

Introduction

In February 2022, the European Commission (EC) [published](#) the proposal for an [EU Data Act Regulation](#), with the aim of ensuring fairness in the allocation of value from data among actors in the data economy and to foster access to and use of data. The act follows the [Data Governance Act](#) and it is the second main legislative initiative resulting from the February 2020 [European strategy for data](#). The aim of the strategy is to make the EU a leader in a data-driven society and to create a single market for data that will ensure Europe's global competitiveness and data sovereignty. Common European data spaces will contribute towards the availability of data for use in the economy and society, while keeping the companies and individuals who generate the data in control.

The EU Data Act and the Data Governance Act are closely interlinked. While the Data Governance Act creates the processes and structures to facilitate data sharing by companies, individuals and the public sector, the proposed EU Data Act clarifies who can create value from data and under which conditions.

In this client alert, we will review and analyse the content of the legislative act, which is likely to feature highly in future EU policy discussions. If the proposed EU Data Act is of relevance for your organisation, please do not hesitate to reach out to us.

Proposed Regulation on a European Data Act

The proposed Regulation on a European Data Act paves the way towards a far-reaching horizontal legislative regime addressing the access to and use of non-personal data in the EU, which will be "an important step in unlocking a wealth of industrial data in Europe," according to Commissioner for Internal Market Thierry Breton. The main objectives of the act include the facilitation of access to and the use of data by consumers and businesses, while preserving incentives to invest through data. The scope of application is quite broad, covering companies doing business in the EU market generating industrial data.

A set of provisions is foreseen to regulate and grant the switching between cloud and edge services. The proposed regulation also introduces provisions that would provide for the use of data held by enterprises in certain situations where there is an exceptional data need by public sector bodies and EU institutions.

Additionally, the proposed legislative regime is creating safeguards against unlawful data transfer taking place without notification by cloud service providers and develops interoperability standards for data to be reused between sectors, very often in the context of connected devices and digital services. As such, the contractual relationships between companies who share data will become regulated when this regulation is adopted.

1. Users of Connected Devices Can Gain Access to Data Generated by Them

The proposal sets out measures on how to access data often exclusively gathered by manufacturers and for the possibility to share such data with third parties to provide aftermarket or other data-driven innovative services.

In particular, where the user cannot directly access data generated by the use of products, the data holder shall make such data available to the user. This should be done without undue delay, free of charge and, where applicable, continuously and in real time. The proposal considers trade secrets in this context, provided that they shall only be disclosed if all specific necessary measures are taken to preserve their confidentiality.

The text maintains incentives for manufacturers to continue investing in high-quality data generation, by covering their transfer-related costs and excluding use of shared data in direct competition with their products. In fact, one of the provisions establishes that the data holder shall not use data generated by the use of the product to derive insights about the economic situation, assets and production methods that could undermine the commercial position of the user in the markets in which the user is active.

2. Unfair Terms Related to Data Access and Use Between Enterprises

The proposal outlines measures to rebalance negotiation power for SMEs by preventing abuse of contractual imbalances in data sharing contracts. The EU Data Act will shield them from unfair contractual terms imposed by a party with a significantly stronger bargaining position. The proposed rules explicitly define unfair terms in the context of data exchange.

In particular, a contractual term is unfair if its object or effect is to:

- (a) Exclude or limit the liability of the party that unilaterally imposed the term for intentional acts or gross negligence
- (b) Exclude the remedies available to the party upon whom the term has been unilaterally imposed in case of non-performance of contractual obligations or the liability of the party that unilaterally imposed the term in case of breach of those obligations
- (c) Give the party that unilaterally imposed the term the exclusive right to determine whether the data supplied is in conformity with the contract or to interpret any term of the contract

To this end, the EC will also develop model contractual terms in order to help such companies to draft and negotiate fair data-sharing contracts.

3. Data Access for Public Sector Bodies and EU Institutions

A section of the proposal specifically addresses public sector players and their access to data. This includes access in case of circumstances of exceptional need. This concept is introduced for public sector bodies to access and use data held by the private sector, especially in case of a public emergency, such as floods and wildfires, or to implement a legal mandate if data is not otherwise available. When such circumstances arise, the text poses an obligation to make data available. A data holder shall, upon request, make data available to the public sector entity that demonstrates an exceptional need to use the data requested. According to the EC, data insights are often needed to respond quickly and securely, while minimising the burden on businesses.

4. Switching Between Data Processing Services

The proposal provides for new rules allowing customers to effectively switch between different cloud data processing services providers. Providers of a data processing service will be obliged to ensure that customers of their service can switch to another data processing service, covering the same service type, which is provided by a different service provider. Formal requirements are set out by the EC, as rights of the customer and the obligations of the provider in relation to switching between providers of such services shall be clearly set out in a written contract.

The EC text puts in place safeguards against unlawful data transfer. In particular, 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 EU where such transfer or access would create a conflict with EU law or national law. The act goes on to clarify that any judicial decision of a third country requiring a provider of data processing services to transfer from or give access to non-personal data held in the EU may only be recognised or enforceable if based on an international agreement.

In case of absence of such an international treaty, a transfer to a third country would be possible provided that the following conditions apply:

- (a) The third-country system requires the reasons and proportionality of the decision or judgment to be set out, and it requires such decision or judgment, as the case may be, to be specific in character, for instance by establishing a sufficient link to certain suspected persons or infringements
- (b) The reasoned objection of the addressee is subject to a review by a competent court or tribunal in the third country
- (c) The competent court or tribunal issuing the decision or judgment or reviewing the decision of an administrative authority is empowered under the law of that country to take duly into account the relevant legal interests of the provider of the data protected by EU law or national law of the relevant Member State

How We Can Help

The proposed EU Data Act would establish an ambitious and far-reaching framework for the use of industrial and other non-personal data within the EU economy. The EC's proposal seeks a balance between the significance of data as a source of new innovation and competitiveness as the EU's digital market develops, and the risks of market distortions and barriers to market entry that could arise if data becomes too concentrated in a small number of powerful economic actors.

The act will undoubtedly bring forward changes to the cross-sectoral governance framework for data access and use, with the potential to radically change the data-driven business environment in the EU. While the rules – when adopted – will apply in parallel to the General Data Protection Regulation (GDPR), it will be critical for businesses to consider the wide definition of data,¹ which can entail a broader range of obligations. Similarly, the infringements for not complying with the rules would be “effective, proportionate and dissuasive” and left at the discretion of national competent authorities, which can bring significant fines for companies. As currently drafted, the proposed rules align the administrative fines with those of the GDPR, meaning they can reach up to €20 million or 4% of the total worldwide annual turnover, whichever is higher.

¹ Article 1, paragraph (1): “data” means any digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audio-visual recording.

Additionally, the proposed act would impact the already complicated regime for transfer of data with the US, which has been contested by litigations leading to the invalidation of the EU-US Privacy Shield. If adopted, the rules would create further regulatory barriers for the transfer of non-personal data across the Atlantic and could potentially impact the ongoing negotiations on the new Privacy Shield.

The EU's co-legislators will now be reviewing the legislative proposal, which may ultimately result in imposing more stringent obligations for companies, and shifting the balance from protection of intellectual property towards data openness. Historically, the legislative proposals pertaining to the governance and regulation of data have proven to be contentious and were significantly altered in their final form.

As such, particularly as this proposal applies across sectors, it will be crucial to closely monitor the progress of the negotiations to better understand the level of impact this proposal will have on your business and to ensure the co-legislators strike the right balance for the future data governance regime.

With us as your trusted advisors on your side, you will be able to spot, assess and understand the risk and opportunities for your organisation from the proposed EU Data Act. We can support you with any legal or policy request you may have. Please do not hesitate to reach out to us for a discussion.

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