

8 February 2021

DATA GOVERNANCE ACT CONSULTATION

JBCE's contribution

(1) Introduction

- (1) The Japan Business Council in Europe (JBCE) supports the European Commission's efforts to create a trusted and interoperable data sharing environment in the EU and congratulates the Commission on its proposal for a Regulation on European Data Governance (Data Governance Act).
- (2) JBCE welcomes the general idea of Data Governance Act (DGA) which sets ambitious goals for creating trust in data intermediaries and strengthens data-sharing mechanisms across the EU.
- (3) We believe that DGA could "increase trust in data sharing, length mechanisms that increase data availability" and these objectives are in line with the aim of Data Free Flow with Trust (DFFT) which was proposed by the Japanese Government. We also welcome the EU's efforts to expand data sharing and so-called "Big Data" from each Member States to the European Single Market, as these will accelerate innovation and digital transformation in Europe.
- (4) In order to promote data flows and sharing with trust and boost innovation in Europe and globally, it is important for the EU to establish a "a new way of data governance as an alternative to the current platform model" with cooperation and harmonization with other countries including Japan, which shares the same values and challenges regarding the digital transformation. We therefore strongly recommend both the EU and Japan to begin a dialogue for future cooperation to avoid any legislative gaps which could hinder the free flow of data between these regions and to ensure interoperability and fair business environments in both regions.
- (5) Whether the DGA will become an efficient instrument with a true impact will very much depend on how the DGA relates to other proposed EU legislation (or existing EU legislation), such as the Digital Market Act (DMA), the Data Act, specific measures proposed to create European data spaces, antitrust reform efforts.
- (6) JBCE would like to highlight the following points for the European Commission's consideration.

(2) Chapter I: General Provisions

- (1) **[Art. 1. Subject Matter and Scope, Art 2. Definitions, Art. 9. Providers of data sharing services (1) and recital (22) (23)]**: One of the objectives of the regulation is to identify/clarify the role of Data Sharing Service Providers and setting up a respective regulatory framework. Although Recital 22 explains which services are not included in the scope, a clear definition including its exceptions should be defined in the body of the text, so that we can understand which data sharing services exactly fall

under the Data Governance Act. The proposal would benefit from a data sharing service provider definition in Article 2, as this would bring clarity regarding which entities are subject to notification procedures under Article 9(1)(a)). The definition of “data sharing services” is unclear. Also, it is not clear which existing businesses are in the scope. Since sharing of data is still at an early stage, the definition of the actual scope of the DGA shouldn't go too far and mutual/existing arrangements between companies should potentially therefore stay out of the scope. We request to provide more detailed definitions and explanations, such as how to assess a service to see if it is covered by this article. This definition will lead to discussions on how to divide the areas of competition (data sharing based on contractual arrangement)/cooperation (data sharing via ‘data sharing services’) in the “data-sharing market”. Therefore, we believe that careful consideration should be given to the definition.

- (2) In addition to that, JBCE believes that a “highly sensitive data” definition should be introduced to set preconditions for the delegated acts on such data transfers to third countries.

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

- (1) **[Art.5 Conditions for re-use (3)]**: We understand that an obligation imposed to companies who re-use data is left to the Member States. It would help to identify a set of rules in the Act to prevent the European Single market from being fragmented and forcing companies to respond differently in each member country which will add additional costs and certain risks.
- (2) **[Art.5 Conditions for re-use (9) (10)]**: JBCE supports the need to protect commercially sensitive data of non-personal nature and data representing content protected by intellectual property rights from unlawful access. Data exchanges will not only have to be secure, trustful and compliant with regulations but in order to encourage the data sharing the respective actors would certainly appreciate a certain kind of flexibility in the contractual and licensing terms of data transactions. International data flows are vital for businesses to compete globally. More clarity is needed on how the proposed framework will work in practice to have a transparent, non-discriminatory and aligned with WTO rules data transfers between the EU and third countries. JBCE would welcome clarification on what constitutes equivalent protection measures, so that data sharing service providers could quickly assess and understand if data flows to third countries are lawful under the Data Governance Act. We strongly request the EU (and Japanese government) to hold concrete dialogues on this issue in fora such as EPA regulatory cooperation framework as soon as possible, without waiting for the adoption of the law.
- (3) **[Art.5 Conditions for re-use (11)]**: If “highly sensitive” data are defined separately in the relevant laws, it may cause risks of inconsistency and confusion in the market. In order to avoid such market risks and operating costs associated with them, “highly sensitive” data should be defined in the Act.

(4) Chapter III Requirements applicable to data sharing services

- (1) **[Purpose & Definitions]:** The purpose of the Chapter III (Notification of Data Sharing Service Providers) should be explained. Then, the scope should be clarified and be limited to the minimum necessary in light of the purpose of Chapter III.
- (2) **[Art. 11. Conditions for providing data sharing services]:** The requirement in Article 11(1) for businesses to divide data sharing and other data monetisation activities into separate legal entities would create a significant administrative burden, require additional investments and will not be sustainable in the long term. A significant part of data sharing service providers' revenue comes from further monetisation of data, e.g. by providing analysis of the transmitted data, but not the data-sharing service itself. This means that such provision would significantly harm data sharing service providers and might in the future even decrease data sharing options. There is a possibility to end up in a situation where no raw data sharing options will be available, as companies will provide only analytics due to the incentives to provide data sharing services. Data sharing should rely on interoperability and international standards¹ to scale-up to the international data sharing with likeminded countries, including Japan.²

(5) Chapter IV Data altruism

- (1) We support the direction that the Commission has set.

(6) Chapter VI European Data Innovation Board

- (1) In order to achieve its objectives in developing a consistent practice for data re-use, data intermediaries and data altruism entities in Europe it is important that industry stakeholders from diverse data economy ecosystems would have permanent seats in European Data Innovation Board and regularly participate in a formal setting of its activities.

About JBCE

Founded in 1999, the Japan Business Council in Europe (JBCE) is a leading European organization representing the interests of about 90 multinational companies of Japanese parentage active in Europe. Our members operate across a wide range of sectors, including information and communication technology, electronics, chemicals, automotive, machinery, wholesale trade, precision instruments, pharmaceutical, textiles and glass products.

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¹ <https://standards.ieee.org/project/3800.html>

² For example in Japan, the "Data Trading Alliance (DTA)" defines data trading market operators to build a fair, transparent and neutral data sharing market.