

Data act

Impact assessment (SWD(2022) 34, SWD(2022) 35 (summary) accompanying a Commission proposal for a regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (data act) (COM(2022) 68)

This briefing provides an initial analysis of the strengths and weaknesses of the European Commission's [impact assessment](#) (IA) accompanying the above-mentioned [proposal](#), submitted on 23 February 2022 and referred to the European Parliament's Committee on Industry, Research and Energy (ITRE).

In its [communication](#) on a European strategy for data, the European Commission observed how data are at the centre of the digital transformation, which in the past few years has brought about radical changes in the economy and society, 'affecting all sectors of activity and the daily lives of all Europeans'. The communication anticipates that this transformation will continue, and sets out the EU's ambition to 'become a leading role model for a society empowered by data to make better decisions'. To further this ambition, the Commission committed itself to 'explore the need for legislative action on issues that affect relations between actors in the data-agile economy to provide incentives for horizontal data sharing across sectors'. Among the key actions envisaged by the communication is the proposal for a data act as part of a cross-sectoral governance framework for data access and use.¹

In its 2021 [resolution](#) on a European strategy for data, the European Parliament urged the Commission 'to present a data act to encourage and enable a greater and fair B2B, B2G, government-to-business (G2B) and government-to-government (G2G) flow of data in all sectors'.²

The IA explains that the data act 'complements the two other major instruments shaping the European single market for data': the [Data Governance Act](#)³ and the [digital markets act](#).⁴ 'While the Data Governance Act focuses on trusted mechanisms for data **sharing** and the digital markets act on fair **competition** between gatekeepers and other market players, also in relation to the use of data, the data act would enable wider data **use** across the economy, notably by regulating the fundamental questions of who can use the data generated by connected products and related services, and what are the conditions for such use' (IA, p. 1).

The initiative is among the new initiatives included in the Commission's [2021 work programme](#)⁵ and in the working document accompanying the [joint declaration](#) on EU legislative priorities for 2022.

Problem definition

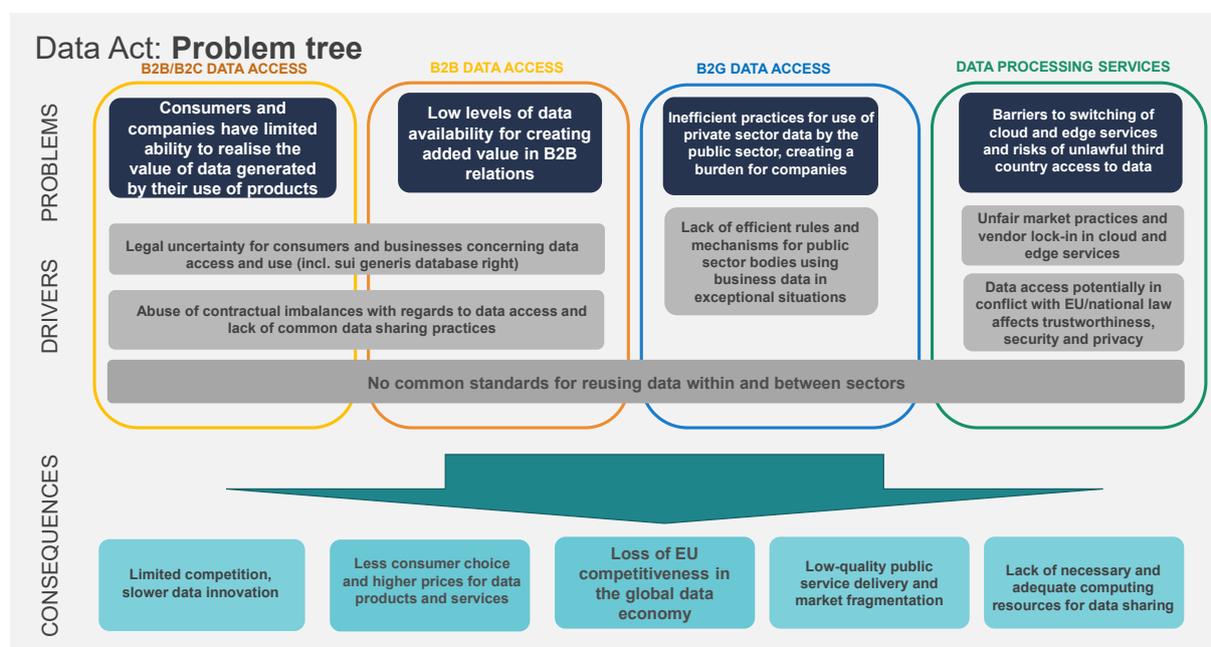
The IA identifies four problems, which are different manifestations of the overall problem of 'insufficient availability of data for use and re-use in the European economy or for societal purposes' (IA, p. 7). With the aid of a problem tree (reproduced as Figure 1, below), the IA illustrates the drivers behind these problems and the consequences that derive from them.

The IA substantiates its findings with references to numerous sources, including the results of stakeholder consultations, academic literature, studies and other relevant sources. Annex 7 complements the discussion by providing, among other things, practical examples of the problems and further detail of the main stakeholders and sectors affected by them.



The IA appears to identify clearly the nature of each problem, its causes, who is affected and how, and how the problem is expected to evolve without EU intervention. The IA's effort to identify the scale of the problem does not appear to be particularly exhaustive, although it does provide some numerical data to illustrate the extent of certain aspects of the problem. One of the external studies supporting the IA (referred to in the IA as the [Deloitte study](#)⁶) does, however, seem to offer a deeper investigation of the problem's magnitude.

Figure 1 – Problem tree



Source: IA, p. 9.

Subsidiarity / proportionality

The IA includes a separate section on subsidiarity under 'Chapter 3 – Why should the EU act?'. There, it justifies the need for EU action, explaining its necessity and added value. According to the IA, existing EU legislation 'already ensures the free flow of personal and non-personal data across the internal market', and the development of a comprehensive framework to access and use data will complement the existing legislation to allow for the achievement of the full potential of the internal market for data. The IA observes that the problems identified and defined therein 'are not Member State-specific', and that 'data value chains in the EU are already structured largely in a cross-border manner'. It argues that national intervention cannot guarantee a coherent framework in the entire single market and ensure comparable conditions of data access and use throughout. The IA therefore concludes that 'a transversal EU solution' is required to address the problems identified, and that it is 'the most efficient manner of achieving a functional and coherent common data space' (IA, pp. 24-26). In line with the Commission's [Better Regulation Guidelines](#), proportionality is one of the criteria used in the comparison of the options for selecting the preferred policy option.

The deadline for the submission of reasoned opinions by national parliaments on whether the proposal complies with the principle of subsidiarity was 16 May 2022. No national parliament had issued a reasoned opinion by that date.

Objectives of the initiative

The IA clearly identifies general and specific objectives. The general objective is 'to maximise the value of the data in the economy and society by ensuring that a wider range of stakeholders gain control over their data and that more data is available for use, while maintaining incentives for data generation and collection'. The specific objectives are the following:

- 1 empower consumers and companies using connected products;
- 2 increase availability of data for commercial use and innovation between businesses;
- 3 introduce new mechanisms for re-use by public sector bodies of data in exceptional situations;
- 4 increase the fluidity of the cloud/edge market and raise trust in the integrity of cloud and edge services;
- 5 establish a framework for efficient data interoperability.

As recommended in the Commission's Better Regulation Guidelines, the objectives set out in the IA establish a logical chain between the problems and drivers identified, and the policy options considered. In this respect, the IA uses an intervention logic tree in an effective way to illustrate and summarise the links between the problems identified, their respective drivers, and the general and specific objectives (IA, p. 28).

The objectives appear to be specific, measurable, achievable and relevant, and the proposal provides a timeline for its entry into force and application, and an evaluation timeframe in regard to its implementation.

The IA does not define any more detailed operational objectives in relation to the preferred option, as recommended in the Commission's Better Regulation Guidelines; instead, it links the monitoring and evaluation indicators directly to the specific objectives (see section 'Monitoring and evaluation', below).

Range of options considered

The IA identifies three policy options in addition to the baseline.

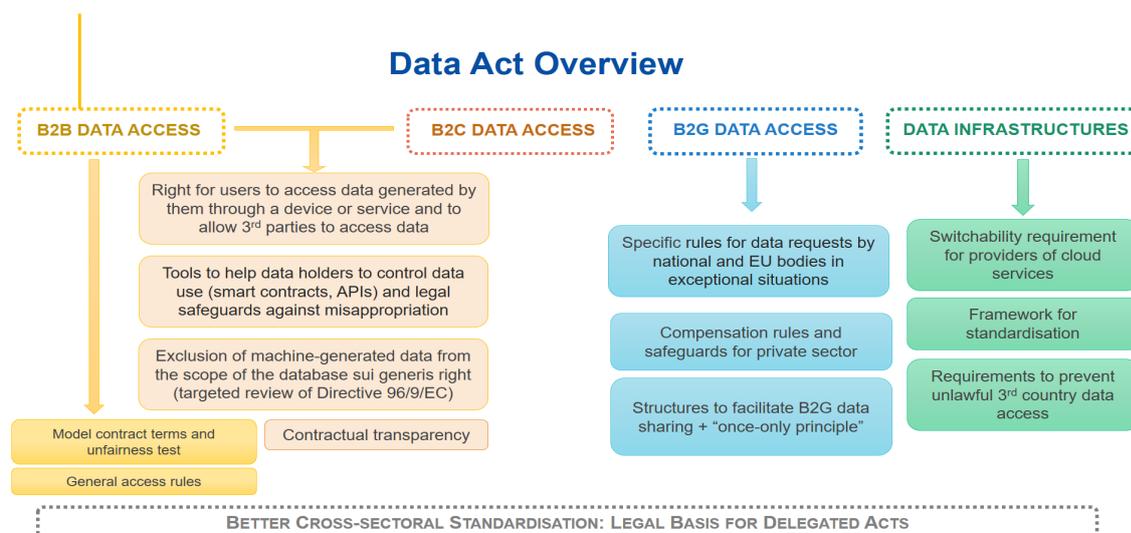
- **Option 1** – Non-binding measures encouraging wider and more efficient data access, use and processing among stakeholders. This option would consist of Commission guidance, and support best practice and self-regulation among the relevant stakeholders.
- **Option 2** – Rules on controlled and predictable data access and use. This option seeks to balance existing incentives to invest in data-generating activities by imposing limited legislative measures designed to strengthen legal certainty on how data can be used and by whom; the option would include a general obligation to allow switching between cloud services.
- **Option 3** – Rules for open data access between businesses and from businesses to public bodies. This option would consist of legislative measures to maximise the opportunities for parties to request access to data and regulate how such data can be used. Compared with option 2, option 3 would entail stricter conditions on data holders regarding compensation, detailed technical specifications for data access, and detailed technical standards for ensuring cloud interoperability.

For each option, the IA describes a series of measures the option would entail; these measures are grouped according to which of the five specific objectives those measures seek to achieve.

The presentation of the options appears to be clear and balanced. Annex 10 to the IA is a useful supplement to the description, depicting the measures under the two regulatory options (options 2 and 3) in more detail. The options presented appear to be realistic alternatives offering a range of measures. They build incrementally on the existing and planned data-sharing instruments making up the regulatory baseline – in particular the Data Governance Act and the digital markets act – and other initiatives under the European strategy for data.

On the basis of its analysis and comparison of the options, the IA concludes that **option 2 is the preferred policy option**, providing a schematic overview of it (reproduced as Figure 2, below).

Figure 2 – Preferred option



Source: IA, p. 66.

Assessment of impacts

The IA assesses the policy options in terms of their economic, social and environmental impacts. The assessment's principal focus is on the economic impacts: the IA first traces the three options' expected macroeconomic effects, before exploring how each of the three performs in achieving the initiative's objectives vis-à-vis the main stakeholder groups.

In line with the Commission's Better Regulation Guidelines, the options are compared with regard to their efficiency, effectiveness, coherence, and compliance with the principle of proportionality. A further basis of comparison is the options' feasibility, taking into account stakeholder support for the adoption and implementation of each of the options.

The assessment of impacts and the comparison of the options in the IA report is mainly a qualitative exercise, supported, inter alia, by a quantitative element in the Deloitte study in the form of cost-benefit and macroeconomic analyses.

SMEs / competitiveness

The IA recognises that the initiative is highly relevant for small and medium-sized enterprises (SMEs), stating: 'Data is a critical resource for start-ups and SMEs, in particular, as a business can be set up with very low initial capital. Some 85 % of new jobs in the data economy over the last years have been created by SMEs' (IA, p. 2). In defining the problem the initiative seeks to address, the IA outlines how SMEs are particularly affected. Consequently, SMEs feature prominently among the initiative's objectives. Moreover, the input received from the SME community, including from consultations, is reported on systematically throughout the IA.

The consultation actions feeding into the IA include an online survey of a representative sample of SMEs and start-ups that use cloud computing in conducting their business; the survey was run as part of an [external study](#)⁷ on the economic detriment to SMEs arising from unfair and unbalanced cloud computing contracts.

SMEs are also one of the four main stakeholder categories in regard to which the IA analyses the policy options' impacts, and examines whether the initiative's declared objectives would be met. In presenting the options, the IA highlights how certain measures contemplated under the options would be of particular benefit to – or even targeted specifically for the benefit of – SMEs. Prominent among these is the introduction, under the preferred option (option 2), of the unfairness test for B2B data sharing terms in contracts. The unfairness test addresses the issue of the abuse of imbalances

in negotiating power in contractual relations: it 'would invalidate unilaterally imposed excessive contract terms on data access and use in "take-it-or-leave-it" situations'. The unfairness test's scope under option 2 is limited to protecting SMEs, which are 'archetypically in a weaker bargaining position'. Under option 3, the unfairness test is wider in scope: it 'would apply to all contractual terms – not only unilaterally imposed terms – on data access and use by all companies, not only SMEs' (IA, pp. 33-36). Annex 11 to the IA goes into more detail on the rationale behind the unfairness test and its envisaged operation and enforcement.

The options presented in the IA also include exemptions granted to SMEs in certain cases to keep the intervention proportionate and avoid excessive burdens on SMEs, and ensure SME support for the initiative.

From the above, it would appear that the four-step process constituting the SME test has been completed, as recommended in [Tool 23](#) of the Better Regulation Toolbox.

The loss of competitiveness in the global data economy is pinpointed in the IA as one of the consequences arising from the problems identified in the status quo, and is therefore one of the initiative's underlying purposes. The IA expects option 2, the preferred option, to have 'a broad impact on competitiveness in aftermarket services linked to connected products and related services' (IA, p. 44). On the other hand, the IA recognises that, despite the opportunities it generates, data access and sharing also comes with certain risks, for instance relating to competitiveness and the ability to innovate. In its design of the policy options and its choice of the preferred option, the IA seeks to balance these opportunities and risks.

Simplification and other regulatory implications

To achieve the stated objectives, the proposal – apart from establishing new rules – also encompasses a targeted review of the [Database Directive](#),⁸ the aim being to clarify that machine-generated data are excluded from the *sui generis* right under that directive.⁹ This clarification is considered necessary given that the 2018 evaluation¹⁰ of the Database Directive found legal uncertainty as to whether machine-generated data is protected by the *sui generis* right. This issue is also discussed in a dedicated annex to the IA (Annex 6).

The IA explains the complementarity of the proposal with other initiatives under the European strategy for data, in particular the Data Governance Act and the proposed digital markets act. In regard to the proposal's coherence with sector-specific legislation, the IA explains that the proposal follows the tried and tested approach of laying down a horizontal framework that can be complemented and built on by sectoral legislation: 'The data act would leave room for vertical legislation to set more detailed rules addressing sector-specific technical aspects of data access, for example cyber-security, data formats or covering issues going beyond data access as such' (IA, p. 67). The IA also acknowledges the risks that data access and sharing pose to data protection rules, and explains how the proposal is designed to be compliant with and complementary to the General Data Protection Regulation.

Monitoring and evaluation

For the purposes of monitoring the proposal's operation, the IA puts forward several indicators, each of them complemented by corresponding sources of information, focusing on the achievement of the specific objectives.

Both the IA and the proposal provide for the carrying out of an evaluation to measure the initiative's performance, albeit with non-matching timeframes (see section 'Coherence between the Commission's legislative proposal and IA', below).

Stakeholder consultation

Stakeholder views are reflected throughout the IA. In the analysis of the options, in particular, the IA systematically takes into account each of the options' likely impacts on the four stakeholder

categories identified as being most relevant for the initiative, namely businesses, SMEs, consumers, and public administrations.

Moreover, stakeholder support for the adoption and implementation of the different options is one of the criteria considered by the IA when comparing the options. In this regard, the preferred option (option 2) is considered to 'provide for a balanced and feasible approach that is in line with the views expressed by stakeholders, who generally confirm the existence of obstacles to data access and use, while remaining cautious as to the extent and intensity of regulatory intervention in B2B, B2C and B2G settings' (IA, p. 66).

Annex 2 to the IA gives an overview of the consultation process. It describes the consultation actions – ranging from public to targeted consultations – carried out under the IA, and the main conclusions drawn from the consultation process. Among the several consultation actions, stakeholders had the opportunity of giving feedback on the [inception impact assessment](#). The period for feedback on the inception impact assessment was 28 May–25 June 2021, and a total of 91 valid contributions were received.

An online [public consultation](#) was conducted between 3 June and 3 September 2021 to gather the public's views on, and experience with, eight data economy-related aspects that would feed into the IA process and the formulation of a proposal for a data act. The questionnaire drew 449 respondents from 32 countries, with companies/business organisations and business associations making up more than 50 % of respondents.

Annex 3 to the IA identifies the stakeholders affected by the measures contemplated in the IA, and gives a quantitative overview of the preferred option's benefits and costs for these stakeholders.

Supporting data and analytical methods used

The IA uses a wealth of studies, academic literature, stakeholder position documents and other documentation as sources of data to underpin its process and findings. Central to the process are two external support studies conducted for the Commission: the first study (referred to in the IA as the ICF study¹¹), which does not appear to be publicly available at the time of writing, has a specific focus, concentrating on contractual agreements in B2B contexts; the [Deloitte study](#), already referred to above, is broader in scope, and explores generally business-to-business (B2B), business-to-consumer (B2C) and business-to-government (B2G) contexts, while excluding B2B contractual matters covered under the ICF study.

These two studies, each with their different scope, give rise to what the IA calls 'two baselines' that might, however, be considered two different aspects of the baseline scenario. With regard to the specific context of contractual agreements in a B2B setting, the ICF study 'takes into consideration the amount of data-related profits', whereby value generated under data sharing is expected to reach €27.1 billion a year by 2030 (the ICF baseline). In general terms, the IA argues that, since the 'initiative would affect a wide range of stakeholders in all sectors of the economy', the most suitable baseline against which to assess the different policy options' impact is the total gross domestic product (GDP) for the EU-27, which stands at around €11.5 trillion for 2020, and is expected to grow to around €13.8 trillion by 2028 (the Deloitte baseline) (IA, pp. 29-31).

The measures contemplated under the different options are assessed, as appropriate, against either one or the other of these 'two baselines': thus, the impacts of measures relating to contracts in a B2B setting are assessed against the ICF baseline, while the impacts of measures relating to B2B (except for contractual matters), B2C and B2G settings are assessed against the Deloitte baseline.

The IA recognises limitations in the methodology; in particular, it is transparent about lack of data and the assumptions made to overcome this data deficiency.

Follow-up to the opinion of the Commission Regulatory Scrutiny Board

The Commission's Regulatory Scrutiny Board (RSB) considered an initial draft version of the IA report at its meeting of 27 October 2021. It issued a negative opinion, asking for the revision and re-submission of the report. Following the submission of a revised version, the RSB issued a [positive opinion with reservations](#) on 21 January 2022.

In its second opinion, the RSB noted the improvements to the report in line with the recommendations it had issued in its first opinion, 'notably in the problem definition and the analysis of costs and benefits'. It pointed out, however, that the report still had 'significant shortcomings' that needed rectification. The RSB recommended: (i) a comprehensive analysis of the initiative's articulation with other related legislation and initiatives; (ii) a clearer definition of data and their content and boundaries; (iii) a better justification of the limits to the initiative's scope; (iv) a clearer description of the relationship between the Deloitte and ICF baselines; (v) a clearer explanation of several concepts and notions that are essential components of the policy options; and (vi) more precision in outlining B2G interactions.

The final IA report seems to address the RSB's recommendations, and describes how it does so in its Annex 1.

Coherence between the Commission's legislative proposal and IA

The proposal appears to correspond essentially to the preferred policy option indicated in the IA. One minor discrepancy is noted in the timeframe for evaluating the data act: the IA states that the evaluation will take place 4 years after adoption of the act; this does not seem to tally with the timeframe obtained by combining the proposal's provisions regarding entry into force, date of application, and deadline for evaluation (entry into force: 20 days after publication; date of application: 12 months after entry into force; evaluation: 2 years after the date of application).

The initiative's general objective is 'to maximise the value of the data in the economy and society by ensuring that a wider range of stakeholders gain control over their data and that more data is available for use, while maintaining incentives for data generation and collection'. The IA provides a clear problem identification, although its effort to identify the scale of the problem does not appear exhaustive. It establishes a clear intervention logic, from the problems and their drivers and consequences, to the initiative's objectives, to the policy options. The IA presents the options in a clear and balanced way; they appear to be realistic alternatives offering a range of measures that build incrementally on existing and planned data-sharing instruments and other initiatives under the European strategy for data. The IA draws on a wealth of studies, academic literature, stakeholder position documents and other documentation as sources of data to underpin its process and findings; however, one of the major support studies of the IA does not seem to be publicly available at the time of writing. The assessment of impacts and the comparison of options in the IA report is mainly a qualitative exercise, supported by a quantitative element that becomes evident only by examining the external studies supporting the IA. The IA distinguishes between various stakeholders and reflects their views throughout; they are taken into account when analysing and comparing the options. The IA deems the initiative highly relevant for SMEs. This shows in its efforts to assess and measure impacts on SMEs, and propose targeted measures to both optimise benefits for and minimise burden on SMEs. The IA uses several visual aids; these are particularly valuable in providing the reader with a clear overview of the problems and drivers, policy objectives and policy options, and also help illustrate the links between them.

ENDNOTES

- ¹ Communication on a European strategy for data, [COM\(2020\) 66](#), European Commission, February 2020.
- ² Resolution of 25 March 2021 on a European strategy for data, European Parliament. The proposal covers three of the dimensions identified in the resolution: business-to-consumer (B2C), business-to-business (B2B), and business-to-government (B2G). G2B is covered by the Open Data Directive (Directive (EU) 2019/1024 of 20 June 2019 on open data and the re-use of public sector information), which regulates the re-use of data held by the public sector and data generated by publicly funded research.
- ³ Regulation (EU) 2022/868 of 30 May 2022 on European data governance (Data Governance Act).
- ⁴ Proposal for a regulation on contestable and fair markets in the digital sector (digital markets act), COM(2020) 842, European Commission, December 2020.
- ⁵ Communication on the 2021 Commission work programme, COM(2020) 690, European Commission, October 2020.
- ⁶ [Study](#) to support an impact assessment on enhancing the use of data in Europe, European Commission, 2022.
- ⁷ Study on the economic detriment to small and medium-sized enterprises arising from unfair and unbalanced cloud computing contracts, European Commission, 2019.
- ⁸ Directive 96/9/EC of 11 March 1996 on the legal protection of databases.
- ⁹ Article 7 of the Database Directive provides for the *sui generis* protection of databases created through a substantial investment, irrespective of the eligibility of a database for copyright protection. The question arises of whether machine-generated databases would meet the condition of 'substantial investment', given that they are created as a by-product of an enterprise's central activity.
- ¹⁰ Evaluation of Directive 96/9/EC on the legal protection of databases, SWD(2018) 146, European Commission, 2018.
- ¹¹ Study on model contract terms and fairness control in data sharing and cloud contracts and on data access rights, European Commission. The IA indicates that publication of this study is forthcoming; an internet search at the time of writing did not yield any results.

This briefing, prepared for the Committee on Industry, Research and Energy (ITRE), 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 impact assessment. It does not attempt to deal with the substance of the proposal.

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