BRIEFING
EU Legislation in Progress

European Parliament

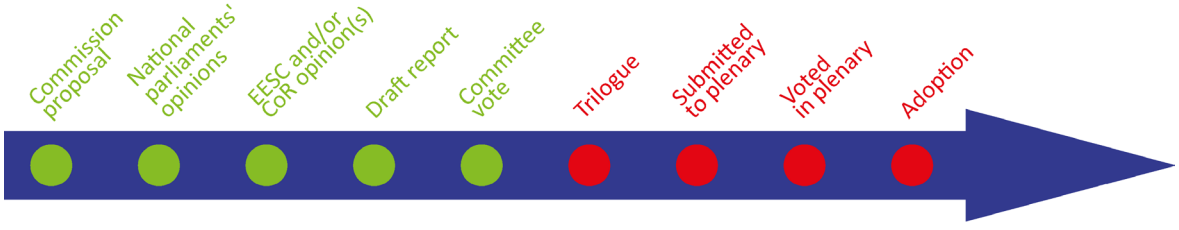
# The data act

## OVERVIEW

On 23 February 2022, the European Commission unveiled a proposal for an EU regulation – the data act – laying down harmonised rules on fair access to and use of data. The aim is to remove barriers to consumers and businesses' access to data, in a context in which the volume of data generated by humans and machines is increasing exponentially and becoming a critical factor for innovation by businesses (e.g. algorithm training) and by public authorities (e.g. shaping of smart cities). The proposed act establishes common rules governing the sharing of data generated by the use of connected products or related services (e.g. the internet of things, industrial machines) to ensure fairness in data-sharing contracts and to allow public sector bodies to use data held by enterprises where there is an exceptional need (e.g. public emergency). Furthermore, the proposed act introduces new rules to facilitate switching between providers of cloud services and other data-processing services, and puts in place safeguards against unlawful international data transfer by cloud service providers.

The Council and Parliament have both proposed substantial amendments to the Commission's text and are now working towards a compromise text. Discussions focus, among other things, on defining the types of data falling in the scope of the act, ensuring that data sharing obligations will not endanger trade secrets, aligning the text with rules already enshrined in the General Data Protection Regulation and the Digital Markets Act, and setting the practical and financial details of cloud switching.

| **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)** | | |
|---|---|---|
| *Committee responsible:* | Committee on Industry, Research and Energy (ITRE) | COM(2022) 68 23.2.2022 |
| *Rapporteur:* | Pilar del Castillo Vera (EPP, Spain) | 2022/0047(COD) |
| *Shadow rapporteurs:* | Miapetra Kumpula-Natri (S&D, Finland)<br>Alin Mituța (Renew, Romania)<br>Damian Boeselager (Greens/EFA, Germany)<br>Elena Lizzi (ID, Italy)<br>Margarita de la Pisa Carrión(ECR, Spain)<br>Elena Kountoura (The Left, Greece) | Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision') |
| *Next steps expected:* | Trilogue negotiations | |

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# Introduction

On 23 February 2022, the European Commission submitted a proposal for a regulation[1] seeking to harmonise rules on fair access to and use of data in the EU. The proposal builds on the assumption that innovation rests increasingly on the use of industrial data, i.e. data generated by machine-to-machine interaction (e.g. connected factory machines) and by human-to-machine interaction (e.g. connected devices). Such data are critical for innovations by business (e.g. algorithm training) and by public authorities (e.g. for shaping smart cities).

In its 2020 communication on a European strategy for data, the Commission highlighted that data are at the centre of the digital transformation, and that data-driven innovation is poised to bring enormous benefits to citizens, such as improved personalised medicine and new mobility, as well as contributing to the European Green Deal. However, the Commission also found that, while the volume of data generated by humans and machines has been increasing exponentially in recent years, most data remain unused or their value is concentrated in the hands of a relatively few large companies, with only 8 % of smaller companies and businesses capturing value from data.[2] As a result, EU policymakers started reflecting on how to unlock the untapped potential of **business-to-business (B2B) and business-to-government (B2G) data sharing**.

In addition, the Commission carried out debates on ways to foster access to data in **trusted and collaborative cloud infrastructure** in the EU, notably in the context of ongoing initiatives for a European federated cloud.

Following this preparatory work, in February 2020 the Commission published the European strategy for data, paving the way to a genuine single market for data.

# Existing situation

EU legislation adopted in recent years has focused on removing barriers to the free flow of data across the internal market, safeguarding personal data protection, increasing trust in data sharing and enhancing the supply of public and private sector data for innovative reuse. The Free Flow of Non-personal Data Regulation ensures that non-personal data can be stored, processed and transferred anywhere in the EU. The General Data Protection Regulation (GDPR), which enshrines a general access and portability right (Article 20 GDPR) in EU law, may cover data generated by connected products and related services according to the Commission's impact assessment. However, the exercise of this right has proven largely theoretical, because it does not cover continuous or real-time access to data (which is essential for products that are always connected to the internet) and because interpretations regarding the types of data that fall under this obligation tend to differ. Furthermore, although both the Digital Markets Act (DMA) and Digital Services Act (DSA) include rules on data access, the obligation to ensure it falls primarily on gatekeepers and large providers and does not create portability between cloud providers. Likewise, the Commission's impact assessment stresses that the Data Governance Act, which sets out rules on fostering voluntary data-sharing agreements, does not apply to cloud and edge services.

In addition, the Commission has proposed to revise the Database Directive, which provides for the *sui generis* protection of databases created through a substantial investment, even if the databases themselves are not original intellectual creations protected by copyright. However, in today's digital world where data are often generated in vast volumes and automatically by sensors, machines and related technologies, it becomes difficult to clearly distinguish which databases may be protected by the *sui generis* right and which may not. There is a risk that data holders (such as original equipment manufacturers) could use their *sui generis* right to prevent access to the internet of things (IoT) data gathered in a database to any third party in a way that leads to lock-in situations.[3] This would present an obstacle to the sharing and use of data. The Database Directive should therefore be amended to prevent the *sui generis* protection from being extended to machine-generated data.

Consequently, in its impact assessment accompanying the proposal, the Commission highlights that there is insufficient availability of data for use and reuse in the EU economy or for societal purposes, and that a range of legal, economic and technical issues relating to data use affect a range of sectors.

# Parliament's starting position

In its 2021 resolution on a European strategy for data, the European Parliament urged the Commission to submit legislation to foster data access and interoperability in the forthcoming data act. Parliament also highlighted the need for creating common European data spaces for the free flow of non-personal data across borders and sectors and between businesses, academia, relevant stakeholders and the public sector.

# Council and European Council starting position

The European Council's conclusions of 21-22 October 2021 underlined the importance of unlocking the value of data in the EU by means of a comprehensive regulatory framework conducive to innovation; facilitating better data portability and fair access to data; and ensuring interoperability.

# Preparation of the proposal

The proposal builds on the Commission's above-mentioned communication on a European strategy for data, on a Commission study supporting the revision of the Database Directive, and on the above-mentioned impact assessment accompanying the proposal. EPRS issued an initial appraisal of the Commission impact assessment in July 2022.

# The changes the proposal would bring

## Principle and objectives

The proposal's underlying premise is that the right to use non-personal data is valuable and that value should be allocated fairly across different sectors of the economy. The proposed data act, therefore, intends to **ensure fairness** in the allocation of value from data among the players in the data economy and to **foster access to and use of data** in a context characterised by the proliferation of cloud services and products connected to the IoT. The overall principle underlying the proposal is that companies will have to open up their non-personal data, namely the data generated by the use of their services or products.

The proposed data act is a **horizontal piece of legislation** based on Article 114 of the Treaty on the Functioning of the EU. It aims to ensure that EU businesses across all sectors are in a position to innovate and compete, to empower individuals with respect to their data, and to equip businesses and public sector bodies with mechanisms enabling them to use data to tackle public emergencies and other exceptional situations. The proposal complements the recently adopted Data Governance Act, which aims to facilitate the voluntary sharing of data by individuals and businesses, and harmonises the rules on the use of certain public sector data. The proposal might be supplemented by additional, secondary legislation in specific sectors (e.g. car industry).

More concretely, the proposal for a data act aims to fulfil a range of **specific objectives**:

- facilitate access to and use of data by consumers and businesses, while preserving incentives to invest in ways that generate value through data. This implies bringing legal certainty to the sharing of data in the EU and clarifying the application of the Database Directive;
- enable the use by national public sector bodies and EU institutions, agencies and bodies of data held by enterprises in certain situations where there is an exceptional data need;

- facilitate switching between cloud and edge services;
- put in place safeguards against unlawful data transfers, without notification, by cloud service providers; and
- provide for the development of interoperability standards for data to be reused between sectors.

## Scope

The proposed data act harmonises data-sharing rules in a range of situations: between businesses, between businesses and public bodies, in the context of data infrastructure such as cloud services, or when non-personal data are transferred across borders into non-EU territories. The proposed legislation will lay down rules about data access and use in each of these situations.

Accordingly, the proposed regulation would apply to and create obligations for:

- manufacturers of products and suppliers of related services placed on the EU internal market, as well as the users of such products or services;
- data holders that make data available to data recipients in the EU;
- data recipients in the EU to whom data are made available;
- public sector bodies and EU institutions, agencies and bodies that request data holders to make data available where there is an exceptional need;
- providers of data-processing services (e.g. cloud) offering them to customers in the EU.

Both **products** (i.e. connected devices) and **related services** would fall within the scope of the draft act. However, products that are primarily designed to display or play content, or to record and transmit content (e.g. personal computers, servers, tablets and smart phones, cameras) would be excluded from the scope) (recital 15). Data generated by the use of a product or related service include data recorded intentionally by the user and data generated as a by-product of the user's action, such as diagnostics data. Data stemming from the interaction between the user and the product through a virtual assistant falls within the scope of the proposed regulation, while **data produced by a virtual assistant** unrelated to the use of a product does not.

## Main provisions

### Business to consumer and business to business data access and sharing measures

#### Right to access data

Chapter II (articles 3 to 7) establishes a harmonised legal framework for making data generated by the use of a product or a related service available to the user of that product or service. In practice, the proposed data act would grant users (consumers or businesses) a new **right to access the data** generated by the use of products or related services (e.g. connected devices such as vehicles, consumer goods and industrial machinery).

**Manufacturers** would have to design their products in a way that allows the user to access the generated data easily by default and be transparent on what data will be accessible and how to access them. **Users** would be able to request access to their data by means of a simple request by electronic means whenever technically feasible. Where data cannot be directly accessed by the user from the product, the data holder should make them available to the user without undue delay, free of charge and, where applicable, continuously and in real time.

**Data recipients** can be any persons or businesses to whom the data holder makes its data directly available, but also a third party (such as an enterprise, a research organisation or a not-for-profit organisation) to whom data are made available at the request of the user (recital 29). However, an

important caveat is that large providers designated as '**gatekeepers**' under the DMA would not be allowed to request or be granted access to users' data (recital 36). Therefore, third parties to whom data are made available at the request of the user should not make the data available to a designated gatekeeper.

Data recipients would be subject to a set of further **limitations**, including the obligation not to use the data they receive to develop a product that competes with the product from which the accessed data originate (article 6). Businesses' information protected under the Trade Secrets Directive would only be disclosed if all necessary measures are taken to preserve its confidentiality. In cases of access to **personal data**, such data should be made available only if there is a valid legal basis under the GDPR (recital 30). Finally and importantly, the proposed data act would 'not apply to, nor pre-empt, voluntary arrangements for the exchange of data between private and public entities' (recital 59).

## Right to share data (enhanced portability right)

The proposed data act would also create a user's **right to share data with third parties**, complementing Article 20 GDPR that establishes a right to data portability for data subjects (individuals). Such a right to share data would be much broader in scope than the GDPR portability right, as it would be granted to individuals and companies alike, and cover both personal and non-personal data. Accordingly, **at the request of a user or a party acting on behalf of the user**, data holders would have to make available to third parties all the data that have been generated using a product or related service, i.e. data generated by IoT-connected devices and services.

## Small and medium-sized enterprises (SMEs) exemption

In principle, micro- and small enterprises would be exempt from the obligations relating to data access and data sharing under the proposal. In practice, such obligations would not apply to data generated by the use of products manufactured or related services provided by micro- or small enterprises.

## Obligations of data holders

Chapter III (articles 8 to 12) imposes a number of **general obligations** on data holders. These include making data available under fair, reasonable and non-discriminatory terms and in a transparent manner; agreeing with the data recipient the terms for making the data available; not discriminating between comparable categories of data recipients, including partner enterprises or linked enterprises, of the data holder, when making data available; and not making data available to a data recipient on an exclusive basis unless requested by the user. Data holders **may receive compensation** for making data available, which should be reasonable and agreed with the data recipient. This does not preclude other EU or national legislation from excluding compensation or providing for lower compensation for making data available. In addition, any compensation set for SMEs would not exceed the costs incurred for making the data available, unless otherwise specified in sectoral legislation. In addition, a data holder '**should not abuse its position**' to seek a competitive advantage in markets where the data holder and a third party may be in direct competition (recital 29). Finally, **dispute settlement bodies** certified by the Member States may assist parties, that disagree on the compensation or conditions, to come to an agreement.

## Unfairness of contractual terms in data-sharing contracts between businesses

Chapter IV (article 13) addresses the unfairness of contractual terms in data-sharing contracts between businesses, to protect micro-enterprises and SMEs. To this end, an **unfairness test** would have to be conducted according to a set of criteria, to assess if a contractual term is either always unfair or presumed to be unfair. This test would protect the weaker contractual party by ensuring that contracts remain fair in situations of unequal bargaining power. To the same end, clauses that do not pass this test would not be binding on micro-enterprises and SMEs. Furthermore, the

Commission would develop and recommend **non-binding model contractual terms on data access and use** (article 34) to assist parties in negotiating agreements.

## Exceptional mandatory business-to-government data sharing

Chapter V (articles 14 to 22) establishes a harmonised framework for the use by public sector bodies (and EU institutions, agencies and bodies) of data held by enterprises in situations where there is an exceptional need for such data. The proposed data act would thus oblige data holders to make data they hold available on request to public sector bodies in two different scenarios in which an 'exceptional need to use data' can be established.

Under the first scenario, an exceptional need is deemed to exist where data are necessary to **respond to a public emergency** (article 15(a)) or where data are necessary (for a limited time and for a limited scope) to **prevent or assist recovery from a public emergency** (article 15(b)). In this case, an exceptional need would be justified when: i) the data are necessary to prevent or respond to a public emergency (e.g. public health emergency, natural disasters, major cybersecurity incidents); and ii) the lack of data prevents public sector bodies from carrying out a task in the public interest (e.g. compilation of official statistics).

Under the second scenario, an exceptional need is deemed to exist where the lack of available data prevents a local authority from fulfilling a specific task explicitly provided by law in the **public interest** (article 15(c)). Public authorities may then resort to the new provision to access data if they were unable to obtain such data by alternative means (including by purchasing the data on the market at market rates) or if the procedure set out in chapter IV would reduce the administrative burden of collecting data.

In the case of an exceptional need to respond to a public emergency, data holders would be required to make data available **without delay and free of charge**. In other cases, including preventing a public emergency or assisting recovery from it, the data holder making the data available would be entitled to **compensation** that includes the costs related to making the relevant data available plus a reasonable margin. Certain activities, such as the prevention, investigation, detection and prosecution of criminal or administrative offences, are explicitly excluded from the scope of exceptional needs.

Public sector bodies would be entitled to sharing the requested data with individuals or organisations carrying out **scientific research or analytics**, or with national statistical institutes and Eurostat for the compilation of official statistics. Furthermore, the proposal envisages mutual assistance and **cross-border cooperation** between public sector bodies to ensure data exchange.

## Switching between data-processing services, and interoperability requirements

Chapter VI (articles 23 to 24) introduces a set of **minimum regulatory requirements to facilitate switching** between providers of cloud services and other data-processing services. Given that the current self-regulatory approach under the Free Flow of Non-personal Data Regulation (i.e. codes of conduct on cloud switching) did not affect market dynamics significantly, the Commission intends to introduce regulatory measures to **avoid 'vendor lock-in'** concerns arising at the level of providers of data-processing services. Against this backdrop, the proposed data act would oblige providers to **remove commercial, technical and contractual restrictions** that make it difficult for customers to terminate a contract, conclude one or multiple new contracts with, or port their data to, another provider, among other things. In particular, it ensures that customers remain with a functional equivalence of the service after they have switched to another service provider. Furthermore, the Commission could mandate the use of **interoperability standards** or specifications for specific types of data-processing services through delegated acts if necessary (article 29).

In addition, chapter VIII envisages the imposition of **interoperability requirements and data-sharing mechanisms and services for operators of data spaces** that could be supplemented by way of delegated acts (articles 28 to 30).

All those provisions would make it easier to move data and applications (from private photo archives to entire business administrations) from one provider to another without incurring costs.[4]

### Safeguards on access to data in an international context

Chapter VII (article 27) puts in place safeguards to **address unlawful third-party access to non-personal data** held in the EU. The proposal requires providers of data-processing services to implement a set of technical, legal and organisational measures to handle access requests from authorities in non-EU countries to non-personal data held in the EU. Third-country court decisions or judgments requiring a provider to transfer or give access to non-personal data should, in principle, only be recognised or enforceable if based on an international agreement (e.g. a mutual legal assistance treaty). In the absence of such an agreement, transfer or access to such data by third-country authorities would be allowed only if specific requirements and safeguards are met (e.g. the third-country system requires a reasoned and proportionality-based assessment subject to a review by a competent court in the third country).

### Databases

Chapter X (article 35) amends the 1996 EU Database Directive to clarify that the specific legal protection envisaged under that directive (the *sui generis* right) does not apply to databases containing data obtained from or generated by the use of IoT products or related services (e.g. connected devices).

### Enforcement and penalties

Chapter IX (articles 31 to 34) lays down the implementation and enforcement framework. Member States would need to designate one or more competent authorities as responsible for the application and enforcement of the new rules. When more than one competent authority is designated, the Member State should also designate a coordinating competent authority. Moreover, Member States should lay down the rules on penalties applicable to infringements of the regulation, and notify the Commission of the designated competent authority or authorities and the rules on penalties.

## Advisory committees

The European Committee of the Regions (CoR) and the European Economic and Social Committee (EESC) each adopted opinions on the proposed data act in June 2022.

## National parliaments

The deadline for the submission of reasoned opinions on the grounds of subsidiarity was 16 May 2022. The German Senate (Bundesrat), the Czech Senate, the Spanish Cortes Generales and the Dutch Senate all entered political dialogue with the Commission on the proposal.

## Stakeholder views[5]

Some of the main contentious points raised so far are listed below.

**Objectives, scope and impact on innovation**

BusinessEurope calls on EU lawmakers to preserve the contractual freedom businesses enjoy when it comes to data sharing, for instance by including rules according to which making data available would be adequately compensated, and by ensuring clear enforceable obligations for third parties receiving data. Allied for Startups recommends that lawmakers establish clear and future-proof

criteria to determine which products are within the scope of the regulation. Similarly, Digital Europe argues that some provisions will undermine companies' contractual freedom and have the opposite effect than intended. The organisation considers it important that data-sharing agreements remain voluntary and commercially viable. It proposes that the EU support and encourage companies to share data, for instance through schemes allowing companies to cooperate closely without falling under antitrust legislation. It also thinks that separate and targeted approaches to business-to-business and business-to-customer data access and sharing should be set out in the final text.

VDMA, representing European companies in the mechanical engineering industry, argues that the proposed data act should refrain from a general and undifferentiated obligation to make B2B machine data available, and that data sharing in a B2B context should in general remain voluntary and based on contractual freedom. VDMA also believes that an obligation to share data might endanger investment in research and development. Along the same line, the Alliance for the Internet of Things Innovation (AIOTI) asks for clarifications on the scope of B2B and the B2G data-sharing provisions. The European Automobile Manufacturers' Association (ACEA) fears that some of the requirements set by the proposal are simply unworkable, and calls on lawmakers to introduce and define a notion of 'accessible data', among other things. The Software Alliance warns that mandating data sharing – or, equally, restricting organisations from sharing or transferring data to third countries – would prevent EU businesses from reaping the full benefits of the digital transition, and would render them less able to innovate and compete effectively in global markets.

BEUC, the EU consumer protection organisation, stresses that the proposed data act should ensure that customers are in control of their data, for instance through a more simple-to-exercise data portability right that extends beyond personal data (so that they can, for example, take all their data from one service to another if they wish). DigitalEurope stresses that the proposed data act should apply to finished connected products (not to components embedded or integrated into another product), clarify that it is only applicable to raw data, and identify data holders based on the notions of control and ability to make data available. ACM, the Dutch competition law authority, argues that the proposed act could still be improved in terms of solving interoperability problems, in particular by fostering the use of open standards for interoperability (and not only for switching).

**Making data available to public sector bodies in exceptional circumstances**

BusinessEurope is in favour of enshrining in EU law a limited set of 'exceptional need' situations that would entitle public sector bodies across the EU to claim data access. DigitalEurope also stresses the need for more stringent conditions to prevent the risk of public bodies misusing data supplied to them. The European Data Protection Board (EDPB) and the European Data Protection Supervisor (EDPS) have expressed deep concerns about the lawfulness, necessity and proportionality of the obligation to make data available to public sector bodies and EU institutions, agencies and bodies in case of 'exceptional need'. The EDPB and the EDPS recall that any limitation on the right to personal data must have a legal basis that is adequately accessible and foreseeable, and formulated with sufficient precision to enable individuals to understand its scope. In accordance with the principles of necessity and proportionality, the legal basis must also define the scope and manner of the exercise of the competent authorities' powers, and be accompanied by sufficient safeguards to protect individuals against arbitrary interference. The EDPB and the EDPS observe too that the circumstances justifying the access are not narrowly specified, and consider it necessary for the legislator to define much more stringently the hypotheses of emergency or exceptional need. Moreover, the EDPB and the EDPS consider that certain public sector bodies and EU institutions, agencies and bodies should be excluded from the scope of the regulation.

**Trade secrets and data protection**

DOT Europe proposes providing more robust safeguards for trade secrets, competition and intellectual property (IP), to avoid undermining investment in innovation. AIOTI recommends that the scope of protection be expanded to cover not only trade secrets but also confidential business data. The International Road Transport Union stresses that the proposed legislation should not allow

data holders to invoke 'trade secrets' as an excuse to refuse users access to their own data. Several companies active in the digital advertising and marketing ecosystem call on lawmakers to ensure that the proposed data act aligns with the GDPR, while SME industry representatives warn of potential conflicts between the Data Act and the GDPR, and emphasise the importance of ensuring a fair playing field.

**Cloud regulation, data portability and free-flow of data**

AIOTI recommends clarifying data-sharing requirements on design, manufacturing and mandatory elements to contracts; aligning data-sharing obligations with industrial reality; and promoting cooperation between providers to enable cloud switching. BusinessEurope asks for removing the proposed restrictions on the transfer of non-personal data, arguing, in particular, that SMEs would have to perform investigations on the laws of a third country, something that even large enterprises find challenging in terms of compliance costs and business opportunities. Allied for Startups calls for making interoperability obligations proportionate to the provider's technical capacities, removing all barriers to cloud switching from the entry into force of the data act, and apply the same switching rules to all cloud offers. They also ask to restrict the ability of start-ups to share their data internationally only when there are significant and legitimate risks of data access by third-country governments. According to the Computer & Communications Industry Association, the proposed data act leaves considerable room for excluding non-EU cloud companies from parts of the European market, and is not in line with the provisions on gatekeepers under the DMA.

**Enforcement**

ACM calls on EU lawmakers to set up an effective oversight mechanism to implement the proposed data act and coordinate the individual Member States' supervisory authorities. BEREC, the EU-wide group of telecoms regulators, calls for the involvement of the national electronic communications regulators in implementing the future regulation. Digital Europe proposes to set up formal coordination and establish consistency, allowing for the identification of one single lead competent authority and an EU-level body able to make binding decisions. The organisation also wants a longer transition period of 36 months to allow for the development of relevant interoperability standards and for companies to prepare for compliance.

# Academic views

**Objectives, scope and impact on innovation**

An EPRS study suggests a data governance model based less on the commodification of data (i.e. enhancing access and sharing data for private profit) and more on the use of data in the public interest, and on the recognition of collective data needs and rights.

More concretely, various concerns have been expressed about the provisions enshrined in the draft data act. Some experts warn that the design of the proposed user rights mechanism suffers from multiple problems (i.e. insufficient scope of data, lacking technical interoperability, high transaction costs) that will make it weak and largely ineffective.[6] They argue the act should instead focus on setting easier data-sharing and user empowerment mechanisms, especially for enabling more innovation in the data economy. The Centre on Regulation in Europe (CERRE) experts recommend limiting the scope of the data access obligation to raw data generated by the use of the product, and exempting not only micro- and small enterprises but also medium-sized enterprises from having to provide data access to connected products. They also propose to exclude from the new law's scope of application only those products that provide general connectivity and computing resources (e.g. internet service providers, servers or PCs) that are fully configurable by the user; to allow users to transfer data to any third party they deem useful (including gatekeepers under the DMA); and to remove the no-competition clause.

Coherence with other legislative instruments, including the Database Directive, the Open Data Directive and the DMA, has also been called into question.[7] In that regard, a European Parliament

study on intellectual property rights (IPR) proposes to amend the draft text, among other things, in order to extend the scope of the new rights on data access, sharing and use to certain larger (not purely data-processing but data-driven) services that are not gatekeepers under the DMA.

The Center for Data Innovation warns about the potential negative effects on the EU market economy, and asks EU lawmakers, among other things, to minimise the burdens of compliance and barriers to entry for all IoT companies seeking to provide their services to European consumers, and to clarify the effect on international data flows.

**Making data available to public sector bodies in exceptional circumstances**

The proposed act's data-sharing requirements to the benefit of public sector bodies in exceptional circumstances are unclear. Some highlight that, although one could understand what constitutes 'exceptional circumstances' under article 14 (e.g. the coronavirus pandemic), the situations covered by article 15 are not clear-cut, and the requirements set by article 15(c) may prove challenging to meet.[8] In the European Parliament IPR study mentioned earlier, the authors ask EU lawmakers to reconsider whether the provisions on data sharing based on exceptional need should be extended to small and micro-enterprises. CERRE stresses that the circumstances under which an exceptional need arises so that public bodies may request data access would require a clearer and narrower definition. Along the same lines, the Center for Data Innovation believes the Commission should further amend the proposed data act to clarify issues such as: the maximum period over which public institutions can hold business data; the security measures that must be in place to protect data shared with the public sector; and the steps a government agency needs to take to request B2G data sharing.

**IP protections and trade secrets**

Commentators stress that it is unclear how effectively any trade secrets will be protected in practice, and there are calls to clarify the relationship with IP rights (particularly with trade secrets legislation).[9] The Max Planck Institute for Innovation and Competition welcomes the initiative, but warns about a number of loopholes regarding how the proposed rules will interact with existing IP protection.[10] The experts call, among other things, for providing guidance on the applicability of programming interfaces (APIs) and the possible conflict that might exist if IP rights such as copyright and patents protect these APIs. The European Parliament IPR study mentioned earlier asks EU lawmakers to clarify that fair, reasonable and non-discriminatory (FRAND) licences would cover necessary and justified-use acts for trade secrets. CERRE experts warn that the exclusion of machine-generated data from the scope of the *sui generis* right would likely require amending the Database Directive, and recommend introducing a rebuttable presumption that access to raw data does not impede trade secrets.

**Data protection and expansion of the scope of data portability rights in EU law**

Experts have highlighted the interplay between the proposed data act and the EU data protection regime. Some authors warn that the proposed act might undermine the rules on personal data protection by giving more legitimacy to profit-driven personal data processing, and that the proposed act might be inconsistent with the goals of the GDPR, consequently precluding the consistent application of both sets of rules. Others are calling for clarification on how the free-of-charge requests for GDPR data portability relate to data access in the proposed act, given that it *does* foresee compensation, and warn that the prohibition on the data receiver using the data it receives to develop a competing product may create legal risks.[11] They also stress that the proposed data act's exclusion of gatekeepers from data access risks having little impact without further alignment with the scope of the GDPR's right to data portability. They therefore call on EU lawmakers to amend the text by providing that the exclusion of gatekeepers from data access should also apply in the context of the GDPR's right to data portability.

**Cloud regulation and free-flow of data**

A CEPS study warns that the provisions on preventing international transfer of, or governmental access to, non-personal data held in the EU, as well as those on cloud switchability, are likely to deepen divides between national governments that are traditionally supportive of the principle of the free flow of (non-personal) data and those keen to localise industrial data within the EU. Similarly, CERRE shares the same concerns about data localisation in the EU, and calls on EU lawmakers to delete this provision. Critics warn that the EU is struggling to build an EU cloud infrastructure, and fear that the proposed data act will go towards data protectionism by favouring EU cloud providers over US ones. With regard to the provisions on switching between cloud and edge services, the European Parliament IPR study mentioned earlier proposes to envisage an exception for SMEs as providers (at least for B2B relations), to revise the relation to the DMA, and to clarify the concept of 'functional equivalence'. Some have also argued that excluding online content services from switchability is unjustified, and that the new right should be applicable to imported, (co-)created and (co-)generated data, applications and digital assets.[12]

**Enforcement**

Experts call on lawmakers to consider aligning enforcement with the Data Governance Act to achieve synergies, and to include a mechanism in the proposed data act determining which Member State is competent to act in cases of cross-border relevance.[13] The European Parliament IPR study mentioned earlier proposes to clarify and strengthen the role of private law enforcement, to make the proposed public enforcement structures optional for the Member States, and to streamline them, at best by a one-stop-shop approach including an EU 'meta authority' for data-related topics. It has also been proposed to complement the enforcement provisions with details on how smart contracts could interact with different domestic legal systems.

# Legislative process

In Parliament, the file has been assigned to the Committee on Industry, Research and Energy (ITRE), with Pilar del Castillo Vera (EPP, Spain) as rapporteur. In March 2023, the plenary adopted its position on the proposal (with 500 votes in favour, 23 votes against, and 110 abstentions) on the basis of the ITRE report, including several significant amendments to the Commission's proposal. Among other things, the first-reading text:

- clarifies the types of data falling within the scope of the regulation (e.g. data that have been processed by 'complex proprietary algorithms' are excluded);
- strengthens trade secret protection to the benefit of data holders;
- clarifies provisions to make it easier for customers to switch cloud providers;
- extends the fairness check to all companies regardless of their size, to prevent large companies from imposing unfair contractual terms;
- sets stricter conditions on B2G data requests (i.e. only non-personal data should be concerned);
- refines the proposed technical and financial conditions for cloud switching and introduces safeguards against unlawful international data transfer by cloud service providers.

In the Council, Member States' representatives (Coreper) reached a position in March 2023, allowing the Council to enter negotiations with Parliament on the text. The Council proposes, inter alia, to add a minimum set of elements to be taken into account when determining the level of compensation for the data holder to make data available; to state that, under certain conditions, data holders have the right to reject data access requests in order to protect their trade secrets; and to make the provision concerning effective switching clearer and more widely applicable. The Swedish Presidency has entered into interinstitutional negotiations with the European Parliament (trilogues) on the final version of the proposed act. The first trilogue meeting took place on 20 March 2023. A second is scheduled for 23 May.

## EUROPEAN PARLIAMENT SUPPORTING ANALYSIS

Data act, initial appraisal of a Commission impact assessment, EPRS, European Parliament, July 2022.

Governing data and artificial intelligence for all, EPRS, European Parliament, July 2022.

IPR and the use of open data and data sharing initiatives by public and private actors, Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, May 2022.

## OTHER SOURCES

Data Act, Legislative Observatory (OEIL), European Parliament.

## ENDNOTES

1 See European Commission, Data Act: Proposal for a Regulation on harmonised rules on fair access to and use of data, 23 February 2022.

2 See European Commission, Impact Assessment report and support studies accompanying the Proposal for a Data Act, 23 February 2022.

3 See Annex 4 to the impact assessment explaining the challenges in implementing the Database Directive.

4 See European Commission, Data Act – Questions and Answers, 23 February 2022.

5 This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'European Parliament supporting analysis'.

6 See W. Kerber, Governance of IoT Data: Why the EU Data Act will not Fulfill Its Objectives, 2022.

7 A. Fernandez, 'The Data Act: The Next Step in Moving Forward to a European Data Space', *European Data Protection Law Review*, Vol. 8 (2022), Issue 1, pp. 108-114. See also G. Hennemann, B. Karsten and M. Wienroeder, The Data Act proposal, Literature Review and Critical Analysis, 2023 (Part I, Part II, Part III), 2023.

8 See A. Christofi and B. Peeters, B2G data sharing for smart city development in Europe: a first look at the Data Act Proposal (Part II), 2022.

9 See I. Graef and M. Husovec, Seven Things to Improve in the Data Act, 2022.

10 See J. Drexl and others, Position Statement of the Max Planck Institute for Innovation and Competition of 25 May 2022 on the Commission's Proposal of 23 February 2022 for a Regulation on Harmonised Rules on Fair Access to and Use of Data (Data Act), Max Planck Institute for Innovation & Competition Research Paper No 22-05. See also V. Moscon, A Closer Insight into Copyright related Issues in the Position Statement of the Max Planck Institute for Innovation and Competition on the Commission's Proposal for a Data Act, June 2022.

11 See I. Graef and M. Husovec, above.

12 See S. Geiregat, The Data Act: Start of a New Era for Data Ownership?, September 2022.

13 See I. Graef and M. Husovec, above.

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