

## Data Privacy and Cybersecurity

# New EU Data Act to Extend Protections to Non-Personal Data

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On 23 February 2022, the European Commission published its draft Data Act (the **Act**). The aim of the Act is to “ensure fairness in the digital environment, stimulate a competitive data market, open opportunities for data-driven innovation and make data more accessible for all”<sup>[1]</sup>. At this stage, it is unclear when the Act will finally be approved, but once it is there will be a 12-month implementation period before it comes into force.

The Act is wide ranging in its scope. It addresses issues such as data sharing, international transfers of data, ease of switching between service providers, and public sector access to data. If the Act is passed, it will inevitably increase the compliance burden on companies operating in the European Union (the **EU**). However, it should also provide increased opportunity to use data in a way that drives innovation and increases revenues.

### To whom will the Act apply?

The Act will apply to:

1. manufacturers of products<sup>[2]</sup> and suppliers of related services<sup>[3]</sup> (such as the internet of things) placed on the market in the EU and the users of such products or services;
2. data holders that make data available to data recipients in the EU;
3. data recipients in the EU to whom data are made available;
4. public sector bodies and EU institutions, agencies, or bodies that request data holders to make data available in certain circumstances; and
5. providers of data processing services (which would include, for example, cloud services) where such services are being offered to customers in the EU.<sup>[4]</sup>

Data are defined widely within the Act to include “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”<sup>[5]</sup>. As far as personal data are concerned, the Act makes clear that it does not affect the applicability of EU law on the protection of personal data, in particular the General Data Protection Regulation (Regulation (EU) 2016/679) (the **GDPR**).<sup>[6]</sup> Organisations that process personal data that fall within the scope of the Act will therefore need to consider both the Act and the GDPR going forward.

### What will the Act do?

A key change to be introduced by the Act concerns the international transfer of non-personal data. The Act requires providers of data processing services to take “reasonable, technical, legal and organisational measures, including contractual arrangements” 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 Member State law.<sup>[7]</sup> This requirement is similar to the restrictions around the international transfer of personal data contained in the GDPR and UK GDPR. The reference to “contractual arrangements”, for example, could see arrangements similar to Standard Contractual

Clauses or Binding Corporate Rules being introduced for transfers of non-personal data. Consequently, EU businesses that transfer data out of the jurisdiction, and international businesses that receive data from the EU, will need to re-think the way in which such data is shared, ensuring that appropriate safeguards are put in place.

The Act also contains provisions around business-to-consumer and business-to-business data sharing. The Act includes an obligation that products be designed and manufactured, and related services be provided, in such a manner that data generated by their use is accessible to the user.<sup>[8]</sup> A data holder will also be required to make available to the user, or a third-party acting on behalf of the user, the data generated by the use of a product or related service.<sup>[9]</sup> Such access must be provided free of charge to the user, but the data holder may require payment of “reasonable” compensation from the third-party to whom it must provide access.<sup>[10]</sup> Businesses need to start thinking, therefore, about whether their products and services would currently allow for such data sharing and if not, how this can be built into their products and services going forward. It may also be that this provides opportunities to generate revenue from data streams that are currently underutilised by companies.

The Act is also intended to make switching between data processing services much easier. Providers of data processing services will be required to remove commercial, technical, contractual, and organisational obstacles that inhibit customers from, for example, terminating their contracts for service, concluding new contracts with different service providers, and porting their data and other digital assets to other service providers.<sup>[11]</sup> The Act also contains provisions to facilitate the interoperability of data, which will likely require more standardised technology and functionality across the industry.<sup>[12]</sup>

The Act further increases access afforded to public sector bodies to data held by the private sector. A data holder will be required to make data available to a public sector body or EU institution, agency, or body which can demonstrate that there is an exceptional need to use the data requested.<sup>[13]</sup> An “exceptional need” will include, for example, responding to a public emergency (such as a flood, wildfire, etc), preventing a public emergency, or assisting the recovery from a public emergency.<sup>[14]</sup> Given recent world events, such coordinated access and use of critical data should be a positive step in the interests of the common good.

Finally, the Act also aims to protect SMEs. Micro or small enterprises are exempt from certain of the obligations contained in the Act, including for example, the provisions around business-to-consumer and business-to-business data sharing. Further, contractual terms relating to the access to and use of data or the liability and remedies for the breach or termination of data related obligations, which have been unilaterally imposed on SMEs will not be binding to the extent they are unfair. The Act contains guidance on when a contractual term will be unfair or presumed unfair for these purposes.<sup>[15]</sup> The Act further provides for the European Commission to publish non-binding model contractual terms on data access and use to assist parties in ensuring that the contracts they negotiate are balanced.<sup>[16]</sup> Larger companies will therefore need to proactively address the way in which they do business with smaller enterprises to ensure they do not fall foul of the Act.

Whilst the Act is aimed at making data more accessible, it is likely to have a big impact on international organisations that utilise EU data. International transfers of such data will become more difficult and burdensome, and so organisations should start to think carefully about the mechanisms they need to implement in order to continue using this data. However, with these increased compliance burdens comes a real opportunity for those companies who embrace the changing environment, and who can put themselves at an economic and competitive advantage by thinking early about how to adapt their businesses to the emerging new data landscape.



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[1] <https://digital-strategy.ec.europa.eu/en/news/data-act-commission-proposes-measures-fair-and-innovative-data-economy>.

[2] Defined as a tangible movable item, including where incorporated in an immovable item, that obtains, generates or collects, data concerning its use or environment, and that is able to communicate data via a publicly available electronic communications service and whose primary function is not the storing and processing of data – Article 2(2) of the Act. An example would include a smart home appliance.

[3] Defined as a digital service, including software, which is incorporated in or inter-connected with a product in such a way that its absence would prevent the product from performing one of its functions – Article 2(3) of the Act.

[4] Article 1(2) of the Act.

[5] Article 2(1) of the Act.

[6] Article 1(3) of the Act.

[7] Article 27(1) of the Act.

[8] Article 3(1) of the Act.

[9] Articles 4 and 5 of the Act.

[10] Articles 4, 5, and 9 of the Act.

[11] Article 23(1) of the Act.

[12] Chapter VIII of the Act.

[\[13\]](#) Article 14 of the Act.

[\[14\]](#) Article 15 of the Act.

[\[15\]](#) Article 13 of the Act.

[\[16\]](#) Article 34 of the Act.

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