Stockholm 13 May 2022

The Confederation of Swedish Enterprise's position on the Data Act Proposal

The Confederation of Swedish Enterprise brings together 60,000 companies and 50 industry and employer organisations. We work on those issues that are important to all companies, irrespective of sector and size. However, our role is also to provide a voice for all those companies and sectors that are yet to emerge, but may do so in the future, given the right and climate are right. We provide Swedish business with a voice in the EU.

The Confederation of Swedish Enterprise welcomes the initiatives in the Data Act with the objectives which would increase the availability and interoperability of data while at the same time incentivising greater data sharing. The Confederation agrees that coordinated EU action can add significant value to both the European economy and European society, when compared to actions taken by individual Member States. Here, businesses need clear and proportionate rules that are - as far as possible – principle based and technology neutral for ensuring predictability, encouraging innovative power and creating a positive investment climate.

While a detailed analysis of the Proposal is still in progress, the Confederation of Swedish Enterprise wishes to highlight the following specific points:

- ✓ Obligations have been imposed on markets where well-functioning contractual arrangements are already in place. This will overburden businesses in sectors where no problems previously existed.
- ✓ Based on the Impact Assessment, the European Commission has potentially both
  a) underestimated the likely costs and
  b) overestimated the likely benefits of the Proposal.
- ✓ It remains unclear to whom the provisions in the Proposal will apply and what kind of data will be affected. Further clarification is needed.
- ✓ Access to B2B and B2C data should be demarcated, to avoid legal uncertainty.
- ✓ The safeguards proposed are insufficient, and risk undermining incentives to invest in data collection.
- ✓ The Commission should propose stronger, more concrete safeguards for trade secrets, to provide a framework for companies to feel safe sharing more data.

Confederation of Swedish Enterprise
Address: SE-114 82 Stockholm Visitors: Storgatan 19 Phone: +46 (0)8 553 430 00
swedishenterprise.se

- ✓ The Proposal fails to specify what constitutes 'reasonable compensation' for data holders for data sharing.
- ✓ The provisions on the transfer of, and access to, non-personal data in international contexts should be removed, to avoid new and unnecessary barriers in the market.
- ✓ The Confederation of Swedish Enterprise does not support the suggested clarification on the sui generis right.

The Proposal risks undermining the competitiveness of companies present in Europe

As the data economy is not confined to the borders of Europe, the Data Act must avoid imposing specific obligations that may result in unintended consequences for the competitiveness of economic operators present in Europe.

Businesses are concerned by the concept of mandatory data sharing, not least in these uncertain geopolitical times. Any data-sharing obligations must take into account the risks of hacking and espionage. The Data Act, as well as the AI Act, will lead to the sharing and storage of data on a significantly greater scale, which will inevitably lead to higher costs, greater energy consumption and increased cybersecurity risks. It is valid to ask how it will be possible to meet the goals of cybersecurity as well as the green and digital transitions while at the same time promoting innovation and competitiveness.

The Confederation of Swedish Enterprise recently published a report entitled "*EU data strategy and data sharing*"[1]. The purpose of this is to add fresh knowledge and further insights into what will make it easier for business and industry to share and make better use of data in the internal market, thus helping drive digital progress. As stated in the report, the concept of data sharing is a relatively new one, and as a result most related legislation is also completely new. Markets need time to operate and adapt to the legislation that already exists.

New legislation on data sharing includes the Directive (2019/1024) on open data and the re-use of public sector information ("Open Data Directive"), the Data Governance Act and the Digital Markets Act. The Confederation of Swedish Enterprise questions whether the European Commission has taken due consideration to these initiatives in its Impact Assessment, which seeks to identify the marginal costs/benefits associated with the Data Act specifically.

The Confederation of Swedish Enterprise acknowledges the legitimate need for additional legislation on data sharing in some sectors. However, with broad horizontal rules covering all sectors, the Data Act risks overburdening businesses in sectors where no problems currently exist and where well-functioning contractual arrangements are already in place. Specific gaps identified in individual sectors could be better handled with separate initiatives, which are already in the process of being drafted. To avoid undermining the competitiveness of companies and European industry, the Confederation of Swedish Enterprise strongly urges the European Commission to limit the existing sharing requirements to those situations and sectors where such data is indeed indispensable.[2]

---

[1] EU Data Strategy and Data Sharing (svensktnaringsliv.se)

[2] The EU Commission itself noted that: *"The interviewees pointed out that given the specificities and the different levels of digitalisation and maturity in terms of B2B data sharing (for example, some sectors have already developed standards between the OEMs, while*

The Impact Assessment potentially underestimates the costs associated with mandatory data sharing

The Confederation of Swedish Enterprise has questions over whether all costs and benefits of the Proposal have been correctly identified and assessed in the Impact Assessment. Given the difficulty in estimating the relevant costs and benefits associated with imposing mandatory data sharing rules, a cautious approach to estimating costs and benefits is warranted. Yet despite this, it seems that the European Commission has both potentially underestimated the likely costs and overestimated the likely benefits.

Taken together, the Confederation of Swedish Enterprise therefore questions whether the proposed Data Act and its associated Impact Assessment actually achieves its objectives in a proportionate way, one which delivers net benefits to European consumers and businesses.

The Impact Assessment estimates only two types of costs associated with the Data Act, both of which relate to the development of technical solutions for data sharing:

1. a one-off cost of EUR 410 million
2. a recurrent costs of EUR 88 million per year.

These costs have been extrapolated from estimates for a single market – the fitness tracker market – for which costs were estimated at EUR 83.4 million in one-off costs and EUR 18 million in recurrent costs.[3]

There are reasons to believe that the Impact Assessment, by only including these two cost types, substantially underestimates the true costs associated with introducing mandatory data sharing.

First, the Impact Assessment potentially underestimates costs by ignoring the reality that mandatory data sharing could undermine incentives to invest in data collection. This could create a major cost to the economy as a whole if/where the Data Act means that these investments are never made, implying either that valuable data is never collected or - in the worst-case scenario - that an entire product/service never reaches the market.

---

others not), each industry sector has different needs in that regard. A horizontal regulatory policy measure could therefore impose unnecessary administrative and compliance burdens to some industry sectors and limit productivity". See European Commission (2022), Study to support an Impact Assessment on enhancing the use of data in Europe, p. 271.

[3] European Commission (2022), Impact assessment report accompanying the document 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), p. 103-104. The extrapolation is based on two assumptions; (i) that 25% of IoT companies will invest to set up and maintain the appropriate technical means for data to be accessed (e.g. APIs), despite the fact that this is not required under the proposed regulation, and (ii) that the fitness tracker market represents 5% of the EU IoT revenue.

The European Commission notes that the benefits of the Data Act "*apply to a bigger and broader range of stakeholders compared to the costs"*. However, this would no longer be the case if/where costs are not limited to technical data provision costs but also incorporate broader costs to the economy arising from data never being generated and products/services never reaching the market. These costs would be borne by many firms and consumers throughout the economy.

Mandatory data sharing could damage innovation in data collection if/where the incentives for companies to invest rely on their ability to potentially generate a competitive advantage from that data. Mandatory data sharing would likely reduce firms' ability to generate a competitive advantage – it could allow rival firms to replicate their services more closely – meaning that they may decide not to invest in data collection in the first place.

In the worst-case scenario, entire business models might be built on the ability to generate a competitive advantage from the collection of data. For example, a manufacturer may be considering entering the market for factory robots. Their entry into this market may be conditional on the ability to generate revenues from the aftermarket (e.g. repair services). If - due to mandatory data sharing - the manufacturer can no longer expect to generate the same revenues on the aftermarket (because it would have to share data with rival firms), it may decide not to enter the market in the first place. This would undermine not only data collection but also the production of factory robots. Similarly, a firm may also be deterred from entering a market if/where mandatory data sharing reduces its ability to guarantee a certain quality of service in the aftermarket, thereby undermining its capacity to protect its brand in the primary market.

The incentives to invest in data collection may be particularly stifled in emerging markets, where returns are uncertain and/or where the full value of data has not yet been realised. This point was raised in interviews with stakeholders from various sectors, who warned that regulatory intervention at this stage could significantly hinder the potential for realising future value creation, since data sharing is a growing field and companies are still exploring ways of creating value from these data sets.[4]

It is standard practice in many sectors of the economy to carefully protect incentives to invest. For example, patents grant exclusive rights to sell a certain product for a limited time.

The Confederation of Swedish Enterprise notes that the Impact Assessment has omitted these costs, despite explicitly noting the risk of them damaging innovation:

"Furthermore, mandatory access rights potentially created by the legislation are also likely to reduce incentives to collect data, as well as to upset the current business models of smart machinery manufacturers in certain industry sectors."[5]

[4] European Commission (2022), Study to support an Impact Assessment on enhancing the use of data in Europe, p. 271-272.
[5] European Commission (2022), Study to support an Impact Assessment on enhancing the use of data in Europe, p. 271.

Second, the Impact Assessment also potentially underestimates costs by disregarding the annual EUR 6 billion that were set out in the cost-benefit analysis that underpins the European Commission's document. These were the costs to data holders associated with developing data management agreements and administrative overhead costs, and were estimated as part of the cost-benefit analysis for policy option 2 (the European Commission's preferred option). In its own Impact Assessment, the European Commission argues that these costs are not relevant, due to legal and technical safeguards included in the proposed Data Act and hence have been excluded.[6]

However, it is not clear why the legal and technical safeguards referred to by the European Commission would not have been considered in the original cost-benefit analysis underlying the Impact Assessment. Were the underlying cost-benefit analysis to suggest a different approach than the currently proposed Regulation, then this should be clarified and a discussion on how this may affect other estimates should be included. Moreover, even if new legal and technical safeguards would reduce costs, it seems unrealistic to assume that the annual cost of EUR 6 billion would be reduced to zero.[7]

The Impact Assessment potentially overestimates the benefits associated with mandatory data sharing

The European Commission estimates benefits of around EUR 270 billion per year, 265 of which can be attributed to measures related to developing rights on cogenerated data and business-to-business data sharing. This benefit is the combined sum of three components:

1. Benefits for data coproducers due to increased effectiveness and productivity, EUR 196.7 billion, calculated by combining:
    a. the EU 27 GVA for affected 'stakeholders' in 2019 (1,311,511 billion)
    b. an assumed 15% increase in effectiveness and productivity from enhanced data access and use, an estimate based on interviews with stakeholders.

2. Cost reductions for data coproducers due to reduced switching costs, EUR 68.1 billion, calculated by combining:
    a. the number of data co-producers (4,542,007)
    b. the estimated switching costs for users of IoT solutions for having aftermarket services from third parties of EUR 100,000 EUR
    c. an assumed 15% reduction in costs, an estimate based on interviews with stakeholders.

3. Increased business opportunities for data holders, EUR 176 million, calculated by combining:
    a. the number of data holders (6,190)
    b. an assumed revenue base of EUR 2.85 million

[6] European Commission (2022), Impact assessment report accompanying the document 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), p. 48 and p. 103.
[7] It is especially surprising that the European Commission chooses to disregard these estimated costs, given that the estimates are based on the same methodology as it employs for its calculation of benefits (i.e. basing estimates on stakeholder interviews) – benefits that have not been discarded (see next section for further details).

c. an assumed 1% increased business and growth opportunities due to increased trust between the players in the market and enhanced access to third parties' data (source unspecified). [8]

There are several reasons to believe that this approach substantially overestimates the true scale of potential benefits associated with the Regulation.

The estimated 15% increase in effectiveness and productivity relies on input from the potential beneficiaries of data access – stakeholders who would have a clear incentive to inflate the potential scale of benefits. Furthermore, neither the Impact Assessment nor its supporting study reveals how many interviews were undertaken to support the estimates.

In any case, the 15% estimate seems disproportionate to any reasonable approximation of what could be expected from a single piece of legislation; it corresponds to approximately eight years of baseline growth in productivity (GVA growth for EU27 during the period 2010-2018 was also around 15%).[9] The Impact Assessment thus implies that the Data Act will give a productivity boost capable of facilitating eight years' worth of growth through a single event.

The Commission itself acknowledges that it is difficult to quantify the expected costs and benefits associated with the Proposal, and that the scale of benefits is essentially based on 'speculative thoughts':

"Therefore, while it was possible to collect qualitative feedback from the public and private sector on the provisional policy options for each subtask, it was more difficult to quantify their costs and benefits, e.g., because case numbers are still small, or the data sharing practices are just emerging and stakeholders themselves do not yet know their scale and/or costs of making data available. In addition, the stakeholders consulted do not yet have a final and consolidated perception on for example the potential benefits they could draw from increased data use and availabilities in their respective domain, besides speculative thoughts."[10]

Given the great uncertainty associated with the scale of potential benefits, the Confederation of Swedish Enterprise would strongly encourage detailed scrutiny of whether the proposed regulation would still provide net benefits when subject to more conservative assumptions.

---

[8] European Commission (2022), Study to support an Impact Assessment on enhancing the use of data in Europe, p. 273-275 and p. 399.
[9] Calculation of compound growth rate based on Eurostat (2022), https://ec.europa.eu/eurostat/databrowser/view/NAMA_10R_2GVAGR__custom_2686062/default/table?lang=en.
[10] European Commission (2022), Impact assessment report accompanying the document 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), p. 110. The problem relating to the estimation of economic benefits from data sharing is also discussed on p. 117: *"Our desk research showed that there is no well-established metric of the economic benefit of data sharing in general. […] even participants in the data economy (i.e. those sharing data, and those receiving it) struggle to quantify the direct economic value of their data activities in terms of e.g. turnover, profit, or efficiency gains".*

Chapter 1 – General Provisions

The Proposal remains unclear as to whom the provisions will apply, and which kind of data will be affected. Recitals 14 to 17 are intended to provide further clarity on what products fall within its scope and how data should be interpreted, but further clarification is required.

The Proposal clearly targets IoT data, to allow users of connected devices to gain access to data generated. This contrasts with provisions for B2G data and the chapter on international data transfer and access, where all types of business data fall under its scope. The Proposal covers smart TVs and voice-activated assistants, while excluding desktop computers and smart phones; yet these tend in many cases to fulfil similar functions and can access the same services.

It remains unclear which components of a physical asset fall under the definition of a ‘product’; it is equally unclear what constitutes a ‘competing product’. In the absence of any definition, it could refer to only physical and movable objects but exclude ‘related services’, i.e. software and data-driven services. If the understanding is limited only to physical products, then the Data Act poses the risk that software providers or service providers could benefit indirectly by developing software-driven products or services based on the extracted data, which then compete directly with the original product or service.

The definitions of ‘related services’ fails to address the responsibilities in the supply chain and who is best placed to provide access to the data. It will be important to clarify which economic operator will be responsible for sharing data from certain types of connected objects, and with whom.

More generally, the definition of data in the Data Act and the definitions used in other regulations are incompatible. As of now, there are regulations with different concepts and legal starting points for data (the GDPR, the Directive of Trade Secrets, the Open Data Directive, Data Governance Act, etc). For those companies that must apply these rules, this becomes problematic. As the Data Act has not yet put the issue of concepts and legal starting points into focus, this problem will persist.

Chapter 2 – B2C and B2B Data Sharing

In the B2B and B2C relation, the Regulation imposes an obligation on the data holder to make data available to users and third parties nominated by the user under certain circumstances.

The Confederation of Swedish Enterprise agrees that micro and small enterprises should be exempted from the new data-sharing obligations.

The Confederation of Swedish Enterprise strongly argues that B2B and B2C data access should be demarcated in the Data Act to avoid legal uncertainty.

In the case of data collected through consumer products, data protection regulation will continue to be a de facto major barrier to data sharing, and at the same time, it already provides users the right of data portability.

On B2B data sharing, voluntary data should prevail to allow for data sharing to take place in several ways, depending on which underlying technical solution is used, which business models the parties use, and the specific legal regulations that apply.

The Confederation of Swedish Enterprise does not agree that any market failure has been presented capable of warranting the proposed mandatory data-sharing requirements in the Data Act. To put such invasive requirements in place in a horizontal regulation could create unforeseen consequences in a range of sectors and harm the innovation and investment climate and the competitiveness of European companies.

Tools such as the European Commission proposals on voluntary model contract terms are welcome, particularly for smaller companies, which often may lack the necessary legal resources and capacity to negotiate contractual data sharing agreements. The European Commission should involve industry actors in drafting these models.

Chapter 3 – Obligations for data holders legally obliged to make data available

The Proposal obliges data holders to make data available to data recipients in the EU under fair, reasonable and non-discriminatory terms, and in a transparent manner.

The Confederation of Swedish Enterprise agrees that micro and small enterprises should be exempted from the new data sharing obligations.

The Proposal, however, leaves open the question of what happens if the data recipient and data holder cannot agree on reasonable protection measures.

Furthermore, the safeguards for sharing data are either unenforceable or insufficient for guaranteeing the protection of trade secrets. The Proposal does not indicate how the legitimate interests of data holders would be protected in the event of unlawful use by third parties, or indeed how the data holder would even be aware that this had happened. It appears that the burden of proof that such an abuse took place would be on the original data holder, which may be difficult in practice.

The Proposal has several shortcomings as to how data holders should be compensated for data sharing. The Proposal allows data holders to agree on ‘reasonable compensation’ with larger companies.[11] However, the Proposal does not sufficiently specify what constitutes a reasonable compensation. The data holder must also provide a calculation for the amount of compensation, which must be sufficiently detailed to allow it to be verified by the recipient.[12] As it is difficult to quantify the costs related to data sharing, this will likely be a difficult exercise for the data holders.

[11] Data holders can charge SMEs only for costs directly related to making data available – a level of compensation that is presumably lower than what is otherwise considered ‘reasonable’. Since the regulation obliges data holders to provide cost-based access to some of its competitors in aftermarkets, this will clearly have a negative effect on the current incentives to invest in data generation.
[12] European Commission (2022), 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), Article 9.

The failure to specify what constitutes ‘reasonable compensation’ is also something that has been criticised by the Regulatory Scrutiny Board.[13] The Confederation of Swedish Enterprise would welcome further clarification on this point.

Chapter 4 – Unfair terms

Greater clarity should be provided on what constitutes ‘good commercial practice in data access and use’ and ‘unilaterally imposed’ in this context. The list of conducts that are considered always unfair and presumed unfair should also be further clarified to ensure legal certainty.

Chapter 5 – B2G data sharing – Making data available to public sector bodies

In B2G relation, the Proposal ensures that data holders make available to public sector bodies of the Member States and to EU institutions, agencies and bodies, where there is an exceptional need and that the data that are necessary for the performance of tasks carried out in the public interests.

B2G data sharing already takes place, on both a voluntary and mandatory basis. The Confederation of Swedish Enterprise recognises the objective of the proposed rules in creating a harmonised framework for the use of such data. Also, companies agree that for specific use cases with a clear public interest, B2G data sharing is necessary, with the appropriate safeguards. However, with the current Proposal, the public sector bodies would be entitled to require data “to fulfil a specific task in the public interest that has been explicitly provided by law”. This use case is unclear and disproportionate. It does not fit the concept of “exceptional need”. The scope for B2G sharing obligations within the current Proposal is therefore too wide and too unpredictable.

Companies have a responsibility to ensure that corporate data remains protected. The more data that is being shared, the greater the risk of data breaches in the sharer’s or the recipient's database, and the greater the risk of violating, for example, privacy rules or the disclosure of trade secrets. Companies don't always rely on public sector privacy and security protection. In addition, there is a lack of trust in how the information shared will be used. Here, Sweden and Finland face additional challenges over B2G data sharing due to the principle of public access to information, something that makes companies often hesitant to hand over sensitive information to authorities. It must therefore be legally ensured that information shared by companies, where relevant, is covered by confidentiality and thus cannot be passed to other actors. In addition, the recipient should always be transparent about how the information will be used.

Chapter 7 – International access and transfer of non-personal data

The Confederation of Swedish Enterprise opposes Article 27, and believes this should be removed. The approach of the Data Act, of mirroring the GDPR on non-personal data held in the EU, appears excessive and disproportionate. What it is important and necessary to protect is intellectual property rights and business secrets, and this aspect should preferably be dealt

[13] European Commission Regulatory Scrutiny Board (2022), Opinion on Impact assessment / Data Act, p. 2.

within existing and planned international agreements such as WTO, the UN, the OECD, the ILO and UNESCO. This Article would be an overregulation, one that would hinder the free flow of data and opportunities to get desired services to the best price.

Chapter 10 - Data Base Directive

The Confederation of Swedish Enterprise does not support the suggested clarification on *sui generis right* of Article 7 of Data Base Directive. In the digital economy, machine-generated data can represent value. The collection of data can be a side effect of the construction of a digital service, for example, and also be a crucial part of the business model.

Economic actors that have built their business models on the collection and use of this data are in just as great a need of protection for their data as other actors. The clarification would only be justified if there was a market failure. The fact that Europe is lagging behind in the digital economy is not that type of market failure; that problem should be solved in other ways by than undermining the protection provided to innovative actors.

.....