Contribution

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Comments to the Commission's inception impact assessment on the Data Act

Introduction

EuroCommerce welcomes the opportunity to provide feedback to the European Commission's Inception Impact Assessment for the Data Act. We have in the past provided feedback on the European Strategy for Data and the inception impact assessment on the Data sharing in the EU and the creation of the Common European data spaces. Data is increasingly regarded as an essential resource that can support economic growth and innovation and promote the overall well-being of the society. For the retail and wholesale sector in particular data is at the heart of their eco-system. Retailers and wholesalers generate different types of data both offline and online, including on products and services (composition, prices etc.), but also through the products themselves (connected devices, AI, IoT), on consumers (behaviour, baskets, etc) and on consumer lifestyle and personal life choices (food allergies, dietary data). Data is used by retailers and wholesalers for multiple purposes – to improve own operations (ex. to manage store orders), for traceability purposes along the supply chain and compliance, to enhance customer service and consumer experience and to raise attractiveness among consumers. We support the aim of the European Commission to encourage further access and use of data in order to mutually benefit public and private actors. We emphasise the need for policy coherence with other pieces of legislation, a number of which are currently revised such as competition rules. In line with better regulation guidelines, we would ask the Commission to ensure that regulation is only considered where is it strictly necessary, justified and a clear legal gap has been identified.

Summary

The Data Economy and its insights can help retailers and wholesalers to improve services, foster digital and green innovation. Providing replies and opportunities to the long-standing issues of data access and interoperability within safe and easily accessible data environments is very important for public bodies, companies, and individuals. EuroCommerce welcomes the effort of the European Commission to establish legal certainty and to promote more data sharing. It is important to ensure that any future (legislative) framework encourages competition and the development of new business models. See below more detailed comments to the inception impact assessment:

- **Data sharing should remain on a voluntary basis**. As common practice already shows, data sharing and data access can only be successful if it remains voluntary, i.e. if companies can decide for themselves which data they want to share or grant access to, when and to whom. Companies will have to invest significant resources to be able to share data and legal and interoperability issues need to be taken into account. A voluntary approach would support

data reuse while safeguarding the competitiveness of European businesses, helping companies grow and securing adequate investment for data management. Additional guidance on how competition law applies to data pooling and data sharing between competing companies, within groups of companies and franchising systems should be considered, specifically with regards to the Horizontal and Vertical Guidelines. Increased legal certainty would support voluntary data sharing. We strongly believe that mandatory data sharing should only be used as a last resort, in exceptional cases of clear market failures and should carefully balance the interests of data holders/generators and data recipients. As for example in the case of certain in-vehicle data that the European Commission is considering granting access to independent car repairers as a means to preserve the secondary market for car repair and maintenance. Any kind of general obligation of sharing of non-personal data can risk providing competitors with access to autonomously generated and valuable data sets, thus, distorting competition and decreasing incentives to invest in data intensive business models.

- **Cross-sectorial data sharing should be encouraged.** Retail and wholesale companies may be operating across different data ecosystems and exchange data with different actors along the supply chain. It is thus essential that the approach allows for voluntary data exchange between different data sectors across the supply chain, within the limits of competition law. Our sector is already sharing large amounts of data across its supply chain, such as through the cooperation with GS1[1] for operational efficiency (e.g. supply chain optimisation, logistics, sales performance) with no reported issues or difficulties in the established contractual relationships. We need practical agreements for data sharing that will provide SMEs with the legal certainty they need to share and access more data. As mentioned above, we note that cross sectorial data sharing is experiencing certain challenges which are reflected in the examples included in the inception impact assessment. In these cases, data sharing is essential for the development of these business models. For example, manufacturers do not always grant retailers and wholesalers access to relevant data (e.g., data generated by products they sell) and can impose strict (contractual) limitations for (re)use of data. Accessing such co-generated data would provide our sector with the insights on product use needed to improve the customer journey, sustainability and secure a level-playing field for the entire data ecosystem.

- **Business-to-Business data sharing should be handled on a case-by-case basis within the limits of competition law**. Retailers and wholesalers may be under pressure from suppliers to share data on their sales and activities, all while some suppliers are directly selling to customers. These cases can increase inter brand competition and contribute to the customer experience, provided that data exchanged between suppliers and their distributors is strictly limited to the information needed for the performance of the contract and suppliers do not use that data to outcompete their distributors. Such situations could hinder competition and threaten the existence of many small and medium sized enterprises. B2B data sharing should be handled on a case-by-case basis depending on the non-personal data involved and the risk of negative effects on competition, always in compliance with competition rules. As stated

[1] organisation that develops and maintains global standards for business communication, they have 1.5 million user companies.

above, current EU legislation already provides the necessary tool for data-sharing to take place when appropriate and is being currently reviewed.

- **Data sharing should be utilized to facilitate regulatory obligations**. Retailers and wholesalers share data for sustainability purposes and the traceability of materials and products which supports overall circular ambitions and recyclability. This process heavily relies on data sharing and would be facilitated from a systemic support to all actors in the supply chain to input data under a common identification. For example, common definitions for different waste streams would help companies in correctly claiming a recovered, recycled, reused material. The Digital Product Passport initiative could support this potential. In this case data sharing should be further promoted as it can be conceived as a tool governed by its stakeholders while taking into account relevant existing initiatives and databases developed at global, EU or Member State levels and by private actors.

- **Business-to-government data sharing requires more clarity and safeguards**. The retail and wholesale sector already shares data with public authorities to fulfil regulatory obligations (e.g., traceability, registration of chemical substances, statistics) or requests from governments (e.g., for statistics, tax, or other purposes). In many cases sharing of such data requires high initial investment costs and hides potentially serious ex-post risks in terms of breach of personal data protection and privacy legislation or public perception. As a result, companies would need more clarity on the process to be followed, the type of data that would fall under the scope and on the defined entity/data intermediary which will organize and monitor this sharing process. It is important to avoid exposing commercially and privacy sensitive data or engage in any kind of data sharing that would hinder existing competition requirements. For that purpose, B2G data sharing should be strictly limited to predefined data sets and should apply concrete conditions for use, including remuneration and/or covering expenses. Any mandatory B2G data sharing requirement should be non-discriminatory, justified on an overriding reason of public interest, proportionate to that public interest objective and the least restrictive measure to achieve that public interest objective.

- **Data sharing for the common good should be based on a clear harmonised definition of what constitutes public interest.** The definition of public interest can be very different in different contexts and more clarity and attention should be given to this front. The concept of opening up data for the common good is too broad and must rely on clear adequate and accurate criteria. We ask the European Commission to provide more clarity on this point and concrete areas that would fall within the definition of public interest.

- **Contractual relationships in business-to-business data sharing should not be further regulated.** B2B data access in the retail and wholesale sector is based on contractual arrangements and has been working well over the years. The sector collects different types of data, i.e. data on customers, individual and accumulated purchase data, consumption trends, etc. which are often considered as business secrets. Current provisions on information exchange in competition law work well and further guidance on horizontal and vertical agreements is being considered as part of the ongoing review of EU antitrust rules. We ask the Commission to ensure policy coherence with the on-going review in competition rules but also other regulation such as the forthcoming Digital Markets Act and only consider further

policy options if a clear legal gap is identified. Our view is that a general obligation to share non-personal data may give competitors access to autonomously generated and commercially valuable data, thus distorting competition, reducing incentives to invest in data intensive business models and subsequently having a negative impact on the end consumer. We would invite the Commission to consider the impact of the introduction of the various policy options such as a 'fairness' test carefully; fairness is a concept which is difficult to define and subject to misinterpretations, which could lead to legal uncertainty and consequently further reluctance to share data. EuroCommerce believes the introduction of model contracts should be further explored without regulating them at an early stage.

- **Non-personal data generated by objects connected to the IoT should be further explored and clarified.** Digitalisation is fuelling the development of ecosystems, where information exchange and data sharing between competitors could be essential for the development of, for example, artificial intelligence (AI) solutions. Nevertheless, it is not always clear who is holding the data of connected objects and subsequently which economic operator will be responsible to share this data and with whom. Furthermore, the inception impact assessment is referring to non-personal data, but we note that data collected by connected devices can be mixed (personal and non-personal data) and it is important that any data sharing would remain voluntary and in line with GDPR and privacy laws.

- **Real-time portability of personal data should take into account the effects on market competition.** We welcome the Commission's efforts to promote data sharing and to further facilitate access to data and data sharing to the benefit of start-ups and SMEs. As the Commission rightfully has pointed out, it is essential to consider any effects that such data sharing may have on market competition. Many retail companies have recently been approached by so called data portability companies which are leveraging the data subjects' right to data portability to gain access to retail companies' customer data aiming at creating new services, e.g. cash-back programs, in direct competition with the service offered by the retail companies, e.g. loyalty programs. Although retail companies take great consideration and care of data subjects' rights and customer trust, we cannot help but question whether this is the type of use that the legislator intended to establish when introducing the right to data portability. In our view the right to data portability is intended to provide data subjects with increased control over their personal data and allow e.g. a customer to take his/her data when he/she wishes to switch to a new service provider. It was not intended to allow third party service providers to use such data requests to create a continuous flow of information from the retailer to such third party, in particular when the customer continues using the retailer's services. For that it should be interpreted in a way that does not allow other companies to exploit such right to gain access to data controllers' customer data. Retail companies heavily invest in their loyalty programs as this is an efficient way to stay relevant on a highly competitive market and offer better services to consumers.
  We acknowledge that we are at the early stages of the legislative process and that it is not clear whether this proposed policy for real-time data portability will impact primarily the retail and wholesale sector. But in light of recent access requests, as described above, we want to stress that the effects on competition must be carefully assessed before extending the right to data portability as set forth in the GDPR. The points put forward by the Commission will also involve extensive resources from the data controller to ensure that technical standards

are satisfied. It is thus important that any requirements on the data controller are proportionate considering cost for implementation, willingness to invest in new services and the actual benefit for data subjects. To ensure a harmonized framework, it is also essential that the Data Act includes references to the GDPR, especially rights that allow the data controller to deny or charge a fee in relation to any unfounded and excessive request of a repetitive character.

- **Government access to privately held non-personal data stored outside the EU should be aligned with EU legislation.** We welcome the initiative, and we stress the importance of ensuring that there is an equally safe framework for the private held non-personal data stored outside the EU that would prevent exposing business secrets due to law of non-EU jurisdictions with extraterritorial effect. We also note that the data sets private entities may be obliged to share could include both personal and non-personal data. For that purpose, governments requesting access to private-held data should be obliged to ensure an appropriate level of protection in accordance with the GDPR and other EU laws. The obligations for cloud service providers should be proportionate but also provide legal certainty for businesses that store their data outside the EU.

- **Data portability for business users in relation to cloud service providers is welcomed.** We welcome the Commission's efforts to facilitate data portability between cloud services by business users. To ensure a more competitive and open European cloud market cloud users should have the choice to rely on the best technology of their choice to develop, to innovate and grow while cloud service providers should be more transparent in relation to the services that they provide. Although we welcome the aim of the initiative, we cannot assess whether there is a real need to establish a legal framework on this issue. We would encourage the Commission to firstly take into account ongoing industry efforts, such as the Switching Cloud Providers and Porting Data (SWIPO) codes of conduct and assess how they can be used as best practices to avoid vendor lock-in. To conclude while we support the aim of the initiative, we would need to further assess and revisit the issue at a later stage.

- **The protection for IP rights should be ensured**. The future European framework for Data should also protect Intellectual Property (IP) rights. The European Commission should ensure that the examination of the role of the Database Directive will not create confusion or hinder IP rights, noting that databases result from substantial investments.

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