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The Regulation of Data Spaces under the EU Data Strategy: Towards the 'Act-ification' of the Fifth European Freedom for Data?

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Abstract

The development of a data-driven digital economy in the EU is based on data-sharing. However, the current scenario is marked by fragmented data silos and big tech dominance, hindering data interoperability in the Digital Single Market. Regulatory efforts have begun addressing this by reducing platform data control and enhancing user empowerment, promoting data portability rights in different legal instruments. Nevertheless, a unified data-sharing infrastructure is essential for the efficacy of these measures. Data spaces are anticipated to provide the needed technical framework, supported by emerging legal regulations to ensure free information movement through this infrastructure. This development raises the question of whether a new EU fundamental freedom is being established, specifically for data. The existing four freedoms – movement of goods, capital, services and people – have been instrumental in shaping the Digital Single Market. However, the progression of societal digitalisation might necessitate a distinct data-centric freedom. This article examines whether the EU's strategies and regulations are evolving towards a fifth fundamental freedom for data, potentially acting as a cohesive force for various data-related initiatives.

Keywords: data spaces, free flow of information, data protection, digital single market, fundamental freedom, European Union.

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1. Introduction

Data plays a fundamental role in the development of the digital economy.[1] The EU has acknowledged this in different policy documents, regulatory developments and enforcement actions.[2] However, the US and China currently dominate information and communication technologies (ICT).[3] From the wide range of ICT applications, big data can be considered an enabler for the development of data-intensive activities, such as AI systems.[4]

In response, the EU has drafted a barrage of policy documents and enacted an extensive web of regulatory instruments to secure a place in the digital economy, particularly to facilitate the use of data from a broad range of sources.[5] However, the current EU landscape around data is characterised by fragmentation and a lack of interconnection between datasets.[6] While certain pieces of legislation have been successful in this, particularly by expanding the EU's political weight thanks to the 'Brussels Effect',[7] the EU is still lagging behind its competitors.[8]

The core of the EU digital economy strategy revolves around enabling the free flow of information within its borders.[9] By doing so, it is expected to directly challenge current practices, particularly from US-based big tech companies, that tend to accumulate, and profit, from owning massive sets of information.[10] For example, Meta operates a considerable number of databases fuelled by its different 'businesses' – Facebook, WhatsApp, Instagram, etc – but the degree to which such datasets are available to outside parties is limited to very few venues, such as developers' APIs, and constrained by tight and restrictive terms of use. On the other hand, open data policies intend to allow access to government data and foster an exchange of

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

[2] Pascal D König, 'Fortress Europe 4.0? An Analysis of EU Data Governance through the Lens of the Resource Regime Concept' (2022) 8 *European Policy Analysis* 484.

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

[4] Daniel E O'Leary, 'Artificial Intelligence and Big Data' (2013) 28 *IEEE Intelligent Systems* 96.

[5] König (n 2).

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

[7] Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

[8] Commission (n 6).

[9] Ineta Breskienė, 'Free Movement of Data in the European Union: Opportunity or Big Challenge in a Use of Artificial Intelligence?', *The future decade of the EU law* (ilniaus universiteto leidykla 2020) 30 <https://www.journals.vu.lt/open-series/article/view/22385> accessed 21 August 2023.

[10] König (n 2) 494.

information with the private sector based on trust over a respectful use of such data, in contrast to Chinese approaches to such issues.[11]

From its inception in the ashes of WW2, the European Union (EU) project evolved extensively from a simple common market for coal and steel,[12] to setting the stage for an integrated Digital Single Market.[13] As part of this economic integration process, the EU has consecrated four fundamental freedoms that compose the core of its internal market: free movement of goods, capital, services and people.[14]

However, digitalisation has transformed the very economy that was supposed to be integrated through these freedoms, leading to concrete action plans in response to it, as will be explored in the following sections.[15] In this respect, it is possible to wonder if information – personal and non-personal data – should also enjoy the same freedoms within the single market, either under the existing ones or, perhaps, through a new fundamental freedom.

The idea of a new EU freedom is not novel, but it has been approached in very different ways regarding its meaning and scope by policymakers,[16] academics[17] and non-governmental organisations.[18] While there are some exceptions where the idea of data free flow was suggested as this fifth freedom,[19] these analyses have not explored the vast web of data-related legal rules enacted in recent years and how

[11] Celeste (n 3).
[12] Ian Ward, *A Critical Introduction to European Law* (3rd edition, Cambridge University Press 2009) 9.
[13] Andrej Savin, *EU Internet Law* (Edward Elgar Publishing 2020) 23–27.
[14] Ward (n 12) 13, 116; Koen Lenaerts, Piet Van Nuffel and Tim Corthaut, *EU Constitutional Law* (Oxford University Press 2021) 153–158.
[15] Carsten Schmidt and Robert Krimmer, 'How to Implement the European Digital Single Market: Identifying the Catalyst for Digital Transformation' (2022) 44 *Journal of European Integration* 59, 61–66.
[16] 'Free Flow of Non-Personal Data: Parliament Approves EU's Fifth Freedom' (*Press room*, 4 October 2019) <https://www.europarl.europa.eu/news/en/press-room/20180926IPR14403/free-flow-of-non-personal-data-parliament-approves-eu-s-fifth-freedom> accessed 20 October 2022.
[17] In this respect, academics have discussed mainly two ideas: (i) EU citizenship (see for example Giovanni Comandé, 'The Fifth European Union Freedom' in Hans Micklitz (ed), *Constitutionalization of European Private Law: XXII/2* (Oxford University Press 2014) <https://doi.org/10.1093/acprof:oso/9780198712107.003.0003> accessed 22 March 2023; or (ii) scientific freedom (see for example Ramon Marimon, Matthieu Lietaert and Michele Grigolo, 'Towards the "Fifth Freedom": Increasing the Mobility of Researchers in the European Union' (2009) 34 *Higher Education in Europe* 25).
[18] For example, the European Centre for International Political Economy developed the Five Freedoms project to work on this particular topic ('Five Freedoms Project' (*European Centre for International Political Economy*) <https://ecipe.org/five-freedoms/> accessed 27 March 2023).
[19] Mirela Marcut, 'EU and Cyberspace – A Plea for the Fifth Freedom of Movement' in Mircea Brie, Alina Stoica and Florentina Chirodea (eds), *The European Space. Borders and Issues* (Oradea University Press–Debrecen University Press 2016) <https://papers.ssrn.com/abstract=3407441> accessed 27 March 2023; Breskienė (n 9).

they contribute to the creation of data spaces as the necessary instrument for the emergence of this new freedom. As such, the purpose of this article is to explore whether the EU's current policy strategies and regulatory efforts that conduce towards data spaces are giving way to a new EU freedom that could connect all these initiatives under a common objective: the free flow of data within the Digital Single Market.

As we will explore in this article, the EU has progressively moved forward with this objective through different legal instruments, which can be grouped into three categories. Firstly, those that attempt to open platforms' databases. Secondly, those that seek to empower individuals and legal entities in getting a tighter grip on their information and how it is shared. These two sets of legal rules introduce different mechanisms to ensure the free flow of data and, consequently, set the stage for the creation of data spaces. In this sense, thirdly, we will analyse those legal rules that pursue the development of a common data-sharing infrastructure, under the name of 'data spaces', by building on the previous regulatory instruments.

Our analysis will be based upon a description of the three phenomena mentioned above, and we will explore the relevant enacted and proposed legal instruments for clues about this new freedom. For this, we build upon the work of De Hert and Papakonstantinou, who have analysed recent EU regulatory approaches to digital technologies;[20] in particular, we will take into consideration how the processes of 'act-ification' and 'EU law brutality' influence the development of the free flow of information and the configuration of this new freedom. These authors argue that the first process aims at facilitating citizens' awareness of new technology-related laws by relying on a 'simple' name for the legal rule; the other process refers to the fact that '(…) new digital technologies-relevant regulatory initiatives by the EU legislator do not hesitate to introduce new terms, new procedures, new principles and new state mechanisms into Member States' legal system under a top-down approach that pays little attention to backwards compatibility's requirements'.[21]

The research question for this article is the following: 'Have the regulatory developments leading up to the EU data spaces consecrated a new fundamental freedom for the free flow of data in the Digital Single Market through Regulations?' To answer this, the paper is structured as follows. Section 2 will briefly review the notion of fundamental freedom and frame why ensuring free data flows is key for the EU economy. Section 3 will explore the first obstacle in this path: breaking platforms' data silos. Section 4 will examine the different data-related Regulations that contribute to the emergence of this new fifth freedom, particularly by setting out the tools for operating in data spaces. Section 5 will address the development of data spaces as the necessary infrastructure for the emergence of this new fifth freedom.

[20] Vagelis Papakonstantinou and Paul De Hert, 'The Regulation of Digital Technologies in the EU: The Law-Making Phenomena of "Act-Ification", "GDPR Mimesis" and "EU Law Brutality"' (2022) 2022 *Technology and Regulation* 48.
[21] ibid 56.

Finally, Section 6 will briefly summarise the findings, provide some closing remarks, and point out future research paths regarding the fifth EU fundamental freedom.

2. The EU Fundamental Freedoms and the Case for Free Flow of Information in the Digital Single Market

2.1 A Brief Overview of the EU's Fundamental Freedoms and the Internal Market

To secure the creation of an internal market, the EU enshrined[22] four freedoms of movement for goods, persons, services and capital; these are currently in the Treaty on the Functioning of the European Union (TFEU).[23] By doing so, it intended to prevent the establishment of barriers to the development of its internal market by Member States and, to a lesser extent, under the European Court of Justice's (ECJ) case law, by other private parties.[24]

Fundamental freedoms should not be confused with fundamental rights, as there are several differences between them.[25] The latter are rights that have been granted special consideration, by putting them at the top of the legal order and developing mechanisms to ensure their protection; in the case of the EU, the notion emerged in its Member States, then made its way into EU case law and, eventually, the Charter of Fundamental Rights of the European Union (CFR) and the European Convention on Human Rights (ECHR).[26] These are intended to be exercised before EU bodies and Member States when dealing with EU law, but also against private parties, when a compromise to any of these rights occurs.[27] However, in certain scenarios, such as the free movement of persons (workers), it has been considered that a fundamental freedom can give birth to a fundamental right, particularly after the enactment of the CFR.[28] Moreover, it is possible that, despite their different intended purposes, they arrive at a similar effect.[29]

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[22] Lenaerts, Nuffel and Corthaut (n 14) 158.

[23] Consolidated version of the Treaty on the Functioning of the European Union OJ C 326, 26.10.2012, p. 47–390 (BG, ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV) OJ C 326, 26.10.2012, p. 47–390 (GA).

[24] Tamas Szabados, 'Conflicts Between Fundamental Freedoms and Fundamental Rights in the Case Law of the Court of Justice of the European Union – A Comparison with the US Supreme Court Practice' (2018) 2018 3 E*uropean Papers – A Journal on Law and Integration* 563600, 569.

[25] Joaquín Sarrión Esteve, 'Las libertades fundamentales del mercado interno, su sinergia positiva con los derechos fundamentales en el derecho de la Unión Europea, y una anotación sobre el ámbito de aplicación' (2016) 8 C*uadernos de Derecho Transnacional* 260, 262–266.

[26] Gloria González Fuster, *The Emergence of Personal Data Protection as a Fundamental Right of the EU* (Springer Science & Business 2014) 164–174.

[27] Lenaerts, Nuffel and Corthaut (n 14) 664–671.

[28] Francesco De Cecco, 'Fundamental Freedoms, Fundamental Rights, and the Scope of Free Movement Law' (2014) 15 *German Law Journal* 383, 384.

[29] Szabados (n 24) 569.

'Despite their fundamental nature, neither of them is absolute: they may be subject to restrictions'.[30] When limiting fundamental freedoms in a cross-border market access scenario, it is necessary to invoke a social or public interest consideration; otherwise, the restriction cannot be upheld.[31] On the other hand, the balancing of fundamental rights, according to the CFR, depends on two key factors: (i) the restrictions are laid out in a law, and (ii) they are necessary and proportionate.[32] However, a key question is how to settle a conflict between these freedoms and rights.[33] In this sense, and taking into consideration the fact that both would be at the same level, the ECJ has a considerable margin to decide which one should prevail.[34]

In this respect, the EU, because of its integration process, has established a robust system anchored in these four key freedoms of movement. Despite their success in integrating the 'physical' single market, the development of an EU digital economy based on the freedom of movement remains a challenge for its lawmakers.[35] While the issues are plentiful, the creation of a legal regime that effectively allows data to move freely across the Digital Single Market is at the top of them.[36]

Beyond the EU itself, both emerging and industrialised countries have moved towards a data-driven digital economy; the former to leap over the previous gap with the so-called developed world and the latter to pursue further economic growth.[37] However, the means to reach this goal are just as varied as jurisdictions and legal regimes can be identified.[38] In the case of the EU, as will be explored below, many data-related legal instruments have been grounded around these four freedoms.

As will be discussed later in this article, data can be either personal or non-personal, and these categories have different legal regimes. Nevertheless, this distinction has been questioned and, as such, a common new fundamental freedom of movement of data can be considered to ensure that there are no barriers for the internal data market. However, it should be taken into consideration that personal data is

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[30] ibid 568.
[31] Sybe A de Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice' (2013) 9 *Utrecht Law Review* 169, 175–177.
[32] ibid 170.
[33] Szabados (n 24) 570.
[34] ibid 578.
[35] Federico Ferretti, 'A Single European Data Space and Data Act for the Digital Single Market: On Datafication and the Viability of a PSD2-like Access Regime for the Platform Economy' [2022] *European Journal of Legal Studies* 173, 199.
[36] Commission (n 6) 6–11.
[37] 'Data-Driven Innovation: Big Data for Growth and Well-Being' (OECD 2015); Ana Inés Basco and Cecilia Lavena, 'América Latina En Movimiento: Competencias y Habilidades Para La Cuarta Revolución Industrial En El Contexto de Pandemia' (Inter-American Development Bank 2021) <https://publications.iadb.org/es/node/30253> accessed 27 March 2023.
[38] Douglas W Arner, Giuliano Castellano and Eriks Selga, 'The Transnational Data Governance Problem' (2022) 37 *Berkeley Technology Law Journal* 623.

associated with a fundamental right under the CFR, thereby already introducing a potential conflict between it and this new fifth freedom for data.

2.2 The Digital Single Market and the Challenges for its Development

The EU authorities have monitored the impact of digitalisation and ICT on citizens' lives for many decades.[39] However, the 2008/2009 economic crisis constituted a breaking point that pushed the EU to double down on its efforts to take advantage of the economic and social possibilities of the digital economy, besides being the next logical step in its economic integration process. To achieve this, the EU identified the role that data plays in securing this future in the 2010 policy document titled 'A Digital Agenda for Europe': data could aid recovery from the economic crisis of 2007/2008 by enabling Europeans to work smarter than their economic competitors.[40]

The idea was to engage 'digital confidence' to build a 'vibrant digital single market' based on 'interoperability and standards', particularly regarding 'data repositories'.[41] The level of disconnection and fragmentation of datasets, both public and private, posed a challenged to realise this; however, the focus was placed on enhancing the then-current technological capabilities of the EU to recover from the economic crisis rather than seeking interconnection between databases.[42] It was in a document titled 'Towards a thriving data-driven economy' that these challenges where finally addressed.[43] In contrast to other ICT developments, big data presented a considerable difference as it was expected to see higher growth rates than other technological developments.[44]

While there were, and continue to be, different organisational and technical shortcomings in the EU's capabilities to engage in big data practices, regulation presented a significant challenge, as noted by the Commission.[45] To address this, it was decided to push forward different regulatory initiatives, which will be described in the following sections, to ensure the '[a]vailability of good quality, reliable and interoperable datasets and enabling infrastructure' for developing '[i]mproved

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

[40] Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Digital Agenda for Europe' COM/2010/0245 final s 1.

[41] ibid 7–14.

[42] Savin (n 13) 24.

[43] Commission, 'Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committtee and the Committee of the Regions "Towards a Thriving Data-Driven Economy"' COM(2014) 442 final.

[44] ibid 2.

[45] ibid 3.

framework conditions that facilitate value generation from datasets' in '[a] range of application areas where improved big data handling can make a difference'.[46]

A year later, the Commission followed up with a landmark document: 'A Digital Single Market Strategy for Europe' ('2015 DSM Strategy'),[47] which makes a renewed call for 'building a data economy'.[48] Particularly turning to personal data protection, and considering that at this time Directive 95/46 was in force,[49] the Commission highlighted that 'Member States are therefore not able to inhibit the free movement of personal data on grounds of privacy and personal data protection, but may do so for other reasons.'[50] It is striking that in the 2015 DSM Strategy, the Commission, despite highlighting this need to ensure the free movement of data, only mentioned the existing four freedoms when describing the Digital Single Market and did not include this fifth freedom.[51]

Almost ten years after the publication of the 2015 DSM Strategy, it is important to question if this approach has been successful in consolidating and promoting as intended the Digital Single Market, or if there are still further regulatory improvements to be made. Considering that the key element at stake here is data, which has a different legal regime depending on its characteristics, are the existing freedoms enough to address a balancing test between them and other fundamental rights, such as the right to personal data protection, when it is intended to promote the free flow of data?

3. Overcoming Platforms' Dominance One Piece of Regulation at a Time

In the 2015 DSM Strategy, the Commission explored the key role that platforms play in the data economy.[52] The use of personal data by both online businesses and platforms alike is not something new or strange in the current configuration of the

[46] ibid 5–6.
[47] Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Digital Single Market Strategy for Europe' (2015) COM(2015) 192 final.
[48] ibid 11–12.
[49] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281, 23.11.1995, p. 31–50 ('Data Protection Directive').
[50] Commission (n 47) 14–15.
[51] A Digital Single Market is one in which the free movement of goods, persons, services, and capital is ensured, and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence (see ibid 3).
[52] Ibid 3.3.

digital economy.[53] Platforms have become controllers of large datasets of any sort of commercial information, from payment data to consumer behaviour information.[54]

These big tech companies attract both businesses and users since they provide a fertile ground for the generation of data.[55] Without them, it is likely that these data could not have been generated in any other manner.[56] For example, YouTubers use the platform's data to adjust their content and vice versa, while Amazon can leverage the data generated by sellers operating on its platform and offer in-demand products at a lower price.

In this respect, platforms determine how data is generated and, more importantly, how it is used.[57] For example, single decisions, such as the change in 2023 of Twitter's API, can have considerable effects on society, leaving researchers without access to data, or other applications losing their capability to interact with the platform. Data, consequently, is trapped within their boundaries and only through certain, relatively new exceptions in legal rules, as discussed below, have tried to changed how data can be accessed.[58] This was highlighted by the Commission in the 2015 DSM Strategy.

As a result of that analysis, the Platform-to-Business Regulation ('P2B Regulation')[59] was enacted and introduced certain provisions dealing with access to data by online businesses in certain types of platforms, mainly online search engines and marketplaces. However, the P2B Regulation did not answer exactly how this access should take place, but merely redirects attention to the platform's procedures for

[53] R Ó Fathaigh and J van Hoboken, 'European Regulation of Smartphone Ecosystems' (2019) 5 *European Data Protection Law Review* 476, 476–478.

[54] Christoph Busch, 'Small and Medium-Sized Enterprises in the Platform Economy. More Fairness for SMEs in Digital Markets' (Friedrich Ebert Foundation 2020) 01/2020 7 <https://library.fes.de/pdf-files/wiso/15946.pdf> accessed 12 February 2024.

[55] José van Dijck, Thomas Poell and Martijn de Waal, *The Platform Society* (Oxford University Press 2018) 59.

[56] Pawel Popiel, 'Regulating Datafication and Platformization: Policy Silos and Tradeoffs in International Platform Inquiries' (2022) 14 *Policy & Internet* 28, 30.

[57] Inge Graef, 'Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence' (2019) 38 *Yearbook of European Law* 448, 461.

[58] Caroline Cauffman, 'New EU Rules on Business-to-Consumer and Platform-to-Business Relationships' (2019) 26 *Maastricht Journal of European and Comparative Law* 469.

[59] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (Text with EEA relevance) PE/56/2019/REV/1 OJ L 186, 11.7.2019, p. 57–79 ('P2B Regulation').

answers,[60] as well as the general legal limitations,[61] particularly those in the General Data Protection Regulation (GDPR).[62]

While limited, Article 9 P2B Regulation served as an initial approach to opening platforms' datasets. After this, the EU pushed for new rules,[63] such as the recent Digital Services Act (DSA)[64] or the Digital Markets Act (DMA).[65] The DMA directly tackled to how platforms should concede access to data; while the DSA provisions engage with a very sectoral issue where access to data is necessary. In particular, the DMA set out to develop, according to its Article 1(1), '(…) harmonised rules ensuring for all businesses, contestable and fair markets in the digital sector across the Union where gatekeepers are present, to the benefit of business users and end users' to foster better competition conditions for businesses and users relying on platforms.'[66] Much like the P2B Regulation, this is done through the adoption of *ex-ante* rules that apply to certain digital services, mainly those that can be considered core platform services,[67] with reinforced duties for gatekeepers.[68]

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

[61] Silvia Martinelli, 'Sharing Data and Privacy in the Platform Economy: The Right to Data Portability and "Porting Rights"' in Leonie Reins (ed), *Regulating New Technologies in Uncertain Times*, vol 32 (TMC Asser Press 2019) <http://link.springer.com/10.1007/978-94-6265-279-8_8> accessed 6 August 2021.

[62] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) OJ L 119, 4.5.2016, p. 1–88 (BG, ES, CS, DA, DE, ET, EL, EN, FR, GA, HR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV) (GDPR).

[63] In this respect, the Digital Single Market strategy had also grounded the future development of the EU digital economy around these intermediaries (see Commission (n 47) s 3.3).

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

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

[66] Filomena Chirico, 'Digital Markets Act: A Regulatory Perspective' (2021) 12 *Journal of European Competition Law & Practice* 493.

[67] DMA, Art 2(2).

[68] DMA, Art 2(1) and (3). To be considered a gatekeeper, it is necessary to meet a three-prong quantitative and qualitative assessment under Art 3 DMA. At the time of writing, the following companies have declared themselves as fulfilling the criteria: Alphabet, Amazon, Apple, ByteDance, Meta and Microsoft (see European Commission, 'Digital Markets Act: Commission designates six gatekeepers' (*Press corner*, 6 September 2023)

Since personal data can be a deciding factor for the entrance of new competitors into a particular market, the DMA has dedicated considerable attention to how (personal) data generated on platforms can be used by businesses, users or even the platform itself.[69] In this sense, it puts in place a general prohibition for the following: using personal data to deliver an online advertisement to end users for third parties;[70] combining personal data from different services, provided either by the gatekeeper or relying on data from third parties;[71] using data from different services provided by the gatekeeper on a separate basis;[72] and enrolling users to combine personal data.[73]

Moreover, the DMA also sets certain limits and requirements for using data given its anticompetitive consequences. In this sense, a gatekeeper can only use publicly available data generated or provided by business users,[74] a provision very much in line with requirements already found in the P2B Regulation. This effective and free-of-charge access could be ensured by '(…) appropriate technical measures, for example by putting in place high quality application programming interfaces or integrated tools for small volume business users.'[75]

As for the 'act-ification', both the DMA and the DSA have been labelled as an act. Moreover, regarding the 'EU law brutality' process, both instruments were proposed as Regulations and enacted as such after their legislative process.[76] In particular, the DSA proves an interesting case since it intended to build upon the Directive 2000/31 (eCommerce Directive); therefore, it recognised the shortcomings of legislative instruments of this kind.[77]

However, the digital economy does not exclusively revolve around activities that take place on platforms, despite their considerable size. Besides tackling their dominant position in the digital economy when it comes to allowing data to flow freely between the different stakeholders, individuals and legal entities can also have a fundamental role in securing this objective. The following section explores how this has been addressed in EU law.

<https://ec.europa.eu/commission/presscorner/detail/en/IP_23_4328> accessed 31 January 2024).

[69] DMA, recital 72.

[70] DMA, Art 5(2)(a).

[71] DMA, Art 5(2)(b).

[72] DMA, Art 5(2)(c).

[73] DMA, Art 5(2)(d).

[74] DMA, Art 6(2).

[75] DMA, recital 60.

[76] Maria Luisa Chiarella, 'Digital Markets Act (DMA) and Digital Services Act (DSA): New Rules for the EU Digital Environment' (2023) 9 *Athens Journal of Law* 33, 36.

[77] Teresa Rodríguez de las Heras Ballell, 'The Background of the Digital Services Act: Looking towards a Platform Economy' (2021) 22 *ERA Forum* 75, 76–80.

4. Empowering End Users to Control their Information in the Data Economy

Many data-related legal instruments emerged from the 2015 DSM Strategy, such as the GDPR, the Free Flow Regulation[78] and the Open Data Directive.[79] Later policy agendas have resulted in rules such as the Data Governance Act (DGA)[80] and the Data Act (DA).[81] Each one of them operates in a very different manner and contributes uniquely to the development of the fifth freedom. All these instruments sought to promote the circulation of information in the EU, and potentially beyond it, to reap the benefits of big data analysis techniques for different purposes.[82] From a purely organisational perspective, for this paper we can split these rules into two groups: the group of laws that emerges, primarily, from the 2015 DSM Strategy; and those that result from the current agenda under the document titled 'A European Strategy for Data' ('2020 EU Data Strategy').[83] These are discussed below.

4.1 Legal Instruments from the 2015 DSM Strategy

For this group, our analysis will be dedicated to two instruments: the GDPR and the Free Flow Regulation. These shall be analysed for the following reasons: (i) they are Regulations rather than Directives, which is particularly interesting for our analysis of the 'EU law brutality' process;[84] (ii) they are not exclusively related to public bodies;[85]

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

[79] Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information (recast) PE/28/2019/REV/1 OJ L 172, 26.6.2019, p. 56–83 ('Open Data Directive').

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

[81] Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act) PE/49/2023/REV/1 OJ L, 2023/2854, 22.12.2023, ELI: http://data.europa.eu/eli/reg/2023/2854/oj (BG, ES, CS, DA, DE, ET, EL, EN, FR, GA, HR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV) (DA).

[82] Ferretti (n 35) 176–177.

[83] Commission (n 6).

[84] Particularly in the field of the right to the protection of personal data, the EU has moved forward with exercising a high degree of legislative authority and power as a manner to ensure certain consistency and harmonisation in this area where borders can result in a detriment towards economic and social development (see Lorenzo Dalla Corte, 'On Proportionality in the Data Protection Jurisprudence of the CJEU' (2022) 12 *International Data Privacy Law* 259; Christopher Kuner and others, 'The GDPR as a Chance to Break down Borders' (2017) 7 *International Data Privacy Law* 231.)

[85] As for the Open Data Directive mentioned previously, its scope pertains to public bodies or entities in the fulfilment of public bodies' duties (see Open Data Directive, Art 1(1)). While the GDPR and the Free Flow Regulation include in their scope public bodies, they are not limited to them and also cover private entities.

and, particularly the GDPR, (iii) they serve as the backbone for many of the other rules under analysis.[86]

The GDPR, enacted in 2016 and entered into force in 2018, resulted from a lengthy process of political discussion between the different European bodies as well as the relevant stakeholders.[87] Its crucial role in the digital regulatory agenda serves as a model for other technology-related rules.[88] The GDPR begins by stating that making data available is not forbidden, but rather one of its underlying assumptions.[89] Rather than referring to the existing four fundamental freedoms, the GDPR refers to the free movement of personal data in several Recitals, such as 12, 13, 19 and 166, but also Articles 1, 45 and 98. Despite this, recent judicial activity seems inclined to put the safeguarding of fundamental rights before enabling the free flow of data.[90]

At the same time, and considering that the GDPR intends to operationalise Article 8 CFR, it grants a set of rights to data subjects.[91] Among these, we can highlight the right to data portability in Article 20,[92] which is supposed to contribute to the free flow of personal data.[93] This right is exercised before the current controller and the data subject should receive the data in question '(…) in a structured, commonly used and machine-readable format (…)', while also having the right to transmit the data directly to another controller. However, it is limited to activities based on two legal bases – consent and performance of a contract – and the data is involved in an automated processing activity.[94] Nevertheless, and despite the questionable efficacy on the

[86] König (n 2) 491.
[87] Christopher Kuner, Lee A Bygrave and Christopher Docksey (eds), 'Background and Evolution of the EU General Data Protection Regulation (GDPR)', *The EU General Data Protection Regulation (GDPR) A Commentary* (1st edn, Oxford University Press 2020).
[88] Papakonstantinou and De Hert (n 20).
[89] See GDPR, Art 1(1). Moreover, while referring to its predecessor, the Data Protection Directive, Lynskey argued that both objectives were on an equal standing (see Orla Lynskey, *The Foundations of EU Data Protection Law* (1st edition, Oxford University Press 2015) 62–75.
[90] Case C-132/21 *BE v Nemzeti Adatvédelmi és Információszabadság Hatóság* EU:C:2023:2 [2023]; Case C-154/21 *RW v Österreichische Post AG* EU:C:2023:3 [2023]. We highlight the work from Laura Drechsler, who made a short commentary highlighting this matter in these decisions (see Laura Drechsler, 'Did the Court of Justice (Re-)Define the Purpose of the General Data Protection Regulation?' (*CITIP blog*, 14 February 2023) <https://www.law.kuleuven.be/citip/blog/did-the-court-of-justice-re-define-the-purpose-of-the-general-data-protection-regulation/> accessed 23 March 2023.
[91] Helena U Vrabec, *Data Subject Rights under the GDPR: With a Commentary through the Lens of the Data-Driven Economy* (Oxford University Press 2021).
[92] Orla Lynskey, 'Article 20 Right to Data Portability' in Christopher Kuner and others (eds), *The EU General Data Protection Regulation (GDPR): A Commentary* (Oxford University Press 2020) <https://doi.org/10.1093/oso/9780198826491.003.0052> accessed 27 March 2023.
[93] Inge Graef, Martin Husovec and Nadezhda Purtova, 'Data Portability and Data Control: Lessons for an Emerging Concept in EU Law' (2018) 19 *German Law Journal* 1359, 1364.
[94] Paul De Hert and others, 'The Right to Data Portability in the GDPR: Towards User-Centric Interoperability of Digital Services' (2018) 34 *Computer Law & Security Review* 193, 200.

ground,[95] many technological developments have emerged that seek to realise this right, such as the re-invigorated call to personal information management systems.[96]

However, not all the data involved in the digital economy can be considered personal data. As such, the Commission moved forward with the Free Flow Regulation. Rather than protecting 'data subjects', the Free Flow Regulation seeks to protect 'users',[97] including 'professional users',[98] by ensuring that their non-personal data is not locked in a particular place,[99] and they are allowed to port it when needed,[100] while also allowing competent authorities access to such information.[101] While the GDPR puts its obligations on the head of data controllers, the Free Flow Regulation entrusts data processing service providers with these obligations.[102]

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

Despite these shortcomings, and particularly the Free Flow Regulation's limited field of application,[105] the Regulation takes a strong stance regarding its objective of fostering the circulation of information in the EU. In this respect, it opens in a similar way to the GDPR, claiming to ensure '(…) the free flow of data other than personal data within the Union by laying down rules relating to data localisation requirements, the availability of data to competent authorities and the porting of data for professional users.'[106] In this sense, the Free Flow Regulation seems to be grounded around the freedom of movement of individuals and services, under its Recital 3,

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[95] Sophie Kuebler-Wachendorff and others, 'The Right to Data Portability: Conception, Status Quo, and Future Directions' (2021) 44 *Informatik Spektrum* 264.
[96] Jan Krämer, 'Personal Data Portability In The Platform Economy: Economic Implications And Policy Recommendations' (2021) 17 *Journal of Competition Law & Economics* 263.
[97] Free Flow Regulation, Art 3(7).
[98] Ibid, Art 3(8).
[99] Ibid, Art 4.
[100] Ibid, Art 6.
[101] Ibid, Art 5.
[102] Ibid, Arts 2 and 3(4).
[103] Nadezhda Purtova, 'The Law of Everything. Broad Concept of Personal Data and Future of EU Data Protection Law' (2018) 10 *Law, Innovation and Technology* 40; Michele Finck and Frank Pallas, 'They Who Must Not Be Identified—Distinguishing Personal from Non-Personal Data under the GDPR' (2020) 10 *International Data Privacy Law* 26.
[104] Laura Somaini, 'Regulating the Dynamic Concept of Non-Personal Data in the EU' (2020) 6 *European Data Protection Law Review* 84, 88.
[105] ibid 88.
[106] Free Flow Regulation, Art 1.

rather than as a standalone new freedom of movement, as the GDPR would seem to introduce.

4.2 Legal Instruments from the 2020 EU Data Strategy

While the first cohort of legal rules provided a legal regime for both types of data, the purpose of this second batch of regulatory instruments is to encourage the sharing of information to stimulate the development of the digital economy. In this regard, the Commission states its intention that '(…) the EU's share of the data economy – data stored, processed and put to valuable use in Europe – at least corresponds to its economic weight, not by fiat but by choice'.[107] To achieve this, the EU moved forward with two new regulations: the DGA and the DA. These, in contrast to the GDPR and the Free Flow Regulation, contain specific provisions involving data spaces.

Instead of using GDPR's binomial formula of 'data subject–data controller', these new rules rely on the notions of 'data holder–data user' under the DGA or 'data holder–data recipient' in the DA. Subsequently, the EU data protection authoritative bodies have expressed their concern over possible confusion about the exact extent of responsibilities that the involved parties have in a particular situations.[108]

The DGA has three main purposes: (i) to govern how data, both personal and non-personal, held by public bodies can be reused; (ii) to set the rules for the provision of certain data intermediation services; and (iii) and create the data altruism institute and lay out its functioning provisions. All these objectives are embodied in its Recital 1, which states that the DGA should strive to contribute to the development of the regulatory framework for the success of the single market while also ensuring the protection of fundamental rights.

The DGA, after introducing its scope and definitions in Chapter 1, focuses in Chapter 2 on how data held by public bodies can be reused for other purposes.[109] This is aligned with the broader 2020 EU Data Strategy, which places a great deal of importance on ensuring that data can be shared between parties to enhance datasets and, in theory, achieve further economic and societal growth. While the reuse of publicly held data has been in the spotlight since the Open Data Directive,[110] and

[107] Commission (n 6) 4.
[108] European Data Protection Board–European Data Protection Supervisor, 'Joint Opinion 03/2021 on the Proposal for a Regulation of the European Parliament and of the Council on European Data Governance (Data Governance Act)'; European Data Protection Board–European Data Protection Supervisor, 'Joint Opinion 02/2022 on the Proposal for a Regulation of the European Parliament and of the Council on Harmonised Rules on Fair Access to and Use of Data (Data Act)'.
[109] DGA, ch II.
[110] König (n 2) 490.

before that in the Public Sector Information Directive,[111] the DGA takes it a step further through its articulation in a Regulation rather than a Directive.

Moving on, data intermediation services and data altruism represent novel data-sharing schemes aimed at facilitating user-enabled data-sharing.[112] It is possible to include in 'data intermediation' any service, including those for-profit, that seeks to enable data-sharing between data subjects and data holders with data users,[113] such as example data cooperatives.[114] These data intermediation services are expected to play a key role in the context of data spaces, as noted in Recital 27. While other scholars have conducted detailed analyses of the DGA,[115] they have not addressed whether these legal innovations are fostering the emergence of a new fundamental freedom. In this respect, Recital 1 merely refers to the necessity of developing a data governance framework to ensure competition in the internal market.

The DA constitutes the last piece of this new cohort of laws dealing with how data can, and should, be used in the digital economy. The DA establishes '(…) a harmonised framework specifying who is entitled to use product data or related service data, under which conditions and on what basis'.[116] Therefore, the DA's objective is far more extensive than just setting forth new rules for the processing – particularly sharing – of data; rather, it constitutes an integral base layer framework for enabling the sharing of (particularly non-personal) data across different actors and industries. However, it lacks references to the fundamental freedoms that compose the internal markets as well as the free movement of data under the GDPR.

In this sense, the DA pushes for rules to (i) govern business-to-consumer and business-to-business data-sharing;[117] (ii) ensure that data is made available by data holders;[118] (iii) address anticompetitive contractual provisions between firms regarding data access;[119] (iv) facilitate private data-sharing with public bodies;[120] (v) switch between data processing services;[121] (vi) allow international data transfer;[122] and (vii) safeguard

[111] Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information OJ L 345, 31.12.2003, p. 90–96 (ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV)
[112] Gabriele Carovano and Michèle Finck, 'Regulating Data Intermediaries: The Impact of the Data Governance Act on the EU's Data Economy' (2023) 50 *Computer Law & Security Review* 105830, 2.
[113] DGA, Art 2(11).
[114] Ibid, Art 2(15).
[115] Lukas von Ditfurth and Gregor Lienemann, 'The Data Governance Act: – Promoting or Restricting Data Intermediaries?' (2022) 23 *Competition and Regulation in Network Industries* 270; Carovano and Finck (n 112).
[116] Ibid, recital 4.
[117] Ibid, ch II.
[118] Ibid, ch III.
[119] Ibid, ch IV.
[120] Ibid, ch V.
[121] Ibid, ch VI.
[122] Ibid, ch VII.

interoperability between data spaces.[123] Regarding this latter objective, and considering our analysis of the data spaces, interoperability is defined in Article 2(19) as '(…) ability of two or more data spaces or communication networks, systems, products, applications or components to exchange and use data to perform their functions'. Following on from this, the DA proposal introduced a series of requirements to ensure this (in Article 28), which could be supplemented by further specifications from the Commission.

From this review of the elements relevant to our analysis, it is possible to draw some conclusions on how these legal instruments contribute to the development of data spaces and the fifth fundamental freedom. First, as noted by the discussion around terminology, it is acknowledged that data has a crucial role in the consolidation of the Digital Single Market; without data-sharing between different stakeholders, data will remain locked behind datasets and, according to this vision, be unproductive. However, at the same time, these instruments, particularly the DGA, recognise that data can involve individuals and, therefore, their fundamental rights. To achieve balance between an unrestrictive free flow of information and data subjects' reticence to share data, impartial intermediaries are introduced to help make choices over data. Finally, we can identify the adoption of safeguards to prevent obstacles when sharing data across different spaces.

5. Untangling the Policy and Regulatory Framework of Data Spaces

Through the legal instruments discussed above, the Commission has called for securing the free flow of information within the Digital Single Market by cracking platforms' dominant positions,[124] but also by empowering key stakeholders with the legal tools to make this a reality. However, to enable data-intensive practices, a common infrastructure has been identified: data spaces.[125]

This is a relatively new notion and it lacks an encompassing legal definition,[126] let alone a cross-discipline definition.[127] Therefore, to define a data space and how it relates to this new fifth EU fundamental freedom, it is necessary to explore its policy origins within the larger EU digital economy strategies and how that conceptualisation has been translated into regulatory proposals.

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[123] Ibid, ch VIII.
[124] Ferretti (n 35) 176–177.
[125] Edward Curry, Simon Scerri and Tuomo Tuikka, 'Data Spaces: Design, Deployment, and Future Directions' in Edward Curry, Simon Scerri and Tuomo Tuikka (eds), *Data Spaces : Design, Deployment and Future Directions* (Springer International Publishing 2022) 5 <https://doi.org/10.1007/978-3-030-98636-0_1> accessed 30 August 2023.
[126] Ducuing Charlotte, Dutkiewicz Lidia and Miadzvetskaya Yuliya, 'D6.2 Legal and Ethical Requirements' (2020).
[127] Curry, Scerri and Tuikka (n 125) 4.

5.1 The Political Will to Digitally Connect Europe: a Single Infrastructure for all Data?

Data spaces have not been considered as infrastructures since their inception. Some of the earlier traces of data spaces can be found in a 2014 EU Commission communication which referred to personal data spaces.[128] This conceptualisation of data spaces was later rejigged and transformed into the EU Digital Wallet,[129] and to some extent into certain data intermediation services under the DGA that operate as personal information management systems.

Although the 2015 DSM Strategy did not trigger any concrete regulatory action for data spaces, it identified some elements that demanded attention:[130] (i) it recognised the necessity of developing a unified digital market between Member States; (ii) it highlighted that localised data centres are a burden; (iii) is deemed data portability necessary to ensure the free-flow of information, and (iv) that this could be enabled by having standardised data formats.[131] Certain objectives were met through different Regulations, such as the GDPR (for objectives (i) and (iii)) and the Free Flow Regulation (for objectives (ii) and (iv)).

Two documents play a key role in the definition, and configuration, of data spaces: (i) 'Towards a common European data space';[132] and (ii) 'A European Strategy for Data'.[133] This latter document can be considered the current guiding policy instrument regarding data spaces in the EU and the one that provides for the pending action points as well as decided courses of action. It is worth highlighting, particularly under the chosen theoretical framework, that neither policy documents takes a particular stance regarding the most suitable legal instrument to be proposed for this objective; however, both the European Health Data Space (EHDS)[134] and the European Financial Data Space (EFDS)[135] proposals have been put forward in the form of a Regulation rather than Directives.

The first document, besides addressing some specific issues,[136] began the process of fleshing out the notion of data spaces, defining data spaces as: 'a seamless digital area with the scale that will enable the development of new products and services based

[128] Commission (n 43).
[129] Steffen Schwalm, Daria Albrecht and Ignacio Alamillo, 'eIDAS 2.0: Challenges, Perspectives and Proposals to Avoid Contradictions between eIDAS 2.0 and SSI' [2022] *Open Identity Summit* 2022.
[130] Commission (n 47).
[131] Ibid.
[132] Commission, 'Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions "Towards a Common European Data Space"' COM/2018/232 final.
[133] Commission (n 6).
[134] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the European Health Data Space' COM/2022/197 final ('EHDS proposal').
[135] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a framework for Financial Data Access and amending Regulations (EU) No 1093/2010, (EU) No 1094/2010, (EU) No 1095/2010 and (EU) 2022/2554' ('FiDA proposal').
[136] Commission (n 132) 1.

on data'.[137] Nevertheless, it did not mention the necessity of having legal rules, even less so a unified framework.

The 2020 EU Data Strategy constitutes the next step in the path for developing data spaces.[138] While Savin argues that it merely updated certain elements of the 2015 DSM Strategy,[139] it is possible to argue that it intended to lay the foundations for tackling areas where further legal rules were necessary for the emergence of the true data economy. In contrast to other documents discussed above, the Commission directly tackled the need to develop a data economy in the EU by seeking to '(…) create a single European data space – a genuine single market for data, open to data from across the world – (…)'.[140] However, strikingly, the document does not make any reference to the emergence of a new freedom within the EU context.

An integrated data economy requires common standards to facilitate, from a technical point of view, data-sharing between mostly disconnected datasets. On top of this, a common data-sharing regulatory framework would tackle the fragmented and sectorial regulation that limits how information can flow between different industries and stakeholders. With both elements in place, it is expected that businesses would be interested in developing digital economy products and services in Europe by choice given the substantial benefits in place, i.e., easy interoperability and legal clarity over the authorisation to do so.

Under these data spaces, it would be possible to enable government-to-business, business-to-business, business-to-government, and government-to-government data-sharing while at the same time keeping individuals in the loop about what is happening with their data, and also providing them with the tools to have a say in how their information is used. To achieve this, the Commission identified four pillars: (i) a cross-sectoral data governance framework; (ii) investment in technological infrastructure; (iii) developing digital skills; and (iv) creating common data spaces in which to converge the first three pillars. Objectives (i) to (iii) have been already tackled, leaving the creation of data spaces as the next challenge.

5.2 What is a Data Space?

Despite the push for the development of data spaces, they are still vaguely conceptualised and scattered across many different policy documents and, recently, regulatory proposals.[141] As such, it is possible to question how all these definitions fit

[137] Commission (n 132).
[138] Commission (n 6).
[139] Savin (n 13) 26.
[140] Commission (n 6) 4–5.
[141] For more on this concept, see Boris Otto, 'A Federated Infrastructure for European Data Spaces' (2022) 65 *Communications of the ACM* 44. Some legal scholars have tried to untangle the legal definition, but focused on the legal consequences rather than attempt to answer what they are (see Anastasiya Kiseleva and Paul de Hert, 'Creating a European Health Data Space: Obstacles in Four Key Legal Area' (2021) 5 *European Pharmaceutical Law Review (EPLR)* 21; Giovanni Comandè

together. In Table 1 below, each key characteristic from these definitions is identified and supported by the relevant wording used in them.

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

Characteristic	**Source**	**Wording used**
Seamless digital area	Towards a common European data space	'seamless digital area'
	A European Strategy for Data	'a genuine single market for data'
Scalable	Towards a common European data space	'with the scale'
	A European Strategy for Data	'to an almost infinite amount'
Allow for data-intensive developments	Towards a common European data space	'will enable the development of new products and services based on data'
	A European Strategy for Data	'businesses also have easy access (…) boosting growth and creating value'
	Building a data economy – Brochure[142]	'boosting the development of new data-driven products and services'
Allow for data economics	A European Strategy for Data	'genuine single market for data'
Global	A European Strategy for Data	'open to data from across the world'
Personal and non-personal data	A European Strategy for Data	'where personal as well as non-personal data'
Secure infrastructure	A European Strategy for Data	'are secure'

and Giulia Schneider, 'It's Time. Leveraging The GDPR to Shift the Balance Towards Research-Friendly EU Data Spaces' (2022) *Common Market Law Review* 34).

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

	Building a data economy – Brochure	'Data spaces are composed of both the secure technological infrastructure and the governance mechanisms'
Governance mechanism	Building a data economy – Brochure	'Data spaces are composed of both the secure technological infrastructure and the governance mechanisms'
Facilitate the exercise of personal data rights	A European Strategy for Data	'Empowering individuals to exercise their rights'

One of the very few things we can take for granted in this regard is that the EU is developing sectoral data spaces: e.g., from health to finance up to mobility, among many others.[143] In this respect, the publication of both the EHDS and the EFDS proposals provides us with a testing ground to validate if the elements identified above are effectively taken into consideration by lawmakers when translating policy into law.

5.3 The First Data Proposal: the European Health Data Space

The first data space to receive a regulatory proposal was the EHDS in 2022. Several reasons are provided in its recitals for this: (i) the COVID-19 pandemic demanded consolidated health data for both the treatment of the disease as well as the research on its potential mitigation measures; (ii) the fact that Europeans increasingly cross Member State borders; and (iii) the need for technical tools that would allow the effective exercise of personal data protection rights provided for under GDPR.

While it does not specifically define what a data space is, it states that the EHDS is composed of '(…) rules, common standards and practices, infrastructures and a governance framework for the primary and secondary use of electronic health data'.[144] How does the EHDS abide by the criteria regarding data spaces that we set out above? Going back to the elements identified in the policy documents, it is possible that the EHDS would meet all of them.

Regarding the 'seamless digital area', is clear that Article 1 of the proposal would address this. Moreover, by allowing both primary and secondary data usage, the EHDS would provide for data-intensive developments. However, this would not allow for data economics, most likely for two reasons: (i) we are dealing with special categories of personal data; and (ii) the data altruism institute under the DGA would be the

[143] Commission (n 6) 22–23.
[144] EHDS proposal, Art 1(1).

preferred mechanism for enabling data-sharing. Turning to its 'global aspect', i.e., the possibility of international data transfers, there are substantial provisions dealing with this, as detailed in Chapter V. Regarding its scope, it would encompass both personal and non-personal data. And, finally, it would be structured around a key secure infrastructure, subject to assessment.

As for the scalability characteristic/requirement, the proposal allows for the connection of different platforms to the area. The seamless digital area would be composed of an amalgam of different platforms, with a core platform servicing and connecting to the others: the MyHealth@EU. By taking this approach, it is clear that the MyHealth@EU platform is positioning itself as the main controller and, most likely, would engage with other connected platforms as a joint controller under Article 26 GDPR. Furthermore, it could interplay with them using the legal categories provided for under the DGA, such as data altruism organisations, introducing further complications as the roles are not the same across regulations and the concepts imply different responsibilities. As such, the degree of responsibility that the MyHealth@EU platform would have in comparison to other connected platforms would be similar to that of Facebook with regards to third-party companies that deploy a 'Like' button on their websites.[145] Therefore, Regulations applicable to platforms, such as the DMA and the DSA, could play a part in the effective implementation of data spaces and, by extension, regarding the content of this fifth freedom.

While not binding, both its explanatory memorandum as well as its proposed Recitals provide some insights into the development of a new fundamental freedom for data. In this respect, the development of the EHDS is intended to facilitate both the freedom of natural persons as well as the free movement of health-related services. At the same it is acknowledged that the free flow of information can create tension with the fundamental right to personal data protection; this is exemplified by the dual legal basis (Articles 16 and 114 TFEU) that the Commission invokes to put forward the proposal.

5.4 Developing the Open Finance Framework as the Second Data Space: the Case of the European Financial Data Space

After the EHDS proposal, the EFDS proposal arrived in mid-2023, under the name Framework for Financial Data Access (FiDA). Together with the Payment Services Regulation proposal,[146] these would form the open finance framework, extending from the current open banking regime under the Payment Services Directive 2. Following up on the expert group discussions around this,[147] the necessity to establish a legal, operational and technological framework that facilitates extensive sharing of personal data within the financial institution landscape has been identified. The

[145] Case 40/17 *Fashion ID GmbH & CoKG v Verbraucherzentrale NRW eV* EU:C:2019:629 [2019].
[146] Commission, 'Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on payment services in the internal market and amending Regulation (EU) No 1093/2010' COM/2023/367 final.
[147] 'Report on Open Finance' (Expert Group on European financial data space 2022).

primary objective of this proposed regulation is to establish comprehensive regulations governing the access, sharing and utilisation of specific categories of data within the financial services sector. This vision, as we begin to explore the presence of the data space characteristics in the EFDS Proposal, coincides with the appetite to allow data-intensive developments.

Drawing from the established terminology and roles defined in the DGA and the DA, the EFDS Proposal outlines an extensive range of customer data, which encompasses both personal and non-personal data, eligible for sharing between data holders and data users, as articulated in Article 2. In this context, the EFDS Proposal introduces several rights and obligations related to data-sharing: (i) from data holders to customers, as stipulated in Article 4; (ii) from data holders to data users in response to customer requests, as outlined in Article 5; and (iii) the provision of customer data to data users, as provided in Article 6.[148]

In contrast to the EHDS, the proposal does not utilise the term 'data space' to describe the EFDS. Instead, it refers to 'financial data sharing schemes', which are envisaged as collective contractual agreements between data holders and data users, to enhance efficiency and technical innovation in financial data-sharing for the benefit of customers. In this respect, the EFDS is seen not as a singular data space, but rather as an amalgamation of such spaces, with industry stakeholders responsible for their establishment. Regardless of this, together, financial data-sharing schemes can be deemed a seamless digital area; this would also, in turn, allow for scalability as necessary by the market participants. These collective agreements would have the necessary governance mechanism. In cases where certain data categories listed in Article 2 are not encompassed by any scheme, Article 11 confers subsidiary authority upon the Commission to establish rules for that activity. In this context, an initial analysis of Article 10(1)(i) suggests that the EFDS aligns closely with a joint controllership arrangement as defined under Article 26 of GDPR.

Within this data space, there is a considerable limitation regarding how data can flow. The introduction of the 'data use perimeter', as detailed in Article 7, delineates the scope of processing certain categories of personal data for specific purposes. In comparison with the EHDS proposal, it resembles the primary and secondary use of electronic health data provisions stipulated therein. In this sense, these limitations could be associated with the limitations that fundamental freedoms can be subject to, as described in Section 2.1.

When it comes to facilitating the exercise of personal data rights, Article 8 mandates that data holders provide customers with a permission dashboard, enabling them to oversee and manage the permissions granted to data users. This dashboard should offer a comprehensive and detailed overview of how a customer's data is currently

[148] Andrés Chomczyk Penedo and Pablo Trigo Kramcsák, 'Can the European Financial Data Space Remove Bias in Financial AI Development? Opportunities and Regulatory Challenges' (2023) 31 *International Journal of Law and Information Technology* 253.

being used in real-time. These dashboards afford customers the ability to both grant and revoke permissions for any relevant data category. We can argue that these dashboards are intended to rely on previously discussed legal instruments that facilitate the exercise of data subjects' interactions when the data is from individuals. While it is beyond the scope of this article, the EU legislator also opens up the possibility of relying on data intermediation services, as regulated under the DGA, to provide this service. Regardless of how this is provided, this is another element that contemplates the active participation of certain actors, such as data subjects, in the process of facilitating data movement.

Finally. the EFDS proposal provides some remarks on whether we are before a new fundamental freedom or not. In this respect, both Recital 45 and Article 28 would seem to understand the development of the financial data space as instrumental for the exercise of the fundamental freedom of services within the EU. As such, the ability to move data across borders would be a consequence of the freedom of services rather than a standalone freedom. Considering that this new fundamental freedom is still in development, it is possible to argue that the EU legislator has decided to make these references to provide a sturdier foundation for the EFDS proposal.

6. Concluding Remarks: has the Stage for The Fifth EU Freedom been Set?

The current objective of creating an EU data economy that keeps the European DNA at its very core is a remarkable but challenging endeavour, as pointed out by Celeste.[149] This ambitious EU project takes place in a divided world with, at least, three clear and different approaches to how data should be used: the US, the Chinese and the European.[150]

As explored in this article, over the last decade different EU data-related legal rules have emerged that have tried to secure a common internal market where data can flow freely. The task was not a simple one given the multitude of factors that are involved in the data economy, as it has evolved into a complex framework of platforms, services and stakeholders which call for both general but also specific regulatory and policy instruments with sensible connections between them rather than inconsistencies, as explored in Sections 3 and 4.

Attempts to tackle platforms' dominance and empower users have introduced several instruments to facilitate this, and the emergence of data spaces could prove to be a decisive step in securing the free flow of data. As such, understanding their regulatory field is critical. While a consolidated legal definition is still missing, the data spaces' constitutive elements envisioned by the European Commission are present in the existing regulatory proposals, as explored in Section 5. In this sense, it remains to be

[149] Celeste (n 3).
[150] Arner, Castellano and Selga (n 38).

seen how the other intended data spaces are translated into regulatory proposals to assess if the same elements are present.

Moreover, this initial exploration in the search for the fifth fundamental freedom reveals disparities to be found across the involved fundamental freedom in each one of these instruments. If the intended common objective across these legal rules is to create a common EU data space, then the thread to knit together this regulatory web and establish a common interpretation tool might be this new fifth freedom.

Introducing a new fundamental freedom for the internal market would require a legal and political process that would not be well received within the EU context.[151] This leaves the lawmakers with limited resources to introduce this new fifth freedom to foster the development of the Digital Single Market. The main instrument would be the use of Regulations to ensure both consistency and harmonisation within the EU.

From our analysis, it seems that the common European data space will be covered through a group of legal rules rather than under a single regulatory umbrella: from the EHDS and the EFDS proposals, as well as other future data spaces, to the GDPR, DGA, DA, DMA and others. This would coincide with De Hert and Papakonstantinou's work on the process of 'act-ification' and, more importantly, of 'EU law brutality', where the EU legislator has taken the lead to regulate emerging ICTs through 'easy to remember' regulations that are directly applicable to and enforceable by end users, particularly data subjects, introducing legal categories that might be foreign to Member States' legal systems.[152]

Answering our research question, these legal instruments have merely put in place the basis for fifth fundamental freedom within the EU rather than fully consecrating it. This freedom, rooted in the free movement of data, would symbolise a significant step in the evolution of the Digital Single Market. However, the realisation of this freedom might depend on a delicate balance between economic aspirations and the protection of fundamental rights.

As with many other fundamental freedoms, they can be exercised by both individuals and legal entities with very different intentions. For a business, having access to data can represent a way of improving its products and services. At the same time, the free flow of data can allow a person to escape a platform's grip when trust has been lost in it. However, what remains to be seen in this context is whether this new freedom would be granted 'fundamental status' and, also, if it would imply a fundamental right; this is particularly relevant as it is undeniable that this identified fifth freedom has a clear instrumental purpose.[153] Decisions from the ECJ, such as those dealing with the balancing between GDPR's protection of fundamental rights and the pursuit of

[151] Ward (n 12) 54–56.
[152] Papakonstantinou and De Hert (n 20).
[153] De Cecco (n 28) 384.

economic activities (discussed above),[154] will be the main arena for discussions around whether or not we are before a new freedom.[155]

In conclusion, while the EU's journey towards a data-centric fundamental freedom is still unfolding, the strides made thus far are indicative of a transformative shift in the digital economy. The path ahead is fraught with challenges and opportunities, but the groundwork laid by the EU's regulatory framework sets a promising stage for the evolution of the Digital Single Market. As this journey continues, it will be crucial to monitor how these legal frameworks adapt and evolve, ensuring that the fifth fundamental freedom, if fully realised, aligns with the broader objectives of the EU's digital strategy and its commitment to safeguarding individual rights. In this respect, this article has laid out some of the foundations for future research on the fifth fundamental freedom.

[154] Drechsler (n 90).
[155] Szabados (n 24) 570.