



Submission to the Department of Enterprise, Trade and Employment on the proposal for a Data Act

May 2022



Coimisiún um
Iomaíocht agus
Cosaint Tomhaltóirí

Competition and
Consumer Protection
Commission

Introduction

1.1 The Competition and Consumer Protection Commission ('the CCPC') welcomes the opportunity to provide observations to the Department of Enterprise, Trade and Employment in 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'). The CCPC provides its views below in relation to the potential contribution of the Data Act to the development of competition, the measures addressing unfair contract terms and issues relating to consumer protection.

Competitive markets

1.2 The CCPC notes that the Data Act is intended to deliver on aspects of the *European strategy for data*, including 'to capture the benefits of better use of data, including greater productivity and competitive markets, but also improvements in health and well-being, environment, transparent governance and convenient public services'¹. The Data Act will provide for lower barriers to switching between service providers as well as lowering barriers to entry for the use of data by businesses to enable them to compete and innovate. The CCPC welcomes the intention of the Data Act to promote competition across markets in which value from data can fuel innovation. The CCPC notes that the measures relating to switching and interoperability will complement those contained in Directive (EU) 2018/1972 ('the European Electronic Communications Code')². In addition, the Data Act will complement the Digital Markets Act ('DMA') by excluding 'gatekeeper' firms from benefiting from the data access regime it introduces. The Impact Assessment accompanying the Data Act notes that these measures are aligned with the "policy objective of the DMA, which is to limit the ability of gatekeepers to combine and exploit data from large numbers of data holders to undermine contestability and fairness in core platform services will be reflected in the Data Act by ensuring that the increased data supply primarily benefits users and smaller economic players."³ The CCPC welcomes the proposed alignment

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0066>

² In addition, the Data Act lays down rules relating to connected products (that is connected to the Internet of Things) which may complement the provisions of the European Electronic Communications Code.

³ Available here: [https://ec.europa.eu/transparency/documents-register/detail?ref=SWD\(2022\)34&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=SWD(2022)34&lang=en)

between the two instruments which should contribute to a more competitive market for data services.

- 1.3 The explanatory memorandum accompanying the Data Act notes that, as data is a non-rival good, exclusive rights of access to data can be an impediment to innovation.⁴ Where access to databases or datasets is limited the wider ecosystem of businesses and potential entrants to a market are constrained in the extent to which they can offer innovative goods or services. The Data Act will provide for a horizontal framework which is complementary to competition and intellectual property law, and is intended to ensure that the data generated by the use of goods and services is accessible on fair, reasonable and non-discriminatory terms.⁵ In this way policy and legislation is increasingly supportive of lowering barriers to entry in digital markets.
- 1.4 In its Communication to the European Parliament and the Council *A competition policy fit for new challenges* the European Commission noted that in view of “the importance of data as a key ingredient for the innovative potential of companies, competition enforcement complements the Commission’s regulatory actions in promoting data sharing and levelling the playing field between gatekeepers and smaller companies.”⁶ The Communication also noted that the ongoing revision of the guidelines applicable to horizontal agreements between competitors “will provide updated guidance on data sharing, to ensure that companies can take the most out of data without undermining competition and allowing the Data Governance Act and the Data Act to fulfil their full potential on that aspect”.⁷ The CCPC observes that the activities of national competition authorities in relation to horizontal activities of undertakings in digital markets will be complementary to the objectives of the Data Act⁸.

⁴ ‘Non-rival’ goods are those that can be used by many people at the same time unlike rivalrous goods which can only be used by one person at a time.

⁵ The CCPC notes that the investments in the databases themselves will be protected by the intellectual property rules while ensuring that there is greater access to data facilitated by the Data Act.

⁶ https://ec.europa.eu/competition-policy/policy/competition-policy-fit-new-challenges_en

⁷ The Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (‘the Horizontal Guidelines’) are available here: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52011XC0114%2804%29> The revised Horizontal Guidelines are expected to be adopted by the European Commission by Q4 2022.

⁸ The CCPC notes Recital 88 which states that the Data Act should not affect the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union.

Unfair Contract Terms

- 1.5 The Data Act contains provisions at Article 13 which are intended to prevent the unilateral imposition of an unfair contractual term concerning, among other things, the access to and use of data by an enterprise on a micro, small or medium sized enterprise. A number of the provisions of Article 13 are aligned to the provisions of the Unfair Terms in Consumer Contracts Directive ('UTCD')⁹, however there are substantial differences between what is considered to be unfair in business-to-consumer contracts and the more restrictive list of unfair terms contained in the Data Act. The CCPC notes Recital 26 of the Data Act which states that the UTCD will apply to contracts between a consumer and a data holder for the use of a product or service generating data.
- 1.6 As is recognised in Recital 53 to the Data Act, the unfair terms covered in Article 13 are specific to those elements of a contract between businesses that are related to access to and use of data. The CCPC notes that the intention of the Data Act is to ensure continued freedom to contract between businesses but to ensure that simply possessing a stronger bargaining position is not grounds to unilaterally impose disadvantageous terms on the weaker party to the transaction. To that extent Article 13 is aligned with the approach taken in a number of other legislative instruments. Directive (EU) 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain ('the UTP Directive') applies to the business conduct of larger operators towards operators who have less bargaining power.¹⁰ The UTP Directive preserves contractual freedom between suppliers and buyers of agricultural and food products but prohibits a range of practices which are considered to be unfair by their nature and due to an imbalance in bargaining power between the parties.¹¹ Similarly, Article 7 of Directive 2011/7/EU ('the Late Payment Directive') provides that a contractual term or a practice relating to the date or period for payment, the rate of interest for late payment or the compensation for recovery costs is

⁹ Directive 93/13/EC

¹⁰ Recital 14

¹¹ Article 3(1) sets out a range of trading practices that are considered unfair in all circumstances while Article 3(2) provides for a prohibition on a range of practices unless they have been previously agreed in clear and unambiguous terms in the supply agreement or in a subsequent agreement between the supplier and the buyer.

either unenforceable or gives rise to a claim for damages if it is grossly unfair to the creditor.¹²

- 1.7 Annex 11 of the Impact Assessment accompanying the Data Act sets out the European Commission’s reasoning regarding the unfairness test subsequently contained in Article 13.¹³ The CCPC notes the explanation in the Impact Assessment that simply “having a situation where one contractual party is able to obtain a better deal reflecting its stronger bargaining power does not mean that such contract terms are unfair. Therefore, the unfairness test does not concern clauses which are simply disadvantageous for one contractual party”. Article 13 will therefore be limited to the protection of micro, small and medium-sized enterprises (MSMEs) in specific circumstances while preserving the contractual freedom of the parties. The Impact Assessment notes that the burden of proof in relation to the unfairness of a contract term would be on the plaintiff in court proceedings. It further notes that the enforcement of Article 13 will be left to Member States as is done in any other EU contract law legislation. It is suggested that this could involve enforcement through the courts, by competent authorities or by both.
- 1.8 The CCPC welcomes the inclusion of Article 13 in the Data Act as a useful provision to ensure that the aim of facilitating MSMEs to use data to innovate in their products and services is not frustrated through the use of greater bargaining power.

Consumer Protection

- 1.9 The Data Act contains a number of provisions which will directly or indirectly benefit consumers of data services. These will include increased competition and choice, rules to facilitate switching of data services and interoperability, measures to reduce the ‘lock in’ of consumers in relation to connected products, and more efficient and greener consumer products. A number of provisions of the Data Act

¹² <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0007>

¹³ [https://ec.europa.eu/transparency/documents-register/detail?ref=SWD\(2022\)34&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=SWD(2022)34&lang=en)

are also intended to complement or rely on rules in Regulation (EU) 2016/679 ('the General Data Protection Regulation') which protect a consumer's data rights.

- 1.10 The CCPC notes the intention in Recital 34 that the Data Act prevent service providers from coercing, deceiving or manipulating consumers through the use of 'dark patterns'¹⁴. Such protections from the use of dark patterns for consumers may complement forthcoming measures contained in the Digital Services Act applying to providers of very large online platforms as well as those proposed in the revision of the Distance Marketing of Finance Services Directive¹⁵.
- 1.11 The CCPC notes that Recital 82 of the Data Act states that natural and legal persons should be entitled to seek redress for infringements of their rights provided by the Data Act. It is proposed to facilitate this by amending Regulation (EU) 2017/2394 (the Consumer Protection Cooperation Regulation ('the CPC Regulation')) and Directive (EU) 2020/1828 ('the Representative Actions Directive'). Article 36 of the Data Act would amend the Annex to the CPC Regulation while Article 37 would amend the annex to the Representative Actions Directive.¹⁶ In relation to the CPC Regulation this would have the effect of bringing the Data Act within the scope of what are defined in Article 3(1) as "Union laws that protect consumer interests". This in turn would enable national consumer authorities to impose penalties for infringements of the Data Act under Article 9(5) of the CPC Regulation as well as to alert other members of the CPC Network under Article 26(3) to possible infringements on their territory.

It is noted that the CPC Regulation and Representative Actions Directive relate to 'consumers' meaning a "natural person who is acting for purposes which are outside his trade, business, craft or profession." Article 2 of the Data Act defines a 'user' for its purposes as meaning a "natural or legal person that owns, rents or

¹⁴ As referenced in Recital 34, dark patterns are "design techniques that push or deceive consumers into decisions that have negative consequences for them. These manipulative techniques can be used to persuade users, particularly vulnerable consumers, to engage in unwanted behaviours, and to deceive users by nudging them into decisions on data disclosure transactions or to unreasonably bias the decision-making of the users of the service, in a way that subverts and impairs their autonomy, decision-making and choice."

¹⁵ Article 16e would require measures to prevent traders from using the structure, design, function or manner of operation of their online interface in a way that could distort or impair consumers' ability to make a free, autonomous and informed decision or choice:

https://ec.europa.eu/info/sites/default/files/1_1_189477_prop_dis_en.pdf

¹⁶ <https://eur-lex.europa.eu/eli/reg/2017/2394/oj>

leases a product or receives a service". Such a definition covers both consumers and businesses. It may provide for greater clarity if the Data Act included a definition for the 'consumer' or referred to an already existing definition under consumer protection law - e.g. the CPC Regulation¹⁷. It is not clear how the indirect consumer protection provided by the Data Act should be exercised under the CPC Regulation. Neither the CPC Regulation nor the Representative Actions Directive cover the interests of legal persons. It is therefore not clear how legal persons could seek redress under Articles 36 and 37 of the Data Act. The CCPC notes that Article 10 provides for a system of dispute settlement while Article 32 facilitates competent authorities to receive complaints and coordinate among themselves in relation to such complaints. The CCPC suggests that the proposal could be further clarified in order to provide for an approach to redress without relying on existing legislative instruments.

As noted above, Article 32(1) of the Data Act provides for a right for natural or legal persons to lodge a complaint with the relevant competent authority in their Member State. Article 32(3) in turn provides that competent authorities shall cooperate to handle and resolve complaints, including through exchange of information on a cross-border basis. The CCPC notes that the cooperation mechanism in the CPC Regulation applies to national consumer authorities, whereas the competent authorities to be designated under the Data Act will include the Data Protection Authorities that are not members of the CPC Network. The European Data Protection Supervisor (EDPS) and the European Data Protection Board (EDPB) issued a joint opinion on the Data Act in May 2022.¹⁸ The CCPC notes the observation contained in the EDPS-EDPB joint opinion that the draft governance architecture set out in Article 31 "will lead to complexity and confusion for both organisations and data subjects, divergence in regulatory approaches across the Union and thus affect the consistency in terms of monitoring and enforcement."¹⁹ The EDPS-EDPB joint opinion suggested that further development of the cooperation mechanism under the Data Act is

¹⁷ The CCPC notes the use of the term 'customer' throughout the Data Act. Clarity would be welcome on whether 'customer' is to be construed as interchangeable with 'user' as defined in Article 2 or whether a distinction is intended to be drawn between types of customers.

¹⁸ https://edpb.europa.eu/system/files/2022-05/edpb-edps_joint_opinion_2022_on_data_act_proposal_en.pdf

¹⁹ *ibid*

required and, in addition, stated that their view that it is unclear how and to what extent the CPC Network mechanism will interact with the Article 32 right to lodge a complaint. The CCPC agrees with the observation of the EDPS-EDPB joint opinion and suggests that further clarity is required on the overall architecture to be employed to facilitate cooperation between the various competent authorities.

The joint opinion observes that, as the General Data Protection Regulation applies when personal and non-personal data in a data set are inextricably linked, the role of data protection authorities should prevail in the governance architecture of the Data Act. The CCPC notes the recommendation of the EDPS-EDPB joint opinion that the co-legislators designate national data protection authorities as coordinating competent authorities under the proposal. The CCPC supports the view of the EDPS-EDPB joint opinion that it is important to minimise the degree of overlap between competent authorities for the purposes of the Data Act.

ENDS

