

# The regulation of data spaces under the EU Data Strategy: towards the ‘act-ification’ of the 5th European freedom for data?

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Data, both personal and non-personal, is necessary for the development of a data-driven digital economy; while generating datasets can be costly, making existing ones available by sharing them can be a sensible alternative to pursue. But how exactly can this take place? The current landscape around databases is one of fragmentation and lack of interconnection, with US-based bigtech companies dominating the scene. In this sense, data spaces have been proposed in the 2020 EU Data Strategy as the necessary infrastructure to enable an EU flourishing digital economy.

Certain EU lawmakers have proclaimed the emergence of a 5th European freedom relating to data, information, and knowledge flows, applicable to the European single market. It would be enshrined alongside the traditional freedoms for persons, goods, services, and capital flows.

While the catalogue of data-related rules is expanding, particularly through what some scholars have called ‘act-ification’, alongside ‘GDPR mimesis’ and ‘EU law brutality’, data spaces, despite their supposed key role, remain substantially in the regulatory shadows.

Therefore, this contribution will explore what are data spaces from a regulatory perspective by tracing their policy origins and current reception in existing legislation. By doing so, we will try to answer whether the EU lawmaker is effectively consolidating a 5th European freedom: the free flow of information.

**Keywords:** data spaces; free flow of information; data protection, digital single market, data strategy, European Union

## 1. Making (personal) data available in a disconnected and fragmented EU digital economy

Information plays a fundamental role in the development of the digital economy.<sup>1</sup> The EU has acknowledged this in different policy documents, regulatory developments, and enforcement actions. However, the current EU landscape around databases is one of fragmentation and lack of interconnection.<sup>2</sup>

The digital economy is characterized by having each participant seeking to retain as much data as possible to benefit from the data-network-activity (DNA) effect.<sup>3</sup> Having data allows to offer better products and services, therefore leading towards a larger network of users, which in turn actively use them and, consequently, generate more data, resulting in a repetition of this cycle. This also has led certain digital market participants to benefit from a 'first-mover advantage',<sup>4</sup> that helped them consolidate true digital monopolies. There is an abundance of examples on this: from Amazon in the marketplace sector to Meta in the social media industry, all of these tech companies have accumulated a vast amount of information that perpetuates their dominant position. Social scientists, such as Zuboff, have explored this issue under names such as 'surveillance capitalism'.<sup>5</sup>

Currently, the US and China dominate information and communication technologies (ICT),<sup>6</sup> particularly in the field of big data, which is an enabler for the development of AI solutions.<sup>7</sup> As a response, the EU has launched a barrage of policy documents and regulatory instruments to secure a place in the digital economy. While certain pieces of legislation have been successful in this, particularly in its extraterritorial influence under the 'Brussels Effect',<sup>8</sup> the EU is still lagging behind its competitors.<sup>9</sup>

The EU strategy for the digital economy is one based around the free flow of information, directly challenging current practices, particularly from big tech companies, that tend to accumulate, and profit, from owning massive sets of information and are not in the obligation to disclose them to competitors. For example, Meta operates a considerable number of databases fuelled by its different 'businesses' -from Facebook to WhatsApp including Instagram or others- but the degree to which such datasets are available to outside parties is limited to very few venues, such as developers' APIs, and constrained by tight and restrictive terms of use. On the other hand, there is a political decision that seeks to break up government dominance over datasets and foster an exchange of information with the private sector based in trust over a respectful use of such data, in contrast to Chinese approaches to such issue.<sup>10</sup>

From its inception in the ashes of WW2, the European Union project evolved extensively from simply a common market for coal and iron,<sup>11</sup> to setting the stage for an integrated Digital Single Market.<sup>12</sup> As part of this economic integration process, the EU has consecrated four freedoms that compose the core of its single market: free movement of goods; free movement of capital; freedom to establish and provide services; and the free movement of people.<sup>13</sup> However, digitalization has, both slowly and in quick bursts, transformed the economy. In this respect, it is possible to wonder if information -personal and non-personal data- should also enjoy such freedom within the single market. In this respect, the purpose of this article is to explore how is the EU's current policy strategies and regulatory efforts are giving way to a new EU freedom: the freedom of data movement.

This 5<sup>th</sup> freedom, as will be explored in this contribution, sits in a very particular spot between different fundamental rights, such as the right to the protection of personal data and the right to conduct a business, but also of different stakeholders, from data subjects to companies. Through our analysis, it will be explored whether the EU has focused on putting people at the forefront of these developments or whether economic progress has been privileged at all cost.<sup>14</sup>

From a methodological point of view, we build upon the work of De Hert and Papakonstantinou, who have analysed recent regulatory approaches to digital technologies and have identified three main trends: "act-ification", "GDPR mimesis" and "EU law brutality".<sup>15</sup> While each one of these phenomena are relevant for our analysis, we shall take the first approximation -act-ification- to explore how this new 5<sup>th</sup> freedom has been incorporated into the EU legal framework. From the right to data portability in the General Data Protection Regulation (GDPR)<sup>16</sup> to the regulation of data intermediation services, each one of this Regulations have taken one step forward in the configuration of this 5<sup>th</sup> freedom.

<sup>1</sup> OECD, 'OECD Digital Economy Outlook 2020' <<https://www.oecd-ilibrary.org/content/publication/bb167041-en>>.

<sup>2</sup> 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Strategy for Data' (European Commission 2020) COM(2020) 66 final 6.

<sup>3</sup> David Bassens and Reijer Hendrikse, 'Asserting Europe's Technological Sovereignty amid American Platform Finance: Countering Financial Sector Dependence on Big Tech?' (2022) 97 Political Geography 102648, 2.

<sup>4</sup> *ibid* 3.

<sup>5</sup> Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Profile Books 2019).

<sup>6</sup> Edoardo Celeste, 'Digital Sovereignty in the EU: Challenges and Future Perspectives' in Federico Fabbrini, Edoardo Celeste and John Quinn (eds), *Data Protection Beyond Borders: Transatlantic Perspectives on Extraterritoriality and Sovereignty* (Hart Publishing 2020).

<sup>7</sup> Daniel E O'Leary, 'Artificial Intelligence and Big Data' (2013) 28 IEEE Intelligent Systems 96.

<sup>8</sup> Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

<sup>9</sup> 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Strategy for Data' (n 2) 3.

<sup>10</sup> Celeste (n 6).

<sup>11</sup> Ian Ward, *A Critical Introduction to European Law* (3rd edition, Cambridge University Press 2009) 9.

<sup>12</sup> Andrej Savin, *EU Internet Law* (Edward Elgar Publishing 2020) 23–27.

<sup>13</sup> Ward (n 11) 13, 116; Koen Lenaerts and Piet Van Nuffel, *EU Constitutional Law* (Oxford University Press 2021) 153–158.

<sup>14</sup> Aída Ponce del Castillo, 'Europe's Digital Agenda: People-Centric, Data-Centric or Both?', *Social policy in the European Union: state of play 2021. Re-emerging social ambitions as the EU recovers from the pandemic* (European Trade Union Institute and European Social Observatory 2022).

<sup>15</sup> Vagelis Papakonstantinou and Paul De Hert, 'The Regulation of Digital Technologies in the EU: The Law-Making Phenomena of "Act-ification", "GDPR Mimesis" and "EU Law Brutality"' (2022) 2022 Technology and Regulation 48.

<sup>16</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) OJ L 119, 4.5.2016, p. 1–88

As such, this paper is structured as follows. Section 2 will frame why ensuring free data flows is key for the EU economy. Section 3 shall attempt to define what is a data space. Section 4 will go through different data-related Regulations that contribute to the development of data spaces and, consequently, of this new 5<sup>th</sup> freedom. Finally, Section 5 will provide some closing remarks and point out future research paths.

## 2. Ensuring the free flow of information within the Digital Single Market

Both emerging and industrialized countries have moved towards a data-driven economy;<sup>17</sup> the former to leap over the previous gap with the so-called developed world and the latter to pursue further economic growth. In any case, the availability of data is necessary to achieve these objectives. However, the means to reach this goal are just as varied as jurisdictions and legal regime can be identified.<sup>18</sup>

As mentioned above, the focus of this analysis will be on EU rules. The reason for this is that the EU, as a result of its integration process, has established a robust system anchored in four key freedoms: goods, services, capital, and people. It is not possible to find another example in integration processes that have match the level of development that the EU law framework presents. However, the development of the digital economy still remains a challenge for EU lawmakers; more precisely, the creation of a legal regime that effectively allows data to move freely across the boundaries where it is applicable.<sup>19</sup>

The idea of a new EU freedom is not new, but it has been aborded in very different manners by policymakers,<sup>20</sup> academics,<sup>21</sup> and civil society organizations.<sup>22</sup> In this respect, it has received many different interpretations and conceptualizations regarding its meaning and scope. For the purpose of our analysis, the 5<sup>th</sup> EU freedom would sit alongside the freedom of people, capital, goods, and services and would cover both personal and non-personal data; its content, scope and other practicalities will be discussed in Section 4.

### 2.1. The rationale for the emergence of a new EU freedom

Digitalization and the influence of ICT over citizens' lives has been under the spotlight of EU authorities for many decades.<sup>23</sup> However, the 2008/2009 economic crisis constituted a breaking point that pushed the EU to double down on its efforts to take advantage of the economic and social possibilities that the digital economy. In this sense, the EU had identified the relevance that data plays for the securing the future back in the policy document 'A Digital Agenda for Europe'; it could help to recover from the economic crisis of 2007/2008 by enabling Europeans in to work smarter than their economic competitors.<sup>24</sup> In that sense, the Digital Agenda for Europe aimed at tackling a lack of integration between different ICT components to produce a virtuous cycle of the digital economy.<sup>25</sup> In this respect, the idea was to enable '(...) the creation of attractive online content and services and its free circulation insider the EU (...) to stimulate a virtuous cycle of demand'.

Nevertheless, it was also highlighted as the first key action area was the development of a 'vibrant digital single market' that required 'building digital confidence' as well as the development of 'interoperability and standards', including 'data repositories'.<sup>26</sup> In this respect, it was already acknowledge the level of disconnection and fragmentation of datasets. However, this policy strategy did not directly tackle the relevance of the data economy and how to address these challenges but rather focused on enhancing the then-current technological capabilities of the EU to recover from the economic crisis.<sup>27</sup>

For this, it was necessary to wait until a following document titled 'Towards a thriving data-driven economy'.<sup>28</sup> This particular policy document was directly aimed at tackling the challenges presented by big data.<sup>29</sup> In contrast to other ICT developments, big data

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<sup>17</sup> Ana Inés Basco and Cecilia Lavena, 'América Latina En Movimiento: Competencias y Habilidades Para La Cuarta Revolución Industrial En El Contexto de Pandemia' (Inter-American Development Bank 2021) <<https://publications.iadb.org/es/node/30253>> accessed 27 March 2023; Douglas W Arner, Giuliano Castellano and Eriks Selga, 'The Transnational Data Governance Problem' (2022) 37 Berkeley Technology Law Journal 623.

<sup>18</sup> Arner, Castellano and Selga (n 17).

<sup>19</sup> 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Strategy for Data' (n 2) 6–11.

<sup>20</sup> 'Free Flow of Non-Personal Data: Parliament Approves EU's Fifth Freedom' (European Parliament 2018) Press release <<https://www.europarl.europa.eu/news/en/press-room/20180926IPR14403/free-flow-of-non-personal-data-parliament-approves-eu-s-fifth-freedom>> accessed 20 October 2022.

<sup>21</sup> In this respect, academics have discussed mainly about two ideas: (i) EU citizenship (see for example Giovanni Comandé, 'The Fifth European Union Freedom' in Hans Micklitz (ed), *Constitutionalization of European Private Law: XXII/2* (Oxford University Press 2014) <<https://doi.org/10.1093/acprof:oso/9780198712107.003.0003>> accessed 22 March 2023.; or (ii) scientific freedom (see for example Ramon Marimon, Matthieu Lietaert and Michele Grigolo, 'Towards the "Fifth Freedom": Increasing the Mobility of Researchers in the European Union' (2009) 34 Higher Education in Europe 25.) Nevertheless, there is a notable exception where the idea of data free flow has been suggested as this 5<sup>th</sup> freedom (see Mirela Marcut, 'EU and Cyberspace - A Plea for the Fifth Freedom of Movement' in Brie, Mircea, Stoica, Alina, and Chirodea, Florentina (eds), *The European Space. Borders and Issues* (Oradea University Press - Debrecen University Press 2016) <<https://papers.ssrn.com/abstract=3407441>> accessed 27 March 2023.

<sup>22</sup> For example, the European Centre for International Political Economy had developed the Five Freedoms project to work on this particular topic (see <https://ecipe.org/five-freedoms/>, last accessed 27 March 2023).

<sup>23</sup> Mario Mariniello, *Digital Economic Policy: The Economics of Digital Markets from a European Union Perspective* (Oxford University Press 2022); Abraham L Newman, 'Digital Policy-Making in the European Union: Building the New Economy of an Information Society' in Helen Wallace and others (eds), *Policy-Making in the European Union* (Oxford University Press 2020).

<sup>24</sup> 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Digital Agenda for Europe' (European Commission 2010) COM/2010/0245 final s 1 <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0245:FIN:EN:PDF>> accessed 28 September 2022.

<sup>25</sup> *ibid* 4.

<sup>26</sup> *ibid* 7–14.

<sup>27</sup> Savin (n 12) 24.

<sup>28</sup> 'Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions "Towards a Thriving Data-Driven Economy"' (European Commission 2014) COM(2014) 442 final.

<sup>29</sup> *ibid* 2.

presented a considerable difference as it was expected to see higher growth rates than other technological developments. Hence, the main reason why the European Commission wanted to pursue this path as part of their ‘work smarter’ motto enshrined in the Digital Agenda for Europe. Within it, the open data movement took a dominant role in the Commission’s position to guide its agenda.<sup>30</sup>

While there were, and continue to be, different shortcomings in the EU’s capabilities to engage in big data practices, regulation presented a significant challenge. In particular, the Commission highlighted that ‘[t]he complexity of the current legal environment together with the insufficient access to large datasets and enabling infrastructure create entry barriers to SMEs and stifle innovation’.<sup>31</sup> In order to address this imbalance, it was decided to push forward many different objectives to ensure the ‘[a]vailability of good quality, reliable and interoperable datasets and enabling infrastructure’ for developing ‘[i]mproved framework conditions that facilitate value generation from datasets’ in ‘[a] range of application areas where improved big data handling can make a difference’.<sup>32</sup>

A year later, the Commission followed up with a landmark document: ‘A Digital Single Market Strategy for Europe’ (the ‘2015 DSM Strategy’).<sup>33</sup> In it, there is a renewed call for ‘building a data economy’, as ‘[b]usinesses and consumers still do not feel confident enough to adopt cross-border cloud services for storing or processing data, because of concerns relating to security, compliance with fundamental rights and data protection more generally’.<sup>34</sup> Particularly turning to personal data protection, and considering that at this moment the Directive 95/46 was in force,<sup>35</sup> the Commission highlighted that ‘Member States are therefore not able to inhibit the free movement of personal data on grounds of privacy and personal data protection, but may do so for other reasons’.<sup>36</sup> A striking issue of the 2015 DSM Strategy is that the Commission, despite highlighting this need to ensure the free movement of data, did not include this 5<sup>th</sup> freedom when describing the Digital Single Market but rather just included the already existing four freedoms.<sup>37</sup>

## 2.2. Overcoming platforms’ dominance one piece of regulation at a time

Besides the desire to become more competitive at an international level, platforms and their practices have caught the attention of EU regulators. As mentioned before, platforms have dominated how data is generated and, more importantly, allows to be used. For example, single decisions, such as the change in Twitter’s API, can have considerable effects on society, leaving researchers without access to data or other applications losing their capability to interact with the platform. Data, consequently, is trapped within their boundaries and only through certain, relatively new, exceptions it can break free.

The use of personal data by both online businesses and platforms alike is not something new or strange in the current configuration of the digital economy, as the literature points out.<sup>38</sup> In particular, platforms have become controllers of large datasets with any sort of commercial information, from payment data to consumer behavior information.<sup>39</sup> When it comes to the use of data within the context of platforms, the Commission points out that ‘(...) there are also market imbalances in relation to access to and use of data, for example when it comes to access to data by SMEs. A case in point comes from large online platforms, where a small number of players may accumulate large amounts of data, gathering important insights and competitive advantages from the richness and variety of the data they hold.’<sup>40</sup>

Given that most of this tech companies are US-based, the EU has found itself in a ‘thin ice’ situation regarding its possibilities to take advantage of these datasets. As such, it is no coincidence that it has reacted through one of its very few available weapons: legislation. Since the EU market is highly relevant for these companies due to its economic size, the EU has set the rules to enter this market as it pleases. In this sense, the EU has pushed for new rules,<sup>41</sup> such as the Digital Services Act (DSA)<sup>42</sup> or the Digital Markets Act (DMA)<sup>43</sup>. While the dominance of big tech companies and key gatekeepers is something that the EU is trying to tackle as part of their open data movement, it is also true that these stakeholders are already here and have vast amounts of information that is intended to be shared with others.

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<sup>30</sup> *ibid* 5.

<sup>31</sup> *ibid* 3.

<sup>32</sup> *ibid* 5–6.

<sup>33</sup> ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Digital Single Market Strategy for Europe’ (2015) COM(2015) 192 final.

<sup>34</sup> *ibid* 11–12.

<sup>35</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281, 23.11.1995, p. 31–50

<sup>36</sup> ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Digital Single Market Strategy for Europe’ (n 33) 14–15.

<sup>37</sup> A Digital Single Market is one in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence. (see *ibid* 3.)

<sup>38</sup> R Ó Fathaigh and J van Hoboken, ‘European Regulation of Smartphone Ecosystems’ (2019) 5 European Data Protection Law Review 476, 476–478.

<sup>39</sup> Christoph Busch, ‘Small and Medium-Sized Enterprises in the Platform Economy. More Fairness for SMEs in Digital Markets’ (Friedrich Ebert Foundation 2020) 01/2020 7 <<https://library.fes.de/pdf-files/wiso/15946.pdf>>.

<sup>40</sup> ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Strategy for Data’ (n 2) 9.

<sup>41</sup> In this respect, the Digital Single Market strategy had also grounded the future development of the EU digital economy around these intermediaries (see ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Digital Single Market Strategy for Europe’ (n 33) s 3.3.)

<sup>42</sup> Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance) PE/30/2022/REV/1 OJ L 277, 27.10.2022, p. 1–102

<sup>43</sup> Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (Text with EEA relevance) PE/17/2022/REV/1 OJ L 265, 12.10.2022, p. 1–66

Hence, it is reasonable to see that some legislative proposals have charged platforms with such set of duties to open up their databases. While the Platform-to-Business Regulation (P2B Regulation)<sup>44</sup> was enacted before the publication of this strategy, these challenges were rightly identified on it. Its Art. 9 deals with access by business users to data, both personal and non-personal, generated within the context of a platform. This is not an obligation but rather a possibility that platforms might grant. If platforms allow online businesses to access this range of information, the P2B Regulation does not answer exactly how this access should take place but rather merely redirects for answers to the platform's procedures.<sup>45</sup> Moreover, this is not a *carte blanche* for business users to do what they please with that information but rather it is limited by the GDPR and its requirements.<sup>46</sup>

This provision in the P2B Regulation acknowledges the role that platforms have in allowing the development of such data-driven environments by enabling larger pools of individuals and companies to find each other relatively easily beyond borders. These large, big tech companies have also taken the role of a key economic actor to attract businesses, as well as users, and provide a fertile ground for operation at a price, be it their data or a fee. In addition, data collected by these platforms is extremely valuable because of the technical and organizational infrastructure put in place by the platform itself and that, probably, could not have been generated in any other manner whatsoever to adjust quickly to economic trends. For example, YouTubers use the platform's data to adjust their content and vice versa or Amazon can leverage the data generated by sellers operating on its platform and offer demanded products at a lower price.

More recently, the DMA also set out to achieve similar objectives. In this respect, it seeks to provide, according to its Art. 1.1, '(...) harmonised rules ensuring for all businesses, contestable and fair markets in the digital sector across the Union where gatekeepers are present, to the benefit of business users and end users' to foster better competition conditions for businesses and users relying on platforms.<sup>47</sup> This is done through the adoption of ex-ante rules that apply to certain digital services, known as core platform services,<sup>48</sup> but only when provided by a gatekeeper.<sup>49</sup>

The DMA has dedicated considerable attention to how (personal) data generated in platforms can be used by businesses, users, or even the platform itself, particularly as personal data can be a deciding factor in 'making or breaking' the entrance of new competitors into a particular market.<sup>50</sup> In this sense, it puts in place a general prohibition for the following: using personal data to deliver an online advertisement to end users for third parties;<sup>51</sup> combine personal data from different services, provided either by the gatekeeper or relying on data from third parties;<sup>52</sup> use data from different services provided by the gatekeeper on a separate basis;<sup>53</sup> and enroll users to combine personal data.<sup>54</sup>

Moreover, the DMA also sets certain limits and requirements for using data given its anticompetitive consequences. In this sense, a gatekeeper can only use publicly available data generated or provided by business users,<sup>55</sup> a provision very much in line with requirements already found in the P2B Regulation. This effective and free-of-charge access could be ensured by '(...) appropriate technical measures, for example by putting in place high quality application programming interfaces or integrated tools for small volume business users.'<sup>56</sup>

However, the digital economy does not exclusive revolve around activities that take place in platforms, despite their considerable size. Information, including big data, is also used on many other fields where there no platforms but rather disconnect datasets. It is here that the notion of data spaces comes to the foreground to connect what is fragmented, which shall be focus of the following section.

### 3. Setting the policy and regulatory framework for data spaces

While the Commission made clear its case for ensuring the free flow of information, particular from dominant platforms to other stakeholders, a key concern still loomed over the horizon: the lack of infrastructure to materialize this vision. In this respect, to further enable data-intensive practices, data spaces have emerged as a response. As will be explored, their notion is relatively new and lacks an encompassing definition.<sup>57</sup> However, given the lack of a considerable amount of regulatory work, we can start to explore policy documents to determine the intended approach. The purpose of this section is to explore how data spaces have been foreseen in policy documents and how they are being implemented in regulatory proposals.

<sup>44</sup> Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (Text with EEA relevance) PE/56/2019/REV/1 OJ L 186, 11.7.2019, p. 57–79

<sup>45</sup> It is not our purpose to dwell into the complexities of platform governance and regulation on itself but rather we acknowledge that platforms have built, based around private law, sets of regulations to deal with the interactions on the platform (see e.g., Paola Iamiceli, 'Online Platforms and the Digital Turn in EU Contract Law: Unfair Practices, Transparency and the (Pierced) Veil of Digital Immunity' (2019) 15 European Review of Contract Law 392; Hannah Bloch-Wehba, 'Global Platform Governance: Private Power in the Shadow of the State' (2019) 72 SMU Law Review 27.)

<sup>46</sup> Silvia Martinelli, 'Sharing Data and Privacy in the Platform Economy: The Right to Data Portability and "Porting Rights"' in Leonie Reins (ed), *Regulating New Technologies in Uncertain Times*, vol 32 (TMC Asser Press 2019) <[http://link.springer.com/10.1007/978-94-6265-279-8\\_8](http://link.springer.com/10.1007/978-94-6265-279-8_8)> accessed 6 August 2021; José van Dijk, 'Governing Digital Societies: Private Platforms, Public Values' (2020) 36 Computer Law & Security Review 105377; Koen Frenken and others, 'Safeguarding Public Interests in the Platform Economy' (2020) 12 Policy & Internet 400.

<sup>47</sup> Filomena Chirico, 'Digital Markets Act: A Regulatory Perspective' [2021] Journal of European Competition Law & Practice <<https://doi.org/10.1093/jeclap/lpab058>> accessed 31 August 2021.

<sup>48</sup> Art. 2(2) DMA.

<sup>49</sup> Art. 2(1) and 3 DMA. To be considered a gatekeeper, it is necessary to meet a three-prong quantitative and qualitative assessment under Art. 3 DMA.

<sup>50</sup> Recital 72 DMA.

<sup>51</sup> Art. 5.2.(a) DMA.

<sup>52</sup> Art. 5.2.(b) DMA.

<sup>53</sup> Art. 5.2.(c) DMA.

<sup>54</sup> Art. 5.2.(d) DMA.

<sup>55</sup> Art. 6.2 DMA.

<sup>56</sup> Recital 60 DMA.

<sup>57</sup> Ducuing Charlotte, Dutkiewicz Lidia and Miadzvetskaya Yuliya, 'D6.2 Legal and Ethical Requirements' (2020).

### 3.1. The political strategy for connecting Europe

Some of the earlier traces of data spaces can be found in a 2014 EU Commission's communication.<sup>58</sup> In it, they provided for the notion of personal data space in the following terms: 'The Commission will launch a consultation process on the concept of user-controlled cloud-based technologies for storage and use of personal data ("personal data spaces"), and support R&I on tools to assist users in selecting the data sharing policies that best match their needs.'

After that we can mention the 2015 DSM Strategy.<sup>59</sup> From this policy strategy, there was not any concrete regulatory action for the effective implementation of data space. Nevertheless, the strategy itself identified some elements that demanded attention in order to set the stage for these envisaged data spaces: (i) it recognized the necessity of developing a unified digital market between Member States in accordance with the broader European unification; (ii) localized data centres are a cumbersome burden; (iii) data portability is necessary to ensure the free-flow of information; and (iv) this could be enabled by having standardized data formats.<sup>60</sup> Nevertheless, the notion of data space remained uncertain under the 2015 DSM Strategy and its regulatory offspring discussed before. However, certain objectives were met through different Regulations, such as the GDPR -for objectives (i) and (iii)- or the Free Flow Regulation -for objectives (ii) and (iv)-, albeit not through the definition of a data space.

Nevertheless, our efforts can be concentrated in two documents in particular that played a key role in the definition, and configuration, of data spaces titled: (i) 'Towards a common European data space',<sup>61</sup> and (ii) 'A European Strategy for Data'.<sup>62</sup> This latter document can be considered as the current guiding policy instrument regarding data spaces in the European Union and the one that provides for the pending actions points as well as decided courses of action. It is worthy to highlight, particularly under the chosen theoretical framework chosen, that both policy documents do not take a particular stance regarding the most suitable choice for the legal instrument to be proposed for this objective; however, the European Health Data Space (EHDS) proposal has been put forward under the form of a Regulation, which will be explored later on.

This first policy document recognized the achievements so far when it comes the development of necessary framework for ensuring the free flow of information across many different actors. Nevertheless, it acknowledge the still existing limitations and, as such, proposed a new of regulatory measures to tackle them, which include: '(...) a proposal for a review of the Directive on the re-use of public sector information (PSI Directive); an update of the Recommendation on access to and preservation of scientific information; and guidance on sharing private sector data'.<sup>63</sup> Besides these particular issues, this document also started to flesh out the notion of data spaces. In this sense, it provides a definition for data spaces in the following terms: 'a seamless digital area with the scale that will enable the development of new products and services based on data'.<sup>64</sup> Nevertheless, it did not aim or mention the necessity of having legal rules, even less so a unified framework, on this data space.

The European Union's policy document titled 'A European Strategy for Data' (the '2020 EU Data Strategy') constitutes the next step in the path for developing the data spaces.<sup>65</sup> While Savin argues that it merely updated certain elements of the 2015 DSM Strategy,<sup>66</sup> we argue that it laid the foundations to plug the gaps necessary for the emergence of the true data economy. In contrast to other documents, the Commission directly tackled the needs to develop a data economy in the EU by providing the tools to move from centralized data processing towards edge computing.<sup>67</sup> The ultimate purpose is to '(...) create a single European data space – a genuine single market for data, open to data from across the world – (...)'.<sup>68</sup> This particular appetite for consolidating data in a common and shared environment is not new but it was already present in previous policy documents from the EU as discussed before.<sup>69</sup> In this respect, the 2020 EU Data Strategy seeks to put in practice years of thinking into how data should be regulated and used for society's benefit through the use of data spaces to put the EU, alongside the jurisdictions with similar safeguards as it,<sup>70</sup> on the global arena. Strikingly, the document does not make any reference to the emergence of a new freedom within the EU context.

The primary reason behind this policy and regulatory agenda is that an integrated data economy requires common standards to facilitate, from a technical point of view, data sharing between mostly disconnected datasets. On top of this, a common data-sharing regulatory framework would tackle the fragmented and sectorial regulation that limits how information can flow between different industries and stakeholders. With both elements in place, it is expected that businesses would be interested in developing digital

<sup>58</sup> 'Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions "Towards a Thriving Data-Driven Economy"' (n 28).

<sup>59</sup> 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Digital Single Market Strategy for Europe' (n 33).

<sup>60</sup> *ibid.*

<sup>61</sup> 'Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions "Towards a Common European Data Space"' (European Commission 2018) COM/2018/232 final.

<sup>62</sup> 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Strategy for Data' (n 2).

<sup>63</sup> 'Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions "Towards a Common European Data Space"' (n 61) 1.

<sup>64</sup> 'Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions "Towards a Common European Data Space"' (n 61).

<sup>65</sup> 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Strategy for Data' (n 2).

<sup>66</sup> Savin (n 12) 26.

<sup>67</sup> 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Strategy for Data' (n 2) 2.

<sup>68</sup> *ibid* 4–5.

<sup>69</sup> 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Digital Single Market Strategy for Europe' (n 33) s 4.1. 'Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions "Towards a Thriving Data-Driven Economy"' (n 28).

<sup>70</sup> In this sense, it is worthy to highlight that this policy document talks about 'digital diplomacy' when discussing the adequacy decisions in force granted under both the Directive 95/46 and the GDPR.

economy products and services in Europe by choice given the substantial benefits in place, i.e., easy interoperability and legal clarity over the authorization to do so.

As such, '[t]he infrastructures should support the creation of European data pools enabling Big Data analytics and machine learning, in a manner compliant with data protection legislation and competition law, allowing the emergence of data-driven ecosystems'<sup>71</sup>. Under its auspices, it would be possible to enable government-to-business, business-to-business, business-to-government, and government-to-government data sharing while at the same time keeping individuals in the loop about what is happening with their data, but also enabling them the tools to have a say in how their information is actually used. To achieve this, the Commission identified four pillars: (i) a cross sectoral data governance framework, (ii) investment in technological infrastructure, (iii) develop digital skills, and (iv) creating common data spaces to converge all the previous three pillars. But how exactly are data spaces configured?

### 3.2. What is a data space?

As mentioned above, the EU has been pushing for the development of data spaces, even before the adoption of the 2020 EU Data Strategy itself,<sup>72</sup> to foster the flow of data from individuals to businesses and governments, between businesses themselves as well as with public authorities. However, the exact notion of what is a data space is still a very vague concept scattered across much different policy and, recently, regulatory proposals for legal instruments.<sup>73</sup> One of the very few things we can take for granted regarding them is that the EU will probably sectoral data spaces: from health to finance up to mobility, among many others. While it is expected for interconnection between them, their sectoral nature sets the stage in a certain manner.

The different documents, from policy strategies up to dissemination brochures, that tackle the challenges that would be solved via data spaces put forward different definitions and elements. As such, it is possible to question how do all these definitions fit in together? In the table below, each key characteristic from these definitions is identified and supported by the relevant wording used in them.

Table 1 - Elements of a data space according to reviewed EU policy documents

Characteristic	Source	Wording used
Seamless digital area	Towards a common European data space	'seamless digital area'
	A European Strategy for Data	'a genuine single market for data'
Scalable	Towards a common European data space	'with the scale'
	A European Strategy for Data	'to an almost infinite amount'
Allow for data-intensive developments	Towards a common European data space	'will enable the development of new products and services based on data'
	A European Strategy for Data	'businesses also have easy access (...) boosting growth and creating value,
	Building a data economy — Brochure <sup>74</sup>	'boosting the development of new data-driven products and services'
Allow for data economics	A European Strategy for Data	'genuine single market for data'
Global	A European Strategy for Data	'open to data from across the world'
Personal and non-personal data	A European Strategy for Data	'where personal as well as non-personal data'
Secure infrastructure	A European Strategy for Data	'are secure'
	Building a data economy — Brochure	'Data spaces are composed of both the secure technological infrastructure and the governance mechanisms'
Governance mechanism	Building a data economy — Brochure	'Data spaces are composed of both the secure technological infrastructure and the governance mechanisms'
Facilitate the exercise of personal data rights	A European Strategy for Data	'Empowering individuals to exercise their rights'

All the elements identified to characterize data spaces are at the service of enabling data sharing and the free flow of information between the involved parties. In this respect, the publication of the EHDS proposal provides us with a testing ground to validate if these are effectively taken into consideration by the lawmakers when translating policy into law. The next subsection will explore this and attempt to draw some conclusions regarding the reliance on a single legal rule to cover all issues related to data spaces.

<sup>71</sup> 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Strategy for Data' (n 2) 5.

<sup>72</sup> 'Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions "Towards a Common European Data Space"' (n 61).

<sup>73</sup> The exact notion of what is a data space is still a very vague concept scattered across much different policy and regulatory instruments. For more on this concept, see Boris Otto, 'A Federated Infrastructure for European Data Spaces' (2022) 65 Communications of the ACM 44. Some legal scholars have tried to untangle the legal definition but focused on the legal consequences of an unknown thing (see Anastasiya Kiseleva and Paul de Hert, 'Creating a European Health Data Space: Obstacles in Four Key Legal Area' (2021) 5 European Pharmaceutical Law Review (EPLR) 21; Giovanni Comandè and Giulia Schneider, 'It's Time. Leveraging The GDPR to Shift the Balance Towards Research-Friendly EU Data Spaces' [2022] Common Market Law Review 34.)

<sup>74</sup> 'Building a Data Economy — Brochure' (*Shaping Europe's digital future*, 21 January 2021) <<https://digital-strategy.ec.europa.eu/en/library/building-data-economy-brochure>> accessed 4 May 2022.

### 3.3. The EHDS proposal as the blueprint for future data spaces?

2022 has seen the publication of the first proposal for a data space regulation: the EHDS proposal.<sup>75</sup> The reasons for going forward first with it can be identified at the very beginning of its recitals: (i) the COVID19 pandemic demanded consolidated health data for both the treatment of the disease as well as the research on its potential mitigation measures; (ii) the fact that Europeans cross Member States borders more and more; and (iii) the need for technical tools that would allow the effective exercise of personal data protection rights provided for under GDPR.

Moreover, the EHDS is expected to interplay with other more horizontal legal instruments, such as the GDPR, the Data Governance Act (DGA),<sup>76</sup> or the Data Act (DA)<sup>77</sup> when finally adopted. This already gives us an insight regarding the scope and, more importantly, the process of 'act-ification' that the 5<sup>th</sup> freedom is experiencing; not only are the data spaces themselves to be provided under Regulations but also the associated rules for their operation beyond its concrete scope. Turning to the subject matter of the EHDS, the proposal contains a broad definition of electronic health data, which includes: personal health data<sup>78</sup>; and non-personal health data.<sup>79</sup> While it does not specifically define what a data space, it states that the EHDS is composed of '(...) rules, common standards and practices, infrastructures and a governance framework for the primary and secondary use of electronic health data'. In our previous section, we identified certain criteria regarding data spaces; in this respect, how does the EHDS fare with regard to them?

The proposal states that it seeks to establish the EHDS by setting forth '(...) rules, common standards and practices, infrastructures and a governance framework for the primary and secondary use of electronic health data'.<sup>80</sup> Going back to the elements identified in the policy documents, it is possible to pin-point that the EHDS would meet all of them. Regarding the 'seamless digital area', is clear that Art. 1 of the proposal would address this. Moreover, by allowing both primary and secondary data usage, the EHDS would provide for data-intensive developments, but the current wording would not seem to allow for data economic, which considering that we are dealing with special categories of personal data and, also, the existence of the data altruism institute, it reasonable to see that this characteristic is missing. As for the global aspect, there are substantial provisions dealing with this, as well as the EDPS has raised concerns over this. Clearly it would compass both personal and non-personal data. And, finally, it will be structured around a key secure infrastructure, subject to assessment.

As for the scalability characteristic/requirement, the proposal allows for the connection of different platforms to the area. Delving into details, the seamless digital area would be composed by an amalgam of different platforms, with a core platform servicing and connecting with the rest of them: the 'MyHealth@EU'. In this respect, this latter piece could be considered as an infrastructural platform to the rest of the platform ecosystem that would be composing the EHDS. By taking this approach, it is clear that the 'MyHealth@EU' is setting itself as the main controller and, most likely, would engage with other connected platforms as a joint controller under GDPR but also it could interplay with them using the legal categories provided for under the DGA, opening up further complications as the roles are not exactly the same across regulations and the concepts imply different scopes for responsibilities. As such, the degree of responsibility that the 'MyHealth@EU' platform would have in comparison to other connected platforms would be similar to that of Facebook with regards third party companies that deploy a 'Like' button in their websites.<sup>81</sup> Therefore, Regulations applicable to platforms, such as the DMA and the DSA, could play in the effective implementation of data spaces and, by extension, regarding the content of this 5<sup>th</sup> freedom.

The main concern regarding the reliance on the EHDS proposal as the blueprint for future Regulation proposals for other data spaces lays in the particular characteristics of the healthcare sector. Some scholars have raised, even before the publication of the EHDS proposal that this industry is besieged by a plethora of issues beyond data protection itself to ensure a true seamless digital area.<sup>82</sup> The following proposal in the pipeline seems to be the European Financial Data Space,<sup>83</sup> which could suffer from similar limitations to serve as the blueprint for future data spaces. In any case, our analysis will have to then explore that particular proposal to ensure that this initial exploration is confirmed.

### 4. Seeking out the 5<sup>th</sup> EU freedom beyond data spaces

The limited regulation currently present regarding data spaces should not be considered as sign of the lack of support for the emergence of a 5<sup>th</sup> EU freedom. As noted in the previous section, many of the policy documents mentioned have given birth to many rules, particularly Regulations. These different policy strategies and regulations converge around the idea of a lacking unified regulatory framework that could project confidence in making data available to others for the development of new ICT solutions. As a result, many legal instruments emerged, such as the GDPR, the Free Flow Regulation,<sup>84</sup> the Open Data Directive,<sup>85</sup> and even the

<sup>75</sup> Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the European Health Data Space COM/2022/197 final

<sup>76</sup> Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act) (Text with EEA relevance) PE/85/2021/REV/1 OJ L 152, 3.6.2022, p. 1–44

<sup>77</sup> Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on harmonised rules on fair access to and use of data (Data Act) COM/2022/68 final

<sup>78</sup> Data concerning health and genetic data as defined in the GDPR, as well as data referring to determinants of health, or data processed in relation to the provision of healthcare services processed in an electronic form, see Art. 2.2.(a) EHDS proposal.

<sup>79</sup> Data concerning health and genetic data in electronic format that falls outside the definition of personal data provided in the GDPR, see Art. 2.2.(b) EHDS proposal.

<sup>80</sup> Art. 1.1 EHDS proposal

<sup>81</sup> *Fashion ID GmbH & CoKG v Verbraucherzentrale NRW eV* [2019] European Court of Justice (Second Chamber) C-40/17, ECLI:EU:C:2019:629.

<sup>82</sup> Kiseleva and de Hert (n 73).

<sup>83</sup> 'Report on Open Finance' (Expert Group on European financial data space 2022).

<sup>84</sup> Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union (Text with EEA relevance.) PE/53/2018/REV/1 OJ L 303, 28.11.2018, p. 59–68.

<sup>85</sup> Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information (recast) PE/28/2019/REV/1 OJ L 172, 26.6.2019, p. 56–83.



Law Enforcement Directive.<sup>86</sup> More recently, rules such as the DGA or the so-to-be-enacted DA have joined this group. All of these instruments sought to promote the circulation of information in the European Union, and potentially beyond it, to reap the benefits from big data analysis techniques for different purposes. However, each one of them does so in a very different manner and contributes uniquely to the development of the 5<sup>th</sup> freedom. This is particularly relevant as we can consider the connection of this 5<sup>th</sup> EU freedom with the internal market and, therefore, under the rule of Art 114 for harmonization,<sup>87</sup> but we will return to this issue in our closing remarks.

#### 4.1. First cohort of data-related regulations

From a purely organizational perspective for this paper, we can split these rules into two groups. A first group of laws that emerge, primarily, from the 2015 DSM Strategy; secondly, those that result from the 2020 EU Data Strategy. Regarding this first batch, our analysis will be dedicated to two instruments: the GDPR and the Free Flow Regulation. These shall be analysed for the following reasons: (i) they are regulations rather than directives, which is particularly interesting for our analysis of the ‘act-ification’ process;<sup>88</sup> (ii) they are not exclusively related to public bodies;<sup>89</sup> and, particularly the GDPR, (iii) serve as the backbone for many of the other rules under analysis.

The GDPR, enacted in 2016 and entered into force in 2018, constitutes the backbone for many different other data-related regulations, as it will be explored later, and a regulatory model that served to develop technology-related rules.<sup>90</sup> Resulting from a lengthy process of political discussion between the different European bodies as well as the relevant stakeholders,<sup>91</sup> the GDPR replaced the Directive 95/46 in its role of operationalizing provisions related to the right to personal data protection enshrined in other legal instruments. In this regard, the GDPR ‘(...) lays down rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data’<sup>92</sup>.

The GDPR opens up by stating that making data available is not forbidden but rather one of its underlying assumptions.<sup>93</sup> However, certain rules must be followed to enable such data processing activities. As such, it puts in charge of data controllers the responsibility of ensuring that personal data follows these prescriptions to avoid harm to individuals when processing their information. Nevertheless, recent judicial activity seems inclined to putting safeguarding fundamental rights before free flow of data.<sup>94</sup>

In any case, the GDPR provided for certain elements to ensure the free flow of information. Among these, we can highlight the right to data portability in Art. 20.<sup>95</sup> Among its many characteristics, it provides some elements that, as will be explored in the following section, have determined the configuration of data spaces and, by extension, the 5<sup>th</sup> freedom. In this respect, this right is exercised before the current controller and the data subject should receive the data in question ‘(...) in a structured, commonly used and machine-readable format (...)’ while also having the right to transmit the data directly to another controller. However, this right is limited to two legal basis -consent and performance of a contract- and the processing should be automated.<sup>96</sup>

However, not all the data involved in the digital economy can be considered as personal data with the meaning that the GDPR gives to this particular category of information. As such, all these data would be left out of the GDPR’s scope of application and, consequently, at mercy of contractual arrangements between the different parties that engage with it. To provide a unified regulatory framework for those activities involving this category of personal data, the Commission moved forward with the Free Flow Regulation.

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<sup>86</sup> Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA OJ L 119, 4.5.2016, p. 89–131.

<sup>87</sup> Lenaerts and Nuffel (n 13) 237.

<sup>88</sup> Particularly in the field of the right to the protection of personal data, the EU has moved forward with exercising a high degree of legislative authority and power as a manner to ensure certain consistency and harmonization in this area where borders can result in a detriment towards economic and social development (see Lorenzo Dalla Corte, ‘On Proportionality in the Data Protection Jurisprudence of the CJEU’ [2022] *International Data Privacy Law* ipac014; Christopher Kuner and others, ‘The GDPR as a Chance to Break down Borders’ (2017) 7 *International Data Privacy Law* 231.)

<sup>89</sup> As for the Open Data Directive, its scope pertains to public bodies or entities in the fulfilment of public bodies duties (see Art. 1.1 Open Data Directive) while the Law Enforcement Directive tackles data protection by ‘(...) competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security’ (see Art. 1.1. Law Enforcement Directive). While the GDPR and the Free Flow Regulation include in their scope public bodies, they are not limited to them and cover also private entities.

<sup>90</sup> Papakonstantinou and De Hert (n 15).

<sup>91</sup> Christopher Kuner, Lee A Bygrave and Christopher Docksey (eds), ‘Background and Evolution of the EU General Data Protection Regulation (GDPR)’, *The EU General Data Protection Regulation (GDPR) A Commentary* (1st edn, Oxford University Press 2020).

<sup>92</sup> Art. 1.1. GDPR.

<sup>93</sup> While referring to its predecessor, the Data Protection Directive, Lynskey argued that both objectives were on a equal standing (see Orla Lynskey, *The Foundations of EU Data Protection Law* (First edition, Oxford University Press 2015) 62–75.

<sup>94</sup> *BE v Nemzeti Adatvédelmi és Információszabadság Hatóság* [2023] ECJ Case C-132/21; *RW v Österreichische Post AG* [2023] ECJ Case C-154/21. We highlight the work from Laura Drechsler who made a short commentary on these decisions (see Laura Drechsler, ‘Did the Court of Justice (Re-)Define the Purpose of the General Data Protection Regulation?’ (*CITIP blog*, 14 February 2023) <<https://www.law.kuleuven.be/citip/blog/did-the-court-of-justice-re-define-the-purpose-of-the-general-data-protection-regulation/>> accessed 23 March 2023.

<sup>95</sup> Orla Lynskey, ‘Article 20 Right to Data Portability’ in Christopher Kuner and others (eds), *The EU General Data Protection Regulation (GDPR): A Commentary* (Oxford University Press 2020) <<https://doi.org/10.1093/oso/9780198826491.003.0052>> accessed 27 March 2023.

<sup>96</sup> Paul De Hert and others, ‘The Right to Data Portability in the GDPR: Towards User-Centric Interoperability of Digital Services’ (2018) 34 *Computer Law & Security Review* 193, 200.

Rather than protection 'data subjects', the Free Flow Regulation seeks to protect 'users',<sup>97</sup> including 'professional users',<sup>98</sup> by ensuring that their non personal data is not locked in a particular place,<sup>99</sup> and they are allowed to port it when needed,<sup>100</sup> while also allowing competent authorities access to such information.<sup>101</sup> While the GDPR put its obligations on the head of data controllers, the Free Flow Regulation charges data processing service providers with these obligations.<sup>102</sup>

Despite the intention of introducing a distinct legal regime, legal scholars have expressed their concerns over the validity of this separation between personal and non-personal data.<sup>103</sup> The criticism gains further grounding as the Free Flow Regulation relies on a residual conception for non-personal data, making the concept as fluid as the very notion of personal data and, therefore, not being able to contribute much to the definition of which information should be subject to each legal regime.<sup>104</sup>

Despite these shortcomings, and particularly the actual limited field of application of the Free Flow Regulation,<sup>105</sup> the Free Flow Regulation takes a strong stance regarding its objective of fostering the circulation of information in the EU. In this respect, it also opens up with a similar claim to the GDPR of ensuring '(...) the free flow of data other than personal data within the Union by laying down rules relating to data localisation requirements, the availability of data to competent authorities and the porting of data for professional users.'<sup>106</sup> The limitations would need to wait until the Data Act to be mitigated.

#### 4.2. The second cohort of complex data-related Regulations

After this, the EU launched a new wave of policy strategies, with subsequent regulatory proposals, starting from 2018. This new cohort of efforts aims at securing a truly consolidated and unified legal regime for the processing of information to develop an EU data economy. In particular, the Commission started to push forward its vision of a connected infrastructure for sharing and using data under the name of data spaces.

In the previous subsection, it has been explored several legal instruments that intended to foster the emergence of this 5<sup>th</sup> freedom. In particular, in one of the latest policy instruments, the Commission states that currently '(...) the EU's share of the data economy – data stored, processed and put to valuable use in Europe – at least corresponds to its economic weight, not by fiat but by choice'.<sup>107</sup> In that sense, the Commission still considers that the EU lacks key regulatory pieces to foster the development of a data economy within its boundaries, and more importantly the tools to be exported to integrate those other regions with the EU.

As such, the regulatory frameworks developed and reviewed, were deemed not be sufficient to accommodate the interactions that the data economy would entail. In this respect, the EU moved forward with two new regulations to cover this and supplement the regulatory framework: the DGA and the DA. The purpose of this Section is to explore these new data-related regulations and understand how they fit within the context of the regulatory framework for the data economy in the EU.

On top of this, the different instruments, as highlighted by EU data protection authoritative bodies, have raised their concerns over the different terminology used across the board and how that can lead to confusion over the exact extent of responsibilities that the involved parties have in a particular situation.<sup>108</sup> While the GDPR's binomial formula of 'data subject-data controller' has been the cornerstone for analysing data flows from a legal perspective for a substantive amount of time, the emergence of new rules with new pair of terms such as 'data holder-data user' under the DGA or 'data holder-data recipient' in the DA introduce further complexity into these information flows.

As part of this acknowledge of the fuzzy and murky boundaries between personal and non-personal data, the DGA emerged to put in place to bolster current practices to ensure this new 5<sup>th</sup> freedom. To achieve this, it has three main purposes: (i) govern how data, both personal and non-personal, held by public bodies can be re-used; (ii) set the rules for the provision of certain data intermediation services; (iii) and create the data altruism institute and lay out its functioning provisions. All these objectives are embodied in its Recital 1, which states:

The Treaty on the Functioning of the European Union (TFEU) provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. The establishment of common rules and practices in the Member States relating to the development of a framework for data governance should contribute to the achievement of those objectives, while fully respecting fundamental rights. **It should also guarantee the strengthening of the open strategic autonomy of the Union while fostering international free flow of data.**<sup>109</sup>

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<sup>97</sup> Art. 3.(7) Free Flow Regulation.

<sup>98</sup> Art. 3.(8) Free Flow Regulation.

<sup>99</sup> Art. 4 Free Flow Regulation.

<sup>100</sup> Art. 6 Free Flow Regulation.

<sup>101</sup> Art. 5 Free Flow Regulation.

<sup>102</sup> Art. 2 and 3.(4) Free Flow Regulation.

<sup>103</sup> Nadezhda Purtova, 'The Law of Everything. Broad Concept of Personal Data and Future of EU Data Protection Law' (2018) 10 Law, Innovation and Technology 40; Michele Finck and Frank Pallas, 'They Who Must Not Be Identified—Distinguishing Personal from Non-Personal Data under the GDPR' (2020) 10 International Data Privacy Law 26.

<sup>104</sup> Laura Somaini, 'Regulating the Dynamic Concept of Non-Personal Data in the EU': (2020) 6 European Data Protection Law Review 84, 88.

<sup>105</sup> *ibid* 88.

<sup>106</sup> Art. 1 Free Flow Regulation

<sup>107</sup> 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Strategy for Data' (n 2) 4.

<sup>108</sup> 'Joint Opinion 03/2021 on the Proposal for a Regulation of the European Parliament and of the Council on European Data Governance (Data Governance Act)' (European Data Protection Board - European Data Protection Supervisor 2021) Joint Opinion 03/2021; 'Joint Opinion 02/2022 on the Proposal for a Regulation of the European Parliament and of the Council on Harmonised Rules on Fair Access to and Use of Data (Data Act)' (European Data Protection Board - European Data Protection Supervisor) Joint Opinion 02/2022.

<sup>109</sup> The section in bold is from the author.

The first portion of the DGA focuses on how data held by public bodies can be re-used for other purposes.<sup>110</sup> This is aligned with the broader the 2020 EU Data Strategy, which places a great deal of importance on ensuring that data can be shared between parties to enhance datasets and, in theory, achieve further economic and societal growth. While the re-use of public-held data has been in the spotlight since the Open Data Directive,<sup>111</sup> the DGA takes it a step further through its articulation in a Regulation rather than a Directive.

Moving on, data intermediation services and data altruism represent novel data sharing schemes aimed at facilitating user-enabled data sharing. As for the first category, it is possible to include in it any service, including those for-profit, that seek to enable data sharing between data subjects and data holders with data users,<sup>112</sup> such as example data cooperatives.<sup>113</sup> These data intermediation services are expected to play a key role in the context of data space, as noted by Recital 27. On the other hand, data altruism implies the '(...) voluntary sharing of data on the basis of the consent of data subjects to process personal data pertaining to them or permissions of data holders to allow the use of their non-personal data (...) for objectives of general interest (...)'<sup>114</sup>.

While other scholars have conducted detailed analysis on the DGA,<sup>115</sup> their comments on whether these practices can enable the 5<sup>th</sup> freedom and how the content of this new Regulation impacts on it are none to little. The DGA is likely, and despite its shortcomings, set to become another cornerstone legislation of the EU data regulatory framework as it bridges between personal and non-personal data but also it fleshes out extensively this freedom.

On the other hand, the DA constitutes the last piece of proposed legislation by the Commission dealing with how data can, and should, be used in the digital economy. The DA would establish '(...) harmonised rules on making data generated by the use of a product or related service available to the user of that product or service, on the making data available by data holders to data recipients, and on the making data available by data holders to public sector bodies or Union institutions, agencies or bodies, where there is an exceptional need, for the performance of a task carried out in the public interest'.<sup>116</sup>

Therefore, the DA's objective is far more reaching than just setting forth new rules for the processing - particularly sharing - of data but rather it constitutes an integral base layer framework for enabling data, particularly non-personal, sharing across different actors and industries. In this sense, the DA pushes for rules to: (i) govern business-to-consumer and business-to-business data sharing;<sup>117</sup> (ii) ensure that data is made available by data holders;<sup>118</sup> (iii) address anticompetitive contractual provisions between firms regarding data access;<sup>119</sup> (iv) facilitate private data sharing to public bodies;<sup>120</sup> (v) switch between data processing services;<sup>121</sup> (vi) allow international data transfer;<sup>122</sup> and (vii) safeguard interoperability between data spaces.

When it comes to personal data, Recital 24 indicates that any personal data processing should be governed by the GDPR.<sup>123</sup> However, as personal, and non-personal data become more intertwined categories,<sup>124</sup> Recital 30 gives some clarification regarding how the interpretation of the cumulative protection should be understood,<sup>125</sup> but both the EDPB and the EDPS call for further clarification on the interplay with the GDPR.<sup>126</sup>

Perhaps one of the more relevant elements is the emphasis on interoperability, defined as by Art. 2.(19) '(...) ability of two or more data spaces or communication networks, systems, products, applications or components to exchange and use data in order to perform their functions'. Further on, the DA proposal introduced a series of requirements to ensure this in Art. 28, which could be supplemented by further specific from the Commission.

## 5. Closing remarks: challenges for the 5<sup>th</sup> EU freedom in a politically convoluted era

The current objective of creating an EU data economy that keeps the European DNA at its very core, as Celeste has remarked,<sup>127</sup> is a remarkable but challenging endeavour. This is due by two distinct facts. On the one hand, this EU ambitious project takes place in a geopolitically divided world with three clear and different perspectives on how data should be used: the US, the Chinese, and the European positions.<sup>128</sup> On the other hand, reality has evolved into a complex myriad of platforms, services and stakeholders which call for both general but also specific regulatory and policy instruments with sensible connections between them rather than inconsistencies. For the particular situation of Europe, this also comes along with the necessity to ensure that fundamental rights are safeguarded as provided by its legal framework.

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<sup>110</sup> Chapter II DGA.

<sup>111</sup> Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information PE/28/2019/REV/1 OJ L 172

<sup>112</sup> Art. 2(11) DGA.

<sup>113</sup> Art. 2(15) DGA.

<sup>114</sup> Art. 2(16) DGA.

<sup>115</sup> Lukas von Ditzfurth and Gregor Lienemann, 'The Data Governance Act: – Promoting or Restricting Data Intermediaries?' [2022] Competition and Regulation in Network Industries 178359172211413; Michèle Finck and Gabriele Carovano, 'Regulating Data Intermediaries: The Impact Of The Data Governance Act on the Eu's Data Economy' (7 December 2022) <<https://papers.ssrn.com/abstract=4295675>> accessed 11 January 2023.

<sup>116</sup> Art. 1.1 DA.

<sup>117</sup> Chapter II DA.

<sup>118</sup> Chapter III DA.

<sup>119</sup> Chapter IV DA.

<sup>120</sup> Chapter V DA.

<sup>121</sup> Chapter VI DA.

<sup>122</sup> Chapter VII DA.

<sup>123</sup> Recital 24 DA.

<sup>124</sup> Finck and Pallas (n 103).

<sup>125</sup> Recital 30 DA.

<sup>126</sup> 'Joint Opinion 02/2022 on the Proposal for a Regulation of the European Parliament and of the Council on Harmonised Rules on Fair Access to and Use of Data (Data Act)' (n 108).

<sup>127</sup> Celeste (n 6).

<sup>128</sup> Arner, Castellano and Selga (n 17).

The battleground chosen are data spaces, however their exact scope remains fuzzy. In this respect, it is possible to draft a working definition applicable to all nine envisaged data spaces: ‘a data space is a secure data-sharing platform ecosystem, including critical infrastructural platforms, for both personal and non-personal that allows for the free movement of information, for a remuneration or not, in order to stimulate data-driven innovations using both EU as well as global data governed by strong fundamental rights-based rules and principles’. From our analysis, it is still early to assess whether these will be covered under a single regulatory umbrella or through a group of legal rules; current trends, as shown by the work on the EHDS and the EFDS, reveal an inclination towards a web of Regulations. This would coincide with De Hert and Papakonstantinou work on the process of ‘act-ification’.

Under this process, we can find the consolidation of a new 5<sup>th</sup> freedom. Different policy documents have made certain references to this 5<sup>th</sup> freedom, albeit with different perspectives on it. For example, it has been subsumed within the freedom of services,<sup>129</sup> particularly to avoid data localisation obligations. However, the trend, particularly after the Free Flow Regulation, would seem to go in the direction of the consolidation of a new freedom, sitting alongside the freedom for goods, services, capital, and people. While these freedoms have been consecrated in foundational legal instruments for the EU, this new freedom would follow the path of ‘act-ification’. But why exactly has this happens in such a manner?

We can argue that this process responds to two main issues: (i) on the one hand, the failure that the last EU-wide ‘constitutional’ process has had;<sup>130</sup> but also, (ii) the limitations that the EU has over competition procedures under its Arts. 101 and 102,<sup>131</sup> which in most cases require lengthy procedures to arrive, if at all, to a result.<sup>132</sup> As such, the EU has been left with limited resources to secure this new 5<sup>th</sup> freedom, particularly the use of Regulations to ensure both consistency as well as harmonization within the Digital Single Market only when and where there are gaps to be harmonization. Data spaces will most likely be addressed through different Regulations and, alongside them, the 5<sup>th</sup> EU freedom will be slowly but steady integrated. Decisions from the European Court of Justice, such as those discussed dealing with the balancing between GDPR’s protection of fundamental rights and the pursue of economic activities, will be the main place for the discussion around whether or not we are before a new freedom.

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<sup>129</sup> ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Building a European Data Economy’ (European Commission 2017) COM(2017) 9 final 7 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0009&from=EN>> accessed 29 September 2022.

<sup>130</sup> Ward (n 11) 54–56.

<sup>131</sup> Iyiola Solanke, *EU Law* (Pearson 2015) 460–470.

<sup>132</sup> See for example the saga on the Google Shopping decision, which has passed its 10-year mark and it is still not settle as the matter has been deferred to the ECJ.