

THE EU DATA ACT

Towards a new European data revolution?

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CEPS Policy Insights

No 2022-05 / March 2022



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Abstract

On 23 February 2022, the European Commission published its long-awaited legislative proposal for a new Data Act. The proposal marks a significant shift in the EU's approach to the data economy. It aims to challenge the constitution of data monopolies across various sectors, by reshaping existing power structures that favour large data incumbents and moving to solidify data as a non-rival good.

Drawing on desk research and a series of interviews conducted with key experts in Brussels, this CEPS Policy Insights paper proposes to unpack this new legislative proposal by exploring its genealogy, the key policy issues at stake, and identifying the main expected political drivers for the negotiations to come.

Despite the Commission's intentions to address market concentration and limit the EU's over-reliance on foreign companies in data-intensive sectors, Member States and European industry's cautious approach to the proposal is indicative of greater challenges to come.

The Data Act's broad territorial reach, revolutionary approach to data access, and extensive technical specifications is expected to have broad implications for citizens, companies and public authorities alike, inside and outside the EU. Upcoming negotiations will be shaped primarily by the outcome of fierce battles between large US-based data incumbents and European actors over the control of their data, complex arbitrages at the Member States' level in prioritising the contradictory interests of dominant national champions and smaller companies in relation to data access, and strong political divides on the opportunity to further the digital sovereignty agenda at EU level.

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Introduction

On 23 February 2022, the European Commission released its long-awaited legislative proposal for a new Data Act. In line with the [2020 European Data Strategy](#) for data, and in the wake of the recent adoption of the [Data Governance Regulation](#), this new proposal could profoundly reshape the European regulatory framework for data, not only from the digital sector's perspective, but for the larger EU economy.

This [new legislative proposal](#) aims to 'maximise the value of data in the economy by ensuring that a wider range of stakeholders gain control over their data and that more data is available for innovative use'. In doing so, it considers various innovative tools to relocalise data processing services at the European level and profoundly transform existing power structures favouring large data incumbents at the expense of smaller (European) actors.

This legislative proposal is extremely bold, as the European executive intends to invert recent market trends that has led to the consolidation of the 'internet economy' and generated data monopolies in various sectors, such as healthcare and the automotive industry.

While it is laudable for the Commission to address market concentration and limit the EU's over-reliance on foreign companies in strategic data-intensive sectors, European industry's obvious lack of appetite for new binding data transfer requirements is indicative of the great challenges to come.

Similarly, EU governments have remained rather cautious in reacting to the proposed text, though some appear to welcome the possibility to oblige businesses to share their data with public authorities in the context of 'public emergencies and situations of exceptional needs'.

The Data Act proposal also marks a significant shift in the EU's approach to the wider data economy, from championing the free flow of non-personal data in the context of the 2016 Digital Single Market (DSM) strategy to the introduction of specific requirements for governing and limiting data transfers in the context of the Data Act.

Drawing on extensive desk research and a series of interviews conducted between January-February 2022 with EU and national officials in Brussels, this CEPS Policy Insights paper proposes to unpack this legislative proposal by (1) exploring the genealogy of the proposal, (2) presenting the key policy issues at stake, and finally (3) identifying the main expected political drivers for the negotiations to come.

A landmark proposal of the von der Leyen Commission, with only a few supporters.

The launch of the Data Act negotiations had been long-awaited since the beginning of the von der Leyen Commission. This proposal was indeed announced and featured in President Ursula von der Leyen's 2020 [State of the Union](#) speech:

"The amount of industrial data in the world will quadruple in the next five years - and so will the opportunities that come with it. [...] And industrial data is worth its weight in gold when it comes to developing new products and services. But the reality is that 80% of industrial data is still collected and never used. This is pure waste."

The 2020 [Communication on the European Strategy for data](#) further detailed this political ambition and the current challenges around data transfers in the EU economy, identifying that:

"In spite of the economic potential, data sharing between companies has not taken off at sufficient scale. This is due to a lack of economic incentives (including the fear of losing a competitive edge), lack of trust between economic operators that the data will be used in line with contractual agreements, imbalances in negotiating power, the fear of misappropriation of the data by third parties, and a lack of legal clarity on who can do what with the data (for example for co-created data, in particular IoT data)".

Following its work programme, the Commission released an [Inception Impact Assessment](#) in May 2021, followed by a public consultation, where industry expressed serious concerns and a rather unanimous opposition towards the introduction of binding requirements for the private sector for Business-to-Government (B2G) and Business-to-Business (B2B) data transfers in the EU. A thorough analysis of recent position papers and qualitative research interviews also confirmed the limited appetite of EU Member States for a greater regulatory burden for their national companies. Despite initial support by EU leaders for the Commission's overarching intentions, the Member States' ambivalence or hesitancy towards this legislation was clearly illustrated by the Netherlands' [recent non-paper](#) published prior to the publication of the proposal. As the only Member State to have publicly shared its preliminary position on the draft proposal, the Netherlands has voiced serious concerns towards binding data transfers obligations for businesses. Instead, it supported the development of market-based mechanisms, including the development of common, private-led data sharing standards.

Similarly, the technological and automotive industries have already [signalled](#) their intention to push back against the various legal and commercial constraints that the Data Act would introduce. Their opposition relates primarily to the mandatory nature of the data sharing requirements introduced, as well as the restrictions they would create for data flows with third countries.

The concerns expressed by industrial actors and governments alike confirm the view that this legislative proposal was primarily pushed by the Commission rather than individual national governments, with the aim of harmonising the emerging European data market. While other key recent EU data policies created conditions for enhanced data transfers, the Commission has now identified, through the Data Act proposal, the need to address the actual modalities and contractual relations governing data value sharing.

While the Council of the European Union appeared relatively hesitant, the European Parliament has already voiced its general support to the Commission's approach. As part of a 2021 European Parliament [own-initiative report](#) on the European strategy for data, the Rapporteur had indeed supported the introduction of more stringent B2B and B2G data transfer requirements, underlying that 'Europe needs to regulate on compulsory data access, where necessary, applying especially to those value chains and data ecosystems in which smaller operators have been involved in creating data sets, but do not have access to the data that they have taken part in producing'. He also added that 'there are also special circumstances where B2G data sharing needs to be compulsory for the common good'.

Unpacking the five key policy issues in the Data Act proposal

The legislative proposal is 42 articles long and likely to trigger significant debate at both national and EU level, considering its broad scope and direct implications for EU citizens, companies and public authorities.

Interviews conducted under Chatham House rules with key experts within the data field suggest that five controversial issues are expected to shape the upcoming negotiations. These key issues include the (i) voluntary/binding nature of data transfers in the context of B2B and B2G data transfers, (ii) the modalities and scale of economic compensation for the private sector, (iii) the nature of standardisation processes for enhancing data portability, (iv) provisions related to data processing services (namely the cloud industry) in terms of cloud 'switchability' and data localisation, and (v) the articulation of this proposal with the existing EU digital policy *acquis* and ongoing parallel negotiations.

The **voluntary or binding nature of data transfers in the context of B2B and B2G** is likely to become a major point of friction within both the European Parliament and the Council. The proposal indeed intends to prohibit unfair contracts in relation to data-related obligations in the context of B2B sharing, in view of supporting small and medium sized enterprises (SMEs) in accessing data. To do so, it introduces an 'unfairness test' to protect weaker commercial parties. In addition, the Commission plans to develop model contractual terms for B2B data sharing contracts. Inevitably, this new regulatory framework is likely to be opposed by dominant economic actors in their respective markets. The vast territorial reach of the proposal extends to manufacturers of products that are sold on the EU market and to providers of data processing services offering such services to customers in the EU. Consequently, it is thus likely to be forcefully challenged by non-European actors.

Similarly, in relation to **B2G data sharing**, recent statements¹ from large trade associations suggest that the extraction, aggregation and securisation of data will create additional costs for the private sector that will need to be financially compensated. The Commission proposal indeed envisions an obligation for B2G data sharing in ‘exceptional [situations of high public interest](#)’ (the definition and scope of this notion is highly controversial), such as public health emergencies, human-induced disaster but also cybersecurity incidents. The proposal stipulates that data should be made available free of charge to address public emergencies, and on a cost-basis, otherwise topped with a ‘reasonable margin’.

Another controversial item on the negotiation table refers to **standardisation and the expansion of the scope of data portability rights** in EU law. Complementing Article 20 of the General Data Protection Regulation (GDPR), the proposal indeed expands the legal grounds for the portability of users’ data, ranging from personal data only to data generated by devices and services connected to the ‘Internet of Things’ (IoT). Thus, a number of US-based economic players will have a clear interest in preserving the current status quo and challenging this new ‘right of users to access and use data generated by the use of products or related services’. This is even more so as article 5 of the Data Act introduces a right for the user to share data with third parties, while excluding core platform services, the so-called gatekeepers (as defined in the Digital Markets Act), from benefiting from these new data sources.

The Data Act negotiations will also revive heated EU discussions on the **regulation of the cloud industry**, notably in the context of ongoing initiatives for a European federated cloud and in the wake of the recent negotiations of the Data Governance Regulation. In its article 27 on international access and transfer, the Commission proposal states that:

‘Providers of data processing services shall take all reasonable technical, legal and organisational measures, including contractual arrangements, in order to prevent international transfer or governmental access to non-personal data held in the Union where such transfer or access would create a conflict with Union law or the national law of the relevant Member State’.

This provision, along with new technical specifications for improving cloud’ switchability (within a maximum of 30 days, providing ‘functional equivalence’), is likely to deepen [previous 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.

A final important issue is the **overall articulation of this proposal with the EU digital policy acquis** (including the GDPR, the Directive PSI, and the Regulation on the Free flow of Data) and currently ongoing negotiations (the Artificial Intelligence Act, the ePrivacy Regulation or the Digital Services Act). The 2018 Regulation on the free flow of data had already proposed the introduction of interoperability mechanisms for cloud providers (via the ‘Switching Cloud

¹ See for instance recent statements from [CCIA](#) and [DIGITALEUROPE](#).

Providers and Porting Data' Codes of Conduct), whose development was significantly proactively hindered by large US-based cloud providers over the past few years.

Yet, the Data Act proposal's regulatory approach would risk both duplication and making the available toolbox more complex, without clear incentives to guarantee the level of cooperation needed with data processing services to achieve proper interoperability.

Additionally, while the negotiations on the ePrivacy Regulation remain stuck, industry representatives have pointed to the contradiction in both encouraging data collection and sharing between the private sector and governments, while at the same time banning systematic data retention by the telecoms industry, for instance. If the goal is to increase data re-use (and thus data processing), the Data Act could also enter into conflict with the GDPR and its principle of data minimisation.

Predictions for the Data Act negotiations amid important shifts in the EU digital power balance

Though it is still too early to understand the possible paths that the negotiations over the Data Act may follow or even map the policy positions of all relevant stakeholders on all the issues at stake, a few relevant policy dynamics deserve to be highlighted.

As for any other legislative text, the greater the speed of an actor in defining and advancing its position, the more likely its influence will be on decision outcomes. Quite clearly, the Netherlands appears to benefit from being the 'first-mover' in the Council. The Dutch government quickly positioned itself prior to the unveiling of the proposal, while most Member States are yet to formulate their national position. This speed differential between certain countries is consistent with many previous negotiations (including the Regulation on the free flow of data or the Digital Services Act) and is likely to influence the first stages of the Data Act negotiations at the technical level.

The interviews with EU officials and diplomats from Member States' Permanent Representations to the EU also suggest that the negotiations on the Data Act will be divided between sovereignty-minded and Atlanticist-liberal Member States. Indeed, the Data Act negotiations are likely to mirror the negotiations over the cloud-related provisions of the recent Data Governance Regulation, pitting France, as well as Spain and Italy (and to some extent Germany) against a range of eastern European Member States, as well as Ireland. It should be emphasised that Germany has remained rather ambiguous regarding the Data Act, as there appears to be significant disagreement within the new government over which position to take. This divide is also clear within the Commission, as evidenced by the diverging approaches of the cabinets of Commissioners Vestager and Breton towards the Data Act, but also between DG Trade and DG Connect.

Also, it should be noted that the configuration of digital policy alliances in the Council has greatly evolved over recent years, as shown by the recent gradual shift of the Netherlands, but also Denmark, in favour of the ‘sovereigntist’ positions defended by France in the context of the DSA/DMA package. The battle for industrial data has led to a restructuring of previous coalitions, which have benefited the positions defended by France in favour of more digital sovereignty for Europe.

Regarding the timeline of the Data Act negotiations in the months to come, a first reading of the proposal is expected to be carried out under the French Presidency of the Council. France aims to release a progress report on 3 June (during the Telecommunications Council). Nevertheless, the French Presidency’s ambition will be limited due to the timing of the proposal but also because more political capital will be needed for the final stages of the DSA/DMA trilogue negotiations and the next steps of the AI Act negotiations.

Deliberations on the Data Act are yet to formally start in the Council and the European Parliament. Yet we can already expect a fierce battle between large US-based data incumbents and European actors over the control of their data (now increasingly considered as non-rival goods), complex arbitrages at the Member States’ level in prioritising the contradictory interests of dominant national champions (e.g the automotive industry in Germany) and those of smaller companies in terms of data ownership and access, and finally strong geopolitical divides on the opportunity to further the EU digital sovereignty agenda currently pushed by the European Commission.

Conclusion

The Data Act will have broad implications for citizens, companies and public authorities alike, inside and outside the EU, and could profoundly transform the European regulatory framework for data.

Its broad territorial reach, revolutionary approach to data access, and extensive technical specifications will inevitably generate strong oppositions from interest groups. The proposal could also be challenged politically due to its potential inconsistencies with the EU’s broader vision for an open, un-fragmented internet, and its clear contradictions with the Commission’s current international digital trade agenda around data flows.

Finding consensus on these major issues will require broad, yet unlikely, support from all stakeholders, not only in view of the text’s adoption both in the Council and the European Parliament, but to ensure its proper and meaningful enforcement against a rather discontented private sector in the EU and beyond.