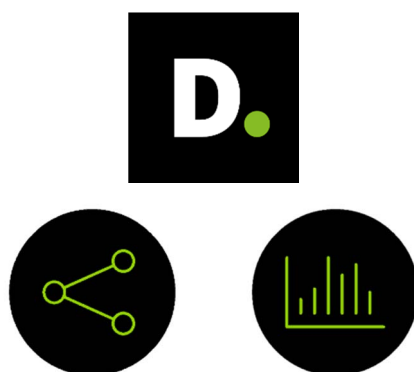


High level conference on Building a Data Economy

Summary of the discussion



SUMMARY REPORT

Of the High level conference
on Building a Data Economy
held in Brussels on the 17th of
October 2016

This summary report of the high level conference on Building a Data Economy was written by the consortium carrying out the “study on emerging issues of data ownership, interoperability, (re)usability and access to data, and liability”, composed of Deloitte Belgium, WIK-Consult and Open Evidence as partners and OpenForum Europe and Timelex as subcontractors.
The opinions expressed in this report are those of the authors and do not necessarily reflect the views of the European Commission.

Setting the scene – the European Commission

The scene was set by Commissioner Oettinger, Commissioner for the Digital Economy & Society who stated that *“data has become a good with major socio-economic value. But to reap the full benefits of new technologies and services, data should flow across borders and across sectors”*¹. The aim of the Commission is to build a **functional data economy**. This can be achieved by encouraging new data services, supporting investments in data analytics and boosting the digital innovation hubs. **A pre-requisite is (however) access to data**. In fact, access to data is crucial in order to generate new viable business models and to *“create a win-win situation for both data holders and data users”*. Re-use of public sector information (Open data) and open access to scientific research funded by the public sector have already helped to generate new services. In addition, from 2018, the General Data Protection Regulation (GDPR) will ensure the same level of data protection throughout the EU. Companies that use personal data will fully benefit from this regulation which establishes a level playing field.

The Commission is currently *“working on an initiative for boosting Europe's data economy, by addressing existing barriers to the free flow of data across border and sectors”*. Such an initiative will *“tackle restrictions on the free flow of data, including legal barriers on the location of data for storage and/or processing purposes. The initiative will also address legal uncertainties surrounding the emerging issues of data ownership and access, reuse, portability and liability”*. Furthermore, the Commission wishes to unlock the full potential of IoT, smart sensor equipped machines, tools and devices by creating an innovative friendly environment and putting in place incentives for companies and the public sector to invest in data sharing.

Concerning raw, machine-generated data, according to Commissioner Oettinger, *“the Commission may have to consider adjusting the legal framework”*. He considered that two elements were important: **greater legal certainty** when it comes to the question "who has rights on data, in particular non-personal data generated by IoT machines and devices". This could take the form of what some academics are starting to call "a new data producer right", but there may also be other approaches. Additionally, there may be a need to examine whether we may have to lay down **some basic principles on contracts** pertaining to the trading or use of data. This could reduce costs of business when trading data.

The Commissioner also argued that: *“current liability law principles are being challenged by an ever-increasing interdependency between devices and software components in IoT and by more and more sophisticated autonomous systems”*. Therefore, the Commission should investigate whether current liability schemes can respond to these challenges and whether alternative schemes could help. In addition, there might also be a need to *“consider potential insurance schemes which could cover the new risks”*.

¹ see the full speech at http://ec.europa.eu/commission/2014-2019/oettinger/announcements/speech-conference-building-european-data-economy_en

Summary of the key messages of the conference

The main elements that emerged during the high level conference on barriers to Free Flow of Data in Europe were the following:

1. **Stakeholders are divided on whether the current data sharing practice present identifiable failures** and on how to intervene to address these.
 - a. **From an SME perspective**, one of the main barriers is the prevalence of **one-sided clauses in contracts**, which prescribe exclusive data use for manufacturers. This could lead to monopolisation of data, and block innovative business models from emerging. For SMEs it **is therefore important to secure the availability of data also for possible re-users**, without undermining freedom of contract. This means giving users the power to decide if and with whom they want to share their data and hence, eventually, making data available for smaller businesses. SMEs consequently advocate requiring manufacturers to open the documentation of their interfaces so as to enable real data access (provided that users are entitled to have access to their data), and right sharing (while keeping the data encrypted).

In this respect, a legal academic expert argued that **markets would benefit from clear "ownership" rules with respect to data**. The possible allocation of an "ownership" right could be considered as a solution for the problem identified by the SMEs as long as it were designed to bring legal clarity with a view to enabling more data sharing (trading).

- b. From the **perspective of bigger companies (large manufacturers and leading firms)**, the current contractual framework is well suited for the present situation and there is no need for further regulatory measures since there is **no clear market failure**. Ownership is not an issue *per se*, as the factual ownership is where the data is stored, and the question of access to data and trust is more important than ownership. Overall, contracts provide the necessary legal certainty among those parties who have contributed to generate the data. These latter are the players who have invested in storage and aggregation of data and therefore they should be the main beneficiaries. For this reason, **putting in place mandatory access to generated data is not an incentive for investment**, as it would discourage data generators to improve their storage and collection processes, and so would be counter-productive. The parties involved in industry 4.0 are quite open to the data sharing and, for any extreme cases involving an unjustifiable denial of access, legal instruments are already in place, such as mechanisms to control abuses of dominant positions. There is **no real justification for granting unconditional access to data to external parties** that did not participate in its generation.
2. **There is agreement on the fact that rules in national laws that geographically restrict** the storage of data are complicating the business of multinational companies. Getting rid of data localisation restrictions was considered by many as a necessary pre-condition before addressing other topics on the agenda.
3. There is also overall agreement on the fact that **legal uncertainty** linked to all aspects of free flow of data may have important economic implications for both SMEs and larger players, but mostly for the former. Legal rules in Member States on data are virtually absent. **Companies revert to contracts** to overcome this legal uncertainty. This system is currently working, but entails transaction costs and may disadvantage smaller players (SMEs and start-ups).

4. The vast majority of participants from different sectors agreed that **identifying the “owner” of the data is not the key question; instead, defining rights for data access and reuse would be more important**. However, the agricultural sector constitutes an exception here, as several stakeholders advocate for a discussion on data ownership for farmers. In addition, any discussion should focus on **“raw” or machine generated data** (i.e., data that has not yet been processed through analytics). Broadening the discussion to processed data would open many other questions, notably linked to IP rights.
5. Stakeholders agreed **that the future data economy is likely to be driven by the platform concept and by network effects** created, rather than by bilateral business contacts. A number of stakeholders are active in the development of specific IT platforms for industrial data sharing. Ensuring interoperability will be a challenge.
6. **Some stakeholders argued that individuals should obtain a fair share of the value of data that they have generated**. This is also in the interest of consumer-facing business: personalisation of offerings is crucial in the E-commerce sector because the choice is much larger than in physical stores. For such personalisation to happen, E-commerce players need to understand their customers better, and cannot rely on data generated by customers on their own platform only. Portability of preferences across platforms is important both for consumers and businesses.
7. **There is general agreement on the fact that distinguishing between personal and non-personal data may not be useful** in order to understand whether the General Data Protection Regulation already covers all aspects of the problem. Certain "raw" data generated by individuals through smart devices are not personal data at all (e.g., data about the locations of road potholes as identified through car sensors) as they can be easily anonymised. On the other hand, the GDPR will apply to any “raw” data that is personal. Block chain technology can be used to enhance security (integrity of data, proof of who used the data etc.).
8. There is also a common view on the fact that **liability rules based on product liability are not “fit for purpose” in the context of the Internet of Things**, with autonomous, self-learning systems, and machine-2-machine interactions. For the identification of liability in the IoT, the “owner vs. data producer” dichotomy is no longer relevant.
9. Notwithstanding the above-mentioned points, most stakeholders voiced **a word of caution with respect to the need for new regulation**. In particular, it would need to be seen whether one uniform approach to data is appropriate.

Insights from Member States

Estonia argued that citizens should benefit from **a 5th Freedom within the EU**, which is about the free flow of data. Estonia underlined that the Free Flow of Data initiative links to a number of elements (e.g., geo-blocking, the telecoms reform, labour law etc.). It is also the pre-condition for related discussions on "ownership" of and access to data. Estonia has worked locally to remove all barriers to flows of data, including in sensitive areas (e.g., banking), in order to create more services for users. Estonia wants an **ambitious proposal** in order not to send a negative signal that controlling the location of data is justified and acceptable. The speaker also suggested that users should receive the data from the processors, because this could open up markets for all sorts of industries. This approach would also be coherent with the idea of MyData, which is a newly developed initiative aiming to allow citizens to have more control over the data trails they leave

behind them, to see where data goes, to specify who can use it, and to modify these decisions over time.

Slovakia presented its vision of a **data-driven State**, enabling advanced analytics. In the first phase, Slovakia will remove both barriers to the implementation of the “once-only principle” as well as barriers to publishing all data as open data. Furthermore, this country will also remove barriers to sharing and reuse of data within the government. The objective is to support innovation by industry.

Denmark presented the example of the **Bookkeeping Act**. Denmark abolished the law that forced companies to store bookkeeping data within the country. This solved the issue of having more than 1000 requests for exemptions per year and did not lead to an increase in fraud. The speaker also underlined the **need to remain open in a global world**, thus the importance of ensuring that data can easily be moved outside the EU as well. It must also be noted that regulation can be a barrier to entrepreneurship and that the public authorities must ensure that such rules remain entrepreneur-friendly as well as future-proof.

Spain raised a point concerning the risk that legislation could hinder large experimental projects, currently under development, in relation to smart cities. The speaker underlined that although large datasets are highly anonymised, this has **not yet enhanced the trust of consumers in the way data are collected, used and shared**. Concerning E-commerce platforms, there is a need to investigate whether there is an imbalance in this system of data generation (in favour of suppliers).

Insight from industry’s experience

One of the contributors at the event summarised key elements which emerged from a recent discussion that he had witnessed in relation to the topic of "data ownership":

- **The data economy is increasingly an economy of platforms.** Conventional competition rules normally do not authorise dominant suppliers to impose predatory prices because they make competition impossible. However, this practice is becoming necessary in the case of platforms: having almost free services for users is a classic way to create enough critical mass to catch the interest of merchants.
- **The lifecycle of data is important.** Data enhances its value through processing: raw data becomes context data which is then transformed into consumer experience enriched data, finally to become usable data and a basis for analytics.
- **Multi-homing should also be considered.** Large vendors will have their own versions of data platforms. *Will customers need to send data to many different industrial platforms?* This brings about the challenge of security and data protection, as well as data localisation. Distributed ledgers and block chains could be an interesting way to solve this set of problems.
- **There is a need for more research on the models for platform organisation and contracts.** If there is no consensus about the economics of data platforms, it can be foreseen that reaching agreement upon what level of regulation is necessary could be difficult. Thus, putting in place a task force working on the economics of data platforms is a prerequisite for making the right decisions.

Most of these elements were also mentioned during the rest of the conference.

During the debate, several points were made relating to different industry sectors:

- The stakeholders pointed to many examples of **industrial platforms**. One stakeholder operating in this area argued that **education of the users** about their rights is key for enhancing their trust on how their data are collected, used and possibly shared. Data security must also be a primary concern for the key players. In terms of barriers, **clear rules on ownership** could help establishing market for data as well as **further standardisation** activities, especially across domains. Data portability can also be an issue, but it is in the interest of the consumers to ensure data portability rights. In fact, as a stakeholder argued, data portability allows for the development of a consumer-centric approach in which individuals can fully dispose and benefit from their data. To foster innovation and the development of new business models, it is also important to allow for experimentation and digital hubs.
- **The automotive sector** is a specific market in which opposing sets of interests – for example, between **manufacturers and the potential re-users of vehicle data** (such as car repairers and insurance companies) - have emerged. The potential data re-users argue that the market should be regulated in order to give to every interested party access to in-vehicle generated data. In fact, the existing practice of B2B contracts leads to market closures and therefore there is a need to open the access to data, and this cannot be achieved relying on contracts among players alone. This would enable re-users of data (such as car repair services and insurance providers) to develop innovative services. The manufacturers on the other hand suggest defining case-by-case what data should be accessible, and the relevant conditions. **Different datasets might have a different level of interest, depending on the players**. Certain data may be of public interest and could be shared with public authorities, while data revealing information about the driver would require a more cautious approach, also considering that Member States could well interpret the GDPR differently. A recent privately-conducted study, entitled “My Car – My Data” concluded that 76% of users are open to the sharing of data if they can benefit from services. Most think that data belongs to the owner or driver of the vehicle and 92% of them want to choose their service provider.
- Confidential and personal data are prominent in **telecommunications services**. The telecommunications sector is more regulated in terms of data than other sectors. Also in this sector, using the concept of ownership is less relevant than the use of data, access to data or exploitation of data. Setting ownership rules means shaping the market in one specific direction but **the solutions should rather focus on contractual issues in a multilateral or bilateral setting, otherwise there is a risk of market failure**. Competition law can also offer adequate answers to issues related to business models. If this proves not to be enough, then the policy-makers could envisage other solutions. Nonetheless, it might be too early to set a clear policy direction and further investigations are needed. Geographical restrictions on the other hand need to be urgently tackled to enable more efficient use of resources and more flexibility.
- Concerning the **banking sector**, a major bank’s representative underlined the need to distinguish between personal and non-personal data, because this has an impact on the legal framework that applies. **Yet, additionally, the distinction between ‘raw data’ and ‘processed data’ (data enhanced by analysis) must also be made**. If the data has been processed, a whole new set of questions arises, e.g., the protection of algorithms. Any regulatory measure should reflect this distinction. Data portability should be limited to the initial raw data and not to the processed data. As the other stakeholders, the bank’s

representative argued that it is more appropriate to use the concept of right to access and use of data instead of ownership of data. In the present situation, market solutions, contractual agreements and licences are more relevant remedies than policy intervention.

- With regard to the **energy sector**, stakeholders provided examples of platforms through which many players can exchange data for better renewable generation forecast. This development reflects the change from centralised to decentralised renewable energy systems. However, some questions remain open, such as: *who owns the data of a smart meter: the service provider or the private consumer? Who else needs access to this data, and based on which model?*
- **In the agricultural sector, stakeholders diverge on the analysis of underlying barriers.** Some stakeholders raise issue in terms of farmers' lock-in into technology and lack of freedom to choose their equipment. In addition, they argue that some relevant questions are still not addressed, for example: *who owns the machine-generated data (the machine owner, the farmer or the operator)? Does a farmer who rents a field and farms it have to share data with the field owner?* Others argue that ownership rights are well defined, and that the industry is already producing interoperability standards for the sharing of data (although not fast enough to keep up with market development).