

European Commission, DG Communication Networks,  
Content & Technology  
Unit G1 – Data Policy and Innovation  
Euroforum Building  
10 rue Robert Stumper  
L-2557 Luxembourg

Briefnummer  
17/10.489/DdN

Onderwerp  
Consultation Data Economy

Den Haag  
26 april 2017

Telefoonnummer  
070-3490354

E-mail  
nood@vnoncw-mkb.nl

Dear Sir / Madam,

The Confederations of Netherlands industry VNO-NCW and MKB-Nederland would like to give their point of view on the consultation by the European Commission on a European data economy.

### 1. Free flow of data

The free flow of data within the European Union is constrained by national requirements on the storage and usage of data. These requirements directly or indirectly determine that data should be stored or processed within a certain geographical area, mostly a single country. The requirements find their origin in the belief that data stored within national borders is more secure than data stored abroad, and that national supervisors would be able to access the data easier when stored within the country.

VNO-NCW and MKB-Nederland point out that government interference by means of localization requirements leads to sub-optimal outcomes and higher cost for business. Data may in fact *not* be optimally and uniformly protected, exactly because it is subject to national requirements. Moreover, data localization requirements harm the international expansion of data driven startups, professional cloud suppliers and other companies with use data on a cross-border and large scale, since they have to invest in data storage facilities in the countries they want to do business in. Finally, localization requirements conflict with free establishment of a business throughout Europe.

*Abolish all national data localization requirements within the EU*

Companies should be free to choose the most optimal location for storing and processing data. To counter above mentioned effects, VNO-NCW and MKB-Nederland support the total abolishment of data localization requirements by means of European

legislation. This brings clarity within in the EU and establishes a proper foundation for economic growth through cross-border digital and data-driven business.

#### *Suggestion for further research*

Since the data economy is global, the fact that requirements on the localization of data are common in non-European areas as well is also relevant to this consultation. The abolishment of European restrictions on the free flow of data will contribute to a European level playing field. But this does not yet level the global playing field. Companies from outside Europa can operate unhindered in the European Union, but European companies are required to host their data in these non-EU countries. This lack of reciprocity harms the level playing field between European and non-European companies and leads to a competitive disadvantage for EU-businesses.

VNO-NCW and MKB-Nederland recommend the European Commission to further investigate the effects of data localization requirements on a global level and the possibilities to conclude agreements achieving equal policies on data localization with third countries and reciprocity. Also should be investigated how this can be incorporated in the framework of the World Trade Organization.

#### *Clarify exceptions with regard to National Security*

National security could be a legitimate reason for storing data within national borders. The framework on these exceptions with regard to National Security has to be clear. Elements of this framework could be include limiting of risk of severe social disruption, i.e. sovereignty, territorial integrity and socio-economic functioning of State.

## **2. Access to and re-use of non-personal data**

The use of digital products and services produces ever more data. For instance mobile phones, televisions, agricultural machines and payment transactions, constantly generate new data. Increasingly, this data is the basic element for new innovative services, smart process and product innovation. The economic and societal potential benefit of data and its application is far greater than the actual current use of the available data. The Commission rightly points out that innovative services require pooling of data sources.

*The question is whether current conditions foster the optimal use. And secondly, to what extent – if any – a role of the government is needed to improve this.*

Data is a non-rival good. This means that data can be re-used and distributed simultaneously and by different entities. The costs of distribution and reproduction (the marginal cost) are minimal. At this time, there is no automatic, ultimate ownership of raw data. In other areas, ownership is accounted for in certain specific information goods, such as copyright, patents or trademark law. For personal data a framework for the processing of this data is already in place.

Data is used in very diverse ways which differ between sectors. In current practice regarding raw data, we see a lot of contractual agreement on access, use and distribution of data. These contractual agreements provide the opportunity to negotiate with parties on terms and conditions with regard to access, use and distribution. The use of contracts makes tailor-made agreements possible. Contractual freedom has proven to be key to innovative advancements.

*Box 1: A market solution in data usage*

A specific case in the production chain of milk (from sensor data of cows to the milk in the supermarket), shows the success of sharing data in complex relationships with lots of parties involved. By contractual arrangements a legal structure was erected to organize collective access to the data for all parties concerned. In this case, data has been pooled in a foundation, which worked out very well. In this case, the farmer was chosen to be the ultimate owner of all the data about his cows collected by the fully automatic dairy farm.

In this manner, the market provides solutions to important questions on the ownership, the usage rights and the monetary value of data. We do not see clear market imperfections which would legitimize public interventions in this area.

*Possible market imperfections*

However, VNO-NCW and MKB-Nederland acknowledge the fact that some companies in different sectors, getting access to desired data is hard or even impossible.

The potential underconsumption of data could be a consequence of the ultimate nature of the market for data: a rapidly evolving, young and dynamic market in which the (exact) value of data has not been recognized by all economic actors or is simply not clear: data is sometimes just regarded as residual product; the data owner is not able to accurately determine a price for its data; or the data owner wants to keep the data to itself for possible further use, but does not prioritize this further use. The market could benefit from improvements in transparency when it comes to the availability of data. Data brokers could potentially play a role in this, but this should be a market driven development.

*Investigate and monitor possible market imperfections, for now no new legislation*

Since the current state of our information society is characterized by young, dynamic and very diverse markets, VNO-NCW and MKB-Nederland would recommend further analysis on the field of use and access to data. Including possible dominant market positions, and the possible failure of government itself, namely legislative and judicial processes not being able to keep up with the speed of technological developments.

The European Commission should carefully assess whether, to what extent and in what specific sectors or domains market imperfections might arise which might legitimize broad government interventions. Then, to carefully analyze to what extent the costs of

additional legislation exceeds the possible benefits of less depletion of data.

We do not *per se* rule out market imperfections in the future. If these imperfections seem arise or aggravate, this could potentially give rise to a policy response. This is why we propose a continuous, but in any case yearly monitoring exercise to fully understand and analyze the speedy market developments.

*Provide guidance and best practices on data use*

Finally, VNO-NCW and MKB-Nederland see that actions to stimulate the market into maturity could be desirable. One could think of non-binding guidance on existing legislation, and sharing of best practices on how to solve practical data-related issues.

### 3. Liability

The European Commission states that current rules concerning liability might not suffice in the era of upcoming technologies such as the Internet of Things (IoT).

Products or services are increasingly dependent on other products, services or sensors (not being part of the original product). Examples are software applications from third parties that consumers install on cell phones the cell phone producer has no knowledge of. Such a software product could potentially harm the functioning of the hardware (a malfunctioning application, that is not part of the original product and is not within the influence of the original producer). In this case, it is hard to prove the exact liable party.

The increasing scale of artificial intelligence and self-learning system will complicate these matters even further. In these complex constellations it will become increasingly hard to pinpoint the culprit.

VNO-NCW and MKB-Nederland roughly distinguish three categories:

- Less complex cases: in the basis, current legislation on products (and services) seems to provide a sufficient framework. The responsibility of the producer seems to be the right starting point. The producer brings the assembled product on the market. Suppliers of hardware and software are not always fully informed about the exact use and configuration of their products in the end product. The producer can make legal arrangements with the suppliers and make agreements about liability issues to mitigate or manage liability risk.
- Complex cases with high risk (self driving vehicles where passenger safety is crucial, fully autonomous cattle farms where safety of produced food or milk is crucial, etc.) in highly professionalized industries: this will force all parties concerned into creating new ways of sharing of liability. For instance in the automotive sector, car manufacturers are pooling the cost of possible accidents

caused by their autonomous cars.

- Complex cases with much lower risk: in this category product or service manufacturers do not arrange liability solutions of their own, and pinpointing the exact cause will prove extremely hard. Although VNO-NCW and MKB-Nederland see the possibility of such problems arising, no concrete evidence or cases have been presented yet.

*Investigate existing law, monitor cases and look at alternative innovative solutions*

The Commission already makes suggestions for a construction in which responsibility is placed at the best placed entity in the value chain to prevent damage.

For now, VNO-NCW and MKB-Nederland urge the Commission to first further investigate existing law and monitor concrete cases that will arise. This way the problem with existing legislation will become more explicit and may be – if necessary – adjusted to these examples. Meanwhile the development of alternative innovative solutions in the market should also be taken into account, see box 2.

*Box 2: Development of innovative solutions in the insurance market.*

One could think of an insurance system which only pertains to the damage of the own party. This puts insurance in a different perspective and more analysis should be carried out on the exact consequences. In reality, this practice has been carried out in case of large-scale and complex accidents, where insurance companies agreed to only cover the damage of the own policy holders. This saves complex and long-lasting legal procedures. The incentive for the insurance company lies in the fact that damage could be recovered at the liable party, but the search costs would be a business decision of the insurance company.

#### **4. Portability of non-personal data, interoperability and standards**

The Commission rightly points out the portability and interoperability are important and vital to the spread of data across society and the economy. In this way, consumers and companies are enabled to easily switch to a different supplier. The lower costs of switching leads to better market competition. Standards for portability and interoperability contribute to this and are thus desirable. This should be a market-led development though.

*Further investigate bottlenecks for portability, no legislative action*

At the moment, the nature and severity of the lack of data portability and the sectors in which it would play is not sufficiently clear. Laying down requirements would not be evidence based as yet.

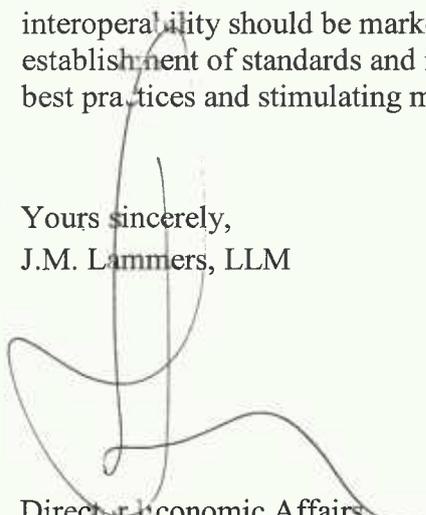
Moreover the implications of portability are severe. The portability requirements for personal data in the new privacy legislation GDPR already prove very difficult and

costly to implement. Meaningful portability of (raw) data will require equal formats for data throughout an enormous volume of different services. That would require a complete built-up of an alternative IT-structure and seems to be a bridge too far. The same goes for interoperability.

*Encourage the establishment of standards and interoperability*

VNO-NCW and MKB-Nederland are of the opinion that these standards and interoperability should be market driven. The Commission could however stimulate the establishment of standards and interoperability by for instance issuing guidance, sharing best practices and stimulating market led initiatives.

Yours sincerely,  
J.M. Lammers, LLM



Director Economic Affairs  
VNO-NCW and MKB-Nederland