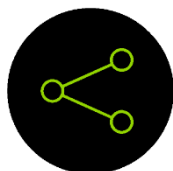


# Stakeholders Workshop on Data Access and Data Sharing: The real impact on SMEs' and start-ups' business models

## Report

**This summary report of the stakeholder workshop on “Data Access and Data Sharing: The real impact on SMEs' and start-ups' business models” is provided by the consortium carrying out the “study on emerging issues of data ownership, interoperability, (re)usability and access to data, and liability’ composed of Deloitte Belgium, Open Forum Europe, Open Evidence and Timelex. The opinions expressed in this report are those of the authors and do not necessarily reflect the views of the European Commission.**



## Report

The Workshop on "Data Access and Data sharing: the real impact on SMEs and start-ups" took place on 29 May 2017 in Brussels and was organised by the Commission in the context of the structured dialogue announced in the Communication of January 2017 "Building a European Economy".

DG JUST unit A2 "Contract law" and DG CNECT unit G1 "Data Policy and Innovation" chaired the workshop. 45 participants registered to attend and 2 presentations and 3 case studies were presented.

The purpose of the Workshop was to collect input from SMEs and start-ups on the problems and obstacles they face when accessing or trying to access data for their businesses.

The ongoing study carried out by Deloitte on the emerging barriers to the data economy contributed to highlight **certain contradictions**. While it emerges from the study's survey and interviews that only 6.3% of companies in the EU are data-intensive and that a consistent number of businesses **do not have access to the data they need to innovate and develop new products and services**, the majority of businesses argue that **they do have access to the data they need for their business**.

This inconsistency in the data can be explained by the infancy of the market (only 6,3 % of European companies are intensive data users) or by many other factors, such as the fact that data are currently used mainly to improve existing products, services or processes and not to disrupt existing markets or by the influence of sectorial legislation and practices.

Despite and/or notwithstanding this inconsistency of the evidence concerning the problem of access to data, during the workshop a number of findings emerged concerning existing barriers preventing business from making more use of third parties data:

- Stakeholders unanimously agreed that contracts are the main vehicles for data sharing and accessing at the current stage of the market. This has pros and cons: on the one side, contractual freedom helps stakeholders adjust contractual clauses to their needs but on the other hand **SMEs and start-ups might suffer from a more limited bargaining power** than incumbents and major business players. This can prevent SMEs and start-ups from accessing the data they need.
- It was noted that, in a certain number of cases, **incumbents do not share data at all with third parties** as they try to protect their data "oligopoly" and benefit – alone- from their exclusive access to the data that others might need. Data sharers might also refrain from

sharing data for other reasons such as the risk of sharing sensitive information, issues linked to legal uncertainties or other obstacles (e.g. problems of valuing data or lack of skills).

- From a technical perspective, **there is a consensus that lack of interoperability of data is an issue and that further interoperability and portability are a prerequisite for more access and reuse of data.**
- **Legal uncertainty (eg. uncertainty about which rules would apply both domestically and cross-border) also plays a role as barrier to the access and reuse of data.** Stakeholders highlighted that, especially for SMEs and start-ups, legal uncertainty comes at a high cost and this concerns many different areas ranging from copyright rules to distinction between personal and non-personal data.
- Finally, it was argued that the lack of industrial platforms and of APIs ensuring direct access to data can also explain the limited number of businesses in Europe currently being intense data users.

**A number of solutions to the above mentioned issues were discussed:**

- **Concerning hard regulatory measures, no particular consensus emerged,** although stakeholders from the after sales automotive market strongly advocated for hard law intervention in their sector.
- On the other hand, **a moderate support was shown for softer measures such as model contracts or standard contract clauses.** This support can be equally found amongst SMEs and start-ups as well as incumbents and bigger players.
- Similarly, **stakeholders mainly agreed on the necessity to encourage interoperability.** The costs of interoperability are particularly high for SMEs.
- Finally, a **consensus emerged on other soft policy measures** such as allowing experimentation through regulatory sandboxes or supporting SMEs and start-ups (also financially) in their innovation journey.

## Workshop Minutes

### 1 - Welcome and introduction

Mr. Dirk Staudenmayer, from the European Commission, DG Justice, greeted the participants and set the scene for the workshop by explaining that the event finds its *raison d'être* in the European Commission "Communication on Building a European Data Economy"<sup>1</sup> and in the stakeholders' consultation activities put forward by the Communication itself. Indeed, the workshop is part of the structured dialogue launched by the European Commission in order to discover and identify emerging barriers in the market which inhibit the data economy. The consultation process is made up of a series of workshops and a public consultation (which lasted until April 2017 and of which the results will be published in July 2017). Finally, Mr. Staudenmayer stressed the idea that right now the Commission is in "listening mode", and that policy measures will be taken only if barriers are identified in the market that justify policy action.

Following this introduction, Ms. Celine Ramjoue (European Commission, DG Connect) took the floor to present the preliminary result of the consultation carried out by the European Commission and closed in April.

She explained that the consultation covered the following topics:

- free flow of data (that is to say the geographical restrictions linked to data location and storage);
- access to data (meaning the barriers for accessing and reusing third parties' data);
- liability (especially in relation to IoT and autonomous systems);
- and portability of data.

Some 380 questionnaire responses were received, as well as 113 position papers (28 as stand-alone contributions). The respondents were mainly business and trade organisations, with a significant number of SMEs. In relation to the free flow of data, 63% of respondents confirmed the existence of data location measures, with 62% supporting the removal of data localisation restrictions through hard or soft law. In relation to access and transfer, a majority of respondents supported the idea that companies should be able to access data, with most respondents requesting some form of soft legislation. Concerning liability, there seems to be a lack of awareness amongst consumers when it comes to their rights as defined under the current legal framework. Finally, in relation to emerging issues, services allowing portability are in demand; nonetheless, portability is not offered by business yet.

<sup>1</sup> See: <https://ec.europa.eu/digital-single-market/en/building-european-data-economy>

## 2 - Presentation of the Study

After the introduction provided by the European Commission, Mr. Patrick Wauters (from Deloitte) and his team presented the preliminary results of the ongoing study conducted by Deloitte and its partners on the emerging barriers related to the data economy. The team explained that the main objective of the study is to create an impact assessment concerning the emerging issues to the data economy such as access to data, liability, data ownership, and interoperability. 10 case studies (each covering a different sector) were considered, with stakeholders from those sectors being contacted in order to obtain relevant insights and map the new business models. At the same time, a general and statistically relevant survey was developed aiming at obtaining quantitative evidence on the trends in the sectors covered by the assignment. As the preliminary results of the study suggest, when new products are developed, and those products are based on data, the development tends to take place in-house. Indeed, currently data sharing and reuse is quite rare, being limited to only 2% of business data<sup>2</sup>. Despite data sharing and reuse currently concerns only a limited number of companies, the survey showed that there is an appetite for more data, with businesses considering that further access to (in particular machine generated and process generated) data could help them improving existing services as well as delivering completely new services.

Regarding the issue of access to data, the evidence collected is contradictory. **A majority of respondents to the general survey carried out by the study team replied that their companies can access the data that they need.** However, **many of the stakeholders interviewed said that data access is a problem and this is also confirmed by the preliminary analysis of the data emerging from the public consultation.** Several reasons could possibly help understanding this contradiction:

- As only 6,3% of EU companies are intensive “data users”<sup>3</sup> access to data is not (yet) a problem for the majority of companies in Europe - but it is a problem for the most innovative ones.
- Companies can access the data they strictly speaking need for their business, but would like to have more to provide new products and services beyond what they currently offer.
- It depends mainly on sectors, as in certain sectors (e.g. automotive) access to data is critical while in other is less important.
- There is no common understanding of what data means, which entailed different interpretations of the question.

Further to these explanations, the study tested a number of possible barriers related the problem of access to data for the businesses expressing concerns in this respect. From the perspective of current of future data users, one of the main barrier underlined by stakeholders is precisely the

<sup>2</sup> Source: the European Data Market Monitoring Tool, IDC 2016

<sup>3</sup> Source: the European Data Market Monitoring Tool, IDC 2016

fact that **data is not made available by data sharers**, as a result of many reasons, such as: a risk of sharing sensitive information, legal and value uncertainty, technical barriers and lack of skills.

Other than data not being made available, the study specifically considered the subject of contractual barriers to the sharing and access data. Indeed, **as contracts are the main vehicle of the data economy at the present state**, contractual issues and legal uncertainty appear to constitute a potential explanation for limited access to data.

While the concept of “data ownership” was originally explored by the study team, soon enough it became clear that **the question of “data ownership” is not a major barrier for the data economy. More relevant is the question of access and reuse rights, which are decided by business through contracts and on a case-by-case basis.** This reliance on contracts has a number of pros and cons: from a positive perspective, contractual freedom ensures that companies can adjust clauses to their needs and act quickly when new developments arise. On the downside, using only contracts as vehicle for exchange of data can entail administrative burden each time a contract needs to be renegotiated and can lead to different approaches towards the same legal concepts due to the variety of clauses used. Moreover, **some businesses (and especially smaller businesses) may suffer from unequal bargaining power and struggle more to obtain access to the data they need.**

The question of liability for wrongful data can also be treated as a contractual barrier at this stage, as most of the businesses currently deal with the liability aspects of data through contracts and on a case-by-case basis, as also shown by the result of the general survey. However, it also emerged that there is a certain lack of clarity in the legal regime as liability and damage types are not well defined and/or understood and the overall liability regime making the distinction between products and services might need a revision.

**Technical obstacles were also identified as representing a considerable barrier, because lack of interoperability entail high cost for businesses willing to access data**, and this is especially true for SMEs and start-ups. Nevertheless, in this area there is a general trend towards greater openness and interoperability, which could reduce the costs of using data on the long term. Finally, the study team pointed out that other barriers, such as the problem of attributing the right value to the data or the lack of skills of employees, can also explain why data access and reuse might not be as simple as it could be for start-ups and SMEs.

### **3 - Presentation of issues faced by SMEs & Start-ups**

Mr. Oliver Gruhn (from Digital SMEs) explained that digital SMEs are not a monolithic group of companies facing the same issues and obstacles. Instead, digital SMEs can be classified into two main categories with different characteristics and needs: on the one hand, the enablers or providers of technologies and, on the other, technology users. Currently, most of businesses use data to optimise their processes and improve their existing services and products rather than for inventing new business models and disrupting the market through innovative solutions. There is a

risk in this respect, as European business found themselves lagging behind in the first digital revolution led by exchange of personal data through platforms (which are mostly US based). Therefore, **Europe needs to develop and invest in platforms for exchanging non-personal data** and pave the way towards more innovative business models built on these premises.

When it comes to the barriers that SMEs and start-ups face in the data economy, the main issue emerged so far relate to the fact that there is **a huge lack of clarity concerning who can access data, how and under which conditions**. Aiming at solving this problem, Digital SMEs would like to see the emergence of an **open market of non-personal data**, for instance through the establishment of platforms allowing both the manufacturers and the other players of the value chain to use the machine generated data. Moreover, **the terms and conditions related to the data should allow everyone to use the data more freely, in order to foster innovation**. Digital SMEs also advocates for **more openness and documentation of APIs in order to facilitate access to data** and limit its concentration. It was also noted that the General Data Protection Regulation will have an impact on all businesses and a correct implementation of these rules must be ensured to make the most out of the data economy.

Mr. Lenard Koschwitz (from Alliance for Start-ups) pointed out that accumulation of data does not directly provide power. Instead, **what matters in the data economy is both to have proper data, and to know how to use that data**. From the experience of Alliance for Start-ups, **the key issue is that, in some cases, data is not made available at all**. Moreover, **very often start-ups do not have the same bargaining power that bigger companies might have**. This could lead to a struggle for start-ups which try to keep transaction costs as low as possible. Ultimately this could also lead to the emergence of cases of abuse of dominant position. In this respect, even in the financial sector where the Payment Service Directive 2 should have substantially helped start-ups and innovative businesses, there was a strong influence of incumbents on the drafting of the legislation which did not completely lead to the results expected by smaller players in terms of opening of the market and market disruption.

Reacting to these presentations, stakeholders from the Alliance for the Freedom of Car Repair in the EU (AFCAR) reiterated that, in the automotive sector, the rules on access to data have been dictated by data holders and incumbents mainly. Moreover, one of AFCAR's members, FIGIEFA, represented by Ms. Silvie Gotzen, considered **that the sector matters more than the size of companies when it comes to access to data and data economy..** Therefore, **this association asks for hard, sectoral regulation that would guarantee access to data to all car repairers who need it.**

A representative from the energy sector explained that this also applies to the energy sector. Indeed, the incumbent companies which are in control of the electricity networks create the rules for access to the infrastructure, which might entail barriers and problems for SMEs willing to access and reuse the data. Nonetheless, **not all stakeholders in the room agreed on defining the question of access to data as a sectorial issue mainly**. Some in fact argued **that in the data economy, barriers between sectors are meaningless** and the most value can be extracted from

aggregating data coming from different sources and different sectors. Other attendees suggested that competition law could help solving the problem of access to data when this relates to the abuse of dominant position of an incumbent. Moreover, some start-ups advocated for more legal certainty around data access and reuse and a reduction of legal costs, through for instance the establishment of a network of pro bono lawyers helping innovative businesses.

Mr. Staudenmayer summarised this debate by pointing at the **two main cleavages emerging**: one related to the possible need of developing general or sector specific measures and the second concerning the possible use of soft or hard law. Following this, he asked the stakeholders to illustrate examples of specific problems and to elaborate on these two cleavages based on their experience.

From the aviation perspective, **a representative from Airbus expressed its support for the development of soft measures, like guidance or model contract terms, rather than hard legislative measures.** This position is linked to the international dimension of the aviation sector which can only thrive if there is a level playing field at the global stage. This means that specific European legislation would not help Airbus as it would impose more burden on European players vis-a-vis non-European companies and would therefore reduce Airbus' competitiveness worldwide.

Mr. Koschwitz (from Alliance for Start-ups) argued that although he did not have any real substantive proof that there is an overall structural problem accessing data, he had identified issues in some cases, the majority of them related to copyright and to exclusive rights. He also argued against sector-focused legislation due to the lack of meaning of borders across sectors in the data economy. Nevertheless, he recognised **that there is no single golden solution and that more research on this topic is necessary before embarking in the development of concrete policy options.** For this reasons, regulatory sandboxing, policy experimentation and A/B testing could be very useful preliminary and "light" policy tools to investigate further how to help the data economy thrive.

#### **4 - Webinar**

Ms. Angela Sanguinetti, from the European Commission – DG Justice, introduced the webinar and explained the purpose of the event that is to say to collect feedback from stakeholders located outside Brussels through non-physical participation to the discussions. Ms. Sanguinetti presented the main themes explored during the morning session and briefed the attendees on the expected outcome of the afternoon's discussion before giving the floor to the speakers.

TST, a Spanish company based in Santander providing IoT solutions, quickly explained its business model and presented a project based on the reuse of public data from the Municipality of Santander. The company created a platform which helps citizens to access big quantities of energy consumption data, and, at the same time, helps the municipality in communicating and exchanging with its citizens. As emerged in the course of this project, the main barriers consisted



in **the lack of interoperability and formatting of the datasets as well as the legal uncertainties related to the access and the reuse of these data.** Moreover, the question of the definition of the border between personal and non-personal data in the energy sector was also mentioned.

Data Scouts is a data analytics company helping its clients exploiting their data in order to get to know their markets better. The barriers that they experienced so far while offering their services relate to the fact that **accessing data does not mean merely having access to an API. It also means having the right processes and legal conditions in place.** In this respect, **the discussion on data ownership is meaningless and the true questions concern access and reuse of data. Interoperability of datasets is also very important, as it drives reusability of data.**

PartsPoint gave an example of the business models of companies providing aftermarket services in the automotive sector. For this type of companies, one of the main cost driver at the moment is represented by the network costs. Good telematic systems and direct access to vehicle data would help reducing these costs. Direct access would have many positive effects: customers would benefit from price reductions; this system would reduce downtime; the product offering would be more innovative; freedom of choice would be enhanced and CO2 emissions would be reduced. Access to real time data is however a precondition for all this to happen. In this regard, **stakeholders operating in this sector mostly consider that hard regulatory measures facilitating access to data are vital** as there are currently market failures and oligopolies of data that need to be broken to provide citizens with a proper choice. **Soft policy measures would not be sufficient in this market segment.**

Following these presentations, the Commission initiated a real-time consultation, asking the participants for their opinion on several issues. When asked about their ability to access and use data necessary to conduct their business, a majority (66%) of the stakeholders replied that they do have access to data, while 20% have not thought about this issue yet. On the other hand, if asked about their ability to access data needed to develop new products and services, 70% of the participants said that they will not be able to access the data that they will need, thus confirming the contradiction emerged from the study. When asked about the problems encountered in accessing data: participants pointed out that the main problem (75%) consists in data holder refusing to share data; 60% of respondents suggested that it was difficult to conclude a contract while 40% reported that there is considerable legal uncertainty and finally 55% pointed out to other problems limiting their access and reuse of data. After commenting the result of the online survey, the European Commission reopened the floor to the debate and several points were still discussed:

- It was argued that access to public data can be also difficult for start-ups and SMEs, also due to the legal uncertainties and the lack of knowledge and skills of public employees.
- Lack of metadata or linguistic barriers can also be barriers for the access and reuse of data, especially in certain contexts.

Building on this discussion, the European Commission asked a few more online questions to the participants, especially concerning the desired solutions for all these barriers. Most of the participants to the webinar, when asked whether they would favour a more horizontal or sector based approach to the solutions, advocated for a sectorial approach although 37% of respondents also supported horizontal measures. Moreover, model contracts were considered as useful solution by 87% of respondents to the online survey held during the webinar, while 70% also supported statutory contract rules.

## 5 - Conclusions

Mr. Dirk Staudenmayer thanked the participants and then summarised the outcome of the discussion held during the workshop. **There was a difference of opinion between supporters of sectoral or of horizontal solutions.** There was clearly a strong plea for sectorial **hard legislation in coming from participants active in the aftermarket of the automotive sector. While there was no support for exclusive data rights, there had been arguments against the exclusive use of data happening in the present situation where the transfer of data is only taking place via contracts.** A certain support for soft measures such as model contract terms in order to keep transaction costs for smaller participants lower and guidance on the legal framework also emerged.