AmCham EU
SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Our position

Data Governance Act

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €3 trillion in 2020, directly supports more than 4.8 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

American Chamber of Commerce to the European Union
Speaking for American business in Europe

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Executive summary

The European Commission's Data Governance Act (DGA) seeks to capitalise on Europe's ambition to develop a better culture of data sharing and for Europe's data economy to boost economic growth, competitiveness, innovation, job creation and societal progress. In order fulfil this ambition, AmCham EU puts forward a number of recommendations to further enhance the legislative proposal.

These recommendations touch upon the aspects of **international access; data sharing services; re-use of public sector data; data altruism**; and the **European Data Innovation Board (EDIB)**.

Recommendations:	
International Access	• Provide legal clarity around the adequacy decisions outlined in Article 30 of the DGA, taking into account existing long-standing international agreements and treaties regarding IP. • More clearly define the types of 'highly sensitive' data that could be subjected to localisation requirements in Article 5 of the DGA.
Data sharing services	• Provide a clear definition of 'data intermediary' data sharing services' in Article 2 of Chapter III, clarifying corresponding rules. • Avoid burdensome and disproportionate notification procedures in the context of Article 9(1)(a).
Re-use of public sector data	• Limit verification and prohibition of processing of data by re-users to cases of potential threats to national security or disclosure of commercially confidential data. • Redefine 'Commercially confidential data' as 'data protected by trade secrets, confidentiality obligations and any other information the unauthorised disclosure of which would harm legitimate commercial interests of the business'. • Contractual agreements between data licensors and public sector bodies when it comes to the terms controlling the re-use of their data by public sector licensees should not be impacted by DGA. • Prevent the re-use of commercially confidential data that cannot be properly protected by any of the proposed measures in the DGA.
Data altruism	• Further clarify concept of data altruism and ensure consistency with legal bases provided in GDPR.
European Data Innovation Board (EDIB)	• The EDIB should use existing international standards as a reference point for its work. • The EDIB's oversight power over the implementation of the DGA should be strengthened. • Ensure consistent approaches between EDPB and EDIB in interpreting personal data concepts.

Introduction

The American Chamber of Commerce to the European Union (AmCham EU) shares the European Commission's ambition to create a European single market for data. In this context, AmCham EU welcomes the objectives of the Data Governance Act (DGA) to increase the availability of data for (re)-use, and the creation of frameworks to increase trust in data sharing.

We believe **that the DGA is an important opportunity to develop a better culture of data sharing in Europe**, which will ultimately contribute to boosting Europe's data economy, and help drive the type of data collaborations necessary to support the EU's artificial intelligence and digital transformation objectives. As rightly underlined by the European Commission, data is an essential resource for economic growth, competitiveness, innovation, job creation and societal progress. Ensuring that the power of data can be harnessed, and **that data can be shared and re-used, is more important than ever,** particularly as Europe looks to recover from the COVID-19 crisis, digitise its industries, and compete globally.

The DGA can also support the roll-out of the sectoral European data spaces, and should help create the necessary conditions for such data spaces to become enabling environments where participants from the public and the private sectors feel empowered to share and re-use data. In providing greater legal clarity and developing clear governance mechanisms that foster open and inclusive approaches and access to the best technologies and widest range of partners, this will help encourage responsible and values-driven data sharing.

To ensure the European Commission's ambitions can become a reality, AmCham EU believes that some aspects of the proposed regulation could be clarified further. It will be important of course to ensure that the proposal achieves its stated goal of increasing data sharing in Europe, rather than unintentionally making collaboration more difficult and creating unnecessary confusion on the relationship with current legal frameworks. Below are some suggestions to prevent such unintended consequences and help ensure the capacity of the EU's digital ecosystem and businesses to innovate.

International access (Article 30)

International data flows are indispensable for European companies' competitiveness, as they operate in a connected environment that goes beyond the EU's borders. Unhindered data flows can have great benefits for Europe's economic growth and innovation: they can enhance citizens' education, work, healthcare, and overall well-being.

'Much of contemporary trade in services would not exist without cross-border data flows. Services trade has been the most dynamic component of global exchange for the past decade, expanding at a rate of 5.4% per year on average.'

World Economic Forum[1]

Moreover, the benefits of greater data access and sharing that the Commission wishes to achieve depend significantly on cross-border collaboration and access to the widest range of tools and partners. The Commission has been correct in identifying improved data sharing and re-use as a key tool to increase the region's digital

[1] World Economic Forum, 'Exploring International Data Flow Governance Platform for Shaping the Future of Trade and Global Economic Interdependence', 2019, viewed on 5 May 2021, http://www3.weforum.org/docs/WEF_Trade_Policy_Data_Flows_Report.pdf

competitiveness. Restricting any access, however, to working with international partners, researchers, or the tools they provide would handicap the potential benefits from the start. As such, **the DGA should contribute to enabling – and not restricting – the free flow of data**. Companies and suppliers in Europe must be able to rely on access to the best services available and have the ability to move data securely across borders to maintain operations, reach customers, and compete in the global economy. Localisation policies, whether deliberate or unintentional, could undermine a number of the key aims of the European Strategy for Data, limiting the innovation targets therein.

Against this background, **legal clarity is needed on the '*adequacy decisions*' outlined in Article 30**, and that may be contemplated under the DGA with respect to IP and trade secrets protection laws of third countries. By setting additional rules for transfer of all types of non-personal data to third countries, the provisions under Article 30 appear to set up a parallel compliance regime comparable to those applicable to personal data in Chapter V of the General Data Protection Regulation (GDPR). Before creating new requirements, the **European Commission should take into account long-standing international agreements and treaties regarding IP** that have brought together a number of like-minded countries (such as WIPO, TRIPs and the Berne Convention). We believe that these texts already provide adequate IP protection arrangements, and do not require additional decisions by the European Commission under the DGA. Attention should also be given to more clearly defining the specific types of 'highly sensitive' data and use cases where public authorities could potentially introduce localisation requirements (Article 5).

Recommendations:
Provide legal clarity around the adequacy decisions outlined in Article 30 of the DGA, taking into account existing long-standing international agreements and treaties regarding IP.
More clearly define the types of 'highly sensitive' data that could be subjected to localisation requirements in Article 5 of the DGA.

Requirements applicable to data sharing services (Chapter III)

Data owners and users will form the heart of the common and sectoral data spaces, and their activities, current and future, will determine the success of creating a more 'open data' environment in the EU. Data owners need certainty that their data is handled in a responsible manner, while data users need legal clarity for access and re-use of that data. The European Commission's proposal to create neutral data intermediaries is welcome, and could serve as an effective model in certain use cases. However, to truly create trust in data sharing, **more clarity is needed on the scope of the data intermediaries impacted** by the provisions outlined in Chapter III. As it currently stands, **it is not clear whether the DGA will create rules for new data intermediary services or apply new rules to already established data-based business models in Europe**.

There is already a significant amount of successful data sharing initiatives occurring in Europe; many existing business-to-business (B2B) and business-to-government (B2G) data collaborations are already providing important examples of the benefits that more open approaches to data can achieve. **The DGA should not disrupt functioning sharing models** – indeed, the proposal's goal to increase their popularity and the benefits they bring – as a result of insufficiently clear provisions on the scope of data sharing services covered by the Regulation. Contractual arrangements in a B2B context, and proprietary platforms and software tools should be more clearly left out-of-scope.

The DGA can be an important contribution to further incentivising data sharing in Europe and should thus avoid introducing additional burdensome compliance requirements, which may very well be different for each Member State. AmCham EU recalls that many successful models of B2B data-sharing, often based on contractual arrangements, exist in Europe and warns again against the negative impact that the new provisions could have.

There currently is a risk that this **lack of clarity could effectively disincentivise existing data collaborations**. Greater certainty could be achieved through the alignment of the relevant recital (22) and operative articles (Chapter III). More specifically, **adding a clear definition of '*data intermediary*' in Article 2** and listing the types of services that are out-of-scope into the body of the regulation, as well as in the recital, would provide much needed clarity.

Moreover, in cases where a data intermediary entity uses technologies by a third-party technology provider, it is also not clear whether the technology provider must also notify that technology when it enables the data intermediary '*through technical or other means'* to provide its intermediation services (Article 9(1)(a)). As it stands, the language in the text is too broad and appears to be inconsistent with Recital 22: in fact, it could include anything used by an intermediary to provide its services and be subject to notification. We caution against imposing disproportionate and burdensome notification procedures on administrative bodies and businesses alike.

Recommendations:
Provide a clear definition of 'data intermediary'/'data sharing services' in Article 2 of Chapter III, clarifying corresponding rules.
Avoid burdensome and disproportionate notification procedures in the context of Article 9(1)(a).

Re-use of certain categories of protected data held by public sector bodies (Chapter II)

AmCham EU welcomes the provisions outlined in Chapter II of the DGA, insofar as they encourage public authorities to **make available a broader range of data**, not covered by the Open Data (PSI) Directive. To make the most of the potential that such data holds, the **mechanisms for access and re-use of public sector data should be simple**, time efficient and not require companies to conduct burdensome investigative work. This can be achieved by ensuring that this data is made available in machine-readable, interoperable format, through open APIs (Application Programming Interfaces). However, the current wording of Article 5(1) regarding the conditions for re-use of data held by the public sector causes concerns, as it suggests that each Member State could have its own criteria to allow data re-use, leading to complex, lengthy, and fragmented processes.

The provision included in Article 5(5) enabling public sector bodies to **verify the results of processing of data undertaken by the re-user**, and to **potentially prohibit the use of these results** appears problematic, because it remains very broad. As it currently is written, this provision could **have a chilling effect on research and innovation in Europe**. We would recommend that the grounds under which such verification and prohibition be undertaken be clarified and limited to threats to national security or to the potential disclosure of commercially confidential data. Similarly, the possibility for public sector bodies to impose obligations to access and re-use the data within a secure processing environment (remote or on-site) provided and controlled by them may be perceived by certain re-users as an additional hurdle and could hinder the re-use of this data.

Recommendation:
Limit verification and prohibition of processing of data by re-users to cases of potential threats to national security or disclosure of commercially confidential data.

AmCham EU would also welcome **more clarity as to the scope of '*non-personal data'* held by public sector bodies that can be made available under Chapter II**, as this could impact existing and future B2G data-sharing activities. Should data licensed to government bodies by commercial actors be in scope of the Regulation,

collaboration between the public and private sector could be jeopardised. A risk could emerge that sensitive commercial information provided by private companies be made available to third parties or competitors, decreasing the incentive for future B2G sharing initiatives. We would stress that **existing contractual arrangements between private entities and public stakeholders should continue to be preserved** and that **confidentiality protections should not be undermined** by these new provisions. Any efforts to enhance the availability of data for use and re-use should be with full respect to the rights of third parties, namely intellectual property rights.

Recommendations:
'*Commercially confidential data*' should rather be defined as '*data protected by trade secrets, confidentiality obligations and any other information the unauthorised disclosure of which would harm legitimate commercial interests of the business'* in the relevant Article 4 and recital 7.
Additional language clarifying that the DGA should not overrule existing contractual agreements between public sector bodies and businesses should be added in recital 9. More concretely, contractual agreements between data licensors and public sector bodies when it comes to the terms controlling the re-use of their data by public sector licensees should not be impacted by the rules set out in the DGA.
Article 5 should be amended to reflect the need to prevent the re-use of commercially confidential data that cannot be properly protected by any of the proposed measures.

In addition, **a more specific definition of what constitutes '*highly sensitive non-personal data'* held by public sector bodies**, outlined in Article 5(11), is needed, as we believe that public bodies should not have the authority to allow re-use or transfer of highly sensitive commercial data subject to the rights of others. Given the broad types of data in scope of this regulation, covering both personal data currently regulated by the GDPR and non-personal data, **clarity on the role of the respective regulators will be essential to avoid overlap and confusion**. This will help reduce the risk of creating unnecessary burdens on firms and especially SMEs seeking to comply with the DGA.

Finally, the **interplay between the DGA, the GDPR and the Regulation on the free-flow of non-personal data** needs to be clarified, so as to ensure seamless application and full respect of existing European law. This is particularly important in the context of preventing de facto data localisation requirements that would go against the proposal's objectives of promoting greater data sharing and collaboration in Europe.

Data altruism (Chapter IV)

AmCham EU supports the possibility for individuals to proactively give consent for their data to be used for general '*interest purposes'*, while guaranteeing full protection of their personal data and privacy. However, the current text raises the **question whether for-profit organisations could access the data collected by '*recognised data altruism organisations'***. Many of the breakthroughs made possible during the COVID-19 pandemic were the result of public-private partnerships, highlighting the need for this issue to be further clarified. In this respect, it is also important to make sure that the **definition of data altruism does not undermine the existing legal bases and exemptions under GDPR**.

Recommendation:
Further clarify concept of data altruism and ensure consistency with legal bases provided in GDPR.

European Data Innovation Board (Chapter VI)

Considering the standardisation role that this new body will serve, we recommend that the **European Data Innovation Board (EDIB) first uses and references existing international standards**. Close cooperation with European and international standardisation bodies and consortia is also necessary to ensure global alignment on the ongoing work in this area. In addition, to avoid national fragmentation, we recommend that the Board's oversight power over the implementation of the Regulation, in particular regarding the designation of competent authorities, be strengthened. The role that industry and businesses will play in the success of the common and sectoral data spaces, **industry representation on the Board and formal exchanges between the Board and business representatives should be guaranteed.** Finally, the EDPB and EDIB need to have consistent approaches to interpreting personal data concepts in order to provide legal certainty to organisations and facilitate trust in the data sharing environment.

Recommendations:
The EDIB should use existing international standards as a reference point for its work.
The EDIB's oversight power over the implementation of the DGA should be strengthened.
Ensure consistent approaches between EDPB and EDIB in interpreting personal data concepts.

Final remarks

AmCham EU and our members are committed to continuing the dialogue with policymakers and stakeholders to jointly develop mechanisms to enable data sharing across Europe in ways that are in line with EU laws and values, while allowing effective data re-use.