Position Paper on the Commission's Inception Impact Assessment on the Data Act (including the review of the Directive 96/9/EC on the legal protection of databases) (Ref. Ares(2021)3527151 - 28/05/2021)

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In its strategy for data published in 2020, the European Commission envisioned its concept for a European Data Economy. With its holistic approach towards a competitive and open data economy which also pays close attention to data protection, the European Commission also announced the creation of a new European Data Act which was intended to also replace the database directive from 1996.

With the now published Inception Impact Assessment (IIA), the European Commission has concretized its ideas on a European Data Act.

General Remarks

As already stated in its comment on the European Strategy for Data, eco sees a broad range of regulation already in place when it comes to data policies – largely addressing the field of personal data. Against this background, eco calls for a cautious approach when putting additional regulation in place so as not to create a regulatory environment that hampers innovation and growth. Additionally, eco recommends a serious consideration of ideas for general and horizontal rules and their interplay with other existing allowances in order to avoid double regulation.
In general, eco acknowledges the grounds for a data regulation, but this regulation should pay close respect to companies' efforts in creating data sets and maintaining them, and to fairness between different business sectors.

On the Inception Impact Assessment in detail

- **On "Problem the Initiative aims to tackle"**

The Commission rightfully identifies existing regulations as cornerstones for further devising market rules for a data economy for Europe. From this solid basis for analysis and subsequent action, the Commission identifies four core fields of action where it assumes necessity for further regulatory activity. The four being:

1. Use of privately-held data by the public sector
2. Data access and use in business-to-business situations
3. Establishing more competitive markets for cloud computing services
4. Safeguards for non-personal data in an international context

1. Use of privately-held data by the public sector

With regard to the use of privately-held data by the public sector, eco calls into question the core premise of the problem that the Commission sets out. The public sector – unlike any other actor – can raise, access and process data according to its needs. In addition, the public sector is in theory able to define clear and transparent rules and formats in which data can be used. The existing problem in this sector is, in eco's view, centred more around the second aspect pointed out by the Commission; namely, where data holders refrain from sharing information out of fear of sanctions due to data protection or other sector-specific regulation. Within different contexts, eco has already pointed out that the following would be helpful in improving data sharing, including in business-to-government contexts: clearly described data sharing scenarios attributing the level of pseudonymization or anonymization, as well as the clear limiting of purposes for which this data is being processed. The aspect of trade secrets, which is already governed through respective legislation should also be taken into account when further devising rules for business-to-government data sharing. In general, the public interest must be carefully weighed against the potential costs and risks involved. The definition of public interest should follow a context-specific approach. The European Commission should continue the dialogue with stakeholders and carry out an assessment in order to introduce adequate compensation schemes for business-to-government data exchange.

2. Data access and use in business-to-business situations

With regard to data access and use in business-to-business situations, eco argues that the same limitations that limit B2G data-sharing also apply to B2B scenarios. With regard to the problems sketched out in the IIA – i.e. lack of incentives for data holder – eco points to the fact that this topic is already being addressed through competition law, where respective rules are laid down in national legislation, such as the German Act Against Restraints of Competition. Taking these aspects into account, eco clearly supports a European approach towards this topic but also would like to reiterate that possible regulation in this field should clearly address questions of market relevance and market power. In addition, the support for open standards for data exchange would appear to be a viable way to enhance B2B data exchange.

3. Establishing more competitive markets for cloud computing services

With regard to the more competitive cloud computing market, eco would like to point out that ideas for general requirements for the portability of data – be it business-to-customer or business-to-business – are regarded as problematic within the industry, especially given the fact that a lot of data that is processed or retained on an encrypted basis often diminishes possibilities for easily transferring data or services. This further leaves aside the question of whether this data is personal data covered under the GDPR. Against this background, eco advocates for no further facilitation of mandatory data or service portability and instead seeks support for the industry in developing formats and APIs for better and more easily-ready exchange for data or data formats. Enforcing portability of data or services should – just as access to data

– only be governed in cases where market power of a few selected actors is overwhelming or markets are close to tipping. The question of whether the Digital Markets Act with its description of a gatekeeper function is the proper blueprint for intended regulation is questionable. Moreover, there are already initiatives in place which are contributing to portability of data and services, e.g. SWIPO. These efforts could be impeded through arising possible regulation.

4. Safeguards for non-personal data in an international context
With regard to safeguards for non-personal data in an international context, eco points out that there is a strict and prohibitive regime for processing personal data in Europe – an aspect that eco would not like to have extended to non-personal data. Aspects of this topic have already been taken up through the Commission's proposal for a Data Governance Act. A provision of a regime creation for the exchange of non-personal data, which is similar to the provisions of the GDPR, might prove crippling to businesses in Europe.

- **On Objectives and Policy options**

eco generally agrees with the Commission's approach towards promoting the use of privately-held data for policy-making, but reiterates its position that this should be supported by clear statutory authorisations to use this data in the intended way so as to avoid sanctioning companies who are sharing their data with government for the public good.

With regard to the aspect of B2B data sharing, eco points out that, in general, the existing rules and provisions are sound and allow for B2B data sharing of non-personal data. A light touch approach through the provision of standardized contract clauses for transparent and fair data sharing could prove helpful, as could the support for the development of open standards, open data formats and open APIs, which would not only ease data exchange but also achieve secondary goals in the field of the cloud market. eco appeals to the Commission to seriously reconsider general obligations for data sharing with other businesses, even under the auspices of the Trade Secrets Directive, which will most likely be easier navigated through dominant or strong actors in the market. A voluntary approach and freedom of contract should remain the basis for B2B data exchange.

With regard to the solution of jurisdictional conflicts which is also mentioned – which largely address the issue of data sharing beyond the European Economic Area – eco stresses that multilateral approaches should always take precedence over bilateral agreements. In order for such solutions to be successful, the aspired regulations – if there are any intended – should be proportionate and unbureaucratic. Taking into account the current situation evolving around data protection authorities, law enforcement agencies and a rapidly evolving regulatory environment – including the e-Evidence file, the GDPR , a possible ePrivacy Regulation and the rephrasing of standard contractual clauses – eco would like to point out the need for a clearly defined legislation which takes these aspects into account and avoids double or

multi-regulation.

eco disagrees with obligations for companies to report on what data they hold. This obligation – even if limited to large companies only – is clearly generating administrative burden without actually enabling or easing B2G data sharing. In contrast, it might actually prove harmful, since companies may inadvertently disclose information on their business activities and strategies by publishing information that they regard as relevant. In addition, the problem might arise through the public sector providing services or data sets which may compete with the services or data sets provided by the commercial actors. Using broadly defined public interest as justification for such a practice – a development which seems to be intended within the IIA – can be regarded as a weak approach.

Beyond that, eco also views the plans to enhance B2B data sharing as potentially problematic. The obligation for manufacturers to additionally grant companies access to their products is intrusive and goes too far in respect to companies' innovations and product design. This also holds true for model contract terms, which also most likely will affect smaller companies and, in doing so, seriously impede their navigation of these standard terms for their own good, with larger companies having a far better capacity for employing their own terms. The option of the establishment of general modalities and requirements for sharing data in the way proposed by the Commission is also something to be viewed critically. The fact that sectoral rules may be established implies that, in the end, a complex system of reporting obligations will be established, which will not help companies in sharing data. A competition-based approach as is currently being adopted in Germany seems most promising when data sharing needs to be enforced. Additionally, ideas like the implementation of a conflict settlement mechanism should also clearly imply a true and fair approach for all parties involved, as compared to the Platform-to-business regulation, where the mediation mechanism has clearly disadvantaged platform owners / platform operators.

In conclusion, eco argues that the Commission's proposals – especially when it comes to deploying requirements for sharing information and data – are unbalanced and lopsided, discriminating against cloud-based and digital businesses. eco cordially calls on the Commission to reconsider its strategy on data sharing, both at B2G and B2B levels, and to revise the aspects that impose a disproportionate burden and stringent restrictions on digital companies. Furthermore, any foreseen provisions of the Data Act on government access to data issues should be aligned with other EU legislative initiatives under the European Data Strategy.

Conclusion

In summary, eco sees many shortfalls in the Commission's intended further activity regarding a Data Act. Concepts such as additional reporting obligations on the data

that companies hold will prove bureaucratic for enterprises who will have to produce more information for public services, with all of this to be undertaken without producing any clear benefits. Data sharing requirements may also prove harmful for companies investing in data processing, irrespective of whether this data is personal or non-personal. Their efforts may be thwarted by the requirement to disclose the information they earned through processing data.

eco recommends a critical review of the intended framework, to be undertaken with the following aspects in mind: minimizing bureaucracy, enhancing competition, and clarifying existing frameworks. This should be undertaken so that data sharing, in general, is more feasible and less risky for companies. This would help to create a framework for a European data economy that all parties, citizens, consumers, businesses and public institutions can profit from.

About eco: With over 1,100 member companies, eco is the largest Internet industry association in Europe. Since 1995 eco has been instrumental in shaping the Internet, fostering new technologies, forming framework conditions, and representing the interests of members in politics and international committees. eco's key topics are the reliability and strengthening of digital infrastructure, IT security, and trust, ethics, and self-regulation. That is why eco advocates for a free, technologically-neutral, and high-performance Internet.