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White Paper on the Definition of Data Intermediation Services

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White Paper on the Definition of Data Intermediation Services

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Abstract

The KU Leuven Centre for IT & IP Law - imec White Paper on the Definition of Data Intermediaries ('the White Paper') provides a detailed academic analysis of the definition of data intermediation services ('DIS') as introduced by the 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 ('the Data Governance Act' or 'the DGA'). The White Paper addresses the different criteria captured by the definition of DIS and offers a critical perspective on their interpretation.

Notably, the definition provided by the DGA leaves considerable room for interpretation and does not provide certainty to organisations that may or may have not been targeted by the legislator. At the time of writing, there is neither institutional nor academic guidance with regard to the interpretation of DIS, and it will also take quite some time until the Court of Justice of the European Union ('the CJEU') will shed light on the matter. This White Paper aims to fill this gap by delineating the boundaries of what could eventually qualify as DIS and what would not, offering some guidance to the concerned organisations until the conclusive answers will be provided by the competent organisations and the CJEU.

Keywords

Data governance; data intermediary; data intermediation services; Data Governance Act.

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List of abbreviations

CDSM	Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC
CJEU	Court of Justice of the European Union
CMO(s)	Collective Management Organisation(s)
EU	European Union
DGA	Data Governance Act (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)
DIS	Data Intermediation Services
DSA	Digital Services Act (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)
DMA	Digital Markets Act (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)
GDPR	General Data Protection Regulation (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)
IME(s)	Independent Management Entity(-ies)
PIMS	Personal information management systems
PSD2	Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L337/35
PSB(s)	Public Sector Body(-ies)
TFEU	Treaty on the Functioning of the European Union

1 Introduction

The Data Governance Act[2] (DGA) introduces a new notion of 'data intermediation services' (DIS) in Art. 2(11) of the DGA. This general definition is accompanied with a list of three categories of DISs, namely services which support data sharing between data holders and data users (Art. 10(a)), services which support data sharing between data subjects and data users concerning the making available of data related to data subjects (Art. 10(b)) and the specific category of data cooperatives' (Art. 10(c)) within the meaning given to this notion by the DGA.[3]

Services qualifying as DIS and falling under either of these three categories identified in Art. 10 of the DGA, shall then comply with a list of potentially demanding rules (Art. 11 and 12 of the DGA). More than obligations, they are conditions that data intermediation service providers (or 'data intermediaries') shall comply with, in order to be allowed to provide such services. These conditions are very diverse both in terms of branches of law (i.e., cybersecurity, price regulation, etc.) and in terms of what it implies for DIs. Moreover, they should be applied across different types of business competent authorities (business-to-business, business-to-consumer, not-for-profit, public-private partnership, public actors, ...). Importantly, these conditions do not only include behavioural rules but also the requirement to provide such services through a 'separate legal person' (Art. 12(a) of the DGA), which has very significant consequences for the internal organisation of DIs (e.g., in terms of possible business models). Failing compliance, they face sanctions (Art. 14 of the DGA) which may go as far as the cessation of the provision of services.

Overall, the DGA aims to facilitate and support the exchange and sharing of data as well as the further reuse of such data for a broad array of purposes (e.g., Rec. 27) to the benefit of companies, individuals, public authorities and society as a whole. The potentially demanding rules imposed on data intermediaries are mainly justified by the lack of trust regarding data sharing and the assumption that DIs can bring this trust in the internal market.[4] In this way, companies and individuals can trust that they retain some form of control over 'their' data and are thereby incentivised to share those data through a data intermediary (Rec. 32 of the DGA). With this regulation, the European Union (EU) aims to make sure that individuals and businesses within the EU can trust data intermediaries and make use of them to share data with third parties.[5] Data intermediaries are therefore expected to become crucial players for the 'European way of data governance'.[6] Data intermediaries are in particular expected to support the advent of a single European data space, where both personal and non-personal data can be exchanged and reused in compliance with applicable law to boost growth and deliver on the general

[2] 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 [2022] OJ L152/1.

[3] For the purpose of the DGA, 'services of data cooperatives' are defined as DIS 'offered by an organisational structure constituted by data subjects, one-person undertakings or SMEs who are members of that structure, having as its main objectives to support its members in the exercise of their rights with respect to certain data, including with regard to making informed choices before they consent to data processing, to exchange views on data processing purposes and conditions that would best represent the interests of its members in relation to their data, and to negotiate terms and conditions for data processing on behalf of its members before giving permission to the processing of non-personal data or before they consent to the processing of personal data', DGA, Art. 2(15)). This specific case of data intermediaries is not further discussed in this paper.

[4] Lukas von Ditfurth and Gregor Lienemann, 'The Data Governance Act: – Promoting or Restricting Data Intermediaries?' (2022) 23 Competition and Regulation in Network Industries 278.

[5] See for example, DGA, Rec. 27.

[6] DGA, Rec. 32.

interest (such as e-health, the circular economy, the digitization of public services, etc.)[7] The European Commission has conceptualised the existence of 'common European data spaces', namely 'purpose or sector-specific or cross-sectoral interoperable frameworks of common standards and practices to share or jointly process data for, inter alia, the development of new products and services, scientific research or civil society initiatives' (Rec. 27 of the DGA). Data intermediaries are expected to support (potentially along with other providers of other infrastructure elements) the operation of such common European data spaces, by offering (technical, legal, business) infrastructure on which data space participants can share data.[8] Core to both the notion of common European data spaces and to the regulation of data intermediaries as per the DGA is the notion of modularity, associated with competition. In contrast to the data governance model of Big Tech platforms, common European data spaces should consist in distributed ecosystems with competitive markets at all levels, including at the level of data exchange.

Since the set of rules applicable to DIS constitute demanding conditions for the provision of such services, including structural requirements, it has a huge impact on the ways in which data intermediaries organise their business model. Yet, given the current formulation of the DGA, the scope (*rationae materiae)* of DIS may appear to be not evident, which could have significant disruptive effects on the activities of businesses.

The demanding character of these rules has been highlighted in one of our earlier white papers and other literature.[9] The legislature expected the inclusion of data intermediaries into the DGA to present chances for the development of new business models especially by bringing trust. Yet, the DGA's requirements may also constrain the development of a number of creative business models for data intermediation and may notably prevent them from scaling. Actually, whether they can find a business model under the constraints imposed by the DGA has not been tested.

It is true that Art. 12(e) marks 'additional specific tools and services' that data intermediaries are allowed to offer (namely temporary storage, curation, conversion, anonymisation and pseudonymisation) provided based on the explicit request or approval of the data holders or data subjects. However, this provision does not dispel all the doubts as to the extent and conditions in which data intermediaries may provide services. In particular, not all scenarios are envisaged *explicitly* in the DGA.[10]

The question of the scope *rationae materiae* becomes therefore crucial, or in other words: which services exactly qualify as DIS under the DGA (and which not)? The DGA does not provide a straightforward answer to this question, which leaves many organisations that may or may not qualify as data intermediaries in disarray. At the time of writing, there are many ongoing workshops regarding this topic but no further guidance from the European Commission or enforcement agencies,

[7] European Commission, 'A European Strategy for data. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions', COM/2020/66 final.
[8] DGA, Rec. 28.
[9] Julie Baloup, Emre Bayamlıoğlu, Aliki Benmayor, Charlotte Ducuing, Lidia Dutkiewicz, Teodora Lalova-Spinks, Yuliya Miadzvetskaya and Bert Peeters, 'White Paper on the Data Governance Act', (2021) CiTiP Working Paper 2021, 27-29; Lukas von Ditfurth and Gregor Lienemann, 'The Data Governance Act: – Promoting or Restricting Data Intermediaries?' (2022) 23 Competition and Regulation in Network Industries 278.
[10] For example, consultancy over data use, which relates to the further use of data after the data transaction phase but which could also help data users calibrate their data demand, are not discussed.

however.[11] In this White Paper, we aim to fill this gap, to the benefit of both potential data intermediaries and enforcement agencies. We do not claim to provide conclusive answers, which shall rest with courts, and especially with the CJEU. In light of the spirit and goals of the DGA (as visible in the recitals, the preparatory documents of the DGA and in the legal regime applicable to data intermediaries) and of analogies with other relevant EU provisions where appropriate, we get to the heart of the definition of DIS. To do this, we discuss all the relevant components of the definition of DIS (including the exceptions laid down in the DGA), with a view to identifying the boundaries of what constitutes a DIS and what does not. Where appropriate, we also draw analogies from other legal branches of the EU law to inform the interpretation of provisions of the DGA. We focus mainly on the definition of DIS as per Art. 2(11) DGA and we do not further explore the categories of DISs identified under Art. 10 DGA. Further enquiry is therefore needed to clarify such categories, and in particular how the DGA applies to the broad array of 'data rights intermediaries'[12] concerning personal data.

The White Paper explores and analyses the logical boundaries of the concepts and notions recruited in defining data intermediaries, particularly how they interact with certain other provisions of the DGA itself, its preparatory documents, and relevant other sources of the EU *acquis Communautaire*. The following therefore will seek to contrast a formal legal understanding of the concepts and notions on the one hand with non-formalistic, functional understandings of the legal arrangements that the data intermediary seeks to capture, or in the case of exclusions and exceptions, seeks not to capture. Non-formalist reading is intended here to signify a practical understanding of how the legal arrangements may be construed, particularly where real-world examples can be understood to shape the legal understanding of the concepts and notions discussed. As the analysis reveals, the dynamics of some of these arrangements raise a trove of novel questions about the nature of data intermediaries that the DGA is not necessarily equipped to address.

The concepts and notions discussed herein therefore will have a profound impact on the reception of data intermediaries as a legal category, with the desirability of categorisation being an implicit driver of how legal arrangements can fit the moulds created by the DGA. On the one hand, clarifying the exact scope of the notion of data intermediary can ameliorate legal certainty and make the notion workable with existing and emerging data sharing practices. Legal certainty is often linked with the predictability and the protection of investments in a certain way of doing business for economic operators, especially as emphasised from the perspective of traditional law and economics literature.[13] In the context of the DGA, it has been argued that rules for data intermediaries in fact add to an "already highly complex framework for data-related activities".[14] On the other hand, providing exclusions or exceptions to the regulatory supervision regime for such data intermediaries may be particularly attractive for entities

[11] Marina Michelli, Eimear Farrell, Bruno Smichowski, Monica Posada Sanchez, Serena Signorelli and Michele Vespe, 'Mapping the landscape of data intermediaries', (2023) Publications Office of the European Union.

[12] Alexandra Giannopoulou, Jef Ausloos, Sylvie Delacroix, Heleen Janssen, Intermediating data rights exercises: the role of legal mandates (2022) 12(4), International Data Privacy Law 316–331.

[13] Louis Kaplow, 'Rules Versus Standards: An Economic Analysis' (1992) 42 Duke Law Journal 557; Aurelien Portuese et al, 'The principle of legal certainty as a principle of economic efficiency' (2017) 44 European Journal of Law and Economics 131. It should be noted that there are alternative views of legal certainty, including those emphasising substantive acceptability by the legal community, rooted in Habermasian discourse theory, see Elina Paunio, 'Beyond Predictability – Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order' (2019) 10(11) German Law Journal 1469.

[14] Lukas von Ditfurth and Gregor Lienemann, 'The Data Governance Act: – Promoting or Restricting Data Intermediaries?' (2022) 23 Competition and Regulation in Network Industries 290; citing Inge Graef and Raphael Gellert, 'The European Commission's proposed Data Governance Act: some initial reflections on the increasingly complex EU regulatory puzzle of stimulating data sharing' (2021) TILEC Discussion Paper No. DP2021-006.

seeking to avoid fulfilling the consequential regulatory requirements, namely by so-called "regulatory arbitrage",[15] i.e. the "perfectly legal planning technique used to avoid […] regulatory costs".[16] Indeed, the DGA has been criticised for increasing compliance costs for potential data intermediaries.[17] Implicit incentives to avoid such regulatory costs can be a key enabler of "coding strategies", including by private sector actors.[18] Whatever the impact of the DGA is in factual and material terms, it cannot be ruled out that pursuant to the relevant stakeholders' assessment of the DGA's rules, they may wish to evade it entirely.[19]

The first section clarifies which data intermediation services are governed by the DGA or, in other words, how the definition of DISs as per Art. 2(11) of the DGA interacts with the identification of data intermediation services in the scope of the DGA as per Art. 10 of the DGA. The third section is dedicated to exclusions and exception to Chapter III DGA. Then, the following sections analyse the criteria, included in the definition of DIS, that should be cumulatively present so they are in the scope of Chapter III of the DGA. Section four analyses the notion of 'service'. Then, section five analyses the expression 'aim to establish commercial relationships for the purpose of data sharing'. In this section, we also analyse the legal regime for 'additional tools and services' that Art. 12(e) of the DGA allows data intermediaries to provide together with data intermediation services. Section six focuses on the 'undetermined number of data holders, data subjects and data users' and section seven briefly analyses the means through which data intermediation services can be provided, namely 'technical, legal or other means'. Finally, section eight looks more specifically into how Chapter III of the DGA applies to research activities.

2 Data Intermediation Services Governed by the DGA

The DGA defines a data intermediation service as 'a service which aims to establish commercial relationships for the purposes of data sharing between an undetermined number of data subjects and data holders on the one hand and data users on the other, through technical, legal or other means, including for the purpose of exercising the rights of data subjects in relation to personal data' (Art. 2(11) of the DGA). The recitals clarify that examples of data intermediation services include 'data marketplaces on which undertakings could make data available to others, orchestrators of data sharing ecosystems that are open to all interested parties, for instance in the context of common European

[15] Victor Fleischer, 'Regulatory Arbitrage' (2010) 89 Texas Law Review 227; also referred to as "legal arbitrage" e.g. in Katharina Pistor, 'Legal Coding beyond Capital?' (2022) 1 European Law Open.

[16] Victor Fleischer, 'Regulatory Arbitrage' (2010) 89 Texas Law Review 227, 229. In this Article, Fleischer argued that regulatory arbitrage "exploits the gap between the economic substance of a transaction and its legal or regulatory treatment, taking advantage of the legal system's intrinsically limited ability to attach formal labels that track the economics of transactions with sufficient precision".

[17] Lukas von Ditfurth and Gregor Lienemann, 'The Data Governance Act: – Promoting or Restricting Data Intermediaries?' (2022) 23 Competition and Regulation in Network Industries 290; citing Andreas Hartl and Anna Ludin, 'Recht der Datenzugänge' (2021) Multimedia und Recht 534.

[18] Katharina Pistor argues that these coding strategies and their focus on the "black letter" of the law, while disregarding the purpose of the law, can further be obscured by the notion of legal certainty. Cf. Katharina Pistor, 'Legal Coding beyond Capital?' (2022) 1 European Law Open 344, 350; Katharina Pistor, 'The Value of Law' (2020) 49 Theory and Society 165. Martijn Hesselink argues that this contributes to the case for a greater system of principles, wherein it would be more difficult to carve out exceptions and more difficult to engage in regulatory arbitrage. Cf. Martijn W Hesselink, 'Reconstituting the Code of Capital: Could a Progressive European Code of Private Law Help Us Reduce Inequality and Regain Democratic Control?' (2022) 1 European Law Open 316, 326.

[19] Lukas von Ditfurth and Gregor Lienemann, 'The Data Governance Act: – Promoting or Restricting Data Intermediaries?' (2022) 23 Competition and Regulation in Network Industries 292; Heiko Richter, 'Looking at the Data Governance Act and Beyond: How to Better Integrate Data Intermediaries in the Market Order for Data Sharing' (2023) 72 GRUR International 462.

data spaces, as well as data pools established jointly by several legal or natural persons with the intention to licence the use of such data pools to all interested parties in a manner that all participants that contribute to the data pools would receive a reward for their contribution' (Rec. 28 of the DGA).

The definition of a DIS is thus based on other notions, namely 'data sharing', 'data subject', 'data holder' and 'data user'. Data sharing is defined, for the purpose of the DGA, as 'the provision of data by a data subject or a data holder to a data user for the purpose of the joint or individual use of such data, based on voluntary agreements or Union or national law, directly or through an intermediary, for example under open or commercial licences subject to a fee or free of charge' (Art. 2(10) of the DGA). 'Data subject' is defined following the definition of the General Data Protection Regulation[20] ('GDPR'), namely as an individual who can be identified through data (Art. 2(7) of the DGA). A data holder is defined, for the purpose of the DGA,[21] as a legal or natural person 'who is not a data subject with respect to the specific data in question, which, in accordance with applicable union or national law, has the right to grant access to or share certain personal data or non-personal data' (Art. 2(8) of the DGA). A data user is defined as a natural or legal person 'who has lawful access to certain personal or non-personal data and has the right, including under [the GDPR] in the case of personal data, to use that data for commercial or non-commercial purposes' (Art. 2(8) of the DGA). Data holders, data subjects and data users are persons who can use DIS or, in other words, the customers of the data intermediaries.

Notably, Art. 10 of the DGA specifies the particular DIS that should be subject to the key requirements outlined in chapter III of the DGA.[22] Particularly, (i) those 'between data holders and potential data users, including making available the technical or other means to enable such services; those services may include bilateral or multilateral exchanges of data or the creation of platforms or databases enabling the exchange or joint use of data, as well as the establishment of other specific infrastructure for the interconnection of data holders with data users', (ii) those 'between data subjects that seek to make their personal data available or natural persons that seek to make non-personal data available, and potential data users, including making available the technical or other means to enable such services, and in particular enabling the exercise of the data subjects' rights provided in Regulation (EU) 2016/679' and (iii) services of data cooperatives.

The inclusion of a general definition of "services of data intermediation" in Art. 2(11) of the DGA and the more specific categories of services listed in Art. 10 of the DGA begs the question how these articles interact with one another. More specifically, the question is whether these need to be read in conjunction with each other in order to define the precise scope of Art. 11 and 12 of the DGA. Carovano and Finck suggest that the listing of Art. 10 "invites speculation as to whether Art. 10 really creates a subset of DIS (compared to the general definition in Art. 2(11)) that are alone subject to Art. 11 and 12."[23] In their view, this provision needs to be understood in the context of the original draft of the

[20] 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 [2016] OJ L119/1.

[21] The definition of a 'data holder' within the meaning of the DGA should not be confused with the definition of a data holder within the meaning of the Data Act where the data holder is, essentially, the data sharing duty-bearer, see Data Act, Art. 2(6).

[22] Art. 11 and 12 of the DGA.

[23] Gabriele Carovano and Michèle Finck, 'Regulating data intermediaries: The impact of the Data Governance Act on the EU's data economy' (2023) 50 *Computer Science & Law Review* 7.

DGA,[24] which did not define data intermediation services, leaving Art. 9 of the proposal (now Art. 10 of the regulation) as the only provision defining which data sharing services would be in scope of the regulation. On the basis of this reasoning, they argue that it was likely not the intent of the legislator through Art. 10 of the DGA to create only a specific subset of data intermediation services that would need to comply with Art. 11 and 12 of the DGA. This view does not, however, seem to be held by other authors.[25]

Looking back to the original proposal of the European Commission, Art. 9 contained much of the same information as the current Art. 10 of the regulation. There are however a few changes that stand out. For instance, Art. 10 now specifically includes intermediation services involving non-personal data between natural persons and potential data users. But the most important difference to be noted in this context is that both the title of chapter III and the first sentence of Art. 9 of the proposal referred to "data sharing services", rather than data intermediation services. What followed in Art. 9(1)(a) through (c) was a listing of data sharing services that would be subjected to the notification procedures introduced by the DGA. These services were "intermediation services between data holders which are legal persons and potential data users", "intermediation services between data subjects that seek to make their personal data available and potential data users" and "services of data cooperatives".

The proposal however did not include any definition of what was to be understood under the term "intermediation services". A (too) broad understanding of this term could have resulted in a large amount of data sharing services to be covered by the DGA, as it explicitly referenced “requirements applicable to data sharing services” under chapter III. It was only in Rec. 22 that the proposal put forward some criteria for the services that would be covered by the regulation, more precisely "*providers of data sharing services that have as a main objective the establishment of a business, a legal and potentially also technical relation between data holders, including data subjects, on the one hand, and potential users on the other, and assist both parties in a transaction of data assets between the two. It should only cover services aiming at intermediation between an indefinite number of data holders and data users, excluding data sharing services that are meant to be used by a closed group of data holders and users*." The proposal was criticised on this, stating that it was "*not possible to infer from art. 9 that [data sharing services] are limited to services 'aimed at intermediating between an indefinite number of data holders and data users*'".[26]

Under the final regulation, chapter III no longer refers to data sharing services, but to data intermediation services. These services are now also defined more clearly in Art. 2(11) of the DGA. In introducing Art. 2(11) and keeping (to a large extent) the original phrasing of (the precedent of) Art. 10 of the DGA, one could wonder whether the intent was not so much to introduce an altogether new scope of chapter III of the DGA, but rather to clarify the scope of the pre-existing Art. 10 where it referred to "intermediation services". Therefore, it would follow that the services covered by the DGA are those services that meet the requirements of Art. 2(11) and fall under one of the categories mentioned in Art. 10. It would be another thing to conclude that the intent of including Art. 2(11) was

[24] European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on European data governance (Data Governance Act)’ COM(2020) 767 final (DGA Proposal)

[25] Heiko Richter, ‘Looking at the Data Governance Act and Beyond: How to Better Integrate Data Intermediaries in the Market Order for Data Sharing’ (2023) 72 *GRUR International* 462; Lukas von Ditfurth and Gregor Lienemann, ‘The Data Governance Act: – Promoting or Restricting Data Intermediaries?’ (2022) 23 *Competition and Regulation in Network Industries* 279.

[26] Julie Baloup, Emre Bayamlıoğlu, Aliki Benmayor, Charlotte Ducuing, Lidia Dutkiewicz, Teodora Lalova-Spinks, Yuliya Miadzvetskaya and Bert Peeters, ‘White Paper on the Data Governance Act’, (2021) CiTiP Working Paper 2021, 27.

for this definition alone to function as the defining factor to set the scope for the services covered by Art. 11 and 12 , thereby potentially broadening the scope of the regulation. This interpretation would almost be a negation of Art. 10, which clearly delineates a limited set of data intermediation services targeted by the notification procedure and conditions introduced by Art. 11 and 12. Any such interpretation of the text would undoubtedly bring an additional element of uncertainty as to which organisations are required to notify their activities and comply with the conditions set in the DGA.

Assuming that the scope of Chapter III of the DGA is indeed set both by Art. 2(11) and Art. 10 of the DGA, the question is to what extent this makes a real difference in practice. Carovano and Finck indicate that looking at Art. 10 of the DGA would imply that services offered by membership organisations which are not constituted by data subjects, one-person undertakings or SME's would qualify as services of data intermediaries under Art. 2(11), but not as data cooperatives (Art. 10(c)). They would then be outside of the scope of the DGA.[27] It is also a point of contention whether Art. 10(1)(b), with respect to data subjects' personal data, refers to personal information management systems ('PIMS'), to what extent all forms of PIMS are covered by it and whether its scope extends beyond PIMS.[28]

The remainder of this paper focuses on the definition of data intermediation services as per Art. 2(11) of the DGA and does not further enquire into the specific categories of such services as per Art. 10.

3 The Exclusions and Exceptions to Data Intermediation Services

3.1 Introduction

In outlining the concept of 'data intermediation service',[29] the EU legislature not only defined what a data intermediation service or data intermediary *is*, but also expressly stipulated which legal arrangements are "at least" excluded.[30] Referred to here in truncated form, these exclusions are: (1) services obtaining data for the purpose of adding substantial value;[31] (2) copyright intermediaries;[32] (3) single-holder and closed-group services,[33] and; (4) public sector services[34] (section 3.2 and Figure 1). Further beyond these, Art. 15 clarifies that the requirements applicable to data intermediaries under Chapter III do not apply to "recognised data altruism organisations or other not-for-profit

[27] Gabriele Carovano and Michèle Finck, 'Regulating data intermediaries: The impact of the Data Governance Act on the EU's data economy' (2023) 50 *Computer Science & Law Review* 7.
[28] EDPB-EDPS, '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)' (2021) 31; Heiko Richter, 'Looking at the Data Governance Act and Beyond: How to Better Integrate Data Intermediaries in the Market Order for Data Sharing' (2023) 72 *GRUR International* 462.
[29] Referred to here interchangeably as "data intermediary".
[30] Art. 2(11) DGA.
[31] Defined by Art. 2(11)(a) DGA as "services that obtain data from data holders and aggregate, enrich or transform the data for the purpose of adding substantial value to it and license the use of the resulting data to data users, without establishing a commercial relationship between data holders and data users".
[32] Defined by Art. 2(11)(b) DGA as ''services that focus on the intermediation of copyright-protected content".
[33] Defined by Art. 2(11)(c) DGA as "services that are exclusively used by one data holder in order to enable the use of the data held by that data holder, or that are used by multiple legal persons in a closed group, including supplier or customer relationships or collaborations established by contract, in particular those that have as a main objective to ensure the functionalities of objects and devices connected to the Internet of Things".
[34] Defined by Art. 2(11)(d) DGA as ''data sharing services offered by public sector bodies that do not aim to establish commercial relationships".

entities" provided certain conditions are met (section 3.3).[35] Finally, Rec. 29 of the DGA clarifies that consolidated tape providers,[36] as well as account information service providers, should not be considered data intermediaries (section 3.4).[37]

Exclusions, exceptions and other categories of legal arrangements potentially involving data sharing that are understood not to comprise data intermediaries may be interpreted in several distinct ways. According to one interpretation, the phrase "at least excluded" may be understood to indicate that these are considered *a priori* out of scope, and that their enumeration only serves clarificatory purposes. In this view, the non-applicability of the data intermediary category to these arrangements should already be deducible from the data intermediary category itself. This would mean that these exclusions are distinct from what can be understood as an "exception", rooted in the idea that an exception exempts a sub-category of arrangements that – were it not for the exception – would be covered by the overarching data intermediary category. In this sense, exclusions are distinct from exceptions in terms of logical structure. According to another interpretation, "at least excluded" could be read to be equivalent to "at least exempting". This interpretation would mean that the exclusions can be considered equal in logical structure as exceptions, meaning that the overarching data intermediary category would cover the relevant legal arrangements were it not for these exclusions. Neither of these interpretations are expressly endorsed here, nor are they addressed by the text of the DGA, yet their implications for questions of scope of the data intermediary category are important in potential adjudication and the flexibility of the scope of data intermediaries. Specifically, Art. 2(11) of the DGA addresses what are referred to here as exclusions, yet in the interest of consistency of addressing the field of legal arrangements expressly considered not to comprise data intermediaries in some fashion, the formally-defined exception (Art. 15) and the clarifications in the recitals are also addressed here, without prejudice to this interpretational dimension.

Exclusions and exceptions to data intermediaries could play an important role in the functioning of the DGA, particularly as it contributes to ordering the EU's data economy. Formally, there is nothing in the legislative text nor the preparatory documents to suggest that these legal arrangements outside the field of data intermediaries are intended to be endorsed by particular legislative actors, that is, that they are motivated to emerge from a specific strategic vision. In this context, exclusions and exceptions can be viewed as contours of an imperfect core concept of data intermediary. Viewed from a realist perspective – that is, non-formally – it must be emphasised that exclusions and exceptions can have serious consequences for the viability of concrete practices, especially where significant regulatory and compliance costs are at stake. In this way, the policy context is implicated by exclusions and exceptions to the data intermediary category, as these may provide alternatives to the organisation of data

[35] This is provided "insofar as their activities consist of seeking to collect data for objectives of general interest, made available by natural or legal persons on the basis of data altruism, unless those organisations and entities aim to establish commercial relationships between an undetermined number of data subjects and data holders on the one hand and data users on the other", Art. 15 DGA.

[36] Defined as "a person authorised under this Directive to provide the service of collecting trade reports for financial instruments listed in Art. 6, 7, 10, 12 and 13, 20 and 21 of Regulation (EU) No 600/2014 from regulated markets, MTFs, OTFs and APAs and consolidating them into a continuous electronic live data stream providing price and volume data per financial instrument", Art. 4(1)(53) Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast).

[37] Defined as "a payment service provider pursuing business activities as referred to in point (8) of Annex I", Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC.

exchanges beyond the European Commission-supported data spaces format.[38] Therefore, exclusions and exceptions have potentially significant implications for the viability of certain business models in the data economy, whether endorsed by a strategic vision or not.

In view of regulatory arbitrage, these exclusions and exceptions will contribute to the degree of certainty inaugurated by the DGA and the viability of particular legal arrangements. What the comprehensive impact of the exclusions and exceptions to data intermediaries is or will be is arguably too early to call, yet the text of the DGA and its interpretation provides the necessary starting point. Such interpretation will add an essential human dimension via the intractability of legal concepts.[39] In this sense, the following is far from the final word on each exclusion or exception.

3.2 Exclusions under Article 2(11) of the Data Governance Act

3.2.1 Services Obtaining Data for the Purpose of Adding Substantial Value

The first clause of arrangements excluded from the definition of data intermediaries are "services that obtain data from data holders and aggregate, enrich or transform the data for the purpose of adding substantial value to it and license the use of the resulting data to data users, without establishing a commercial relationship between data holders and data users".[40]

This exclusion has several key aspects that remain unclear, several of which are potentially problematic. In this regard, the following will break down the components of the exclusion and address key emerging questions. Firstly, what is entailed by the "obtaining" of data is not wholly clear. The choice of this term seems deliberate, as the DGA also defines e.g. the notion of "access",[41] which can be fulfilled "without necessarily implying the transmission or downloading of data". The fact that such services do not access, but instead "obtain" data could indicate that the data in question may also be transmitted or downloaded by the service. Further, analogously, the Database Directive provides *sui generis* protection for a database "which shows that there has been qualitatively and/or quantitatively a substantial investment in […] the obtaining]…] of the contents",[42] whereas databases are defined as "collections of independent works, data or other materials which are systematically or methodically arranged and can be individually accessed".[43] In this context, the use of the word "obtain" could indicate that *sui generis* protection of databases,[44] by virtue of substantial investments in obtaining

[38] In this way, exclusions may be constitutive of "negative data spaces" – a portmanteau of "negative space" and "data spaces". Cf. Elizabeth L Rosenblatt, 'Intellectual Property's Negative Space: Beyond the Utilitarian' (2012) 40 Florida State University Law Review 441; Elizabeth L Rosenblatt, 'A Theory of IP's Negative Space' (2010) 34 Columbia Journal of Law & the Arts 317.

[39] In the words of John Farago, intractable cases – "the cases that reflect life's uncertainty", John M Farago, 'Intractable Cases: The Role of Uncertainty in the Concept of Law' (1980) 55 New York University Law Review 195, 235, with data intermediaries arguably constituting such cases – are the "marrow of the law" – "[the] central lesson of intractable cases is that, faced with a determination that to the very best of our judicial abilities leaves us uncertain, we do not choose to surrender to an arbitrary fate", John M Farago, 'Intractable Cases: The Role of Uncertainty in the Concept of Law' (1980) 55 New York University Law Review 195, 239); for an opposing view, see Anthony D'Amato, 'Judicial Legislation Benjamin Nathan Cardozo Commemorative Issue' (1979) 1 Cardozo Law Review 63.

[40] Art. 2(11)(a) DGA.

[41] Art. 2(13) DGA.

[42] Art. 7(1) Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L 77/20 (Database Directive).

[43] Rec. 17 Database Directive.

[44] It should be noted that the notion of investment in the obtaining of the contents of a database refers to the resources used to seek out existing independent materials and collect them in the database, and not to the resources used for the creation

data, should not be prejudiced by the regulation of data intermediaries. In light of the low level of political optimism for the *sui generis* database right,[45] this interpretation may be questionable. Alternatively, a thus-far-unpronounced interpretation of "obtaining" data as an autonomous notion of the DGA could be made.

Secondly, this exclusion is limited to services that obtain data from "data holders". Data holders are legal or natural persons (that are not data subjects in respect of the specific data) that have "the right to grant access to or to share certain personal data or non-personal data".[46] In effect, this entails that where the data is obtained from a party not comprising a data holder – notably, data subjects – this exclusion would cease to apply. The limitation of this exclusion to data holders seems to bifurcate the scope of applicability of the data intermediary category into those catering to data holders and those to data subjects, given that the definition of data intermediaries considers "data subjects and data holders on the one hand" as equivalent entities within the data intermediary structure. Making this exclusion potentially accessible to services obtaining data from data holders but not for services obtaining data from data subjects could lead to unintended complications, for instance, where data holders are comparatively heterogeneous or where they include sole traders.

Thirdly, this exclusion requires that the services "aggregate, enrich or transform the data for the purpose of adding substantial value to it and license the use of the resulting data to data users". This component of the exclusion has several sub-elements, from which several issues arise. Namely, aggregation, enrichment or transformation are not clear notions in the context of EU data law. Rather than relying on the notion of "processing",[47] which has an established definition in the law,[48] this introduces new notions the coverage of which is not defined. Further, the inclusion of the notion of aggregation could be (correctly or incorrectly) interpreted to signify that the subsequent "resulting data" is necessarily non-personal data. This could be the case, as the Free Flow of Non-Personal Data Regulation includes "aggregated datasets used for big data analytics" as a specific example of non-personal data.[49] Moreover, it is curious to note that the requirement of aggregation, enrichment or transformation must be for the "purpose of adding substantial value to [the data]", which does not

as such of independent materials, see Case C-203/02 *British Horseracing Board* [2004] ECR 2004 I-10415 para 31; Case C-338/02 *Fixtures Marketing* [2004] ECR 2004 I-10497 para 24.

[45] The European Commission has reiterated that "there is no evidence to conclude that the sui generis right has been fully effective in stimulating investment in the European database industry, nor in creating a fully functioning access regime for stakeholders'', European Commission, 'Evaluation of Directive 96/9/EC on the legal protection of databases' SWD(2018) 146 final, 46. Moreover, the European Commission affirmed that "with the growing rollout of IoT machinery, it becomes difficult to clearly distinguish which databases may be protected by the sui generis right and which may not", European Commission, 'Impact Assessment Report accompanying the document 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)' (SWD(2022) 34 final), 133.

[46] Art. 2(8) DGA.

[47] Art. 2(12) DGA.

[48] Art. 4(2) 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) [2016] OJ L 119/1; Art. 3(2) 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 [2018] OJ L 303/59 (FFDR).

[49] Rec. 9 FFDR; a similar discussion could be raised regarding the notion of transformation, which in the context of the copyright *acquis* can be understood to be coextensive with the right of adaptation, which is vertically harmonised in regard to computer programs and databases. See Art.4(1)(b) Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L 111/16 (Software Directive), and Art. 5(b) Database Directive, though only the Software Directive explicitly covers "transformation of the form of the code in which a copy of a computer program" (Rec. 15) under the right of adaptation. Whether the data in question in law and in fact comprises a computer program or a database covered by these rights is a question of case-by-case analysis.

address either the success of this purpose, i.e. that substantial value has in fact been added, nor how this purpose can be determined.[50] A last and perhaps more controversial aspect of this component is that the exclusion requires that the services "license the use of the resulting data to data users".[51] This makes the presumption that data can be licensed, specifically, licensable by the service to data users for downstream acts of *use*.[52] Especially in light of the fact that an exclusion can attract economic behaviour to benefit from it, the ability to license can be problematised as it may encourage the mirroring of a licensor-licensee relationship common to e.g. intellectual property rights and trade secrets, here for an undefined, broad category of acts vis-à-vis data under the label of "use".[53] For cases where the "obtaining" of data and the subsequent aggregation, enrichment and transformation lead the resulting data to benefit from *sui generis* database protection, the ability to license certain acts may be doctrinally uncontroversial, yet the fulfilment of the criteria for *sui generis* protection is not a given. As a corollary, this could mean that licensing of data is legally more accessible than the licensing of certain categories of databases; a bizarre policy choice. More generally, this component of the exclusion may be an attempt to bring the exclusion into the fold of the notion of "data sharing",[54] which is defined *inter alia* as "the provision of data … for the purpose of the joint or individual use of such data […] for example under open or commercial licences".[55] In formulating this component of the exclusion, and with a view to the desirability of non-compliance with the DGA's requirements for data intermediaries from the perspective of regulatory arbitrage, the DGA defers to private ordering via licensing, arguably enacting a shift towards a proprietary model of data governance that had previously been rejected.[56] This is especially true where aggregation, enrichment and/or transformation of data are interpreted broadly,[57] thus potentially encouraging a pattern of behaviour by such service

[50] It would go far beyond the scope of this contribution to delve into political, economic, or philosophical theories of value, yet the inclusion of the purpose requirement undoubtedly implicates their relevance.

[51] For purposes of consistency, "license" and "to license" are used here to refer respectively to the noun and verb.

[52] A singular right to use data is not established by the DGA, nor any other data-related instrument in the European *acquis*. As a requirement of being a data holder, that person must have the "the right to grant access to or to share" certain data (Art. 2(8) DGA), but not the right to use data.

[53] Picht finds that treating IPR licensing as a blueprint for data "licenses" is "conspicuous", Peter Georg Picht, 'Caught in the Acts: Framing Mandatory Data Access Transactions under the Data Act, further EU Digital Regulation Acts, and Competition Law' (Max Planck Institute for Innovation and Competition Research Paper No. 22-05, 2022), 10, arguing that "the IP licensing blueprint is really more a starting point than the solution to most data licensing issues" and that digital regulation should "strive to adopt an improved and adapted version of [IPR licensing]", Peter Georg Picht, 'Caught in the Acts: Framing Mandatory Data Access Transactions under the Data Act, further EU Digital Regulation Acts, and Competition Law' (Max Planck Institute for Innovation and Competition Research Paper No. 22-05, 2022), 11.

[54] Regarding the notion of "data sharing", see Section 5.2.

[55] Art. 2(10) DGA; if it is indeed the case that the Art. 2(11)(a) exclusion excludes a subset of "data sharing", this could indicate that the act of "obtaining" data in the sense of this exclusion is to be interpreted as the obverse act to the act of "provision" (i.e. obtaining being equivalent to "being provided") in the sense of Art. 2(10).

[56] Indeed, the availability of any title to data as such, regardless of practices applied to said data, should be treated with scepticism. Cf. European Commission, 'Building a European Data Economy' COM(2017)9 final, 13; Herbert Zech, 'Data as tradeable commodity' in Alberto de Franceschi (ed.), European Contract Law and the Digital Single Market (Insentia 2016); Josef Drexl, 'Designing Competitive Markets for Industrial Data – Between Propertisation and Access' (Max Planck Institute for Innovation and Competition Research Paper No. 16-13, 2016); P Bernt Hugenholtz, 'Against "Data Property"' in Hanns Ullrich, Peter Drahos and Gustavo Ghidini, Kritika: Essays on Intellectual Property (Edward Elgar Publishing 2018); Thomas Margoni et al, 'Data property, data governance and Common European Data Spaces' (2023) Computerrecht: Tijdschrift voor Informatica, Telecommunicatie en Recht. The idea that appropriation is a necessary prerequisite for use is an idea ultimately rooted in Lockean property theory: "yet being given for the use of men, there must of necessity be a means to appropriate [the fruits of the earth] some way or other, before they can be of any use", John Locke, Two Treatises of Government (Cambridge University Press 1988), 286)).

[57] Aggregation, in particular, may be problematic, which can be understood to be synonymous with terms such as "amassing", "collection" or "assembling". By extension, this can comprise processes of accumulation of data, thereby intensifying, rather than coherently addressing, contemporary issues of data and political economy, Cf. Ugo Pagano and Maria Alessandra Rossi,

providers to intensify licensing practices vis-à-vis data. This would allow a wide range of potential data intermediaries to not be caught by the DGA regulatory regime.[58]

Fourthly and finally, this exclusion requires that the service does not establish a commercial relationship between data holders and data users. This raises *a fortiori* issues regarding the notion of "commercial relationship" in the general definition of data intermediaries discussed below.[59] It is clear that these should be interpreted consistently. This exclusion could, however, clarify the overarching notion, as the obtaining of data from data holders on the one hand is seen to be separable from the licensing of the use of "resulting data" to data users on the other. These acts of aggregation, enrichment and transformation may thus implicitly be capable of breaking the chain of commercial relationships between data holder and data user.[60] In this regard, the service benefitting from this exclusion is a middle-entity separating data holder from data user,[61] yet still not a data intermediary *stricto sensu*. This reading is supported somewhat by the proposed text of the DGA, which in the context of the exclusion of services obtaining data for the purpose of adding substantial value stated "without establishing a direct relationship between data holders and data users",[62] rather than referring to a commercial relationship.

Two potential examples of legal arrangements that may be targeted by this exclusion are addressed here.[63] A first example is presented by open data pools, namely, according to the DGA, 'data pools established jointly by several legal or natural persons with the intention to license the use of such data pools to all interested parties in a manner that all participants that contribute to the data pools would receive a reward for their contribution'.[64] There is no consensual definition of data pools in the literature. In a study on competition law in the digital environment, Crémer et al. define data pools as 'data sharing system[s] which involve [...] an element of reciprocity, whereby at least some companies distribute data.'[65] Data pools have been discussed primarily in the context of competition law,[66] as a means for smaller companies to enter the data economy at scale and the European Union is committee to facilitating data pools for that purpose. In Rec. 28, the DGA explicitly brings into the scope of Chapter

'Incomplete Contracts, Intellectual Property and Institutional Complementarities' (2004) 18 European Journal of Law and Economics 55; Cecilia Rikap, Capitalism, Power and Innovation: Intellectual Monopoly Capitalism Uncovered (Routledge 2021).

[58] Part of the reason for the profusion of modal verbs used here is the simple fact that this provision of the DGA does not determine burdens of proof at this definitional level. It is simply not clear what aggregation, enrichment or transformation mean, nor how these notions can be proven factually and by whom.

[59] See Section 5; see also Section 3.3.

[60] Cf. Lukas von Ditfurth and Gregor Lienemann, 'The Data Governance Act: – Promoting or Restricting Data Intermediaries?' (2022) 23 Competition and Regulation in Network Industries 270, who argue that the commercial relationship criterion should be construed in light of the "main purpose" of data sharing (at 281).

[61] This is linked to a broader issue of the exclusions, namely their use of the term "intermediary" independent of the concept of "data intermediary".

[62] Rec. 22, European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on European data governance (Data Governance Act)' COM(2020) 767 final, elaborating: "for example advertisement or data brokers, data consultancies, providers of data products resulting from value added to the data by the service provider".

[63] There are further legal arrangements that could emerge, potentially comprising important business models. For instance, an added value service in a manufacturing data space (See Edward Curry et al, 'Data Sharing Spaces: The BDVA Perspective' in Boris Otto et al (eds), *Designing Data Spaces: The Ecosystem Approach to Competitive Advantage* (Springer 2022). These potential cases are not addressed here largely due to their speculative nature, though the role of new legal arrangements that are developed in accordance with the DGA ought to be revisited.

[64] Rec. 28 DGA.

[65] Jacques Crémer et al, 'Competition Policy for the Digital Era' (Publications Office of the European Union 2019), 92–93.

[66] Ariel Ezrachi, 'EU Competition Law Goals and the Digital Economy' (2018) Oxford Legal Studies Research Paper No. 17/2018; Björn Lundqvist, Competition and data pools, Journal of European Consumer and Market Law, Vol. 7(4), 2018, 146-154.

III DGA 'open data pools', However, while data pooling often imply data-enrichment services to add value to the data, the question is then whether there would still be a 'direct commercial relationship' between data holders and data users relating to data sharing.

A second example is this of data trusts. While there is no univocal definition of data trusts, they are generally referred to as "intermediaries that aggregate [weaker parties' such as consumers'] interests and represent them vis-à-vis data [users]. [they use more technical and legal expertise, as well as greater bargaining power, to negotiate with organizations on the conditions of data use to achieve better outcomes that those that individual [parties] can achieve. [...] They may or may not need to hold data".[67] While a wide range of different legal arrangements may be referred to as 'data trusts', some of them may escape the definition of DIS based on the present exclusion.[68] It will be for potential data intermediaries providing relevant services to evaluate *in concreto* whether their services qualify as DIS or whether they are excluded from the scope and, in particular, whether the data-enrichment activities conducted on the data result in breaking the connection between data holders and data users. In this regard, although data pools and data trusts are commonly referred to as data intermediaries,[69] this exclusion may play an important role in their design.

Overall, as argued above, this exclusion has a number of problem areas. First, the notion of "obtaining" is underdeveloped and lacks a clear link to other novel notions established by the DGA. Second, the limitation of the exclusion to "data holders" lacks concrete motivation. Third, the requirement for potential data intermediaries to "aggregate, enrich or transform the data for the purpose of adding substantial value to it and license the use of the resulting data to data users" introduces a number of acts regarding data that remain nebulous and advances the licensability of data without a clear justification. Nevertheless, this exclusion could potentially elucidate the relationship of data intermediaries to the *sui generis* database right, and could be interpreted as contributing to the specification of the interpretation of licences within the context of data sharing, acts of use in the context of aggregation, enrichment and transformation, and the notion of 'commercial relationship' in the DGA. The breadth of potential data intermediaries addressed by this exclusion poses a risk for the applicability of the Chapter III regime, especially in light of the open texture of its requirements.[70] This exclusion should therefore be observed in the coming years within the context of regulatory arbitrage and private coding strategies.

3.2.2 Copyright Intermediaries

[67] Aline Blankertz, 'Designing Data Trusts: Why We Need to Test Consumer Data Trusts Now' (Stiftung Neue Verantwortung, February 2020) <https://www.stiftung-nv.de/en/publication/designing-data-trusts-why-we-need-test-consumer-data-trusts-now>, accessed on 29 August 2023.

[68] Establishing whether this can be the case is particularly difficult, as trusts are generally a legal concept of common law jurisdictions, such as the United States (see Kimberly A Houser and John W Bagby, 'The Data Trust Solution to Data Sharing Problems' (2023) Vanderbilt Journal of Entertainment & Technology Law 25(1) 113,145ff).

[69] M Micheli et al, 'Mapping the landscape of data intermediaries — Emerging models for more inclusive data governance' (Publications Office of the European Union 2023).

[70] The "open texture" of law is most prominently articulated by Hart (HLA Hart, *The Concept of Law* (2nd ed, Clarendon Press 1994), 124). It could be further argued that the fact that notions of services that "obtain" data and of "adding substantial value" remain underdeveloped within the legislative text, this invites a deliberation of these notions internal to the provider of such a service obtaining data for the purpose of adding substantial value. This means that such potential data intermediaries would not submit a notification under Art. 11 DGA in the first place, making monitoring more difficult.

The second clause of arrangements excluded from the definition of data intermediaries are 'services that focus on the intermediation of copyright-protected content'.[71]

At face value, this exclusion seems quite straightforward. However, delving further into it, several issues emerge, with the coverage of this exclusion vis-à-vis certain intermediaries remaining unclear. Most clearly, Recital 29 of the DGA names online content-sharing service providers defined in Art. 2(6) of the Directive on copyright and related rights in the Digital Single Market ('CDSM Directive') as a form of such a service that should not be covered by the DGA.[72] This Recital indicates that this is not exhaustive via the modifier "such as", yet the lack of precision, especially in regard to other relevant intermediaries, is nevertheless unwelcome. More specifically, whereas the CDSM Directive precisely indicates that the service of such a provider is characterised by having a "main or one of the main purposes", this is not necessarily congruent with the idea of "focus" under the DGA.[73]

Furthermore, it is striking that this exclusion does not address the role of collective management organisations ('CMOs') and independent management entities ('IMEs'), two crucial legal arrangements for intermediaries in the domain of copyright. CMOs are defined by the Collective Management Directive as: "any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which fulfils one or both of the following criteria:(i) it is owned or controlled by its members; (ii) it is organised on a not-for-profit basis".[74] IMEs are further defined as "any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which is: (i) neither owned nor controlled, directly or indirectly, wholly or in part, by rightholders; and (ii) organised on a for-profit basis". In essence, the potential for the definition of data intermediary to cover CMOs and IMEs will depend on the interpretation of the data intermediary notion itself, and perhaps more specifically, on whether the requirement for data intermediaries to "[aim] to establish commercial relationships for the purposes of data sharing" can be read to be in conformity with the requirement for CMOs and IMEs to be "authorised by law, or by way of assignment, licence or any other contractual arrangement" under the Collective Management Directive. For instance, where a data intermediary "aims to" establish a commercial relationship between a data holder and a data user involving potentially copyright-protected material, assuming there also exists a contractual arrangement between the intermediary

[71] Art. 2(11)(b) DGA.

[72] Rec. 29 of the DGA; "'online content-sharing service provider' means a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes". See alsoArt. 2(6) Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92 (CDSM Directive).

[73] Especially given the lacking availability of copyright ownership information, Cf. Martin Sentfleben et al, 'Ensuring the Visibility and Accessibility of European Creative Content on the World Market: The Need for Copyright Data Improvement in the Light of New Technologies and the Opportunity Arising from Article 17 of the CDSM Directive' [2022] JIPITEC 13(1) 67), an intermediary may incidentally focus on the intermediation of copyright-protected content, despite not having this as (one of) its main purposes.

[74] Art. 3(a) Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market[2014] OJ L 84/72.

and the data holder and data user respectively, this could fit the notion of "any other contractual arrangement" under the Collective Management Directive.

Further issues emerge from the exclusion's phrasing of "copyright-protected content", which simultaneously narrows the scope of copyright to the detriment of related rights and introduces the notion of "content" which is not formally used in the context of copyright.[75] Firstly, related rights, also referred to as neighbouring rights, are generally rights that apply to subject matter that are not protected as original, many of which are harmonised by the EU copyright *acquis*, potentially intersecting with "data" as defined in the DGA.[76] The question of related rights is particularly relevant in the context of data, which may be contained within a database potentially protected by the related right to copyright or the *sui generis* database right, and further as CMOs are often responsible for specific categories of related rights,[77] such as the right of phonogram producers or the right of producers of the first fixations of films.[78] In this regard, the copyright *acquis*, where it regulates copyright and related rights simultaneously, generally refers to copyright-protected works and other protected subject matter together.[79] This is not done in the DGA. Secondly, the reference to "content" could suggest an alignment with the notion of "digital content", which is defined as "data which are produced and supplied in digital form" in the Digital Content Directive.[80] In light of this definition of digital content, and given that the DGA regulates and defines the notion of data autonomous from the Digital Content Directive, however, it seems unnecessary to introduce the notion of "content", when "data" seems to fit the bill already.

In an abstract sense, it would make sense to exclude CMOs and IMEs from the scope of the data intermediaries directly. Indeed, the Collective Management Directive pursues objectives not dissimilar to those of the DGA regarding the legal arrangements that it regulates, namely to foster a high standard of governance, financial management, transparency and reporting,[81] whereas the DGA also sets out to establish greater transparency.[82] Nevertheless, the DGA does not make such a clarification. Further, as is done in the Data Act,[83] it would also be sensible to clarify the position of the DGA vis-à-

[75] Copyright typically substantively addresses the rights of authors in their "literary and artistic works" (Art. 2 jo. 1 Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886 (as amended on September 28, 1979) 828 UNTS 221).

[76] See also regarding the intersection of the definition of data with copyright and related rights: Leander S Stähler, 'Chapter III, Article 11 of the Data Act – The regulation of unauthorised access to data' in Ducuing C et al (eds), 'White Paper on the Data Act Proposal' (CiTiP Working Paper Series 2022), 39f.

[77] See regarding the fragmentation of copyright and related rights in the context of collective management: Daniel Gervais, 'Collective Management of Copyright: Theory and Practice in the Digital Age' in Daniel Gervais (ed), Collective Management of Copyright and Related Rights (2nd ed, Kluwer Law International 2010), 10ff.

[78] Artt. 2(c) and 3(2)(b) Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10 (InfoSoc Directive) and Art. 3(2) Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version) [2006] OJ L 372/12 (Term Directive) regarding phonogram producers; Artt. 2(d) and 3(2)(c) InfoSoc Directive and Art. 3(3) Term Directive regarding producers of the first fixations of films

[79] E.g. Rec. 56 InfoSoc Directive and Rec. 2, 64, 66 of CDSM Directive.

[80] Art. 2(1) Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L 136/1 (Digital Content Directive): "'digital content' means data which are produced and supplied in digital form". Given the DGA's definition of data as a digital representation, the number of situations in which digital content is not legally congruent with data and vice versa are vanishingly difficult to imagine.

[81] E.g. Rec. 9 Collective Management Directive.

[82] E.g. Rec. 5 DGA.

[83] Rec. 84 and Art. 35,European Commission '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.

vis related rights to copyright – including the *sui generis* database right, which is also addressed regarding services obtaining data for the purpose of adding substantial value – yet the impression that this is the purpose of this particular exclusion is unconvincing. Without delving too deeply outside the scope of the DGA, this exclusion potentially opens a can of worms that many "intermediaries" in digital space have not so far fully tackled, namely how to establish the subsistence of copyright in large sets of "content".[84] In this sense, the complex interface of data regulation and copyright will continue to raise questions, including in the context of data intermediaries.

3.2.3 Single-Holder and Closed-Group Services

The third clause of arrangements excluded from the definition of data intermediaries are "services that are exclusively used by one data holder in order to enable the use of the data held by that data holder, or that are used by multiple legal persons in a closed group, including supplier or customer relationships or collaborations established by contract, in particular those that have as a main objective to ensure the functionalities of objects and devices connected to the Internet of Things".[85]

In essence, this exclusion applies to two variations of what are called "single-holder and closed-group services" here – one focusing on a single data holder enabling use of data, while the other focusing on multiple legal persons in a closed group, whereas the remainder of the exclusion clarifies what is included within this latter notion.

Excluding services exclusively used by one data holder can be seen as a boundary condition of the data intermediary definition regarding data sharing by an "undetermined number of […] data holders on the one hand". Indeed, this exclusion determines this number, at least for the data holder side of the intermediary and for use of the data. It should be noted that this exclusion only applies to data holders and not data subjects, which could implicitly entail that data subject-oriented solutions for enabling the use of personal data, such as personal information management systems or PIMS,[86] or where data subjects make use of an electronic identification scheme,[87] could still be addressed in some form by the notion of data intermediary.[88] Further, the exclusion is limited to the "use of the data held by that data holder", which is more specific than the general "for the purposes of data sharing" criterion of the data intermediary definition. Recalling that, on the one hand, data sharing refers to the act of "provision of data",[89] and on the other that the "for the purposes of data sharing" criterion is quite

[84] Copyright scholars will be familiar with the debate on the advantages and drawbacks of the current lack of a requirement or infrastructure for the registration of copyright works across most jurisdictions (cite). Interestingly, Art. 17 of the CDSM Directive may provide an opportunity to ameliorate this state of the art (see Martin Sentfleben et al, 'Ensuring the Visibility and Accessibility of European Creative Content on the World Market: The Need for Copyright Data Improvement in the Light of New Technologies and the Opportunity Arising from Article 17 of the CDSM Directive' (2022) JIPITEC 13(1) 67)).
[85] Art. 2(11)(c) DGA.
[86] European Data Protection Supervisor, 'Opinion 9/2016: EDPS Opinion on Personal Information Management Systems: Towards more user empowerment in managing and processing personal data' ((2016).
[87] Currently, electronic identification schemes are chiefly offered by the EU Member States themselves in accordance with Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC [2014] OJ L 257/73 (eIDAS Regulation); however, the 2021 proposal for amending the eIDAS Regulation would also enable the provision of private electronic identification schemes by so-called "private identity providers",Rec. 14 European Commission 'Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity' COM(2021) 281 final.
[88] It should be noted that some of these tools could qualify as "services only provide technical tools for data subjects or data holders to share data with others" that should not be considered to be data intermediation services (Rec. 28 DGA).
[89] Art. 2(10) DGA.

expansive,[90] the limitation to the undefined notion of "use" in this exclusion could signify that there remain certain single-data-holder data sharing arrangements that would nevertheless be covered as data intermediaries.

The notion of services used by a closed group is a similar confinement of the "undetermined number" aspect of the data intermediary definition,[91] though applying not only to the data holder side, but also to the data user side. It should be noted that the data holder side is equally limited to data holders, thereby excluding data subjects,.[92] The exclusion further clarifies as examples of such a closed group "supplier or customer relationships or collaborations established by contract", which could cover all manner of vertical or horizontal supply/value chain arrangements between legal persons. The specification that services that "have as their main objective to ensure the functionalities of objects and devices connected to the Internet of Things" is especially useful as it would seem to suggest at least that networks of legal persons making use of machine-to-machine (M2M) communications should be covered by this exclusion.[93] Further still, this specification could be a forward-looking carve-out for the specific Internet of Things (IoT) exchanges to be inaugurated by the Data Act,[94] which proposes specialised rules for the exchange of IoT data.[95]

Viewed more broadly, this exclusion reflects a policy shift throughout the DGA legislative procedure. The Staff Working Document accompanying the DGA proposal mentioned several concrete examples of data intermediaries,[96] including Siemens Mindsphere.[97] Siemens Mindsphere, now rebranded as Insights Hub,[98] would, however, in certain instances benefit from this exclusion as a bespoke service for industrial IoT operators. In its documentation, Siemens states that "[the] data you bring into Insights Hub comes from your site & things. These data points come from sensors on your local machines or field devices, which are connected to the Programmable Logic Controller (PLC) which collects your specific data points." [99] While it is possible to share data across Insights Hub environments, [100] this is not guaranteed for every case, and will likely depend on the exact configuration of each industrial operator making use of such tools. Tools such as Siemens' Insights Hub therefore, may instead serve as a means for creating such closed-group data intermediaries rather

[90] See Section 5.2.
[91] See Section 6.
[92] Data subjects must be "an identified or identifiable natural person" (Art. 4(1) GDPR).
[93] Rather than refer to closed groups, the DGA proposal text stated that "platforms developed in the context of objects and devices connected to the Internet-of-Things that have as their main objective to ensure functionalities of the connected object or device and allow value added services, should not be covered by this Regulation" (Rec. 22, DGA Proposal).
[94] Data Act Proposal.
[95] Specifically data generated by "products" and "related services"; where a product is "a tangible, movable item, including where incorporated in an immovable item, that obtains, generates or collects, data concerning its use or environment, and that is able to communicate data via a publicly available electronic communications service and whose primary function is not the storing and processing of data" (Art. 2(2) Data Act Proposal) and a related services is "a digital service, including software, which is incorporated in or inter-connected with a product in such a way that its absence would prevent the product from performing one of its functions" (Art. 2(3) Data Act Proposal).
[96] They are referred therein as "data intermediaries" although the proposal itself addresses "providers of data sharing services".
[97] European Commission, 'COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT Accompanying the document Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on European data governance (Data Governance Act)' SWD(2020) 295 final, 76.
[98] 'Insights Hub Industrial IoT as a Service | Siemens Software' (*Siemens Digital Industries Software*) <https://plm.sw.siemens.com/en-US/insights-hub/> accessed 30 August 2023.
[99] 'Index - Developer Documentation' (*Siemens*) <https://documentation.mindsphere.io/MindSphere/concepts/index.html> accessed 30 August 2023.
[100] 'Index - Developer Documentation' (*Siemens*) <https://documentation.mindsphere.io/MindSphere/concepts/index.html> accessed 30 August 2023.

than data intermediaries outright. Whatever the motivation behind this change to the DGA, the business models of such organisations may remain largely unaffected.[101] At the same time, from the perspective of regulatory arbitrage, this exclusion potentially makes the use of the technologies provided by Siemens for closed-group exchanges more attractive. Generally, this exclusion may have important implications for the development of industrial data clouds and data sharing ecosystems for industrial actors.[102]

3.2.4 Public Sector Services

The fourth clause of arrangements exempted from the definition of data intermediaries are "data sharing services offered by public sector bodies that do not aim to establish commercial relationships".[103] This exclusion is further clarified by Rec. 29: '[Chapter III] should not apply to services offered by public sector bodies in order to facilitate either the reuse of protected data held by public sector bodies in accordance with [Chapter II of the DGA] or the use of any other data, insofar as those services do not aim to establish commercial relationships'. In contrast, Rec. 27 of the DGA clarifies that, in principle, data intermediaries may include public sector bodies. It is thus difficult to decipher in which cases public sector bodies fall into the scope of Chapter III of the DGA.

Public sector bodies[104] are chiefly addressed by the DGA in the context of conditions for the re-use of certain categories of data held by public sector bodies.[105] Chapter II of the DGA complements the Open Data Directive,[106] by applying to data which are covered by rights of third parties[107] and can therefore not be made available on an 'open data' basis. In light of Art. 2(11) of the DGA as informed by Rec. 27 and 29, several scenarios should be distinguished. First, a distinction should be made, depending on whether public sector bodies ('PSBs') provide services facilitating data sharing in the context of data held by PSBs or not. Where PSBs provide services to facilitate the sharing of data other than PSB-held data with the aim to establish commercial relationships, they shall be subject to the same legal regime as any other putative data intermediary, provided they indeed provide a 'service'.[108] Questions could then also arise whether and to what extent (financial) support from member States could be legitimate, notably in light of EU State aid law. The second situation is where PSBs deal with PSB-held data. It should first be noted the DGA does not rule out the application of Chapter III of the DGA in this situation wholesale. To remind, Rec. 29 states that Chapter III 'should not apply to services offered by

[101] See also: "The provision of cloud storage, analytics, data sharing software, web browsers, browser plug-ins or email services should not be considered to be data intermediation services within the meaning of this Regulation, provided that such services only provide technical tools for data subjects or data holders to share data with others, but the provision of such tools neither aims to establish a commercial relationship between data holders and data users nor allows the data intermediation services provider to acquire information on the establishment of commercial relationships for the purposes of data sharing." (Rec. 28 DGA).

[102] Cf. 'European Alliance for Industrial Data, Edge and Cloud Presents Its First Deliverables | Shaping Europe's Digital Future' (*European Commission*, 4 July 2023) <https://digital-strategy.ec.europa.eu/en/news/european-alliance-industrial-data-edge-and-cloud-presents-its-first-deliverables> accessed 30 August 2023.

[103] Art. 2(11)(d) DGA.

[104] Art. 2(17) of the DGA defines a public sector body as 'the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities, or one or more such bodies governed by public law'.

[105] Indeed, Rec. 29 DGA clarifies that "This Regulation should not apply to services offered by public sector bodies in order to facilitate either the re-use of protected data held by public sector bodies in accordance with this Regulation or the use of any other data, insofar as those services do not aim to establish commercial relationships."

[106] 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) [2019] OJ L 172/56 (Open Data Directive).

[107] Art. 5(1) DGA.

[108] On the notion of 'service', see Section 4.

PSBs in order to facilitate […] the reuse of protected data held by PSBs in accordance with [Chapter II DGA] […] *insofar as those services do not aim to establish commercial relationships*' (emphasis added). Two scenarios should be further distinguished, namely the *making available* of data by PSBs for reuse on the one hand, and the *facilitation of such making available* of data on the other hand. The making available of data by PSBs cannot qualify as data intermediation services. Such a scenario consists in a direct bilateral data sharing relationship between the PSB as the data provider and (a) data (re-)user(s), without any intermediation involved,[109] i.e. referred to in the DGA as 'direct' data sharing, in contrast to data sharing 'through an intermediary'.[110] In contrast, the facilitation of making available data implying the presence of two PSBs, with one making data available and the other facilitating such making available, attracts a more elaborate discussion. Facilitating the making available of data, where it includes the establishment of commercial relationships, could indeed typically overlap with the function of data intermediaries as per Chapter III of the DGA. In this context, two questions arise. First, whether the facilitation of making data available can consist in data intermediation within the meaning of Art. 2(11) and, second, how the nature of the transactions involved with the making available of PSB data bears an impact therein.

Chapter II DGA lays down conditions for PSBs to make data covered by rights of third parties available to data re-users, which implies both data professionalism and data processing equipment.[111] In this context, Art. 7(1) of the DGA requires member States to designate 'competent bodies' (who would logically qualify as PSBs) to 'assist' PSBs holding data in making such data available.[112] In light of the legal regime applicable to PSBs willing to make data available to potential data re-users pursuant to Chapter II of the DGA, such assistance shall notably include the provision of technical support, for example to pseudonymize data and ensure their privacy and confidentiality. It shall also include legal support, such as to assist PSBs in providing support to data re-users gaining the clearance of rights of third parties on the data (such as in case of IPRs of third parties). Finally, competent bodies shall provide PSBs with assistance in assessing the adequacy of the commitments made by data re-users in case of international transfer of non-personal confidential data.[113] Additionally, member States may choose to empower such competent bodies to grant access for the re-use of data from the PSBs, in which case the conditions applicable to such activities shall be applicable to them *mutatis mutandis.*[114] In principle, nothing prevents Member States to entrust competent bodies with similar duties concerning the application of the Open Data Directive.

The DGA does not clarify the legal nature of the ensuing relationships between the PSB, the competent body and the data re-user. It can be argued that empowering competent bodies to grant access for the reuse of data on behalf of PSBs does not make them data intermediaries. Indeed, the reading of Art. 7(2) of the DGA suggests a form of legal mandate from the PSBs to the competent bodies acting on their behalf. In such case, they do not act as neutral intermediaries supporting data transactions between PSBs and data re-users: The data transaction would then be formed between the competent bodies (acting on behalf of PSBs) and the data re-users.

[109] "Data provider" is used here in the context of the structure of "data sharing" as "the provision of data" (Art. 2(10) DGA), and is without prejudice to the categorisation of the PSB as a data holder.
[110] Art. 2(10) DGA.
[111] Art. 5 DGA.
[112] Art. 7(1) DGA.
[113] Art. 7(4)(e) and Art. 5(10) DGA.
[114] Art. 7(2) DGA.

When competent bodies do not transact data on behalf of PSBs but 'assist' them in doing so, the question remains whether they may be considered to provide data intermediation services. The nature of the activities, albeit with a different wording, shares similarities with the activities of data intermediation services as they can be interpreted under the DGA (see other sections of the White Paper). That DISs can be provided by 'technical, legal or any other means' (see section 7 below) is particularly relevant. The provision of technical support to pseudonymize, requested by PSBs, could qualify as 'additional tools and services' under Art. 12(e). The most questionable activity consists in the assistance in assessing the adequacy of the commitments made by data re-users in case of international transfer of non-personal confidential data. Indeed, such activity amounts to supervising the data user, which seems at odds with the strict delineation of DIS activities to the data intermediation phase as opposed to data collection and data use. However, two requirements for DISs are comparable: DISs shall put in place adequate technical, legal and organisational measures to prevent the international transfer of or access to non-personal data,[115] and they shall without delay inform data holders in case of unauthorized transfer, access or use of non-personal data.[116] Both requirements seem to require data intermediaries to keep an eye on data use by data users. In sum, the nature of the assistance activities provided by competent bodies to PSBs does not appear to be antinomic to DISs.

Three elements remain to be established, namely: (i.) whether the activities are provided by competent bodies as 'services', implying activities of an economic nature (see section 4 below); (ii.) the 'undetermined-ness' of the number of participants in the ecosystem (see section 8 below), and; (iii.) whether competent bodies aim to establish commercial relationships between PSBs and data re-users. The latter element can be subdivided into separate components. Firstly, the question is whether the assistance activities as specifically *geared towards* the establishment of such relationships, which shall be analysed following section 5 below. Secondly, whether the making available of PSB data qualifies as 'commercial relationships', i.e. commercial data sharing, calls for specific developments.

In the absence of clear indications on how to interpret this term,[117] we cannot make conclusive statements. On the one hand, it could be argued that this exclusion precisely aims at distinguishing Chapter II from Chapter III, just like Art. 15 does between Chapter III and Chapter IV.[118] On the other hand, the specific condition that PSBs should not 'aim to establish commercial relationships' in that context suggests, at least in theory, that, *a contrario,* there could be scenarios in which PSBs do indeed intermediate commercial relationships for the purpose of PSB-held data sharing. Also, the reference in the DGA to 'commercial relationships' irrespective of the quality of the market participants as traders (see section 5 below), implies that neither the nature of PSBs nor the fact that their core activities are *not* trading plays a conclusive role therein. As discussed in section 5 below, a decisive element seems to consist in the existence of a price (or 'fee', 'compensation', 'reward, …), which also plays a role in the distinction between DIS and data altruism services.[119] The Open Data Directive establishes the principle that the re-use of data shall be free of charge for the data re-user, except that the PSB may recover the marginal costs incurred by the making available of data.[120] An exception is

[115] Art. 12(j) DGA.
[116] Art. 12(k) DGA.
[117] See Section 5.1.
[118] See Section 3.3.
[119] Ibid.
[120] Art. 6(1) Open Data Directive.

laid down for specific types of PSBs and for public undertakings, in particular where such entities shall generate revenues to cover the costs of their activities.[121] In this case, the Open Data Directive lays down softened charging rules and notably allows for a 'reasonable return on investment'.[122] As for Chapter II of the DGA, PSBs may in principle charge fees, but fees shall be 'derived from the costs related to conducting the procedure for requests for the re-use of the [data] and limited to the necessary costs related to [the activities required by the making available of data].[123] The vocabulary used by these legal instruments is not harmonised and differs also from the regulation of the 'reward' under the definition of data altruism.[124] Yet, the concept of direct or marginal cost for the activities incurred by data sharing or for the making available of data, i.e. in contrast to profit-making or 'return on investment', appears to play a crucial role. With respect to data altruism, the absence of profit-seeking (or more specifically of seeking remuneration beyond the costs incurred) seems to play a crucial role in distinguishing altruistic from commercial data sharing.[125] By analogy to data altruism, it could thus be argued that a relationship in which PSBs share data or make data available in exchange for a fee that does not exceed the covering of the costs incurred for doing so, does not constitute a 'commercial' relationship. In contrast, where PSBs may exceed this threshold (for example, where they are allowed a return on investment), the relationship could be considered 'commercial'.

The DGA Is entirely silent on the question whether the 'commercial' element implies that the parties *voluntarily* engage into data transacting, namely out of their own (economic) motives. Under the Open Data Directive, PSBs are *requested* to make the data that they hold available to third parties,[126] which implies that their *motives* for sharing data cannot be entirely commercial. In contrast, Chapter II of the DGA does not require the making available of data but harmonizes the ways in which data should be made available, should PSBs decide to do so.[127] In such case, PSBs voluntarily engage into the making available of data.

In light of the above, the situation of PSBs appears to be extremely unclear. It could tentatively be argued that the facilitation of data sharing (or the making available of data) held by PSBs to data (re-)users, for example by 'competent bodies' requested to assist PSBs under Chapter II of the DGA could constitute a DIS, depending, notably, on the nature of the relationships between the PSBs and the data re-user, on whether the activity of competent bodies is geared towards the establishment of such relationships. Whether the mandatory nature of data sharing (or making available) plays a role in the nature of the relationship (i.e. as commercial or not) remains unclear. In any case, particularly relevant for the case of PSBs, i.e. acting as 'competent bodies', is whether they actually provide a 'service'. It should be particularly noted that even where activity is merely reimbursed, it may still qualify as a 'service', as further discussed in Section 4.

Albeit with little legal certainty, our conclusion is that the facilitation services provided by public sector bodies, i.e. both in the context of PSB-held data and other types of data, may attract different legal qualifications. Whether it qualifies as DIS under Chapter III of the DGA depends notably on the nature

[121] Art. 6(2) Open Data Directive.
[122] Art. 6(4) Open Data Directive.
[123] Art. 6(1) to (5) DGA.
[124] The definition of data altruism requires that data subjects and data holders voluntarily sharing data do not "[seek] or [receive] a reward that goes beyond compensation related to the costs that they incur" (Art. 2 (16) DGA).
[125] See Section 3.3.
[126] Open Data Directive, Art. 3.
[127] DGA, Art. 5. On the unclear normative value of Chapter II of the DGA, see Baloup et al. White Paper on the Data Governance Act, CiTiP Working Paper 2021, eds. Ducuing and Baloup, sec. 3.1.

of the underlying data sharing relationships, which could mean that PSBs would have to comply with Chapter III for some of their activities but not for all of them. They may notably have to unbundle the services provided under the heading of Chapter III from these other data sharing facilitation services. In light of this, this exclusion could be interpreted as a quagmire for public sector initiatives to support data sharing, such as the Flemish Data Utility, now branded as Athumi,[128] which is a public enterprise of the Flemish government; "a neutral third partner and catalyst for innovative initiatives, and we stimulate economic and social prosperity".[129] This raises the question of whether this exclusion ultimately supports or frustrates such initiatives.

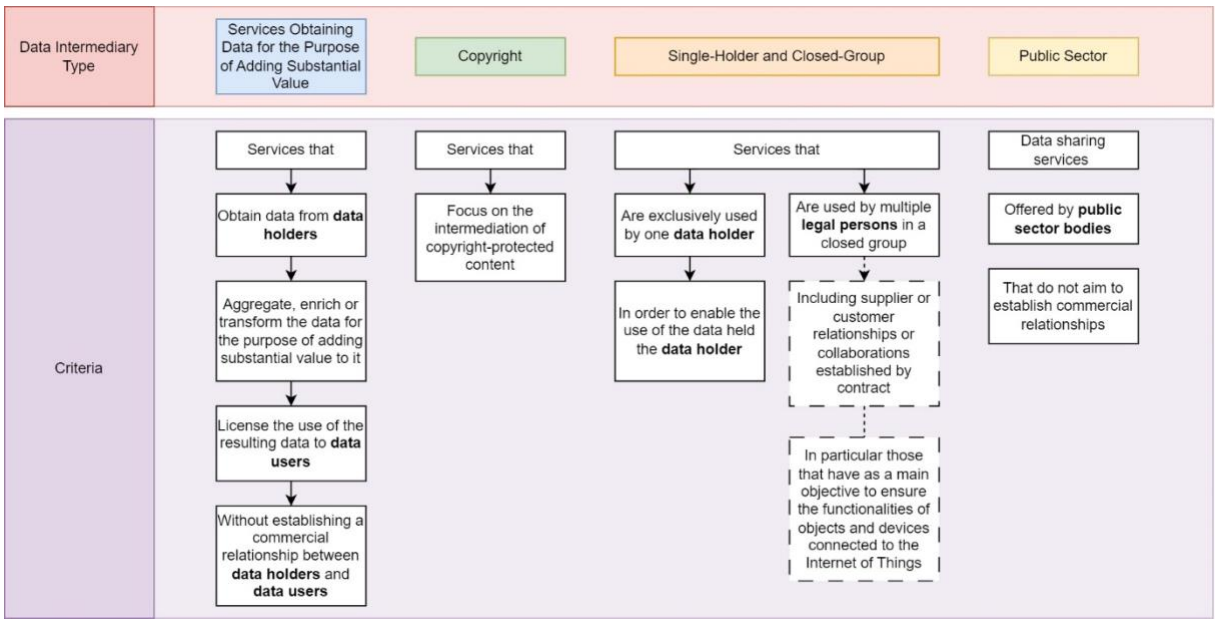

Figure 1: Article 2(11) Exclusions

3.3 Recognised Data Altruism Organisations and Not-for-Profit Entities

As mentioned earlier, Art. 15 of the DGA clarifies that Chapter III shall not apply to recognised data altruism organisations and "other not-for-profit entities insofar as their activities consist of seeking to collect data for objectives of general interest, made available by natural or legal persons on the basis of data altruism, unless those organisations and entities aim to establish commercial relationships between an undetermined number of data subjects and data holders on the one hand and data users on the other."[130]

This exception – and unlike Art. 2, Art. 15 is labelled an exception and not an exclusion – carves out not only recognised data altruism organisations within the meaning of Chapter IV, but also other similar arrangements and is therefore broader in scope. Specifically, it not only applies to those data altruism organisations that have been entered into the public registers of recognised data altruism organisations established by Art. 17, but also to "other not-for-profit entities" collecting data for

[128] Athumi, 'Trust in Data Collaboration' (*athumi*) <https://athumi.be/en/> accessed 30 August 2023.
[129] 'The Flemish Data Utility Company' (*www.vlaanderen.be*) <https://www.vlaanderen.be/digitaal-vlaanderen/athumi-het-vlaams-datanutsbedrijf/the-flemish-data-utility-company> accessed 30 August 2023.
[130] Art. 15 DGA.

objectives of general interest, made available on the basis of data altruism (see Figure 2). Recognised data altruism organisations already need to be not-for-profit entities,[131] and can only receive data on the basis of data altruism where data subjects and data holders "make their data available for objectives of general interest as provided for in national law".[132] Two implications of this should be addressed. On the one hand, it can provide a safety net for organisations or entities seeking to engage in data altruism activities without yet having been recognised, and without simultaneously falling under the data intermediary regime. In this regard, the exception can encourage and enable the setting up of data altruism entities more generally. On the other hand, this exception potentially creates a subclass of entities engaging in data altruism, but without being subject to the monitoring applicable to recognised data altruism organisations under Art. 24, while also not being caught by the regulatory regime for data intermediaries. This could potentially be addressed by the national policies for data altruism,[133] or the European data altruism consent form,[134] but this category of entities is not explicitly addressed outside of Art. 15.

The recitals provide one example of such a non-recognised entity, highlighting that "repositories that aim to enable the re-use of scientific research data in accordance with open access principles should not be considered to be data intermediation services within the meaning of this Regulation".[135] While this is an important recognition of open science and open access, this only clarifies the role of one potential application pertaining to one form of general interest. Moreover, such an application could alternatively already be covered by another exclusion to data intermediaries, such as the closed-group data intermediary exclusion addressed above. The list of general interest objectives potentially pursuable under the mantle of data altruism is vast, and the structure through which data is shared (the label "repository" does little to address this), especially in light of increased technological developments in the context of federated and distributed services, is similarly varied. Therefore, in light of the risk of regulatory arbitrage, such non-recognised entities should be anticipated.[136]

A final curious aspect of this exception is that it also utilises the notion of "aim to establish commercial relationships" as a benchmark for determining its scope. As both recognised data altruism organisations and the applicable not-for-profit entities already can only receive data on the basis of data altruism – which includes the requirement that data is voluntarily shared "without seeking or receiving a reward that goes beyond compensation related to the costs that they incur"[137] – it might appear redundant to further require that the entities in question do not aim to establish commercial relationships. This raises the question of whether, via this exception, not having the "aim to establish commercial relationships", which is addressed throughout the DGA, is effectively achieved by such arrangements where compensation is priced at cost.

[131] Art. 18(c) DGA.
[132] Art. 2(16) jo. Art. 18(a) DGA.
[133] Art. 16 DGA.
[134] Art. 25 DGA.
[135] Rec. 29 DGA.
[136] See also, relatedly, regarding the risk of forum shopping due to a lack of clarity regarding how the notion of "general interest" in the context of data altruism should "be substantiated (or implemented) and if so by whom and how": Julie Baloup, Emre Bayamlıoğlu, Aliki Benmayor, Charlotte Ducuing, Lidia Dutkiewicz, Teodora Lalova-Spinks, Yuliya Miadzvetskaya and Bert Peeters, 'White Paper on the Data Governance Act', (2021) CiTiP Working Paper 2021, 43.
[137] Art. 2(16) and Art. 18(a) DGA.

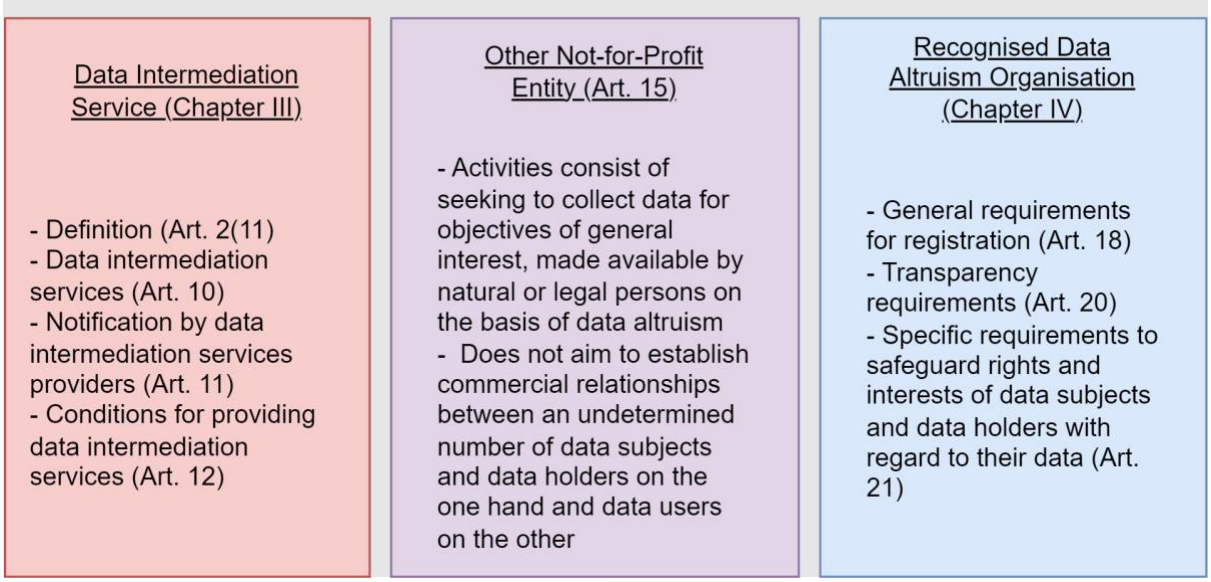

Figure 2: Article 15 Entities

3.4 Clarifications *qua* Exclusions and/or Exceptions: Consolidated Tape Providers and Account Information Service Providers

Rec. 29 of the DGA adds two clarifications to the scope of data intermediaries that may be construed to comprise exclusions or exceptions to the category in some fashion. Namely, it addresses the role of consolidated tape providers and of account information service providers, which "should not be considered to be data intermediation service providers for the purposes of this Regulation"[138].

Each of these should be considered individually, as they emerge from separate legal instruments, however, some aspects of their integration in the DGA should be addressed. Foremost, consolidated tape providers and account information service providers are mentioned in the same Recital that addresses other exclusions enumerated in Art. 2 of the DGA. This would appear to elevate these to the same level. However, by referring to concrete instruments outside of the DGA, it could rather be seen as distinguishing the novel exclusions created by the DGA itself in contradistinction from other legal arrangements already regulated by other EU legal instruments. What is certain, is that the placement of these service providers within the recitals is a deliberate choice. In the DGA proposal, consolidated tape providers and account information service providers were included in the recitals as well.[139] In its first reading, the European Parliament, however, moved them into Art. 2, enumerated below the other exclusions.[140] The fact that the final text of the DGA indeed moved them back to the recitals could therefore indicate that these two categories should be considered as interpretative aids and as clarifications to the provisions of the DGA itself.

[138] Rec. 29 DGA.
[139] Rec. 22, DGA Proposal.
[140] Amendment 37, European Parliament, 'REPORT on the proposal for a regulation of the European Parliament and of the Council on European data governance (Data Governance Act) (COM(2020)0767 – C9-0377/2020 – 2020/0340(COD))'.

The account information service is defined by the Directive on payment services in the internal market[141] ('PSD2 Directive') as ''*an online service to provide consolidated information on one or more payment accounts held by the payment service user with either another payment service provider or with more than one payment service provider*''.[142] Based on the definition, it can be noted that this service does not entail an intermediation role of the service provider. The account information service provider[143] directly effectuates an exchange of data related to one or more payment accounts, without establishing any commercial relationship between the parties involved but merely transmitting the information. Due to this reason, the distinction in practice between a data intermediation service provider and an account information service provider should not raise doubts. Moreover, should there be uncertainty about whether a given activity qualifies as a data intermediation or account information service, any doubt is expected to dissolve due to the fact that account information is a regulated service subject to authorisation at the national level. As payment services included in the list of Annex I of the PSD2 Directive, account information services can only be provided by payment institutions that have been authorised by the competent authority of the home Member State, pursuant to Art. 5 of the PSD2 Directive. In the absence of such authorisation, account information services cannot be provided in the EU. The authorisation regime provides for legal certainty regarding the qualification of account information services. In particular, national competent authorities assess in detail the applications for authorisation of prospective providers, and determine whether an activity can be considered an account information service within the meaning of the PSD2. Therefore, there is either a verified account information service for which an *ad hoc* authorisation has been granted, or there is no account information service that can be legitimately provided. Contrary to the notification procedure for data intermediation services under the DGA, the authorisation of payment services under the PSD2 Directive is a comprehensive assessment carried out by a national authority that provides for legal certainty regarding the classification of a given activity. For these reasons, there do not seem to be theoretical and practical definitional issues in relation to the distinction between account information and data intermediation services.

As concerns consolidated tape providers, similar considerations can be made to those already presented above for account information services. A consolidated tape provider is defined by Regulation 600/2014[144] as a ''*person authorised under this Regulation to provide the service of collecting trade reports for financial instruments listed in Articles 6, 7, 10, 12 and 13, 20 and 21 from regulated markets, MTFs, OTFs and APAs and consolidating them into a continuous electronic live data stream providing price and volume data per financial instrument*''[145]. Similarly to account information service providers, the providers of consolidated tapes do not play an intermediation role that aims to establish relationships for data sharing, but they directly consolidate and provide certain financial information. The provision of consolidated tapes is a type of data reporting service, which is a service consisting in reporting and/or publishing information. Given the different nature of the service compared to data intermediation, there should not be risks of confusion between the two services.

[141] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC 2015] OJ L337/35 (PSD2 Directive).
[142] As defined in Art. 2(16) PSD2 Directive.
[143] Defined in Art. 2(19) PSD2 Directive as "a payment service provider pursuing business activities as referred to in point (8) of Annex I".
[144] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 [2014] OJ L173/84 (Regulation 600/2014).
[145] As defined in Art. 2(1)(35) Regulation 600/2014.

Furthermore, data reporting services, including those on consolidated tape, are subject to an EU-wide authorisation regime according to Art. 27b et seq. of Regulation 600/2014. As a consequence, the authorisation of consolidated tape providers ensures legal certainty regarding the qualification of the service.

3.5 The Space for More Exclusions?

As indicated in the introduction of this contribution, the field of legal arrangements that are not or will not be covered by the notion of data intermediary has the potential to grow. For one, exclusions to the category of data intermediaries under Art. 2(11) of the DGA addresses arrangements that are "at least" excluded, logically meaning that only the lower bound of the set of exclusion is stipulated, and therefore not a closed list that could be further expanded. Formally, the review of the Regulation required by 24 September 2025, which may be accompanied by legislative proposals,[146] could be an opportunity for the European Commission to reflect on the exclusions established here based on the available evidence.

More specifically, Recital 3 of the DGA clarifies that "[sector]-specific Union law can develop, adapt and propose new and complementary elements, depending on the specificities of the sector, such as the Union law envisaged on the European health data space and on access to vehicle data".[147] This applies also to the range of exclusions, exceptions and clarification regarding data intermediaries, where for instance sector-specific exclusions are deemed to be necessary. However, although having important linkages to the DGA, the proposal for a European Health Data Space Regulation does not address exclusions or exceptions to data intermediaries.[148] Further, the current draft of the Data Act, which would have been an opportunity to address the position of "operators of data spaces",[149] especially in regard to the notion of data intermediary and the relevant exclusions and exceptions, does not do so.

Beyond this, the DGA clarifies that services providing "technical tools for data subjects or data holders to share data with others", where the provision of these tools "neither aims to establish a commercial relationship between data holders and data users nor allows the data intermediation services provider to acquire information on the establishment of commercial relationships for the purposes of data sharing", should not be considered data intermediaries.[150] As examples of such services, "cloud storage, analytics, data sharing software, web browsers, browser plug-ins or email services" are mentioned,[151] however, with continual development of new technologies that may or may not comprise such "technical tools", the scope of relevant services that should not be considered data intermediaries may evolve to reflect a changed reality.

Generally, key notions advanced by the exclusions, the exception and clarifications discussed above remain unclear, and thereby may be seen by the CJEU as an opportunity to clarify the notion of data intermediary, as well as its obverse. This may be especially relevant where there are unique extant data sharing arrangements that the CJEU may deem necessary to exclude or exempt from the scope

[146] Art. 35 DGA.
[147] Rec. 3 DGA.
[148] European Commission, 'Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the European Health Data Space' COM(2022) 197 final.
[149] Art. 28 Data Act Proposal.
[150] Rec. 28 DGA.
[151] Rec. 28 DGA.

of data intermediaries in light of general principles of the EU law. Moreover, the expansive definition of data promulgated by the DGA may have a corollary expansive applicability for the notion of data intermediaries, meaning that should the notions upon which the notion of data intermediary is contingent, including that of "data" or of "data sharing" be narrowed, further unforeseen arrangements may also be interpreted to be excluded or exempted.

Intermediate Conclusions

The exclusion of services obtaining data for the purpose of adding substantial value provides an important avenue for data-aggregating, data-enriching and data-transforming services to avoid application of the data intermediary regime.

- The exclusion introduces the novel notion of a service being able to "obtain" data, with an unclear link to other practices involving data addressed by the DGA.
- The exclusion is limited to services that obtain data from data holders, meaning that services obtaining data from data subjects may still be captured as data intermediaries.
- The exclusion advances a novel theory regarding the relationship between obtained data, certain practices (aggregation, enrichment and transformation) that pursue the "purpose of adding substantial value", and the ability to license of the use of resulting data.
- This exclusion is unique in that it addresses the lack of the establishment of a commercial relationship as a requirement, in opposition to the "aim to establish commercial relationships" pursued by the core of data intermediaries.
- The exclusion could be particularly useful for arrangements that could be labelled as certain types of "data pools" or "data trusts".

The exclusion of copyright intermediaries may have a significant impact.

- Although Online Content-Sharing Service Providers are addressed, other important copyright intermediaries such as Collective Management Organisations and Independent Management Entities remain unaddressed.
- The exclusion's scope limitation to copyright raises uncertainty regarding the role of related rights, especially that of the *sui generis* database right.

The exclusion of single-holder and closed-group services is relatively straightforward.

- The exclusion of single-holder services can be seen as a boundary condition of the "undetermined number" criterion of the notion of data intermediary.
- The exclusion of closed-group services clarifies the position of certain arrangements among legal persons and of certain Internet of Things and Machine-to-Machine data exchange formats.

The exclusion of public sector services complicates the role of public sector bodies vis-à-vis the data intermediary regulatory regime.

- Several scenarios should be distinguished where public sector bodies may, or may not, be covered by the scope.
- Public sector bodies remain covered where they fulfil all requirements of a data intermediation service.
- Public sector bodies may be covered by the data intermediary regulatory regime where they facilitate data sharing or the making available of data for other public sector bodies. A tentative interpretation is that they are covered where these other public sector bodies make data available to data (re)users at a price which goes beyond recouping the costs incurred.

The position of data altruism organisations and other not-for-profit entities vis-à-vis the category of data intermediaries is complex.

- The exception for recognised data altruism organisation is sensible.
- The creation of a subclass of unrecognised not-for-profit entities engaged in data altruism creates a regulatory lacuna that deserves further attention.

The clarifications that account information providers and consolidated tape providers should not be considered data intermediaries are straightforward.

- Neither type of service provider plays a role as an intermediary.
- Both are already subject to a specialised authorisation mechanism, providing legal certainty with regard to which entities are account information or consolidated tape providers.

There is room for further exclusions and exceptions within the framework of the DGA.

- Art. 2(11) of the DGA does not provide an exhaustive list of excluded legal arrangements.
- Sector-specific regulatory instruments for the EU data economy may shape the scope of exclusions and exceptions..
- The notion of "technical tools" may play a significant role in the context of new technological developments.
- Jurisprudence regarding the DGA may have wide-ranging impacts for the key legal concepts, including exclusions and exceptions.

4 "Service"

The White Paper further addresses the general criteria which are outlined in Art. 2(11) and should be assessed to determine whether a particular activity may qualify as DIS.

First, an activity should qualify as a 'service'. Yet the legislative text and the relevant recitals of the DGA do not provide any special interpretation of the term 'service' within the meaning of the DGA. There is no institutional guidance with regard to its interpretation, and it will also take some time until the CJEU elaborates on it, if ever. It may very well be that the EU institutions will not offer any specific

guidance with regard to this term, and it will be interpreted as the general definition of services under the Art. 57 of the Treaty of Functioning of the European Union ('the TFEU') and the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market ('the Services Directive'). Notably, the DGA, Art. 57 of the TFEU and the Services Directive all share a common objective to enable the functioning of a single market for certain services across the EU, and there are no indications in the text of the DGA suggesting that a different interpretation of the term ''service'' is warranted.

According to the Art. 57 of the TFEU, an activity shall be considered as a 'service' if it is normally provided for remuneration, in so far as it is not governed by the provisions relating to freedom of movement for goods, capital and persons, and it can be of an industrial, commercial character, it can also be an activity of craftsmen or professions. While delineation between services and goods as well between services and capital or persons is more straightforward, distinguishing services from establishment may be more complicated. Services are supposed to be of a temporary nature, whereas establishment requires an actual pursuit of an economic activity through a fixed establishment for an indefinite period[152] Yet, as noted by the CJEU, there can be no general time limits set in order to distinguish between establishment and services. The CJEU explained in Schnitzer that even an activity carried out over several years in another Member State can, depending on the circumstances of the case, be considered to be service provision, as can recurrent service provisions over an extended period, such as consulting or counselling activities.[153] Overall, the decision whether the rules on services or those on establishment apply has to be made on a case-by-case basis, taking into account not only the duration of the provision of the service but also of its regularity, periodicity or continuity.[154] Notably, as applicable for all the four freedoms of the EU, there must be a cross-border element for the EU law to be triggered. Over the years it became evident that this requirement encompasses a broad range of situations, i.e. that there is no need for a service provider or a service recipient to actually move anywhere as the services may be provided simply over the internet or via other distant means. It has been subsequently clarified in the Services Directive that services may require the proximity of provider and recipient, may require travel by the recipient or the provider but may also be provided at a distance.[155]

One of these criteria may prove to be rather complex in some contexts though, including the context of the data intermediation services, and that is the *remuneration* criterion. The reference to remuneration in the TFEU was introduced to exclude gratuitous services and those without a direct economic link between the provider and the recipient from the scope of the TFEU.[156] According to the court, the activity must not be provided for 'nothing', even if 'there is no need 'for the person providing the service to be seeking to make a profit'.[157] The essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question.[158] According to the Services Directive,

[152] Case C-221/89 *Factortame and Others* [1991], para. 20.
[153] Case C-215/01 *Schnitzer* [2003], para. 30.
[154] Case C-55/94 *Gebhard* [1995], para. 27.
[155] Directive (EU) 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376 (Services Directive), Rec. 33.
[156] Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (fifth edition, Oxford University Press, 2016) 296.
[157] Case C-281/06 *Jundt* [2007], para. 32-33.
[158] See, inter alia, Case C-281/06 *Jundt* [2007], para. 29, Case 263/86 Humbel [1988], para. 17; Case C-422/01 *Skandia and Ramstedt* [2003], para. 23; Case C-76/05 *Schwarz and Gootjes-Schwarz* [2007], para. 38; and Case C-318/05 *Commission v Germany* [2007], para. 67.

the relevant activities should be only those that are open to competition[159] and are performed in exchange for an economic consideration.[160] Although the relevance of the remuneration criterion is rather clear in situations that involve, e.g. direct payments between private profit-seeking organisations, it may be less evident in situations that involve public funding. According to the CJEU, the assessment of whether certain activities, in particular activities which are publicly funded or provided by public entities, constitute a 'service' has to be carried out on a case-by-case basis in the light of all their characteristics, in particular the way they are provided, organised and financed.[161] Also, in some cases the remuneration is essentially only a reimbursement for the services provided and does not entail direct financial profit for the service provider.

Assessment of these situations may prove to be particularly relevant while deciding whether an organisation is providing data intermediation services under the DGA. Notably, some organisations may be funded by public funds exclusively, some may benefit from both public funding and payments from private entities, some may be only receiving private remuneration. Some organisations may be non-profit, whereas others may be profit-seeking, and the *profit* itself may also take many forms.

With regard to public financing the CJEU noted that in case an activity is financed by public funds and there is no intention to receive remuneration, it should be excluded from the concept of services.[162] The payment of a fee by service recipients, to make a certain contribution to the operating expenses, would not in itself constitute remuneration because the service would be still essentially financed by public funds.[163] However, this does not address the situations of mixed funding which may be also characterised by commercial intentions.

In those cases where the remuneration is only a mere reimbursement for the services provided and does not entail direct financial profit for the service provider, the activity may still be eventually qualified as a service. According to the settled case-law, the concepts of economic activity and of the provision of services in the context of the internal market must be given a broad interpretation.[164] According to the advocate general Trstenjak, 'a broad understanding of the notion 'pecuniary interest' would seem logical.' Particularly, 'the service provider may not be absolutely required to be profit-making. Rather, it should also be sufficient, for the pecuniary interest requirement to be satisfied, if the service provider merely receives cost-covering remuneration in the form of reimbursement of costs. The notion of pecuniary interest is thus also intended to cover simple reimbursement'.[165]

Notably, the remuneration as such may not necessarily come from the recipients of the service. In so far as it contributes to the carrying on of the principal activity, 'the fact that the service provider may not be directly remunerated by recipients of the service is not decisive. In accordance with consistent case-law, the requirement for pecuniary consideration laid down in Art. 57 TFEU does not mean that the service must be paid for directly by those who benefit from it.'[166]

[159] That is in order for Member States not to be obliged to liberalise services of general economic interest or to privatise public entities which provide such services or to abolish existing monopolies for other activities or certain distribution services. Services Directive, Rec. 8.
[160] Services Directive, Rec. 17.
[161] Services Directive, Rec. 34.
[162] Case C-281/06 *Jundt* [2007], para. 30.
[163] Services Directive, Rec. 34.
[164] Case C-484/14 *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH* [2016], Opinion of AG Szpunar, para. 37.
[165] Case C-159/11 *Azienda Sanitaria Locale di Lecce* [2012], Opinion of AG Trstenjak, para. 33.
[166] Case C-484/14 *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH* [2016], Opinion of AG Szpunar, para. 43.

Therefore, it is necessary to examine the very particular architecture of an organisation in question (i.e. a potential data intermediation service provider) on a case-by-case basis, whilst taking into account that the element of public funding or the lack of profit-seeking intentions would not be *per se* decisive factors. Nor would it be decisive that the service provider is not directly remunerated by the recipients of the service.

As noted earlier, it should be taken into account though that a mere reimbursement of costs may still allow qualifying the activity as a service, and hence would render it within the scope of the DGA.

Intermediate Conclusions

- there is no special meaning of 'services' attributed to the definition of DIS in the framework of the DGA
- in case there is no specific guidance with regard to this term, the general definition of 'services' in the EU law should be taken into account
- the general definition of 'services' in the EU law is broad and likely to catch many activities in question
- it is necessary to examine the very particular characteristics of activities of an organisation (i.e. activities of a potential data intermediation service provider) on a case-by-case basis
- even if activities would rely on public funding and would be merely reimbursed (i.e. if there would be no profit-seeking element), they may still qualify as services and hence fall within the scope of the DGA

5 "Aim to Establish Commercial Relationships for the purpose of data sharing"

In this section, we aim to clarify the criterion 'aim to establish commercial relationships', which constitutes a cornerstone of the definition of DIS. We discuss each of the components in turn, namely 'commercial relationship' (5.1), the fact that DIS shall 'aim to establish' such relationships (5.3) for the 'purpose of data sharing' (5.2). We also include a section on the 'additional services and tools' that, by exception, the DGA allows data intermediaries to provide (5.4). Finally, we bring all the components together in order to conclude on the extent to which a clear interpretation of this criterion can be given.

5.1 Commercial Relationship

The overall purpose of the DGA refers to the role data intermediaries play in facilitating new data transactions by connecting parties.[167] The establishment of a 'commercial relationship' between data holders/data subjects and data users therefore constitutes the key function of data intermediaries. Many recitals and exceptions refer to this criterion. At first glance, the 'commercial relationship' criterion serves to distinguish three different data sharing situations: data sharing in the context of commercial relationships, which may include the role of data intermediaries as per Chapter III of the

[167] DGA, Rec. 27.

DGA, the making available of PSB data as per Chapter II and following the Open Data Directive, and data altruism which can be facilitated by recognised data altruism organisations as per Chapter IV of the DGA (see also section 3.3).[168] However, the expression 'commercial relationship', undefined in the DGA despite its crucial role, still raises several interpretation questions.

First, the expression 'commercial relationship', uncommon in EU law, appears to place the focus on the nature of the relationship between the parties involved. The notion of 'commercial relationship' was not present or defined in the DGA proposal of the European Commission. The proposal included only a recital stating that data intermediaries 'have as a main objective the establishment of a *business*, a legal and potentially also technical relation between data holders [...] and potential users [...] and assist both parties in a transaction of data assets between the two [...]' (emphasis added).[169] The emphasis here, then, was primarily on enabling a *business* relationship between two parties with the ultimate goal of a data transaction. In that light, it is odd at first glance that the new expression 'commercial relationship' was finally chosen instead of working with existing European definitions such as a 'business', which is referred to in the EU Charter of Fundamental Rights concerning the freedom to conduct a business,[170] or 'economic activity', which is core to the competition law notion of an undertaking and has expanded to many branches of the EU law. Both the conduct of a business and economic activities refers to the activities functionally conducted by entities. An economic activity refers to any activity of producers, traders or persons providing services for which there is a market. Specifically, the exploitation of tangible or intangible property for the purpose of obtaining sustainable revenue from it, constitutes an activity.[171] The term was later redefined as a 'sale of products or services at a certain price, in a certain/direct market',[172] which always implies conducting a concrete assessment.[173]

The adjective 'commercial' is sometimes used in the EU law, and especially in consumer law, to refer to 'commercial and professional activities' of businesses, therein contrasted with consumers.[174] In consumer law, the adjective 'commercial' relates to 'practices', with the aim to protect consumers against unfair practices in the context of relationships with traders.[175] 'Business-to-consumer commercial practices' are defined as 'any act, omission, course of conduct or representation, commercial communication including advertising and marketing, *by a trader, directly connected with the promotion, sale or supply of a product to consumers*'.[176] The notion of 'commercial' appears to be associated with the activity of trading, especially in the context of B2C relationships.

[168] See also Julie Baloup, Emre Bayamlıoğlu, Aliki Benmayor, Charlotte Ducuing, Lidia Dutkiewicz, Teodora Lalova-Spinks, Yuliya Miadzvetskaya and Bert Peeters, 'White Paper on the Data Governance Act', (2021) CiTiP Working Paper 2021, 37-48.
[169] DGA Proposal, Rec. 22.
[170] EU Charter of Fundamental Rights, Art. 16.
[171] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L347, Art. 9 (1).
[172] Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, User guide to the SME definition, Publications Office, [2015], 9.
[173] Case C-612/21 Gmino O. [2023] para. 35; C-520/14 *Gemeente Borsele a Staatssecretaris van FInancien,* [2016] para. 29.
[174] See for example 'a person who pursues commercial or professional activities', Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] (consolidated version) OJ L351,1, Art. 17(1)(c).
[175] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') [2005] OJ L149/22.
[176] Unfair Commercial Practices Directive, Art. 3(r).

More recently, the notion of 'commercial' is referred to in other legislative initiatives for the digital environment, and especially in the Digital Services Act[177] ('DSA') and in the Digital Markets Act ('DMA').[178] In the DMA, the term 'commercial' is used to refer to both the capacity of businesses, the nature of relationships between actors in the ecosystem of large online platforms and in particular the terms and conditions.[179] Rec. 2 establishes a distinction with 'services which act in a non-commercial purpose capacity such as collaborative projects', which exempts such services from the scope.[180] Rec. 40 of the DMA clarifies the notion of 'commercial relationship' in the context of the ecosystem of large online platforms. It states that 'such commercial relationships can be on either a paid or a free basis, such as free trials or free service tiers [...]'. The precision that commercial relationships can be without a fee ('free basis') in this context should not be viewed as an essential criterion but rather as a circumstantial exception to the general understanding of the notion of 'commercial'. It is associated, in this context, with the nature as an intermediary platform, which can recoup costs on (one of) the other side(s) of the platform. It implies that the 'free' nature of a service does not take away the commercial capacity of the online platform.

The DSA also refers to the notion of 'commercial' in similar ways. Interestingly, the notion of 'commercial' is referred to in the definition of 'advertisement', as 'information designed to promote the message of a legal or natural person, irrespective of whether to achieve commercial or non-commercial purposes, and presented by an online platform on its online interface against remuneration specifically for promoting that information'.[181] Advertisement typically consists in a 'commercial practice' within the meaning of the Unfair Commercial Practices Directive.[182] At first glance, the definition of advertisement could seem to disconnect the notion of 'commercial' from that of remuneration. However, the expression 'commercial or non-commercial purpose' actually relates to the purpose of the advertiser and not to the relationship between the advertiser and the advertisement taker. The latter does imply a remuneration, which confirms the view that what is commercial relates to trading activities.

In sum, the notion of 'commercial' in the EU law is used to refer to trading activities. While 'commercial' can qualify relationships, it is implicitly based on the commercial capacity of the entities at stake, i.e., trading. In contrast, the DGA seems to constitute a specific case, by placing the emphasis *solely* on the nature of the *relationship* between the data holders or data subjects on the one hand, and data users on the other. The focus thus shifts from the capacity of the entity to the ultimate purpose of the facilitated relationship between the entities, namely data transactions. This interpretation is confirmed by the fact that both data holders (and obviously data subjects) and data users in different scenarios, can also be natural persons without commercial capacity. For example, consider an HR matchmaking platform that matches data holders (job seekers as natural persons without commercial capacity) and their data with data users (job providers).[183] In that light, it should

[177] 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) [2022] OJ L277/1.
[178] 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) [2022] OJ L 265/1.
[179] DMA, i.a. Rec. 13, Rec. 38, 39, 40.
[180] DMA, Rec. 2.
[181] DSA, Art. 3(r).
[182] Unfair Commercial Practices Directive, Art. 2(d).
[183] See Karamel, https://karamel.career/.

also be clarified that the 'establishment of a commercial relationship' criterion is not about the capacity of the data intermediary, which can be a commercial or non-commercial entity.[184]

That commercial refers to the nature of the relationship, irrespective of the capacity of data holders, data subjects and data users, is unusual. It implies that entities who are not traders can engage, incidentally, in trade relationships. But this unusual situation raises other questions in turn, such as which concrete criteria determine the 'commercial' nature of a relationship, especially in the case where individuals (or other entities who do not act in their commercial or professional capacity) enter into such relationships. Our thesis is that the expression 'commercial relationship' should not be read in isolation but that the expression 'for the purpose of data sharing', discussed in the following section, should always be included as an additional criterion for determining whether a 'commercial relationship' exists. Merely facilitated trading activities between data holders and data users are thus not enough, the trading activities must have the purpose of data sharing clearly at their core, which we discuss in the following section.

5.2 For the purpose of data sharing

As a reminder, the DGA defines the term of data sharing as 'the provision of data by a data subject or a data holder to a data user for the purposes of the joint or individual use of such data, based on voluntary agreements or Union or national law, directly or through an intermediary, for example under open or commercial licences subject to a fee or free of charge'. With 'data sharing', the legislature opted to use the broadest possible term that could capture all possible ways (e.g., through access or a transfer of data) in which further use by data users can be enabled. EU institutions (and in particular the European Parliament committees) have proposed other terms, such as 'exchange' and 'pooling', which can ultimately all be put under the expression 'data sharing'.[185] This is confirmed by the recitals, which refer for example to 'bilateral data sharing', 'multilateral sharing of data', 'pooling of data' and 'joint use of data'.[186] Again, this frames the fact that the way in which commercial relationships may arise and the way in which further use of data is facilitated (technical, legal or other means) is not important.[187] Still, it is somewhat strange that, here again, a new definition of the term is used, since the term has no uniform meaning or definition throughout any existing policies or laws. Data sharing genuinely refers to more than just a (physical) data transfer. It is essentially a catch-all phrase that refers to a variety of potential processing activities on (personal) data such as exchanging, gaining access to, or processing (personal) data within a jurisdiction in the EU or from a jurisdiction outside the EU.[188]

[184] Heiko Richter, 'Looking at the Data Governance Act and Beyond: How to Better Integrate Data Intermediaries in the Market Order for Data Sharing' (2023) 72 GRUR International 462.
[185] See e.g., European Commission 'A European Strategy for data. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions' COM/2020/66 final and Impact Assessment Report Accompanying the document 'Proposal for a Regulation of the European Parliament and of the Council on European data governance (Data Governance Act)' [2020] COM(2020) 767 final.
[186] DGA, Rec. 27.
[187] Gabriele Carovano and Michèle Finck, 'Regulating data intermediaries: The impact of the Data Governance Act on the EU's data economy' (2023) 50 Computer Science & Law Review 5.
[188] Daniela Spajic, Anton Vedder (supervisor), Pompeu Casanovas (Co supervisor) and Silvia Zullo (Co supervisor), 'Patient data sharing for the improvement of healthcare and medical research: towards a moral duty of patients to share health-related data?' (DPhil thesis, Catholic University of Leuven 2023).

The expression 'for the purpose of data sharing' raises mainly two questions. First, data sharing is always with a purpose, which is indeed indicated in the definition of data sharing ('data provision… for the purpose of data use'). Then, while the DGA appears to govern the data sharing phase, how does the purpose of data sharing influence the interpretation of what is a DIS? And second, how does the expression 'for the purpose of data sharing' interact with the 'establishment of commercial relationships'?

As to the first question, the overall objective of the DGA is precisely to enable more data sharing so that data, as a resource, can be used by a large number of persons in the course of their respective activities.[189] How does the instrumental nature (always aimed facilitating further use) of data sharing itself impact the nature and scope of a DIS? I. After all, the[190] The data intermediary only fulfils the role of intermediary for facilitating further uses, but, importantly, *does not pursue specific further uses themselves*. This is what the DGA refers to as the 'European way of data governance', [191] The independence requirements, and in particular both the structural unbundling requirement and the ban on data cross-usage [192] are particularly designed to prevent the data intermediary from pursuing further uses from data. While a DIS may involve offering their customers the means to benefit from data-related economies of scope, *they* should *not* benefit from economies of scope related to the data entrusted to them. According to the European Commission, as visible in the Impact Assessment, this stands in contrast to the 'Big Tech' model, pictured by the European Commission as a 'vertical integration' of data-related activities leading to data monopolies. To sum up, the DGA precisely aims to isolate DIS, namely data intermediation enabling data sharing, from the subsequent use of data. The notion of DIS should therefore not expand to such subsequent use of data, which is considered conducive to bringing trust to data holders, data subjects and data users, in contrast to the situation of 'Big Tech platforms'.

The second question relates to the relationship between 'commercial relationships' and 'for the purpose of data sharing'. When looking at the differences betweenin particular based on voluntary agreements), in the context of Chapter III of the DGA, and data altruism, whether through the use of data altruism organisations or not within the meaning of Chapter IV of the DGA, the focus is less on data sharing modalities but on the other element in the definition of a DIS, namely the commercial nature of the relationship between the data holder and the data user. This interpretation is congruent with the exception of data altruism organisations from the scope of Chapter III of the DGA and in the steady focus of the DGA, discussed in Section 3.3 above, on the establishment of commercial relationships as a key feature of the definition of DIS. Data altruism is indeed essentially defined as non-commercial data sharing, namely 'the voluntary sharing of data [...] '*without seeking or receiving a reward that goes beyond compensation related to the costs [...] incur[red*] while making data available for objectives of general interest [...] (emphasis added). [193] Data altruism appears to be defined by two features: the absence of profit (only recouping the costs incurred by sharing data) and the purpose of general interest. In contrast, it can be inferred that 'commercial relationship for the purpose of data sharing' refers to situations of data sharing for which there is a price going beyond the recouping of costs incurred by the sharing of data (and possibly profit-seeking) and that has

[189] See for example the impact assessment of the DGA, sec. 2.1.
[190] DGA, Art. 10 (a).
[191] DGA, Rec. 32.
[192] DGA, Art. 12 (a) and (c).
[193] DGA, Art. 2(16).

motivations other than the general interest, in particular the economic individual interest of the parties.

This raises the question how this criterion, forming the cornerstone of the definition of DIS, can be interpreted in the context of the sharing of personal data through dedicated data intermediaries. For example, giving consent to share personal data in exchange for monetary or non-monetary consideration remains contested.[194] In light of the legal ambiguity surrounding data ownership and, in particular, the lack of a property regime for data, 'commercial relationships for the purpose of data sharing' appears to constitute a complex data-specific expression to refer to the trading of data as an asset, as initially included in the proposal.[195]

5.3 Aim to establish

In this section, we focus on the last element of the criterion 'aim to establish commercial relationships for the purpose of data sharing', namely the 'aim to' part. The question is, of course, what exactly does it mean for data intermediaries to 'aim to' and how can this be assessed concretely? This raises two sets of questions. First, whether the 'aim to' element should be interpreted from a subjective or objective perspective. And second, what level of proximity should be present between the activities of the putative data intermediary and the establishment of commercial relationships for the purpose of data sharing.

First, the term 'aim to' appears to support an aspirational rather than essentialist definition of a DIS. The term 'aim' seems to point to the ways in which the business model of the data intermediary is designed, namely so that it is actually *targeted at* establishing commercial relationships between data holders and data users. [196] Several authors have similarly emphasised the function of data intermediaries to establish commercial relationships, which shall, by general opinion, prevail over the different ways in which it could be done and thus the different *types* of data intermediaries (such as data platforms, trusts, marketplaces, etc.)[197] This functional approach invites us to look at every data intermediary and their related business model *in concreto*. With few exceptions, it is neither the nature of the DIS nor the structural organisation of data intermediaries that matters, but whether DIS are designed to establish commercial relationships for the purpose of data sharing. This is also confirmed by the fact that the service can be provided through a broad range of means (technical, legal or other) (see Section 7 below).[198] The criterion of 'aim to' is therefore expected to flexibly adapt to different types of activities, hopefully in a future-proof manner. Depending on whether enabling interactions between data holders and data users are purposefully reflected in the data intermediary's business model, for example, data intermediaries may or may not fall within the scope of the DGA. This implies that the entry point for the assessment should be the business model of the potential data

[194] EDPB, 'Statement 05/2021 on the Data Governance Act in light of legislative developments' (2021) 1-8; See e.g., M. Fierens and W. Ooms, 'Personal data as a commodity: is the door open for small-scale data processing?', (2022) CiTiP Blog <https://www.law.kuleuven.be/citip/blog/personal-data-as-a-commodity-is-the-door-open-for-small-scale-data-processing/> accessed 30 August 2023.
[195] DGA Proposal, Rec. 22.
[196] Lukas von Ditfurth and Gregor Lienemann, 'The Data Governance Act: – Promoting or Restricting Data Intermediaries?' (2022) 23 Competition and Regulation in Network Industries 280-281.
[197] Heiko Richter, 'Looking at the Data Governance Act and Beyond: How to Better Integrate Data Intermediaries in the Market Order for Data Sharing' (2023) 72 GRUR International 460.
[198] DGA, Art. 2 (11).

intermediary and that the assessment shall be subjective, namely from the perspective of the business model of the data intermediary.

Second, the question arises which degree of proximity (i.e., direct or indirect) is required between the service provided by the data intermediary and 'the establishment of commercial relationships for the purpose of data sharing'. While it may look theoretical, this question has also practical implications. In decentralised contexts where several different actors conducting activities are inter-connected, the establishment of commercial relationships for the purpose of data sharing may arise from the more or less concerted action of these actors thus not necessarily involving direct facilitation.[199] Think for example of service providers that aim to familiarise data holders or data users within a certain ecosystem or platform and only aim to technically support a DIS in establishing commercial relationships.[200] Another example is this of a platform that supports actors in connecting data holders and data users. The degree of proximity between the DIS and the establishment of commercial relationships thus constitutes a crucial element. Otherwise, services as alien one to the other as a matchmaking online platform and cloud computing or trusted execution environments could equally be considered as a DIS. At the very least, the word 'aim to' indeed translates in that the DIS shall be *designed* for the establishment of commercial relationships for the purpose of data sharing, rather than consist in generic services which could incidentally also be used to support such relationships. The DGA does not directly tackle this question, but interpretative elements can be found in recitals.

Rec. 28 considers that 'cloud storage, analytics, data sharing software, web browsers, browser plug-in or email services' do not qualify as data intermediaries provided the following conditions are met: (i.) they provide only technical tools for data holders and data users to share data with others but [they do not] aim to establish a commercial relationship nor (ii.) allow the data intermediary to acquire information on the establishment of commercial relationships for the purposes of data sharing. The further circular reliance on the notion of 'aim to establish commercial relationships' has little further interpretative value. In contrast, the circumstance that the services allow the data intermediary to acquire *information* on the establishment of such relationships may be more promising. The focus on information can be explained by the European Commission's current fears that providers of data-related services (i.e., online platforms) benefit hugely from data-related information or economies of scope and is therefore associated with the risk of harm that the DGA aims to prevent from happening. In this respect, the Data Act also contains restrictions on the use of data between data holders and users to prevent data being used to develop competing products.[201] Core platform services under the DMA are also prohibited from using data from business users when competing with them on their own platform.[202] Other than that, it could be argued that a service that technically allows the data intermediary to acquire such information actually results from business decisions to design services specifically to establish commercial relationships between data holders and data users.

However, the Recital may turn out to raise more questions than it provides answers. It does not clarify the precise nature of the information the data intermediaries need to be aware of (i.e., whether information on individual transactions or on the mere existence of commercial relationships as a

[199] See e.g., Gabriele Carovano and Michèle Finck, 'Regulating data intermediaries: The impact of the Data Governance Act on the EU's data economy' (2023) 50 *Computer Science & Law Review* 6.
[200] See use.id, https://get.use.id/.
[201] Data Act, Rec. 28, 35 and Art. 4 (4) and 6 (e).
[202] DMA, Rec. 46 and Art. 5 (2).

general outcome), as well as how decisive this point is. A broad interpretation of 'information' may even be at odds with an entity that does not aim to establish commercial relationships between data holders and data users, but does have access, for example, to information about transactions between data holders and data users that are facilitated by a data intermediary. As with the term data sharing (see Section 5.2), in view of the ultimate purpose of the DGA, we believe that Rec. 28 should only be applied in a limited context. It remains to be seen, moreover, whether this criterion constitutes the exclusive criterion or is only a clue in a broader bundle. Specifically, whether the desired business model – in the light of the subjective "aims to" criterion – should be taken in isolation, or whether non-subjective standards can complement this criterion. Many other clues, connected to the running of a data intermediation business, could also be relevant, such as the pricing system (whether dependent on the establishment of commercial relationships or not), or the economic viability of the activities without the establishment of commercial relationships as an outcome.[203] However, the DGA does not touch upon such circumstances, which means that it will be for Courts (and maybe ultimately for the CJEU) to further establish such criteria. Additionally, it cannot be excluded that the question arises in the future concerning services other than those listed in Rec. 28.

5.4 The additional tools and services of Article 12(e) of the DGA

The definition of DIS serves to establish which services shall or, respectively, shall not qualify as a DIS and thus trigger the applicability of the rules of Chapter III of the DGA, provided the DIS qualifies as one of the categories identified in Art. 10 of the DGA. Particularly important for potential DIs, is the requirement to legally unbundle DISs (provision through a separate legal person) from the provision of other services.[204] The rationale is that vertically integrated businesses could engage into self-preferencing. Unbundling requirements have already been laid down in various areas of law, such as liberalised network industries, to counter this risk.[205]

Furthermore, the commercial terms for the access to DIS shall not be dependent upon whether data holders and users use *other services* provided by the data intermediary or by related entities.[206] The stringency of this ban on tying appears in the light of a comparison with competition law. However, there, an exemption for certain trading conditions between two legally independent companies that affect trade between Member States and prevent, restrict, or distort competition within the internal market (i.e., such as tying their services) is still allowed if four requirements are met, and in particular where this serves to the benefit of consumers.[207] The data entrusted by data holders shall also not be used by the data intermediary for purposes other than put them at the disposal of data users[208] and, more generally, any data collected by the data intermediary in the course of the provision of DIS shall be used only for the development of DIS (which notably prevents data intermediaries from leveraging data-related economies of scope in services provided in adjacent markets)[209].

[203] DGA, Art. 12 (1) (b).
[204] Art. 12 (a) DGA.
[205] See also Julie Baloup, Emre Bayamlıoğlu, Aliki Benmayor, Charlotte Ducuing, Lidia Dutkiewicz, Teodora Lalova-Spinks, Yuliya Miadzvetskaya and Bert Peeters, 'White Paper on the Data Governance Act', (2021) CiTiP Working Paper 2021, 27-29.
[206] DGA, Art. 12(b).
[207] TFEU, Art. 101(3).
[208] DGA, Art. 12 (a).
[209] DGA, Art. 12 (c).

The stringency of the legal unbundling obligation is however qualified by Art. 12I of the DGA, which creates a grey zone consisting of 'additional specific tools and services' which are *not* DIS but which can nonetheless be provided *together* with a DIS by exception. In addition, the DGA clarifies in the recitals that other data-related services (cloud storage, analytics, data sharing software, web browsers, browser plug-ins or email services), separate from these 'additional specific tools and services', can also qualify as and be provided together with a DIS if they are directly related to the provision of data intermediation services.[210]

Art. 12(e) of the DGA reads as follows:

> 'DIS may include offering additional specific tools and services to data holders or data subjects (a) *for the specific purpose* of facilitating the exchange of data, (b) *such as* temporary storage, curation, conversion, anonymisation and pseudonymisation, such tools being used (c) only at the explicit request or approval of the data holder or data subject and third-party tools offered in that context not being used for other purposes' (emphasis and letters added).

Three elements of this provision should be emphasised. First, the condition for data intermediaries to invoke the applicability of the grey zone is that the additional specific tools and services are provided 'for the specific purpose of facilitating the exchange of data'. This should notably be contrasted with services which logically come *after* the data sharing phase (see Section 3.2.1) for which, on the contrary, data sharing is instrumental. Albeit logical in theory, this criterion may not so easily apply in practice. For example, especially for small and medium-sized enterprises as data users, it may be particularly helpful to receive support as to how data could support their activities. At first glance,such a service would logically relate to the phase *after* data sharing. However, it could as well be argued that it could help SMEs calibrate their data needs and thus better target their data demand to begin with. In that light, expertise on data-driven business models may be viewed as instrumental to (or 'for the specific purpose of') the exchange of data is debatable.

Second, Art. 12(e) of the DGA reads as an open-ended provision with examples (temporary storage, curation, conversion, anonymisation and pseudonymisation). Other services and tools could therefore as well fall in the scope of the grey zone, provided they comply with the other criteria. This can be viewed as a means to ensure that the DGA is both future-proof and adaptable to the various types of businesses which could emerge.

Third, Art. 12(e) of the DGA lays down specific safeguards which are not as far-reaching as the legal regime applicable to DIS but aims to prevent data intermediaries from abusing their customers and the trust that they place in them. The safeguards are twofold. The services shall be either explicitly requested or explicitly approved by either of the customers. 'Third party tools' constitute a specific category, with dedicated safeguards, namely that they shall not be offered in that context for other purposes. The latter safeguard could, at first glance, read as a demanding prohibition akin to unbundling incumbent on the third party. However, the terms 'offered in that context' suggests a more lenient interpretation, namely that the data intermediary, when proposing such tools, shall not use them for other purposes.

Other than that, the DGA does not further clarify the legal regime of these additional services. For example, and especially in light of the requirement for the data intermediary to gather the explicit

[210] DGA, Rec. 28.

approval or request of their customers, it remains unclear whether transparency obligations apply to the provision of these services. Similarly, the DGA does not clarify whether the price of these additional services is regulated, which seems to suggest that it is not. The ban on tying seems to suggest that the price for DIS cannot be different, depending on whether customers use the additional services. This could be read as a prohibition of bundled offers and is consistent with EU interoperability objectives, so that customers should remain free to choose between two options, namely the one with, or respectively, without the additional services.

In the same respect, the DGA also does not clarify how additional services then relate exactly to multiple data-related services, which are also mentioned and could or could not directly concern the provision of data intermediation services (and consequently be part of the DIS).[211] Although at first glance the terminology of 'additional' appears to refer to services that may be provided separately from the DIS and thus may also be provided to other parties next to a DIS, the DGA seems to look at these types of services as exclusively part of the DI" ("may incl"de"). Rec. 32 and 33 are inconsistent with Rec. 28 in that respect. Moreover, third-party tools cannot be used for other purposes, while no such requirement for proprietary tools of the DIS are included.[212] This again points to the fact that the DGA only views these services as part of the DIS. However, in doing so, the DGA abstracts from the situation where a DIS provides multiple data-related services to others (such as additional tools that facilitate data sharing) separate from the DIS.[213] This two-part inconsistent regime creates confusion, especially considering the increasing interoperability and modularity in the EU.

Intermediate Conclusions

'Commercial relationships' point towards the distinction with other types of data sharing situations and constitute a key criterion for the application of Chapter III of the DGA

- There is no further positive clarification of the term 'commercial'. However, in our view, 'commercial' relates to trading activities.
- In contrast to other occurrences, the reference to 'commercial relationships' is entirely disconnected from the capacity of the entity (i.e., can be either commercial or non-commercial such as individuals acting as 'data subjects') and refers only to the nature of the relationship between the entities involved.
- The focus is consequently on the ultimate purpose of facilitated relationships, namely data sharing and enabling further (re-)use of the data.
- 'Commercial' therefore seems to be closely connected to 'for the purpose of data sharing'.

'For the purpose of data sharing'

- The DGA establishes a broad definition of data sharing to include all possible scenarios in which data can be provided and in which further use of data by data users can be enabled.

[211] DGA, Rec. 28.
[212] DGA, Rec. 32 and 33 and Art. 12 (c) and (e).
[213] DGA, Rec. 28.

- ‘Commercial relationships for the purpose of data sharing’ can be contrasted with ‘data altruism’, constituted by both the absence of a price going beyond the incurred costs and a general interest motive. So commercial relationships for the purpose of data sharing refers to data market transactions.
- DISs facilitate further data use without pursuing any such further use themselves.
- DISs are prohibited from benefiting from many of the economies of scope related to the data entrusted to them.

‘Aim to’ criterion refers to the ways in which the business model of the data intermediary is designed

- It should be interpreted as a subjective and aspirational criterion where the function of the DIS prevails over the possible types.
- The interpretation shall thus be made *in concreto* and aims for the DGA to be future proof.
- The required degree of proximity between the DIS and the establishment of commercial relationships for the purpose of data sharing, is not much clarified.
- It is notably unclear whether the interpretation can be completed with non-subjective standards too (e.g., the possibility to acquire information on the establishment of commercial relationships and/or the pricing system, etc.).

Additional tools and services when providing a DIS

- By exception to the independence requirements of Art. 12 of the DGA, data intermediaries can provide ‘additional tools and services’ when providing a DIS, subject to specific safeguards.
- The scope of such additional tools and services should be interpreted restrictively, however, the criterion for identifying allowed additional specific tools and services (i.e., ‘for the specific purpose of facilitating the exchange of data’) remains unclear.
- The requirements related to additional tools and services can be compared to provisions in the Data Act and DMA, which aim to prevent vertically integrated companies from favouring their customers over rivals.
- The legal regime applicable to additional tools and services and its relationship with the requirements applicable to DIS, is unclear (for example, are they subject to the ban on tying?).

6 “Undetermined Number of Data Subjects, Data Holders and Data Users”

The DGA’s definition of data intermediation service providers only encompasses entities that intermediate “*between an undetermined number of data subjects and data holders on the one hand*

and data users on the other".[214] This criterion raises several questions, beginning with what exactly an "undetermined number" means vis-à-vis a "determined number" of actors. To answer this question, Section 6.1 queries the semantic meaning of the term 'undetermined', while Section 6.2 illustrates and contrasts the usage of 'undetermined' and 'indeterminate' in EU case law. Section 6.3 then considers undetermined-ness specifically in the context of the DGA and discusses the implications of the act's exclusion for closed groups for avoiding an undetermined number in practice. Further, it is unclear whether *both* serviced data subjects/holders *and* serviced data users must separately constitute undetermined numbers for a servicing intermediary to fall within the DGA's definition of a DIS provider, or whether an undetermined number of *either* data subjects/holders *or* data users is sufficient to trigger the applicability of the DGA's definition. Section 6.4 presents the arguments for and against these two alternative interpretations of the DGA's definition.

6.1 A Semantic Understanding of "undetermined number"[215]

The Oxford Dictionary of English defines "undetermined" as "*not authoritatively decided or settled*" or "*not known*."[216] On their own, these definitions are not particularly illuminating. Hence, a juxtaposition with the preparatory works of the DGA is warranted. In the DGA proposal from the European Commission, Rec. 22 defined data intermediaries in part as "*services aiming at intermediating between an indefinite number of data holders and data users, excluding data sharing services that are meant to be used by a closed group of data holders and users*".[217] This original definition of data intermediaries was likely altered in response to the European Data Protection Board and European Data Protection Supervisor Joint Opinion on the DGA Proposal, which flagged that platforms facilitating data exchange with an 'indefinite' number of data users would act in contravention to the Art. 25 of the GDPR, which obliges controllers to ensure that personal data is "*not made accessible without the individual's intervention to an indefinite number of natural persons*." To avoid conflict with the GDPR's legal regime, it is evident that the intermediation activities legitimised by the DGA had to be constrained. The substitution of the "indefinite" criterion with the "undetermined" criterion therefore implies that the latter term is narrower and less permissive in scope than its predecessor.

"Indefinite" is defined in the Oxford Dictionary of English as "*not clearly expressed or defined; vague"*.[218] Already, certain semantic differences between "indefinite" and "undetermined" are visible. Indefiniteness is akin to the concept of indeterminacy in that it may indicate a lack of qualitative definition, an inability to be quantified or identified based on the given criteria of a case. Undetermined-ness, on the other hand, implies that an otherwise determinate class has simply not been sufficiently concretized via the assignment of a specific value or identity. In other words, an indefinite number of entities implies a number that cannot be derived based on predefined characteristics, while an undetermined number implies a grouping whose membership has been qualitatively circumscribed but not individually specified. To exemplify the difference in meaning, one could consider an "indefinite" group of data users to refer to "anyone who is interested in a given dataset". In contrast, an example of an "undetermined" group of data users could be "digital

[214] Art. 11 DGA.
[215] For a similar semantic analysis, see: Gabriele Carovano and Michèle Finck, 'Regulating data intermediaries: The impact of the Data Governance Act on the EU's data economy' (2023) 50 *Computer Science & Law Review* 7.
[216] *Oxford Dictionary of English* (3rd ed., 2010).
[217] Rec. 22 DGA Proposal.
[218] *Oxford Dictionary of English* (3rd ed., 2010).

advertising agencies established in Spain". The latter group is quantifiable but unspecified in number or identity, while the former is unquantifiable, market predictions notwithstanding.

From a semantic perspective, the DGA's concept of an "undetermined number" of data subjects/data holders/data users therefore seems to refer to a class whose membership is qualitatively defined, yet not specifically identified and quantitatively unknown. This is reinforced by the fact the DGA does not look for undetermined-ness in the group of data subjects/data holders/data users itself, but in its *number*. In other words, the definition of a DIS under the DGA entails the offering of services to an open group, whose constituent numbers may be restricted by some qualitative requirements and may in theory be identifiable at a future point during the course of data intermediation, yet are nevertheless unspecified in the DIS' operational framework *ab ovo*. From this, it follows that the matter of whether a putative intermediary's intended audience is undetermined or determined largely (though not completely) overlaps with the matter of whether a putative intermediary offers its services to an open group or a closed group.

This interpretation seems to be confirmed by the mention, in Rec. 27 of the DGA, of 'specialised DIS', which are envisaged to flourish in the context of data spaces. The reference to 'specialised DIS' implies that data intermediaries would include qualitative limitations having an impact on who can recourse to their activities.

6.2 Undetermined and Indeterminate numbers in CJEU Case Law

CJEU case law largely supports the distinction between undetermined as "quantifiable, but unknown" and indeterminate as "unable to be quantified".

Examples of the term "undetermined number" in CJEU jurisprudence are found in the judgement of *T-241/01 Scandinavian Airlines System v Commission*, where it was applied to the number of origin and destination markets for air transport to and from two Danish settlements,[219] in the order of *T-441/08 ICO Services v Parliament and Council*, where it was applied to the number of "mobile satellite services operators" undergoing licensing procedures, [220] and in AG Sharpston's Opinion of *C-400/08 Commission v Spain*, where it was applied to the number of "large retail establishments" in Spain,[221] and in the order of *T-12/96 Area Cova and Others v Council and Commission*, where it was applied to the number of boat-owners of Portuguese nationality who fished for Greenland halibut in a specific area in the 1995 fishing year.[222]

Meanwhile, the concept of an indeterminate number is much more widely employed in CJEU jurisprudence. It is particularly relevant in the context of copyright law, where one of the criteria for a communication of protected works to the public is communication to an indeterminate number of potential recipients. The judgement of *Case C-135/10 SCF* explains the indeterminate nature of the public by referring to the WIPO glossary: "*making a work … perceptible in any appropriate manner to persons in general, that is, not restricted to specific individuals belonging to a private group.*"[223] In this case, the patients of a dental practice were considered to be a determinate (though presumably

[219] Case T-241/01 *Scandinavian Airlines System v Commission* [2005], para. 102
[220] Case T-441/08 *ICO Services v Parliament and Council* [2010], para. 39
[221] Case C-400/08 *Commission v Spain* [2011], para. 58
[222] Case T-12/96 *Area Cova and Others v Council and Commission* [2001], para. 30
[223] Case C-135/10 *SCF* [2012], para. 85

undetermined) audience when it came to the issue of communicating a protected phonograph via the practice's radio.[224]

These examples from adjacent case law reinforce the idea that undetermined-ness in the EU law refers to a qualitatively delineated but unquantified and unspecified grouping of objects. When applied to the participants in data sharing ecosystems, the concept of an "undetermined number" aptly serves to encapsulate the finite but shifting and multitudinous number of actors that typify these arrangements. It reflects the European regulator's concern that data intermediation services are akin to the online intermediation services governed by the DMA[225] and the P2B Regulation[226] in their capacity to harm competition by benefiting from strong network effects derived from simultaneously interfacing with myriad actors in the multi-sided digital economy.[227] In order to forestall the potential anticompetitive effects of self-interested DIS providers, the DGA's definition of intermediaries targets these providers precisely by the feature that gives them their power – the openness and undetermined-ness of their data sharing ecosystems.

6.3 "Undetermined number" and openness of groups in the context of the DGA

From a legal perspective, the DGA's text largely reflects a conceptual divide between DIS providers operating in open ecosystems and non-intermediaries offering their services in closed groups. Rec. 28 of the DGA offers, *inter alia*, the following examples of DIS': "*orchestrators of data sharing ecosystems that are open to all interested parties, for instance in the context of common European data spaces, as well as data pools established jointly by several legal or natural persons with the intention to license the use of such data pools to all interested parties*".[228] Here, the openness of DIS to all interested parties is specifically highlighted as a distinguishing mark that indicates capture by the DGA's legal definitions.

This openness of DIS' stands in contrast to Art. 2(11)(c)'s exclusion of services used by multiple legal persons in a closed group from the scope of the DIS definition. Art. 2(11)(c) highlights two non-exhaustive cases that may warrant exclusion: "*supplier or customer relationships or collaborations established by contract, in particular those that have as a main objective to ensure the functionalities of objects and devices connected to the Internet of Things*".[229] Indeed, in a supplier or customer relationship, there are usually clearly-defined and numbered roles that revolve around the supply of a specific product or service, with the entities acting as supplier and customer identified in advance of the provision of the product or service. New parties usually enter such arrangements through novation of contracts, wherein they replace a prior party in the relationship.

On the other hand, collaborations established by contract do not necessarily result in closed groups for data sharing. New parties may readily accede to existing contracts and grow a given data sharing ecosystem, unless there exist specific provisions to the contrary. This is likely why Art. 2(11)(c) of the DGA further clarifies that its exclusion is targeted in particular toward contractual arrangements that

[224] Case C-135/10 *SCF* [2012], para. 95.
[225] Art. 2(2) and 2(5) DMA, plus Rec. 14 DMA.
[226] Art. 2(2) P2B Regulation.
[227] C.f. Rec. 33 DGA and Rec. 3 DMA.
[228] Rec. 25 DGA.
[229] Art. 2(11)(c) DGA.

"*have as a main objective to ensure the functionalities of objects and devices connected to the Internet of Things*". [230] , [231] Contractual collaborations that are centred around enabling specific IoT functionalities are more likely to be closed by nature, as IoT devices have pre-defined functions that rely on concrete components and services in order to be realised, the responsibilities for which may be reliably assigned among a finite group of actors.

Therefore, it is important to keep in mind that the DGA's exclusions from the DIS provider label under Art. 2(11)(c) are qualified rather than absolute. They only apply insofar as such arrangements actually constitute closed groups in reality. Rather than presupposing that all contractually-established collaborations are closed by default, the IoT-related example in Art. 2(11)(c) of the DGA flags that certain industrial arrangements are particularly likely to result in closed groups compared to others. Therefore, the conclusion whether a certain group is closed or not (and in parallel – whether it is undetermined or not) must be made on a case-by-case basis, with regard to the specificities of any given relationship between a putative DIS provider and its data holders / data subjects / data users.

6.4 Single-sided vs. double-sided undetermined-ness

If one accepts that the DGA ties undetermined-ness to openness, then it is natural to wonder whether a data-sharing ecosystem can be considered closed off via determining the number of participants on only one side, whether it be the side of the data subjects / data holders or that of the data users. In the alternative scenario, the number of participants on both sides would have to be determined in order to escape classification as a DIS. In other words, how should 'an undetermined number of data subjects and data holders *on the one hand* and data users *on the other*' (emphasis added) be interpreted?

This question is relevant in light of Art. 2(11)(c), which, as discussed in Section 3.2.3, excludes from the scope of DIS two types of services, namely:

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

The first excluded scenario involves the determination of the number of only one side of the ecosystem, with a single data holder and an undefined number of potential data users. Yet, this exclusion does not necessarily imply that the arrangement that it governs concerns a closed group of legal persons. For one, it stands prior to and separate from the subsequent exclusion of "multiple legal persons in a closed group" further in the same article, with the subsequent exclusion being separated with an "or" conjunction, which indicates an alternative scenario. Furthermore, if "closing" one side of a data sharing ecosystem (in this case – the data holders) was sufficient to avoid classification as a DIS, then it would not matter whether the determined side consisted of one, two, three, or more strictly identified entities – that side would be determined all the same. In that light, this specific exclusion of services used by only *one* data holder should be considered a *sui generis* one, with little or no interpretative value as to understanding the threshold for what constitutes a closed group.

[230] Art. 2(11)(c) DGA.
[231] See Section 3.2.3.

The DGA provides little interpretative guidance, which paves the way for two alternative interpretations as to the question whether the undetermined-ness criterion requires that the number of *both* groups constituted by, respectively, data holders or data subjects, and data users, shall be undetermined. Or, alternatively, whether the undetermined-ness of the number of either of the two groups suffices. Before we proceed, it should be recalled that, in certain cases, the respective groups may overlap. For example, an open pool (on this see Section 3.2.1) may imply that participants act as both data holders and data users.

On the one hand, the expression "an undetermined number of data subjects and data holders on the one hand and data users on the other" could be interpreted as meaning 'an undetermined number of data subjects and data holders on the one hand, and an undetermined number of data users on the other hand'. This reading is based on the clear distinction between the two groups, namely data holders or data subjects on the one hand, and data users on the other. Such a reading would be in line with the major significance given to the matchmaking function of DIS', namely their function to establish commercial relationships for the purpose of data sharing, to the benefit of their customers. The matchmaking function notably implies that the data intermediary connects agents, yet unknown to each other, so they can share data. This interpretation would imply that a service associated with a data sharing ecosystem with one side, i.e. *either* side – constituted by a determined number of participants, would *escape* the qualification as a DIS. In case of doubt as to not only the interpretation but even the literal reading of the terms, as is the case here, it could also be argued that the reading that results in the fewest obligations shall prevail, in light of the general principle of legal certainty.

On the other hand, a broader reading of the criterion would be: "an undetermined number constituted by data subjects and data holders on the one hand and data users on the other". In other words, this scenario would involve the undetermined-ness criterion applying to the combined number of data subjects, data holders, and data users as a whole, rather than applying to each side individually. This interpretation would imply that services could escape classification as DISs only provided that both sides of the data sharing ecosystem are with a determined number of participants. Recalling the overlap between the concepts of undetermined-ness and openness, as well as their contrast with determined-ness and closedness, this reading highlights that an ecosystem cannot be considered closed if parts of it are left open to undefined actors. This interpretation is also based on the legislative history of the DGA. The phrase 'on the one hand… on the other hand', from which derives the confusion regarding the application of the undetermined-ness criterion, was not present in the initial DGA proposal from the European Commission, in which Rec. 22 referred to 'services aiming at intermediating between an indefinite number of data holders and data users [...]'. When the European Parliament later included data subjects alongside data holders in the evolving DGA text, it is plausible that the phrase "on the one hand . . ." was added to clarify the relationship between ecosystem actors, in which data providers (data holders and data subjects) stand opposed to data users. In other words, the confounding phrase "on the one hand … on the other hand" may not actually be related to the question whether one or both sides of participants should comprise an undetermined number of participants.

Intermediate Conclusions

- An undetermined number is one that may be qualitatively restricted, finite, and quantifiable in theory, but is nevertheless unknown at the moment of reckoning.
- CJEU case law supports the notion that undetermined means quantifiable, whereas indeterminate means unquantifiable.
- Under the DGA, the criterion of undetermined number overlaps with the consideration of whether a data sharing ecosystem is open or closed to interested parties.
- Excluded closed-group arrangements usually have participating parties circumscribed either by a restrictive type of relationship (e.g., supplier or customer relationships) or by a naturally-limiting contractual subject matter (e.g., the enabling of pre-defined IoT functionalities via pre-defined roles).
- Groups must determine whether they are closed on a case-by-case basis, since some of the DGA's examples of closed groups are qualified rather than absolute.
- The DGA's provisions are ambiguous as to whether *both* sides of a data sharing ecosystem must simultaneously be undetermined to fulfil the undetermined number criterion, or whether *either* of the sides being undetermined is sufficient.

7 "Technical, Legal, or Other Means"

As a fifth and last requirement, Art. 2(11) of the DGA states that the means through which data intermediation services can be rendered can be technical, legal or other means. In essence, this requirement does not seem to bring any limitation as to the material scope of the DGA. Rather, it is an affirmation of the intent to bring a very broad spectrum of services under the application of the DGA and subject them to the notification procedure and substantive obligations. Particularly the inclusion of "*any other means*" seems a clear indication that the legislator intends to preserve a broad interpretation as to the means employed by providers of data intermediation services. Rather than having a clear, immediate impact on the scope as per the letter of the regulation, this requirement resembles more a double safeguard of its broad scope. First of all, it rules out a restrictive interpretation as the means employed by data intermediation services under scope of the regulation. Second, it attempts to ensure the survival of this broad scope in light of the further development of data intermediation services.

In trying to ensure a broad application that will withstand future developments, the legislator unfortunately also introduces an element of uncertainty as to the exact confines of the regulation's scope. Carovano and Finck argue, for instance, that potentially even law firms that sporadically and without any technical sophistication facilitate data-sharing between multiple parties, could be caught by the scope of the DGA and be required to comply with Art. 11 and 12 thereof.[232] Indeed, any

[232] Gabriele Carovano and Michèle Finck, 'Regulating data intermediaries: The impact of the Data Governance Act on the EU's data economy' (2023) 50 *Computer Science & Law Review* 7.

company that – even sporadically and regardless of means – provides any service related to data sharing will need to consider carefully whether compliance with Art. 11 and 12 would be required. Given that the obligations under Art. 12 could very well have a major impact on the overall organisation of these companies, it would be safe to assume that many would prefer not to be subjected to them. In the absence of any de minimis threshold, such as an exclusion of micro and small enterprises[233], what is left is a substantial grey zone of potentially affected companies.

Intermediate Conclusions:

The reference to "technical, legal, or other means" does not clearly delineate the potential scope of data intermediary services. In fact, it is prone to add to any uncertainties as to this scope by attempting to rule out any strict interpretation as to the means to be employed by providers of data intermediary service. Taken into account the lack of any de minimis threshold and the potential major impact that compliance with Art. 12 would have on organisations, many organisations will have to make difficult assessments in light of these uncertainties.

8 Data intermediation in the context of research activities

8.1 Introduction

In recent years the European Commission has been funding several projects aimed at exploring technological solutions to harness the potential of data in the EU. Some of these projects are intended, among others, to facilitate data sharing and use and stimulate a data-driven EU economy. Funding for these projects is provided as part of the political priority of the European Commission to shape Europe's digital future, and to execute the European strategy for data.

Some of the activities carried out in the context of these projects may fall under the legislative definition of data intermediation service, especially if the partners of a project decide to test solutions that enable data sharing between data holders and data subjects, on the one hand, and data users on the other hand. In this case, the application of the DGA to the activities of the project could present inconveniences, as project partners would have to face the administrative and financial burdens inherent in the steps to take to comply with the provisions of the DGA, from the notification to the competent authority to respecting the conditions for providing data intermediations services. Therefore, the full application of the DGA to such research activities, with the compliance burdens that ensue, may in part hinder the achievement of the objectives of the funding programmes of the European Commission, which ultimately also correspond to the objectives of the DGA and of the other initiatives stemming from the European strategy for data. For this reason, it is warranted to assess whether the activities carried out in the context of research projects funded by the European Commission would fall inside the scope of application of the DGA, or if there are any reasons to argue that they would be outside of its scope.

The DGA does not explicitly exempt the activities carried out for research purposes from the provisions on data intermediation. Therefore, any service provided in the context of publicly funded research

[233] Such as under Art. 7 of the Data Act; see also Gabriele Carovano and Michèle Finck, 'Regulating data intermediaries: The impact of the Data Governance Act on the EU's data economy' (2023) 50 *Computer Science & Law Review* 7.

projects that falls under the definition of data intermediation service will be, in principle, subject to the relevant provisions of the DGA.

However, besides the absence of a general exemption in the legislative text, such activities could, due to their specific nature, fall out of the scope of the DGA because they do not satisfy the conditions to qualify as data intermediation services. This section will consider whether research projects can be considered data intermediation services in light of the criteria laid down in the legislative definition. Given that research projects can be structured in multiple ways and, especially as concerns the remuneration and economic advantages gained by participants during the project, the structure adopted in practice can be a decisive factor to qualify the activities as data intermediation services, this section will consider different hypotheses of how the research activities could take place.

Despite the differences that these projects can present in practice, a baseline definition of the research activities that will be scrutinised in light of the notion of data intermediation service must be provided. This definition shall be as follows:

The activities carried out in the context of a project for the creation/testing of a data space/data-sharing platform, or to explore technological, operational or organisational solutions that facilitate or enable the establishment of relationships for the sharing of data between data holders/subjects and data users. These activities are fully funded by public funds granted in the context of programmes managed by the European Commission or other European or national public bodies and are conducted exclusively within the framework, and according to, the terms set in the grant agreement. Therefore, the purpose of the services provided as part of these activities is exclusively that of achieving the objectives set in the grant agreement, and any commercial or profit-making activity is solely ancillary thereto.

The activities described above are hereinafter referred to as ''research activity'' or ''project activity''.

8.2 General considerations on the role of research in the DGA and in relation to data intermediation

Research, and in particular scientific research, is mentioned multiple times in the recitals and articles of the DGA in relation to the re-use of certain categories of protected data held by public sector bodies, as well as with regard to data altruism. The promotion of scientific research is clearly one of the objectives pursued by the provisions of the DGA on data re-use and data altruism[234].

On the contrary, the connection between research and the provisions on data intermediation services is not clearly established by the text of the DGA. There is arguably an indirect connection, as data intermediation services are regulated in the DGA in order to ensure that they play a key role in the data economy, facilitating, among others, the establishment of common European data spaces, and they ultimately facilitate the sharing and processing of data to be used for scientific research.[235] As stated in the explanatory memorandum of the legislative proposal on the DGA, the instrument drew inspiration from the principles for data management and re-use developed for research data[236], and it is built on the assumption that increased access to data would enable research organisations to make

[234] See Rec. 6, 7, 8, 15, 16 and 45 of the DGA.
[235] See Rec. 27 of the DGA.
[236] This is evidenced, among others, by the reference to the FAIR data principles in Rec. 2 of the DGA.

scientific developments. However, in the Impact Assessment on the DGA of the European Commission staff working document[237], the promotion of research is only mentioned with regard to data re-use and data altruism. Therefore, besides a fairly abstract connection, research does not occupy any specific position in the provisions on data intermediation services.

There are no elements in the legislative text, in the explanatory memorandum or in the Impact Assessment that would suggest that the services provided in research projects may, as such, fall outside of the definition of data intermediation service. In the absence of indications in this sense, the assessment of whether research projects fall under this definition should be conducted on the basis of the criteria laid down in the legislative definition of data intermediation service in Art. 2, point 11), of the DGA. The legislative definition sets out four criteria that must be satisfied to have a data intermediation service,[238] as discussed in the previous sections of this paper. In particular, there must be: i) a service, ii) which aims to establish commercial relationships for the purposes of data sharing, iv) between an undetermined number of parties. (iv) Such service can be provided by legal, technical or other means.

These criteria are applied below to the baseline definition of research activity, considering different scenarios for the application of the 'service' criterion.

8.3 Qualification as a service

As discussed in Section 4, the legislative text and the relevant recitals of the DGA do not provide guidance on the interpretation of the term 'service' within the meaning of the DGA, and there are no indications in the text of the DGA suggesting that an interpretation of this term different from that reached under other EU legal acts is warranted. It may very well be that, while assessing whether an activity qualifies as data intermediation service, the court will rely on the earlier well-established criteria stemming from the case-law on the definition of service under Art. 57 of the TFEU, the Services Directive and EU legislation on public procurement.

In the case of platforms and technological solutions developed by a consortium/federation for a programme funded by means of EU public funds, the application of these criteria from the case-law may not always be clear cut though, and would greatly depend on how the activities are structured in practice.

To provide for some clarity, it is possible to distinguish multiple hypotheses where the project would, or would not, likely qualify as a service:

1. Participation in the project without benefits for later commercialisation phase/acquisition of IP rights. The contributors to the project operate a technological solution for data sharing in order to test its functioning, and to this end they provide services to data holders/subjects and data users for a certain period of time during the project, without remuneration or other evident economic advantage besides the public funding for the project. Once the platform is developed, they share its architecture without continuing to operate it for commercial

[237] European Commission, 'Commission staff working document impact assessment report accompanying the document Proposal for a Regulation of the European Parliament and of the Council on European data governance (Data Governance Act)', SWD/2020/295 final, LINK.
[238] See the analysis carried out above in Sections 4, 5, 6 and 7 of this paper.

purposes, and without acquiring IP rights in relation to the technologies developed during the project. In this case, it can be argued that the activities of the project do not constitute data intermediation services, for the following reasons: i) the contributors are remunerated only through the public funds and there is no economic link with the recipients, ii) they only operate the platform for the purposes of completing the project, without any economic advantage expected to materialise at a later stage. If they do not continue to use the platform for commercial purposes afterwards, there would not be any economic advantage from the development and testing of the platform in the research phase.

As stated by the ECJ, when an activity is financed by public funds and there is no intention to receive remuneration, such activity should be excluded from the concept of service[239].

2. Participation in the project with benefits for later commercialization phase/acquisition of IP rights. The second hypothesis is identical to the first, with the only difference being that the contributors continue to operate the platform for commercial purposes after that the research phase is concluded, or acquire IP rights on the technologies developed during the project. In this case, it can be argued that the contributors gain an economic advantage for the activities conducted in the research phase, in terms of marketing and visibility, acquisition of IP rights, and technological development of solutions to be exploited at a later stage. Should this be the case, the fact that there is no direct remuneration or evident economic advantage in the R&D phase does not exclude a qualification as a service. In particular, the broad understanding of remuneration in the above-mentioned case-law is aimed at excluding gratuitous services and those without a direct economic link between the provider and the recipient from the scope of the TFEU[240], where there is no consideration for the service in question[241]. The economic advantages consisting of later commercialisation benefits and/or acquisition of IP rights could constitute the economic link and consideration required to qualify an activity as a service. In this case, however, it may be difficult to assess *ex ante* which economic advantages would accrue from the research activities. Since no economic advantage materialises before and during the performance of the research activities, this assessment must be based on the contractual documents or any written documentation that confirms the economic rationale for the participation by the partners in research activities. For instance, the acquisition of IP rights could be agreed on in the contractual documents pertaining to the research project, or company documents could reveal the strategy to carry out the research activities with the ultimate aim to commercially exploit the research output. Nonetheless, there might not be written documents that enable to identify *ex ante* the economic advantages to be gained with the research activity. When this is the case, the identification of the service is left to the notification by the data intermediation service provider in accordance with Art. 11 of the DGA, or to the supervision by the competent authorities that can monitor compliance with the DGA by data intermediation service providers pursuant to Art. 14 of the DGA.

3. Participation in the project receiving remuneration from the recipients of the service. In the third hypothesis, contributors provide services to data holders/subjects and data users for a

[239] Case C-281/06 *Jundt* [2007] para 30.
[240] Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (fifth edition, Oxford University Press, 2016) 296.
[241] See, *inter alia*, Case C-281/06 *Jundt* [2007] para 29; Case C-76/05 *Schwarz and Gootjes-Schwarz* [2007] para 38; Case C-318/05 *Commission v Germany* [2007] para 67.

certain period of time during the project, receiving in exchange compensations for the services that do not exceed the costs of providing such services. In this circumstance, it must be distinguished between the case where the remuneration covers all the costs, only part of the costs or exceeds the costs:

a. If the remuneration covers all the costs, it must be noted that the opinion of the AG in the *Azienda Sanitaria* case[242] concluded that a mere reimbursement of costs also allows for an activity to qualify as service, since even in this case there might be a pecuniary interest. The AG adopted a broad definition of the notion of pecuniary interest, which also covers the situation where there is a simple reimbursement of the costs. However, citing the reasoning of the AG, this broad interpretation was justified because *Directive 2004/18*[243] *was intended to serve to attain the fundamental freedoms in the internal market.* It remains to be seen if the objectives underlying the DGA justify a similarly broad interpretation of the meaning of service. There are two reasons to believe that this would be the case: i) the legal basis of the DGA is Art. 114 of the TFEU, that enables the adoption of legal acts for the establishment and functioning of the internal market, ii) the DGA pursues the specific objective to address the fragmentation of the data economy in the internal market, for which the harmonisation of as many data intermediation activities as possible would be sensible. Therefore, in this scenario the activity would likely qualify as a service.

b. If the remuneration exceeds the costs, the activity would certainly qualify as a service, *a fortiori* considering that the mere reimbursement of costs is sufficient to meet the service criterion.

c. If the remuneration does not cover all the costs, the answer is not clear-cut and requires significant interpretive effort. The assessment on whether the activity would qualify as a service in light of the case-law mentioned above would have to take into account several factors, and its outcome would greatly depend on the specific circumstances of the case. For instance, if the remuneration covers a tiny portion of the costs and there are no other economic advantages accruing to the contributors from the project, it can be argued that there is not a service, citing the *Jundt* judgement of the CJEU of 2007.[244] In this judgement, the Court held that an activity mainly financed with public funds through which the state does not intend to engage in activities for remuneration, but to maintain a system of public education, does not qualify as a service. Based on this judgement, also the activities carried out in a project that is mainly financed through public funds would not be services, despite the small fraction of financing coming from the recipients of the service. However, this conclusion would not hold true if the Court adopts a broad understanding of economic link for the definition of data intermediation services, stating that even a remuneration covering a small portion of the costs is sufficient to establish an economic link. This

[242] Case C-15911 *Azienda Sanitaria Locale di Lecce* [2012], Opinion of AG Trstenjak para 33.
[243] Directive 2004/18 is no longer in force since 18/04/2016, and was repealed by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC[2014] OJ L 94 of 28.03.2014.
[244] Case C-281/06 *Jundt* [2007].

may be the case, considering that the DGA arguably envisages a very broad interpretation of data intermediation services, as noted above.

In light of the considerations made above, it can be noted that the research activity may not qualify as a ''service'' only in the hypothesis where the participants to the project do not gain any economic benefit from the project itself, besides the reimbursement of the costs via the public funding, and do not obtain, among others, economic benefits for a later commercialization phase (e.g. marketing), IP rights or a remuneration from the recipients of the service.

Another situation in which there might not be a 'service' is the case where participants are paid with a remuneration that does not cover all the costs, and there are no other economic benefits gained by the service provider. However, it is difficult to foresee how the CJEU will interpret the DGA in such a case, because the relevant case-law precedents only relate to public services provided by public bodies, and not to private entities providing services for a remuneration below costs.

In light of the above, it would be difficult to argue that the research activity would in any case not be a service, in the presence of a remuneration that covers or exceeds the costs. One potential, albeit very difficult, argument to claim that services provided for a remuneration that only covers the costs, without exceeding them, is not a data intermediation service would be to rely on the definition of data altruism in Art. 2(16) of the DGA. According to this Art., you can only have data altruism when the data is voluntarily shared without seeking or receiving a reward that goes beyond compensation related to the costs incurred. In the general architecture of the DGA, data intermediation and data altruism seem to be framed as different categories of services, where data intermediation is a commercial activity and data altruism is not. The definition of data altruism could be read as indicating that a remuneration equal to the costs does not render an activity commercial, and thus that data intermediation without a remuneration exceeding the costs falls outside the scope of the DGA because it is not a 'service'. This interpretation, however, may be erroneous when considering that Rec. 29 of the DGA reads ''*data altruism organisations regulated by this Regulation should not be considered to be offering data intermediation services provided that those services do not establish a commercial relationship between potential data users, on the one hand, and data subjects and data holders who make data available for altruistic purposes, on the other*''. In distinguishing between data altruism and data intermediation this recital focuses on whether a commercial relationship was established, and not on the factor of the remuneration. The same distinguishing criterion is affirmed in Article 15 of the DGA.

8.4 Criterion on the aim to establish commercial relationships

As concerns the establishment of commercial relationships, the application of this criterion shall not lead to a different outcome depending on whether a service is provided in the context of a research activity or of a fully-fledged economic activity. In light of the explanations on this criterion put forward above, it is essential to look at how the services are provided in practice, focusing on aspects such as the interpretation of the notions ''commercial relationship'' and ''aim to establish'', and their applicative implications. The provision of the service in the context of a research activity is arguably not a decisive element to determine if this criterion is met, nor should it be relevant in any respect. A provider may be aiming at the establishment of commercial relationships also in the context of a research project, e.g. to test the functioning of an operational model in the market.

8.5 Criteria on purpose of data sharing and undetermined number of parties

For the application of these criteria, the fact that the service is provided in the context of a publicly funded research activity also seems to be irrelevant. If a data intermediation service is provided as part of a research project, it cannot be argued that the ultimate purpose is research-related and not data sharing, because data sharing is in any case the purpose of the service *per se*. It can equally be said that the criterion on the undetermined number of parties participating in data intermediation is satisfied depending on how the activities are organised in practice.

Therefore, whether these criteria are satisfied must be decided on a case-by-case basis looking at the aspects outlined above, and the outcome of this assessment should not be influenced by the ultimate research objective of the project. As concerns the criterion on the undetermined-ness of recipients of the service, a decisive factor for its application would be whether there is an open or closed base of recipients. There are two most significant examples that can be provided to illustrate how this criterion could apply to research projects. In the first example, a research project would test a technological and/or organisational solution to enable data sharing in a predetermined, closed group of data subjects and data holders, on the one hand, and data users on the other hand. This could be a practically and strategically convenient arrangement for testing, as it allows the participants in the project to select the ecosystem in which they intend to test their solutions before offering the service to a wider base of recipients. In this hypothesis, the undetermined-ness criterion would not be met, and thus the activity would not qualify as a data intermediation service. In the second example, the testing would be conducted by offering the services to any interested recipient, without any limitation that would render the recipients of the service a predetermined and closed group. In this case, the activity could be considered a service if all the other criteria are equally met.

Intermediate Conclusions

- There is no generalised exemption of research activities from the DGA framework on data intermediation services;
- There are no indications that data intermediation services provided in the context of research activities should be subject to a differentiated regime;
- When considering the different scenarios of how research activities may be organised, there are elements to argue that in some scenarios the activities carried out would not qualify as data intermediation services. For instance, this would likely be the case where the participation in the project does not provide the participants with any economic benefits, whether immediate or to materialise at a later stage.

9 Conclusion

The DGA aims to facilitate and support the sharing of data for both companies and individuals as well as the further reuse of such data for a broad array of purposes. The EU believes that such sharing can be encouraged by using a new, trusted data intermediary along the way. Data intermediaries are

therefore expected to become crucial players for the 'European way of data governance' and support the advent of European data spaces. At the heart of this new way of data governance is modularity and interoperability to take control of data-related services provided on top of an existing service, such as algorithms on platforms (see e.g., also DMA and DSA). In contrast to the current data governance model of vertically integrated Big Tech platforms, common European data spaces should consist in distributed ecosystems with competitive markets at all levels, including at the level of data exchange.

To establish trust through data intermediates and accomplish fine-grained interoperability, services qualifying as a DIS and falling under the scope of the DGA shall comply with a list of potentially demanding rules. These are diverse in terms of branches of law (i.e., cybersecurity, price regulation, etc.) and should even be applied across different types of business relationships (business-to-business, business-to-consumer, …). Legal unbundling must even be established between a DIS (provided through a 'separate legal person') and other services provided by an organisation. However, this could have very significant consequences for the internal organisation of data intermediaries (for example in terms of possible business models), which cannot be fully anticipated at this point and should be analysed on a case-by-case basis. Further, it seems that building so-called 'trust' necessarily prohibits a data intermediary from benefiting certain economies of scope, such as by tying preferential commercial conditions (including pricing) for the provision of DIS to the provision of their other services (i.e., services which do not qualify as DIS).

The DGA is now written in such a manner that the scope of the DGA, and application of the obligations associated with it are not readily apparent. The decisions a potential DIS provider will have to navigate in order to know whether they are addressed by these obligations are collated in Figure 3. Given the potential impact of such obligations on a service provider's business model, this is problematic. At the time of writing, there is guidance neither from the European Commission, nor from enforcement agencies, nor from academia regarding the exact scope of a DIS. For these reasons, this White Paper took a closer look at the various criteria set out in the definition of a DIS in the DGA.

Firstly, the DGA introduces the new notion of a DIS in Article 2(11) of the DGA through a general definition that is further accompanied with a list of three categories of DISs under Article 10. The inclusion of both a general definition of a DIS as well as three specific categories of a DIS raises questions about the consistency of both articles. After all, the general definition could be interpreted to serve as an explanatory factor for the categories of a DIS, or it could be the sole determining factor in itself for a DIS. Given that no unequivocal explanation can be found for this, this ambiguity in reality only provides additional opportunities for potential data intermediaries to escape the scope of the DGA.

Secondly, following the DGA, a DIS is a service. However, services are not given a specific meaning within the DGA and therefore the general definition of 'services' in EU law should be taken into account. Yet again, this is a broad definition that potentially encompasses many different activities. To know whether there is really a service within the meaning of the general European definition, it is always necessary to examine the specific features of the activities of a potential provider of data intermediation services on a case-by-case basis. Even if activities are dependent on government funding or the service provider merely receives the reimbursement of costs (i.e., if there is no profit), they could still be classified as services and therefore fall within the scope of the DGA, depending on the particular situation.

Thirdly, a DIS is a service aimed at establishing commercial relationships between data subjects and data holders for the purposes of data sharing. Commercial relationships seem to point to the distinction with other types of data exchange situations as formulated in the DGA (e.g., data altruism organisation). Although there is no further clarification of the term 'commercial', it seems to refer to some sort of trading activity. The reference to commercial here is completely independent of the capacity of the entity (i.e., can be either commercial or non-commercial, such as individuals acting as 'data subjects') and relates only to the nature of the relationship between the entities involved. After all, the ultimate purpose of the sharing of data is its further (re-)use between those entities. Hence the emphasis on their commercial relationship instead of their capacity. Given the objective of facilitating the further (re-)use of data, the DGA also contains a separate but broad definition of data sharing, encompassing all possible scenarios in which data can be shared. The 'aim' criterion seems to further refer to the ways in which a data intermediary's business model can be specifically designed to establish commercial relationships for the purpose of data sharing. This seems to imply that the function of a DIS takes precedence over the possible types. However, it is unclear whether this subjective 'aim' criterion can also be supplemented with non-subjective standards (see for example the possibility of obtaining information about entering into commercial relationships and/or the price system, etc. in Rec. 28). Such a subjective criterion again provides additional opportunities for potential data intermediaries to escape the scope of the DGA.

Fourthly, relationships should be established between an undetermined number of data subjects, data holders on the one and data users on the other hand. Consequently, the question is whether a data-sharing ecosystem is open or closed to interested parties. Again, this must be considered on a case-by-case basis as some examples of closed groups are qualified rather than absolute throughout the text of the DGA and its recitals. The question then arises to what extent data sharing can be considered closed by determining the number of participants from only one side, whether they are the data subjects/data holders or data users. The distinction between data holders and data subjects, both of whom can operate on the same side, namely as providers of data, and data users on the other side, was only established later in the final version of the DGA and may explain the new terminology in the DGA or " on one side... and on the other...". However, we believe it is possible to read both options into the DGA text, leaving it ambiguous as to whether either or both sides of a data sharing ecosystem must be determined in practice. Again, in practice, this only increases the opportunity for potential data intermediaries to escape the scope of the DGA. What there is no doubt about is that a potential data intermediary can escape the DGA's criterion of an undetermined number of associated data holders/data subjects and data users, by pre-emptively specifying the number and roles of these entities and close-off its data sharing ecosystem to other entrants. Since it is the number of entities in a data sharing ecosystem that must be determined rather than the concrete identities of participating data holders / data subjects and data users, it would then still be possible in the long term for parties departing from a closed data sharing ecosystem to be replaced via an appropriate contractual mechanism, with their roles assumed by another entity and the overall number of active participants remaining the same.

Lastly, a DIS can be provided through technical, legal or other means. The reference to 'technical, legal, or other means' does not further delineate the potential scope of data intermediary services. Like the definition of data sharing, it wants to be able to capture as many forms of data intermediation as possible. After all, the types of a DIS are secondary to its function. However, such a broad definition

may also lead to more uncertainty about the scope, as it tries to exclude a strict interpretation of the means to be used by data mediation service providers.

On top of the unclarity regarding the definition of a DIS, there are also discrepancies between the exclusions and exceptions and remaining data intermediation scenarios. In fact, the exclusions and exceptions vary in terms of their respective (material and personal) scope, in terms of the legal relationships to which they relate and their positioning in relation to the broader field of EU law as well as the emerging field of EU data law and other aspects of the DGA. To name a few of the issues raised above: services obtaining data for the purpose of adding substantial value seem to not cover current developments regarding PIMS, copyright intermediaries do not address CMOs, and IMEs and unrecognised non-profits have no examples outside of scientific research data repositories. Besides, as for research projects, it would be desirable that they are subject to a lighter application of the DGA's obligations, or do not fall in its scope of application at all. However, in the absence of a generalised exclusion or exemption, the different configurations that research activities may have in practice will also have to be considered on a case-by-case basis under the DGA.

All of this is problematic for the applicability of the DGA and its potentially demanding obligations to existing and future data exchange and sharing arrangements and in particular to organisations providing services possibly qualifying as a DIS. Whether data intermediaries can find a business model under the constraints imposed by the DGA has not been tested. Grey areas therefore offer opportunities to potential data intermediaries to effectively ignore the DGA and its obligations, hence also EU "legislation, values and standards". A more complete explanation of the scope is required. In that respect, however, a minimalist interpretation of the actual function and business model of a DIS, limited to the fine-grained interoperability level of data exchange, seems to be an appropriate starting point for interpreting the further scope of the DGA.

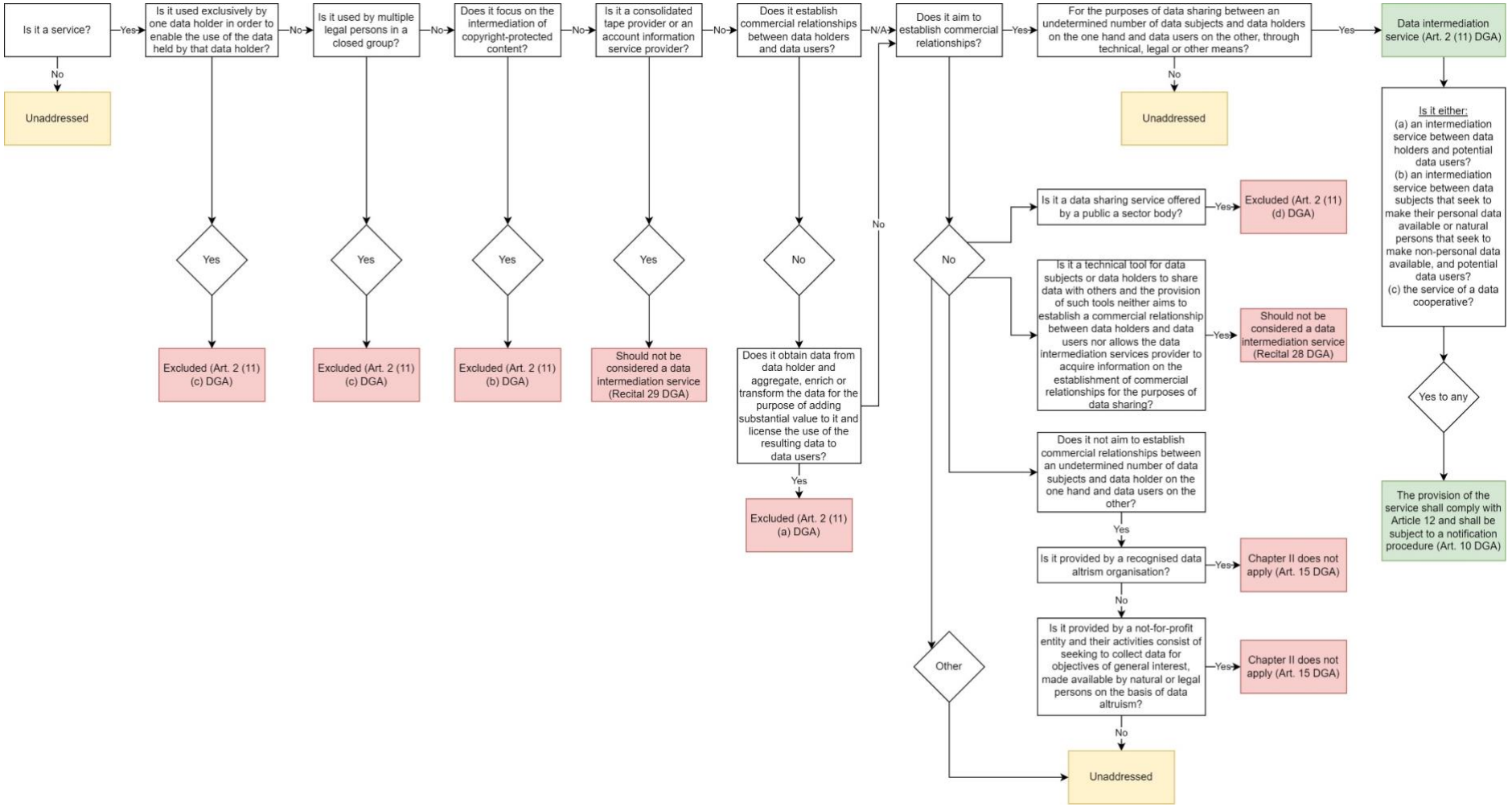

Figure 3: Is it a data intermediation service?