

3 September 2021

ETNO comments to the Public Consultation on the Data Act

ETNO welcomes the opportunity to comment on the measures being explored by the European Commission in preparing the Data Act. This document complements our response to the public consultation questionnaire with regards to the two specific sections on **business-to-government data sharing for the public interest and on business-to-business data sharing**, building on our recent feedback to the Commission's Inception Impact Assessment (IIA) on the Data Act.

ETNO supports the overall objective of fostering data sharing and re-use across sectors and national borders. However, future regulatory measures to boost data exchanges and promote greater data availability should avoid adverse effects on competition and innovation. Mandated access to data, especially in the business-to-government context, could have a particularly chilling effect on European providers of data analytics offerings. Public administration should rely on a variety of providers to avoid that data outsourcing be seized by few data-dominant companies, with the risk of strengthening those tech giants even further.

Business-To-Government Data Sharing for the Public Interest

Telecommunications operators cooperate with Public Administrations, typically by providing **mobility aggregated data as a service** to tackle epidemics, natural disasters and environmental pollution¹. This data exchange has increased during the COVID-19 outbreak, by giving Public Authorities access to anonymous and aggregated data in order to better make predictions on the spread of the pandemic.

Such cooperation is generally **based on voluntary contractual agreements, but oftentimes lacks compensation on investments made** (e.g. inherent costs of extracting, analysing and aggregating/securing the data). For this cooperation to flourish in the long term, and not just as an urgency response to a crisis situation, it is of outmost importance that any data sharing agreement is based on mutually beneficial terms in order to offer long-term sustainable solutions.

However, these identified shortfalls do not mean that long-term successful and continuous cooperation cannot be realised through contractual agreements and that regulation would be necessary.

¹ Please note that in the Netherlands this type of exchange does not take place as the Dutch data protection authority does not consider the necessary data anonymous.



ETNO members were surprised to read in the Commission's Inception Impact Assessment (IIA) that the "commercialisation" of data services by companies would hinder making raw data available to the public sector – and consequently "limit the public sector's capacity to develop data models on its own". ETNO does not share the view that the effort of companies to commercialise the data they initially collected is the main cause of today's lack of data analytics by public authorities. We think that this assessment is very far from market realities. To the contrary, in the telecoms sector, public authorities explicitly demand companies to analyse mobile location data and provide analytical insights to help public authorities address societal challenges such as fighting pandemics or improving infrastructure planning. These analytics solutions bring substantial benefits in terms of cost efficiency and quality of the insights.

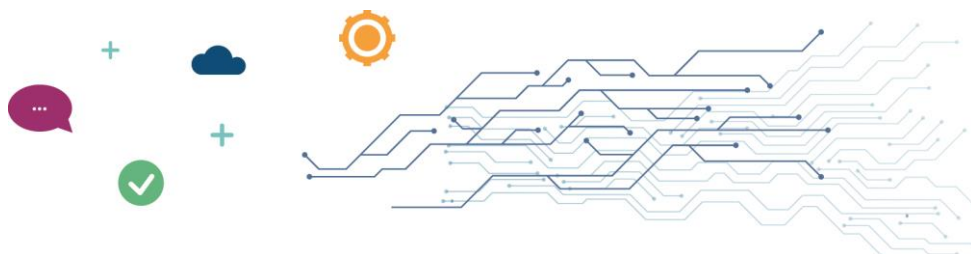
Therefore, introducing any form of access regulation (in combination with cost-based regulation) that would crowd-out the successful commercial solutions available in the market would be unjustified and, contrary to the Commission's considerations, would lead to even more limitations of business-to-government (B2G) collaborations.

ETNO rejects the introduction of access obligations in a market that – from first-hand experience of the telecoms sector – is well-functioning and experiences no market failure that would justify such intervention. Operational barriers and technical challenges, not the lack of interest, prevent the generalisation of B2G data sharing. This is especially true for the public sector, which still lacks the analytical ability and capacity to make enough use of available data, including public data.

The Commission adopted a **Communication on Guidance on B2G data sharing in the Data Economy** in April 2018. The Communication identified [basic principles for data sharing](#). These principles (i.e., proportionality, purpose limitation, do no harm, transparency, accountability, fair and ethical data use, conditions for data use and mitigate limitations of private sector data) were confirmed and redefined in the [B2G data sharing Expert Group Report](#) published in February 2020 along with the Data Strategy.

ETNO thus believes that, to enable a thriving B2G data sharing market in the EU, a mutually beneficial cooperation based on **voluntary** contractual agreements should be the key objective. With regards to the Commission's public consultation and the IIA, we would like to stress the following:

- **Public interest:**
 - In exploring the need for a regulatory framework consisting of data sharing obligations, the consultation document lays out a very broad and insufficiently defined idea of what might constitute public interest that could trigger data sharing obligations, to the detriment of legal certainty for businesses. The consultation document describes public interest as "*general benefits to society as a whole – like effective responses to disasters or crises and improvements to public services – as recognised in law, at EU or Member State level*". Public interest purposes for which data sharing can help should be **strictly limited and defined** to cover events like natural disasters and health epidemics (see the sharing of mobile insights between telecom operators and Public Authorities at EU, national and local level to fight against the spread of COVID-19). Use cases such



as “prevention and resilience”, as mentioned in the questionnaire, are overly vague and public authorities could exercise a wide discretion in requiring data sharing from private parties. This would create legal uncertainty and would risk crowding out commercial initiatives, thereby disincentivising private investments.

- By and large, data sharing for public interest purposes should involve all relevant market players, while avoiding to single out certain sectors and thereby cause a fragmented approach. We have witnessed voluntary data sharing efforts by various stakeholders during the COVID-19 pandemic, which have allowed for very granular insights into human movement patterns based not only on telecom network location data, but also on GPS data.
- For other challenges besides the above-mentioned emergency situations, imposing any B2G data sharing obligations would furthermore jeopardise existing businesses’ initiatives (such as data analytics services for smart cities). The impact on innovation and competitiveness would be severe. Therefore, instead of any binding measures, this incipient market can grow thanks to stimulating measures that allow it to reach its full potential.
- **Compensation:**
 - Telecoms data are collected and processed with **considerable additional investment**. For example, the provision of mobility insights requires pre-processing, analysis and aggregation of location data, including anonymisation and secure transmission in compliance with strict data protection requirements set out by the GDPR and the ePrivacy Directive. Making this data available to third parties (including time and resources for preparing and adapting them to the specific request and purpose) thus entails significant costs.
 - Consequently, **fair financial compensation models** need to balance the need for investments in data generation on the data supplier side and the public interest of the public entity concerned. Fair compensation would give businesses the necessary incentive to boost this market, whereas pro bono and free data access as a rule would undercut further incentives to market development.
 - Other incentives such as tax breaks and public funds could encourage the investment in B2G data sharing solution; however, these measures should complement a robust financial remuneration framework that is the key to fostering competition and innovation in the data sharing market.
- **Public Sector:**
 - At present the public sector is not well-equipped to make use of and promote availability for its own public data, and this is even more true for further re-use of privately-held data. To overcome operational and technical gaps, it is thus first and foremost necessary to **improve public sector capacities and digital skills** so that public entities can reap the full benefits of private sector data.



- Furthermore, public administration should rely on a **variety of data analytics providers** to promote competition and avoid that data outsourcing be seized by few data-dominant companies, with the risk of strengthening existing foreign tech giants even further.

In parallel with the Data Act, a **Data Governance Act (DGA)** is being negotiated. The DGA sets the “conditions” (not obligations) for re-use of public data by private companies. Since the DGA aims at setting the right conditions to foster data sharing for public data (data generated with public investment), the **principle of voluntary data sharing** should even more so apply in any B2G data sharing in the future Data Act. Applying a voluntary approach with regard to public entities and their data and, in contrast to that, imposing access obligations on private companies with regard to the data they generate, would be an unjustified approach.

Business-To-Business data sharing

Telecommunications operators provide services based on data analytics, such as mobility solutions, to business customers. The sharing of data with other companies is necessary to develop those innovative services. Data sharing is typically based on contractual agreements between the businesses concerned. These contracts usually define the conditions (duration, purpose, compensation) and restrictions for using data, thereby addressing the specific needs of the contractual parties. Voluntary data sharing is then governed by general contract and competition law.

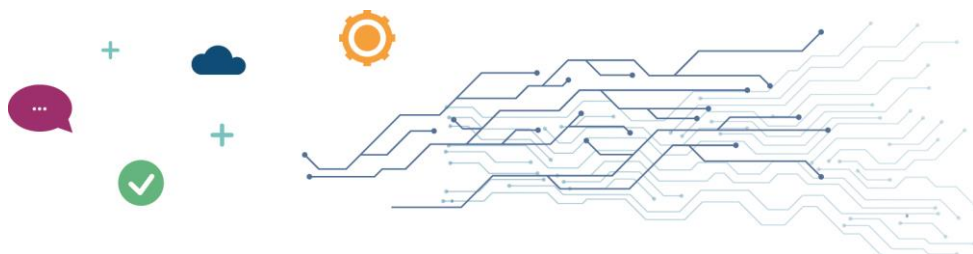
Business-to-business (B2B) data sharing should continue to be based on voluntary contractual agreements, as a flexible way to address the specificities needed to make B2B sharing mutually beneficial.

We understand that the Commission is exploring several options to ensure fairness in B2B data access and use, with an emphasis on **Internet of Things (IoT) environments**. These options could include transparency obligations for device manufacturers; a ‘fairness test’ to prevent unfair data access and use conditions; data access and use rights on FRAND terms; harmonized modalities for data access; and clarification of the Database Directive.

We caution against the introduction of horizontal, untargeted regulation obliging businesses to grant access to their data. The introduction of **cross-sectorial symmetric obligations** would be unjustified and would not reflect the specificities and characteristics of markets when it comes to data.

Mandatory access to data provisions are being discussed in the context of the Digital Markets Act (DMA) and would apply only to the providers of core platform services – including cloud computing services – that have been defined as “gatekeepers” through a combination of different criteria.

To further improve voluntary sharing and re-use of non-personal data in B2B environments, we welcome proposals towards the development of **contract model clauses** serving as a negotiation basis that could help increasing efficiency and reducing uncertainties in negotiations (e.g. in the context of co-generated industrial data).



ETNO believes that in a dynamic data market, no mandatory provisions for a “fairness test” are necessary.

We also welcome the ongoing Commission’s work towards the **update of Horizontal cooperation agreements and the Horizontal Cooperation Guidelines** to facilitate data pooling and data sharing agreements among partners and competitors. Any data sharing initiatives, in full compliance with EU competition rules, will help EU players to be competitive and to create innovative and interoperable products and services that support the broader EU competitiveness. For that, competition policy needs to evolve to be able to respond to the new challenges of the digital economy. Since these agreements need scale to become significant, ETNO supports a **new block exemption for data sharing/data pooling agreements**, as well as further guidance on this kind of agreements in the Guidelines.

For questions and clarifications regarding this paper, please contact **Paolo Grassia**, Director of Public Policy (grassia@etno.eu).