Data Reform Bill: Smart Data

Lead department	Department for Business, Energy and Industrial Strategy
Summary of proposal	The proposal creates powers to enable Smart Data schemes to be introduced in any given sector, to be defined in secondary legislation
Submission type	Impact assessment (IA) – 8 April 2022
Legislation type	Primary legislation
Implementation date	2023
Policy stage	Final
RPC reference	RPC-BEIS-5009(2)
Opinion type	Formal
Date of issue	20 May 2022

RPC opinion

Rating[1]	**RPC opinion**
Fit for purpose	The Department's approach to estimating and accounting for impacts on business is in line with RPC guidance for primary legislation IAs, although there are areas where clarification would be useful. The IA includes a quantitative assessment of costs and benefits to small and micro businesses (SMBs).

Business impact target assessment

	Department assessment	**RPC validated**
Classification	Qualifying regulatory provision (IN)	Qualifying regulatory provision (IN) (subject to confirmation in the further IA(s) – supporting secondary legislation - to be submitted for RPC scrutiny).
Equivalent annual net direct cost to business (EANDCB)	Not quantified	Further IA(s), supporting secondary legislation, to be submitted to the RPC for validation of (an) EANDCB figure(s).

[1] The RPC opinion rating is based only on the robustness of the EANDCB and quality of the SaMBA, as set out in the Better Regulation Framework. RPC ratings are fit for purpose or not fit for purpose.

Business impact target (BIT) score	Not quantified	See above
Business net present value	Not quantified	
Overall net present value	Not quantified	

RPC summary

Category	Quality[2]	RPC comments
EANDCB	**Green**	The Department's approach to estimating and accounting for impacts on business is in line with RPC guidance for primary legislation IAs. The IA presents an indicative EANDCB figure, explaining that the final figure will depend on policy detail to be determined for related secondary legislation. The RPC expects to see further IA(s) produced for those measures in order to validate an overall EANDCB figure for the policy for BIT-accounting purposes.
Small and micro business assessment (SaMBA)	**Green**	The IA includes a useful quantitative assessment of costs and benefits to SMBs. More-explicit discussion of proportionality of costs by business size and, as appropriate, mitigation will be required in IA(s) supporting related secondary legislation.
Rationale and options	**Good**	The IA provides a good description of barriers to take-up of Smart Data and discusses market failures. The IA covers a range of options, including some non-regulatory.
Cost-benefit analysis	**Satisfactory**	The Department has strengthened its evidence base significantly since the consultation stage IA, including a survey and commissioned research. The IA provides a good assessment of risks and sensitivities, although more discussion and clarification on the latter would be helpful.
Wider impacts	**Satisfactory**	The IA provides a reasonable discussion of wider society and economy impacts. The IA covers competition and innovation impacts throughout the IA but would benefit from drawing this together more clearly and from improvements in a number of areas.
Monitoring and evaluation plan	**Satisfactory**	The IA sets out key objectives for monitoring and evaluation. The plan would benefit from discussing the data that will collected and used.

[2] The RPC quality ratings are used to indicate the quality and robustness of the evidence used to support different analytical areas. Please find the definitions of the RPC quality ratings here.

Summary of proposal

Smart Data (SD) is the secure sharing of customer data with authorised third-party providers (TPPs), upon a customer's request. The IA states that these providers can then use these data to provide innovative services to consumer or business users, such as automatic switching or better account management. The proposal is for regulation-making powers to enable SD schemes to be introduced in different sectors, to be defined in secondary legislation.

SD places a number of requirements, mainly falling on data controllers, such as to: provide data to TPPs immediately following customer requests and subsequently to provide ongoing access to that customer's data; adhere to common or consistent technical standards, guidelines, etc to ensure inter-operability; and provide product and performance data, such as tariffs or geographical availability of services.

Policy decisions for individual SD schemes, for example on scope of the data and the number of data holders covered, would be implemented through related secondary legislation. The Department can, therefore, provide only an indicative assessment at this stage, with more detailed IA(s) to follow alongside related secondary legislation. The most significant quantitative analysis relates to the telecommunications sector, where it is estimated that bringing forward the implementation of Smart Data could yield benefits of around £70 million in present value terms.

EANDCB

The IA provides a good justification for why the Department is unable to present an EANDCB figure for validation at this stage. The quantitative indicative analysis presented satisfies the relevant RPC requirements.[3] The Department states that further IAs will be produced to support related secondary legislation. The RPC expects to see such further IA(s) in due course, to enable it to validate an overall EANDCB figure for BIT-accounting purposes.

<u>Counterfactual</u>

The IA's indicative quantitative analysis focuses on a telecommunications SD scheme and assumes that the impact of the proposal is to bring forward this scheme by five or seven years, from a counterfactual where an SD scheme is implemented in year 10. The IA supporting the related secondary legislation will need to provide further evidence to support any assumption that SD schemes will occur without government intervention, i.e. that the proposal simply brings forward, rather than creates, additional costs.

[3] As set out in the RPC document https://www.gov.uk/government/publications/rpc-case-histories-primary-legislation-ias-august-2019. The IA's analysis is consistent with 'scenario 2' in the guidance.

Clarification of attribution of impacts to primary vs secondary legislation

The IA states that there would be minimal direct costs to business arising from the primary legislation; these costs would occur when the SD powers are exercised via secondary legislation (and when sectors to be covered are defined). On this basis, the IA's indicative analysis is sufficient at this stage and in line with the RPC guidance referred to above. The impacts in this analysis are, however, described in places as an indirect impact of the primary legislation itself rather than a direct impact of the whole policy. The IA would benefit from clarifying the attribution of impacts and their direct/indirect nature to support the position that there are no impacts to be scored for business impact target purposes until implementation of the secondary legislation.

The IA would benefit from considering the possibility that the primary legislation might have a 'signalling' impact if firms respond in advance of the secondary legislation by, for example, incurring costs for preparing data and data-sharing systems or by adjusting price and subscription offers to reflect anticipated changes in consumer behaviour.

Direct/indirect impacts

As noted above, the bringing forward of costs is described in parts of the IA as an indirect impact of the legislation. Assuming that the legislation will mandate SD schemes by a certain date, any such bringing forward of costs would be a direct impact on business and would need to be included in the EANDCB figure for the related secondary legislation.

Non-monetised costs

The IA would benefit from extending the indicative quantitative analysis provided for the telecommunications sector to other sectors likely to be covered by the legislation, taking account of their different service and market characteristics.

Treatment of fees

The IA notes that costs to business include those incurred by regulators and scheme administrators, which are then recouped from industry via charges and levies (paragraphs 89 and 90). Although not identified separately, it appears that the IA correctly includes these costs in the illustrative analysis. The IA(s) supporting related secondary legislation will need to identify these costs separately, and likely exclude them from the EANDCB under the tax exclusion to the BIT.

See also comments under ‘Cost-benefit analysis’ below.

SaMBA

The IA includes a useful quantitative assessment of costs to SMBs as data holders, drawing upon the experience of Open Banking, and benefits to SMBs as consumers and TPPs, using research by Frontier Economics. The former assessment would benefit from more-explicit discussion of proportionality of costs by business size. This will be required in the IA supporting related secondary legislation and, where disproportionate impacts are identified, discussion of mitigation will also be needed.

The extent to which SMBs will be subject to SD requirements will be determined by secondary legislation. Nevertheless, the IA would benefit from clarifying policy intentions at this stage (there appear to be contradictory references - to SD expected to be mandatory for medium/large data holders and an exemption based on business size by employee band not being proposed – paragraphs 151-152 on page 49).

There are a number of other issues that the SaMBA in the IA(s) supporting related secondary legislation could address, including:

- how any such SMB exemption might affect the distribution of consumers to different-sized firms;
- the extent to which SD requirements may create barriers to entry;
- the deployment of apps etc. by incumbents being outsourced to SMBs, who may, therefore, bear the burdens of SD compliance as well;
- the representativeness of Open Banking data costs (see comment under ‘Cost-benefit analysis’ below); and
- clarifying the statement in paragraph 155 that "…*the smaller number of SMF users for these services and their overall expenditure in communications and energy sectors is far lower than that in banking*."

Rationale and options

The IA acknowledges that some SD schemes are being developed by the private sector but demonstrates that this has been limited and relatively slow. The IA describes, in some detail, the barriers to timely take-up of SD by business and consumers (pages 12-16) and provides a theoretical justification for intervention, with market failure arguments (pages 16-18). In relation to financial data sharing, the IA would be improved by taking greater account of evidence from the US, where consumer data sharing appears to have been largely private-sector driven. The IA’s consideration of rationale would be improved by addressing the risk that information sharing might facilitate collusion by allowing firms to monitor adherence to implicit market-sharing agreements or to punish rivals by “cream-skimming” and “sludge-passing”. The IA could also address the impacts of SD on standard network externalities (especially for telecoms) and the potential impact on 'tipping' equilibria.

The IA covers a range of options, including some non-regulatory. The latter includes explaining (as noted above) why voluntary action by the private sector is unlikely to be sufficient to meet the policy objectives. The IA would benefit from providing a clearer analysis of how private or self-regulatory (industry-led) schemes might differ in coverage (which firms and what data), enforcement and impact on market outcomes. Given the range of industry-led self- and co-initiatives (varying in detail and effectiveness by sector), there may be scope for considering these in more detail in relation to the secondary legislation.

The secondary legislation IAs should also consider the type of interoperability, such as technical, semantic and economic/commercial.

Cost-benefit analysis

<u>Evidence and data</u>

The Department has strengthened its evidence base significantly since consulting. This includes the addition of a survey to members of the Open Banking directory to gather indicative evidence of the potential costs to businesses, and commissioning of research from Frontier Economics on the productivity benefits for TPPs and cost savings for SMBs. The IA now also includes more information on international comparators, in particular Australia and the EU (page 7).

The IA is quite reliant on Open Banking examples and would benefit from a detailed analysis of the potential differences between Open Banking and other sectors, and a discussion of why broader schemes like *midata* have not been rolled out 10 years after they were made possible in legislation. The IA would benefit significantly from demonstrating that the costs of Open Banking implementation are representative of those in other sectors. This should take account of differences in consumer information held and frequency of requests (since banking and, often, financial services do not proceed by way of fixed period contracts like telecoms and energy).

<u>Methodology and assumptions</u>

The IA provides a good assessment of risks (pages 52-56) and sensitivities (pages 35-38), the latter including useful variations, in the counterfactual, on when SD might be implemented, and on the length of the appraisal period. The NPV figures resulting from varying the implementation scenarios and appraisal periods (tables 9-11, pages 37-38) are not always intuitive, especially when they turn net costly, and would benefit from greater explanation and clarification.

The IA would benefit from strengthening its assessment of SD benefits and costs:

- *time savings and reduced search costs* – assessing whether this will necessarily lead to better outcomes and whether the costs of churn and switching might outweigh the benefits. The IA would also benefit from discussing how far using *FinTech* adoption as a proxy for SD adoption is appropriate given recent data on shakeouts, failures, etc. and regulatory complications of encouraging entry of 'disruptors' from outside the sector.

- *informed decision-making* - whether consumer patterns of demand might shift as a result of new pricing or services, meaning past usage may be an unreliable basis for decisions. The analysis could address competition and platform aspects, such as where detailed usage information is not collected on an individual consumer basis because it is irrelevant to uncapped or free-service users and offers no network management benefits. On the signal strength example, the IA could address that coverage data is already freely available and used by comparison platforms and what benefit personalised data might provide, and why third parties do not already provide them if they would create value.

- *switching costs* – from analysing switching costs more thoroughly, including addressing a lack of evidence that more personal information would make the large population of non-switchers more likely to seek savings. The IA could also address further "policy aspects" of switching, such as who should initiate the process ("gaining party" or "losing party") and consumer protection issues.

Wider impacts

The IA provides a good discussion of wider society and economy impacts (page 44 and, in more detail, on pages 70-72) and includes a detailed Public Sector Equality Duty assessment. The IA includes a short trade impacts section and covers the more significant competition and innovation impacts throughout the IA. The section on risks includes a useful discussion of possible unintentional harm to competition and how this is being mitigated (pages 52-53). The IA would benefit from discussing how far the requirement to provide data to TPPs would allow rivals to impose costs on incumbents and to track what might otherwise be proprietary or operational information, and to clarify how data protection responsibilities arising from the GDPR will be managed. The IA could consider whether firms will, as a result, restrict the data they hold on customers, limiting both the remedy of the market failure and the quality of the services provided. More generally, the IA would benefit from differentiating more clearly between competition and co-operation and considering further the issue of collusion.

The IA would benefit from drawing together impacts on competition and innovation into sections explicitly addressing the better regulation framework expectations in these areas, referencing out to the rest of the IA as appropriate.

The IA would also benefit from considering how the proposal might trigger future changes in regulation. In particular, the IA could consider "regulatory entrepreneurship", where disruptors operate in unregulated, less regulated or legal grey areas to build a consumer base that can be mobilised in support of regulatory change (examples, according to the literature, perhaps being *Uber* and *FinTech* in both the UK and Germany).

The IA would benefit from further consideration of the impact of Open Banking, addressing potential negative, as well as positive, effects. For example, the IA could consider the viability of new-entrant *FinTech* businesses and risks to consumers around information sharing, switching and innovation. For the IA(s) supporting related secondary legislation and/or sector-specific IAs, the analysis would benefit from considering further the impacts on welfare of relational fiduciary duty[4] (for example, with transparency provided by a US-style requirement to share data with consumers) against the protective force of competition.

Monitoring and evaluation plan

The IA sets out key objectives for monitoring and evaluation (M&E) and notes that it will draw from plans already in place for Open Banking. The plan would benefit from discussing in more detail the questions that will be addressed by the evaluation and the data that will collected/used. Given that the M&E of SD schemes themselves will be the responsibility of the departments or regulators that introduce secondary legislation for their scheme, the IA would benefit from describing how this activity will be co-ordinated and financed.

As noted above, the potential for further regulatory change could be discussed as part of the M&E plan.

Other Comments

The IA would benefit from explaining more clearly how the proposal relates to other relevant measures, such as the recently-announced consumer protection proposal relating to subscription services (paragraph 29, page 14).

Regulatory Policy Committee

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[4] For example, in the case of banks, this would include the modalities of credit provision and willingness to extend or renegotiate loans.