# Feedback to the European Commission's adoption of the Data Act

Overall, the Data Act (DA) is a welcome proposal as it broadens access rights to machine-generated data while providing structural conditions for greater sharing and reuse of data. Likewise, it introduces new interoperability provisions to secure a fairer allocation of machine-generated data between users and data holders. However, the proposal falls short in securing an ambitious framework for business-to-government (B2G) data sharing in the public interest. Instead, it relies on an ad-hoc framework which limits data sharing requirements to cases of exceptional need. A stronger mandate was on the table but scrapped in favor of a more moderate option.

The remainder of this submission focuses on five different points where we see a potential for improvement in order to deliver on the objectives laid out in the European strategy for data. They relate to (in order of importance):

1. Rules for business-to-government data sharing (Chapter V);
2. Review of the 1996 Sui Generis Database Right (Chapter X);
3. Access rights to machine-generated data (Chapter II);
4. Rules on interoperability and data sharing services (Chapter VIII); and
5. Terminology and regulatory consistency.

## Rules for business-to-government data sharing

Chapter V is a missed opportunity to develop a systemic approach to B2G data sharing to fulfill public interest goals. In the European strategy for data, the Commission made it explicitly clear that the European data economy was characterized by a shortage of data availability for the public good due to the lack of "private sector data available for use by the public sector to improve evidence-driven policy-making and public services" (p. 7). Yet, the proposed approach – limited to situations of exceptional need – falls short of realizing this ambition and lacks an institutional framework for continuous sharing and reuse of such data. B2G data sharing limited to rare situations of emergency or exceptional use precludes the fulfillment of societal benefits derived from public interest data sharing and use. Furthermore, a strong horizontal standard is needed as the basis for additional sectoral regulation, in particular with regard to the common European data spaces.

However, the need for an approach which fulfills public interest data sharing, use, and reuse has long been on the legislative agenda: in 2014, the Commission Communication on building a European data economy considered a reverse Public Sector Information

approach to foster access to data in the public interest, which was reiterated in the 2017 workshop on access to privately-held data for public bodies. Still in 2017, the mid-term review of the Digital single market strategy laid down the objective to look further at the "access of privately-held data for public administrations for the execution of their public interest tasks" (p. 11). In 2018, the Commission set up a high-level expert group on B2G data sharing which recommended to untap the societal benefits arising from data sharing through an ambitious public interest framework.

Nevertheless, with the Data Act proposal, the Commission favored a low-intensity regulatory option, justifying the intervention in its Impact Assessment Report on the basis of a cost-benefit analysis led by Deloitte. The report explained that the high-intensity regulatory intervention – which delineated public interest use-cases as well as the creation of data steward bodies – "would entail higher administrative and compliance costs for companies (..) without necessarily compensating them with greater benefits".

Despite these conclusions, the Deloitte analysis clearly outlined its own limitations due to the inability "to fully execute a cost-benefit analysis" (p. 244) since it was impossible to quantify the societal benefits coming from a public-interest framework. In light of this acknowledgement, the support study still recommended the Commission to consider a high-intensity regulatory option because of "potential societal, environmental and economic benefits for private and public sectors (in terms of cost savings, efficiency gains) derived from a more structured and harmonized approach that incentives business-to-government data sharing use cases".

In this light, it is problematic that measures that flip a market-centric logic by allowing the transfer of data and associated value from the private to the public sector, are ultimately assessed in almost purely economic terms. And it is concerning that the Commission justified its regulatory choice based on a limited cost-benefit analysis, despite contrasting indications provided by Deloitte itself. In the end, the high-intensity regulatory option was rejected mainly because of the administrative and compliance costs that large companies would have incurred to set up data steward bodies, without accounting for society-wide benefits. We provide a more detailed analysis of the challenges with the impact assessment of public value in our opinion "Data Act impact assessment fails to grasp societal value of data".

Therefore, the Commission proposal for Chapter V should be amended to include not only sharing in the case of emergencies, but also sharing requirements based on clearly defined situations of public interest. In addition, to make B2G sharing obligations systemic, Chapter V should be modified to establish a "public data commons" institution, acting as a steward for aggregated public interest data and providing access to third parties, including public sector bodies, research institutions, and SMEs conducting work in the public interest. The

public data commons would evaluate the legitimacy of requests and assess the access-requesting entities, analogous to those laid down in article 21. This way, the public data commons would have the mandate to designate data available for further reuse, thus fostering an approach where the shared data between private and public sector authorities is managed as a public good.

## Review of the sui generis database right

While we welcome the fact that the proposal does clarify that the Sui Generis Database Right (SGDR) does not apply to data generated by the use of connected devices in Chapter X of the proposal, this limited exclusion is not sufficient. By excluding these types of data, the Commission once more implicitly acknowledges that the SGDR protection introduced by the 1996 Database Directive with the objective of encouraging the production of databases in Europe does not make sense in an environment where almost all business — and societal — processes create substantive amounts of data. The targeted limitation of the scope of the SGDR does not adequately reflect this situation and falls short of the Commission's own stated objective of reviewing the SGDR. The Commission should therefore undertake a comprehensive review of the SGDR with the objective of substantively updating the 1996 Database Directive during the legislative cycle.

In addition, the limitation of the scope of the SGDR right in the DA proposal needs to be expanded to also cover B2G data sharing in Chapter VI. The requirement in recital 63 that "data holders should exercise their rights in a way that does not prevent the public sector body and Union institutions, agencies or bodies from obtaining the data, or from sharing it" should also be codified in Chapter X of the proposed Act, for example by introducing the language that mirrors the language that can be found in Article 5(7) of the Data Governance Act (DGA).

## Access to machine-generated data

Chapter II of the proposed Data Act follows an approach that expands on the right to data portability beyond personal data to cover all data generated by connected devices and related services. As we argue in our policy brief on the issue, this approach is the right mechanism to increase data sharing and reuse of information beyond private actors and we welcome the clear position the Commission has taken against introducing new property-like rights for data.

We see two main aspects where the proposal can be strengthened further. First, in its current form, article 6(2(e)) prevents third parties from developing a competing product from the data they receive from data holders. This contradicts the overall objective of Chapter II to promote data reuse, as well as the interoperability rules that the Commission aims to

promote. Third parties should be able to develop competing products on the same basis as competing services.

Second, article 5 of the proposal establishes a right for users to share data generated by the use of a product or related service to a third party "acting on behalf of a user". It is unclear whether the third party corresponds to data intermediation services and data altruism organizations within the DGA meaning or to data recipients conveying the data request on behalf of a user. Given the European data strategy's ambition to develop common European data spaces, data governance structures introduced by the DGA should be adequately leveraged in the DA. Article 5 should therefore clarify that third parties acting on behalf of users correspond to data altruism organizations and data intermediation services within the DGA meaning.

## Rules on interoperability and data sharing services

The DA introduces interoperability as a key design principle of the European data economy, applying it in particular to the emerging European common data spaces. Chapter VIII is a welcome introduction of interoperability standards and requirements, which are correctly defined as key means of achieving the goals of the data strategy.

In light of the Commission's ambition to develop common and interoperable European data spaces, the initial proposal would benefit from an approach clarifying as much as possible the technical requirements for operators of data spaces and data processing services. As highlighted by the JURI support study on data sharing, "the provisions on interoperability implement a comprehensive framework for operators of data spaces, but fall short of establishing conditions for effective data portability, access and sharing as the technical standards still have to be developed" (p. 117). Therefore, the Commission proposal should extend the essential interoperability applicable to operators of data spaces also to data processing services – given their focus on data interoperability and on technical interoperability. General principles of interoperability applicable to operators of data space should guide future standardization processes of cloud portability, data access, and data sharing.

## Terminology and regulatory consistency

Last but not least, the Commission proposal would benefit from greater consistency with other policy files.

First, as outlined by the EPDB-EDPS opinion, there is a lack of consistency with key GDPR concepts that remain undefined throughout the Act, such as the definition of 'personal data', 'consent', 'controller', 'data recipient', 'personal data', 'data subject', and 'processor'.

Importantly, the proposed definition of ‘user’ in article 2(5) does not distinguish between situations where users are data subjects or legal persons, therefore leading to incidental rights to data portability depending on the legal title under which they use the product or related service. Likewise, with the DGA, the proposal misses defining recurrent terminology: ‘data sharing’, ‘data user’, ‘data reuse’, ‘non-personal data’, and ‘permission’. In particular, a significant omission concerns the term ‘access’, defined in the DGA but not in the DA – despite its intention to provide access rights to users’ machine-generated data.

Second, there is a lack of alignment between the DGA and DA when the same terminology is used. This is clear in the definition of ‘data holders’ that are differently defined across both measures, although they advance the same objectives of the European strategy for data. The recent Regulation on European health data space exacerbates this inconsistency by introducing a third data holder definition.

Finally, the concept of common European data spaces, one of the key principles of the European data strategy remains underdeveloped across the DGA and the DA, following a trend undertaken by both the Digital Europe Working Programme for 2021-2022 and the Commission Staff Working Document on common European data spaces. The same lack of conceptual clarity is also noticeable for ‘operators of data space’: a concept introduced by the DA to enhance interoperability between sectoral data spaces, but left undefined.

As we explained more in depth, these issues need to be addressed to reduce friction across policy files and increase legal certainty in the Commission’s approach to the development of common European data spaces.

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