

Bird & Bird

# Will the Data Act unlock value in the EU data economy?

Telecompaper webinar

*28 June 2022*



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# Agenda

- **Why a Data act**
- **Key takeaways and examples**
- **What does it mean in practice**
- **Impact for businesses**
- **If I were an inhouse advisor, what would I do**







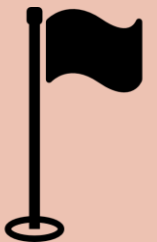
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# Creating a Single Market for data

- Horizontal regulation on access to & use of non-personal data in the EU
- 80% of industrial data not used to date = untapped potential
- Common basic rules on who can use & access data across all economic sectors
- Unlock “a wealth of industrial data” to benefit business, consumers, public sector
- Overcome legal, economic & technical obstacles responsible for under-use of data
- Sector specific rules to be built on – health data space, mobility, agriculture

## Sector specific

Tech & Comms, Media, Financial Services,  
Health, F&B, Aviation, Automotive...

## Competition

Antitrust, mergers

## Data Protection

Personal data, access, use, employment

## IP

Trade secrets, digital content, copyright,  
databases, computer programs, open data

## Consumer protection

Contract terms, transparency

## Government

G2G, G2B, B2G

## Products Services

Connected, safety, liability, software

## Territory

EU, US, APAC..

## AI

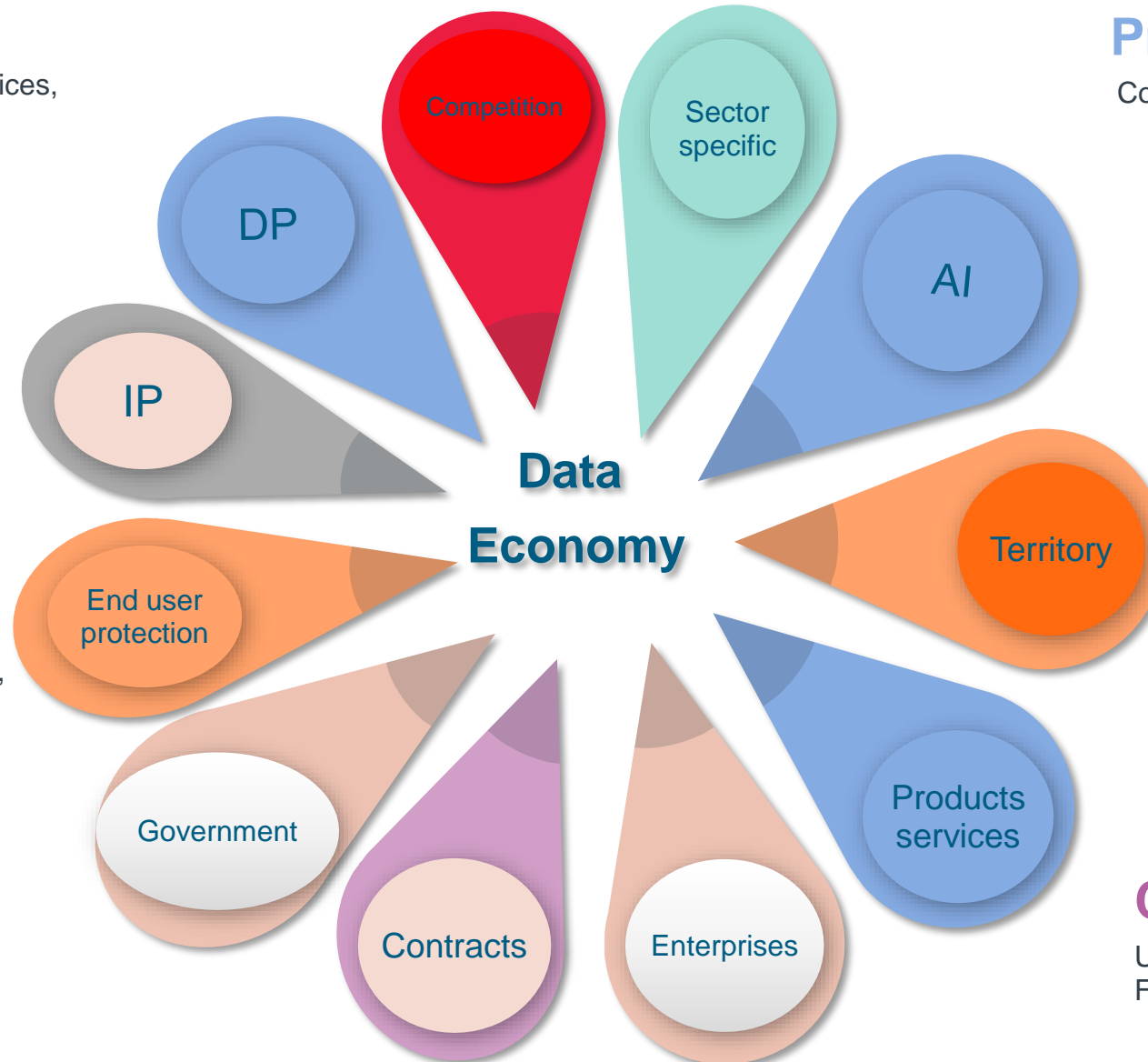
Risk, ethics, liability

## Enterprises

Micro, SMEs, large enterprises

## Contracts

Unfair contract terms, grey lists, black lists,  
FRAND

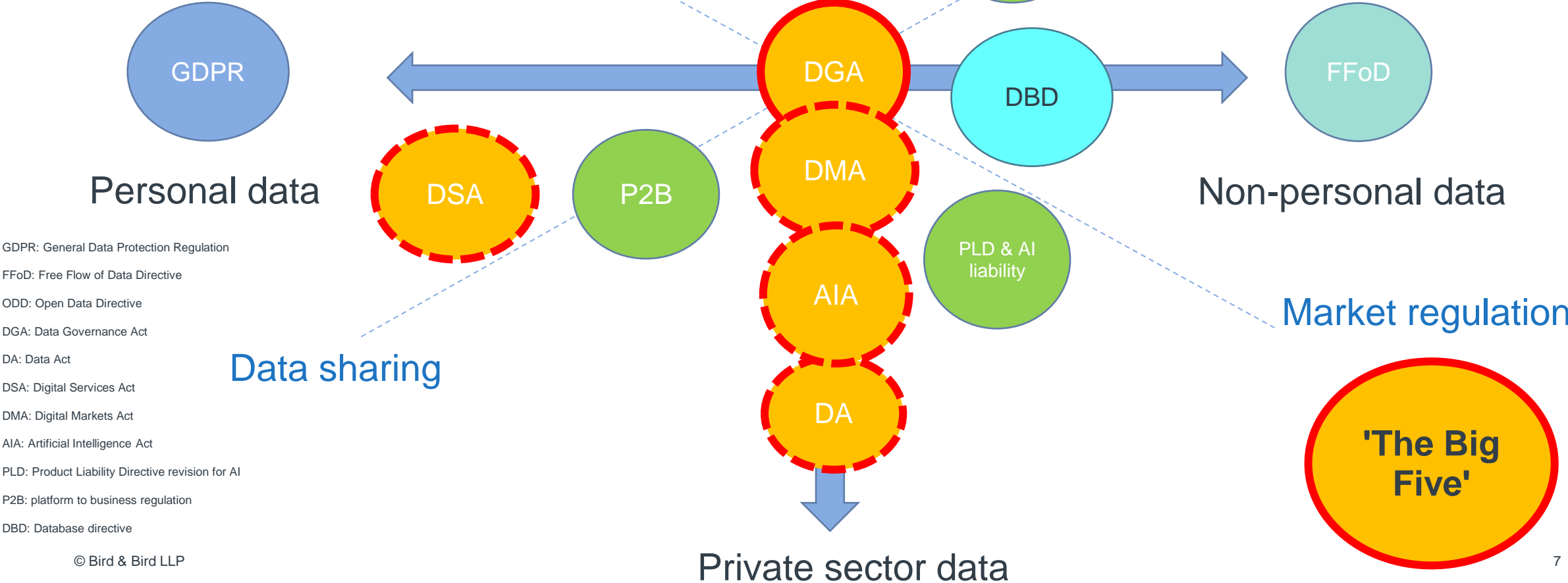


# Legal data instruments

End user protection

Public data

Data Ownership  
Sui generis  
Trade secrets



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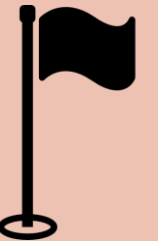


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# Data Act key takeaways

- Regulates access to connected devices to offer complementary products
- Gives users the right to access data generated by their devices
- Gives users the right or require manufacturers to provide data to third parties on reasonable (FRAND) terms

Massive opportunity to get access to data, big risk to business models relying on data exclusivity



# Key obligations

- New rules on access and use of non-personal data
- Data portability obligations and facilitating switching
- Fair, reasonable and non-discriminatory approach in B2B data-sharing contracts
- Data access by design or default

# Examples

After sales markets: Airline can require Rolls Royce to provide aircraft engine data for third party maintenance

Insurance company can offer innovative services on the basis of automotive data

Consumers and third parties gain access to virtual assistant data

No possibility to compete with my smart dishwasher

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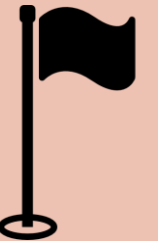
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# ‘Internet of Things’ Act

## Scope:

- Physical movable products that obtain, generate or collect data through electronic comms services
- Related products/services generating data + metadata

*“data means 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”*

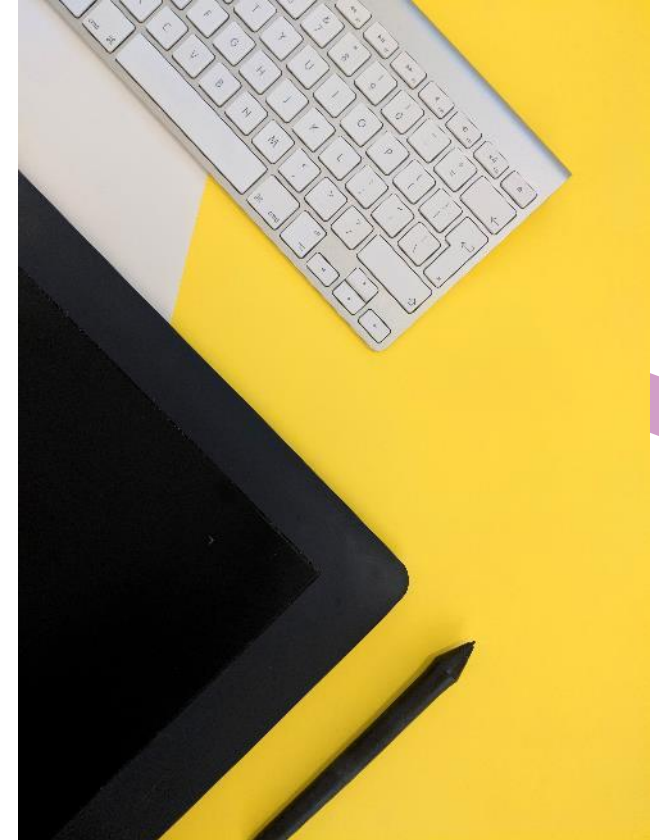
# Who comes within its scope?

- Private-sector organisations with sets of industrial data
  - Data-processing and cloud computing services
  - Public bodies and EU institutions
- 
- Very relevant for SMEs as data portability requirements allow shifting between services
  - Citizens will get new rights and old rights will be strengthened

# Data access by design?

## *B2C and B2B data sharing*

- Products/related services designed so data generated is accessible to user
- Users have right to access data generated by use of products/related services
- Right to share data with third parties, free of charge and in real-time
- 3rd parties receiving data to use only for purposes agreed and then delete data
- Exemption for SMEs from business data sharing obligations



# FRAND: get ready for disputes

*Data holders to make data available to recipients*

- Data holders to make data available under fair, reasonable, non-discriminatory terms
- No discrimination between different enterprises when making data available
- Any compensation agreed between data holder & data recipient to be reasonable
- Access to dispute settlement bodies to determine if terms are FRAND

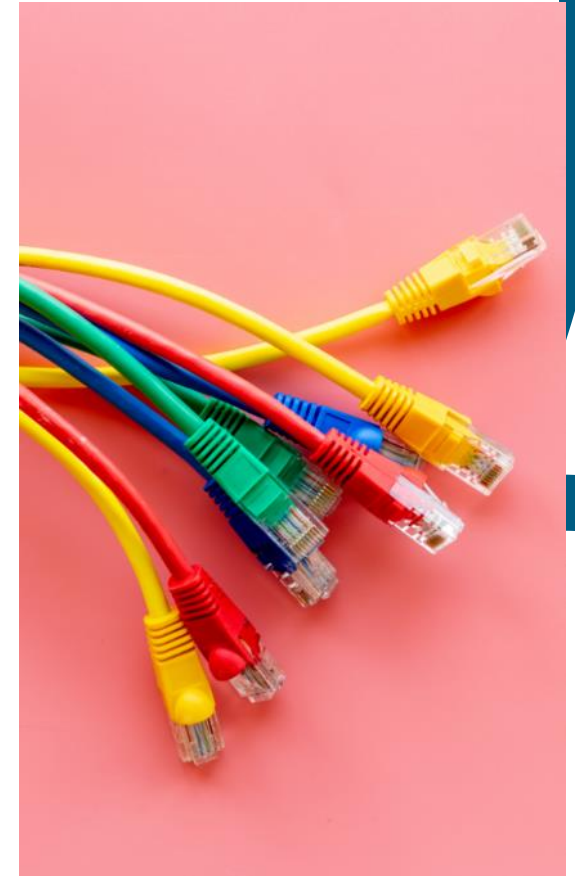




# B2B data access and use

## *Unfair contractual terms related to B2B*

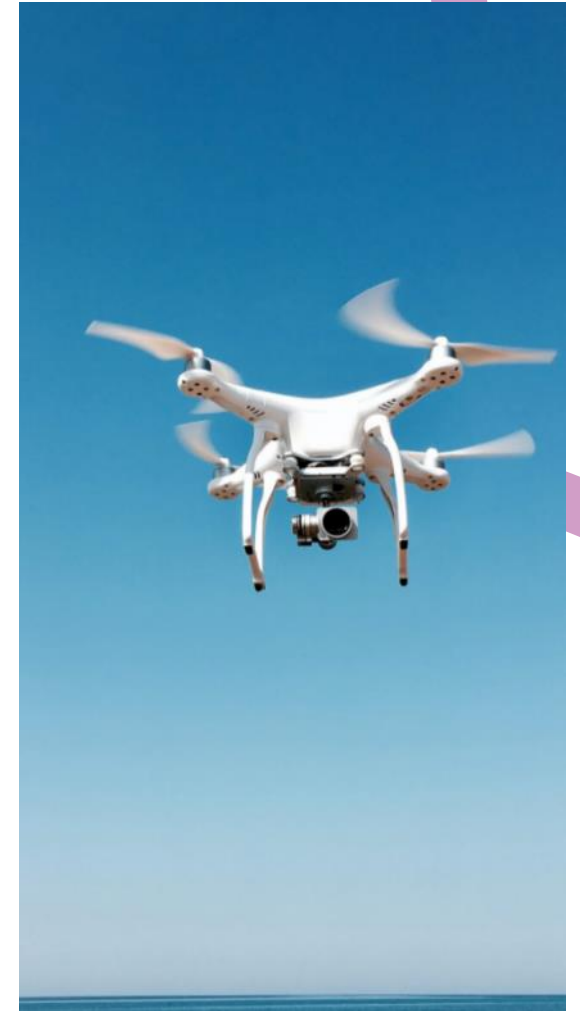
- Contractual term unilaterally imposed by an enterprise on an SME not binding if unfair
- Grossly deviates from good practice in data access, contrary to good faith, fair dealing
- Excludes or limits liability or remedies in case of non-performance of contract
- Terminates contract with unreasonably short notice
- 'Imposed' = party unable to influence content of contract despite negotiation attempts



# Public emergencies

## *Obligation to make data available*

- If public body or Union institution demonstrates exceptional need
- Lack of data prevents body/ institution from fulfilling task in public interest
- No alternative means to obtain such data
- Data to be provided free of charge or only costs
- Sharing of data with scientific researchers



# What are data processing services (DPS)?

*Services that allow on-demand and broad remote access to a scalable and elastic pool of shareable and distributed computing resources: networks, servers or other virtual or physical infrastructure, operating systems, software, including software development tools, storage, applications and services*

Includes Cloud providers processing "EU data"

- **On-demand administration** - customer unilaterally self-provision computing capabilities (server time or network storage, without any human interaction)
- **Broad remote access** - access through mechanisms promoting the use of heterogeneous thin or thick client platforms (from web browsers to mobile devices and workstations).
- **Scalable** - computing resources that are flexibly allocated by the data processing service provider, irrespective of the geographical location of the resources, in order to handle fluctuations in demand.
- **Elastic pool** - rapidly increase or decrease resources available depending on workload.
- **Shareable** - computing resources that are provided to multiple users who share a common access to the service, but where the processing is carried out separately for each user, although the service is provided from the same electronic equipment.
- **Distributed** - computing resources that are located on different networked computers or devices and which communicate and coordinate among themselves by message passing.
- **Highly distributed** - data processing closer to where data are being generated or collected (edge computing).

# Switching between data processing services

## *Remove obstacles to effective switching*

- DPS providers to ensure digital assets switching to DPS covering the same service type
- **Functional equivalence** after switching, including metadata
- Comply with EU Cloud Rulebook – written contracts and SCCs on switching
- Gradual withdrawal of charges (3 years) - Introduce monitoring mechanism on switching charges
- Mandatory development of standards for cloud interoperability

Data portability was the exception, now becomes standard





# International contexts non-personal data safeguards

- DPS providers to take measures against unauthorised access to data
- Third country rules for governmental access to non-personal data in EU should be enforceable
- Non-EU Private party data sharing only in compliance with Union of MS law
- Data Innovation Board to assist withing developing guidelines

US companies to provide regulatory safeguards depending on type of data originating in the EU



# Interoperability

“Operators of data spaces” facilitate interoperability of data, data sharing mechanisms and services and publicly provide information on:

- dataset and structure
- technical means to access the data
- means to enable the interoperability of smart contracts

Interoperability standards shall be performance oriented, for same type of service, enhance portability, allow **functional equivalence**

The Commission, by way of delegated acts, can mandate the use of European standards for interoperability

No definition of "Operators of data spaces"  
= DPS providers?



# Smart contracts

## *Minimal requirements for data sharing*

### Smart contract vendor to ensure

- Contract robustness to avoid functional errors
- safe termination and interruption
- data archiving and continuity
- access control
- Conformity assessment (EU declaration of conformity) on the above
- Apply harmonised standards with common specifications on the above

Companies should look into the contractual requirements for data sharing – vendor to perform conformity assessment



# Review of Database Directive

*'IP rights remain unaffected'*

- Sui generis right does not apply to databases containing data generated or obtained by products and services
- Sui generis right should not interfere with access rights for businesses and consumers





# Points of discussion



How to determine product and user generated data?



Voluntary access vis-a-vis data monopolies



Interplay with vertical rules for agricultural, health and automotive sectors



Contractual fairness test:  
'reverse implementation'

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# A preparation checklist for businesses

*Start today*



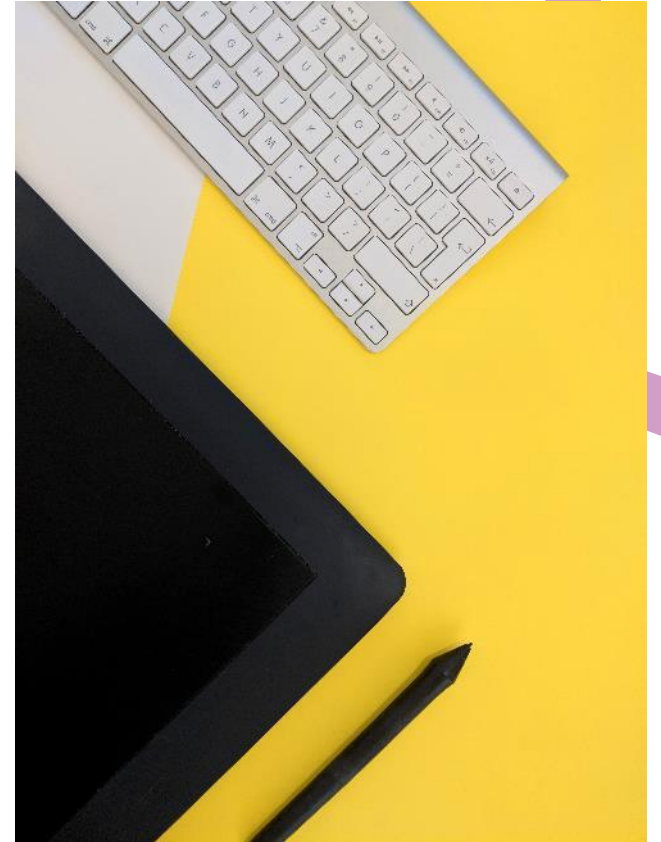
**'The Big Five'**

1. Name responsible persons and identify relevant stakeholders
2. Allocate budget and resources for your compliance project
3. Map where your business is today (current legislation vs new proposals)
4. Identify the key proposals for your business but understand that 'The Big Five' form the big picture, supplemented by sectoral legislation
5. Prioritise actions and start executing

# Impact for businesses

- Business to benefit from facilitating access to fair and trustworthy cloud and edge services
- More level playing field to enable SMEs to emerge & compete
- data portability to provide more choice of provider and competition
- Interoperability for reuse of data between sectors
- SMEs to be shielded from unfair contractual terms
- facilitating access to fair and trustworthy cloud and edge services

"...using connected products and related services and increasing the availability of data for commercial use and innovation between businesses would generate up to EUR 196.7 billion a year by 2028"



# Exemptions or support for SMEs

1. Start-ups and SMEs are exempted from:
  - B2C and B2B data-sharing obligations
  - making data available to the public sector in exceptional circumstances
2. Support for start-ups and SMEs to protect against unfair contractual terms unilaterally imposed on them
3. SMEs may benefit from the deployment of model contractual terms

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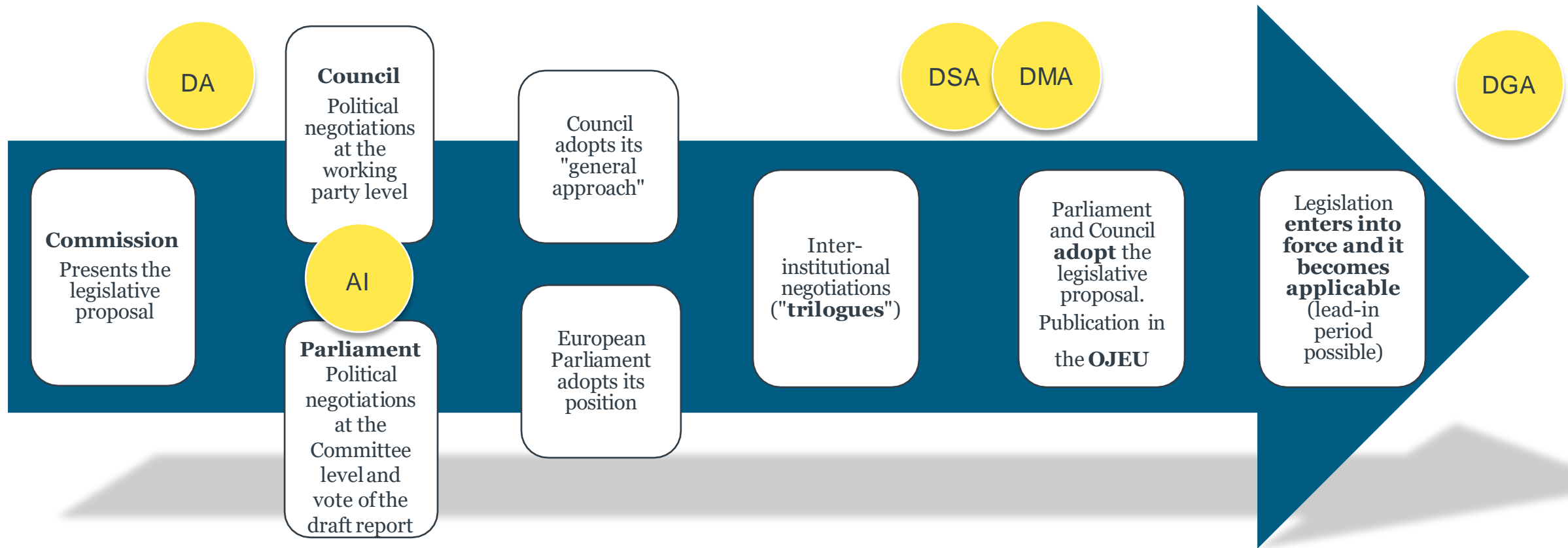
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# If I were an inhouse advisor, what would I do?

- Check if business data are caught by the Act and what that means
- If I would want the use public sector data, also look at the Data Governance Act for restrictions or potential licenses
- Can we benefit from new data sources?
- Where do we need to be compliant?
- Do we need to get the PA team ready to contribute to the EU legislative process

# EU ordinary legislative procedure





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