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Free flow of non-personal data in the European Union

Impact assessment (SWD(2017) 304, SWD(2017) 305 (summary)) of a Commission proposal for a regulation of the European Parliament and of the Council on a framework for the free flow of non-personal data in the European Union (COM(2017) 495)

Background

This note seeks to provide an initial analysis of the strengths and weaknesses of the European Commission's [impact assessment](#) (IA) accompanying the above Commission [proposal](#) (the proposal), submitted on 13 September 2017 and referred to Parliament's Committee on Internal Market and Consumer Protection (IMCO).

The creation of a connected digital single market is one of the ten priorities identified by Commission President Jean-Claude Juncker in his [political guidelines](#) for the Commission at the start of his mandate. In its [digital single market strategy](#) (DSM), the Commission stated that 'Any unnecessary restrictions regarding the location of data within the EU should both be removed and prevented' and committed to proposing an initiative to tackle restrictions on the free movement of data and unjustified restrictions on the location of data for storage or processing purposes. The challenges to the data economy are also specifically discussed in the 2017 [communication](#) on building a European data economy, which recognises that 'unjustified restrictions on the free movement of data are likely to constrain the development of the EU data economy [and] impair the freedom to provide services and the freedom of establishment stipulated in the Treaty'.

The aim of the proposal is to remove geographical restrictions on the storage of non-personal data in the internal market and to facilitate switching between cloud service providers and the porting of data. It is meant to complement the 2016 [General Data Protection Regulation](#) (GDPR) which provides a single set of rules for the protection of personal data and provides the basis for the free flow of such data. Thus, for the purposes of the proposal, data is defined as 'data other than personal data as referred to in' the GDPR.¹ The Commission seeks to build upon the existing applicable legal framework that regulates the internal market for data services ([E-commerce Directive](#), [Services Directive](#), [Transparency Directive](#)), and pursues a high level of cybersecurity in the EU ([NIS Directive](#)), while at the same time remaining consistent with the existing provisions.²

¹ The GDPR defines personal data as 'any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person'.

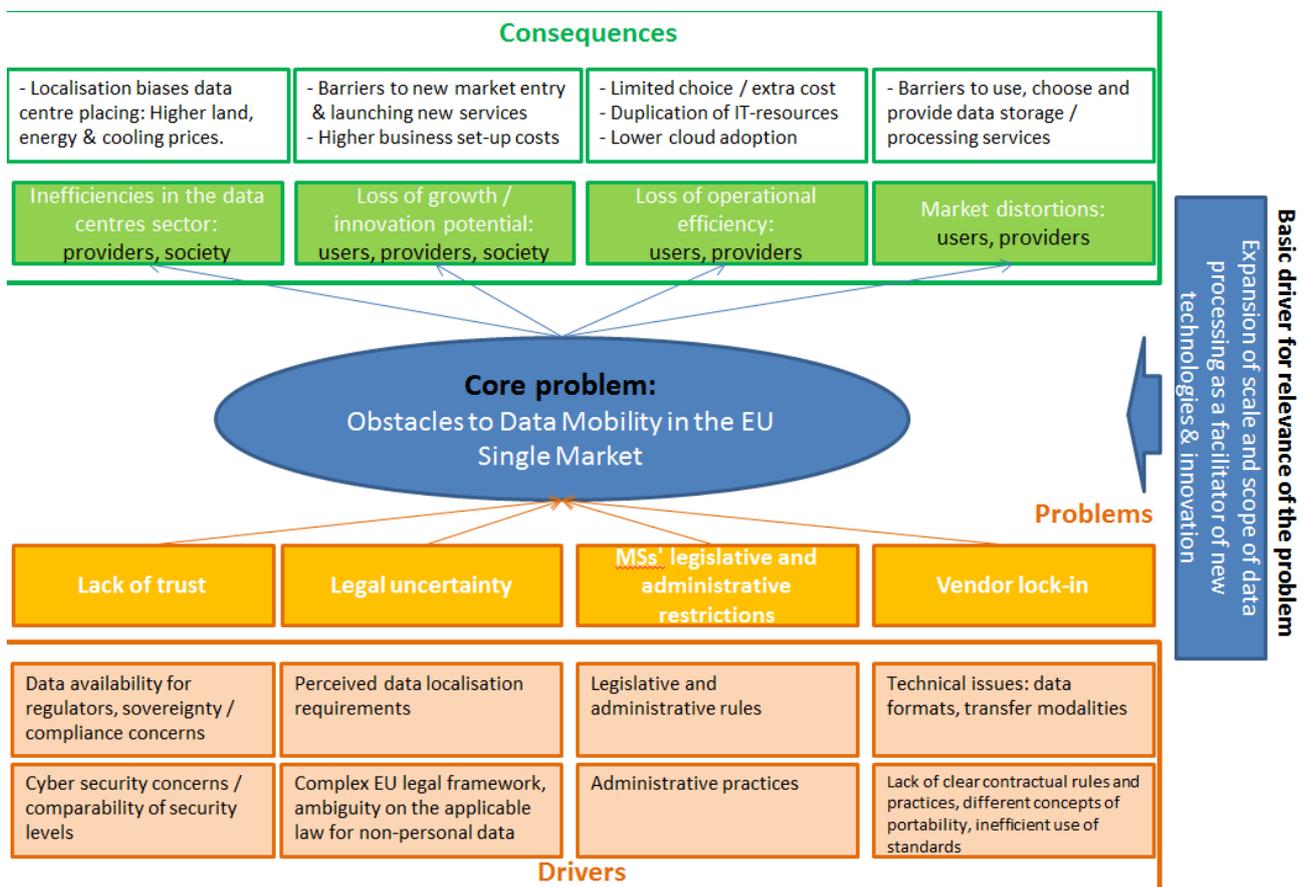
² See also, M. Negreiro, [Free flow of non-personal data in the European Union](#), EPRS, European Parliament, December 2017; M. Szczeпаński, [A renewed industrial policy strategy](#), EPRS, European Parliament, November 2017; [Data Flows – Future Scenarios](#), Policy Department for Economic and Scientific Policy, European Parliament, November 2017.

Problem definition

The IA establishes 'obstacles to data mobility in the EU single market' as the core problem and identifies four underlying problems: Member States' legislative and administrative restrictions, legal uncertainty, lack of trust and vendor lock-in.³ Considering the complexity of the matter and the detail in which the problem definition is discussed, the IA (in its main body and in Annex 5) makes a clear exposé of the core problem, the underlying problems, the problem drivers and the consequences of the problem.

The qualitative analysis in the problem definition section appears to be sufficiently thorough and rigorous to identify the nature of the problem. It identifies satisfactorily the regulatory and market failures and the behavioural biases which are responsible for the problem. The evidence base, however, does not appear strong on quantitative data, and for this reason the scale of the problem does not emerge clearly.

As recommended in [Tool 14](#) of the Commission's Better Regulation Guidelines, the IA uses visual aids to help understand the problem definition. In particular, the problem tree (IA, p. 6) reproduced below helps illustrate the links between the various factors constituting the problem definition.



Objectives of the legislative proposal

The general policy objective of the proposal is 'to achieve a more competitive and integrated EU market for data storage and processing services and activities' (IA, p. 18). The IA then identifies four specific objectives:

1. Reduce the number and range of data localisation restrictions, enhance legal certainty and transparency of remaining (justified and proportionate) requirements;
2. Facilitate cross-border availability of data for regulatory control purposes, specifically when that data is stored/processed in another Member State, reducing the propensity of Member States to impose data localisation restrictions for that purpose;

³ Vendor lock-in is when cloud service providers make switching to another provider difficult and costly, effectively preventing them from switching (locking them in).

3. Improve the conditions under which users can switch data storage and processing (cloud) service providers and port their data to a new provider or back to their own IT systems;
4. Enhance trust in and the security of (cross-border) data storage and processing, reducing the propensity of market players and the public sector to use localisation as a default safe option.

The IA explains how these specific objectives address the identified problems, and then translates them into four intervention areas. In the section entitled 'How would actual impacts be monitored and evaluated?', having identified the preferred policy option, the IA then sets out operational objectives for each of the intervention areas in line with the Better Regulation Guidelines. The table below lists the operational objectives according to the corresponding intervention area.

Intervention areas	Operational objectives
Free flow of data across borders	<ul style="list-style-type: none"> • Prevent the adoption by Member States of unjustified and/or disproportionate national measures, eliminate existing unjustified and/or disproportionate national measures; • Stimulate dissemination of information on data localisation restrictions by Member States, aggregate the information at the EU level; • Foster the adoption of data storage services.
Data availability for regulatory control by Member State authorities	<ul style="list-style-type: none"> • Stimulate exchange of information among MS and collaboration on data request; • Provide clarity on applicable law and jurisdiction.
Switching and porting data between providers and IT systems	<ul style="list-style-type: none"> • Lower switching barriers for users.
Security of data storage and processing	<ul style="list-style-type: none"> • Improving the level of actual and perceived security linked to data storage.

The objectives as set in the IA appear to be specific, measurable, achievable and relevant, and a time frame is set for the monitoring and evaluation of the achievement of the policy objectives of the proposal.

Range of options considered

As required by the Commission's [Better Regulation Guidelines](#), the IA begins by mentioning options that were discarded, explaining why they were discarded without a full assessment of their impacts. The IA then describes the retained policy options:

- **Option 0.** This is the baseline option, which would imply no policy change and a reliance on Member States and market players, acting within the current policy and regulatory framework, to address the challenges outlined in the problem definition part of the IA.
- **Option 1.** This is a non-regulatory option, which would entail (i) the issuance of guidelines to complement existing EU instruments relevant to the identified objectives; (ii) strengthened enforcement of relevant existing EU legislation, (iii) the fostering of regular discussions between the Commission and the Member States on the issues at stake and encouraging Member States to deploy mechanisms capable of addressing the issues; and (iv) encouraging market players to self-regulate and co-regulate to address identified problems.
- **Option 2.** This is a principles-based regulatory option. The legislative intervention would:
 - i. lay down the principle of free flow of data requiring Member States not to impose 'unjustified and disproportionate data localisation restrictions', and requiring them to notify the Commission of any draft acts introducing new data localisation requirements or changing existing ones;
 - ii. require Member States to review existing data localisation requirements and notify the Commission of any they consider to be in compliance with the proposal and which they intend to maintain;
 - iii. lay down the principle of right of access to data, even when stored in another Member State, for competent authorities for regulatory control purposes;

- iv. lay down the principle that data porting should be facilitated and that detailed, clear and transparent information should be given to users in this regard;
- v. create the legal basis for the establishment of standards regarding the security of storage and processing of data;
- vi. require the designation of a single point of contact within each Member State and the establishment of an expert group composed of such a single point of contact as an advisory body.

This option also has a sub-option, referred to intermittently as **Sub-option 2a** or **Option 2a**. This is a hybrid option combining binding provisions for the measures mentioned in points (i), (ii), (iii) and (vi) above on the one hand, and soft measures encouraging self-regulation in regard to the porting of data and clarifying the applicability of existing requirements regarding the security of data storage and processing, on the other. The principles based legislation under Options 2 and 2a 'would be detailed and made operational using', amongst other things, implementing acts (IA, p. 21).

- **Option 3.** This is a detailed legislative option envisaging:
 - the pre-definition of what constitutes justified and proportionate data localisation restrictions with a detailed mechanism to ensure transparency;
 - the establishment of a mandatory cooperation framework for the enforcement of access rights for competent authorities;
 - detailed and binding obligations on cloud service providers regarding the porting of data;
 - the development of common standards and a European certification scheme regarding the security of storage;

This option would "envisage implementing acts in all the intervention areas ... and a dedicated Committee" (IA, p. 22).

The options are compared as to their effectiveness in achieving the specific policy objectives, their economic impacts, their environmental and social impacts, their coherence with existing legislation, the administrative burdens which they would impose on the public authorities of the Member States, and the views of stakeholders on each option. The efficiency of the options does not seem to be among the criteria for comparison as is required in [Tool 12](#) of the Commission Better Regulation Toolbox. The resultant preferred option is Option 2a.

Scope of the impact assessment

The IA makes a fairly orderly assessment of the impacts, systematically examining the economic impacts, the environmental and social impacts, the impacts on Member States' public authorities and the stakeholders' point of view for every intervention area under every option.

Doubts do arise however in regard to the completeness of the scope of the analysis. In its problem definition the IA states that 'security is a common driver behind data location restrictions imposed by Member States and is often used as "convenient shorthand" for national security, national sovereignty and for security as a public policy task' (IA, p. 8). Despite this assertion, the IA does not seem to make any significant analysis of the impact that the public security exception, as laid down in Article 4(1) of the proposal, would be expected to have on the operation of the general principle of the free flow of non-personal data.

Also, given the assertion that, without data localisation restrictions, data centres are more likely to be located in lower temperature zones⁴ (IA, p. 29), it would perhaps have been opportune for the IA to delve into the regional dimension of the impacts of the options in order to identify any significant disparity in the geographical distribution of impacts, something which does not seem to take place.

⁴ The IA explains that server cooling is a major expenditure for data centres and therefore the location of servers in a low temperature zone can lead to substantial energy gains and cost reductions.

The IA assessment discusses the reasons why Member States use data localisation restrictions in its problem definition section, coming to the conclusion that these are often unfounded and restrictions are frequently unjustified and disproportionate (IA, p. 8). It seems reasonable to query whether this matter would have merited a more in-depth examination in the analysis of impacts.

Subsidiarity/proportionality

Just after the problem definition, the IA includes a separate chapter entitled 'Why should the EU act?' (IA, p. 16), which discusses subsidiarity, amongst other things. It recalls how 'the cross-border element is obviously a fundamental aspect of the problem', requiring by its nature a supranational measure. When discussing the preferred option, the IA includes a specific section on 'subsidiarity, proportionality and coherence of the preferred option' (IA, p. 58). It argues that the preferred option designs an effective and coherent framework which cannot be accomplished by the Member States acting individually.

In regard to proportionality, the IA highlights how Option 2a relies to a high degree on existing EU instruments limiting the administrative burdens on Member States. It also draws attention to the hybrid nature of Option 2a striking a balance between regulation and self-regulation. One of the concerns raised by the Regulatory Scrutiny Board in regard to the IA is however specifically about proportionality, arguing that the IA does not provide a basis for assessing the proportionality of the options.

In the chapter 'Why should the EU act?', mentioned above, the IA also discusses the legal basis of the proposal (Article 114 of the Treaty on the Functioning of the European Union) and the added value of EU action, submitting that the proposal would lead to gains of up to €8 billion or 0.06 % of GDP for the economy of the EU.

The deadline for the submission of reasoned opinions by national parliaments on whether the proposal complies with the principle of subsidiarity was 6 December 2017. Before that date, the French Senate issued a [reasoned opinion](#) stating why it considers that the proposal does not comply with the principle of subsidiarity. One of the concerns raised by the Senate is the weakness of the impact assessment, which does not substantiate the proposed initiative, identifying the public consultation exercise as one of the main weaknesses. It also expressed concern that the impact assessment does not appraise the risks of the removal of localisation requirements. It noted that the expected gain to the European economy of 0.06 % of GDP is not proportional to the measure proposed. Furthermore, the Senate does not agree with the way that data, for the purposes of the proposal, is defined by default, i.e. as data not considered as personal data under the GDPR. It also raises concerns regarding the exception of public security in Article 4(1) of the proposal. It argues that apart from public security, Member States also have the right to invoke – at least – grounds of public order and public health as exceptions to the free movement of persons, goods, capital and services in the Union.

Budgetary or public finance implications

For each of the intervention areas under each of the options the IA analyses the impact on Member States' public authorities. For Option 2 and Option 2a the IA estimates an annual cost of €33 384 for Member States for the allocation of the human resources necessary for structured cooperation through the single points of contact.

SME test/Competitiveness

The IA discusses SMEs in its general discussion on stakeholders, acknowledging that in their regard 'some additional considerations' (IA, Annex 3, p. 26) need to be made. It does not seem to make the specific analysis that constitutes the SME test as detailed in [Tool 22](#) of the Commission's Better Regulation Toolbox, but acknowledges their added vulnerability and their added potential to benefit from EU action.

Competitiveness is an underlying theme throughout, with the IA setting the context by arguing that the removal of barriers to the free movement of data is fundamental to any data economy and would 'stimulate innovation

and improve Europe's global competitiveness' (IA, p. 3). The point made by the IA is that EU action on the free flow of data would not only improve the competitiveness of the sector but the competitiveness of European businesses as a whole. This because the adoption of cloud solutions could lead to a significant reduction in ICT expenditure and increase in innovation potential for businesses in all sectors of the economy.

Simplification and other regulatory implications

The IA systematically analyses the administrative burden of the options on Member States' public authorities.

In section 1.4, 'Scope', the IA examines the coherence of the proposal 'with existing legal instruments and other Commission initiatives', in particular with the GDPR. In this discussion, the IA seems to indicate that the proposal also applies to personal data and to mixed data sets in circumstances where the data are not covered by the GDPR, such as when data localisation requirements seeking to limit the free flow of personal data within the EU are based on reasons other than the protection of personal data.⁵ This, however, does not seem to be in line with the proposal itself which, in the demarcation of its scope in Article 2 and in its definition of data in Article 3, is quite unambiguous that its provisions are applicable only to 'data other than personal data'.

Also confusing, again for the reason that personal data (whether alone or as part of a mixed data set) is excluded from the operation of the proposal, is the assertion that 'to the extent that this initiative deals with mixed data sets that include personal data, the applicable provisions of the GDPR must be fully complied with in respect to the personal data part of the set' (IA, p. 3).

Quality of data, research and analysis

Apart from the stakeholder consultation (discussed below under 'Stakeholder consultation') and literature review, the IA's evidence base consists of a number of external studies commissioned for the purposes of the IA and on a number of other studies not specifically commissioned for the purpose. The Commission also engaged Professor Joachim Beck as an external consultant. Details of these sources are given in Annex I to the IA.

From the outset, the IA is transparent about the limitation that the available sources of information and data allowed for 'qualitative rather than quantitative insights' (IA, p. 24). Indeed, the lack of a quantitative evidence base is felt throughout, but there are several instances where conclusions do not appear to be sufficiently backed up, neither quantitatively nor qualitatively, by persuasive argumentation.

In one such instance, the IA explains that 'cooling may account for up to half of a data centre's power expenditure' (IA, p. 29), and argues that the dismantling of data localisation restrictions would allow service providers greater freedom to locate their data centres in lower temperature regions, allowing them to achieve energy savings on the cooling of servers. The IA does concede that other factors weigh on the decision on where to locate a data centre, but makes no effort to explore to what extent lower cooling costs would influence location decisions vis-à-vis other factors. It therefore comes to the tenuous conclusion that free flow of data has a positive impact on the environment. Another example arises in the discussion of the impact of the baseline scenario on public authorities. Here the IA makes the generic affirmation that the non-establishment of common security criteria 'could in the future lead to burden for Member States authorities as a result of the collective risk this poses to their societies', without offering anything by way of argumentation or even explanation to back up this claim. This type of qualitative analysis seems to fall short of the rigour and thoroughness required in the Better Regulation Guidelines.

⁵ IA, p. 5: 'The initiative [the proposal] does not concern the processing of personal data and the free movement of such data as governed by the GDPR and the proposed e-privacy regulation. Specifically, since the GDPR prohibits restrictions on the free movement of personal data within the Union where these are based on reasons connected with the protection of personal data, the initiative deals with data flow restrictions imposed by Member States based on reasons other than the protection of personal data (e.g. security of storage of the data).'

Another issue that emerges is that in certain instances during the analysis of the impacts of a particular option the IA lapses into a comparison with other options, which might give rise to suggestions of bias against particular options and in favour of others. Thus one gets to the end of the analysis of impacts – before getting to the sections on the comparison of options and on the preferred option – with the distinct view that the only real choice is between Option 2 and Option 2a. In all fairness, however, one must also keep in mind that the IA was subject to at least two substantial revisions, further to the Regulatory Scrutiny Board's opinions, which could have influenced the sequential logic of its presentation.

Stakeholder consultation

Two separate online open public consultations were conducted for the purposes of the IA. The first, on '[The regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy](#)', ran from 24 September 2015 to 6 January 2016 and according to the IA received 1 034 replies. Further to the Regulatory Scrutiny Board's recommendations for improvements in its first opinion on the IA (discussed below under 'Commission Regulatory Scrutiny Board'), a second online open public consultation on '[Building the European data economy](#)' was conducted between 10 January 2017 and 26 April 2017. This second public consultation drew 380 responses.

Annex 2 to the IA gives details of the stakeholder consultation sources used for the purposes of the IA, including, apart from the open public consultations, structured dialogues with Member States, consultation workshops and meetings, Eurostat surveys, and consultation activities conducted by external experts.

The IA makes systematic reference to the position of stakeholders in the problem definition and in the analysis of impacts of the options, stating, amongst other things, that 61.9 % of stakeholders in the public consultation 'indicated that data localisation restrictions should be removed' (IA, p. 31) and 55.3 % 'believe that legislative action is the most appropriate instrument' to achieve this (IA, p. 23). However, although it is not clear whether the numbers of stakeholders consulted are sufficient to enable a meaningful quantitative analysis, the IA seems to use the numerical values extracted from the stakeholder consultation to compensate for the lack of available quantitative evidence to underpin the IA.

Monitoring and evaluation

The IA outlines how the Commission intends to monitor and evaluate the operation of the proposal in the short term and in the mid-to-long term. It identifies monitoring indicators corresponding to the operational objectives established in regard to the preferred policy option as required by [Tool 12](#) of the Commission's Better Regulation Toolbox. The IA also specifies the various sources through which the Commission intends to gather the information in connection with the indicators and corresponding operational objectives. In the IA the Commission undertakes to perform a comprehensive evaluation of the application of the rules. This undertaking is reflected in the review clause (Article 9) of the proposal. The IA however does not seem to specifically contemplate the apparently separate review of the development and implementation of the self-regulatory codes of conduct on the porting of data envisaged in Article 6(3) of the proposal.

Commission Regulatory Scrutiny Board

The Regulatory Scrutiny Board issued a [negative opinion](#) on the IA on 28 September 2016. Following the submission of a revised new version of the IA, it issued a [second opinion](#) on 7 November 2016. The Board noted the considerable changes to the initial version of the report, but nevertheless gave another negative opinion because of 'important shortcomings' that needed to be addressed. The Board makes clear that the second opinion is 'in principle final' and that 'appropriate political guidance' should be sought on whether and under what conditions the initiative may proceed.

Very important revisions appear to have been made to the IA in response to the Board's two opinions. Most noteworthy is the identification of a different (sub-)option as the preferred option. The IA now identifies

Option 2a as the preferred option, addressing concerns by the Board in its second opinion that the evidence seems to point toward less stringent options than Option 2, which was previously the preferred option. Another significant change was the conduct of a second open public consultation in the beginning of 2017 (discussed above under 'Stakeholder consultation') in response to the Board's call for the IA to better reflect stakeholders' views and for the assessment of impacts to be better substantiated.

Among the other concerns raised by the Board in its two opinions are: that the IA does not establish the size of the problems engendered by location restrictions on data; that it leaves open a number of issues such as what geographical restrictions are unjustified and disproportionate and what the process to make the principles-based legislation operational will be; that a clearer link and coherence with other policy initiatives concerning data should be established; and that more evidence should be produced to establish the magnitude of the problem. In Annex 1, the IA describes how it attempts to address the issues raised by the Board. It does not seem, however, that all the concerns raised by the RSB have been addressed to the full.

Coherence between the Commission's legislative proposal and IA

In general the proposal appears to correspond to the preferred policy option indicated in the IA. Uncertainty is however created by the suggestion in the IA that personal data and mixed data sets may in certain circumstances fall under the scope of the proposal, which does not seem actually to be the case.

Conclusions

The IA makes an orderly and well-structured analysis, using, as required in [Tool 12](#) of the Commission's Impact Assessment Toolbox, sufficiently 'non-technical' language to be able to be read by 'non-expert readers'. It expounds the nature of the problem and clearly identifies general, specific and operational objectives, together with monitoring indicators.

The absence of an analysis of the impacts of the public security exception and of an examination of the regional dimension of the impacts raises doubts on the completeness of the assessment and creates uncertainty as to whether any significant impacts have been missed.

The scant availability of quantitative evidence, acknowledged by the IA itself and highlighted by the RSB in its two negative opinions, is perhaps the most notable trait in the IA, and the efforts to extract meaningful quantitative markers from the stakeholder consultation do not seem to compensate. This dearth of quantitative evidence, combined with the fact that the qualitative argumentation in the analysis of the impacts appears to be tenuous and insufficiently expanded, seems to weaken the IA's effectiveness in underpinning the proposal.

This note, prepared by the Ex-Ante Impact Assessment Unit for the European Parliament's Committee on Internal Market and Consumer Protection (IMCO), analyses whether the principal criteria laid down in the Commission's own Better Regulation Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal. It is drafted for informational and background purposes to assist the relevant parliamentary committee(s) and Members more widely in their work.

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