

The Data Act: empty promises for business-to-government data sharing?

A critical analysis of the Proposal on the Data Act and its implications for the redistribution of data.

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Abstract: On 23 February 2022, the European Commission issued a Proposal for The European Parliament and of the Council on harmonized rules on fair access to and use of data, also known as the Data Act. The main objective of the Act is to unlock data's potential for innovation by providing opportunities for the reuse of data, the regulation will have direct implications for businesses, public sector bodies, cloud, and other data processing service providers, covering private sector data, personal and non-personal data, and co-generated data such as the Internet of Things. It however fails to create rules and principles that boost the sharing of data, introducing only a few mandatory sharing rules for exceptional situations. Furthermore, the proposal has some fundamental gaps that maintain the current obstacles to the sharing of data. The analysis presented in this paper summarizes the Act's proposal, focusing on its provisions related to business-to-government data sharing, outlining its gaps, and its potential implications for smart cities. © 2023 The Author(s)

1. Introduction

On 23 February 2022, the European Commission issued a Proposal for The European Parliament and of the Council on harmonized rules on fair access to and use of data, also known as the Data Act.¹ The proposed text aims to make a shift in the European approach to data, challenging data monopolies in different sectors, and solidifying data as a non-rival good. According to the European Commission,² the economic value of data is estimated to rise to € 829 billion by 2025, only in the European Union. Data is unlike any other resource on the planet, due to its non-rivalrous and non-excludable nature characteristics it makes it possible to use the same dataset an unlimited number of times, for a variety of purposes without loss in quality and quantity.³ These qualities of data also demonstrate its potential to increase the well-being of individuals by informing decision-making that targets social challenges.⁴

However, often the public sector lags behind the private sector in technologies such as sensors and appliances, at the same time it remains responsible to answer society's challenges. At the same time, data has become the heart of many businesses, that concentrate and centralize it under their influence, creating a monopoly over data and restricting access to the benefits that come from it. This control over data generates a centripetal movement that re-moves the value away from the public sphere into the private sector⁵ hindering the flow of data and its transformative potential.⁶

In that respect, a regulatory framework for business-to-government data sharing is necessary to create a lawful structure that makes the sharing of data possible and at the same time fuels cooperation. It is based on this fact that the European Commission has designed the European Data Strategy,⁷ with the main objective of reallocating the value of data while allowing its free flow for the benefit of businesses, researchers, and public administration, the Data Act Proposal is a part of this Strategy.

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¹Perarnaud, Clément, and Rosanna Fanni. The EU Data Act: Towards a new European data revolution?. No. 35693. Centre for European Policy Studies, 2022, pp. 1-8.

²European Commission, 2020 Factsheet: The European Data Strategy. European Commission, 19 February.

³Data-driven innovation: big data for growth and well-being. OECD Publishing, Paris, 2015. <https://www.oecd.org/sti/data-driven-innovation-9789264229358-en.htm>

⁴European Commission, 2020a Factsheet: The European Data Strategy. European Commission, 19 February.

⁵Tarkowski et al. Open Future Policy Brief n. o 3, A public interest framework for Business-to-Government data sharing in the Data Act. (2022).

⁶Alemanno, Alberto. Towards a European strategy on business-to-government data sharing for the public interest. Final report prepared by the High-Level Expert Group on Business to Government Data Sharing European Commission (2020)

⁷European Commission, Factsheet: The European Data Strategy. European Commission, 19 February 2022.

and other data processing service providers, covering private sector data, personal and non-personal data, and co-generated data such as the Internet of Things (IoT). The Act also aims to facilitate the use by the public sector bodies of data held by the private sector, however, there are still doubts on how the Data Act could be an asset to help the development of business to government data sharing in contexts such as smart cities.

Thus, this study has the main objective of assessing the Data Act, through the analysis of the most recent Proposal, focusing mostly on its provisions of Chapter V relating to business-to-government data sharing. It aims to inquire how the provisions related to business-to-government data sharing would apply to smart cities contexts due to its closeness to citizens and impact on society's life. To this end, following the introduction, Section II analyzes the structure of the Data Act Proposal, presenting a summary of the Regulation in a general manner, following an in-depth analysis of Chapter V of the Act related to business-to-government data sharing in subsection II 1., and an examination of the gaps of the Chapter in subsection II 2. Section III is focused on the implications of the Data Act for smart cities and how the gaps might impact the development of these environments. At last, the study is concluded in section VI with a summary of the analysis and closing remarks.

2. The Data Act Proposal: a summary

Data is vital to our society, it is an integral part of economies, and is considered to be responsible for the creation of millions of jobs. The European Commission has been aware of its relevance, and for this reason has been making efforts to regulate its use while profiting from its benefits. This is the foundation in which the European Commission proposed "The Data Act" on February 2022.⁸ The proposed Act is a part of the "The European Data Strategy"⁹ which aims to unlock the potential of the digital economy by increasing the flow of data and making it available to be used and reused for the benefit of society. This Strategy is based on prior work and studies commissioned by the Commission, that can be traced back to a Communication on "Building a European Data Economy"¹⁰ which proposed policy and legal solutions to unleash the EU's data economy, including the idea of "Reverse Public Information"¹¹ as a method of B2G data sharing.

With The Data Act, the EU aims to redistribute the value of data among actors of the data economy by introducing mandates to grant access to datasets to the benefit of private and public entities, with the endeavor for general accessibility, interoperability, and portability of data creating technical safeguards and firm limitations for re-use in the data lifecycle in place.¹² The Act aims to flexibilize some of the existing barriers that currently exist in the European market to break data concentration and push for the creation of value from data by different stakeholders.¹³

The proposal consists of 42 articles divided into eleven chapters based on four main pillars: making better access to IoT data; confronting unfair contractual clauses in data sharing processes; making business data available for the common good, and making it easier to switch between cloud services. It initiates with Chapter I presenting the scope and terminology of the Act, defining concepts and its relationships with other legislation such as the GDPR, while Chapter II gives users rights to access data and the possibility to request its sharing with third parties. Chapter III sets general rules for data holders to make data available, yet citing that reasonable compensation must be agreed upon. Chapter IV aims to tackle unfair contractual terms related to data access and use between enterprises, while Chapter V, which will be discussed in more detail in part II 1., concentrates on business-to-government data sharing, creating a framework under which public sectors may request data under specific circumstances. Chapter VI introduces a regulatory requirement enabling customers to switch between cloud services, whereas Chapter VII settles technical, legal, and organizational safeguards to prevent unlawful third-party access to non-personal data. Chapter VIII sets requirements related to interoperability for operators of data spaces and data processing services providers, setting basic requirements for smart contracts, whereas Chapter X, lays down implementation and enforcement frameworks related to authorities in each Member State. At last, the Data Act finalizes with Chapter XI which is dedicated to final provisions.

The Act has direct implications in different areas such as for businesses, public sector bodies,¹⁴ cloud, and

⁸European Commission, Proposal for a Regulation of the European Parliament and of the Council on harmonized rules on fair access to and use of data (Data Act) COM (2022) 68 final, Brussels, 23 February 2022.

⁹Communication 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.

¹⁰Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, Building a European Data Economy.

¹¹As mentioned by Tarkowski et. al. (2022), this concept refers to the 2013 PSI Directive that came before the Open Data Directive, which laid down rules for the reuse of public data with the objective to facilitate access and reuse of privately-held data.

¹²Hennemann, Moritz, and Gregor Lienemann. The Data Act-Article-by-Article Synopsis of the Commission Proposal. Available at SSRN (2022), pp. 1-35.

¹³Botero Arcila, Beatriz, and Teodora Groza. Comments to the Data Act from the Law and Technology Group of Sciences Po Law School. Available at SSRN (2022), pp. 1-9.

¹⁴The definition adopted of "public sector body" is as stated in Article 2(9) of The Data Act "public sector body" means national, regional, or local authorities of the Member States and bodies governed by public law of the Member States, or associations formed by one or more

Internet of Things' data.¹⁵ Due to its extension, the Act goes beyond any current legal framework,¹⁶ proposing institutional, decentralised structures for data access, sharing, and portability. Thus, it has been defined as a bold, courageous proposal that, if adopted, could reshape the European regulatory framework for data having an impact on the larger EU economy.¹⁷

The Data Act has connections with other legislative measures such as the GDPR and the Digital Markets Act. Some connections are more tangential than others, for instance, the Data Act's right of data access complements the right to receive and port personal data of Article 20 GDPR, GDPR principles such as data minimization and data protection by design and by default are also mentioned on the Act directly on Recital 8 and indirectly, and should guide all transfers of personal data. The Data Act is connected to the Digital Markets Act since it takes the concept of "gatekeepers" to exclude those companies as eligible as third parties to receive data generated by the use of a product or related service.¹⁸ At last, the Data Act is also linked to the Digital Services Act, since both touch upon intermediary services such as cloud services providers and very large online platforms, creating new obligations for on-line players, and regulating rights to data subjects. Additionally, the ambition to unlock the potential of data fits into the purposes of the Proposal for a Regulation on the European Health Data Space, which is one piece of a larger plan that aims to develop thirteen common European data spaces to boost growth and create value with the reuse of data.¹⁹

3. Chapter V of the Data Act

Following the general analysis of the structure and general objectives of the Data Act, this section aims to analyze Chapter V of the Data Act, which is focused on business-to-government data sharing provisions. The gaps in the Proposal will be examined in the subsequent section II 2.

As previously highlighted, the spirit of the Data Act is to create mechanisms that allow the redistribution of data between different actors and stakeholders in the economy, including mechanisms that allow data sharing between businesses to governments. Chapter V of the Data Act named "Making Data Available to Public Sector Bodies and Union Institutions, Agencies or Bodies Based on Exceptional Need" aims to make business data available to the public sector (B2G) under certain "exceptional circumstances". The Article can be divided into three hypotheses as follows.

3.1. Articles 14, 15, 16 and the obligation to make data available based on exceptional need

The Chapter opens with Article 14, setting a general obligation to make data available based on "exceptional needs", highlighting that this chapter does not apply to small and micro enterprises.²⁰ The following article 15 goes into the circumstances in which the exceptional need is deemed to exist, resulting in the obligations for private companies to make data available.²¹

The first two circumstances – 15(a) and (b) – relate to the existence of a public emergency, and the need to use private data to deal with it. Yet, the third one – 15(c) – is related to situations when the lack of available data prevents the public sector from fulfilling a specific task in the public interest that has been explicitly provided by law. In this case, the public sector will have to be unable to obtain data by alternative means including purchasing data on the market through public procurement. When it comes to definitions, Recital 57²² is the guide for defining what can be considered a "public emergency" presenting some examples such as "emergencies resulting from environmental degradation and major natural disasters including those aggravated by climate change".

In our perspective, the circumstances presented in articles 15(a) and (b) are narrower and context-dependent than 15(c) – in which the specific task must be in "public interest explicitly provided by law" – due to the amplitude of the concept of "public interest" in comparison to the concept of "public emergency". This is aggravated by the fact that the Act did not provide any definition or criteria to define "public interest" as it did with "public emergency". As a result, the lack of definition might make the transfer of data even more complex and bureaucratic for the public sector, during a period in which a fast response is essential for a proper response to an emergency. The

such authorities or one or more European regulatory framework for data having an impact on the larger EU economy bodies;

¹⁵Perarnaud and Fanni, 2022.

¹⁶Leistner, Matthias, and Lucie Antoine. IPR and the use of open data and data sharing initiatives by public and private actors. Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Legal Affairs (2022).

¹⁷Perarnaud and Fanni, 2022.

¹⁸Graef, Inge and Husovec Martin. Seven Things to Improve in the Data Act. SSRN Electronic Journal, (2022).

¹⁹A First look at the European Health Data Space Proposal, Open Future (2022), <https://openfuture.eu/blog/a-first-look-at-the-european-health-data-space-proposal/>

²⁰Article 14 Data Act.

²¹Article 15 Data Act.

²²Recital 57 Data Act.

joint opinion issued by EDPB- EDPS goes in the same direction, advocating for a more explicit delimitation or definition by the Proposal.²³

The subsequent Article 16 provides further guidance, expressing that Chapter V does not affect obligations laid down by Union or national law for reporting, complying with information requests, or demonstrating or verifying compliance with legal obligations. It also prohibits the use of the B2G data sharing hypothesis to carry out activities for the prevention, investigation, detection, or prosecution of criminal or administrative offenses. This is essential when it comes to the protection of fundamental rights of individuals and the possibilities that may come from the sharing of data, giving certain legal certainty to the private sector.

3.2. Article 17 concerning formalities of the requests to make data available

Article 17(1) sets the requirements for the data requests that are made by the public sector body, namely, the sector must specify what data are required, demonstrate the exceptional need for it, the purpose of the request, and for how long that data will be used, and the legal basis of the request must be specified. The deadline by which the data must be made available must be detailed, yet the data holder might request a modification or withdraw the request. Article 17 (2) defines the specifications for the requirement namely, be expressed in clear, concise, and plain language, be proportionate to the exceptional need, in terms of granularity and volume of data requested, and the frequency of the access to the data. The public sector must respect the legitimate aims of the data holder, taking into account trade secrets and costs to make the data available, and be concerned as possible with non-personal data. On this subject, the EDPS and EDPB “Joint Opinion on the Data Governance Act” stresses that the distinction between personal and non-personal data is not that straightforward in practice due to cases where non-personal data results from anonymization of personal data, which can confuse and struggles when requesting and receiving data.

Going further, the request must be available online and include the information the data holder may face penalties in the event of non-compliance. Number (3) of Article 17 rules out the use of the data obtained by B2G data sharing for reuse under the Open Data Directive²⁴ nor the Directive should apply to the data held by public sector bodies that were obtained under this Chapter. However, Article 17(4) clearly states that 17(3) does not prohibit the public sector from exchanging data obtained via this Chapter with other public sectors if this exchange is done to complete the task on which the request for data was based. Making data available to a third party is also not ruled out if it was outsourced by publicly available agreement, technical inspections, or other functions to this third party. Nevertheless, when making data available in both situations the public sector must notify the data holder.

3.3. Articles 18 and 19 regarding compliance with data requests

Following Article 18 regulates the private sector and how the data holder must comply with the requests for data, namely pointing out that the data must be made available without further delay. The data holder may decline the request or seek its modification within 5 working days when the request is related to a public emergency and within 15 working days related to other cases of exceptional need. However, 18 (2) (a) and (b) list under what grounds the decline or request for modification must be done, namely if the data is unavailable or the request does not follow the conditions laid down by Article 17(1) and (2). Based on 18 (3), the data holder may decline or ask for modification for data requests based on public emergencies if the data holder already provided the data to a previous request for the same purpose to another public sector. In this situation, the data holder must identify the public sector body with whom the data was previously shared. Article 18 (5) is one of the most important sections of Chapter V since it states that when complying with the request to make data available, the data holder must make efforts to pseudonymize the data if the request can be fulfilled with pseudonymized data.²⁵ At last, Article 18(6) states that in case the public sector wants to challenge the data holder’s refusal to provide the data requested this challenge shall be brought to the competent authority referred by Article 31, which is designated by each Member State as responsible to enforce this Regulation.

Article 19 lays down the obligations of the public sector when receiving data based on the abovementioned requests, namely don’t use the data for purposes that are not compatible with the purpose of the request, when personal data is necessary the sector must implement organizational measures to safeguard the rights and freedoms of data subjects, destroy the data as soon as they are no longer necessary and inform the data holder of the deletion. Trade secrets are also protected by Art. 19(2) which mentions that appropriate measures must be applied to preserve their confidentiality.

²³EDPB-EDPS Joint Opinion 2/2022 on the Proposal of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act)

²⁴Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information.

²⁵Here lays the link between the Data Act with Article 25 of the GDPR and principles of data protection by design and by default that is explicitly mentioned by Data Act Recital (8).

Article 20 related to monetary compensations and closing articles

The subsequent Article 20 is related to possible compensations to data holders under data requests based on Article 15 (b) or (c). Compensation must not exceed technical and organizational costs incurred to comply with the request, including costs for anonymization and possible technical adaptation if necessary, and the data holder must provide information on the basis for the calculation of costs and the reasonable margin. It is important to highlight that as Article 20 (1) states, requests for data to respond to a public emergency shall be provided free of charge due to its nature.

Despite the restrictions presented by Article 17, Article 21 states that the public sector is allowed to share data received based on this chapter with individuals and organizations that carry out scientific research or analytics that are compatible with the purpose for which the data was requested, or to national statistical institutes for official statistics. These individuals or organizations must act on a non-profit basis or for a public interest mission, and shall not include a decisive influence of commercial undertakings. These institutions or individuals must comply with the provisions of the abovementioned Articles 17(3) and 19.

Finally, Chapter V finishes with Article 22 which lays down rules that aim to make public sector bodies cooperate and assist one another to avoid the misuse of data that was requested and provided. The Article also states that whenever public sector body intends to request data, it shall first notify the competent authority of that Member State which will advise the requesting public sector to reduce the burden on the data holder.

4. Gaps in Chapter V provisions

Following the analysis of the Data Act Proposal, especially in Chapter V of the Proposal, this section aims to make an analysis of the limitations and gaps of the Proposal when it comes to business-to-government data sharing. First, it is essential to be mindful that the main objective of the Data Act is to ensure fairness in the allocation of the value of data, unlock its potential, and boost its reuse while reducing monopolies over data. Yet, it is of our understanding that the Act has some gaps that may undermine the possible fight against the “silo mentality” of private companies, as follows.

The Act creates two mandatory B2G data sharing hypotheses, related to public emergencies and public interest tasks. The definition of “public emergency” is present in Article 2(10) yet, it lacks a definition for “public interest”. The absence of a definition for “public interest” is one of the main gaps observed in the Proposal, since this delineation is crucial to avoid potential abuses²⁶ from the public sector, but also to permit B2G data sharing to flourish and benefit society. The High-Level Expert Group on Business-to-Government Data Sharing has highlighted that the task of creating a “one-size-fits-all” definition for “public interest”²⁷ might be an almost impossible task to accomplish, instead, the creation of a set of criteria that would help to qualify whether a task is in the public interest is suggested.²⁸ In our opinion, the HLEG proposal would give legal certainty while maintaining a certain level of flexibility that is necessary when it comes to “public interest” tasks. Moreover, the creation of a set of criteria to qualify whether a task is in the public interest would allow more situations to fit into this category, such as smart city appliances since they have the main purpose of producing social welfare benefits fitting into “public interest”. Another option may come from the interpretation of Article 6 (I)(e) of the GDPR, as it states that the processing of personal data by public authorities must be necessary for the exercise of a public task that is carried out in the “public interest”. Here, the general understanding is that “public interest” would be determined based on Union or Member State Law, thus varying depending on the context of the case.

Another relevant point of the Act is the lack of limitation on what type of data is shared, for how long, and how it is going to be safeguarded. As the Center for Data Innovation points out, neither Article 17 nor Article 19 of the Data Act create any limits on the sharing of personal data.²⁹ Although this topic deserves to be the subject of a dedicated study, it is of our understanding that even though personal data may be perceived as important in certain data-sharing situations, it is essential to set boundaries for its responsible use to avoid possible misuse and abuses. The joint opinion of the EDPS-EDPB follows the same route, pointing out the risk of “commodification” of personal data due to the lack of safeguards regarding personal data in the act.³⁰ producing a power imbalance

²⁶EDPB-EDPS Joint Opinion 2/2022 on the Proposal of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act)

²⁷France has introduced the notion of “public interest data” which can be found in Loi Lemaire gives a mandate to the State to access any kind of private data and to make it available for wide re-use. N.o 2016-1321 du 7 octobre 2016 pour une République numérique. <https://www.legifrance.gouv.fr/dossierlegislatif/JORFDOLE000031589829/>

²⁸Alemanno, Alberto. Towards a European strategy on business-to-government data sharing for the public interest. Final report prepared by the High-Level Expert Group on Business-to-Government Data Sharing European Commission (2020).

²⁹Center for Data Innovation, Feedback on the Data Act. 2022 <https://datainnovation.org/2022/05/feedback-on-the-data-act-proposal-by-the-european-commission/>

³⁰In this context, the European Commission Communication COM (2018) 232 final has indicated a few principles that could support the supply of private sector data to public sector bodies, amongst these principles are “data collaboration agreements should seek to be mutually beneficial while acknowledging the public interest goal by giving the public sector body preferential treatment over other customers”. However,

between the private sector and the public sector.^{31 32 33} guide these contracts. An alternative would be placing preferential conditions in contractual clauses between businesses and governments, as they have emerged³⁴ as a method to ensure better conditions in contractual arrangements between the private and the public sector. The basis for settling conditions would be the public interest goal behind the purchase of data, reflecting lower prices, higher quality, and early delivery of purchased data.

As it is possible to observe, the regulation of business-to-government data sharing in the Data Act is context-based and limited. The Act did fail to present other fewer interventionist options such as incentives to the private sector or soft law approaches, leaving a “regulation vacuum”.^{35 36} By choosing to only insert a mandatory data sharing hypothesis without creating principles and general rules to expand the sharing of data, the Act obstructs the construction of a legally compliant, technically feasible, socially acceptable, financially and commercially viable B2G data sharing process.³⁷ It is essential to point out that mandatory data sharing is only one of the many options to regulate B2G data sharing, it lies at an extreme of a spectrum.³⁸

The vacuum of regulation impacts many sectors in different ways. In the next section, we have opted to analyze the Act’s impact and its gaps in business-to-government data sharing in smart cities contexts due to its potential to serve the public interest.

5. Implications of the Data Act to smart cities

This section aims to focus on the implications of the B2G data sharing provisions for smart cities and how these gaps might impact the development of data sharing in these environments. The choice to make an analysis focused on smart cities is based on two main reasons, according to studies,³⁹ by 2050 around 55 percent of the world’s population will live in urban areas, and this concentration of population increases significantly the societal challenges at the same time it demands more efficient public services. Due to its characteristics, data has the potential to inform decision-making that targets these challenges, delivering a more efficient public administration.⁴⁰

The term “smart city” is not new, yet there is still an ongoing discussion on a proper definition for it since the concept varies depending on political and commercial intentions behind its use.⁴¹ That said, we adopt the definition of smart cities used by Yigitcanlar et al., who describes smart cities as an integration of physical, digital, and human systems with the objective of providing innovative solutions to several challenges presented by growing cities.⁴²

Throughout the analysis of this study, it is possible to conclude that the Data Act has chosen to adopt concentrated and limited mandatory provisions of B2G data sharing, which are mostly located in Articles 15 (a), (b), and (c), restricted to the hypothesis in which there is a public emergency and the data is essential to either respond to it or to prevent and assist recovery from it, whereas (c) is related to situations in which the public sector is not able to fulfil a specific task in the public interest. Having this in context, we observe that The Data Act does not have the main focus on creating a broad B2G data sharing mechanism, instead, it chose to create a narrow mandatory provision that would only be applicable in exceptional situations.

As abovementioned, the Data Act was the last proposed Act part of the “European Data Strategy”. Throughout

Communications are meant to clarify current policies and provide a framework on how to interpret policies, but these interpretations are non-binding. See <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:0232:FIN>

³¹EU Science Hub, 2020. JRC Technical Report. JRC Digital Economy Working Paper 2020-04. The economic of Business-to-Government data sharing. European Commission.

³²These imbalances are also mentioned by the Rapport relatif aux données d’intérêt général which states that when the public sector must comply with private law contract it should be ensured that contractual clauses do not harm the proper functioning of the public service and that this situation would demand the introduction of a specific legislation. See Cytermann, Laurent et al. Rapport relatif aux données d’intérêt général (2015) 2.

³³It is worthy of note that power imbalances are still in place even when the public sector chooses to refrain from B2G data sharing in smart cities contexts, solutions financed and controlled by the state might perform worse than the private solutions due to the amount of data collected and siloed by these data-driven companies which eventually makes them able to provide a better service. See Früh, Alfred, Nadja Braun Binder, and Robert Schibli. Data Governance für Smart Mobility aus rechtlicher Perspektive. sui generis (2022). pp. 15–24.

³⁴European Commission Communication COM(2018) 232 final.

³⁵For more information about less interventionist instruments to boost B2G data sharing: Shkabatur, Jennifer. The global commons of data. Stan. Tech. L. Rev. 22 (2019), pp. 354.; Martens, Bertin, Alexandre De Streel, Inge Graef, Thomas Tombal, and Néstor, Duch-Brown. Business-to-Business data sharing: An economic and legal analysis. EU Science Hub(2020) and Huyer, Esther, and Gianfranco Cecconi. Analytical report 12: Business-to-government data sharing. European Data Portal: Brussels, Belgium (2019).

³⁶For more information on how to create value for business to enable B2G data sharing: Huyer and Cecconi, 2019.

³⁷Huyer and Cecconi, 2019.

³⁸Richter, 2021.

³⁹<https://ourworldindata.org/urbanization>

⁴⁰European Commission, 2020a Factsheet: The European Data Strategy. European Commission, 19 February.

⁴¹Melgaço, Lucas, and Rosamunde van Brakel. Smart cities as surveillance theatre. Surveillance and Society 19, no. 2 (2021): 244-249.

⁴²Yigitcanlar, Tan, Md Kamruzzaman, Laurie Buys, Giuseppe Ioppolo, Jamile Sabatini-Marques, Eduardo Moreira da Costa, and JinHyo Joseph Yun. Understanding smart cities: Intertwining development drivers with desired outcomes in a multidimensional framework. Cities 81 (2018): 145-160.

its course, the Proposal has changed, as the Open Future policy brief mentions,⁴³ initially it included a general mechanism for requesting the reuse of business data by public bodies for any “duly justified purpose”, however, the subject was eventually dropped. The choice of restricting mandatory B2G data sharing might be explained due to the timing of the Proposal that came to light in 2021, after the peak of the COVID-19 pandemic, which boosted B2G data sharing practices within the EU.⁴⁴ This was also confirmed by the EU Parliament Rapporteur Miapetra Kumpula-Natri Report about the EU Data Strategy Proposal in 2020 in which she underlined that “there are special circumstances where B2G data sharing needs to be compulsory for the common good”.⁴⁵ There is also a possibility that the proposal was influenced by the results of the public consultation, where the industry expressed opposition to mandatory B2G data sharing, followed by some Member States such as the Netherlands that published a “non-paper” advocating against binding data transfer obligations to businesses.⁴⁶

The choice of the European Commission to reduce the reach of B2G data sharing provisions to only exceptional situations has as a consequence restricted the application of the Data Act to a smart cities’ context. This not only is not interesting for these circumstances but also restricts the application of the Data Act to other B2G data sharing situations, maintaining power imbalances and monopolies over data.

Nevertheless, other modalities of B2G data sharing are not ruled out by the Act, since Article 15(c)(1) mentions that the public sector may obtain data by “other alternative means”, which in our opinion may include the purchase of data on the market, data philanthropy, and public-private partnerships. In the light of a hypothesis of purchase of data by the public sector, it is crucial to mention that Chapter IV related to unfair terms related to data access and use between enterprises is not applicable, since as the title hints, the chapter and the following articles are related to unfair contractual terms in contracts between larger companies and micro, small or medium-sized enterprises. The same is valid for the following articles of Chapter V that are related to making data available to public sector bodies based on exceptional needs.

This demonstrates that the choice of the Data Act to take the route of only creating mandatory narrow provisions and not create general rules and principles for business-to-government data sharing maintains the status quo of the main problems encountered by public sectors on this matter, namely unfair contractual clauses, restrictions to the usage of data, and the privatization of public data.^{47 48}

6. Conclusions

This study has aimed to analyze the Data Act Proposal, focusing on the provisions related to business-to-government data sharing and how they may apply to smart cities. The Data Act Proposal has been deemed to be a bold, courageous proposal that would have the power to reshape the European regulatory framework for data having an impact on the larger EU economy.

Yet, throughout the analysis of the provisions of the Act related to business-to-government data sharing, it is possible to conclude that by choosing a narrow and limited regulation that applies to public extraordinary situations the Data Act falls short of having an impact on fighting the power imbalances created by data monopolies. Although the Act does not prohibit further business-to-government data sharing models, such as the purchase of data or data philanthropy, it does not regulate or create principles to make these transactions safer and fairer for the public sector. Instead, the Act leaves fundamental gaps such as the lack of definition of “public interest” which maintains the legal uncertainties that currently block the further development of B2G data sharing but also leaves a fertile soil for potential abuses in face of the absence of limitations. The Act also does not regulate nor create stronger principles and rules related to the sharing of personal data leaving questions regarding lawfulness and liability.

As a consequence, this study has concluded that the current Proposal of the Data Act is far from reaching the aimed result when it comes to creating a fairer business-to-government data sharing environment. This also causes its applications to smart cities contexts close to impossible, since its narrowness does not benefit the further development of the redistribution of data. As a result, municipalities are still left to apply different models of data sharing with no legal certainty, being subjected to power imbalances and unjust contractual clauses. Hopefully, there is still time to make the necessary changes, inserting a set of criteria that would allow the sharing of privately held data based on the public interest, allowing B2G data sharing to flourish and benefit society.

⁴³Tarkowski et al. 2022.

⁴⁴Around 20 Mobile Network Operators (MNOs) across Europe have cooperated with the EU Member States to provide access to analyzed and aggregated mobility data to provide input to the epidemiological and economic models that inform strategies and policies. According to analysis the relationship between human mobility and virus spread can explain up to 92 percent of the initial spread of the virus. See at Ramazzotti, Giorgia. Prospects of ‘Business to Government’ data sharing in Europe: Insights from Covid-19 and political philosophy. (2020).

⁴⁵Committee on Industry, Research, and Energy Rapporteur: Miapetra Kumpula-Natri Report. 11.09.2020

⁴⁶Perarnaud and Fanni. 2022.

⁴⁷Micheli, 2020.

⁴⁸For more information regarding the main problems encountered by Cities in business-to-government data sharing agreements see Micheli, 2020.

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