

June 2021

## ETNO comments on the Inception Impact Assessment on the Data Act

### *Business-To-Government Data Sharing*

Telecommunications operators cooperate with Public Administrations, typically by providing **mobility aggregated data as a service** to tackle epidemics, natural disasters and environmental pollution<sup>1</sup>. 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, as the Commission's Inception Impact Assessment (IIA) implies.

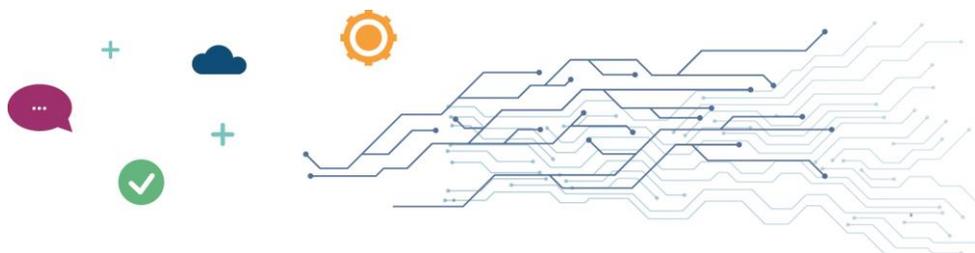
ETNO members are thereby surprised to read in the IIA that the "**commercialisation**" of data services by companies would hinder making raw data available to the public sector – and consequently "*limit the public sector's capacity to develop data models on its own*". Assuming that the effort of companies to commercialise the data they initially collected is the main driver of today's lack of data analytics by public authorities 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

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<sup>1</sup> 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.

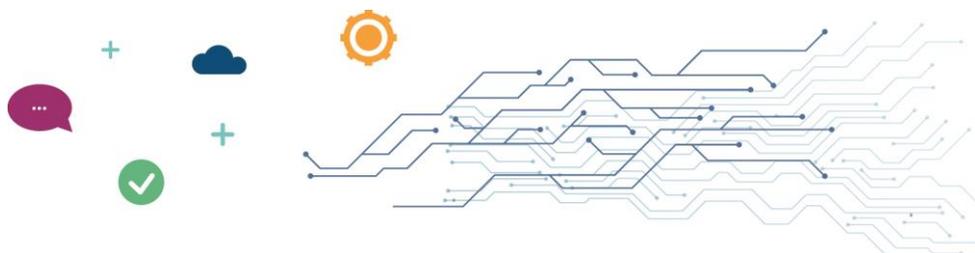


sharing. This is especially true for the public sector, which still lacks the analytical ability and capacity to make enough use of available data, including public data.

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, the following elements are necessary to ensure a mutually beneficial cooperation based on voluntary contractual agreements.

- **Public interest:**
  - Any future framework should aim at **clearly developing criteria that define where there is “public interest”** in order to create legal certainty for all parties. 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).
  - For other challenges besides the above-mentioned emergency situations, imposing B2G data sharing obligations would jeopardise existing businesses’ initiatives (such as data analytics services for smart cities). The impact on innovation and competitiveness would be severe. Therefore, instead of 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 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.
- **Public Sector:**
  - As previously noted, the IIA argues that the lack of availability of privately-held raw data can *“limit the public sector’s capacity to develop data models of its own”*. However, at present the public sector is not well-equipped to make use of and promote availability for its own public data, 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 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***

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.

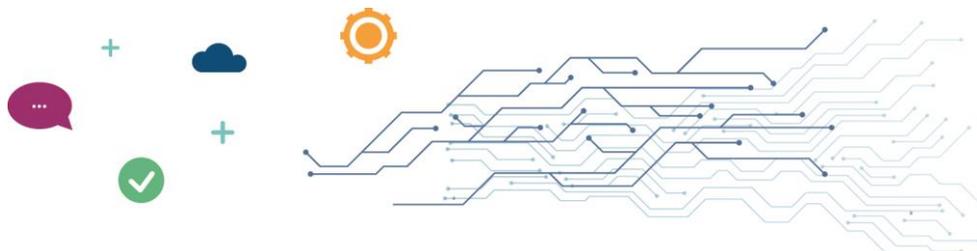
**Business-to-business (B2B) data sharing should continue to be based on voluntary contractual agreements**, as a flexible way to address the specificities needed to make B2B sharing mutually beneficial.

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) in case of systematic market failure, especially in situations where this would open-up secondary markets for complementary services.

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 reducing uncertainties (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.