

Non-paper on the Data Act

Introduction

Data has become increasingly important to our economy and society. It creates enormous added value by, among others, contributing to research and innovation, increasing efficiency of many societal processes and enhancing the competitiveness of industries. The full potential of the data economy is not even reached yet, as there is still a huge amount of untapped industrial data in the European economy. Moreover, data can be re-used endlessly and is non-rival. However, to utilise data to its full potential, all individuals and organisations participating in the data economy should be able to benefit from the use of data and trust that their rights and interests are protected. Therefore further measures should not only stimulate data sharing, but also address and mitigate risks concerning the privacy of European citizens and the protection of their personal data. Due to existing deficiencies in the market, such as a lack of interoperability, individuals and organisations are often hesitant or unable to share their data. This limits the potential of data to drive innovation and address societal issues and leads to competition problems such as lock-in or excessive bundling of services. Several European initiatives¹ already aim to contribute to trusted data sharing and a well-functioning data economy within the broader fabric of society. These steps are welcomed by the Netherlands, as they follow the main points of its view on a responsible data-economy as stated in the Dutch vision on data sharing between businesses, published in February 2019². A recent study commissioned by the Dutch Ministry of Economic Affairs and Climate Policy³ and a study by the Netherlands Bureau for Economic Policy Analysis (CPB)⁴ emphasize the need for governments to take additional measures.

The Netherlands is committed to preserving an open economy, cooperation with international partners, creating the right frameworks and setting global standards. The Netherlands welcomes the upcoming Data Act. It provides the opportunity to take additional measures to ensure that data is available to private and public stakeholders, such as businesses and knowledge institutions, to address societal and economic challenges and drive innovation whilst respecting the rights and interests of all parties involved. The European Commission (EC) has presented a first outline of the upcoming Data Act in the IIA⁵ and in the public consultation. By means of this non-paper, the Netherlands intends to contribute to a broad policy discussion on the Data Act by outlining the necessary steps to ensure a fair, well-functioning and competitive European data economy.

Main goals of the Data Act

The Netherlands believes the Data Act should:

1. Strengthen the rights of individuals and organisations participating in data sharing arrangements so that they can exercise more control over their provided and observed data. Specifically, the Data Act should:
 - Ensure individuals can better exercise their right to data portability (Article 20 GDPR) to stimulate unbundling of services and allow individuals to easily switch between services.
 - Ensure fairness in data access and use in data sharing between organisations to provide better safeguards for SMEs participating in the data economy.
 - Ensure service portability in data-driven markets where vendor lock-in limits competitiveness.
2. Further contribute to a framework for development and implementation of the standards necessary to increase interoperability. Increased interoperability is necessary for the further development of the data economy and to achieve the policy goals of the Data Act, especially the measures that aim to strengthen data and service portability.
3. Ensure that the use of privately-held data by the public sector to serve the public interest is organised in line with the rights, obligations and interests of all parties involved. The Data Act can contribute to fair and reliable Business-to-Government (B2G) data sharing when there is a legitimate public interest, for example to provide official statistics, while protecting individual data protection rights, privacy and intellectual property rights.

¹ a.o. the General Data Protection Regulation (GDPR); European Data Strategy; the proposed Data Governance Act; European Alliance for Industrial Data, Edge and Cloud; European Health Data Space and European Open Science Cloud via Horizon Europe

² <https://www.government.nl/documents/reports/2019/02/01/dutch-vision-on-data-sharing-between-businesses>

³ <https://www.government.nl/documents/reports/2020/11/30/exploring-data-sharing-obligations-in-the-technology-sector>

⁴ <https://www.cpb.nl/sites/default/files/omnidownload/CPB-Background-Documents-Policy-Options-Data-Economy-Literature-Review.pdf>

⁵ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13045-Data-Act-&-amended-rules-on-the-legal-protection-of-databases_en

1. Strengthening the rights of individuals and organisations

Increased data usage and data sharing can have societal and economic benefits. These benefits should be fairly distributed amongst the participants in the data economy. Currently, a relatively small number of companies collect and process personal and non-personal data to create value. This data is often provided by, or observed from, individuals or organisations through all kinds of data sharing agreements and provisions. Individuals and organisations, especially SMEs, that provide data often have insufficient insight in and control over the terms of arrangements and thus the creation, collection, use or sharing of data that relates to them. With the increase in data being collected, created and used by among others Internet-of-Things(IoT)-devices this leads to several issues. This lack of insight and control *i)* hinders individuals and organisations in protecting their own rights or interests, *ii)* leads to data too often being used and shared in ways which are not necessarily in line with their interests *and iii)* limits individuals and organisations in using their provided and observed data to create value. This in turn leads to vendor lock-in and excessive bundling of data-driven products and services, which hamper competition and limit innovation. Therefore, the Netherlands is of the opinion that the rights of individuals and organisations should be strengthened to increase the control they have over their provided and observed data.

a. Individuals

The rights of data subjects towards their personal data are mainly laid down in the GDPR. The GDPR provides individuals, among others, with the right to erasure, right to restrict processing and the right to data portability.⁶ These rights aim to provide individuals control over the use of their personal data, but in practice that goal is not always achieved to the fullest of its potential. The Netherlands agrees with EC's notion in the IIA that a lack of interoperability formats limits the ability for individuals to port their data and thereby control the use of their data⁷. For some products and services that derive value from personal data, data subjects require real-time portability or portability according to certain technical specifications in order to port their data and switch or combine services in a way that is valuable to the individual. The current right to data portability does not stipulate technical specifications and the existing market lacks the coordination and incentives to develop these interoperability formats by itself, leading to vendor lock-in and excessive bundling of services.

The Netherlands believes that the EC should stipulate interoperability requirements to help individuals take advantage of the portability right for products and services which derive value from processing personal data and where issues with lock-in and bundling of services occur or can occur, such as IoT-devices. An important consideration in formulating these measures should be the allocation of the costs involved with these measures, especially the costs to SMEs.

b. Organisations

While individuals' rights over their personal data are already laid down in horizontal legislation, the legal protection of 'non-personal' data is currently very fragmented and often indirect. For example, some data is protected by intellectual property rights or as trade secret. But even then the protection is often indirect. In the IP Action Plan⁸ the EC states that a robust framework is needed to ensure organisations can generate, view, share and use data and therefore wants to stimulate access to and the exchange of data by clarifying a number of provisions of the Trade Secrets Directive and revision of the Databases Directive. The Netherlands welcomes the clarifications regarding the Trade Secrets Directive. However, concerning the Database Directive, it is very important that the right balance is struck between the interests served by the protection of databases on the one hand and the use of databases on the other.

Due to the fragmented protection of non-personal data, the access and usage rights when organisations co-generate data are often laid down in private contracts. Due to the lack of insight and control by organisations which provide data this can lead to an asymmetrical distribution of access and usage rights. Freedom of contract for organisations is an important principle, but fair data access and use rights for organisations, especially SMEs and start-ups, are essential to develop new products and services, foster innovation in general, ensure organisations can protect their own rights and interests and ensure a fair distribution of the value created with data. It is important that the Data Act ensures clear and fair data access and usage rights in data sharing arrangements where data is cogenerated which is valuable to multiple parties. Specific data types or different sectors will require different measures. While transparency obligations and fairness tests can be useful, the Netherlands believes the Data Act should contain codified access and use rights or horizontal modalities. The aim should be to set a broad standard for fairness of

⁶ Articles 15 – 18 GDPR

⁷ [Data Act & amended rules on the legal protection of databases \(europa.eu\)](https://european-council.europa.eu/media/en/press-communications/infographic/infographic_data_act_2020.pdf)

⁸ Making the most of the EU's innovative potential An intellectual property action plan to support the EU's recovery and resilience, COM/2020/760 final

use so that organisations can benefit from the value their provided, observed and (co-)generated data provides and the rights and interests of all parties are protected. Sectoral initiatives could then build upon this and develop specific tools, standards or agreements per sector or domain. This process could take inspiration from the FAIR-principles, which as common principles form the basis for specific standards and tools in the broader research and health sectors.

For certain products and services which derive value from processing data, among which cloud computing services, organisations suffer similar problems of vendor lock-in and bundling of services as individuals. For these products and services organisations, and especially SMEs, could benefit from a right to data and application portability. The Netherlands therefore supports the Commission in researching the possibilities for data portability, interoperability and application portability to establish a more competitive market for cloud computing services. Such measures are a necessary addition to the initiatives that are focusing on strengthening European cloud supply and establishing federated cloud services, like GAIA-X and the possible IPCEI Cloudinfrastructure and Services. Furthermore, several organisations have experienced similar lock-in problems in the business software market as in the market for cloud computing services⁹. We therefore urge the Commission to also research possible measures to strengthen the ability of organisations to switch between business software providers in this market as well.

2. Interoperability and standardization

Every data sharing arrangement requires a certain level of interoperability. Nonetheless, there are few common principles or generally accepted standards that effectively facilitate data sharing on a large scale, whether within an industry or between industries. Standardization and interoperability are necessary to realize the opportunities for data sharing to stimulate innovation and increase competitiveness in data-driven markets. However, developing and implementing the necessary standards for data sharing and interoperability is a complex and lengthy process which requires high levels of cooperation and coordination. The market by itself lacks the necessary coordination and incentives to achieve a meaningful level of interoperability on a broad scale, in a timely manner and in line with European legislation and values. This is further complicated by the fact that data markets are highly diverse and there are different needs and requirements per sector.

Improved interoperability is also crucial to realize the opportunities the Data Act presents. To ensure that measures to increase fairness in access and usage rights and to improve portability are effective in practice interoperability within sectors and across sectors needs to be increased. A well-functioning eco-system of sectoral and cross-sectoral initiatives is needed to develop the necessary standards to support the legislation and to adapt to future innovations. Prioritisation and coordination at European level are vital to stimulate the market and existing ecosystems to develop these standards. We therefore urge the Commission to ensure the standards necessary to support the Data Act are developed timely, using the existing European Standardisation System. Harmonised standards can provide a means to comply with European regulation where applicable. The EC should determine; based on the policy goals of the Data Act, taking into account existing initiatives and with input from stakeholders; for which sectors, services and products increased interoperability should be prioritized. Within the existing system the necessary standards can then be developed through an open process with a broad group of stakeholders, including SMEs. Data protection safeguards should be put first in development to mitigate potential risks to intellectual property and risks concerning the privacy of European citizens and the protection of their personal data. Broad implementation of the standards should be ensured by linking standards and technical specifications to portability, usage and access rights where applicable. If successful this process can further contribute to establishing an ecosystem for the prioritization, development and implementation of standards for data sharing.

3. The use of privately held data by the public sector

The Netherlands acknowledges that business-to-government (B2G) data sharing currently lacks (common) structures and dedicated functions. This can limit the benefits of data for the common good as the use of certain privately-held data can be necessary to serve the public interest. Fair and sustainable access to such privately-held data by the public sector could lead to better and more innovative delivery of public services and better policy making. The production and dissemination of reliable independent official statistics is an important example of a data-driven public service which plays a fundamental role in today's society. Sustainable access to privately held data sources is crucial for the production of better quality and timely independent official statistics by national statistics institutes in a more efficient and less costly manner. Furthermore, the recent pandemic is one of many examples which showed the value of fast and

⁹ <https://fd.nl/ondernemen/1319877/the-stranglehold-of-the-software-giants-m3f1caMuF2wb>

accurate information for policymaking. Fast occasional B2G data sharing could contribute to better-informed decision-making in such unpredictable emergencies.

Although B2G data sharing can be useful for dedicated purposes, it is essential that any such measures to promote it are carefully constructed and take into account the rights, obligations and interests of all parties involved, including individual data protection rights, the right to privacy and business secrets. Moreover, the purpose and public interest should be clearly defined and proportionality and accountability should be ensured in order to prevent misuse. With regard to the lawfulness of foreseen data sharing arrangements, it is important to emphasize that more and more datasets may be classified as personal data in the sense of the GDPR because anonymizing data is becoming, increasingly difficult. Sharing personal data with the government on a structural basis requires a specified legal basis and has to adhere to all requirements set in data protection legislation.¹⁰ Any substantive data sharing rules that aim to serve as a legal basis for processing¹¹ have to be well specified and adhere to all relevant legal requirements. Bases for data processing that are worded in a wide and general manner would not be in line with our European system of fundamental rights.

¹⁰ the GDPR, E-privacy regulation, the EUGDPR, the Law Enforcement Directive, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights.

¹¹ E.g. article 6 GDPR