



French Republic

**EUROPEAN AFFAIRS
COMMITTEE**

Paris, 11 May 2023

POLITICAL OPINION
on the 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) COM(2022) 68 final

The French Senate,

Having regard to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “Commission Work Programme 2020 – A Union that strives for more”, COM(2020) 37 final,

Having regard to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “A European strategy for data” on 19 February 2020, COM(2020) 66 final,

Having regard to the resolution of the European Parliament of 25 March 2021 on a European strategy for data (2020/2217(INI)) (2021/C 494/04),

Having regard to Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications),

Having regard to the Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic

communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), COM(2017)/010 final

Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation),

Having regard to Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure,

Having regard to Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union,

Having regard to Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code,

Having regard to Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act),

Having regard to the 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) COM(2022) 68 final,

Relevant aims

Whereas the widespread presence of connected products in the private and public spheres generates much data that is growing exponentially;

Whereas this data opens up promising prospects to stimulate innovation in many sectors;

Whereas users of connected products or related services do not usually have, for technical and business reasons, access to data generated by use of these products and services;

Whereas this data is often used by its holders for purposes other than those that justify collecting it, without users being fully informed of such purposes;

Whereas major players in digital technology tend to prevent micro, small and medium-sized firms from accessing data in satisfactory conditions and this data could help them develop new services in a balanced competitive framework;

Supports the principle of implementing horizontal EU legislation that defines harmonised rules for fair access to data generated by use of connected products or related services and provides for dispute resolution processes;

Approves, in particular, the aim of transparency in collecting this data and recognition of the effective rights of consumers and firms to the data that they generate by using connected products or related services;

Also supports the aim of chosen sharing of this data with third parties, in a balanced competitive framework that makes it possible for the third-party beneficiary to not be bound by excessive demands from the data holder;

Is also in favour of the adoption of rules allowing an effective change of data processing service provider and supervision of international transfers of non-personal data;

Considers nonetheless that, in order to meet these aims, the Proposal for a Regulation should be clarified and completed in regard to several points;

Draws attention to the necessary articulation of this legislation with existing and forthcoming sector-specific systems, for example in health data;

Would like EU rules in consumer protection – in addition to recognising consumers' rights to data generated by the connected products or related services that they use – to be the subject of a general assessment of their relevance in an increasingly digital environment and would like adaptations and supplements to be added to these rules to ensure better protection of consumers online;

Clarifying the scope of application of the Regulation

Whereas the Proposal for a Regulation concerns data “generated by the use of a product, including where incorporated in an immovable item, or of a related service”;

Recommends that it be explicitly stated that this concerns connected products specifically and that the data in question is raw data that has not been modified or added and that results directly from use of these products or related services;

Requests that it be also specified that electronic communications services, which are governed by specific legal texts, are excluded from the scope of application of the Proposal for a Regulation;

Ensuring the primacy of personal data protection rules

Whereas the data collected by connected products or related services may include personal data;

Whereas the collection and use of such data are regulated by several EU legal texts, including the GDPR and the Privacy and Electronic Communications Directive;

Recommends that it be specified that the definition of personal data that might be present in data collected by connected products or related services is the same definition as that given by the GDPR;

Considers that it is preferable for it to be expressly stated that, for personal data in the collected data, the applicable EU rules in personal data prevail, in all scenarios, over the provisions of the Proposal for a Regulation, subject to the supervision of the relevant national body for data protection;

Whereas the user of the connected product might not be the person whose personal data is collected;

Underlines that there is a need to be especially vigilant in regard to such cases and that the data holder should ensure that such data is passed on to the user in strict compliance with the GDPR;

Strengthening protection of users' rights to data generated by use of connected products or related services

Whereas it is proposed to recognise that the user of a connected product or related services has a right to access data generated by their use of the product or related services easily, securely and directly;

Whereas this access should be provided for technically when the connected product is designed;

Requests that it be demanded that, in order to ensure effective accessibility, the data format should be understandable, structured, customary and machine-readable and that the metadata needed for the data to be read should be disclosed to the user;

Considers that it should also be specified that when data is not directly accessible it should be made available to the user without undue delay and have equivalent technical characteristics in terms of reuse, security and format;

Whereas the Proposal for a Regulation provides for the user to be informed, prior to their acquisition of the connected product or related services, of the data that their use will generate, of the ways to access this data, of the future use of this data, of this data being potentially shared with a third party, and of the right to lodge a complaint with the relevant authority;

Whereas it also provides for the user to be informed in advance, if need be, of the existence of trade secrets and intellectual property rights and of the consequences of these for exercising their right to use and share this data with a third party;

Whereas it is stipulated that the data holder can only use this data as part of a contractual agreement reached with the user of a connected product or related services;

Whereas the Proposal for a Regulation provides that the holder of the data is expressly forbidden from using this data to assess the user's financial situation, assets or production methods;

Recommends that clauses unjustifiably harming the user's rights in using and sharing data be identified and that the opportunity to prohibit or nullify them be examined;

Facilitating sharing of data with third parties

Whereas the user of a connected product or related services is entitled to ask the holder of data generated in this way for this data to be made available to a third party;

Whereas the Proposal for a Regulation provides for access controllers to be excluded from direct or indirect advantages of such data sharing;

Whereas this exclusion is justified in regard to the excessive market power of these operators;

Whereas the Proposal for a Regulation provides that micro- and small-sized firms are not bound by the obligation to make data available unless they have partner firms or associated firms;

Considers that micro and small-sized firms that have a link to a manufacturer of connected products or a provider of related services should also be bound by this obligation;

Calls for reflection on the relevance of applying thresholds under ordinary law in terms of revenue, balance sheets and numbers of employees to qualify these firms and on whether account should be taken, for this purpose, of the amount of data generated by the connected products or related services that they make available;

Whereas the Proposal for a Regulation provides that the data holder that makes this data available to a third party checks the quality and security of this data;

Whereas the Proposal for a Regulation provides that this data sharing agreed upon between the data holder and a third-party beneficiary should be fair, reasonable, non-discriminatory and transparent;

Approves the fact that some clauses that reduce small and medium-sized firms' access to data and the possibility to use it are prohibited and considered unenforceable;

Whereas the Proposal for a Regulation authorises reasonable, non-discriminatory payment for data being made available, chargeable to the third-party beneficiary and for which the data holder should provide the calculation basis;

Requests that, in order to prevent risks of abuse, the amount that may be invoiced to the third-party beneficiary be regulated more precisely than simply by a demand for a reasonable, non-discriminatory character;

Ensuring balanced protection of trade secrets and taking imperative security requirements into account

Whereas the Proposal for a Regulation provides that the data holder and the user of the connected products or related services should agree upon the technical and operational measures to apply to ensure protection of trade secrets before sharing data;

Whereas the Proposal for a Regulation states that such measures should also be provided for in the case of data sharing with third parties;

Whereas the Proposal for a Regulation expressly forbids the user and the third-party beneficiary from using the data collected to develop rival products;

Underlines that the contractual framework for protection of trade secrets that may be revealed by raw data in the event of a request to access and pass on this data should be balanced and not exceed the demands for protection of such secrets;

Considers nonetheless that protection of trade secrets should, in special cases, be able to justify a refusal to pass on the data, including to the user, if the data holder shows that revealing it could have serious, detrimental consequences, including in regard to security;

Regulating the access that national and EU authorities have to data in the event of a public emergency

Whereas under the terms of the Proposal for a Regulation, data holders could, in the event of a public emergency, be obliged to share data generated by use of connected products or related services with a national public body or an organisation of the European Union with an exceptional need to use this data to tackle an emergency, prevent such an emergency or contribute to a recovery following such an emergency;

Whereas the public emergency is defined by the Proposal for a Regulation as “an exceptional situation negatively affecting the population of the Union, a Member State or part of it, with a risk of serious and lasting repercussions on living conditions or economic stability, or the substantial degradation of economic assets in the Union or the relevant Member State(s)”;

Would like the precise nature of such an emergency to be specified with explicit reference to various situations (health, natural catastrophe, major catastrophe with a human cause, cyberattack), would like the consequences of such an emergency to be specified (including effects on financial stability or major economic assets), and would like the duration of such an emergency to be regulated;

Considers that the obligation to share data outside of public emergencies, when an absence of available data prevents the public organisation or institution from fulfilling a specific task in the public interest, should be expressly regulated, especially in regard to its duration and impact, in order to not unfairly deprive firms of the benefits that they can legitimately get from using databases that they have built up;

Underlines that this data sharing should only be required if the public authorities concerned can provide evidence that that they are unable to obtain this data quickly by other means;

Requests that it should be specified that public organisations can only use the data for the purpose of the request and with strict respect for the rights and freedoms of people, especially when the case concerns personal data that cannot be anonymised;

Strengthening the effectiveness of the right to change data processing service providers

Whereas the main data processing service providers that are active in Europe are very large foreign corporations that have a dominant position in the internal market and have developed practices to prevent their users from using software other than that which they offer and from turning to other providers;

Whereas the Proposal for a Regulation seeks to remove technical, contractual and business barriers to effectively changing data processing service providers;

Requests that the data processing service provider be obliged to share precise information on the conditions, costs and ways to change provider, prior to acceptance of the data processing service;

Would like it to be expressly stated that data transfers cannot be refused or delayed when the client enjoys an offer to use data processing services free of charge;

Considers that the technical complexity of this transfer and transitional period and the imperative requirement of service continuity demand that the client be precisely informed of the technical steps of the process for changing one's data processing service provider and the rights and obligations of the different parties;

Whereas it is provided that the gradual removal of fees charged for changing one's service provider will be spread over three years from the moment when the Regulation comes into force;

Considers that due to its duration such a period could prevent European service providers from developing their presence in the internal market, which is increasingly dominated by major foreign players;

Ensuring respect of European values and interests in the international flow of data

Whereas international transfers of data should not expose data to the risk of being made accessible to foreign authorities that are not linked to European states through an international agreement

that ensures protections of personal data, intellectual property, trade secrets, confidentiality commitments and commercially sensitive data;

Whereas the Proposal for a Regulation obliges data processing service providers to check the legality of any request for access or transfer of non-personal data from a foreign authority and to ensure its proportionality and the possibility of dispute in a competent court of law in the third-party country;

Whereas it is stipulated that the service provider that receives such a request should consult the relevant authorities or organisations, including when they consider that the decision can concern commercially sensitive data or harm the Union's interests or its Member States' interests in national security or defence;

Whereas the Proposal for a Regulation obliges service providers to take all technical, legal and organisational measures that are reasonable, including contractual agreements, in order to prevent access to data and transfer of data to third-party states that are not bound by such agreements when this access or transfer violates legislation of the Union or of a Member State;

Approves the definition of rules set forth out of concern to ensure respect of European values and interests in the international flow of data;

Requests that a list of sensitive data (including health data) and data that may harm national security if disclosed, for which sovereign hosting is needed to protect it from extraterritorial application of non-EU legislation, be drawn up;

Underlines that the sovereign nature of this hosting especially demands that this service be provided by a European firm in which the accumulation of direct or indirect foreign stakes may only be marginal;

Developing norms in portability and interoperability of data

Whereas the portability and interoperability of data are required to exchange and use the data of distinct data spaces and systems;

Whereas it is provided that the Commission will adopt implementing acts to define harmonised rules in this field;

Calls for greater clarification of the subject of these harmonised norms in data portability and interoperability and requests that the process of drawing up these norms, particularly in regard to the role of Member States and standardisation organisations, be detailed;

Ensuring effectiveness in overseeing implementation of the Regulation

Whereas Member States should designate relevant national authorities to monitor implementation of the Regulation, handle complaints and impose sanctions in the event of breaches;

Draws attention to the coordination needed in Member States between the different national authorities, in particular the relevant authorities in personal data protection;

Recommends that the relevant national authorities be allowed to apply solutions in the event of obligations stipulated by the Regulation not being respected;

Requests that an intra-EU structure for coordination be set up to make it easier to implement the Regulation.