

DATA TRUSTS INITIATIVE

Response to the consultation on the Data Governance Act

Summary

Achieving the promise of the digital economy will require robust data governance frameworks that allow data sharing – helping develop new data-enabled products and services – while protecting individual rights and freedoms. In pursuit of this aim, the Data Trusts Initiative welcomes the opportunity to respond to this consultation on the draft Data Governance Act.

- A variety of legal tools to support data sharing already exist, based on contractual, cooperative or corporate structures.
- Data Trusts differ from the above in that they rely on the legal framework provided by trust law. A data trust is a mechanism for individuals to take the data rights that are set out in law and pool these into an organisation – a trust – in which trustees make decisions about data use on their behalf. While trust law was developed in common law jurisdictions, its principles and practices have equivalents across jurisdictions that could be used as the basis for data trusts.
- Data trusts offer important lessons for the design of trustworthy data governance institutions, highlighting the type of safeguards that could be used to ensure the safe and effective operation of data intermediaries. For example:
 - The fiduciary duties created by trust law require that trustees act with undivided loyalty for the beneficiaries of the trust.
 - Courts are able to intervene if a trustee fails in their duties, providing further safeguards.
- Since publication of the draft Act, there have been questions about the way in which Recital 24 might affect the operation of data intermediaries such as data trusts – in particular, concerns about whether it would be possible to delegate rights under the GDPR to a data trustee. In this respect, it is important to note that the creation of a data trust need not require the transfer of rights. Data trusts can be designed in ways that ensure individuals retain the ability to remove their rights from trusts, with safeguards that ensure the trust operates in ways that support enfranchisement.
- A more complete exploration of the issues about delegation and transfer of rights can be found at: <https://datatrusts.uk/blogs/understanding-the-data-governance-act-in-conversation-with-sylvie-delacroix-ben-mcfarlane-and-paul-nemitz>

Data intermediaries and data trusts

Adding to existing data governance approaches, a data trust is a mechanism for individuals to pool the data rights created by current legislation into an organisation – a trust – in which trustees make decisions about data use or data sharing on their behalf. Complementing the regulatory regimes that already exist in many countries,

these new 'bottom-up' institutions would seek to manage the vulnerabilities to which individuals and groups are exposed as a result of shifting patterns of data use, and to empower individuals to influence the terms by which data about them may be used.

As a 'bottom-up mechanism for data stewardship', data trusts were first delineated in: Delacroix & Lawrence, 'Bottom-up data trusts: challenging the one size fits all approach to data governance', *International Data Privacy Law*, 9 (4), 236-252 <https://doi.org/10.1093/idpl/ipz014>

The core characteristics of a data trust include:

- **Independent, fiduciary stewardship:** The fiduciary duties arising from trust law require that trustees act with undivided loyalty in pursuing the best interests of the trust's beneficiaries, creating safeguards that help ensure trustees operate independently of other interests when managing the trust.
- **Institutional safeguards:** Trust law has some well-established processes for holding trustees to account. Each trust is overseen by a Court. The latter can intervene to safeguard the interests of the beneficiaries if the data trustee is not deemed to fulfil its fiduciary responsibilities. In the event of a claim, it is for the trustees to demonstrate that they have sought to promote the beneficiaries' interest with appropriate degrees of impartiality, prudence, transparency and undivided loyalty. This reversal of the burden of proof is important, and a key element among the institutional safeguards specific to Trust law.
- **Collective action:** The ability to pool rights in a trust, coupled with the flexibility of trust law in managing a range of different types of rights, is core to the ability of data trusts to act as powerful intermediaries in negotiating data use. Instead of being faced with the choice of either agreeing to lengthy terms and conditions or being unable to access digital services, individuals would task a data trustee with negotiating more favourable terms of data use on their behalf, using the power associated with the aggregation of rights in the trust to increase their influence in negotiating terms of use.

A [Working Paper](#) from the Data Trusts Initiative explores the various issues surrounding the design of a framework to develop data trusts in practice, and in a way that is complementary to data coops and other types of data intermediaries. You can also read more about the initiative at www.datatrusts.uk