

# Promoting Data Sharing in The EU

## A Regulatory and Antitrust Perspective



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# Overview

- I. Insufficient B2B data sharing as an obstacle to the building of a European data space
- II. The strategy to facilitate B2B data sharing
- III. The data sharing intermediaries model: a primer
- IV. The data sharing intermediaries model and its interaction with competition law
- V. Conclusions

# I. Insufficient B2B data sharing as an obstacle to the building of a European data space (1/2)

## Communication: A European Strategy for Data - COM(2020) 66

- A. The (horizontal) vision : a **European data space** → A genuine single market for data where businesses can access an „almost infinite“ amount of high-quality industrial data.
  
- B. To (i) complement, (ii) adapt and (iii) implement horizontal strategy within specific sectors/thematic areas: **Sectoral data spaces** (e.g. the agricultural data space)

# I. Insufficient B2B data sharing as an obstacle to the building of a European data space (2/2)

## Communication: A European Strategy for Data - COM(2020) 66

- Lack of economic incentives
- Lack of trust as to actual compliance with contracts
- Differences in negotiating power
- Fear of misappropriation by third parties
- No legal certainty as to who can use the data and how (e.g. co-created data)

## II. The strategy to facilitate B2B data sharing

1. Harmonised framework for data sharing intermediaries

**Proposal for a Data Governance Act – COM(2020)767**

2. Granting / amending / removing substantial rights of access and use of data

**Possible Data Act – 2021**

# III. The data sharing intermediaries model: a primer (1/3)

## Data sharing intermediation service (Article 9)

- B2B data sharing intermediation
- C2B data sharing intermediation
- Through data cooperatives

## Intermediation falling out of scope (considerandum 22):

- between a **limited** number of data holders and data users (e.g. cloud service providers)
- **not** establishing a **direct relationship** between data holders and data users (e.g. data brokers)

# III. The data sharing intermediaries model: a primer (2/3)

## Notification regime (Article 10)

- Obligation to notify to the NCA of the MS where its main establishment is the intention to provide data intermediation services. **Upon notification, the provider may start.**
- Requirement of **establishment in the EU** or to have a **legal representative in the EU**.
- After notification, data sharing services can be provided in **all** Member States.

# III. The data sharing intermediaries model: a primer (3/3)

## Regulatory requirements for data sharing intermediaries (Article 11)

- **Neutrality** as regards the data exchanged (i.e. prohibition of use of such data for the intermediaries' non-intermediation activities)
- If intermediary also carries on business activities different from data sharing intermediation → **structural segregation**
- Guarantee of a **fair, transparent and non-discriminatory access** to the data sharing services for both data holders and data users, “including as regards pricing”



# IV. The data sharing intermediaries model and its interaction with competition law (1/2)

Data sharing improves market transparency.

## **GOOD TRANSPARENCY**

- Enhanced market transparency triggers enhanced efficiency
  - ✓ Diffusion of best business practices
  - ✓ Handling of unstable demand
  - ✓ Lowering switching costs
  - ✓ Etc...
- Mitigation of market failures (in some sectors: ex. insurance)
  - ✓ Adverse selection
  - ✓ Moral hazard

## **BAD TRANSPARENCY**

Turning competition into anticompetitive cooperation

In this case → Infringement of Article 101 TFEU

## IV. The data sharing intermediaries model and its interaction with competition law (2/2)

1. COM's Horizontal Co-operation Guidelines address **information, not data**.
2. Efficiency defence under Article 101 para. 3 TFEU as hitherto interpreted **could be precluded** to parties to a data exchange (e.g. unpredictability of innovation v. „*appreciable objective advantage*“ required by the CJEU - *C-56/64, Consten and Grundig v Commission, para. 13*).

# Conclusions

The introduction of a harmonised framework for data sharing intermediaries is a **step forward** towards improved B2B data sharing in the EU

**BUT**

it must be **complemented** by efforts to improve legal clarity as to when data sharing qualifies as anticompetitive information sharing.

## RECOMMENDATIONS

- Update of the Horizontal Co-operation Guidelines, already announced in *A European strategy for data*, COM(2020) 66
- Notices of informal guidance

# Thank you for your attention

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