Summary ECIS end of year webinar

Data Act: regulatory overreach or appropriate?

7 December 2022

Jonathan Sage

Chair of the Public Affairs Group at ECIS

Jonathan welcomed the participants to ECIS' end of year webinar, focusing on the European Commission's ("Commission") Data Act proposal and in particular the provisions on cloud interoperability and data portability. Jonathan continued to briefly introduce ECIS, explaining its 30+ year long history as a trade association that since its inception in 1989 has consistently fought for the same principles of better interoperability in IT markets, vigorous competition on the merits, and a diversity of consumer choice.

Jonathan outlined ECIS' recent focus on cloud interoperability and what led to the topic of discussion for this webinar. ECIS has system interoperability "*in its name*" and therefore strongly supports the principle of more effective cloud interoperability enshrined in the Commission's Data Act proposal. However, when drawing up regulation with specific measures, these measures need to be workable in practice to ensure that they open up the market. Raising the requirements for cloud providers could on the one hand push the burden of effective switching to incumbents; on the other hand such measures may favour the incumbents. As such, the question should be asked, "*how can Europe get the balance right between apparently conflicting goals?*"

Lara Natale

Moderator, Senior EU Advisor – Data Economy, Vodafone

Lara introduced the panellists providing transatlantic perspectives from policy, industry and academia.

She explained that the webinar would be centred around two key topics.

- The Data Act provisions, a framework for effective switching and efficient data interoperability
- The wider implications of the Data Act on, for example, cybersecurity and international trade

Pierre Chastanet

Head of Unit Cloud & Software, European Commission

Pierre set out the importance of cloud solutions for Europe's digital ambitions. He explained that thanks to policy and industry efforts implementing self-regulation mechanisms a lot of progress has already been made to overcome barriers to effective switching and interoperability. Nevertheless, vendor lock-in continues to be a big issue. To date, changing cloud providers still is a very costly process. Primarily because self-regulation initiatives such as codes of conduct do not include sufficient detail on specific measures and obligations.

Pierre explained that with the Data Act the Commission has tried to overcome the issues that were not resolved by self-regulatory initiatives. The Commission acknowledges in its legislative proposal the different cloud service models and the varying difficulty these present to effective switching and interoperability. The Commission has tried to reconcile diverse industry perspectives, with some operators claiming portability within minutes, whereas others set out that this can be very difficult to achieve. Therefore, the Commission introduced what it believes are very reasonable timeframes, while also ensuring sufficient ambition, in the knowledge that interoperability will only improve switching processes in the future.

On the phasing out of switching charges Pierre explained that this should allow data processing services providers sufficient time to adapt their solutions to open technical specifications, that should be deployed across the industry.

On standardisation Pierre set out that the Commission would be open towards all consensus processes driven by European stakeholders, provided these are fully open, transparent and inclusive. The provisions on European standards and specifications were included in the proposal to ensure that standardisation-processes do not take longer than required and can be implemented effectively.

Pierre closed by acknowledging that the devil will be in the detail in terms of application in practice and that the Commission is looking forward to comments and remarks from industry participants to move the Data Act forward.

Filip Swiderski

Principal Policy Advisor ECR Group in the European Parliament's IMCO Committee

Filip explained that while the principles behind the Data Act should be supported, the Data Act itself lacks sufficient realism on market practices. Within the IMCO Committee, Filip and his colleagues tried to look at actual market outcomes, while remaining strongly supportive on the free flow of data.

According to Filip, the ECR's proposals focus on streamlining provisions, *e.g.*, by ensuring shared responsibilities among the source and destination cloud service provider. With the suggested amendments, the rapporteur also tried to put the customer at centre by ensuring it plays an important role from day one. Filip explained that the customer knows best what it wants to achieve with its cloud solution, but that today a customer is not getting the full picture of what it is buying. Therefore, flexibility was provided on the ability to extend deadlines. Finally, Filip explained that more clarity is required on functional equivalence and switching charges in order for these provisions to be effective.

Despite some differences of opinion, Filip expressed confidence in a correct outcome and congratulated the Commission for dedicating time and resources to this important development. He is looking forward to engaging with the Commission during the negotiations and welcomes stakeholders to provide their views.

Emilie Petras-Sohie

Senior Legal & Policy Manager, IBM

Emilie opened her keynote by highlighting that IBM fully supports the objectives of the Data Act and she thanked the Commission for tabling a great and timely initiative for cloud solutions in Europe. She explained that IBM has long invested in a multicloud approach, supported hybrid cloud solutions and the acquisition of Red Hat proves its belief in open technologies.

Emilie went on to explain that strong competition in the market is needed, and that effectiveness of the Data Act must be ensured. She provided various ways in which the Data Act can be improved to better contribute towards reaching its goals:

- On functional equivalence, in general, Emilie urged market participants and the legislators to continue dialogue on what should be achieved, and how to best achieve it. She expressed support of parliamentary initiatives aimed at ensuring clarity on who is responsible but highlighted a need for more clarity on the obligations for providers and why these are required.

- On the included timeframes Emilie welcomed amendments allowing for extensions and sufficient flexibility, and cautioned against confusion between the notice period, contract duration and the terms of the switching processes.

- On the duration of contracts, according to Emilie, fixed term contracts should not be prohibited, as customers often want those.

- According to IBM, clients own their data, and they should be able to decide what happens with it. However, the international data transfer provisions in the Data Act will force IBM to make decisions on what happens to customer data.

Hannah Bracken

Policy Analyst, U.S Department of Commerce

Hannah described how she and some of her U.S. government colleagues are following with interest the European Commission's proposal for the Data Act, given the potential implications of the legislation for multiple U.S. stakeholders and for transatlantic cooperation on data sharing, trade, law enforcement, and other priorities. Hannah described how many of the Act's objectives of maximizing the value of data in our economies and promoting innovation are shared across the Atlantic. Hannah encouraged continued and robust stakeholder engagement on the question of "functional equivalence" and on what would constitute reasonable switching timelines within the Data Act proposal.

Some desired outcomes that Hannah described include that the Data Act does not impede EU-U.S. data sharing for civil, regulatory, and criminal law enforcement purposes, and that the final text includes explicit provisions for the protection of intellectual property, including copyright protected works. Hannah described a desire for clarity regarding internal business and business-to-business transfers of non-personal data. Finally, Hannah encouraged the recognition of international standards to allow for the most robust technical standards and high degrees of compatibility with trade partners.

Paul Timmers

Professor, European University Cyprus, University of Oxford, Cybersecurity, strategic autonomy and sovereignty

Paul broadened the discussion by providing views on the Data Act from a geopolitical and sovereignty perspective. He introduced the concept of *the political trilemma of the world economy* created by economist Dani Rodrik to capture the trade-offs that governments faced in their responses to globalization. The trilemma holds that democracy, national sovereignty and globalization are mutually incompatible; it would be possible to combine two of the three, but it is impossible to implement all three in full simultaneously.

Paul went on to apply the political trilemma of the world economy to the Data Act proposal. He explained that the proposal clearly is good for democracy, as it creates rights for customers. The Data Act should also contribute towards globalisation, with Europe as a leader. Unfortunately this means that national sovereignty will suffer. Paul warned legislators to take into account the experience big technology platforms have with regulations. Due to their experience, Big Tech players will be more used to and capable of effectively implementing the Data Act provisions and they could end up being the ultimate winners.

Paul urged legislators to focus more on the possible sovereignty issues the Data Act may cause. He concluded by providing three possible ways forward: (i) we could ignore the sovereignty issue and accept the increasing power of the Big Tech players; (ii) we could implement adequate reporting on the usage, capacity and control of data; or (iii) we could expand the Data Act to provide a holistic approach to cloud policies.

Jonathan Sage

Chair of the Public Affairs Group at ECIS

Jonathan closed out the webinar by providing an ECIS perspective on the topic. He opened by applauding the seemingly uniform agreement among the panellists on the need for proper international standards.

According to Jonathan, IT markets have changed significantly over time as we moved from on premise infrastructure to cloud subscription models and he urged all industry participants to work on removing trade barriers. Jonathan recognized that the development of international standards takes time, especially for PaaS and SaaS services where a hiatus period will need to be bridged. Nevertheless, Jonathan ensured that ECIS will continue to play its part and provide an objective industry perspective.

Lara Natale

Moderator, Senior EU Advisor – Data Economy, Vodafone

Lara concluded the webinar and thanked everyone for the lively and very timely debate.

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About ECIS

ECIS is an international non-profit association founded in 1989 that strives to promote market conditions and interoperable solutions in the ICT sector allowing vigorous competition on the merits and a diversity of consumer choice. ECIS has actively represented its members on many issues related to interoperability and competition before European, national and international bodies, including the EU institutions and WIPO. ECIS' members include large and smaller information and communications technology hardware and software providers.

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