

Data Economy Workshop Report

Moderator

Ms Julia Fioretti, EU correspondent, Thomson Reuters.

Europe is doing relatively well in terms of digitisation. The Netherlands are on top of digitisation globally, while Germany holds a second place. Out of the top 1 million websites globally, 30% are from the EU.

Panel 1 - Barriers to data access and reuse and liability issues

The panel discussed access to and transfer of data, as well as liability questions resulting from emerging technologies like Internet of Things (IoT) and autonomous systems.

Panellists:

Mr Michal Boni, Member of the European Parliament, European People's Party

Dr Nuria Oliver, Director of Research in Data Science at Vodafone & Chief Data Scientist at Data-Pop Alliance.

Dr Christiane Wendehorst, Professor of Private Law, University of Vienna and Vice-President and Founding Member of the European Law Institute (ELI)

Ms Maria Alvarez Caro, Digital Regulation Principal Economist, BBVA

Mr Jorgen Bødmar, President, EMOTA

Access to and transfer of data in B2B contexts

When speakers were asked about the benefits of the data economy, all of them consider data as being key for economic growth. Ms Alvarez Caro stated that competitiveness advantage will come from businesses that are able to offer data services on top of the services they traditionally sell. This is why it would be essential to encourage and incentivise businesses to invest in data. However, many of the speakers underlined the need to understand "what data is" since data in itself has no intrinsic value. Instead, the value of data comes from its contextualisation and combination with other data. Indeed, this can give way to many new services and products. However, Ms Wendehorst encouraged the EU to catch up to compete with big data industries based outside of the EU. The IoT field offers an open opportunity for the EU to lead globally on this matter.

Open data policies in public administrations were praised during the debate as offering a possibility for businesses to reuse public sector information. This was identified by the speakers as a government example that could be useful for the development of a data economy in the EU. However, it was also claimed that further efforts should be made on this matter to fully achieve the advantages of open data.

Another matter brought into the discussion several times was the impossibility to effectively discern personal data from non-personal data. All underlined that a European data economy is composed of both. The General Data Protection Regulation (GDPR) puts the individuals in the centre of the law, granting them new rights. As long as data is anonymised, businesses comply with the GDPR.

However, it is necessary to strike a balance between a high level of data protection and development of a data economy. For example, it was clear that, in the area of eHealth, patients can benefit very much from using their own data for their health and treatment by giving consent to the use of data. At the same time, it was also argued that such data in an anonymised and aggregated form can be of much benefit for society: for better policies to ensure a good health or for research purposes.

When asked about the barriers to an effective data economy, some highlighted the lack of a data-driven culture, digital competences and literacy. There needs to be an awareness of what can be done with data for the benefit of industry and the economy. More investments need to be made in digital literacy.

The ePrivacy Directive was raised in the discussion by MEP Boni who claimed that it should be flexible and balanced to allow transmission of data in cases such as the eHealth.

Data localisation and other deficiencies in the legal system are barriers to the effective development of a full-fledged data economy. It was also claimed that the lack of interoperability and common standards causes data silos, even within the same organisation.

Ms Alvarez Caro explained that, for many businesses, data imply key strategic decisions. Businesses make huge investments to have high quality data. They should be able to exchange data for a money. The market should adjust these investments while market power differences should also be addressed.

When solutions proposed by the European Commission were discussed, the least preferred option was introducing data ownership rights as it would be the most disrupting initiative, stifling innovation. The idea of compulsory licences led to scepticism by Ms Wendehorst. However, she suggested that fair default or model contracts would be beneficial for enhancing B2B access to data and ensuring interoperability, portability and to avoid lock-in effects as a horizontal solution. Some opposition was found in the other panel where Ms Zolynski stated that access rights should be granted in specific cases when data can be considered as infrastructure, i. e. essential to enter the market or to develop new services.

Liability in IoT and AI

There is a consensus on the necessity to differentiate between the Internet of Things (IoT) and Artificial Intelligence (AI) by all contributors because the problems are not always the same. Ms Wendehorst stated that our current product liability law is not fit for purpose for the IoT. There are a number of changes to be made, not only in the liability part, but also in the field of sales law. However, we need to establish a clear boundary between the two and set up a new liability regime. MEP Boni, on the contrary, highlighted that IoT liability should be addressed by looking at standardisation and certification procedures.

As far as Artificial Intelligence is concerned, it is very difficult to track where the damage comes from if it is not from a particular human behaviour or input, according to Ms Wendehorst. The European Parliament has passed a resolution to look into this matter to understand how to design new liability rules for AI. Suggestions for discussion could range from keeping the existing regime to giving robots

a legal personality to make them liable. Ms Oliver introduced the active research area of the opacity and interpretability of the algorithms, which has an impact on liability of IoT and AI. There is a substantial problem of humans not understanding fully how some algorithms work so it makes it difficult to establish liability for these. Also it was found out that data driven and decision making algorithms can also have biases which can be due to biases in the data.

Mr Bödmar on the contrary stressed that developments in IoT go faster than legislation on it, thus guidance and principles would be the best way forward for liability matters.

Panel 2 - Towards an EU framework for free flow of data and data portability

This panel focused on unjustified or disproportionate data localisation restrictions in Member States which may be preventing the free flow of data, as well as obstacles to data portability.

Panellists:

Mr Luukas Ilves, Digital Policy coordinator at Permanent Representation of Estonia

Mr Martin Lundqvist, McKinsey Global Institute.

Mrs Célia Zolynski, Member of the Conseil National du Numérique of France and Professor of Private Law, University of Versailles Saint-Quentin/Paris Saclay

Mr Ola Landström, Legal Adviser, Swedish National Board of Trade and Guest Lecturer, Stockholm University.

Free Flow of Data

The panellists agree that no data localisation restriction should exist. This raises the question whether the current legal framework is sufficient or whether we need additional legislation.

Mr Lundqvist explained that Global data flows account for 10% of the economic growth globally from 2004 to 2014, which is around 7.8 trillion of US dollars (from 2004 to 2014). Since 2014, data flows have gained a more important role, being significantly bigger in these global flows than fiscal, trade or services. This supports the idea of data being increasingly important driver for economic growth. See also: 2016 McKinsey report ["Digital globalization: The new era of global flows"](#)

Mr Landström stated that in the EU there is a good legal framework dealing effectively with localisation requirements via instruments found in the Treaties (e.g. infringement procedure for localisation restriction against Poland in 2010). However, all 28 Member States call for the removal of localisation restrictions to achieve a real free flow of data. Similarly, Mr Ilves pointed out that infringement procedures do not provide clarity to businesses. An important matter for businesses is the perception of location restrictions in the EU. This is a point to be considered as businesses often take strategic decisions based on such perceptions. There are also regulatory and technological barriers that still need to be torn down so that data can move freely.

Mr Ilves reported that in mid-June Estonia approved its first "Data Embassy". To show that data location is not important any more, Estonia stores the back-up of its key national datasets in Luxembourg.

What is the value of data? Data is only of value when it is contextualized. In this sense, Artificial Intelligence (AI) contributes a lot to growing value, but also raises a lot of concerns. In the future there will be different economic ecosystems on the basis of data that will need to be based on the principle of free flow of data to collaborate and grow.

Mr Landström also stated that the GDPR was one of the main barriers to the free flow of data. It was stated that the 1995 Personal Data Protection Directive is based on working towards harmonisation in the internal market (art. 15), whereas the GDPR is based on the misuse of privacy (art. 16). A problem arises when a demarcation between personal and non-personal data must be established, which in practical terms is impossible. For instance, when anonymising non personal data sets, one can obtain personal data. Fines resulting from the use or sharing of these data do not incentivise businesses to share data, losing business opportunities. Legislation has caused a drift towards privacy and away from free trade and innovation. However, one cannot avoid the question of personal data when setting up this legislation. When implementing the GDPR, proportionality measures should be encouraged in order to be able to strike a balance between free flow of data and protection of personal data. Data are both personal and non-personal data, and the fact that you cannot treat those data sets in the same way impedes the free flow of data.

Portability

Ms Zolynski highlighted that lock-in and data retention strategies are applied by many stakeholders. These obstacles to the reuse and sharing of data lower the potential benefits of data. The value of data comes from its processing and combination (especially in the field of AI). Data circulation must be better organised by ensuring data portability, by developing data sharing tools and by avoiding lock-in strategies. There are too many asymmetries in power between users and providers of cloud computing services. Access rights to data as an infrastructure need to be defined. This can help to reduce switching costs and have an impact on the negotiating process in contractual relationships. However, there are concerns about its implementation and demarcation between personal and non-personal data.

Mr Ilves also claimed that an instrument enabling portability rights in B2B context is a less developed and discussed matter. There are many concerns about what the implications of a potential legislation would be. However, the public sector can start by setting up the example of portability of data from public to private sector or between public organisations.

The GDPR has an important role for portability: to switch cloud providers, consent has to be given by the user as transferring the data would mean controlling it. Ms Landström stated that we would need to first know to which end we want to achieve portability rights. If this were to enhance competition between cloud providers, then we should look at competition law. This would mean putting value of the data as a concept of competition law and make assessments of these markets based on the data accumulated by the companies.

Conclusions

All speakers of the workshop supported further discussion on all data economy topics. Similarly, they supported the necessity to create a framework that incentivises investments in data and sharing of

data. Ms Alvarez Caro proposed EU guidance for data sharing and access and voluntary technical guidance on how to design user-friendly APIs for developers. More than half of the voting audience (35 people) supported the former idea while 14% supported the latter on Mentimeter. Ms Alvarez Caro also suggested the idea of creating testing environments for guidance on data sharing and for other measures such as regulation, if ultimately necessary to put in place. Ms Oliver supported these ideas while stressing that a sector by sector discussion would create much more impact. She also suggested the idea of sub-guidance and legislative guidance to prevent businesses from breaking the law. Ms Wendehorst proposed the adoption of horizontal default contract rules which should ensure basic principles of fairness are met in B2B relations. She also supported the idea of combining it with other measures such as guidance for specific sectors and investment in technical solutions such as APIs. Investment in APIs also found a good number of supporters amongst the speakers and the audience. Ms Oliver and Mr Bödmar stated that technology moves much faster than legislation so the best option would be to look at the best practices (context of the data and characteristics) to understand how to unleash the potential of the data economy in each sector.

As far as liability was concerned, it was clear that speakers in general agreed to differentiate between liability for IoT and AI. Some of the speakers and 67% of the voting audience (33 people) agreed that a new liability regime is needed for these products.

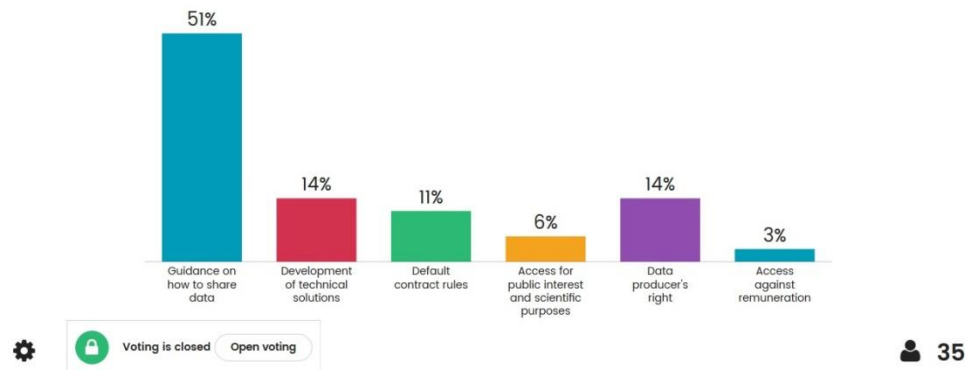
MEP Boni preferred a combination between EU legislation in some areas (such as the free flow of data/data localisation restrictions) and soft law in other areas such as access to and sharing of data. He also thinks that free flow of data should not be restricted because of security reasons. Mr Ilves highlighted that we would need to wait for the Impact Assessment and results from the consultation before judging whether we need additional legislation. However, it would be necessary to get rid of ambiguities to offer clarity to businesses and public administrations. More than ¾ of the voting audience (18 people) agreed with the idea of legislation on localisation restrictions on Mentimeter. Mr Lundqvist underlined the need to look at the facts around the value of free flow of data and encouraged stakeholders and public administrations to be pragmatic. He put forward the need of harmonising the current legal framework and simplifying it and was not sure yet if a legal proposal on free flow of data is necessary. For Ms Zolynski, it is not necessary to regulate now, but stakeholder discussions must go on. Panel 2 speakers agreed that the European Commission should enhance collaboration with all actors of the data economy, keeping the discussion alive on free flow of data and deepening the discussions about portability. 60% of the voting audience (18 people) agreed that portability is an important topic to discuss. According to panellists, there are still too many 'silos': sectors like health, energy, safety etc. need to share their data so that they can create value and work as a single market. Mr Landström and Ms Zolynsky hoped that discussions will define which data are considered personal data due. The same holds for portability: which data are concerned by portability issues? Mr Landström called for the discussion of data economy matters also in the Article 29 Working Party by integrating questions from different Ministries. To deal with matters related to data protection, Ms Wendehorst suggested data trusteeships (Personal Information Management Systems) that receive a mandate from the data subject to exercise particular data rights on their behalf and according to standardised directions. This could open up silos of privately held data while protecting personal data, using data protection as a driving force for the data economy.

Audience on Mentimeter

Regarding data access, 51% of the voting audience (35 people) supported the production of EU guidelines for data sharing and access, followed by development of technical solutions and introduction of data producers' rights (14% each).

Which solution would improve access to and transfer of data?

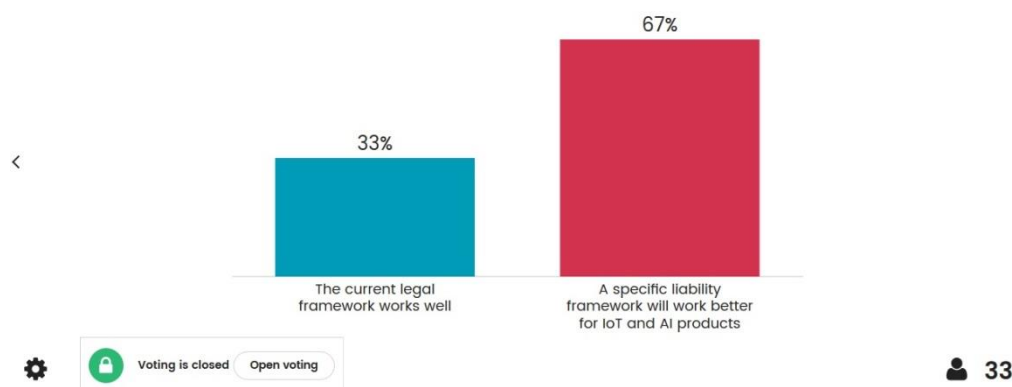
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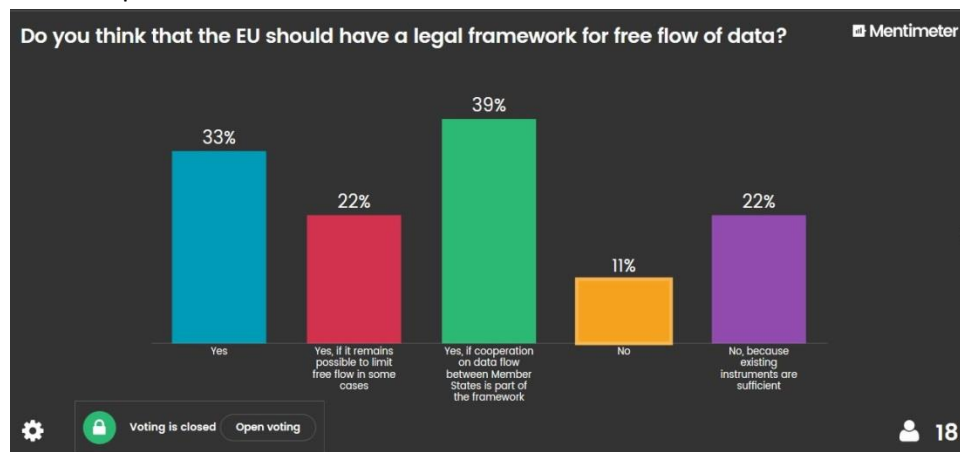
67% of the voting audience (33 people) supported the creation of a specific liability framework for IoT and AI.

Which legal framework for liability would work best for IoT and AI products?

Mentimeter



Almost 70% of the voting audience (18 people) supported a legal framework on free flow of data, while 40% of those highlighted the need to include cooperation on data flow between the Member States as part of that framework.



39% of the voting audience (18 people) believe that portability is important in the context of free flow of data and 28% stated that while it is important, portability conditions should be specified.

