Response to BEREC public consultation on the data economy

Brussels, 21 November 2018

Please provide the name (and website, if available) of your organisation, as well as the contact information (name, e-mail and/or phone number) for a contact person. In the case of personal contributions, please provide your name, nationality and contact information.

> Name of the organisation/person, website, nationality and contact information
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Please indicate the place(s) of operation of your organisation and the sector(s) in which your organisation mainly operates. Please explain how you are involved in the data economy.

> Place of operation, sector(s), involvement in the data economy
>
> DIGITALEUROPE represents the digital technology industry in Europe. Our members include some of the world's largest IT, telecoms and consumer electronics companies and national associations from every part of Europe.

1. GENERAL ISSUES

Question 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.

> DIGITALEUROPE agrees that the general definition of the data economy put forward by the Commission in its 2017 Communication 'Building a European Data Economy' is broadly correct. However, we believe that a specific definition might not be needed. Given how pervasive the use of data now is across multiple industry sectors and verticals, it is increasingly less relevant to separate out the data market from 'the economy' as a whole.

Question 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?

DIGITALEUROPE agrees both with the above characterisation of data as non-rivalrous and with the four key characteristics that have been outlined. Other important aspects of data that we believe should be taken into account in this discussion are the following:

i. Many types of data are replicable or easily substitutable. Users can provide the same data to more than one service; each service can generate proprietary usage and telemetry data, which can be used to improve the service. Such data generation does not, of itself, prevent a competing service from generating its own similar usage data specific to its service;

ii. Seeking a wide variety of data inputs is key to gaining valuable insights, and it is unlikely that a single entity will control all such relevant data; and

iii. Not all data is commercially useful. The quality of the data collected and how it is used is as important as the volume. The relevance and importance of any single data set often only become apparent after statistical study. It is often not obvious in advance whether the addition of a given data set will add more predictive ability.

Question 1.3

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

DIGITALEUROPE agrees with the comment regarding the importance of adopting a consistent data taxonomy in analysing the data economy. However, it also remains important not to create too many different (and potentially overlapping or inconsistent) categories within any such taxonomy. On the contrary, simplicity and consistency of approach should be ensured.

A clear data taxonomy illustrates the convergence of sectors that is being accelerated through the broader emergence and development of the data economy. In particular, as the introduction to this report acknowledges, certain new cloud-based services have been brought within the communications sector for the first time through the widening of the definition of 'electronic communications service' in the EECC, and in particular through the introduction of a new category of 'number-independent interpersonal communications services' (NI-ICS). Considering the wider ecosystem of 'minor ancillary services' (on the periphery of this sector) and 'information society services' (generally outside of scope of telecoms regulation), it is clear that the boundaries between industry verticals are continuing to blur. As we comment on in Section 4 below, this drives a need for regulators in increasingly overlapping segments to work more closely together and avoid overlaps.

More generally, it is also important to distinguish between raw input data and processed data (to which algorithmic analysis, insight and organisation may have been applied) when discussing potential regulation of data and/or encouragement of additional data sharing between businesses and the public sector.

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2

Question 1.4

What kind of competition concerns are likely to be of relevance in the data economy?

See above our answer to question 1.2.

If unique data sets are present, competition regulators can address concerns about access to those data sets under the framework of existing competition law. Competition law principles have been applied successfully to a wide variety of changing patterns, and they can be successful applied to data as well. From a competition perspective, data is simply a class of assets that vary in their competitive significance. Data can be a product, an input for some other product or commercially irrelevant. The challenge for competition regulators is to separate cases requiring closer scrutiny from the bulk of cases where data control and usage is economically beneficial, drives innovation and is competitively benign.

More generally, it is important that broad questions related to the data economy and its impact on competition are managed by competent authorities in a coherent manner. Many types of regulatory authorities – competition, market and consumer protection in addition to BEREC members – are taking interest in these issues, and this may lead to considerable regulatory overlaps. To ensure coherence, we call on BEREC and its members to focus their attention on the role of data and how it impacts competition in telecoms markets specifically. Broader market dynamics around data should remain the purview of competition authorities.

Question 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.)?

Please refer to our answer to question 1.4 immediately above.

As a general comment, DIGITALEUROPE believes that existing competition law can address any competition issues that may arise in relation to data, subject to evidenced market failure. In particular, we do not believe that data protection and privacy legislation should be used to address perceived competition issues, given that its objectives are distinct and relate to the protection of individuals' fundamental rights.

2. ECS AS AN ENABLING FACTOR FOR THE DATA ECONOMY

Question 2.1

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?

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3

> DIGITALEUROPE considers all of the parameters listed above to be important. The key to the development and sustainability of the data economy is the delivery of ubiquitous, seamless and reliable connectivity to European citizens and businesses that addresses all of the listed parameters.
>
> It's also important to note that not all ECS providers own or operate a network. Network-independent ECS also serve to support the growth of the data economy both directly, through increased user demand for such services, and indirectly, by driving demand for adjacent information society services. Some of the parameters listed in the question remain relevant for network-independent ECS, too; for example; security at an OTT level is increasingly important in ensuring the health of the data economy.

Question 2.2

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?

> Electronic communications data will form an increasingly important part of the data economy in the future, especially as more internet-based services fall within the scope of telecoms legislation and the volume of this data grows as a result. Getting the proposed ePrivacy Regulation right for all stakeholders will be a key component in ensuring that ECS providers – both traditional telecoms and OTT players – can help in the development of the data economy. As the proposal stands, there will be significant restrictions and limitations on the ability for ECS providers to make full use of electronic communications data (metadata and content) to improve services, drive better insight and foster innovation, while at the same time ensuring fundamental rights are sufficiently protected.
>
> Other initiatives that might help the development of the data economy could include an assessment of the unique datasets that network-dependent ECS providers collect and hold (as Question 2.3 below acknowledges), and whether there is merit in sharing certain of this information (potentially via NRAs or even BEREC) to assist in the development of new business models and sectors across the sector more broadly.
>
> As well as ensuring connectivity, ECS providers can generate data that should also be seen as part of the broader data economy in any general discussion about data access and the development of the digital economy. In other words, the data generated by all participants – from network operators to network-independent service providers and information society services and platforms – should be taken into account.

Question 2.3

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?

> We are already seeing new revenue and business models emerge – not just for ECS providers – based on analysis and insight derived from data. In the future, ECS providers may have the opportunity to process

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4

vast quantities of electronic communications data to drive numerous use cases in the IoT sphere, from smart cities to connected cars and smart manufacturing. In line with our answer to question 2.2 above, however, we stress that the current text of the ePrivacy proposal will unduly restrict a lot of this activity, which must rely on the use of both communications content and metadata.

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

Question 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?

Our answers above have already touched on aspects of this question. DIGITALEUROPE sees an increasing significance of data, irrespective of industry sector or value chain. The telecoms sector will be no different. As more and more data is collected at every level of the value chain, from the network to the services sitting on top of the network, its importance will only increase.

As we have already stated, the exact outcome and progress of the proposed ePrivacy Regulation will dictate the framework around what ECS providers can and cannot do in relation to the electronic communications data that they collect. In addition, the broad application to the ePrivacy rules, both those related to electronic communications data (applying to all ECS providers in the expanded definition) and those related to terminal equipment data (applying to many value-added services provided by ECS in the IoT sphere), will impact the positive use of data across the value chain.

In parallel, the GDPR already sets out more generally how personal data can be collected and processed. The Regulation on a framework for the free flow of non-personal data in the European Union seeks to do the same for non-personal data.

Beyond this, the work of the European Commission as part of its 'Towards a common European Data Space' initiative from April 2018 will also influence how business and government think about the sharing of data outside of their respective organisations. This also has the potential to materially impact the significance of data in this sector.

Question 3.2

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

When looking at ECS providers, BEREC should take into consideration the nature of the various players in the telecoms value chain, their technical ability to access data that either goes through their network or are captured by their services and how this is framed by their privacy policies. For example, the use of end-to-end encryption by many number-independent interpersonal communications services limits the ability of the service provider to utilise such data.

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5

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

As stated in our response to question 1, the use of data by ECS providers appears to DIGITALEUROPE to be likely to drive innovation and new products and services, and unlikely to restrict competition in doing so. Seeking to regulate in this area or to adapt and amend market assessment criteria/methodology seems to be unnecessary and premature.

Question 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?

Opportunities include the emergence and development of new, innovative services from all providers (new and existing) and better-tailored services.

In terms of risks, collected consumers will need to take greater interest in and control over the data that their service providers collect, and service providers will need to build and retain trust and ensure that they are transparent and clear about how they use such data.

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

Question 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.

DIGITALEUROPE encourages NRAs to make judicious and proportionate use of their information gathering powers in the new EECC to ensure that they have full visibility into all ECS services in markets that are within their jurisdiction. The use of this additional insight to drive informed decision making can only be a positive development. That said, there should be a recognition that, particularly for small market players, there is a not insignificant cost to generating and compiling data requested by NRAs; for this reason, all data requests should be proportionate and targeted to a specific goal. Technical barriers to such data collection should also be considered, i.e. level of encryption, as well as service providers' privacy policies.

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6

Question 4.2

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

> In line with our response to question 4.1 above, DIGITALEUROPE believes that NRAs' use of data to drive informed decision making should be proportionate and targeted to specific goals. Technical barriers such as encryption and service providers' privacy policies should also be considered.

Question 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?

> Broadband deployment is key to overall connectivity and the development of the data economy. NRAs should utilise the latest developments in data analytics tools and software deployed in other industries to maximise and present insights obtained.

Question 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)?

> DIGITALEUROPE welcomes the open data policy set out in the BEREC Regulation, together with the latest proposed reform of the PSI Directive.
>
> All of the proposed examples above (QoS indicators, consumer complaints, coverage, usage statistics) could be useful ways to increase the utility and benefit of the data that is collected across the industry.

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

Question 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?

> Our response to the questions in Section 1 remains equally relevant here. We reiterate that the historically high bar set by the European Union for compelling access to proprietary assets should apply equally to data. Compulsory data-sharing mechanisms impacting the private sector should be considered very carefully for impact and effectiveness. We welcome the Commission's initial approach to some of these issues in its 'Towards a Common European Data Space' Communication from April 2018.

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7

Question 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.

> DIGITALEUROPE does not consider that there is a need at present to seek to improve the competitive conditions in data economy–related markets. Even where that may potentially be the case in the future, we caution against the use of regulatory remedies currently available for ECS markets without detailed analysis of their applicability, relevance to and impact upon data markets.

Question 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.

> Closer cooperation between NRAs, data protection authorities and competition law authorities is increasingly important. On the other hand, it is crucial to minimise overlap between the various authorities in order to ensure legal certainty and coherence. For example, telecoms authorities should focus their interest in the data economy on how it impacts competition and consumer protection in telecoms markets specifically.

Question 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?

> DIGITALEUROPE takes the opportunity to reiterate the need for caution in translating any NRA experience in the field of telecoms regulation to the data economy more broadly. While in some cases such experience may well be very valuable and to the benefit of the broader ecosystem, there are also risks in seeking to take existing telecoms concepts and applying them to a much wider range of data economy participants. One such example is interoperability. While fixed physical network and/or PSTN number interoperability has been a feature of telecoms markets for many years, as described in our response to earlier sections of this paper, data has fundamentally different characteristics and features which would in our view make a generalised application of such concepts inappropriate.

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8

6. OTHER ISSUES

Question 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.

DIGITALEUROPE welcomes BEREC's work on the data economy. We note that perceived issues around data have been the focus of much debate and activity for many EU and Member State regulators across sectors. This increases the importance of collaboration and coordination between authorities in order to minimise overlaps and ensure coherence of policy and regulatory intervention. Overall, DIGITALEUROPE believes that the use of data is economically beneficial, drives innovation and is competitively benign. To the extent that evidence suggests intervention might be needed, competition law continues to provide the necessary analytical framework.

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9

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10