

The Consumer Voice in Europe

BEREC PUBLIC CONSULTATION ON THE DATA ECONOMY

BEUC response



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Why it matters to consumers

When companies can compete on the merits, consumers benefit from more choice, better quality of services and better deals. With data being seen as a necessary input for the development of innovative products and services, it is essential to prevent that firms use the data they collect from consumers to raise barriers to competition. Additionally, a healthy digital ecosystem depends on firms respecting consumers' rights and authorities. The EU needs to adopt policies in which data can serve the public good, for example stimulating the creation of tools to enhance the control of consumers' personal data and applications to help consumers to make informed choices (e.g. comparing quality of service of different providers). This should also include the ability for authorities to identify through the data gathered market failures where intervention would be needed.

General Remarks

BEUC welcomes BEREC's consultation on the data economy. With the evolution of digital technologies and fast-developing digital markets, new opportunities and challenges emerge for consumers, the economy and society as a whole. The digitalisation of everyday activities, which rely on the collection and processing of large amounts of data, highlights the importance of data for the modern economy.

Consumers constantly generate data while engaging with firms in digital markets and using smart devices. This data enables companies to improve their services and innovate. However, often data holders would seek to gain a competitive advantage over rivals by restricting access to the data generated by consumers therefore restricting competition and cutting-off consumers from innovative products and eventually better deals.

BEUC considers that policy-makers and regulatory bodies must approach the data economy from a consumer and people centric perspective by exploring how data should be used to develop a pro-competition ecosystem in which consumers can enjoy a wide variety of innovative products under safe and fair conditions.

In our response to this consultation, BEUC would like to highlight the importance of designing a European data policy that places consumers in the driving seat. This has practical consequences such as ensuring that consumers are in control of the data they generate through their devices and that, by enabling the use of this data by other parties, consumers can benefit from more innovative products and services. Furthermore, the non-rivalrous nature of data also provides opportunities for regulatory bodies to develop public-interest oriented digital services in benefit of a more cost-efficient administration.

Note: Since not all questions are related to BEUC's remit of activities, below we have provided a response only to those questions that are most important from a consumer perspective.

Feedback to the questionnaire

1. GENERAL ISSUES

1.1. *Do you agree on this general definition of the Data Economy? If you have an alternative definition or any comments on the proposed definition, please provide details below.*

BEUC agrees with the general definition of the data economy. However, we would like to add that the definition should also acknowledge that the data economy is composed by both qualitative and quantitative elements. Additionally, the usefulness of data for the economy would depend on multiple factors such as format, accessibility and the capability of systems to interoperate to facilitate the transfer and use of the data.

1.2. *In your opinion, what are the most important characteristics of data to be taken into account when analysing its economic properties? Are there elements missing in the previous list?*

Data can also be classified taking into account two parameters: on one side the nature of the data and, on the other side, according to its economic role:

First, according to the nature of the data, we can distinguish between:

- Personal data, which is data that would fall in the scope of the General Data Protection Regulation (GDPR) and,
- Non-personal data, which would cover by exclusion data that do not fulfil the criteria set out in the definition of personal data under the GDPR. This can relate for example to statistical and industrial data or publicly-available data not attributed to any physical person (e.g. mobile coverage data).

The practical implication of this distinction lies on the fact that stricter conditions apply for the sharing of personal data while non-personal data could and should be shared more broadly within the limits of IP and trade secret laws to allow authorities, companies and interest groups like consumer organisations to develop products and services in the general interest of consumers.

Secondly, according to their economic role and under a competition rationale we can differentiate between:

- Data as an 'input', which is data that is collected and incorporated into the production of goods and services and,
- Data as an 'output', which is data as a final product (e.g. financial data).

This classification is important for the competitive process because when data is considered as an input, it is possible that firms acting as *de facto* data holders do not have an incentive to allow other parties to access that data. This is due to the fact that data can provide a very important advantage for the data holders over competitors since the latter would not have the same chances to develop products and services that rely on that data.

1.3. *What classification of data do you consider to be most relevant (in the context of BEREC work on the data economy)? Please elaborate below.*

For BEREC's work, perhaps the most relevant distinction would be between personal and non-personal data as well as public and privately-held data. Concerning non-personal data, BEREC could stimulate the availability of such data in a usable format for interested groups (e.g. coverage or quality of service data). However, when non-personal data is privately held by a company, any requirement to access such data would have to weight the general interest of making that data available with the respective IP or trade secret protection.

1.4. *Which kind of competition concerns are likely to be of relevance in the data economy?*

The collection and processing of data can raise different competition concerns:

Firstly, when a firm that has *de facto* control over data that is necessary for product and service development decides not to give its rivals access to the data to develop or improve competing services. In this scenario, it is not only rivals who suffer for not being able to compete on an equal footing, but also consumers who are deprived from innovative products and services.

Under EU competition law, this practice could be considered as a "refusal to deal or to supply" as a sub-category of an abuse of dominance under Article 102 TFEU. However, intervention benchmarks for addressing this behaviour by means of antitrust enforcement are very high: first, it is necessary that the undertaking holding the data enjoys a dominant position in the relevant market and, secondly, that the refusal to supply relates to an indispensable input, something that is often difficult to prove.

Secondly, in order to gather vast amounts of user's data, some companies often impose unfair or illegal contractual conditions (e.g. in the form of broad permissions to collect data). However, consumers are unlikely to change providers either because they don't understand/are not clearly informed what data are collected and how, or due to lock-in effects (e.g. caused by high switching cost or strong network effects – on this issue see next point) or simply because there is no alternative. This concern has two legal consequences that are relevant for competition law considerations: on one side, the eventual breach of consumer law (as an unfair commercial practice or contract terms) and, on the other side, the exercise of an exploitative abuse in the terms of Article 102 TFEU, if the firm enjoys a dominant position. Both situations are being analysed in the context of investigations opened in Italy¹ and Germany² against Facebook.

The relevance for competition law enforcement of an infringement of data protection law when collecting and processing personal data is not yet fully developed by case law. However we believe that it should be part of any competition law infringement assessment as a criteria for and indication of exploitative practices.

It is important to highlight that there are still important interconnections between competition, data protection and consumer law. For example, allowing companies to make the provision of a digital service dependent on the consent of a data subject to share data,

¹ Autorità Garante Della Concorrenza E Del Mercato, "Misleading information for collection and use of data, investigation launched against Facebook" (2018), <<http://www.agcm.it/en/newsroom/press-releases/2455-misleading-information-for-collection-and-use-of-data,-investigation-launched-against-facebook.html>>

² Bundeskartellamt, "Preliminary assessment in Facebook proceeding: Facebook's collection and use of data from third-party sources is abusive" (2017), <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/19_12_2017_Facebook.html>

despite such consent not being necessary for the provision of the service, could make easier for such companies to strengthen their market power regarding the data that is collected upon the consumer's consent. This issue is currently being discussed in the context of the proposed review of the ePrivacy Regulation. .

1.5. *Do you think that competition issues regarding the power of market data can be sufficiently addressed by current competition law and the upcoming regulatory framework (EECC, GDPR, e-Privacy Regulation, PSI Directive, etc.)?*

The European law *acquis* provides substantial rules that address data related issues from different dimensions. It is therefore worth noting that when assessing how each European law treats data, this needs to be looked vis-à-vis the objective of each regulatory instrument.

In this regard, the question should ask on one side whether EU competition laws are sufficient to tackle the competition concerns related to data and, on the other side, what are the eventual competitive effects of other horizontal (e.g. GDPR, Trade Secrets Directive) or sectorial legislation (e.g. PSI Directive, Type Approval Regulation, etc).

If we look at data as an input for the development of goods and services, the baseline for addressing lock-in effects is primarily found in competition law. As mentioned above, within the competition law framework, a refusal to grant access to data would need to be regarded as a case on refusal to deal as a sub-category of an abuse of dominance under Article 102 TFEU. The case-law goes back to the *Magill*³ judgment of 1995 where the CJEU confirmed an abuse of market dominance by TV stations that, controlling access to the listings of TV programs based on Irish and British copyright law, prevented an independent publisher from entering the market by offering comprehensive TV guides including the programs of all TV stations. In this case, the CJEU justified competition law intervention by the fact that the TV stations prevented the emergence of a new product to the prejudice of consumers. This new product rule was later interpreted as an additional requirement in the case of a refusal to license an intellectual property right as compared to other refusal to deal cases.

The application and enforcement of this rule creates considerable challenges:

First, an abuse can only be argued if the data holder is dominant. In the data economy market definition and the assessment of dominance can be particularly difficult.

Secondly, the refusal to deal has to constitute an abuse. The leading case of the Court of Justice of the EU (CJEU) in this regard is the *Bronner*⁴ case, dealing with access to a nationwide home delivery system for daily newspapers. Under European law, such an abuse requires a refusal to supply an indispensable input, thereby preventing the petitioner from competing in a downstream market. However, it is not clear whether data collected by companies can constitute an indispensable input.

The question is whether the fact that collecting and storing the information in a digital format, which makes the information retrievable and treatable, including for the purposes of big data analysis, should not make the digital dataset of the data holder a different and 'indispensable' product. Even if this question were answered in the affirmative, challenges would arise from the restrictive interpretation of the indispensability test in *Bronner*. According to this test, an input will not be considered indispensable if there are no 'technical, legal or even economic obstacles capable of making it impossible, or even unreasonably difficult' to duplicate the resource. In this context, the benchmark for economic obstacles is very high.

³ Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission*

⁴ Case C-7/97 *Bronner*

Competition law may also fail to provide sufficient relief in the field of restrictive agreements in the framework of Article 101 TFEU. Manufacturers of connected devices may also impose restrictions on distributors that make it more difficult for the final users to get access to the machine-generated data. It would be difficult to argue a violation of Article 101(1) TFEU in a case in which manufacturers could unilaterally deny access in the framework of Article 102 TFEU.

Regarding data protection and privacy laws, the GDPR contains some pro-competition provisions like the portability right but it falls short to address lock-in effects. In this sense,

Article 20 of the GDPR provides for a general right to data portability as regards personal data, which is not just a right to strengthen the data subject's autonomy, but has been conceived from the very beginning as a tool to 'support the free flow of personal data in the EU and foster competition between controllers'.⁵ However, this right is limited to personal data. The more consumers use connected devices, the more they will also need to connect devices of different suppliers, for instance in their households, whether the data shared among those devices is personal or non-personal data. Furthermore, the portability right applies to data provided by the data subject but not necessarily to all data generated by the use of devices.

These challenges as well as the difficulty to enforce competition law in each and every case, while these problems are now becoming widespread in digital markets, strongly argue in favour of taking additional legislative action outside the realm of competition and data protection laws.

2. ECS AS AN ENABLING FACTOR FOR THE DATA ECONOMY

1.1. Services provided by network operators can be assessed based on various parameters (latency, bandwidth, reliability, security, ubiquity, etc.). Considering that the development of the data economy is supported among others by the electronic communication networks, which parameters are the most relevant for the development of the data economy in your view?

From a consumer perspective, the following parameters are important for the development of the data economy:

- *Data access and control:* To enable the developments of product and services depending on accessing data held by de facto data holders, it is important that consumers are able to unlock that data by granting access to third parties.
- *Security:* the circulation of data needs to happen only when high security standards are in place to prevent the risk of data breaches. It is particularly important that ECS comply with Article 40 of the revised European Electronic Communications Code. In this regard, we encourage ECS to use encryption as much as possible to manage the risk of to the security of communications. Furthermore, whenever there is a security incident, affected consumers should be informed without undue delay about the possible data breached.
- *Data protection and privacy:* the sharing of data needs to happen in a context in which products are designed following the requirements of the GDPR and e-

⁵ Article 29 Data Protection Working Party, Guidelines on the Right to data portability (13 December 2016; revised 5 April 2017)

Privacy law and consumers are able to exercise their data subject rights without technical restrictions.

- 1.2. *What more can ECS providers do to help the development of the data economy? Conversely, do you identify any bottlenecks for the development of the data economy that are related to ECS providers and, if so, what, in your view, could be done to address this issue?*

The sharing of data with consumer organisations can help the development of public-interest oriented services. For example, in Belgium our member Test-Achats developed an application that helps consumers to identify the most reliable network operator in terms of mobile coverage⁶. Similar services can be developed across Europe if authorities make such data available in a commonly used format.

- 1.3. *What kind of evolution do you foresee regarding the role of ECS providers in the value chain? For example, with regard to the development of the Internet of Things or mobile network location-based services, could new revenue models for ECS providers emerge based on the data economy?*

ECS have a fundamental role above all to ensure the quality and level of connectivity necessary for the Internet of Things and the digital economy to develop its full potential. From this point of view, by controlling the infrastructure and networks, some ECS could act as gate-keepers to consumers access to the benefits of the data economy. In terms of new revenue models, unfortunately the predominant business model on the internet currently relies on the constant monitoring of consumers' activities and monetisation of their personal data. We encourage ECS to explore revenue models that are built on the premise of the full respect of the fundamental rights to data protection and privacy, and that move away from the 'corporate surveillance' ethos that currently dominates the digital economy.

3. IMPACT OF THE DATA ECONOMY ON COMPETITION IN ECS MARKETS

- 3.1. *What is the significance of data for the telecommunications value chain today? How would you expect this significance to change in the future?*

N/A

- 3.2. *How are ECS providers making use of (anonymised) data? Are they buying/selling it from/to third parties? Please elaborate.*

N/A

- 3.3. *Are you aware of cross-sectoral initiatives carried out by ECS providers with regard to data analytics? Please provide examples of (big) data analytics projects/initiatives carried out by ECS providers⁷.*

N/A

- 3.4. *What is your view on how the use of data (including the combination of data services and ECS) may change the competition dynamics among ECS providers? Do you see any risk of leveraging market power, or conglomerate effects caused by the use of*

⁶ Test-Achats, BEcover+ <https://www.test-achats.be/applications#becover>

⁷ As defined in the EECC, including providers of OTT-0 or OTT-1 services.

data in the telecommunications sector? If so, should the methodology to assess market power be reviewed to further consider access to data?

N/A

3.5. *Are there cases in which exclusive ownership of data or other potential hurdles related to data restrict competition or the development of new telecommunications business models? Please provide examples. Below are some specific examples of cases that may be of interest to BEREC:*

- *Do you see any competitive differences with regard to data collection and analysis between MVNOs and MNOs?*
- *Do you see any competitive differences with regard to data collection and analysis between fixed line infrastructure operators and retailers that rely on wholesale access?*
- *Do you see any competitive differences with regard to data collection and analysis between "traditional" ECS and OTT-0/OTT-1 providers?*

BEUC considers that it is not appropriate to refer to exclusive ownership of data. In terms of competitive differences, the fact that ECS are subject to the ePrivacy Directive but OTTs are not could provide certain advantages to the latter. This difference in the regulatory regime creates problems not only from the point of view of competition but also from the point of view of consumer protection. From our perspective the way to address this issue is not to deregulate and repeal the ePrivacy rules but to ensure that OTTs are brought inside the scope. This has been the approach taken in the proposal for an ePrivacy Regulation, currently being discussed by the EU co-legislators. We fully support the approach and objectives of this proposal.

3.6. *What opportunities and/or risks do you see for consumers linked to an increase in data collection and analysis in the telecommunications sector?*

The collection and processing of data can help to improve services and develop innovative products for consumers. However, there are also risks related to the increased monitoring and tracking of consumers' activities, the loss of control of the data that is being collected, the use of unfair practices forcing consumers to share data in take-or-leave scenarios and the increasing risk of data breaches. Telecommunication companies are in a special position as providers of infrastructure and services therefore while it is important to stimulate innovation in this sector, close monitoring is needed to prevent they follow the path of dominant internet platforms, with all the problems associated with the increasing level of concentration in digital markets.

4. NRAs' ECS REGULATORY ACTIVITY IN THE CONTEXT OF THE DATA ECONOMY

4.1. *What is your view on how NRAs can use data to better perform their duties (e.g. consumer protection, fostering competition, monitoring the quality of services and network deployment/coverage, the assessment of market power...)? Can the use of digital tools improve the capacity for action? If that is the case, please provide further explanation, as well as any proposals you may have.*

BEUC agrees that NRAs can and should use data to better perform their duties. For example, BEREC could develop tools to monitor the quality of service of internet access and facilitate the exercise of consumers rights under the TSM.

4.2. *What kind of data, or which specific data, should NRAs collect and publish which could facilitate the development of the data economy?*

NRAs should collect and publish data related to quality of service; coverage; consumer complaints and usage statistics;

4.3. Regarding this provision, which relevant data (and to what level of detail) should NRAs collect (e.g. as QoS metrics) and which techniques could be applied, both in collecting data and in making it available to end-users?

Data provided to consumers must be understandable and comparable. Consumer organisations when running comparison services can benefit from this data to provide information to consumers that reflects market conditions.

4.4. How can NRAs and BEREC contribute to increasing the availability of data in the spirit of the PSI Directive and the reviewed Regulation? In your opinion, what specific data should NRAs and BEREC publish (e.g. QoS indicators, consumer complaints, coverage, usage statistics)?

Data on consumer complaints would be very useful. Alternative Dispute Resolution bodies have this data and would be useful to make it accessible to be able to identify market failures and define the appropriate measures. Other type of useful data for consumer organisations can include coverage data, quality of service and usage statistics.

5. NRAs' EXPERIENCE APPLIED TO THE CASE OF THE DATA ECONOMY

5.1. Do you consider the competitive conditions in data economy-related markets are optimal for the development of the data economy? For example, do you consider that there are efficient data-sharing mechanisms in place?

N/A

5.2. If you consider that the competitive conditions in data economy-related markets could be improved, which of the potential tools measures (along the lines of the ones listed in the introduction to this section) would, in your view, be appropriate to foster the development of the data economy? Please also explain if you consider such tools to be ineffective or if you consider that they could even harm the data economy's development.

N/A

5.3. Do you see the need for closer cooperation between the NRAs (that have a regulatory focus on ECSs) and other regulatory bodies, such as data protection authorities, competition law authorities (National Competition Authorities, which usually focus on ex-post regulation), consumer protection authorities or other bodies, on issues related to the data economy (such as data portability, market power assessments, merger control, rules on the treatment and sharing of data, etc.)? Please specify the area of potential collaboration, the roles that could be played by NRAs, within their competence, and which regulatory body or institution to collaborate with.

BEUC considers that there is a need to boost the co-operation between regulatory authorities, particularly in what concerns the sharing of expertise and cross-sector fertilisation. This is because business practices in the digital economy can trigger the simultaneous application of different areas of EU law.

Areas of potential collaboration could include: monitoring on the use of personal data by ECSs and OTTs; assessment of the market share of ECSs and OTTs taking into account the data they hold of individuals; co-operation to identify common infringements and in the

appropriate design of remedies; gathering insights about the use and sharing of between smart devices, etc.

5.4. In relation to data markets, which are the key issues that should be taken into account when assessing competition dynamics? What should be the geographical scope for data markets (national/European/international/other) and what drivers should be taken into account?

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5.5. In general, how can NRAs contribute to address competition/regulatory issues in order to foster the transition to a data economy?

NRAs can contribute by monitoring more closely the market of ECS and OTTS and gathering data that is necessary to obtain a real picture of the market dynamics, market shares and relationships between the service providers between themselves and vis-à-vis customers. This includes closer co-operation with other relevant authorities and interest groups like consumer organisations.

5.6. Is there any other issue in relation to the application of NRAs' experience to the data economy that you would like to add?

6. OTHER ISSUES

6.1. Is there any additional issue not included in previous questions that you would like to address? For the sake of classification, please, differentiate between:

- 1) Issues in relation to ECS regulation under the powers for NRAs in the new Electronic Communications Code;*
- 2) Areas where NRAs or BEREC could collaborate with other public bodies or organisations in the context of the data economy when applying existing regulation for the data economy; and*
- 3) Any additional issue relevant for NRAs that is not addressed in the existing regulation applicable to ECSs and/or the data economy.*

Issues related to the development and take up of Artificial Intelligence technology by ECS should be carefully explored as well. Additionally, it would be important to look at the relationship between this discussion and potential policies around device neutrality.



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