

Digital Education and Research Platforms and Infrastructures Neglected in European Commission Impact Assessments

Decisions about the regulation of the digital economy in Europe have a major impact on the provision of, and access to, education and research in the 21st century. However, this impact is regularly not taken into account, or is so only partially or late in the day.

A survey of impact assessments published by the European Commission points to the need to do better. More specifically, there is a need to:

1. Review the European Union's Innovation Principle to ensure it reflects the importance of public sector research and education
2. Update the Commission's Better Regulation Toolkit to include the needs and interests of public sector research properly
3. Ensure that the impacts on education and research in general are taken into consideration in any legislation related to the Digital Agenda.

Introduction

The European Union's impact assessment (IA) process is a key part of the effort to ensure that any new rules are properly thought through, and that inadvertent consequences are avoided. In preparing any such law or regulation, the Commission should look in particular at [impacts on environmental, social and economic outcomes](#) (and in particular SMEs). Typically, as part of looking at who is affected, there is also consideration of consumers and fundamental rights.

However, while rights to education and research are fundamental rights, they are not systematically covered in the European Commission's impact assessment process. We are particularly concerned that this is not the case in regard to legislation relating to the Digital Agenda, Digital Single Market and intellectual property. This contrasts with the strong emphasis on drawing on research in order to inform better policy making, as most recently affirmed in the Council Conclusions on 8 December 2023.¹

This is problematic for a number of reasons. Firstly, research, including knowledge transfer activities and scholarly communications, is strongly intertwined with innovation and growth in the knowledge economy. Secondly, education and research are fundamental rights underpinning many aspects of modern day society. Thirdly, education and research is fully digital and yet the Commission seems not to take account of the predominance of education and research platforms given the sole focus in the impact assessments for the Copyright in the Digital Single Market (CDSM) Directive and the Digital Services Act (DSA) being commercial and ecommerce platforms.

¹ Council Conclusions on Strengthening the role and impact of research and innovation in the policymaking process in the Union, 8 December 2023 <https://data.consilium.europa.eu/doc/document/ST-16450-2023-INIT/en/pdf>

For example, core to the effectiveness of research are open access policies and the numerous digital repositories, to which researchers upload their articles, data, code, videos, etc., in order to disseminate them to the world. Similarly, open education resources – recognised as an increasingly important tool for delivering teaching adapted to learners’ needs – also work by accepting materials uploaded by teachers and others.

Any legislation that adds liabilities, obligations and/or costs for these digital infrastructures will have repercussions for the achievement of education, science and research objectives. In the interests of good policy-making, these should be taken into account early on in the legislative process but this appears not to be happening.

This short paper evaluates the process followed for five recent or ongoing pieces of legislation, as well as coverage of research in the EU’s Better Regulation Toolbox.

Directive on Copyright in the Digital Single Market (CDSM)²

The impact assessment addressed two provisions that look to regulate the operation of digital platforms. These became Article 15 (on news aggregators) and Article 17 (on the liability of online content-sharing service platforms).

Article 15: News aggregator sites are vital resources for education and research. However, the IA only considers the impacts on authors, publishers, platforms and consumers, as well as social impacts. Under the latter, it focuses only on the idea that what is healthy for news publishers is good for society as a whole. There was no assessment of the impact of this unique and entirely new intellectual property right on education, research and scientific progress.

Article 17: While platforms like YouTube were the most regularly cited example of an **online content-sharing service provider**, scientific, research and education repositories also fall under this definition (as indicated by the fact that they needed subsequently to be excluded). Surprisingly, the IA was silent and did not address in any way the impact of rules on public interest platforms, not even in the section on fundamental rights, which limits itself to consideration of freedom of expression and copyright. Very late in the day, in the final version of the Directive, due to advocacy by library groups and the help from parliamentarians there is an explicit provision underlining that not-for-profit repositories are not covered by these new rules.

In summary: There was no assessment of the impact of the new platform-related provisions on education, science and research in the impact assessment.

² <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016SC0301&qid=1660811646521>

Digital Services Act (DSA)³

The Digital Services Act represents another key pillar of the European Union's efforts to regulate digital platforms and other services more effectively. It imposes new rules around their conduct towards consumers, with a view to ensuring better protection of users.

Surprisingly given the CDSM Directive's last-minute reference to education, scientific and research platforms the IA did not evaluate the impact of the DSA on education and research in Europe. Despite Recital 11 explicitly considering the rules set out in the CDSM Directive's Article 17 by establishing that the DSA is without prejudice to that Directive, it fails to mention or reflect the exemption for repositories mentioned there. The final Act therefore leaves the entire sector unclear as to whether it falls in or out of scope of this major plank of the EU's digital platform regulatory activity.⁴

Where there is consideration of research, it focuses on questions of access to information for researchers, both in terms of content held on platforms which is valuable for research purposes and which may risk otherwise being taken down (and the risks to research of over-blocking, for example, because entire domain names are blocked), and data about how the new rules are being implemented. As pointed out above, however, it overwhelmingly fails to touch upon or even clarify whether not-for-profit educational platforms are in or out of scope, thus creating a conflict of law with the CDSM Directive.

Summary: The assessment fails to consider the impacts of the new rules on digital research and education infrastructures.

Digital Markets Act (DMA)⁵

Complementing the Digital Services Act, the Digital Markets Act focuses on competition issues around the operation of major digital players, and in particular the risks of harmful behaviours. One of the aspects explored is the impact of market structures on investment in innovation by companies, alongside that of SMEs. However, there is no consideration of digital platforms for research. Nonetheless, it does appear from the list of types of service provided that repositories are highlight unlikely to be covered by this legislation.

Summary: There is no explicit consideration of impacts on education and research infrastructures, although it appears that they are not affected.

³ <https://digital-strategy.ec.europa.eu/en/library/impact-assessment-digital-services-act>

⁴ <https://libereurope.eu/article/statement-the-digital-services-act-education-and-science-requires-better-policy-making-procedures/>

⁵ Main report: https://eur-lex.europa.eu/resource.html?uri=cellar:57a5679e-3f85-11eb-b27b-01aa75ed71a1.0001.02/DOC_1&format=PDF, Annexes: https://eur-lex.europa.eu/resource.html?uri=cellar:57a5679e-3f85-11eb-b27b-01aa75ed71a1.0001.02/DOC_2&format=PDF

Artificial Intelligence Act (AI Act)⁶

The AI Act is an effort to put in place rules to regulate the development of AI applications in Europe. A key motivation behind this was the desire to address concerns about uses of AI that could have negative consequences, although there is also a focus on providing clarity and options for new services to be developed and rolled out.

There is an emphasis on supporting innovation in the assessment, which explores the merits of a regulatory sandboxing scheme, as well as mobilising Digital Innovation Hubs and Testing Experimentation Facilities. These represent a welcome consideration of how to support research.

There is also extensive consideration of impacts on SMEs, as well as on the costs to users of AI systems, and even the suggestion that AI researchers could benefit from the additional work created by requirements to test products continuously. As for education, there is only a cursory mention, with the suggestion that developing AI could be a bonus for education by supporting personalised learning. In the Commission proposal there is, however, no recognition of the fact that cutting edge AI research often takes place in universities and the chilling effect that the AI Act potentially heralds for machine learning in European academic institutions. Given the open environment that characterises AI research, and the strong connection that exists between university research and industrial application, it seems surprising that the impact of the new Act on cutting-edge research in Europe is not addressed.

The closest the IA gets to looking explicitly at the right to research is in a section that addresses both the freedom to conduct a business and the freedom of science. In this, it is acknowledged that the new rules could create restrictions on the activities of the scientific community, and so the IA recommends that the principle of proportionality should apply. As a result, the most restrictive option proposed is excluded.

***Summary:** The AI Act impact assessment provides a mixed example of how an IA can consider impacts on education and research, although it leaves a lot to be desired as cutting-edge research and the interplay between academia and industry is ignored.*

Data Act⁷

The Data Act focuses on promoting better access to data in Europe in order to make better and wider use of its potential to drive growth. It includes provisions on consumer access to data, data sharing and interoperability, as well as facilitating access to cloud services.

For the research field, access to data is clearly a major issue, and it is welcome that the impact assessment sets out its intention of considering impacts on such access. However, the substantive consideration is limited to just a paragraph, and focuses on exceptional circumstances only.

⁶ <https://digital-strategy.ec.europa.eu/en/library/impact-assessment-regulation-artificial-intelligence>

⁷ <https://digital-strategy.ec.europa.eu/en/library/impact-assessment-report-and-support-studies-accompanying-proposal-data-act>

There is no consideration at all of the needs of research institutions for data on a day-to-day basis. While SMEs are proposed fair terms of access, no such provisions are extended to universities and research institutions. This is particularly surprising given that most cutting edge AI research occurs in universities.⁸

Summary: While the Data Act impact assessment makes welcome high-level points about supporting research in an emergency, it does not support day-to-day data driven innovation across universities and other public institutions.

Better Regulation Toolbox

The European Commission released the [Better Regulation Toolbox](#) in November 2021 as a complement to the [Better Regulation Guidelines](#). The idea of the Toolbox is to provide guidance, tips and best practices to help Commission officials carry out impact assessments. These are to be applied 'selectively and with common sense', with the exception of provisions that are mandated already under the Guidelines.

The Toolbox does go into far more depth than the Guidelines, which, as an indication, only mandate that impact assessments should consider broad effects on economic (in particular SMEs and competitiveness), social and environmental outcomes, impacts on rights, and conformity with the principles of doing no harm and 'digital by default'.

Encouraging, the Toolbox does indeed have a chapter focused on research and innovation (Tool #22), which does at least underline the relevance of this as a policy area. As with other Tools, it covers the consideration of research and innovation in future planning, impact assessment, and policy implementation approaches.

Despite the inclusion of the tool, there are a number of weaknesses in the Toolbox as it currently stands:

- Crucially, there is no guarantee that impacts on research are taken into account, as opposed to impacts on SMEs for example. The dependence on 'common sense' is likely what leads to connections being missed, for example, in the legislation mentioned above.
- The Tool appears to focus primarily on private-sector innovation, with the only references to public sector innovation being to when there are direct contacts between the two. This is likely a legacy of the [EU's Innovation Principle](#), which itself is strongly focused on how the EU can support innovators in companies, rather than researchers in public institutions.
- While it is welcome to see references to the need to consult researchers as part of impact assessment processes, this appears to focus more on drawing on their expertise in a specific area, rather than looking at the impacts of legislation or regulation on research in general.
- References to limiting compliance costs are clearly focused on businesses, not on the research institutions that often also face these.

⁸ <https://www.knowledgerights21.org/news-story/getting-it-right-on-data-access-for-research/>

Overall, the impression is that the current Toolbox sees public-sector research as a second-order concern, and provides little guarantee that it will be taken into account. It appears dubious that had the Toolbox been in use, the missed opportunities highlighted above in this paper would have been seized. Any future update to the Toolbox and underlying Guidelines would benefit from a stronger emphasis on ensuring that public-sector research and education are fully considered.

Conclusion

Recent experience of impact assessments by the Commission on legislation with the potential to affect the operation of digital education and research infrastructures is not encouraging. Despite the crucial role that research and education plays in our economy and society, and the public interest role digital education and research platforms play, the importance of the innovation these stimulate appears to be overwhelmingly ignored in the impact assessment process.

To correct this, one key step would be to ensure a more standard approach to education, science and research in the wider impact assessment practice, set out in the Better Regulation Guidelines and Toolbox. This would ensure that the consequences for education, scientific and research infrastructures in particular are systematically taken into account, thus avoiding the unfortunate outcomes we have seen in the Digital Services Act, or the need for remedial action later on dependent on the good will of MEPs as was the case with the Directive on Copyright in the Digital Single Market. A parallel action would focus on updating the EU's Innovation Principle, which is currently heavily focused on the needs of the private sector.

We recommend therefore, going forward, that the impact on education, science and research comprises a mandatory section in assessments of all new legislation that relates to the digital agenda, digital platforms and intellectual property, based on an updated innovation principle that takes full account of the role of public sector research.

About [Knowledge Rights 21](#) (KR21)

The KR21 programme is built on a conviction that **knowledge is essential for education, innovation and cultural participation**, and that everyone should have the possibility to access and use it, in particular through libraries, archives and digitally.

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