Business-to-government data sharing for environmental purposes

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In this paper, I analyse whether two horizontal legislative initiatives supporting business-to-government (B2G) data sharing can contribute to environmental protection. More specifically, I look at the voluntary 'data altruism' mechanism provided in the Data Governance Act and at the compulsory B2G data sharing obligation for 'exceptional needs' provided in the Data Act proposal.

Introduction

While data are sometimes presented as the new oil in the European data economy, it would be reductive to solely consider the potential economic value of data without reflecting on their societal value. Indeed, as the European Commission's *Strategy for data* outlines, "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" (European Commission 2020a: 3).

Importantly, not only public sector data but also private sector data can make a significant contribution to the common good (European Commission 2020a: 6). 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 public actors to use these data could generate immense scientific and environmental benefits for our society (Shkabatur 2019: 383).

Therefore, I argue that data sharing between private and public actors can significantly contribute to the realisation of environmental objectives. More specifically, I pinpoint two interesting European legislative initiatives that can support this. While sector-specific legislation has the advantage of being much more targeted and adapted to a sector's needs, this must be balanced with the non-rivalrous and general-purpose nature of data, which implies that they can be re-used for completely different purposes in another sector (European Commission 2020b: 15). In fact, such a sectoral limitation seems particularly unwarranted if the data sharing legislation pursues broader societal objectives.

Consequently, I focus on business-to-government (B2G) horizontal data sharing initiatives which can contribute to environmental protection. More specifically, I look at the *voluntary* 'data altruism' mechanism provided in the Data Governance Act (DGA 2022) and at the *compulsory* B2G data sharing obligation for 'exceptional needs' provided in the Data Act proposal (DAP 2022).

Voluntary B2G data sharing and 'data altruism'

Clearly, private actors can *voluntarily* decide to share data with public actors for environmental purposes. For instance, phone operators increasing their B2G sharing of location data with a regional authority can allow the latter to optimise its public transport system in order to reduce CO2 emissions from personal vehicles. In practice, such *voluntary* data sharing mainly relies on contracts. Private actors are therefore free to draft such contracts as they please, although they can rely on European Commission guidelines (European Commission 2018a: 13-4).

However, recently the Commission has started to promote voluntary sharing for societal purposes through the development of a series of 'Common European data spaces,' which should lead to large pools of data becoming available in domains of public interest such as environmental protection (European Commission 2020a: 22-3). A key legislative instrument to support the establishment of these European data spaces is the DGA (2022).

More specifically, Articles 16 to 25 of the DGA contain measures aiming to facilitate voluntary data sharing for the

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common good at the EU level. In the DGA this is referred to as "data altruism," which can be defined as a voluntary mechanism through which data subjects (individuals – see General Data Protection Regulation, Art. 4.1) can decide to share their personal data and data holders (private actors – see DGA, Art. 2.8) can decide to share their non-personal data for objectives of general interest without seeking or receiving a reward (Art. 2(16)). This can contribute to achieving environmental objectives such as combating climate change.

This "data altruism" mechanism (DAM) is in fact quite particular as it does not organise direct voluntary data sharing between private actors and public entities that will make use of the data for a specific environmental objective. Instead, the mechanism aims to create data pools that are managed by an intermediary called a "data altruism organisation" (DAO) (Art. 18). Data are therefore only indirectly shared between private actors and public entities as the latter only obtain the data from the pool and not directly from the former. For instance, using this DAM private actors can provide data about air quality and releases of polluting materials around their worksites to an environmental data pool managed by a DAO, from which a public actor can 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 share non-personal data on its own initiative with these data pools and cannot decide to provide personal data that it holds unless the individuals to which the data pertain have consented to it. In this regard, the DGA provides that in order to facilitate data altruism, the Commission may develop a standardised "European data altruism consent form" (Art. 25).

A third particularity of this DAM is that the conditions for being recognised as a DAO are quite strict. Indeed, only public and private non-for-profit entities that pursue objectives of general interest and have a legally independent functionally separate structure can be recognised as DAOs (Art. 18). Therefore, a for-profit private actor that decides to share data extracted from its commercial activity in order to promote environmental protection as a 'side-activity' cannot be recognised as a DAO. It will therefore have to fall back on classic contracts.

To conclude, it must be underlined that this DAM is only one option to engage in voluntary data sharing for environmental objectives, and that private actors are not compelled to use this mechanism. Indeed, other 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" can also be used for the common good (DGA: Recital 49). In the next section I turn to situations in which a private actor might be compelled to share some of its data with public actors.

Imposing compulsory B2G data sharing for 'exceptional needs'

The underlying logic of imposing B2G data sharing is that if it were fully up to private actors to decide whether they want to engage in such sharing it might limit the possibility of societal benefits in fact being achieved. Accordingly, discussions on B2G compulsory data sharing emerged in 2017 during the public consultation pertaining to the latest recast of the Public Sector Information Directive (PSI Directive 2019). At the time, the European Commission was considering including a new provision in the Directive according to which data held by private companies but deemed to be of public interest should be shared with public sector bodies.

While numerous respondents to the public consultation supported this proposition, such a provision was finally not included in the recast of the Directive (European Commission 2018b: 8). The reason was that many stakeholders responding to the public consultation had indicated 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 (European Commission 2018b: 8). According to them, further discussion was needed on compulsory B2G data sharing initiatives.

Therefore, the European Commission appointed a High-Level Expert Group (HLEG) on B2G Data Sharing. Its mandate was to evaluate the key principles involved in the supply of private sector data to public sector bodies under preferential conditions for re-use which were contained in the European Commission's abovementioned data sharing guidelines (European Commission 2018a). The HLEG suggested a series of principles for "scalable, responsible and sustainable B2G data sharing for the public interest" (HLEG on B2G Data Sharing 2020: 7). In substance, the HLEG identified four core principles, namely proportionality, data-use limitation, risk mitigation and safeguards, and compensation, which aim to balance the interests of private data holders on the one hand and pub-

lic re-users on the other hand (HLEG on Business-to-Government Data Sharing 2020: 80-3).

In the wake of the HLEG's seminal report, discussion pertaining to the possibility of imposing *compulsory* B2G data sharing for societal purposes has reappeared in the European Commission's inception impact assessment on the Data Act (European Commission 2021: 5). This eventually led to the inclusion in Articles 14 to 22 of the DAP (2022) of *compulsory* B2G data sharing provisions in cases of 'exceptional needs'.

The DAP provides that "upon request, a data holder [Art. 2(6)] shall make data available to a public sector body [Art. 2(9)] or to a Union institution, agency or body demonstrating an exceptional need to use the data requested" (Art. 14.1). Importantly, however, this obligation does not apply to small and micro-enterprises (Art. 14.2).

The key criterion to determine when private actors might be compelled to share data with a public sector body is therefore that of 'exceptional needs'. While the policy option to request B2G data sharing "for any duly justified purpose" was considered (European Commission 2022: 37), this option was eventually rejected because it would entail higher administrative and compliance costs for private actors without necessarily compensating them with 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 (European Commission 2022: 49-50). The DAP therefore only applies in specific *ad hoc* B2G sharing scenarios, and complements "existing reporting or compliance obligations in sectoral legislation that establish ongoing or recurring data exchange mechanism[s] between public institutions and the private sector" (European Commission 2022: 158; Drexl et al. 2022: 52-3).

According to the DAP, an 'exceptional need' will exist in specific circumstances such as when there is a need to respond to, prevent or assist recovery from a public emergency (Arts. 15.a) and b)) or when a lack of available data prevents a public sector body from carrying out a specific task in the public interest and the body is unable to obtain such data by timely alternative means (Art. 15.c)).

In the light of this relatively narrow definition of 'exceptional needs' one might wonder whether data sharing for environmental purposes might be considered an instance of data sharing for 'exceptional needs'. One could argue that global warming and degradation of our environment are public emergencies that we need to respond to or to prevent (Arts. 15.a) and b)). Such a view could be supported by the alarming reports of the Intergovernmental Panel on Climate Change (IPCC 2021; IPCC 2022) on the impact of human activity on global warming and on the catastrophic consequences that this can 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.

Furthermore, a public emergency is defined in the DAP 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)" (Art. 2(10)). One could argue that the current state of our environment and climate could be considered to represent 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 DAP 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" (European Commission 2022: 61).

On the other hand, one could argue that while global warming and the degradation of our environment could have disastrous consequences they have not yet fully materialised and are somewhat mid- to long-term concerns so that these concerns might not yet be qualified as public emergencies, at least if addressed from a general perspective. This view seems to be supported by Recital 57 of the DAP, 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." In other words, 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 drought or a fire), it might not be imposed to 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" (DAP: Recital 58). This interpretation seems to be supported by the Commission stating that "it is the exceptional character of the situation that will be the main criterion" (European Commission 2022: 158).

Similarly, the fact that global warming and the degradation of our environment could be perceived as mid- to long-term concerns rather than imminent concerns could also prevent the possibility of relying on Article 15.c) of the DAP to impose B2G data sharing. Indeed, one could argue that as the issue is not imminent the potential lack of available data preventing public sector bodies from carrying out their environmental protection tasks could still be timely addressed through alternative means such as by adopting dedicated legislative measures (DAP: Art. 15.c).1; Drexl et al. 2022: 51).

Nevertheless, if the risk of serious and lasting repercussions on living conditions or economic stability deriving from environmental degradation were to become more significant and imminent as time passes, data sharing for environmental purposes could be explicitly added as a new 'exceptional need' in a subsequent review of the Data Act (DAP: Art. 41.c)).

Conclusion

In conclusion, while the DGA's 'data altruism' mechanism might foster increased B2G data sharing for general environmental purposes, one must not overlook that it is purely *voluntary*. However, if it were fully up to private actors to decide whether they want to engage in such sharing it might limit the possibility of societal benefits in fact being achieved.

Data sharing for general environmental objectives might also not be considered data sharing for 'exceptional needs' in the light of the current phrasing of Article 15 of the DAP. Due to the fundamental environmental and climate adaptation challenge that our societies must address, one could question whether we can afford to wait any longer or whether we should act now and already include B2G data sharing to tackle environmental and climate issues in the final version of the Data Act. What is certain is that further research on data sharing by private actors as an avenue to foster societal benefits will need to be conducted, as I attempt to do in Thomas Tombal (2022).

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