Council of the European Union

Brussels, 25 February 2022
(OR. en)

6596/22
ADD 3

Interinstitutional File:
2022/0047(COD)

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CODEC 214

COVER NOTE

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	24 February 2022
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	SEC(2022) 81 final
Subject:	REGULATORY SCRUTINY BOARD OPINION - Data Act

Delegations will find attached document SEC(2022) 81 final.

Encl.: SEC(2022) 81 final

EUROPEAN COMMISSION

21.01.2022

SEC(2022) 81

REGULATORY SCRUTINY BOARD OPINION

Data Act

{COM(2022) 68}

{SWD(2022) 34, 35}

EUROPEAN COMMISSION
Regulatory Scrutiny Board

Brussels,

Opinion

Title: Impact assessment / Data Act

Overall 2nd opinion: POSITIVE WITH RESERVATIONS

(A) Policy context

The Data Act implements the European strategy for data and the Intellectual Property Action Plan. It aims to ensure 'fairness' in the allocation of data value among actors of the data economy, including in business-to-consumer (B2C), business-to-business (B2B) and business-to-government (B2G) situations. It aims to clarify rights of access to and use of data and databases. It also aims to enhance the use of industrial and personal data (in compliance with the GDPR) in the economy and for 'common good' purposes, such as improving public services and better policy making. It will also support the European Green Deal and digital transformation of European industry. The initiative includes a targeted review of the Database Directive and complements the recently adopted proposal for a Data Governance Act. These facilitate voluntary sharing of data (but not the material rights) by individuals and business, and harmonise conditions for the use of certain public sector data.

(B) Summary of findings

The Board appreciates the improvements to the revised report in line with the Board's recommendations, notably on the problem definition and the analysis of costs and benefits.

However, the report still contains significant shortcomings. The Board gives a positive opinion with reservations because it expects the DG to rectify the following aspects:

(1) The report does not comprehensively explain the articulation of the initiative with other EU legislation.

(2) The definition of data, its content and boundaries, as well as the extent of access to data are not clearly outlined. It is not clear why the report limits the scope for consumers and companies to connected products and related services.

(3) The report is not sufficiently clear on the content of some of the policy options notably on the effective application of some of the concepts contained therein.

(4) The report lacks clarity on the conditions for data sharing in B2G situations and

This opinion concerns a draft impact assessment which may differ from the final version.

a more clear-cut distinction between 'exceptional situations' and 'public emergencies'.

(C) What to improve

(1) The report should include a comprehensive analysis of the articulation of the initiative with other EU legislation and initiatives in the same area such as the Digital Services Act.

(2) A clear definition of 'data', its content and boundaries should be provided. The report should clarify the issue of data ownership, relative to primary and secondary uses.

(3) The report should justify why it limits the scope for consumers and companies to data generated by connected products and related services. It should clarify why it excludes data from software or web services, which often would seem to have similar characteristics.

(4) Building on the clearer explanation of the dual baseline used for the analysis of impacts, the report should strengthen the description of the relationship between the two in terms of their methodological assumptions. It should also be clearer on the complementarities of the two baselines or their distinct, independent, character.

(5) Despite a better overall description of the proposed measures contained in the options, the report should provide further clarity on the various concepts and notions. These include the effective application of the once-only principle, prevention of gold-plating, the definition of 'reasonable compensation' and 'duly justified purpose', and the operation of the proposed 'unfairness test', as well as its articulation with DMA and DSA initiatives.

(6) The report should be more precise on the B2G data sharing situations, clarifying whether – and how – this is predominantly a problem for businesses or for governments. The report should better frame the concept of 'exceptional situations', leaving less room for (mis)interpretation, clarifying the conditions under which these would need to be justified by the public sector bodies and better distinguishing between 'exceptional situations' and 'public emergencies', which determine whether or not the data holder receives compensation. In the same vein, the analysis should include more details on the management of public emergencies leading to request for data.

(D) Conclusion

The DG must revise the report in accordance with the Board's findings before launching the interservice consultation.

If there are any changes in the choice or design of the preferred option in the final version of the report, the DG may need to further adjust the attached quantification tables to reflect this.

Full title	Impact Assessment on Data Act
Reference number	PLAN/2021/10588
Submitted to RSB on	13 December 2021

Date of RSB meeting	Written procedure

ANNEX: Quantification tables extracted from the draft impact assessment report

The following tables contain information on the costs and benefits of the initiative on which the Board has given its opinion, as presented above.

If the draft report has been revised in line with the Board's recommendations, the content of these tables may be different from those in the final version of the impact assessment report, as published by the Commission.

Overview of benefits (total for all provisions) of the preferred Options

I. Overview of Benefits (total for all provisions) – Preferred Option		
Description	***Amount***	***Comments***
	Direct benefits	
Efficiency and productivity gains	EUR 196.7 billion p.a.	Benefits for businesses expected to be realised by 2028.
Investments	EUR 30.4 billion p.a.	Benefits for businesses and consumers.
Reduced legal costs	Not quantifiable	Benefits for businesses.
Contractual fairness	EUR 7.4 billion p.a.	Businesses, especially SMEs, are expected to benefit.
Reduced costs of moving between aftermarket and other service providers	EUR 68.1 billion p.a.	Benefit for business customers and consumers.
Reduced economic losses in emergencies	Not quantifiable	Society overall would benefit from data sharing that reduces economic losses in emergencies.
Efficiency gains from more effective environmental protection	EUR 65-93 billion p.a.	Societal and environmental benefits.

Contribution in the area of public health	EUR 76-109 billion p.a.	Societal benefit.
Efficiency gains of national structures	EUR 337 million p.a.	Public sector bodies would experience efficiency gains leading to more confidence in public services.
Lower administrative burden	EUR 155 million p.a.	Large and medium businesses would experience lower compliance costs and less duplication in B2G data sharing. Qualitative benefits include improved reputation and workforce motivation.
Demand for cloud services	EUR 7.1 billion p.a.	Expected to benefit small cloud service providers.
Confidence in cloud services	Not quantifiable	To benefit cloud service providers and to reassure 76% of users who registered concerns about extraterritorial access.
Indirect benefits		
Government revenues	EUR 96.8 billion p.a.	Societal benefits.
Additional jobs	2.2 million	Societal benefits.
Reduced emissions	Potentially 48% reductions through data-driven efficiencies in logistics.	Businesses and societal/ environmental benefits.
Reduced waste	Not quantifiable	Sensor data can identify the source of failures leading for example to a reduction of 450-500 million tonnes of waste in EU construction sector.

II. Overview of costs – Preferred option							
		Citizens/Consumers		Businesses		Administrations	
		One-off	Recurrent	One-off	Recurrent	One-off	Recurrent
RObligation of manufacturers to allow access	Direct costs	n/a	n/a	EUR 410 m n/a	EUR 88 m p.a. Max EUR 300k p.a. (per SME) Max EUR 1 m p.a. (per large companies)	n/a	n/a
	Indirect costs	n/a	n/a	n/a	n/a	n/a	n/a
Ensuring contractual fairness	Direct costs	n/a	n/a	n/a	EUR 69 m p.a.	n/a	n/a
	Indirect costs	n/a	n/a	n/a	n/a	n/a	n/a
B2G data sharing	Direct costs	n/a	n/a	EUR 552.5 m	EUR 78.1 m	n/a	EUR 21.6 m p.a.
	Indirect costs	n/a	n/a	n/a	n/a	n/a	n/a
Facilitate switching between trustworthy cloud and edge services	Direct costs	n/a	n/a	n/a	n/a	n/a	n/a
	Indirect costs	n/a	n/a	n/a	n/a	n/a	n/a
Interoperability	Direct costs	n/a	n/a	n/a	n/a	EUR 1 m (per standard)	n/a
	Indirect costs	n/a	n/a	n/a	n/a	n/a	n/a

EUROPEAN COMMISSION
Regulatory Scrutiny Board

Brussels,
RSB

Opinion

Title: Impact assessment / Data Act

Overall opinion: NEGATIVE

(A) Policy context

The Data Act implements the European strategy for data and the Intellectual Property Action Plan. It aims to ensure 'fairness' in the allocation of data value among actors of the data economy, including in business-to-consumer (B2C), business-to-business (B2B) and business-to-government (B2G) situations. It aims to clarify rights of access to and use of data and databases. It also aims to enhance the use of industrial and personal data (in compliance with the GDPR) in the economy and for 'common good' purposes, such as improving public services and better policy making. It will also support the European Green Deal and digital transformation of European industry.

The initiative includes a targeted review of the Database Directive and complements the recently adopted proposal for a Data Governance Act. These facilitate voluntary sharing of data (but not the material rights) by individuals and business, and harmonise conditions for the use of certain public sector data.

(B) Summary of findings

The Board notes the useful additional information provided in advance of the meeting and commitments to make changes to the report.

However, the Board gives a negative opinion, because the report contains the following significant shortcomings:

(1) The report lacks clarity as to the purpose and scope of the initiative, notably precisely which situations in the data-sharing context remain unregulated and problematic.

(2) The report lacks a single and consistent baseline. The relationship between the two baselines used is unclear and does not sufficiently reflect future developments.

(3) The report lacks clarity on the precise design and content of the policy options and the measures contained therein. Various concepts and notions – notably 'fairness' and 'public interest' – are not well defined.

(4) The report is not sufficiently clear on some costs and benefits and underlying assumptions used in the impact analysis.

(5) The report does not bring out clearly enough the views of different categories of

stakeholders. It does not highlight the issues on which their views differ most significantly.

(C) What to improve

(1) The report should provide further detail on the precise situations of data access and use that the initiative will address in each context, not least for B2G relations. It should explain why it only covers data generated by products and not by software applications. It should also explain in exactly which B2B situations the existing competition rules would not suffice, thereby necessitating targeted action. In relation to 'switchability' between cloud providers, the report should be clear that this aspect is regulated already for the hyperscalers under the Data Market Act, which covers the large share of the market. The report should better explain what remains problematic and why it is important to address it.

(2) As a broader legal scope for data sharing bears significant risks, the report should identify and analyse them specifically and explicitly. It should assess the impact it may have on other domains such as trade secrets. It should clearly address the risks of instrumentalising data for unauthorised or unintended use in all contexts and identify corresponding mitigating measures.

(3) The report grounds the baseline analysis on two separate and not necessarily converging scenarios. It should explain this duality and the underlying assumptions, and assess the resulting effect on the robustness of the estimates.

(4) The report should better define the concepts and notions used. For example, the 'fairness' test, contrary to its name, does not define 'fairness' as such but rather identifies examples of 'unfairness' in grey and black-lists and a catch-all clause. The burden of proof is thus reversed – an important distinction. The report should explain how this test is going to work in practice and how the principle of contractual freedom will be respected.

(5) The report should further detail all the measures that constitute policy options with greater precision (e.g. obligations on cloud and edge services, the definition of specific B2G reporting obligations and application of the 'once-only' principle, compensation for data, prevention of gold-plating, etc). It should present all the essential elements of these measures in the main text (with details in the annex). It should also analyse how data sharing obligations, on contractual terms or under general access rules, would impact businesses' freedom to determine the content and terms of the contract. The general access rules should be further specified.

(6) The report should provide clear information with regard to criteria on the concept of 'public interest' and the choice of, and rationale for, the services that have been identified for the specific policy options. It should transparently explain the seemingly arbitrary choice as to why certain areas (e.g. health or environment) are included in the preferred option while others are not (e.g. law enforcement, judicial access, housing, education, urban planning). It should clarify what is meant by 'emergencies' and whether this would include, for example, preventing or investigating a terrorist attack. It should also clarify how the once-only principle would be applied in practice and how competing information request by public authorities will be avoided. There is also a need for greater clarity on the envisaged compensation and sanction regimes. In a broader context, the report should also discuss why and in which circumstances normal acquisition of data through standard reporting obligations or procurement are not feasible. The report should also clarify who would be empowered to define and execute emergency and other data requests.

(7) The impact analysis should be strengthened to allow clear identification of the costs

and benefits for all affected groups and the macroeconomic impacts. The report should clarify which costs and benefits result directly from this initiative, which more indirectly via sectoral legislation. Consistency should be ensured in the use and applicability of various estimates of different provenance. The report should clarify the underlying assumptions and estimation methods.

(8) The report should better address the simplification and burden reduction aspects. It should indicate whether and where current reporting obligations would need to be repealed or amended for the initiative not to result in additional administrative burden. Where new burdens are likely to occur, the report should identify them and clearly indicate whether overall this initiative will directly increase or reduce administrative burdens.

(9) The report should more transparently present the views of all relevant stakeholders and indicate how it has assessed and integrated dissenting or minority views. This would eliminate the impression that only majority views are followed.

Some more technical comments have been sent directly to the author DG.

(D) Conclusion

The DG must revise the report in accordance with the Board's findings and resubmit it for a final RSB opinion.

Full title	Data Act
Reference number	PLAN/2021/10588
Submitted to RSB on	29 September 2021
Date of RSB meeting	27 October 2021

Electronically signed on 21/01/2022 10:30 (UTC+01) in accordance with article 11 of Commission Decision C(2020) 4482