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Statement on the EU Commission's Draft Regulation on European Data Governance (Data Governance Act) – COM(2020) 767 final

Berlin, 21 January 2021

Following its appointment in autumn 2019, the EU Commission identified digital policy as a central field of action. The Data Strategy presented by the Commission in spring 2020 set out the key pillars of the Commission's future data policy. The Data Strategy also announced the prospect of a Data Governance Act which would set out the legal framework for the availability of data for use. With the current draft regulation, the Commission has followed through on this announcement.

In the current draft regulation, eco identifies initial positive approaches for a better and more legally secure use of data. At the same time, in numerous aspects the draft falls short of the expectations of the Internet industry for enhancing digitalisation and, on the grounds of bureaucratic approaches, does not create a suitable framework for enabling a pro-active data policy.

Looking at the Data Governance Act on a detailed basis, eco has the following comments to offer.

On Article 2: Definitions

The use of the term "data altruism" regarding the possibility to consent to the processing of non-personal data raises the question of how data altruism differs here from data protection. As currently drafted, this term blurs the distinction between personal and non-personal data. Furthermore, in eco's view, the limitation of purpose to scientific research and the provision of public services is too narrow.

On Article 5: Conditions for re-use

The logic behind the further use of data from the public sector being subject to conditions, in particular licensing issues, can be understood in principle. However, care should be taken to ensure that the processing of non-personal data is not subject to disproportionately high requirements and bureaucratic constraints that would ultimately make this infeasible. The processing of data in a controlled secure processing environment may make sense in individual cases. At the same time, however, only marginal consideration is given to the question of the relationship between this and generally applicable requirements in the area of IT security and data protection. While the provision of the secure environment by the respective government is fundamentally to be welcomed, this raises questions

regarding the extent to which corresponding market-oriented solutions make more sense, and the extent to which these secure environments meet other requirements.

On Article 7: Competent bodies

The Internet industry regards the plans to designate one or more bodies to support the processing of data and making data accessible as a meaningful step towards enabling better data usage.

On Article 9: Providers of data sharing services

The regulation stipulates that certain providers of data sharing services shall be subject to a “notification procedure”, with the associated services and providers being defined as part of this. From eco’s standpoint, a problem here is that additional bureaucratic effort would initially be brought about through structural separation and the establishment of a separate institution for this purpose, followed up by further administrative effort related to monitoring by the competent authority. In return, the proposal does not provide incentives that would lead to increased use of data fiduciary services. As such, existing data fiduciaries would initially incur administrative burdens without benefiting from the regulatory regime. It is unclear whether this would lead to the desired economies of scale and a level playing field between smaller and large established providers. Moreover, there is a risk that overly restrictive requirements (see Article 11) would prevent possible innovation and differentiation between individual data fiduciary services. In view of the fact that these are often services that work with user authentication and payment functions or that are trust services, this would needlessly open up an additional regulatory field that would lead to avoidable administrative burdens. This could have a negative impact on providers of associated services and products.

On Article 10: Notification of data sharing service providers

Article 10 provides a more in-depth description of the detailed notification process for data sharing services. At the same time, this raises the question of why such a notification requirement would be necessary and expedient. Here the regulation conveys a sense of excessive rulemaking, and it would also not bring about any added value in the market. eco advocates against the further pursuit of the chosen path. Instead, eco advocates for endeavouring to find a market-oriented solution on the basis of pre-existing standards and norms, which could include voluntary notification in order to create more transparency in the market and thus achieve scaling potential.

On Article 11: Conditions for providing data sharing services

In eco's view, the conditions to be imposed on data sharing services would not serve a purpose. What is particularly inexplicable here is the envisaged structural separation and the prohibition on offering any additional services beyond pure data transmission, if these services do not require access to the data to be shared. Innovative offers by data fiduciaries, such as analysis tools for the preparation of data or machine learning, must also be allowed in the future, as these can represent an important distinguishing feature in the market. The benefit attached to pure "data brokers", on the other hand, is questionable.

On Article 26: European Data Innovation Board

While the concept of establishing a European Data Innovation Board is understandable in principle, the proposed composition of the Board reveals that only representatives of administrations are intended to be involved in the Board's work. Standing industry and academic representatives are not envisaged. eco considers this approach to be unpromising and advocates opening up the Innovation Board beyond the realm of the authorities. Similar experiences have also led to positive developments for the European Network and Information Security Agency (ENISA).

On Article 27: Tasks of the Board

The tasks of the Innovation Board include the issues of cross-sectoral data use and related data exchange. This underscores eco's call for the industry to be involved in the related aspects. What is unclear is the extent to which the work of the Data Innovation Board could counteract related industry efforts, for example, through regularisation and standardisation. eco argues here for clear and transparent work by the Innovation Board, work which would take related efforts by the industry appropriately into account, and which would include and involve the industry.

Conclusion:

With the Data Governance Act, the European Commission is aiming to create the legal basis for common data processing and data sharing. eco expresses doubts concerning the possibility of this goal actually being achieved on the basis of the present draft regulation. While the draft does contain meaningful aspects – such as the planned-for bodies that are intended to provide support in making public data accessible – the envisaged

legal framework would create considerable additional administrative and bureaucratic work for companies and services that want to use such data commercially. The extent to which commercial data usage is even foreseen and wanted under this Act therefore remains debatable. The envisaged regulations for the providers of data fiduciary services are associated with a high administrative burden and would subject the companies to an additional monitoring regime on top of the other prevailing requirements for data protection and IT security. By contrast, incentives for scalability and competition between corresponding services are not in evidence in the draft regulation. The administrative implications of the planned regulation are also obscure. In particular, the scope of responsibility of data protection supervisory authorities is likely to be significantly expanded. The interactions with related regulation in other areas appears to be imbalanced. eco recommends a fundamental revision of the draft regulation with the clear objective of formulating open standards and corresponding basic usage scenarios for the use and interconnection of data in certain categories (e.g. location data).

About eco

With more than 1,100 member companies, eco is the largest Internet industry association in Europe. Since 1995 eco has been highly instrumental in shaping the Internet, fostering new technologies, forming framework conditions, and representing the interests of members in politics and international committees. The focal points of the association are the reliability and strengthening of digital infrastructure, IT security, trust and ethically-oriented digitalisation. That is why eco advocates for a free, technology-neutral and high-performance Internet.