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CHAPITRE 10

Data sharing by private actors as an avenue for more sustainability

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Introduction

1. Data's societal value. While data is often presented as the new oil of the European data economy, it would be reductive to solely consider the potential economic value of data, without reflecting on its societal value.² Indeed, as outlined in the European Commission's *Strategy for data*, "making more data available and improving the way in which data is used is essential for tackling societal, climate and environment-related challenges, contributing to healthier, more prosperous and more sustainable societies".³

¹ This chapter was written in the context of the Digital Legal Studies research initiative, which is funded through the Law Sector Plan of the Dutch Ministry of Education, Culture and Science (OCW). At the time of the drafting, I was a Post-doctoral researcher at the Tilburg Institute for Law, Technology and Society (TILT) and the Tilburg Law and Economics Center (TILEC) of Tilburg University; and Lecturer at the Université de Namur. At the time of publication, I work as a Case Handler at the European Commission – DG Competition. The views and opinions expressed herein are personal and do not necessarily reflect those of the European Commission or other EU institutions.

² On the status of data, see Chapter 12 of Marie-Sophie DE CLIPPELE.

³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "A European strategy for data", 19 February 2020, COM(2020) 66, p. 3. On the multiple rationales for

This societal rationale for data sharing seems to receive a large adherence from all categories of actors, as 91.5 % of the respondents to the Commission's public consultation on its *Strategy for data* agreed that more data that are useful for the common good (e.g. for improving mobility, reducing energy consumption and/or contributing to a greener society) should be made accessible.⁴ Importantly, it was also acknowledged that not only public sector data, but also private sector data, can make a significant contribution in this regard.⁵

In contrast, this implies that a lack of data sharing by private actors will not only create economic challenges, but also societal challenges. Indeed, as the societal value of the data held (exclusively) by some actors is enormous, allowing (some) third parties to use this data could generate immense scientific, environmental or mobility benefits for our society.⁶ Accordingly, a just, fair and equal access to (some) of the data that these actors hold could be precious to avoid socio-economic disparities and inequalities of opportunity.⁷

2. Data sharing by private actors can contribute to sustainability.

Therefore, this chapter will argue that data sharing by private actors can significantly contribute to the realisation of sustainability objectives. While the concept of sustainability (or sustainable development) can be quite vague⁸, we suggest to rely on the definition provided in the "Brundtland Report"⁹, which is recognised in many legal rules at the European and the national level. Namely, sustainability is about meeting "the needs of the present without compromising the ability of future generations to meet their own needs".¹⁰ Meeting those needs implies limits, which are not absolute, but rather "limitations imposed by the present state of

data sharing, see T. TOMBAL, *Imposing Data Sharing Among Private Actors: A Tale of Evolving Balances*, Alphen aan den Rijn, Wolters Kluwer (Innovation Law Series n° 48), 2022; T. TOMBAL, "The rationale for compulsory B2B data sharing and its underlying balancing exercises", *R.D.T.I.*, 2021/3, n° 84, p. 5-26.

⁴ European Commission, "Summary Report on the open public consultation on the European strategy for data", 24 July 2020, available at <https://ec.europa.eu/digital-single-market/en/news/summary-report-public-consultation-european-strategy-data>, p. 2.

⁵ See Communication from the Commission, "A European strategy for data", *op. cit.*, p. 6.

⁶ J. SHKABATUR, "The Global Commons of Data", *Stanford Technology Law Review*, 2019, Vol. 22, p. 383.

⁷ *Ibid.*, p. 401-402.

⁸ For a more extensive discussion of this concept, see Chapter 1.

⁹ United Nations, "Our Common Future", *Report of the World Commission on Environment and Development*, 1987, available at <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>.

¹⁰ *Ibid.*, p. 15.

technology and social organization on environmental resources and by the ability of the biosphere to absorb the effects of human activities".¹¹ Said otherwise, achieving sustainability means finding a balance between economic growth, societal justice and environmental protection, while taking into account both present and future needs.¹² The United Nations' seventeen Sustainable Development Goals (SDGs) further give substance to this concept.¹³

The aim of this chapter is to outline and analyse the existing or proposed European initiatives that can support data sharing by private actors for sustainability purposes. Such initiatives could either be sectoral or could have a more general horizontal scope. While sector-specific legislations have the advantage of being much more targeted and adapted to the sector's needs, this must be balanced with the non-rivalrous and general-purpose nature of data, which implies that it could be re-used for completely different purposes in another sector.¹⁴ In fact, such a sectoral limitation seems especially unwarranted if the data sharing legislation pursues sustainability objectives, as cross-sectoral re-use could generate significant societal value. Therefore, this chapter will focus on horizontal/cross-sectoral initiatives pertaining to data sharing by private actors, which can contribute to sustainability purposes.

3. Outline. As will be outlined below, data sharing for sustainability purposes could be purely *voluntary*, for instance by relying on the "data altruism" mechanism provided in the Data Governance Act (Section 1).¹⁵ Due to its voluntary nature, the data altruism mechanism could pursue any of the 17 SDGs. On the other hand, data sharing could also be made *compulsory*, in certain situations, in order to pursue sustainability purposes

¹¹ *Ibid.*

¹² See Rio Declaration on Environment and Development, Annex 1 to the *Report of the United Nations Conference on Environment and Development*, Rio de Janeiro, 3-14 June 1992; Treaty on European Union, OJ C 326/13, Art. 3.

¹³ United Nations, "Transforming our world: the 2030 Agenda for Sustainable Development", *Resolution adopted by the General Assembly on 25 September 2015*, available at https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E.

¹⁴ Deloitte, "Realising the economic potential of machine-generated, non-personal data in the EU", *Report for Vodafone Group*, July 2018, available at https://www.vodafone.com/content/dam/vodcom/files/public-policy/Realising_the_potential_of_IoT_data_report_for_Vodafone.pdf, p. 32. See also Commission Staff Working Document, Impact assessment report accompanying the document "*Proposal for a Regulation of the European Parliament and of the Council on European data governance: An enabling framework for common European data spaces (Data Governance Act)*", Brussels, 25 November 2020, SWD(2020) 295 final, p. 15.

¹⁵ Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act), OJ L 152/1, 3 June 2022.

(Section 2). Discussions pertaining to *compulsory* data sharing for sustainability purposes have mainly focussed on private data being shared with public actors (business-to-government (B2G) data sharing) (Sections 2.1 and 2.2). Such compulsory B2G data sharing could, in theory, pursue any of the 17 SDGs, but we will see that in practice it mainly aims to tackle situations of public emergencies, which fit more within the “Sustainable Cities and Communities” and the “Climate Action” SDGs. Contrary to B2G data sharing, data sharing between private actors (business-to-business (B2B) data sharing) for sustainability purposes has not received the same interest from the European legislator. In this regard, this chapter will outline that it might also make sense to impose it in certain circumstances, in the hope to spur further discussions on this topic (Section 2.3). In fact, we will argue that the Data Act proposal might indirectly contain an embryo of compulsory B2B data sharing for sustainability purposes¹⁶, which fits in particular in the “Responsible Consumption and Production” and the “Climate Action” SDGs.

¹⁶ Proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act), 23 February 2022, COM(2022) 68 final. For detailed comments of this proposal, see W. KERBER, “Governance of IoT Data: Why the EU Data Act will not fulfill its objectives”, *SSRN Working Paper*, 8 April 2022, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4080436; J. DREXL, C. BANDA, B. GONZÁLEZ OTERO, J. HOFFMANN, D. KIM, S. KULHARI, V. MOSCON, H. RICHTER and K. WIEDEMANN, *Position Statement of the Max Planck Institute for Innovation and Competition on the Commission’s Proposal of 23 February 2022 for a Regulation on harmonised rules on fair access to and use of data (Data Act)*, 25 May 2022, available at <https://www.ip.mpg.de/en/research/research-news/position-statement-on-the-eu-data-act.html>; P. PICHT, “Caught in the acts: framing mandatory data access transactions under the Data Act, further EU Digital Regulations Acts, and competition law”, *Max Planck Institute for Innovation and Competition Research Paper No. 22-05*, June 2022, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4076842, p. 19-42; G. COLANGELO, “European Proposal for a Data Act: A First Assessment”, *CERRE Assessment Paper*, July 2022, available at https://cerre.eu/wp-content/uploads/2022/07/200722_CERRE_Assessment-Paper_DataAct.pdf; E. HABICH, “FRAND Access to Data: Perspectives from the FRAND Licensing of Standard-Essential Patents for the Data Act Proposal and the Digital Markets Act”, *IIC*, 2022, Vol. 53, Issue 9, p. 1343-1373; R. PODSZUN and P. OFFERGELD, “The EU Data Act and the Access to Secondary Markets”, *Study for the Ludwig-Fröhler-Institut für Handwerkswissenschaften*, 2022, available at <https://ssrn.com/abstract=4256882>; A. METZGER and H. SCHWEITZER, “Shaping Markets: A Critical Evaluation of the Draft Data Act”, 2022, available at <https://ssrn.com/abstract=4222376>; B. MARTENS, “Pro- and anti-competitive provisions in the proposed European Union Data Act”, *Bruegel Working Paper 01/2023*, available at <https://www.bruegel.org/sites/default/files/2023-01/WP%2001.pdf>.

SECTION 1. Fostering sustainability through voluntary data sharing

§ 1. – Illustrations of data sharing by private actors for sustainability purposes¹⁷

4. Data sharing examples. Evidently, private actors could *voluntarily* decide to share data with other entities for sustainability purposes. Several examples of B2G and B2B data sharing can be provided to illustrate this.

For instance, in terms of environmental protection, B2G data sharing could allow the identification of priority actions to be undertaken in order to address fundamental issues such as deforestation, the loss of biodiversity and the management of hazardous waste.¹⁸ Alternatively, increased B2G data sharing about the quality of the air and about the release of polluting materials could enable public actors to develop services recommending, or on the contrary advising against, certain leisure activities for more fragile people in certain specific areas. In terms of mobility, data sharing between transport service providers (trains, buses, trams, shared cars, bikes, scooters, etc.) and public actors could allow the latter to provide suggestions to individuals on how to get from point A to point B by relying on multimodal transportation (e.g. taking a train, then a bus, then a shared bike). This could notably take the form of a “multimodal mobility open data platform”, in order to “facilitate cooperation between different actors involved in mobility issues, establishing the basis for future development of Mobility as a Service (MaaS) concepts for citizens”.¹⁹ Such a platform, built on data sharing, would indeed allow the gathering and provision of data from various transport modes, and would notably enable the individuals to opt for the most sustainable ones. In the agricultural sector, farmers increasingly make use of various sensors in order to improve the efficiency of their operations. These can be weather stations, humidity sensors, soil scanners,

¹⁷ This sub-section builds on T. TOMBAL, *Imposing Data Sharing Among Private Actors*, *op. cit.*, p. 90-92.

¹⁸ Communication from the Commission, “A European strategy for data”, *op. cit.*, p. 26-27.

¹⁹ See <https://www.bable-smartcities.eu/explore/use-cases/use-case/useCase/open-platform-for-multimodal-mobility-information-and-services.html>.

crop sensors, etc.²⁰ Accordingly, if such “smart farming” data was shared with public actors, this could allow the latter to pass on this knowledge to all farmers operating within a specific area, including those that do not rely (or only marginally rely) on smart farming equipment, to suggest to them tailored cultivation strategies that are the most efficient for specific climates or soils. Naturally, in order to move towards a more sustainable world, it will be important to complement this increased efficiency with more sobriety in energy consumption as well, as it must not be overlooked that the use of any technology (including technologies allowing data sharing) has an environmental cost.

Moving on to B2B data sharing, this could allow, in terms of environmental protection, private actors to better understand the environmental impact of each step of the supply chain, in order to identify the friction points where they could act in order to reduce the pollution deriving from their activity, thus contributing to Europe’s goal to become climate-neutral by 2050.²¹ In the energy sector, B2B data sharing about the result of innovative experiments aiming at decarbonising the existing energy systems could generate significant environmental benefits, by accelerating the transition towards greener energy production.²² In terms of mobility, data sharing between navigation technology service providers and freight and logistics businesses can assist the latter in their transition towards more sustainable transport services, as economies of scale can be reached if some travels are rationalised, while also making this transport more efficient and secure.²³ Similar objectives could also justify the exchange of data between car manufacturers, navigation system providers, fleet managers and parking operators, in order to develop “smart parking” services, as “drivers looking for a parking spot cause about one-third of traffic in city centres”.²⁴ Through such data exchange, a driver looking for a parking spot could be quickly and efficiently informed about the nearest parking availability and be instantly redirected to it by her navigation system. If deployed at a large scale, this would limit the pollution deriving from CO₂ car emissions and would also pursue mobility objectives, by reducing the number of cars on the network. In the agricultural sector, B2B sharing of production data, supply chain data and other types of data, such

²⁰ Everis, “Study on data sharing between companies in Europe – Case studies”, *Study for the European Commission*, 2018, available at <https://publications.europa.eu/en/publication-detail/-/publication/8b8776ff-4834-11e8-be1d-01aa75ed71a1/language-en>, p. 43.

²¹ Communication from the Commission, “A European strategy for data”, *op. cit.*, p. 26-27.

²² *Ibid.*, p. 31.

²³ *Ibid.*, p. 28. See also <https://www.aisin.com/en/product/mobility/cs-s/>.

²⁴ See <https://erticonetwork.com/saving-time-and-reducing-costs-thanks-to-smart-parking/>.

as earth observation or meteorological data, would allow the actors of the sector to apply more tailored and precise production approaches.²⁵ For instance, data sharing about the efficiency of a certain type of pesticide and the appropriate dose to be sprayed could reduce the environmental footprint of such practices, by avoiding “over-spraying”.

As indicated above, all of these examples could occur in a purely *voluntary* setting. In practice, these instances of *voluntary* data sharing mainly rely on contracts. Private actors are thus free to draft such contracts as they please, although they can seek guidance in the European Commission’s Communication “Towards a common European data space”.²⁶

§ 2. – The “data altruism” example²⁷

5. Definition. However, more recently, the Commission has set to promote such voluntary sharing for sustainability purposes through the development of a series of “Common European data spaces”, which should lead to the availability of large pools of data in domains of public interest such as environmental protection.²⁸ A key legislative instrument to support the establishment of these European data spaces is the Data Governance Act (DGA), which aims at creating an overarching framework encompassing horizontal measures relevant for all Common European data spaces.²⁹ More specifically, this chapter will focus on Articles 16 to 25 of the DGA, which contain measures aiming at facilitating voluntary data sharing for the general interest at the EU level.³⁰

²⁵ B. MARTENS, A. DE STREEL, I. GRAEF, T. TOMBAL and N. DUCH-BROWN, “Business to business data sharing: an economic and legal analysis”, *EU Science Hub*, 2020, available at <https://ssrn.com/abstract=3658100>, p. 33.

²⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “Towards a common European data space”, Brussels, 25 April 2018, COM(2018) 232 final, p. 13-14.

²⁷ This sub-section builds on and further develops the analysis initiated in T. TOMBAL, “Business-to-government data sharing for environmental purposes”, *Network Industries Quarterly*, Vol. 24, Issue 3, July 2022, p. 7-11.

²⁸ See Communication from the Commission, “A European strategy for data”, *op. cit.*, p. 22-23. These domains of public interest are further detailed in the Appendix of the “European strategy for data” (p. 26-34).

²⁹ Proposal for a Regulation of the European Parliament and of the Council on European data governance (Data Governance Act), 25 November 2020, COM(2020) 767 final, p. 6.

³⁰ This is without prejudice to potential organisational or technical arrangements put in place at the national level to foster such data sharing in the general interest. Such national policies will however have to be notified to the European Commission (see Article 16 of the DGA).

This is referred to as “data altruism” in the DGA, which can be defined as the voluntary mechanism through which data subjects³¹ (individuals) can decide to share their personal data, and data holders³² (private actors) can decide to share their non-personal data, for objectives of general interest, without seeking or receiving a reward (although the direct costs incurred by the sharing can be recovered).³³ This could contribute to sustainability objectives, such as combating climate change or improving mobility.³⁴

6. Particularities of the “data altruism” mechanism. It is important to outline from the outset that this “data altruism” mechanism is in fact quite peculiar, as it does not organise a direct voluntary data sharing between the private actor and the private or public entity that will make use of this data for a specific sustainability objective. Rather, this mechanism aims at creating data pools that will be managed by an intermediary, called a “data altruism organisation” (DAO).³⁵ Data is thus only indirectly shared between the private actor and the private or public entity, as the private or public entity only obtains the data from the pool, and not directly from the private actor. For instance, through this “data altruism” mechanism, private transport service providers could volunteer some of their non-personal data to a mobility data pool managed by a DAO, and other (public or private) entities would then have the possibility to extract some data from that pool in order to develop their open data platform for sustainable multimodal mobility. Another example would be a situation where private actors volunteer data about the quality of the air and the

³¹ “An identified or identifiable natural person (...); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person” (Article 4(1) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), *OJ L 119/1*, 4 May 2016).

³² “‘Data holder’ means a legal person, including public sector bodies and international organisations, or a natural person who is not a data subject with respect to the specific data in question, which, in accordance with applicable Union or national law, has the right to grant access to or to share certain personal data or non-personal data” (Article 2(8) of the DGA).

³³ Article 2(16) of the DGA.

³⁴ *Ibid.* See also Recital 45 of the DGA. For some examples, see Human Technology Foundation et L’Exploratoire Sopra Steria Next, “Le data altruisme: Les données au service de l’intérêt général”, available at https://www.soprasteria.fr/docs/librariesprovider2/sopra-steria-fr-documents/notindexdocuments/rapport-htf---sopra-steria-next---data-altruisme_version-digitale.pdf?Status=Master&sfvrsn=bfc6c6dc_15, p. 29-34.

³⁵ Article 18 of the DGA.

release of polluting materials around their worksites with an environmental data pool managed by a DAO, from which a public actor could extract data in order to develop a service advising against certain leisure activities for more fragile people in certain specific areas.

Importantly, the private actor can only volunteer non-personal data from its own initiative to these data pools, and cannot decide to volunteer personal data that it holds unless the data subjects to which this data pertains have consented to it. In this regard, it is interesting to point out that the DGA provides that in order to facilitate the collection of data based on data altruism, the Commission may adopt implementing acts in order to develop a standardised European data altruism consent form, which should be easily understandable and available in paper and electronic format.³⁶ In doing so, it should consult the European Data Protection Board, take into account the advice of the European Data Innovation Board³⁷, and duly involve relevant stakeholders.³⁸ It will also be important to ensure that individuals truly understand the extent of the processing to which they consent and the implications that it might have for them.

A third particularity of this “data altruism” mechanism is that the conditions to be recognised as a DAO are quite strict. Indeed, only public or private non-for-profit entities that pursue a general objective interest through a legally independent and functionally separate structure can be recognised as DAOs.³⁹ On the other hand, a for-profit data holder that would decide to share some data extracted from its commercial activity in order to promote sustainability as a “side-activity” could not be recognised as a DAO. For instance, if Google were to set up a specific unit dedicated to sharing some of the data it holds in the general interest and/or to the constitution of data pools in the general interest, this unit could not be recognised as a DAO. Similarly, non-for-profit re-users that process data for charitable purposes may not be recognised as DAOs either.⁴⁰ This is because none of these actors operates as a non-for-profit data sharing intermediary. In this regard, these provisions on data altruism reflect the fact that the DGA focusses, to a large extent, on intermediaries as generators of trust in order to foster more data sharing.

³⁶ Article 25 of the DGA.

³⁷ See Articles 29 and 30 of the DGA.

³⁸ Article 25.1 of the DGA.

³⁹ Article 18 of the DGA.

⁴⁰ M. VON GRAFENSTEIN, “Reconciling Conflicting Interests in Data through Data Governance: An Analytical Framework (and a Brief Discussion of the Data Governance Act Draft, the AI Regulation Draft, as well as the GDPR)”, *HIIG Discussion Paper Series 2022-2*. 2022, available at <https://doi.org/10.5281/zenodo.6457735>, p. 33.

7. Registration. If an entity believes that it fulfils these conditions and wishes to be recognised as a DAO, it will have to file a request to the authority that is competent for registrations⁴¹ for the territory where it is established.⁴² Its application for registration must contain the information listed in Article 19.4 of the DGA, among which “the objectives of general interest it intends to promote when collecting data” and “the nature of the data that the entity intends to control or process, and, in the case of personal data, an indication of the categories of personal data”.⁴³ Importantly, this entity will thus have to determine in advance for which objectives of general interest it will manage a data pool, for instance sustainability objectives, and which data it will need to do so. While the first limb of this requirement is quite straightforward, the second one might be more problematic, as the DAO may not necessarily know in advance which exact datasets it will need. Accordingly, we believe that the DAO should, at first, be allowed to provide a general description of the types of data it will need. As time passes and as its data needs becomes clearer, the DAO should then further specify the datasets it intends to gather.

If the entity meets the conditions to be recognised as a “data altruism organisation” and has provided all the requested information, it will be registered by the competent authority in its public register of recognised DAOs⁴⁴, and this registration will have to be communicated to the Commission for inclusion in the public Union register of recognised DAOs.⁴⁵ From that moment on, the entity “may use the label ‘data altruism organisation recognised in the Union’ in its written and spoken communication”.⁴⁶ It may also use the common DAO logo, which will be designed by the Commission and which should be accompanied by a QR code linking to the Union’s public DAO register.⁴⁷

⁴¹ “Each Member State shall designate one or more competent authorities responsible for its public national register of recognised data altruism organisations” (Article 23.1 of the DGA). This authority will have to cooperate with the relevant data protection authority for its tasks related to personal data processing (Article 23.3).

⁴² Articles 19.1 and 19.2 of the DGA. If the entity has establishments in more than one Member State, it will have to register in the Member State in which it has its main establishment (Article 19.2). If the entity is not established in the Union, it will have to designate a legal representative in one of the Member States where it intends to offer data altruism services, and it will be deemed to be under the jurisdiction of the authority of that Member State (Article 19.3).

⁴³ Articles 19.4.h) and i) of the DGA. Any further change pertaining to this information will have to be notified within 14 days of the date of the change (Article 19.7).

⁴⁴ Articles 17.1 and 19.5 of the DGA.

⁴⁵ Articles 17.2 of the DGA.

⁴⁶ Article 17.2 of the DGA.

⁴⁷ *Ibid.*

8. Challenges. At this stage, it is important to underline that due to its voluntary nature, this “data altruism” mechanism will face three challenges in developing itself.⁴⁸ First, it will only function if its concrete implementation generates trust between all the relevant actors and if their fears in potential data misuses (by competitors) are alleviated, which is not a given in light of scandals such as *Cambridge Analytica*. Second, the data subjects’, data holders’, data re-users’ and DAOs’ (non-financial) incentives to engage in such a mechanism will need to be identified and fostered. Third, DAOs will need to generate funding mechanisms to ensure their durability while remaining (financially) independent.

9. Transparency and safeguards requirements. To address these challenges, several transparency and safeguards requirements are imposed by the DGA. In terms of transparency, DAOs will have to inform, prior to the processing and in a clear and easily comprehensible manner, the data holders and the data subjects that have volunteered data to the pool about the specific objectives of general interests that can be pursued by data re-users, as well as whether it permits such re-uses by third parties established in non-EU countries.⁴⁹ They will also have to keep full and accurate records about the (private or public) entities that have extracted data from the pool; about the date, duration and purpose of such processing; as well as about any fees that might have been paid by this entity to access the data (such fees could ensure the durable funding of DAOs).⁵⁰ DAOs must also transmit an annual activity report to the competent national authority, containing at least the information listed in Article 20.2 of the DGA, such as “a description of the way in which the general interest objectives for which data was collected have been promoted”; “a list of all natural and legal persons that were allowed to process data it holds, including a summary description of the general interest objectives pursued by such data processing and the description of the technical means used for it, including a description of the techniques used to preserve privacy and data protection”; and “a summary of the results of the data processing”.⁵¹ From our understanding of the DGA, the “results” mentioned here relate to contribution that data sharing will make to the objectives of general interest pursued and can thus be understood in terms of “efficiency” of the data sharing mechanism. On the other hand, an assessment of the

⁴⁸ For a more detailed analysis of these three challenges see Human Technology Foundation et L’Exploratoire Sopra Steria Next, “Le data altruisme”, *op. cit.*, p. 16-23.

⁴⁹ Articles 21.1 and 21.6 of the DGA.

⁵⁰ Article 20.1 of the DGA.

⁵¹ Article 20.2.b) to d) of the DGA.

environmental costs of the technologies supporting this data sharing mechanism does not seem to be required nor even considered.

In terms of safeguards, the DAOs will have to ensure that the data from the pool is not used for other objectives than those of general interest to which the data subjects and data holders have consented.⁵² In this regard, they should provide tools to facilitate the collection of such consents, as well as to allow their easy withdrawal.⁵³ They should also ensure appropriate security measures pertaining to the processing and storage of the data.⁵⁴ Moreover, if an unauthorised use of non-personal data occurs, they will have to inform the relevant data holders about it without delay.⁵⁵ Furthermore, the DAOs will have to comply with the “data altruism rule-book” that will be developed by the European Commission in close cooperation with DAOs and any other relevant stakeholders.⁵⁶ Such rulebook shall lay down appropriate information requirements ensuring that data subjects and data holders are provided with all the relevant information mentioned above.⁵⁷ It shall also lay down the appropriate technical and security requirements to be implemented by DAOs, as well as recommendations on interoperability standards and communication roadmaps aiming at raising awareness about the data altruism mechanism.⁵⁸ If a DAO fails to respect any of the above requirements, it risks being removed from the register of recognised DAOs and losing its right to use the DAO label.⁵⁹

10. Other types of voluntary sharing. Naturally, “data altruism” only constitutes one option to engage in *voluntary* data sharing for sustainability objectives⁶⁰, and private actors are not compelled to resort to that mechanism. Indeed, other *voluntary* sharing mechanisms, such as “open collaborative knowledge sharing platforms, open access scientific and academic repositories, open source software development platforms and open access content aggregation platforms” could also be used for the common good.⁶¹ On the contrary, in Section 2, we will now turn to situ-

⁵² Article 21.2 of the DGA.

⁵³ Article 21.3 of the DGA.

⁵⁴ Article 21.4 of the DGA.

⁵⁵ Article 21.5 of the DGA.

⁵⁶ Articles 18.e) and 22.2 of the DGA.

⁵⁷ Article 22.1.a) of the DGA.

⁵⁸ Article 22.1.b) to d) of the DGA.

⁵⁹ Article 24.5 of the DGA.

⁶⁰ For a reflection on the concrete actions that should be taken in practice in order to launch a data altruism initiative, see Human Technology Foundation et L’Exploratoire Sopra Steria Next, “Le data altruisme”, *op. cit.*, p. 45-65.

⁶¹ Recital 49 of the DGA.

ations in which a private actor might be compelled to share some of its data for sustainability purposes.

SECTION 2. Fostering sustainability through compulsory data sharing

11. Compulsory sharing. While the DGA focusses on *voluntary* data sharing, data sharing could also be made *compulsory*, in certain situations, in order to pursue sustainability purposes. The underlying logic is that, if it is fully up to the private actors to decide whether they want to engage in data sharing, there is the risk that only few of them will do so. This, in turn, would only lead to limited sustainability benefits. Legislators could thus be tempted to impose data sharing for sustainability purposes in certain circumstances, in order to maximise the chance of generating sustainability benefits. Interestingly, the European initiatives pertaining to *compulsory* data sharing for sustainability purposes mainly focus on B2G data sharing (§ 1 and § 2). However, this chapter will outline that it might also make sense, in certain circumstances, to impose B2B data sharing for sustainability purposes (§ 3).

§ 1. – Emerging reflections on compulsory B2G data sharing⁶²

12. Public Sector Information (PSI) Directive recast. At the European level, reflections on B2G compulsory data sharing emerged in 2017 during the public consultation pertaining to the latest recast of the Public Sector Information (PSI) Directive also called “Open Data Directive.”⁶³ More concretely, the European Commission initiated, in its public consultation, a discussion on whether a new provision could be included in the PSI Directive, according to which data held by private companies, and deemed

⁶² This sub-section builds on and further develops the analysis initiated in T. TOMBAL, “Business-to-government data sharing for environmental purposes”, *op. cit.*, p. 8.

⁶³ Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information, *OJ L 172/56*, 26 June 2019. For more details on this Directive, see Chapter 11.

to be of public interest, should be shared with public sector bodies.⁶⁴ While 88 % of the 205 respondents to the public consultation, across all types of contributors, supported this proposition, such a provision was finally not included in the recast of the Directive.⁶⁵ However, it should be pointed out that Recital 19 of the 2019 PSI Directive provides that “Member States may also decide to apply the requirements of this Directive to private undertakings, in particular those that provide services of general interest”. This has notably been done, to a certain extent, in France.⁶⁶

The reason why such a provision was eventually not included in the PSI Directive is that many stakeholders responding to the public consultation had outlined that the Commission had failed to provide a sufficiently clear definition of these “public interests” and that the objectives and scope of such a proposition also lacked clarity.⁶⁷ According to these stakeholders, further discussions were needed regarding these compulsory B2G data sharing initiatives.⁶⁸

13. High-Level Expert Group on Business-to-Government Data Sharing. To conduct such further discussions, the European Commission appointed a High-Level Expert Group (HLEG) on Business-to-Government Data Sharing.⁶⁹ Its mandate was notably to evaluate the key principles for the supply of private sector data to public sector bodies under preferential conditions for re-use, which were contained in the European Commission’s Communication “Towards a common European data space”.⁷⁰ On the

⁶⁴ See https://ec.europa.eu/info/consultations/public-consultation-review-directive-re-use-public-sector-information-psi-directive_en.

⁶⁵ European Commission, “Consultation on PSI Directive review – Synopsis report”, 25 April 2018, available at <https://ec.europa.eu/digital-single-market/en/news/synopsis-report-public-consultation-revision-directive-reuse-public-sector-information>, p. 8.

⁶⁶ Loi n° 2016-1321 pour une république numérique du 7 octobre 2016, *J.O.*, 8 octobre 2016. See specifically Articles 17 to 24, according to which private undertakings that have been delegated to manage a public service (such as industrial, commercial, statistical, road utility or electricity and gas distribution and transport public services), have to share, with the delegating public authority, the data collected and processed in the context of the exploitation of this public service that are essential for its execution.

⁶⁷ European Commission, “Consultation on PSI Directive review – Synopsis report”, *op. cit.*, p. 8.

⁶⁸ *Ibid.*

⁶⁹ See <https://ec.europa.eu/digital-single-market/en/news/commission-appoints-expert-group-business-government-data-sharing>.

⁷⁰ Communication from the Commission, “Towards a common European data space”, *op. cit.*, p. 13-14. See also Commission Staff Working Document establishing a guidance on sharing private sector data in the European data economy accompanying the Communication “Towards a common European data space”, Brussels, 25 April 2018, SWD(2018) 125 final.

basis of these discussions, this HLEG suggested a series of principles for “scalable, responsible and sustainable B2G data sharing for the public interest”.⁷¹ In substance, the HLEG identified four core principles for B2G data sharing in the public interest, namely: i) proportionality, ii) data-use limitation, iii) risk mitigation and safeguards, and iv) compensation, which aim to balance the interest of the private data holders, on the one hand, and the public re-users, on the other hand.⁷²

The principle of proportionality pertains to the fact that the public actors’ request for access to private sector data should be justified by clear and demonstrable public interest and that the potential public benefits should be balanced with the interests of the private actors, notably in light of the costs and efforts required for the data supply.⁷³ Furthermore, only data that is necessary, relevant and proportionate in terms of detail (e.g. type of data, quantity, frequency of access) for the public interest pursued should be requested.⁷⁴ In the same vein, according to the data-use limitation principle, the shared private data can only be used for the specific public interest pursued by the public actor and can only be further used for compatible purposes to the extent necessary and proportionate.⁷⁵

According to the risk mitigation and safeguards principle, appropriate safeguards should be adopted in order to mitigate the risks that B2G data sharing could cause to private actors, notably in terms of divulgation of commercially sensitive information (e.g. trade secrets), or to individuals whose personal data is shared.⁷⁶ In essence, this would mean that private actors’ commercially sensitive information should only be shared with a public authority if the latter is subject to a confidentiality obligation preventing it from disclosing the information at hand to third parties. To limit these risks, the data sharing could be organised “in testing environments (‘sandboxes’) for pilot testing (‘pilots’) to help assess the potential value of data for new situations in which a product or service could potentially be used (‘use cases’)”.⁷⁷ Regarding the protection of

⁷¹ High-Level Expert Group on Business-to-Government Data Sharing, “Towards a European strategy on business-to-government data sharing for public interests – Final report”, 2020, available at <https://op.europa.eu/en/publication-detail/-/publication/d96edc29-70fd-11eb-9ac9-01aa75ed71a1>, p. 7.

⁷² *Ibid.*, p. 80-83.

⁷³ *Ibid.*, p. 80.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, p. 81.

⁷⁶ *Ibid.*, p. 82.

⁷⁷ *Ibid.*, p. 7.

individuals, the HLEG suggested considering the use of privacy-preserving technologies.⁷⁸

Finally, the compensation principle provides that private actors should be compensated in exchange for agreeing to voluntary B2G data sharing, and that the exact level of compensation should be determined on the basis of the proportionality and the risk mitigation and safeguards principles.⁷⁹

§ 2. – Compulsory B2G data sharing for “exceptional needs” in the Data Act Proposal⁸⁰

14. Data Act Proposal. In the wake of the HLEG’s seminal report, discussions pertaining to the possibility to impose *compulsory* B2G data sharing for sustainability purposes have reappeared in the European Commission’s inception impact assessment on the “Data Act”, where it indicated that “a more flexible framework for access and use of [private] data sources, including data-sharing requirements, transparency requirements and safeguards, could be designed. (...) In a high intensity option, legislation would lay down a right of public sector to access privately-held data for a range of defined public interest purposes”.⁸¹ This eventually led to the inclusion, in the European Commission’s Data Act proposal, of *compulsory* B2G data sharing provisions in certain specific circumstances, namely in case of exceptional needs.⁸²

⁷⁸ *Ibid.*, p. 9.

⁷⁹ *Ibid.*, p. 83.

⁸⁰ This sub-section builds on and further develops the analysis initiated in T. TOMBAL, “Business-to-government data sharing for environmental purposes”, *op. cit.*, p. 9-10.

⁸¹ European Commission, Inception Impact Assessment: “Data Act (including the review of the Directive 96/9/EC on the legal protection of databases)”, May 2021, Ares (2021)3527151, p. 5.

⁸² See Articles 14 to 22 of the Proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act), 23 February 2022, COM(2022) 68 final. For a detailed comment of these provisions, and notably of their relation with national legislation, see J. DREXL, C. BANDA, B. GONZÁLEZ OTERO, J. HOFFMANN, D. KIM, S. KULHARI, V. MOSCON, H. RICHTER and K. WIEDEMANN, *Position Statement of the Max Planck Institute for Innovation and Competition on the Commission’s Data Act Proposal*, *op. cit.*, p. 49-59; H. RICHTER, “Access to private sector data for the common good”, *CERRE report*, February 2023, accessible at https://cerre.eu/wp-content/uploads/2023/02/Data_Act_B2G_data_sharing.pdf.

Concretely, the Data Act proposal provides that “upon request, a data holder⁸³ shall make data available to a public sector body⁸⁴ or to a Union institution, agency or body demonstrating an exceptional need to use the data requested”.⁸⁵ Importantly, however, not all private actors would be bound by this compulsory data sharing obligation, as it does not apply to small and micro-enterprises.⁸⁶

a) Exceptional needs

15. Definition. The key criterion to determine when private actors might be compelled to share data with a public sector body is thus that of “exceptional needs”. Indeed, while the policy option to request B2G data sharing “for any duly justified purpose” was considered⁸⁷, this option was eventually rejected because it would entail higher administrative and compliance costs for private actors, without necessarily entailing greater benefits, and because such a broad scope would be too unpredictable for private actors and could lead to a lack of harmonisation across the EU.⁸⁸ The Data Act proposal thus only applies to specific *ad hoc* B2G sharing scenarios, namely B2G sharing for “exceptional need”, and complements “existing reporting or compliance obligations in sectoral legislation that

⁸³ “‘Data holder’ means a legal or natural person who has the right or obligation, in accordance with this Regulation, applicable Union law or national legislation implementing Union law, or in the case of non-personal data and through control of the technical design of the product and related services, the ability, to make available certain data” (Article 2(6) of the Proposal for a Data Act).

⁸⁴ “‘Public sector body’ means national, regional or local authorities of the Member States and bodies governed by public law of the Member States, or associations formed by one or more such authorities or one or more such bodies” (Article 2(9) of the Proposal for a Data Act).

⁸⁵ Article 14.1 of the Proposal for a Data Act.

⁸⁶ Article 14.2 of the Proposal for a Data Act. For some, this exclusion does not make sense as public interests should prevail in case of exceptional needs (J. DREXL, C. BANDA, B. GONZÁLEZ OTERO, J. HOFFMANN, D. KIM, S. KULHARI, V. MOSCON, H. RICHTER and K. WIEDEMANN, *Position Statement of the Max Planck Institute for Innovation and Competition on the Commission’s Data Act Proposal*, *op. cit.*, p. 49).

⁸⁷ Commission Staff Working Document, “Impact assessment report accompanying the document Proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act)”, Brussels, 23 February 2022, SWD(2022) 34 final, available at <https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=SWD%3A2022%3A34%3AFIN&qid=1645811711252>, p. 37.

⁸⁸ *Ibid.*, p. 49-50.

establish ongoing or recurring data exchange mechanism between public institutions and the private sector”.⁸⁹

According to Article 15 of the Data Act proposal, an “exceptional need” will exist in three circumstances:

“(a) where the data requested is necessary to *respond to a public emergency*; (b) where the data request is limited in time and scope and necessary to *prevent a public emergency* or to *assist the recovery from a public emergency*; (c) where the lack of available data *prevents the [public sector body] from fulfilling a specific task in the public interest* that has been explicitly provided by law; and

(1) the [public sector body] has been *unable to obtain such data by alternative means*, including by purchasing the data on the market at market rates or by relying on existing obligations to make data available, *and the adoption of new legislative measures cannot ensure the timely availability of the data*; or

(2) *obtaining the data* in line with the procedure laid down in this Chapter *would substantively reduce the administrative burden for data holders or other enterprise*” (emphasis added).

16. Environmental protection as an exceptional need? In light of this relatively abstract definition of “exceptional needs”⁹⁰, one could wonder whether, for example, data sharing for environmental protection purposes, which is a key sustainability objective, might be considered as a hypothesis of data sharing for “exceptional needs”. Arguably, one could put forward that global warming and the degradation of our environment are public emergencies that we need to respond to or to prevent (Articles 15.a) and b)). Such a view could be supported by the alarming IPCC reports on the impact of human activity on global warming and on the catastrophic consequences that this could lead to – especially for more vulnerable populations –, if our societies do not evolve, in the coming years, towards more sustainable ways of living that preserve our environment.⁹¹ Moreover, the explanatory memorandum of the Data Act proposal provides that it could allow “mobilising the existing wealth of

⁸⁹ *Ibid.*, p. 158; J. DREXL, C. BANDA, B. GONZÁLEZ OTERO, J. HOFFMANN, D. KIM, S. KULHARI, V. MOSCON, H. RICHTER and K. WIEDEMANN, *Position Statement of the Max Planck Institute for Innovation and Competition on the Commission’s Data Act Proposal*, *op. cit.*, p. 52-53. This also appears from the text of Article 16.1 of the Proposal for a Data Act.

⁹⁰ On this point, see G. COLANGELO, “European Proposal for a Data Act: A First Assessment”, *op. cit.*, p. 22-23.

⁹¹ Intergovernmental Panel on Climate Change, *Climate Change 2021: The Physical Science Basis*, Cambridge University Press, 2021, available at <https://www.ipcc.ch/report/>

relevant private sector data in order to tackle climate-, biodiversity-, pollution- and natural resource-related [issues] in line with objectives of the European Green Deal⁹².⁹³

Furthermore, a public emergency is defined in the proposal as an “exceptional situation negatively affecting the population of the Union, a Member State or part of it, with a risk of serious and lasting repercussions on living conditions or economic stability, or the substantial degradation of economic assets in the Union or the relevant Member State(s)”.⁹⁴ One could argue that the current state of our environment and climate could be considered as reflecting such an exceptional situation that risks leading to serious and lasting repercussions on living conditions or economic stability. In this regard, the Impact Assessment accompanying the Data Act proposal indicates that “access to and use by public sector bodies of direct economic loss data, including the costs of emergency response and recovery, could improve the accuracy of the risk assessments that inform climate adaptation actions”.⁹⁵

On the other hand, if one were to argue that while global warming and the degradation of our environment could have disastrous consequences, these have not fully materialised yet and are rather mid- to long-term concerns, in such a way that these concerns might not be qualified as public emergencies yet. Going even further, one could argue that the challenge ahead is about mitigating the effects of global warming and the degradation of our environment, which will become part of the new normality of mankind, rather than about addressing an exceptional public emergency. This view could be supported by Recital 57 of the Data Act proposal, which seems to focus on specific identifiable public emergencies, such as “emergencies resulting from environmental degradation and major natural disasters including those aggravated by climate change, as well as human-induced major disasters”. Said otherwise, while B2G data sharing could be imposed to address a (or prevent an imminent) *specific public emergency that is a consequence of global warming* (e.g. a flood, a hurricane, a draught or a fire), it might not be possible to impose it to

ar6/wg1; Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation and Vulnerability*, Cambridge University Press, 2022, available at <https://www.ipcc.ch/report/sixth-assessment-report-working-group-ii/>.

⁹² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “*The European Green Deal*”, 11 December 2019, COM/2019/640 final.

⁹³ Proposal for a Data Act, Explanatory memorandum, p. 6.

⁹⁴ Article 2(10) of the Proposal for a Data Act.

⁹⁵ Commission Staff Working Document, “Impact assessment report accompanying Data Act”, *op. cit.*, p. 61.

address *more general concerns pertaining to global warming and the degradation of the environment*, because one might consider that we are not “in circumstances that are reasonably proximate to the public emergency in question”.⁹⁶ This interpretation seems to be supported by the fact that the Commission outlines that “it is the exceptional character of the situation that will be the main criterion”.⁹⁷

Similarly, the fact that global warming and the degradation of our environment could be perceived as mid- to long-term concerns rather than as imminent concerns could also bar the possibility to rely on Article 15.c) to impose B2G data sharing. Indeed, if one were to argue that as the issue is not imminent, the potential lack of available data preventing the public sector body from fulfilling its environmental protection tasks could still be timely addressed through alternative means, such as the adoption of dedicated legislative measures.⁹⁸

To conclude on this point, data sharing for general environmental or sustainability objectives might thus not be considered as a hypothesis of data sharing for “exceptional needs”, in light of the current phrasing of Article 15. We believe that this is an issue as it is important to tackle these challenges sooner than later, and that data sharing for environmental purposes should be explicitly added as an “exceptional need” in the final text of the Data Act. That being said, this should not justify disproportionate actions by public bodies, which will need to remain reasonable in their action and will need to factor that data sharing itself has an environmental impact.

Nevertheless, if it were not to be added as an “exceptional need” in the final text of the Data Act, it is worth mentioning that data sharing for environmental purposes could be added as a new “exceptional need” in a subsequent review of the Data Act, if the risk of serious and lasting repercussions on living conditions or economic stability deriving from environmental degradation were to become even more significant and imminent as time passes.⁹⁹

⁹⁶ Recital 58 of the Proposal for a Data Act.

⁹⁷ Commission Staff Working Document, “Impact assessment report accompanying Data Act”, *op. cit.*, p. 158.

⁹⁸ Article 15.c).1) of the Proposal for a Data Act. See J. DREXL, C. BANDA, B. GONZÁLEZ OTERO, J. HOFFMANN, D. KIM, S. KULHARI, V. MOSCON, H. RICHTER and K. WIEDEMANN, *Position Statement of the Max Planck Institute for Innovation and Competition on the Commission’s Data Act Proposal*, *op. cit.*, p. 51.

⁹⁹ See Article 41.c) of the Proposal for a Data Act.

b) B2G data sharing framework

17. B2G data sharing framework. On the other hand, as indicated above, Article 15 could lead to the imposition of B2G data sharing in order to address a specific public emergency that is a consequence of environmental degradation or of a lack of sustainability. In such cases, which will likely multiply in the coming years, data will have to be shared in accordance with the “proportionate, limited and predictable framework” that has been established in the Data Act proposal in order “to ensure legal certainty and to minimise the administrative burdens placed on businesses”.¹⁰⁰

1. Obligations imposed on public sector bodies

18. Transparency and proportionality. Public sector bodies willing to request data from private actors for exceptional needs must “(a) specify what data are required; (b) demonstrate the exceptional need for which the data are requested; (c) explain the purpose of the request, the intended use of the data requested, and the duration of that use; (d) state the legal basis for requesting the data¹⁰¹; [and] (e) specify the deadline by which the data are to be made available”.¹⁰² Such a request will have to be expressed in clear, concise and plain language, and will need to be made publicly available online without undue delay.¹⁰³ Moreover, it will have to be proportionate to the exceptional need (in terms of the

¹⁰⁰ Recital 61 of the Proposal for a Data Act.

¹⁰¹ It should be outlined here that the European Data Protection Board (EDPB) and the European Data Protection Supervisor (EDPS) have expressed serious concerns on the lawfulness, necessity and proportionality of the obligation for data holders to share personal data with public sector bodies in case of “exceptional need”, as “any limitation on the right to personal data must be based on a legal basis that is adequately accessible and foreseeable and formulated with sufficient precision to enable individuals to understand its scope [see Article 23 of the GDPR]. In accordance with the principles of necessity and proportionality, the legal basis must also define the scope and manner of the exercise of their powers by the competent authorities and be accompanied by sufficient safeguards to protect individuals against arbitrary interference. The EDPB and the EDPS observe that the circumstances justifying the access are not narrowly specified and consider it necessary for the legislator to define much more stringently the hypotheses of emergency or exceptional need” (EDPB-EDPS, *Joint Opinion 2/2022 on the Proposal of the Proposal of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act)*, 4 May 2022, available at https://edpb.europa.eu/our-work-tools/our-documents/edpb-edps-joint-opinion/edpb-edps-joint-opinion-22022-proposal-european_en, p. 3. See p. 20-24 for more details.

¹⁰² Article 17.1 of the Proposal for a Data Act.

¹⁰³ Article 17.2.a) and f) of the Proposal for a Data Act.

granularity and volume of the data requested and frequency of access of the data requested, which should, to the extent possible, be limited to non-personal data) and it will have to respect the legitimate interests of the private actor (taking into account the protection of trade secrets and the cost and effort required to make the data available).¹⁰⁴ In this regard, public sector bodies can only request the disclosure of (alleged) trade secrets to the extent that it is strictly necessary to achieve the purpose of the request.¹⁰⁵

All of the above echoes the HLEG's proportionality principle and aims at preserving the business interests of the private actors. That being said, the above provisions seem to rely on the premise that the public sector body knows in advance exactly which data it needs for the specific objective it pursues (including in terms of volume and granularity), as well as which private actors it should contact to obtain that data. Yet, systematic information asymmetries between the private data holders and the public sector bodies could affect the effectiveness of this mechanism, as the latter will not always know in advance which data is held by the former, nor which amount of data it will need exactly to fulfil the objective it pursues.¹⁰⁶

19. Private actor established in another Member State. If a public sector body intends to request data from a private actor established in another Member State, it will first have to notify the competent authority of that Member State of that intention before contacting the private actor.¹⁰⁷ In order to reduce the administrative burden on the private actor in complying with the request, that competent authority could advise the requesting public body of the need to cooperate with public sector bodies of the Member State in which the private actor is established (e.g. by requesting the data directly to those public sector bodies rather than to the private actor¹⁰⁸).¹⁰⁹ The requesting public sector body would however not be bound by that advice, but would merely need to take it into account.¹¹⁰

¹⁰⁴ Article 17.2.b) to d) of the Proposal for a Data Act. According to the EDPB and the EDPS, the proposal should also outline the need to respect the rights and freedoms of data subjects whose personal data could be shared (EDPB-EDPS, *Joint Opinion 2/2022 on the Data Act Proposal*, *op. cit.*, p. 21).

¹⁰⁵ Article 19.2 of the Proposal for a Data Act.

¹⁰⁶ J. DREXL, C. BANDA, B. GONZÁLEZ OTERO, J. HOFFMANN, D. KIM, S. KULHARI, V. MOSCON, H. RICHTER and K. WIEDEMANN, *Position Statement of the Max Planck Institute for Innovation and Competition on the Commission's Data Act Proposal*, *op. cit.*, p. 54-55.

¹⁰⁷ Article 22.3 of the Proposal for a Data Act.

¹⁰⁸ Articles 22.1 and 22.2 of the Proposal for a Data Act.

¹⁰⁹ Article 22.4 of the Proposal for a Data Act.

¹¹⁰ *Ibid.*

20. Data-use limitation. Additionally to these transparency and proportionality obligations pertaining to the data request, public sector bodies will also be bound by several obligations regarding the data use, which echo the HLEG's data-use limitation principle. First, they can only use the data in a way that is compatible with the declared purpose, unless the private actor has expressly agreed for the data to be used for other purposes.¹¹¹ Second, if they have received personal data, they must comply with the personal data protection rules and implement technical and organisational measures that safeguard the rights and freedoms of the data subjects concerned.¹¹² Third, if a private actor's trade secrets have been disclosed to a public sector body, the latter will have to take appropriate measures to preserve the confidentiality of those trade secrets.¹¹³ Fourth, they will have to destroy the data as soon as they are no longer necessary for the declared purpose and they will have to inform the private actor about this.¹¹⁴

21. Interaction with the PSI Directive. The Data Act proposal also makes an interesting clarification regarding the articulation between this compulsory B2G data sharing framework and the abovementioned PSI Directive (also called "Open Data Directive")¹¹⁵, in order to protect the interests of the private actors who are compelled to share data. Indeed, the proposal provides that the data obtained by the public sector body through this framework may not be made available for further re-use in open data.¹¹⁶ The underlying justification is to limit the further dissemination of the data shared by the private actor, as absent this provision, there might have been a risk that the data shared with the public actor could have been made available to anyone wishing to obtain it (including potential competitors of the private actor) through the G2B open data regime. However, this does not preclude a public sector body from transmitting the data received to another public sector body or to a private third party if this is necessary to fulfil the specific purpose for which the data was requested.¹¹⁷

¹¹¹ Article 19.1.a) and Recital 65 of the Proposal for a Data Act.

¹¹² Article 19.1.b) and Recital 64 of the Proposal for a Data Act. In this regard, any further personal data processing for a purpose other than that for which the personal data have been collected will have to comply with Article 6.4 of the GDPR (EDPB-EDPS, *Joint Opinion 2/2022 on the Data Act Proposal*, *op. cit.*, p. 22).

¹¹³ Article 19.2 of the Proposal for a Data Act.

¹¹⁴ Article 19.1.c) of the Proposal for a Data Act.

¹¹⁵ See point 12.

¹¹⁶ Article 17.3 of the Proposal for a Data Act.

¹¹⁷ Article 17.4 and Recital 62 of the Proposal for a Data Act.

The aim is thus to protect the interests of the private actor compelled to share its data, which is an illustration of the HLEG's risk mitigation and safeguards principle. That being said, the current formulation of the Data Act Proposal may be too strict in this regard, as not all data shared under this B2G framework will be commercially sensitive data.¹¹⁸ Therefore, some argue that in order to preserve to the largest extent the “potential positive externalities of data re-use”, the public sector bodies should be able to make the data obtained available for further re-use in open data “as long as legitimate interests of businesses as data holders are not negatively affected”.¹¹⁹

22. Re-use for scientific and statistical purposes. Importantly, the received data can nevertheless be shared with national statistical institutes and Eurostat for the compilation of official statistics, and this will have to be notified to the private actor.¹²⁰ A public sector body can also share the received data with certain individuals or organisations – which will also have to comply with the requirements imposed on public sector bodies¹²¹– in view of carrying out scientific research or analytics, if this is compatible with the declared purpose and if the public sector body cannot perform such research itself.¹²² However, the public sector body can only share the data with individuals or organisations that act on a not-for-profit basis or in the context of a public-interest mission recognised in Union or Member State law, which excludes organisations upon which commercial undertakings have a decisive influence.¹²³ In all of these hypotheses, the public sector body will have to inform the private actor about this further dissemination of the data.¹²⁴

¹¹⁸ J. DREXL, C. BANDA, B. GONZÁLEZ OTERO, J. HOFFMANN, D. KIM, S. KULHARI, V. MOSCON, H. RICHTER and K. WIEDEMANN, *Position Statement of the Max Planck Institute for Innovation and Competition on the Commission's Data Act Proposal*, *op. cit.*, p. 56.

¹¹⁹ *Ibid.*

¹²⁰ Article 21.1 of the Proposal for a Data Act.

¹²¹ Article 21.3 of the Proposal for a Data Act.

¹²² Article 21.1 and Recitals 62 and 68 of the Proposal for a Data Act. If personal data are concerned, appropriate safeguards will need to be adopted “taking into account the potentially sensitive nature of the data at issue, in accordance with Article 89 GDPR” (EDPB-EDPS, *Joint Opinion 2/2022 on the Data Act Proposal*, *op. cit.*, p. 22-23). This should include “lawful, responsible and ethical data management, such as vetting requirements for researchers who will have access to large amounts of potentially sensitive personal data” (*ibid.*, p. 23).

¹²³ Article 21.2 and Recital 68 of the Proposal for a Data Act.

¹²⁴ Articles 17.4 and 21.4 and Recital 62 of the Proposal for a Data Act.

2. Response by data holders

23. Duties imposed on data holders. The proposal also details the expected behaviour from the private actor who receives a data sharing request for exceptional needs from a public sector body. Such access will have to be provided without undue delay.¹²⁵ The private actor may however decline or seek the modification of the request¹²⁶ if the requested data is unavailable or if the request does not meet the conditions outlined in the previous sub-section.¹²⁷ It may also do so, in the specific case of a data request made to respond to a public emergency, if it has already provided the requested data to another public sector body for the same purpose, and if the latter has not notified the private actor of the destruction of the said data.¹²⁸ In such a case, the private actor will have to indicate the identity of the other public sector body that submitted the previous request.¹²⁹ The underlying idea of this provision is to minimise the burden on the private actors by enforcing the “once-only principle”¹³⁰ (i.e. the same data should not be requested by more than one public sector body).¹³¹ While this is understandable from a conceptual point of view, this “once-only” requirement could end up being counterproductive as this might delay the obtention, by public sector bodies, of the data they need to address a public emergency, especially if the public sector body that submitted the previous request is slow to react to the data access request of the other public sector body.¹³² For this reason, some suggest that the data holder should still have “an obligation to make the data available if the requesting [public sector body] – after making reasonable efforts [to be assessed based on the urgency of the situation] – cannot obtain the data from [public sector bodies] that made previous requests”.¹³³

¹²⁵ Article 18.1 of the Proposal for a Data Act.

¹²⁶ “[W]ithin 5 working days following the receipt of a request for the data necessary to respond to a public emergency and within 15 working days in other cases of exceptional need” (Article 18.2 of the Proposal for a Data Act).

¹²⁷ Article 18.2 of the Proposal for a Data Act.

¹²⁸ Article 18.3 of the Proposal for a Data Act.

¹²⁹ Article 18.4 of the Proposal for a Data Act.

¹³⁰ See <https://ec.europa.eu/digital-building-blocks/wikis/display/CEFDIGITAL/Once+Only+Principle>.

¹³¹ Recital 61 of the Proposal for a Data Act.

¹³² J. DREXL, C. BANDA, B. GONZÁLEZ OTERO, J. HOFFMANN, D. KIM, S. KULHARI, V. MOSCON, H. RICHTER and K. WIEDEMANN, *Position Statement of the Max Planck Institute for Innovation and Competition on the Commission’s Data Act Proposal*, *op. cit.*, p. 55.

¹³³ *Ibid.*

If, in any of the above hypotheses, the private actor declines or seeks the modification of the request, this can be challenged by the public sector body in front of the competent national authority.¹³⁴

If the private actor agrees to the request but this requires the disclosure of personal data, it will have “to take reasonable efforts”¹³⁵ to anonymise or pseudonymise (if anonymisation proves impossible) the data, insofar as the request can be fulfilled with anonymised/pseudonymised data.¹³⁶ This should be linked with the obligation, mentioned *supra*, for public sector bodies to limit their request, to the extent possible, to non-personal data.¹³⁷ Concretely, to the extent possible, only non-personal or anonymised data should be shared between private actors and public sector bodies in cases of exceptional need. If this is not possible and the response to the exceptional need requires the sharing of personal data, the private actor will have to apply, to the extent possible, technological safeguards such as pseudonymisation and data aggregation.¹³⁸

3. Remuneration

24. Access price. The type of exceptional need underlying the data request of the public sector body will determine whether the private actor is entitled to a remuneration. On the one hand, if the data is requested to respond to a public emergency (Article 15.a)), the private actor will have to provide it for free.¹³⁹ The Commission justifies the lack of remuneration in such a situation by outlining that “public emergencies are rare events and not all such emergencies require the use of data held by enterprises” and that “the business activities of the data holders are therefore not likely to be negatively affected as a consequence of the public sector bodies (...) having recourse to this Regulation”.¹⁴⁰

On the other hand, if the data is requested on the basis of Article 15.b) or c), the private actor will be entitled to a reasonable compensation that “shall not exceed the technical and organisational costs incurred to

¹³⁴ Article 18.6 of the Proposal for a Data Act.

¹³⁵ According to the EDPB and the EDPS, the wording “to take reasonable efforts” should be deleted to make this obligation stronger (EDPB-EDPS, *Joint Opinion 2/2022 on the Data Act Proposal*, *op. cit.*, p. 21).

¹³⁶ Article 18.5 and Recital 64 of the Proposal for a Data Act.

¹³⁷ Article 17.2.d) of the Proposal for a Data Act. See point 18.

¹³⁸ Recital 64 of the Proposal for a Data Act.

¹³⁹ Article 20.1 of the Proposal for a Data Act.

¹⁴⁰ Recital 67 of the Proposal for a Data Act.

comply with the request including, where necessary, the costs of anonymisation¹⁴¹ and of technical adaptation, plus a reasonable margin”.¹⁴² This is because such cases may be more frequent.¹⁴³ It thus echoes the HLEG’s compensation principle. Importantly, this means that the public sector body does not pay for the data itself, but rather only for the costs incurred by the data request plus a reasonable margin.¹⁴⁴ Information about the calculation of these costs and reasonable margin will have to be provided by the private actor at the request of the public sector body.¹⁴⁵ While the Data Act proposal does not define what constitutes a “reasonable margin”, inspiration could be taken from the PSI Directive which defines a “reasonable return on investment” as “a percentage of the overall charge, in addition to that needed to recover the eligible costs, not exceeding 5 percentage points above the fixed interest rate of the [European Central Bank]”.¹⁴⁶

4. Articulation with the *sui generis* database right

25. *Sui generis* database rights. Finally, it should be outlined that Recital 63 of the proposal provides that if the requested datasets are covered by *sui generis* database rights¹⁴⁷, these rights should be exercised by the private actor in such a way that it does not prevent the public sector body from obtaining or sharing the data in accordance with the Data Act. This should be understood as a limit to the exercise of the private actor’s *sui generis* right, and not as a lack of existence of such right. Said otherwise, the private actor cannot raise its *sui generis* database right as an obstacle to compulsory B2G data sharing in exceptional needs, but this

¹⁴¹ For some, the costs of pseudonymisation should also be covered, as according to Article 18.5 of the Proposal for a Data Act, data holders are required to take reasonable efforts to pseudonymise the data prior to the sharing (J. DREXL, C. BANDA, B. GONZÁLEZ OTERO, J. HOFFMANN, D. KIM, S. KULHARI, V. MOSCON, H. RICHTER and K. WIEDEMANN, *Position Statement of the Max Planck Institute for Innovation and Competition on the Commission’s Data Act Proposal*, *op. cit.*, p. 58).

¹⁴² Article 20.2 of the Proposal for a Data Act.

¹⁴³ Recital 67 of the Proposal for a Data Act.

¹⁴⁴ Recital 67 of the Proposal for a Data Act.

¹⁴⁵ Article 20.2 of the Proposal for a Data Act.

¹⁴⁶ Article 2(16) of Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information, *OJ L 172/56*, 26 June 2019. See also J. DREXL, C. BANDA, B. GONZÁLEZ OTERO, J. HOFFMANN, D. KIM, S. KULHARI, V. MOSCON, H. RICHTER and K. WIEDEMANN, *Position Statement of the Max Planck Institute for Innovation and Competition on the Commission’s Data Act Proposal*, *op. cit.*, p. 58.

¹⁴⁷ Article 7 of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, *OJ L 77/20*, 27 March 1996.

does not affect in any way the existence of this right in the first place.¹⁴⁸ This reminds a similar provision in the PSI Directive, which prevents public sector bodies from raising *sui generis* database rights as an obstacle to compulsory G2B data sharing (open data).¹⁴⁹ However, a striking distinction between the two acts is that the Data Act Proposal only mentions this in a recital and not in the operational part of the legislation.¹⁵⁰

§ 3. – Compulsory B2B data sharing can also contribute to more sustainability

26. Compulsory B2B data sharing. As outlined in the introduction, one must acknowledge that initiatives imposing B2B data sharing for sustainability purposes are scarce and have not received the same interest from the European legislator as compulsory B2G data sharing initiatives. Therefore, we will aim at developing some prospective reflections on why imposing B2B data sharing for sustainability purposes might make sense in the hope to spur further discussions on this topic. Our aim is thus not to be exhaustive, but rather to set some foundations on which future research could build.

a) Contextualisation

27. Balancing exercises entailed by data sharing. Like any other initiative imposing data sharing, initiatives imposing B2B data sharing will entail balancing exercises.¹⁵¹ For instance, the sustainability benefits deriving from the wider data sharing that such initiatives would entail

¹⁴⁸ This is a clear difference with Article 35 of the Proposal for a Data Act, which provides that “In order not to hinder the exercise of the [IoT data access right (see below Section 2.3.b)], the *sui generis* right provided for in Article 7 of Directive 96/9/EC does not apply to databases containing data obtained from or generated by the use of a product or a related service” (emphasis added).

¹⁴⁹ Article 1.6 of Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information, *OJ L 172/56*, 26 June 2019.

¹⁵⁰ See J. DREXL, C. BANDA, B. GONZÁLEZ OTERO, J. HOFFMANN, D. KIM, S. KULHARI, V. MOSCON, H. RICHTER and K. WIEDEMANN, *Position Statement of the Max Planck Institute for Innovation and Competition on the Commission’s Data Act Proposal*, *op. cit.*, p. 59.

¹⁵¹ On these balancing exercises, see T. TOMBAL, *Imposing Data Sharing Among Private Actors*, *op. cit.*; T. TOMBAL, “The rationale for compulsory B2B data sharing and its underlying balancing exercises”, *op. cit.*; M. VON GRAFENSTEIN, “Reconciling Conflicting Interests in Data through Data Governance”, *op. cit.*

would have to be balanced with the private actor's business interests, as compulsory data sharing might deter its incentive to further invest in data collection if third parties can request the data from the holder at no costs and without any effort (fear of free-riding).¹⁵²

28. Specific circumstances. One way to address these balancing exercises would be to consider that initiatives imposing B2B data sharing for sustainability purposes should only be created when "specific circumstances" dictate it.¹⁵³ Indeed, such legislations should only be adopted if they are proportional and necessary to address these "specific circumstances", in order to achieve an optimal balance with the private actor's freedom to conduct a business. Accordingly, this would entail that such compulsory data sharing should only be imposed if less stringent alternatives, such as the stimulation of *voluntary* data sharing for sustainability purposes, turn out to be insufficient to achieve the desired sustainability objectives, or if it is highly important and/or urgent to achieve these objectives.¹⁵⁴

"Specific circumstances" justifying the adoption of a compulsory data sharing legislation could, arguably, be established in situations where a just, fair and equal access to (some) data would be necessary to tackle sustainability challenges.¹⁵⁵ For instance, important sustainability objectives such as avoiding food waste or limiting mankind's environmental footprint could be deemed as justifying compulsory B2B data sharing. To illustrate this, it can be reminded that, as mentioned above, farmers increasingly resort to "smart farming", notably in order to monitor the health of crops and to detect plant diseases at an early stage.¹⁵⁶ As this data is usually collected through sensors integrated in farming equipment sold by specialised manufacturers, it is the latter who often have control on the data, and they might not be eager to share it. Yet, one could reflect on whether it would be justified, in some specific situations, to compel these farming equipment manufacturers to share such data in order to prevent food waste. For instance, these manufacturers could be forced to share data about the apparition of a disease they have received from one/several farms (inferred from the observation of crop sensor data or from sensors assessing the health of cattle) with farmers active in the same territory on a very short notice, in order to enable the farmers to

¹⁵² D. RUBINFELD and M. GAL, "Access Barriers to Big Data", *Arizona Law Review*, 2017, vol. 59, p. 374.

¹⁵³ Communication from the Commission, "A European strategy for data", *op. cit.*, p. 13, footnote 39. See also European Commission, Inception Impact Assessment: "Data Act", *op. cit.*, p. 1 and 4.

¹⁵⁴ See point 15 by analogy for B2G data sharing in cases of exceptional need.

¹⁵⁵ J. SHKABATUR, "The Global Commons of Data", *op. cit.*, p. 401-402.

¹⁵⁶ See point 4.

address the issue rapidly and to limit the loss of crops or cattle. In the same vein, these manufacturers could be forced to share data about the efficiency of a certain type of pesticide and the appropriate dose to be sprayed, in order to reduce the environmental damage caused by such products. Indeed, as these manufacturers could financially benefit from “over-spraying” as it implies that they will sell more products, they might not be willing to share such data on a voluntary basis. Yet, this could lead to highly detrimental environmental consequences, and could therefore potentially justify the imposition of compulsory B2B data sharing for sustainability purposes.

b) An embryo of B2B data sharing for sustainability purposes: the “IoT data access right” in the Data Act Proposal

29. The IoT data access right. In fact, we argue that the Data Act proposal might contain an embryo of such a compulsory B2B data sharing for sustainability purposes, even if this is not necessarily apparent from the outset. We refer here to the proposal’s provisions pertaining to the Internet of Things [(IoT)] data access right, which makes it compulsory for providers of IoT products¹⁵⁷ and of related services¹⁵⁸, including virtual assistants¹⁵⁹, to share personal and non-personal IoT data generated by their users¹⁶⁰ with the latter, or with private third parties¹⁶¹ at the request of their users.¹⁶²

¹⁵⁷ “‘Product’ means a tangible, movable item, including where incorporated in an immovable item, that obtains, generates or collects, data concerning its use or environment, and that is able to communicate data via a publicly available electronic communications service and whose primary function is not the storing and processing of data” (Art. 2(2) of the Data Act Proposal). See also Recitals 14 and 15.

¹⁵⁸ “‘Related service’ means a digital service, including software, which is incorporated in or inter-connected with a product in such a way that its absence would prevent the product from performing one of its functions” (Art. 2(3) of the Data Act Proposal). See also Recital 16.

¹⁵⁹ “‘Virtual assistants’ means software that can process demands, tasks or questions including based on audio, written input, gestures or motions, and based on those demands, tasks or questions provides access their own and third party services or control their own and third party devices” (Art. 2(4) of the Data Act Proposal). See also Recital 22.

¹⁶⁰ “‘User’ means a natural or legal person that owns, rents or leases a product or receives a services” (Art. 2(5) of the Data Act Proposal). See also Recital 18.

¹⁶¹ “A third party to whom data is made available may be an enterprise, a research organisation or a not-for-profit organisation” (Recital 29 of the Data Act Proposal).

¹⁶² See Articles 3 to 7 of the Data Act Proposal. For a more detailed analysis of this right, see T. TOMBAL and I. GRAEF, “The regulation of access to personal and non-personal data in the EU: from bits and pieces to a system?”, *The boundaries of data: technical, practical and regulatory perspectives*, B. VAN DER SLOOT and S. VAN SCHENDEL (ed.), Amsterdam University Press, 2023 [Forthcoming]; R. PODSZUN and P. OFFERGELD, “The EU Data Act and the Access to Secondary Markets”, *op. cit.*; A. METZGER and H. SCHWEITZER, “Shaping Markets: A Critical Evaluation of the Draft Data Act”, *op. cit.*; B. MARTENS, “Pro- and anti-competitive provisions

1. The “IoT data access right”

30. The right in a nutshell. More specifically, the Data Act proposal provides that “products shall be designed and manufactured, and related services shall be provided, in such a manner that data generated by their use¹⁶³ are, by default, easily, securely and, where relevant and appropriate, directly accessible to the user”.¹⁶⁴ If this IoT generated data is not directly accessible to the user, the provider of IoT products or related services will have to make it available to the user¹⁶⁵ (B2U data sharing) on the basis of a simple request (through electronic means where technically feasible), “without undue delay, free of charge and, where applicable, continuously and in real-time”.¹⁶⁶ Furthermore, the provider of IoT products or related services will also have to make this IoT generated data available to a third party (B2B data sharing)¹⁶⁷, upon request by a user¹⁶⁸ or by a party acting on behalf of a user, “without undue delay, free of charge to the user, of the same quality as is available to the [provider] and, where applicable, continuously and in real-time”.¹⁶⁹

in the proposed European Union Data Act”, *op. cit.*. To some extent, this builds on and complements the personal data portability right contained in Article 20 of the General Data Protection Regulation (GDPR).

¹⁶³ “Data generated by the use of a product or related service include data recorded intentionally by the user. Such data include also data generated as a by-product of the user’s action, such as diagnostics data, and without any action by the user, such as when the product is in ‘standby mode’, and data recorded during periods when the product is switched off. Such data should include data in the form and format in which they are generated by the product, but not pertain to data resulting from any software process that calculates derivative data from such data as such software process may be subject to intellectual property rights” (Recital 17 of the Data Act Proposal). On the other hand, “information derived or inferred from this data, where lawfully held, should not be considered within scope of this Regulation” (Recital 14).

¹⁶⁴ Article 3.1 of the Data Act Proposal.

¹⁶⁵ “Where the user is not a data subject, any personal data generated by the use of a product or related service shall only be made available by the data holder to the user where there is a valid legal basis under Article 6(1) of Regulation (EU) 2016/679 and, where relevant, the conditions of Article 9 of Regulation (EU) 2016/679 are fulfilled” (Article 4.5 of the Data Act Proposal).

¹⁶⁶ Article 4.1 of the Data Act Proposal.

¹⁶⁷ Importantly however, “any undertaking providing core platform services for which one or more of such services have been designated as a gatekeeper, pursuant to [the Digital Markets Act], shall not be an eligible third party under this Article” (Article 5.2 of the Data Act Proposal).

¹⁶⁸ “Where the user is not a data subject, any personal data generated by the use of a product or related service shall only be made available where there is a valid legal basis under Article 6(1) of Regulation (EU) 2016/679 and where relevant, the conditions of Article 9 of Regulation (EU) 2016/679 are fulfilled” (Article 5.6 of the Data Act Proposal).

¹⁶⁹ Article 5.1 of the Data Act Proposal.

Importantly, while the data sharing shall be free for the user, the provider can charge the third party a reasonable compensation.¹⁷⁰ Finally, it should be outlined that the obligations contained in these provisions do not apply to providers of IoT products or related services that qualify as micro or small enterprises.¹⁷¹

2. An embryo of B2B data sharing for sustainability purposes

31. Vector for specific sustainability objectives. While it seems that this IoT data access right has mainly been included in the Data Act proposal for economic purposes, namely to ensure fairness in the allocation of value from data among actors in the data economy and to foster access to and use of data in order to increase innovation and competition¹⁷², it could also support a specific sustainability objective. Indeed, the proposal outlines that the manufacturer's or designer's exclusive control over the use of data generated by IoT products or related services typically contributes to lock-in effects which hinders the development of aftermarket services by alternative players.¹⁷³ Accordingly, such an IoT data access right would allow the development of a competitive offer for aftermarket

¹⁷⁰ Article 9.1 of the Data Act Proposal. For a more detailed analysis of what a "reasonable compensation" could entail, see G. Monti, T. TOMBAL and I. GRAEF, "Study for developing criteria for assessing "reasonable compensation" in the case of statutory data access right", *Study for the European Commission Directorate-General Justice and Consumers: Final report*, Publications Office of the European Union, 2022, available at <https://data.europa.eu/doi/10.2838/19186>; E. Habich, "FRAND Access to Data: Perspectives from the FRAND Licensing of Standard-Essential Patents for the Data Act Proposal and the Digital Markets Act", *IIC*, 2022, Vol. 53, Issue 9, p. 1343-1373. It is also worth noting that the option not to include any compensation for the data holder has been explored but was eventually not retained, due to fears that this would unduly affect the data holders' business interests (Commission Staff Working Document, "Impact assessment report accompanying the Data Act", *op. cit.*, p. 36).

¹⁷¹ Article 7.1 of the Data Act Proposal. For the definition of what constitutes a micro or small enterprise, see Article 2 of the Annex to the Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, 2003/361/EC, *OJ L 124/36*, 20 May 2003.

¹⁷² Data Act Proposal, Explanatory memorandum, p. 2.

¹⁷³ Data Act Proposal, Explanatory memorandum, p. 13. See also Recital 19 of the Proposal.

services, such as repair and maintenance¹⁷⁴, as the users would no longer depend on the manufacturer's services only.¹⁷⁵

Importantly, this would not only have economic competitive benefits, but also sustainability benefits. Indeed, as outlined in the proposal, the sharing of such IoT data could “support innovation and the development of digital and other services protecting the environment, health and the circular economy, in particular though facilitating the maintenance and repair of the products in question”.¹⁷⁶ The underlying idea is that if users can more easily obtain the data that is necessary to repair their IoT device, and if they can ask the manufacturer to share this information with other private actors that offer repair and maintenance services¹⁷⁷, then users will be more likely to try to have their device repaired. Indeed, if this data access right allows for several cheaper repair options to emerge, users will more likely resort to them than in a situation where their only option is to use the manufacturers' costly exclusive repair services (in which case users might simply prefer to buy a new product). As a result, this will increase the life-span of these IoT products as they will be replaced less often, and this will contribute to a greater circular economy in Europe.¹⁷⁸ Indeed, “increased reparability and optimization opportunities, due to better data access in the context of predictive maintenance services carried out by independent repairers, should translate into a longer usage time for connected products”.¹⁷⁹

32. Circular Economy Action Plan. This fits perfectly in line with the European Union's “Circular Economy Action Plan”, where the Commission indicated that it would ensure that users “receive trustworthy and relevant information on products at the point of sale, including

¹⁷⁴ For specific sectoral data sharing legislations pertaining to “repair and maintenance” data, see Regulation (EU) 2018/858 of the European Parliament and of the Council of 30 May 2018 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC, *OJ L 151/1*, 14 June 2018, Articles 61 to 66; and Regulation (EU) No 167/2013 of the European Parliament and of the Council of 5 February 2013 on the approval and market surveillance of agricultural and forestry vehicles, *OJ L 60/1*, 2 March 2013, Articles 53 to 56.

¹⁷⁵ Data Act Proposal, Explanatory memorandum, p. 13. See also Recital 28 of the Proposal.

¹⁷⁶ Recital 14 of the Data Act Proposal. See also Commission Staff Working Document, “Impact assessment report accompanying the Data Act”, *op. cit.*, p. 2.

¹⁷⁷ The data holder's trade secrets will however have to be preserved. See Articles 4.3 and 5.8 of the Data Act Proposal.

¹⁷⁸ Commission Staff Working Document, “Impact assessment report accompanying the Data Act”, *op. cit.*, p. 10.

¹⁷⁹ *Ibid.*, p. 61.

on their lifespan and on the availability of repair services, spare parts and repair manuals”.¹⁸⁰ This will thus enhance the users participation in the circular economy, and this will eventually provide “high-quality, functional and safe products, which are efficient and affordable, last longer and are designed for reuse, repair, and high-quality recycling”.¹⁸¹ As indicated by the Commission, the sustainability benefits of the circular economy are manifold, as it will bring “a whole new range of sustainable services, product as-service models and digital solutions will bring about a better quality of life, innovative jobs and upgraded knowledge and skills”.¹⁸²

Conclusion

33. Voluntary and compulsory data sharing by private actors can significantly contribute to sustainability. In light of the above, we can conclude that voluntary or compulsory data sharing by private actors can significantly contribute to the realisation of sustainability objectives, and that existing or proposed European cross-sectoral initiatives already support this to a certain extent.

Regarding *voluntary* data sharing, we have outlined that, while in practice private actors mainly rely on contractual agreements, the Data Governance Act created a specific framework for voluntary data sharing, namely the “data altruism” mechanism. This mechanism is in fact quite peculiar, as it does not organise a direct voluntary data sharing between the private actor and the private or public actor that will make use of this data for sustainability purposes. Rather, this mechanism aims at creating data pools that will be managed by an intermediary, called a “data altruism organisation”. Data is thus only indirectly shared between the private actor and the private or public re-user, as it will first transit towards a dedicated data pool.

However, if it is fully up to the private actors to decide whether they want to engage in *voluntary* data sharing (either through contractual

¹⁸⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “A new Circular Economy Action Plan For a cleaner and more competitive Europe”, 11 March 2020, COM(2020) 98 final, p. 5.

¹⁸¹ *Ibid.*, p. 2.

¹⁸² *Ibid.*

agreements, the “data altruism” mechanism or other mechanisms), this might limit the hypotheses in which sustainability benefits deriving from data sharing might be achieved in practice. Accordingly, we have outlined that data sharing could also be made *compulsory*, in certain situations, in order to pursue sustainability purposes.

In this regard, we outlined that the European Commission has included in its Data Act proposal several provisions pertaining to compulsory B2G data sharing for “exceptional needs”. However, due to the relatively narrow definition of “exceptional need” provided in Article 15 of the proposal, one could wonder whether, for example, data sharing for environmental protection purposes, which is a key sustainability objective, might be considered as a hypothesis of data sharing for “exceptional needs”. On the one hand, one could argue that global warming and the degradation of our environment are public emergencies that we need to respond to or to prevent (Articles 15.a) and b)), as this risks leading to serious and lasting repercussions on living conditions or economic stability. On the other hand, some could argue that while this could have disastrous consequences, these have not fully materialised yet and are rather mid- to long-term concerns, in such a way that these concerns might not be qualified as public emergencies yet, at least if addressed from a general perspective. Similarly, this might also bar the possibility to rely on Article 15.c) to impose B2G data sharing, as specific environmental data sharing legislation could still be adopted. Accordingly, we believe that data sharing for general sustainability purposes might thus likely not be considered as a hypothesis of data sharing for “exceptional need”, in light of the current phrasing of Article 15, and that data sharing for environmental purposes should therefore explicitly be added as an “exceptional need” in the final text of the Data Act. On the other hand, as indicated above, Article 15 could lead to the imposition of B2G data sharing in order to address a specific public emergency that is a consequence of environmental degradation (e.g. floods, fires, etc.). In such cases, data will have to be shared in accordance with the proportionate, limited and predictable framework that has been established in the Data Act proposal in order to ensure legal certainty and to minimise the administrative burdens placed on businesses.

Finally, this chapter argued that while compulsory B2B data sharing for sustainability purposes has not received the same interest from the European legislator as B2G data sharing, it might also make sense to impose it in certain circumstances. As a starting point, we argued that B2B data sharing for sustainability purposes should only be made compulsory if there are “specific circumstances” that justify it, in order to achieve an optimal balance with the private actor’s freedom to conduct a business.

We believe that such “specific circumstances” could, arguably, be established in situations where a just, fair and equal access to (some) data would be necessary or highly urgent to tackle sustainability challenges. For instance, important sustainability objectives such as avoiding food waste or limiting mankind’s environmental footprint could be deemed as justifying compulsory B2B data sharing in the agricultural sector.

In fact, we argued that the Data Act proposal might contain an embryo of such compulsory B2B data sharing for sustainability purposes, even if this is not apparent from the outset. Indeed, while it seems that the proposal’s “IoT data access right” has mainly been included for economic purposes, we argue that such a right could also support a specific sustainability objective, by fostering the development of a competitive offer for aftermarket services, such as repair and maintenance, as the users would no longer depend on the manufacturer’s services only. As a result, this would increase the life-span of these IoT products as they will be replaced less often, and this will contribute to a greater circular economy in Europe, which fits perfectly in line with the European Union’s “Circular Economy Action Plan”.