ZEI INSIGHTS

Data Access – Optimizing the Policy Framework for a European Data Economy

No. 46 February 2017

By Sanni Kunnas

Digitalization and the new wave of 21st century ICTs have fundamentally disrupted the way markets, public institutions and individuals function and communicate, becoming a central point of attention for policy makers in the last few years. On a European level, the long-term objective of fostering the emergence of a functional data driven economy culminated in the European Commission's announcement of its Digital Single Market (DSM) strategy in May 2015.[1] The agenda has received priority status under the Juncker presidency and aims at creating a clear legal framework and removing existing barriers to the movement of data, in order to safeguard Europe's position as a world leader in the digital economy. According to estimations by DG CONNECT, unlocking online opportunities will help European companies grow globally as well as improve public services, bringing an additional €415 billion per year to the economy and creating hundreds of thousands of new jobs.[2]

However, whereas the DSM strategic initiative has undergone dynamic developments, including new actions to digitalise the European industry and promote cross-border E-commerce, the EU is still not making the most of its data potential. The re-use of data on downstream markets remains highly limited as well as the development of commercial data platforms.[3] For this purpose, the Commission published on the 10th January 2017 a new Communication and Staff Working Document addressing issues of free flow of data, machine-generated data access, rules on liability, and the portability, interoperability as well as technical standards of data.[4] Further, two public consultations are to be launched accompanied by a broad dialogue with member states and stakeholders to define the next steps.[5]

Due to its significantly growing economic value, the question of if and how access to data, for purposes of re-use, should be regulated has become a contested issue in several sectors.[6] The Commission argues from the core premise that market players need to have access to raw data sets, in order to open up the innovation potential on downstream markets.[7] With this end in view, the key objectives and areas of concern still subjected to open discussion have been identified as the following: (i) improving access and sharing of anonymous machine-generated data; (ii) protecting investments and assets of market players; (iii) defining proper data classification to avoid disclosing confidential data and (iv) minimising lock-in effects and equalising bargaining power between SMEs

and bigger enterprises.[8] To give stakeholders a first insight, the Commission simultaneously revealed a non-exhaustive list of possible legislative and non-legislative measures to be taken into consideration as possible regulatory solutions.

While it is still too early to draw any conclusions regarding future policy design, the announced stakeholder dialogues on the pros and cons regarding data access regulation will play a decisive role in this process.[9] Thus, by shedding light on key stakeholder arguments, it can give a preliminary indication on how the Commission might proceed on this matter in the future.

First of all, there has been much debate as to whether it is too early – or even necessary at all – to impose binding legislation for data access. On the one hand, leading experts such as Erik Brynjolfsson and Andrew McAfee argue that excessive regulation tends to stifle innovation and hinder new business models from developing freely.[10] On the other hand, opening up access to upstream markets (e.g. information infrastructure such as raw data bases) has in the past proven to be successful in several European markets, leading to increased competition, innovative business practices and consumer benefits.[11] These two contrary arguments on the effect of regulation reflect to a large extent the fundamentally different regulatory approaches found in the U.S. and the EU. However, due to the unpredictability of the data economy's dynamic development and the limited survey evidence on current data sharing practices in Europe, the majority of stakeholders still seem to favour a non-legislative, non-sector specific approach by the Commission.[12]

Second of all, it needs to be considered whether the abovementioned argument is sufficient for justifying a binding, regulatory approach or whether further evidence is needed to back up the Commission's assumption. In particular industrial stakeholders have pointed to the lack of a clear market failure and that there is no evidence showing that the contractual solutions currently in place for regulating non-personalized data access fall short of providing legal certainty. At the other end of the spectrum are the potential data re-users, arguing that the current B2B contracts lead to market foreclosures and prevent interested parties from entering downstream markets.[13] Reinforcing the latter, the preliminary conclusion made in a legal study by Osbourne Clarke for the Commission seemed to confirm the latter statement, showing that the lack of coherence makes it difficult for businesses to manage and use their data efficiently.[14]

Following up on these opposing arguments, future policy making should thus include an assessment of the scope to which contractual and general competition law provisions, especially Art. 102 TFEU on the abuse of a dominant position, can be invoked to claim wider access to data held by one economic operator.[15] As shown in cases such as IMS Health or Microsoft, the ECJ has partially been successful in its jurisprudence to grant information access to the benefit of smaller market players.[16] However, according to the Commission "raw machine-generated data is not protected by existing intellectual property rights since they are deemed not to be the result of an intellectual effort and/or have any degree of originality."[17] In other words, machine-generated data is not covered by the existing legal framework, making it hard to rely on past guidelines and jurisprudence. To conclude, if the Commission should choose a

traditional legislative approach, defining clear data classifications to distinguish between different types of data remains an essential prerequisite in order avoid disclosure of confidential information, while granting third party access.

Lastly, while ensuring that new business models can enter downstream markets and spur innovation in the data economy, there are many larger stakeholders urging the Commission to refrain from regulatory action that could potentially discourage investments in new data storage, generation and processing technologies. The only way to ensure this is by allowing companies to remain the main beneficiaries of their own aggregation and storage of data. As recently summarised at the high level conference on "Building a Data Economy" organized by the Commission, putting in place mandatory access to machine-generated data is not an incentive for investment, as it would discourage data generators from improving their storage and collection processes. According to this view, there is no real justification for granting third parties unconditional access to data they did not participate in generating.[18]

Based on the preliminary evaluation in the recent Communication and Staff Working Document, the Commission does not see any urgent need to regulate machine-generated data access in the emerging European data economy. For now, any policy decisions seem to have been postponed until after the wide stakeholder and public consultation, when more evidence has been gathered on real data sharing practices in different member states. However, given the weight of current stakeholder arguments advocating a more cautious approach by the Commission, it seems unlikely that issues of data flow or data access will be regulated in a binding way any time soon.[19] Instead, in order to improve current legal certainty and enable a favorable environment for data business, starting off with non-legislative measures, such as providing legal guidance, technical solutions, voluntary model contract terms for data usage licences or default contractual rules, might be a more appropriate line of measures from which companies, governments and consumers could stand to benefit.[20]

Sanni Kunnas, ZEI Alumna "Class of 2016", is a Policy Advisor for Energy, Climate and Digitalization at the German Chemical Industry Association in Brussels.

Bibliography:

1. European Commission (2015): A Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen, Press release, 6. May, available online: http://europa.eu/rapid/press-release_IP-15-4919_en.htm (28.01.2017).

2. European Commission (2017): Digital Single Market. Bringing down barriers to unlock online opportunities, available online: https://ec.europa.eu/priorities/digital-single-market_en (28.01.2017).

3. European Commission (2017): Building a European data economy, COM(2017) 9 final, p. 10.

4. European Commission (2017): Staff Working Document on the free flow of data and emerging issue of the European data economy, SWD(2017) 2 final; European Commission (2017): Building a European data economy, COM(2017) 9 final;

5. A three-month public consultation on "Building the European Economy" was launched on the 10. January 2017 and can be accessed online until the 26. April: https://ec.europa.eu/digital-single-market/en/news/public-consultation-building-european-data-economy (28.01.2017).

6. The Commission specifically mentions transport, energy markets and health and care based services as sectors that could benefit from increased data sharing, see: European Commission (2017): Building

a European data economy, COM(2017) 9 final, p. 8.(Accessed on November 10 2016).

7. European Commission (2017): Building a European data economy, COM(2017) 9 final, p. 8.

8. European Commission (2017): Staff Working Document on the free flow of data and emerging issue of the European data economy, SWD(2017) 2 final, p. 30f.

9. European Commission (2016): High level conference on the data economy. Summary report.

10. Erik Brynjolfsson and Andrew McAfee (2014): The Second Machine Age. Work, Progress, and Prosperity in a time of brilliant technologies, Norton, p. 216ff.

11. Christian Koenig and Bernhard von Wendland (2017): The Art of Regulation. Competition in Europe – Wealth and Wariness, Edward Elgar Publishing.

12. European Commission (2016): High level conference on the data economy. Summary report.

13. Ebd.

14. Osborne Clarke (2017): "Osborne Clarke carries out study for EU Commission on "Lack of clear rules for data treatment"", 10. January, available online: http://www.osborneclarke.com/news/osborne-clarke-erstellt-studie-fur-die-eu-kommission-klare-regeln-fur-die-nutzung-von-daten-fehlen/ (29.01.2017).

15. European Commission (2017): Building a European data economy, COM(2017) 9 final, p. 10.

16. IMS HealthC-218/01 [2004]; T-201/04 - Microsoft v Commission. For more information, see: Paul Craig and Grainne de Burca (2011): EU Law. Text, cases, and materials, Oxford, p. 1033.

17. European Commission (2017): Building a European data economy, COM(2017) 9 final, p. 10.

18. European Commission (2016): High level conference on the data economy. Summary report, p. 3ff.

19. FTI Consulting (2017): EU Data Economy: Let the Data Flow!, 10. January, available online: http://fticommunications.com/2017/01/eu-data-economy-let-data-flow/ (29.01.2017).

20. European Commission (2017): Staff Working Document on the free flow of data and emerging issue of the European data economy, SWD(2017) 2 final, p. 30ff.