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EDRi's response to BEREC's consultation on the data economy

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Contents

INTRODUCTION AND OBJECTIVES

European Digital Rights (EDRi) is an association of civil and human rights organisations from across Europe. We defend rights and freedoms in the digital environment, including the rights to privacy, personal data protection and the freedom to seek, receive and impart information.

We welcome this opportunity to respond to BEREC's consultation on the data economy. In our response, we follow the structure of the consultation and omit BEREC's text in occasions for brevity purposes.

Please provide the name (and website, if available) of your organisation, as well as the contact information (name, e-mail and/or phone number) for a contact person. In the case of personal contributions, please provide your name, nationality and contact information.

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Please indicate the place(s) of operation of your organisation and the sector(s) in which your organisation mainly operates. Please explain how you are involved in the data economy.

Place of operation, sector(s), involvement in the data economy
Digital Civil and Human Rights organisation (NGO) Place of operation: Europe. Involvement on the data economy: EDRi has over 15 years of experience in advising policy-makers and other stakeholders about human digital rights. We have expertise in particular on the implications of the data economy for people's rights to privacy, personal data protection and freedom of expression and opinion.

1. GENERAL ISSUES

Question 1.1:

The term 'Data Economy' tries to capture the increase in the availability of data, the related business opportunities and the (potential) social value of the insights that can be generated. According to the EC report "Building a European Data Economy"[1], the *"data economy measures the overall impacts of the data market – i.e. the marketplace where digital data is exchanged as products or services derived from raw data – on the economy as a whole. It involves the generation, collection, storage, processing, distribution, analysis, elaboration, delivery, and exploitation of data enabled by digital technologies".*

Do you agree on this general definition of the Data Economy? If you have an alternative definition or any comments on the proposed definition, please provide details below.

EDRi's answer to question 1.1

It would have been more advisable to frame this question differently, as it is important for BEREC to explain why it thinks that this definition (or even the data economy as a whole) is relevant for its work and what elements of regulation of what markets (there is not a single "marketplace") are covered by the specific legal tasks accorded to it by relevant legislation that are not covered by the activities of national data protection authorities, the European Data Protection Board (EDPB), national competition authorities or the European Commission.

BEREC's view of the legal framework is not clear, its view on its role in the regulatory framework is not clear and its definition of what markets it may be referring to is not clear. To answer the question directly:

1. There is no single "data market", nor is there even a unified concept of "data" from a legal perspective.

2. The question fails to distinguish between personal and non-personal data and, therefore, between data that is covered by the fundamental rights to privacy and data protection and other data.

3. The concept of "raw data" in Communication COM(2017) 9 final is inconsistent with both the 1995/46 Directive and the General Data Protection Regulation (GDPR) as it assumes that recording data is not processing of that data ("data that has not been processed or changed since its recording").

As an overarching objective for European Union policies on the data economy, there should be a distinct focus on preventing personal data from becoming a currency or commodity that can be traded for services. BEREC has a legal obligation to ensure that its actions do not breach the Charter of Fundamental Rights, including the respect for private and family life and protection of personal data.

[1]Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Building a European Data Economy" {SWD(2017) 2 final. Brussels, 10.1.2017 COM(2017) 9 final

As emphasised by the European Data Protection Board in its guidance on consent (WP259.rev01), Article 7(4) of the GDPR "[..] seeks to ensure that the purpose of personal data processing is not disguised nor bundled with the provision of a contract of a service for which these personal data are not necessary. In doing so, the GDPR ensures that the processing of personal data for which consent is sought cannot become directly or indirectly the counter-performance of a contract."

This overarching objective is not an obstacle to building a European data economy. On the contrary, it is instrumental in ensuring that the data economy provides direct benefits the European citizens and that the fundamental rights of citizens are respected. For citizens, there is a clear distinction between services that process personal data for purposes that the citizens find beneficial and want (and for which they would freely give consent), and services that process personal data harvested from citizens (perhaps with coerced consent) solely for the benefit of the companies doing the processing. The targeted advertising operations of the US "tech giants" (e.g. Google and Facebook) is an obvious example of the latter.

Question 1.2:

Data is an essential input to many newly emerging services. However, it is hard to assess the individual value of a single piece of data. It might be also considered that, in the context of the data economy, a single piece of data has a negligible value by itself and, therefore, data will start generating added value only when a significant amount of information is processed and structured in a meaningful manner. Insights derived from data, and thus its value, depend on the quality and reliability of data, as well as its ability to be combined with other data. Inherently, larger amounts of data tend to allow more far-reaching insights. The marginal cost of collecting digital data can also be particularly low (if not negligible); therefore, substantial economies of scale can be present. Moreover, the utilisation of data can lead to the provision of better services, and thereby increase the number of users, which in turn can generate even more data to be collected. Thus, the data economy is often associated with strong network effects, even sometimes leading to "winner–takes-all" situations.

Data has sometimes been referred to as the "new oil", but a key difference is that data is non-rivalrous in consumption. That is, the same data about a consumer can be made available to many different companies, rather than only being used once: e.g. data on date of birth, gender, home address, telephone number, credit card details, etc. Even though data is essentially non-rivalrous, it cannot be regarded as a pure public good in economic terms because people or companies may be excluded from using it. For example, some types of data may be specific to a particular platform and can also be made exclusive through commercial or technical means.

Data is not a homogenous good and there are different types of "data" (e.g. personal and non-personal). Different types of data will in turn have different values to different types of businesses, as the value of data depends on its context and is affected by four key characteristics: volume, velocity, variety and veracity. For instance, the volume of data may be important when looking to establish patterns in consumer behaviour in aggregate.

Conversely, the velocity of data – how quickly its usefulness depreciates – is more relevant to services that promote products based on what users are currently searching for.

In your opinion, what are the most important characteristics of data to be taken into account when analysing its economic properties? Are there elements missing in the previous list?

EDRi's answer to question 1.2

Understandably, the "chapeau" of this question is highly simplistic. Data is sometimes rivalrous, sometimes not, sometimes it depreciates quickly, sometimes it does not, sometimes it has "winner-takes-all" effects, and sometimes not. In addition, we urge against dealing with "data" from a "economic properties" perspective.

BEREC's specific legal responsibilities are the most important point to keep in mind. In this regard, it is not the characteristics of the data that is important, but rather its impact on competition in electronic communications markets.

Data that is generated can either be directly personal data (e.g. name, IP address, etc), inferred personal data (e.g. log-on and log-off times that from which, for example, inferred mental and physical health data can be generated), personal data tied to communications metadata and non-personal communications data.

From an economic perspective, data has particular characteristics that make regulation under traditional models very difficult. This is clear from the Whatsapp takeover by Facebook, for example. Its value for Facebook resided primarily in the value of merging data, rather than the simple monetary value of the company. It is fundamentally incorrect to consider data to be "non-rivalrous" - the scarcity is not generated by the raw data, but the power to control, merge and infer.

Traditional competition law was unable to address this issue in the Facebook/Whatsapp merger and it remains to be seen if the GDPR will be able to help in similar circumstances. We encourage BEREC to work together with competition and data protection authorities to complement each other's work. However, we urge caution in BEREC's work in this area. BEREC should focus not bypass its legal functions.

Finally, the analogy of "data" as the new oil fits perfectly in a climate change disaster, a flood of data breaches and data exploitation. Because of the multiple ways in which personal data can be abused and thereby pollute our societies and our trust in online services and products, we encourage BEREC to take a very cautious approach to "data" and, as mentioned above, clearly differentiate between personal and non-personal data.

Question 1.3:

Different types of data can be distinguished and a taxonomy of data is useful to structure the analysis of the data economy. For example, one common distinction is that between personal and non-personal data. BEREC would be interested in respondents' input regarding more detailed or alternative classifications that can be made, especially those that are more relevant in relation to the analysis to be done by BEREC.

What classification of data do you consider to be most relevant (in the context of BEREC work on the data economy)? Please elaborate below.

EDRi's answer to question 1.3

We would argue that this question is entirely unnecessary. It is not BEREC's role to classify data, but to ensure the effective functioning of electronic communications markets. If it does not matter, from an existing BEREC perspective, if a communication is IP or PSTN, encrypted or not, voice or text, then the nature of the data should not matter in a market that is relying on data.

Question 1.4:

The ability to access data may be important in terms of reinforcing existing network effects in certain circumstances. As a result, there may be concerns about the exercise of market power in online markets and the ability of firms with market power to foreclose or restrict competition. For instance, concerns could include:

- exclusive control of certain data that creates a significant barrier to entry;
- leverage of market power into adjacent markets;
- lack of competition over non-price features, e.g. privacy.

Which kind of competition concerns are likely to be of relevance in the data economy?

EDRi's answer to question 1.4

The three concerns listed are key. We believe that lack of competition (indeed, the near impossibility of competition) over non-price features is the most important of the three, followed by the leverage of market power and then exclusive control acting a barrier to entry (which covers a range of different topics).

Question 1.5:

Do you think that competition issues regarding the power of market data can be sufficiently addressed by current competition law and the upcoming regulatory framework (EECC, GDPR, e-Privacy Regulation, PSI Directive, etc.)?

EDRi's answer to question 1.5

It is not clear what "the power of market data" may mean. In any event, it is far too early to give a clear answer to this question. As we comment in our answer to question 3.6, the lack of trust in online services by citizens should be one of the highest issue for concern for anyone involved in these markets. Certainly, a vigorously implemented GDPR and ePrivacy Regulation would serve to greatly reduce the problems we see in the market. In addition, we refer BEREC to comments made by our member Privacy International in relation to competition and data for further input:

https://privacyinternational.org/explainer/2293/competition-and-data

2. ECS AS AN ENABLING FACTOR FOR THE DATA ECONOMY

Electronic communications services (ECS) are an enabling factor for the data economy, as they provide the infrastructure upon which the data economy is developing. For data to be collected and distributed everywhere, networks must be ubiquitous, reliable, interoperable, secured and offer high speed transmission. Therefore, the development of ECS should both directly and indirectly support the growth of the data economy.

ECS providers can also develop innovations and new services that will allow them to play a new role in the data economy, going further than being the infrastructure on which the data economy relies. Some telecommunications network providers already offer services such as cloud storage and analytics solutions, which actors in the data economy can use to develop their businesses, but telecommunications network providers can also directly participate in the data economy by developing data-based services of their own. For example, they may offer mobile network location-based services. Moreover, with the development of the Internet of Things (IoT), ECS providers are enabling connectivity to billions of devices that can collect data.

This creates an opportunity for ECS providers to play a major role in the collection and analysis of a large volume of data. With the following set of questions, BEREC intends to identify the services and innovations provided by ECS providers that contribute to the development of the data economy.

Question 2.1:

Services provided by network operators can be assessed based on various parameters (latency, bandwidth, reliability, security, ubiquity, etc.). Considering that the development of the data economy is supported among others by the electronic communication networks, which parameters are the most relevant for the development of the data economy in your view?

EDRi's answer to question 2.1

Competition can be engendered by more control being asserted by individuals over their personal data. Therefore, control and transparency for individuals. This is particularly important in the handset market, particular when an OS provider is active across multiple markets and it is of a near-monopolistic nature in several of those markets, as it is currently the case.

Question 2.2:

What more can ECS providers do to help the development of the data economy? Conversely, do you identify any bottlenecks for the development of the data economy that are related to ECS providers and, if so, what, in your view, could be done to address this issue?

EDRi's answer to question 2.2

This question does not appear to fall within BEREC's competence.

Question 2.3:

What kind of evolution do you foresee regarding the role of ECS providers in the value chain? For example, with regard to the development of the Internet of Things or mobile network location-based services, could new revenue models for ECS providers emerge based on the data economy?

Answer to question 2.3:

Mobile ECS providers process a large amount of location data in the context of providing the electronic communications services. Location-based services using this data could generate additional revenue for ECS providers, but in line with the provisions for value-added services in the current ePrivacy Directive, such processing should only be allowed with freely given consent of the data subject (end-user). The location data generated in the context of providing mobile electronic communications services allows very precise profiles to be drawn regarding the private lives of the persons concerned, as established in the jurisprudence of the Court of Justice of the European Union. Only consent of the data subject, of course combined with state of the art technical data protection measures and safeguards such as pseudonymisation, can ensure that the benefits of the value-added service using location data outweigh the risks to the fundamental rights and freedoms of the data subject.

3. IMPACT OF THE DATA ECONOMY ON COMPETITION IN ECS MARKETS

The provision of electronic communication networks and services generates a significant amount of data that, in some cases, cannot be obtained by other sources. The availability of processing this data might create some opportunities for telecommunication operators. For instance, data can potentially be used to improve the services provided to the users, gain internal efficiencies, deliver innovative services, create new business models or, in the cases and conditions allowed by privacy regulation, commercialise this asset.

A distinction can be made between network or infrastructure data on the one hand and content or usage data on the other hand.

Data related to the network itself are of great relevance in optimising the network operations of telecommunications operators[2]. Analysis of this type of data can help to make network operations more efficient.

Telecommunications operators can also benefit from the analysis of usage data. For example, customer loyalty and churn can be examined with data analytics methodologies. The aim could be, for example, to identify the factors affecting churn and, based on these findings, take action to reduce it over time. Another area where data analytics could be of use is fraud detection. Consumers could also benefit from innovative products and services based on data collection and analysis. The development and implementation of smart home services, for example, could improve safety, energy efficiency and comfort.

The growing importance of data collection and analysis may also affect competition in the telecommunications sector. For example, ECS providers with a large number of customers

[2]For example, the analysis of topography data for planning network deployment can help increase the range and transmission capacity of mobile radio base stations.

could possibly benefit from economies of scale in terms of data collection and analysis. Moreover, some ECS providers are vertically integrated across different levels of the value chain and might thus benefit from economies of scope, as they act both as network operators in the fixed or mobile network and as service providers at wholesale and retail level. A telecommunications company with a broad product portfolio, for instance encompassing fixed network services, mobile services, IPTV or even Smart Home services, can collect significantly more data than those providing just stand-alone services, which it can then use to better serve their customers and optimise their business operations while reducing costs. Overall, having access to a wide variety of data may facilitate innovation or optimisation when combined with data analytics techniques. ECS and data services (such as cloud computing) may also be combined to make new service proposals that could affect competition dynamics.

With regard to mobile services, it should be noted that network operators have exclusive access to additional network data compared to resellers or MVNOs. Therefore, a question may arise about whether network operators are able to extend their advantages from (exclusive) data collection and analysis to other areas.

Instant messaging services and voice over IP (VoIP) services have been widely adopted by consumers and are increasingly competing with traditional telecommunications services, such as SMS or voice telephony. The Privacy and Electronic Communications Directive (2002/58/EC) established ECS sector-specific data-protection rules. This Directive will be replaced by the EU e-Privacy Regulation, which will then apply directly in the member states and will not need to be transposed into national law.

Question 3.1:

What is the significance of data for the telecommunications value chain today? How would you expect this significance to change in the future?

EDRi's answer to question 3.1

This question is too multi-sided to be dealt with in one response. With regard to personal data, it is important to recall the principles and safeguards repeatedly stated by the Court of Justice of the European Union, most notably in the Digital Rights Ireland (293/12) and Tele2 (203/15) cases. With regard to non-personal data, this falls outside our scope of work.

Question 3.2:

How are ECS providers making use of (anonymised) data? Are they buying/selling it from/to third parties? Please elaborate.

EDRi's answer to question 3.2

We would like to stress the limitations of the notion of "anonymised" data, for which there is rich academic research that should be taken into account.

Question 3.3:

Are you aware of cross-sectoral initiatives carried out by ECS providers with regard to data analytics? Please provide examples of (big) data analytics projects/initiatives carried out by ECS providers[3].

EDRi's answer to question 3.3

No.

Question 3.4:

What is your view on how the use of data (including the combination of data services and ECS) may change the competition dynamics among ECS providers? Do you see any risk of leveraging market power, or conglomerate effects caused by the use of data in the telecommunications sector? If so, should the methodology to assess market power be reviewed to further consider access to data?

EDRi's answer to question 3.4

This work needs to be undertaken in cooperation with competition authorities. The key issues that need to be addressed are the failure of competition in services that rely on exploitation of personal data and the market dynamics created by merging of data sets. We fear that current assumptions around the functioning of traditional markets frequently lead to inappropriate decisions being made by relevant authorities.

Question 3.5:

Are there cases in which exclusive ownership of data or other potential hurdles related to data restrict competition or the development of new telecommunications business models? Please provide examples. Below are some specific examples of cases that may be of interest to BEREC:

- **Do you see any competitive differences with regard to data collection and analysis between MVNOs and MNOs?**
- **Do you see any competitive differences with regard to data collection and analysis between fixed line infrastructure operators and retailers that rely on wholesale access?**
- **Do you see any competitive differences with regard to data collection and analysis between "traditional" ECS and OTT-0/OTT-1 providers?**

Answer to question 3.5

No comment.

Question 3.6:

What opportunities and/or risks do you see for consumers linked to an increase in data collection and analysis in the telecommunications sector?

[3]As defined in the EECC, including providers of OTT-0 or OTT-1 services.

EDRi's answer to question 3.6

As pointed out in the Tele2 Ruling of the CJEU, telecommunications metadata "allow very precise conclusions to be drawn concerning the the private lives of the persons whose data has been retained, such as everyday habits, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them" (Paragraph 99).

These insights continue to grow, as more and more data sets can be merged and new assumptions can be made. For example, a middle-aged person's log-on and log-off times could indicate disrupted sleep patterns, which is a risk factor for dementia, while disrupted sleep patterns in young people is a risk factor for poor educational performance and social problems. Similarly, location data indicating proximity to a busy road is a risk factor for certain respiratory conditions.

Both the Eurobarometer and the US NTIA have shown that concerns among individuals is leading to serious concerns and measurable damage to the online economy. https://www.ntia.doc.gov/blog/2016/lack-trust-internet-privacy-and-security-may-deter-economic-and-other-online-activities

https://www.ntia.doc.gov/blog/2018/most-americans-continue-have-privacy-and-security-concerns-ntia-survey-finds

We mainly see risks for consumers if ECS providers are allowed to process electronic communications data without consent for purposes not directly related to the provision of the electronic communications service. Processing without consent will invariably be done for purposes that solely benefit the ECS provider, perhaps even to the detriment of the customers.

To illustrate with an example, the Danish EDRi member IT-Pol has looked at a pilot study done in 2011 by a large Danish mobile operator with further processing of metadata (call details records) for the purpose of constructing social graphs of its customers and getting a better understanding of the interactions between customers. The general interest of the provider was churn prediction and prevention. However, the provider was specifically interested in identifying customers classified as "ambassadors", meaning customers with a substantial influence on their friends, so that "contagious churn" could be better prevented (assumption: if an "ambassador" leaves the provider, his/her friends are more likely to leave as well).

Besides the general creepiness of a company building social graphs of its customers, irrespective of the purpose, there is a clear competition issue here. If the provider can determine a small group of customers who have a large influence on their friends, the provider can target this small group with a good offer, while charging higher prices from customers that have no influence on their friends. Identifying the social network of an "ambassador" also means that the provider can target this particular group with a good offer after the "ambassador" has left, rather than offering attractive/competitive prices/terms to all customers. In summary, this type of behavioural profiling will only lead to more favourable terms or lower prices for a small group of customers.

The 2011 project never went beyond the pilot study phase because of intervention by the Danish NRA (the NRA ruled that under the ePrivacy Directive, the profiling could only be done with consent of the end-users).

(note: The description above is based on information obtained by IT-Pol in a Freedom of Information request with the Danish NRA.)

4. NRAs' ECS REGULATORY ACTIVITY IN THE CONTEXT OF THE DATA ECONOMY

The emergence of the data economy is characterised not only by an increase in the quantity of data available, but also by the availability and use of data analysis tools (e.g. Apache Hadoop, SAP HANA, etc.) that are capable of analysing rapid real-time flows of data. These new data and tools can greatly influence how NRAs take regulatory decisions.

The use of data in increased quantity and quality by NRAs, combined with new analytical tools, may have the potential to significantly improve the quality of regulatory decisions in various aspects (e.g. consumer protection and empowerment, fostering competition and investment, monitoring the quality of services and network deployment/coverage and the assessment of market power).

Furthermore, in the context of an evolution towards an open government data ecosystem, defined by the re-use of public sector information (PSI) Directive[4], NRAs could have a significant role in contributing to the economic and social benefits that may be possible. In fact, the electronic communications sector alone is responsible for vast amounts of data being generated/collected and the nature of such information may allow for significant benefits beyond its use for strict regulatory purposes.

This section therefore addresses the dimensions of the relationship between NRAs and the data economy in the context of NRAs' duties and responsibilities, as established by the new European Electronic Communications Code (EECC) and the proposal for a revised BEREC Regulation.

In adapting to the data economy, NRAs should consider how to leverage data in order to enhance the quality of their work, their decisions and the accuracy of regulatory analysis (e.g. market definitions or market power assessments) as a step towards "data-driven" regulation (increased use of available relevant data).

With the increasing volumes of data generated by customers and operators, the quality of data used by NRAs – not only existing internal data but also data that can be collected from operators (respecting existing principles, such as proportionality) – can also be improved. Additionally, data collected and generated by NRAs (when not subject to confidentiality clauses and when their publication is allowed by national legislation), may also be useful for different actors in the digital economy.

[4]Directive 2013/37/EU of the European Parliament and the Council of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information, as well as proposal for a directive of the European Parliament and of the Council on the re-use of public sector information (Brussels, 25.4.2018). COM(2018) 234 final 2018/0111 (COD)

Question 4.1:

What is your view on how NRAs can use data to better perform their duties (e.g. consumer protection, fostering competition, monitoring the quality of services and network deployment/coverage, the assessment of market power…)? Can the use of digital tools improve the capacity for action? If that is the case, please provide further explanation, as well as any proposals you may have.

EDRi's answer to question 4.1

Data collection should be approached with caution. As we recommended recently, such data collection should:

- not lead to more personal data being collected or generated by operators than otherwise would have been the case;

- aggregate and depersonalise all personal data to the greatest extent technically possible;

- ensure effective cooperation with competition and data protection authorities.

Question 4.2:

What kind of data, or which specific data, should NRAs collect and publish which could facilitate the development of the data economy?

EDRi's answer to question 4.2

See comments to question above.

Question 4.3:

Under the new EECC (art. 22) NRAs shall conduct surveys on NGN deployment, including relevant information on operators' intentions to invest (planned network deployments, upgrades and extensions) and QoS parameters.

When this information is not available in the market, NRAs shall also make data from the geographical survey available and easily accessible to allow for its re-use (when not subject to confidentiality). Such data may be particularly useful for end-users as it can support their choices (e.g. allowing them to check for connectivity options in different areas).

Regarding this provision, which relevant data (and to what level of detail) should NRAs collect (e.g. as QoS metrics) and which techniques could be applied, both in collecting data and in making it available to end-users?

Answer to question 4.3

No comment.

Question 4.4:

The PSI Directive set the framework for the re-use of public sector information, as part of an open data policy, recognising it as a major opportunity to stimulate innovation, economic growth and social engagement, adding value to users and the society in general.

Along the same line, the draft reviewed BEREC Regulation[5] includes a mandate to BEREC to enforce an open data policy. According to this provision, BEREC shall "*promote the modernisation, coordination and standardisation of the collection of data by NRAs. Without prejudice to intellectual property rights, personal data protection rules and the required level of confidentiality, this data shall be made available to the public in an open, reusable and machine-readable format on the BEREC website and the European data portal*."

Intensified by digitisation, the amount (and types) of public data has vastly increased. Both businesses and citizens now expect data within the scope of the PSI Directive to be online, readily available under non-restrictive conditions and easy to understand.

How can NRAs and BEREC contribute to increasing the availability of data in the spirit of the PSI Directive and the reviewed Regulation? In your opinion, what specific data should NRAs and BEREC publish (e.g. QoS indicators, consumer complaints, coverage, usage statistics)?

EDRi's answer to question 4.4

We refer to our detailed comments submitted last year:

https://epicenter.works/sites/default/files/berecstakeholdermeeting2017-03.pdf

5. NRAs' EXPERIENCE APPLIED TO THE CASE OF THE DATA ECONOMY

The data economy is governed by different regulatory instruments that address various aspects, such as the protection of personal data (the General Data Protection Regulation), re-use of public sector information (the PSI Directive), guidance on private sector data sharing, the free flow of non-personal data and e-Privacy, among other issues.

However, the data economy and regulations on access to data are in general not in the regulatory scope of NRAs in the electronic communications sector. This does not necessarily imply that there is no role for NRAs with regard to issues in the data economy. As addressed in previous sections of this public consultation, many sectors are involved in the data economy. In this respect data economy concerns the economy as a whole. The impact of the data economy on competition dynamics for ECSs should be considered and ECSs are a key enabling factor for the data economy.

For their part, NRAs have gained considerable experience from monitoring ECS markets, analysing them and designing remedies to encourage competition and investment. Although different to data markets, there could nonetheless be synergies to be harnessed from NRAs' experience gained on ECS markets which may be useful in the context of encouraging competition and investment in the data economy.

In this context, BEREC is interested in areas where the experience of NRAs could be useful in addressing potential issues in the development of a data-based society in the future. As of

[5]Article 2 of the Proposal for a Regulation of the European Parliament and of the Council establishing the Body of European Regulators for Electronic Communications. Inter-institutional File: 2016/0286 (COD).

today, powers on the data economy for NRAs are very limited as they are focused on ECS markets, however it can be useful for BEREC to envisage potential future areas where NRAs could share their experience to help the development of the data economy, such as:

- Monitoring the evolution of the data markets
- Encouraging the development of wholesale markets for access to data.
- Fostering interoperability obligations (to maximize network effects while weakening winner takes all effects) and data portability (e.g. oriented towards reducing consumers' switching costs when moving from one digital ecosystem to another)
- Fostering transparency and non-discrimination (concerning either just the dominant players or all players).

BEREC is therefore interested in collecting views from all actors on the potential need for the above mentioned tools in the context of the data economy. This could be in the short, medium and/or long-term, with the aim of addressing any potential bottlenecks for investment and competition that may not be sufficiently covered under ex-post competition law.

Question 5.1:

Do you consider the competitive conditions in data economy-related markets are optimal for the development of the data economy? For example, do you consider that there are efficient data-sharing mechanisms in place?

EDRi's answer to question 5.1

This question is based on a false premise that maximisation of data use is always the best and preferable way of encouraging markets and weakening "winner takes all" effects.

With regard to personal data, maximising data use creates significant privacy and security risks. Indeed, it is excessive data use that is undermining market forces, trust and innovation in the online market. This has led to a "law of diminishing returns" for all market players except (so far) big tech monopolies.

We urge BEREC therefore, to take a more nuanced approach in relation to this question and also to ensure full cooperation with data protection authorities, in order to facilitate competition, innovation and trust.

Question 5.2:

If you consider that the competitive conditions in data economy-related markets could be improved, which of the potential tools measures (along the lines of the ones listed in the introduction to this section) would, in your view, be appropriate to foster the development of the data economy? Please also explain if you consider such tools to be ineffective or if you consider that they could even harm the data economy's development.

EDRi's answer to question 5.2

It is crucial for the economics behind the "winner-takes-all" problem to be fully understood. Only on this basis can a competitive and sustainable market be developed. As mentioned above, it is crucial that NRAs and competition authorities fully grasp the anti-competitive and anti-consumer logic behind and consequences of mergers such as Facebook/Whatsapp .

Paradoxically, in relation to personal data, more data can lead to a smaller market. A focus solely on generating more personal data, sharing more personal data, more interoperable personal data, etc, will have counterproductive effects.

Question 5.3:

Do you see the need for closer cooperation between the NRAs (that have a regulatory focus on ECSs) and other regulatory bodies, such as data protection authorities, competition law authorities (National Competition Authorities, which usually focus on ex-post regulation), consumer protection authorities or other bodies, on issues related to the data economy (such as data portability, market power assessments, merger control, rules on the treatment and sharing of data, etc.)? Please specify the area of potential collaboration, the roles that could be played by NRAs, within their competence, and which regulatory body or institution to collaborate with.

EDRi's answer to question 5.3

Collaboration amongst authorities is positive. However, since it is not clear what type of collaboration (formal, informal) and the goals it will aim to achieve we cannot provide an adequate answer.

Question 5.4:

In relation to data markets, which are the key issues that should be taken into account when assessing competition dynamics? What should be the geographical scope for data markets (national/European/international/other) and what drivers should be taken into account?

EDRi's answer to question 5.3

Regarding personal data, the European scope has been defined for decades. Regarding non-personal data, we have no opinion.

Question 5.5:

In general, how can NRAs contribute to address competition/regulatory issues in order to foster the transition to a data economy?

EDRi's answer to question 5.5

It is crucial for NRAs to clearly distinguish between different types of data – infrastructure data, non-personal data and personal data (in particular the subset of personal data that is inferred personal data).

Each of these markets works differently and must be approached differently. Regulation of each market has particular challenges and, done right, would be very different from the others.

Faced with the rapacious, short-sighted and anti-competitive data collection of data brokers and internet giants, there is an understandable, but equally short-sighted, drive from traditional telecoms operators to enter into these "markets" as well. Building an anti-competitive market among network operators to compete in an anti-competitive way will not deliver benefits for the market nor for individuals.

BEREC should therefore focus on its core competence – ensuring competition and well-being of individuals – rather than "fostering" markets which are unsustainable.

Question 5.6:

Is there any other issue in relation to the application of NRAs' experience to the data economy that you would like to add?

Answer to question 5.6

No comment.

6. OTHER ISSUES

This section covers any other issues that have not been addressed in previous sections/questions and which stakeholders consider to be of potential interest to NRAs in the context of the report that will be prepared by BEREC.

Question 6.1:

Is there any additional issue not included in previous questions that you would like to address? For the sake of classification, please, differentiate between:

1) Issues in relation to ECS regulation under the powers for NRAs in the new Electronic Communications Code;

2) Areas where NRAs or BEREC could collaborate with other public bodies or organisations in the context of the data economy when applying existing regulation for the data economy; and

3) Any additional issue relevant for NRAs that is not addressed in the existing regulation applicable to ECSs and/or the data economy.

Answer to question 6.1
No comment.