Contractual topics/agreements
- Legal & Tech (e.g. smart contracts, automation)
- Alignment of legal regimes and roles within data spaces

Paused. Can be relaunched in 2024.

IP & Know-How



- Data „ownership“ and derived works
- IP management and patents
- Know-how management & creation of valuable assets

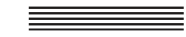
Annex

Legal texts (excerpts) from DGA

04

Data Governance Act

Legal texts (excerpts)



Article 2 DGA

(11) '**data intermediation service**' means a service which aims to establish commercial relationships for the purposes of data sharing between an undetermined number of data subjects and data holders on the one hand and data users on the other, through technical, legal or other means, including for the purpose of exercising the rights of data subjects in relation to personal data, excluding at least the following:

(a) services that obtain data from data holders and aggregate, enrich or transform the data for the purpose of adding substantial value to it and license the use of the resulting data to data users, without establishing a commercial relationship between data holders and data users;

(b) services that focus on the intermediation of copyright-protected content;

(c) services that are exclusively used by one data holder in order to enable the use of the data held by that data holder, or that are used by multiple legal persons in a closed group, including supplier or customer relationships or collaborations established by contract, in particular those that have as a main objective to ensure the functionalities of objects and devices connected to the Internet of Things;

(d) data sharing services offered by public sector bodies that do not aim to establish commercial relationships;

(7) '**data subject**' means data subject as referred to in Article 4, point (1), of Regulation (EU) 2016/679;

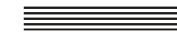
(8) '**data holder**' means a legal person, including public sector bodies and international organisations, or a natural person who is not a data subject with respect to the specific data in question, which, in accordance with applicable Union or national law, has the right to grant access to or to share certain personal data or non-personal data;

(9) '**data user**' means a natural or legal person who has lawful access to certain personal or non-personal data and has the right, including under Regulation (EU) 2016/679 in the case of personal data, to use that data for commercial or non-commercial purposes;

(10) '**data sharing**' means the provision of data by a data subject or a data holder to a data user for the purpose of the joint or individual use of such data, based on voluntary agreements or Union or national law, directly or through an intermediary, for example under open or commercial licences subject to a fee or free of charge;

Data Governance Act

Legal texts (excerpts)



Article 10 DGA

“The provision of the following data intermediation services shall comply with Article 12 and shall be subject to a notification procedure:

- (a) intermediation services between data holders and potential data users, including making available the technical or other means to enable such services; those services may include **bilateral or multilateral exchanges** of data or the **creation of platforms or databases** enabling the exchange or joint use of data, as well as the **establishment of other specific infrastructure** for the interconnection of data holders with data users;
- (b) intermediation services **between data subjects** that seek to make their personal data available or **natural persons** that seek to make non-personal data available, and potential data users, including making available the technical or other means to enable such services, and in particular **enabling the exercise of the data subjects’ rights** provided in Regulation (EU) 2016/679 [= GDPR];
- (c) **services of data cooperatives** (further defined in Art. 2 (15) as “data intermediation services offered by an organisational structure constituted by data subjects, one-person undertakings or SMEs who are members of that structure, having as its main objectives to support its members in the exercise of their rights with respect to certain data, including with regard to making informed choices before they consent to data processing, to exchange views on data processing purposes and conditions that would best represent the interests of its members in relation to their data, and to negotiate terms and conditions for data processing on behalf of its members before giving permission to the processing of non-personal data or before they consent to the processing of personal data”).

Data Governance Act

Legal texts (excerpts)



Article 12 DGA

Below are listed and summarised in plain language the most relevant conditions included (for the full legal text see Article 12 DGA):

- (a) The data intermediated cannot be used for anything else than making it accessible for data users.
- (a) Intermediation services must be provided by a dedicated legal person.
- (c) Data about intermediation service use can only be used for developing the intermediary service itself.
- (c) Data about intermediation service use must be provided for data holders (but not data subject or data users or other intermediaries) if requested.
- (d) The format of the data intermediated can only be converted
 - to enhance interoperability or ensure harmonisation with standards, or
 - by request of the data user (but not data subject or data holder or another intermediary), or
 - when required by EU regulation, and
 - when the data subject or data holder has not opted out of conversion.
- (e) Additional tools and services (e.g., temporary storage, curation, conversion, anonymisation, and pseudonymisation) can be provided by the dedicated legal person only
 - to data subjects and data holders (but not data users or other intermediaries), and
 - for the purpose of facilitating the data exchange, and
 - with the explicit request by or approval of the data subject or data holder.
- (f) Access to intermediary services must be fair including pricing which (b) cannot depend on whether or how much the service user also uses other services by the intermediary or its affiliates.
- (i) Intermediation services must be interoperable with other intermediary services.
- (m) Intermediation services for data subjects must act in those data subjects' best interest (including information and advice regarding consents).
- (n) Intermediation services that support obtaining consents from data subjects or permissions from data holders must include tools both to grant and revoke them.