Body of European Regulators for Electronic Communications

BEREC

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BEREC High-Level Opinion on the European Commission's proposal for a Data Act

BEREC welcomes the Data Act proposal to enhance users' control of their data and generate societal benefits by increasing data availability.

SUMMARY OF BEREC'S MAIN INSIGHTS

BEREC welcomes the objectives of the draft Data Act, as presented by the European Commission, and the benefits that it will generate for both individual and business users by making data available for their use and re-use, which will ultimately foster a competitive data market and reinforce data-driven innovation.

In this document, BEREC shares some best practices and suggestions gained by its experience in applying similar provisions in the telecommunications sector, which could contribute to the final version of the Data Act.

The main BEREC proposals are as follows:

1. BEREC suggests some **clarifications on the definition of the scope** to reflect that, although some of its Chapters have a more concrete aim, the general remit of the Data Act encompasses all kind of data.
2. BEREC indicates the need to clarify that the new **data access and sharing obligations should be a general users' right**, not limited to consumers, and proposes a number of additional guarantees aimed to **reinforce the pre-contractual information obligation** proposed in the draft Data Act.
3. BEREC elaborates on the exception of data sharing rights for gatekeepers and signals the importance of **coherently integrating the obligations related to data imposed on gatekeepers** under the Data Act with those under the Digital Markets Act (DMA) and, more generally, the GDPR, taking due consideration of the different objectives of each these Regulations. In this regard, BEREC recommends conducting a profound analysis about the proportionality and the potential impact of such limitation on the right of users to choose the product or service of their choice and, more generally, on innovation.
4. Considering compensations for data transfers, BEREC suggests taking into account the marginal impact of the transfer on the business model of the data holder on one

side, and the **risks of lowering incentives in innovation and investment in data collection** of the data holders on the other side, as the compensation for data sharing for SMEs cannot exceed the costs directly related to sharing the data. Therefore, BEREC suggests considering the investments made in the data collection and production for compensation.

5. BEREC notes that the Data Act does not detail the **methodology to calculate compensation costs**. While acknowledging the difficulties of homogenisation, BEREC suggests complementing the Data Act with best practices or guidance in this field together with controls such as an enhanced dispute resolution procedure by a public authority in other to ensure a consistent implementation of the Data Act and further developing the internal market.
6. BEREC recommends **reinforcing the dispute resolution mechanism** in the Data Act by the establishment of a binding procedure led by the public authority in charge of the enforcement of the Regulation, and the publication of those Decisions to enhance legal certainty. Furthermore, the procedure should envisage a cooperation mechanism for the resolution of cross-border disputes in a harmonised manner in the EU.
7. **BEREC strongly welcomes the provisions to facilitate switching between data processing services.** As more and more European enterprises increasingly depend on data processing services to remain competitive, the extension of switching rights to data processing services is timely and essential to (i) allow for a healthy development of these services, (ii) ensure free choice for users and (iii) reduce current issues caused by user lock-in, such as a loss of innovation incentives and an increasingly consolidated market. The reduction and eventual removal of switching charges will lead to increased competition in the data processing services market.
8. BEREC considers that **interoperability is an essential precondition to achieving the objectives of the Data Act**, without prejudice of its potential impact on innovation. Standardised data spaces would facilitate switching of cloud providers and stimulate the generation of added value through new services. BEREC also emphasises the importance of prioritising the development of standards such as data spaces covering relevant sectors to contribute to the openness of the data economy stimulating, in turn, the innovation of internet-based services and platforms as well as the contestability of the dominating platforms.
9. BEREC underlines the **importance of independent bodies** to shape stable and predictable regulatory environments, independent of short-term political cycles and industry, as well as other stakeholders' pressure. Furthermore, considering that the draft Data Act deals with requests issued by public administrations, political independence becomes even more crucial. BEREC includes a number of proposals aimed to reinforce the independence of the enforcing bodies.
10. BEREC considers that cooperation with competent authorities of other Member States, and among competent authorities at national level, will be key for successfully applying the Data Act and providing the right basis to advance the EU internal market, and

recommends the **establishment of permanent cross-border cooperation mechanisms**.

11. BEREC warns of the **risk of excessive fragmentation of the tasks foreseen in the Data Act among national competent authorities**, as that could undermine both the effective implementation of the rules, due to the difficulties to apply consistently the different provisions of the Regulation, and hinder coordination at international level due to the heterogeneity of the national bodies.
12. BEREC considers that the 12-month period for the applicability of the Data Act is a reasonable timeframe to prepare for its implementation. However, BEREC signals that **meeting the Data Act implementation deadline would be more feasible in the case of assigning new duties to pre-existing bodies** as the establishment of new authorities would be more complex, costly and time consuming.

    Finally, BEREC reiterates its availability to contribute within its field of expertise to achieve the objectives of the Data Act and **identifies where the experience of NRAs and BEREC will be particularly valuable for the development and enforcement of the Data Act**.

INTRODUCTION

BEREC acknowledges the increasing usage of data and its potential to contribute to growth and innovation. BEREC therefore welcomes the objectives of the draft Data Act, as presented by the European Commission, and the benefits that it will generate for both individual, non-profit and business users by making data available for their use and re-use, in particular with regard to stimulating a competitive data market and reinforcing data-driven innovation.

Developing on these objectives and the draft Data Act provisions, BEREC would like to share some best practices gained by its experience in applying similar provisions in the telecommunications sector that could serve as inspiration for the finalisation of the Data Act.

BEREC has previously provided insights and recommendations, which can be useful for the finalisation of the Data Act. Relevant BEREC documents to consider include the Report on the Data Economy[1], the Report on Enabling the Internet of Things[2] and, more recently, the Draft BEREC Report on the Internet Ecosystem[3], currently under public consultation.

BEREC'S VIEWS ON THE SPECIFIC PROVISIONS

I. General provisions: scope and definitions

The draft Data Act defines the objective, subjective and geographic scope of the Regulation. The objective sphere of application includes data generated using a product or related service and, in the case of the request of data by public administrations, any data needed for the performance of a public interest task. The entities included within the remit in the Act are: manufacturers and users of products and suppliers of related services within the EU; data holders making data available to data recipients in the EU and recipients in the EU; Member States and EU public administrations and providers of data processing services offering such services to customers in the Union.

BEREC's views

The scope of the Act should encompass all types of data

BEREC notes inconsistencies in the scope of the Act defined in Article 1. This provision refers only to data generated by the use of a product or related service (i.e. IoT data). While this scope is suitable to the provisions contained in Chapters II to V, in the case of the subsequent chapters regarding, for instance, switching and interoperability of data processing services,

[1] BoR (19) 106, https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/8599-berec-report-on-the-data-economy

[2] BoR (16) 39, https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/5755-berec-report-on-enabling-the-internet-of-things

[3] BoR (22) 87, https://berec.europa.eu/eng/document_register/subject_matter/berec/public_consultations/10270-draft-berec-report-on-the-internet-ecosystem

the scope of the Act should encompass all types of data to reach the aims of the Data Act and be consistent with the obligations imposed. Complementing the general scope, the data types covered within scope of each section should also be defined.

An additional technical comment is the reference to virtual assistants in Article 7(2). BEREC is of the opinion that the legislator should consider extending the product and related service definitions (in Article 2) by inclusion of virtual assistants, instead of referring to it in Article 7, to ensure its validity for the entire Data Act Regulation.

All Electronic Communication Services (ECS) able to provide IoT connectivity, including mobile services, should be considered

Recital 14 of the draft Data Act lists the electronic communications services that enable the connectivity of Internet of Things (IoT) products covered by the Regulation, including: *land-based telephone networks, television cable networks, satellite-based networks and near-field communication networks*. BEREC understands that all ECS enabling IoT connectivity may be part of the definition of the connected products within the scope of the Regulation.

Therefore, this list cannot be regarded as exhaustive. In this regard, it should be clarified that the services named under this recital are examples and other ECS, such as mobile services, should be considered.

Exclusion of human-generated data should not be based on categories of products

As for Recital 15, BEREC supports the exclusion from the scope of the Data Act of data generated from human input. However, the list of examples in the Recital[4] include products that also can generate M2M data and should consequently fall under the scope of the Data Act.

In this regard, it is suggested that the intended exclusion be made by differentiating between the different types of data instead of excluding specific categories of products, which could hinder the Data Act's goal of being an instrument as horizontal and broad as possible.

A legal definition of "data space" should be added

Finally, BEREC notes that the Data Act does not include a legal definition of "data space". Including this definition would increase legal certainty and facilitate the enforcement of the obligations on data space operators envisaged in Article 28.

II. ***B2C and B2B data sharing: obligations to make data generated by the use of products or related services accessible***

The Data Act introduces the aim to increase legal certainty for consumers and businesses to access data generated by the products or related services they own, rent or lease.

[4] Namely, personal computers, servers, tablets and smart phones, cameras, webcams, sound recording systems and text scanners.

Manufacturers and designers must design the products in a way that makes the data easily accessible by default, and they will have to be transparent on what data will be accessible and how to access it. Users will be entitled to oblige the data holder to give access to the data to third party service providers. Exceptions are micro- and small-enterprises, which will be exempt from data sharing obligations, and gatekeepers, designated under the DMA, which will be exempt from the possibility to access to data as third-party service provider.

BEREC's views

BEREC welcomes that the draft Data Act ensures users' access to their data in a transparent manner

In the Report on Enabling the Internet of Things (2016), BEREC underlines that, if users do not trust that their data is being handled appropriately, there is a risk that they might restrict or completely opt out of its use and sharing, which could impede the successful development of IoT technologies.

In 2016, BEREC did not identify a need to deviate from the basic principles of general data protection law in the IoT context, i.e. no need for a special treatment of IoT services. However, BEREC suggested considering specific adaptations of these general rules to the IoT environment (e.g. rules on information and consent to be made as user-friendly as possible), as well as a "privacy-by-design" approach. In addition, BEREC suggested devising simpler terms and conditions for the collection and sharing of data (including simplified means to obtain informed consent from users) and a common framework to simplify and categorise different levels of data sharing.

BEREC welcomes that the draft Data Act aligns with these BEREC proposals empowering users by ensuring their access to data in a transparent manner.

Additional user protection provisions regarding pre-contractual information

BEREC supports the obligations in Article 3, which entail that the data holder (producer of IoT equipment or service provider) must provide a minimum set of information about the data generated and collected before the conclusion of a contract. Setting a minimum standard will help to ensure a common baseline of end-user protection across the EU and, at the same time, will not represent an excessive burden to undertakings providing relevant products or services.

As a similar obligation to provide pre-contractual information is included in Article 102 of the European Electronic Communications Code (EECC), BEREC has gained some experience with enforcing this type of obligations. In this regard, BEREC underlines the importance of the requirement of a clear and comprehensible format in technologically complex areas where the user might not have sufficient information, skills or expertise. In addition, the EECC includes three additional user protection provisions that could also be implemented in this context:

- The information shall be provided on a durable medium or, where not feasible, in an easily downloadable document.
- The information shall, upon request, be provided in an accessible format for end-users with disabilities.
- The information shall become an integral part of the contract and shall not be altered unless the contracting parties expressly agree otherwise.

In general, BEREC can further contribute with its experience, including elaborating best practices and potential ways to secure the user's rights.

The rights of users to access and use data generated by the use of a product or related services

Other essential parts of the proposal are the rights of the user to know and to access the data that the data holder (producer/service provider) collects based on the use of equipment, as well as the terms for sharing data with third parties upon request by the user. BEREC expects that these provisions will require more specific guidance for the determination of user/data subject and the rights to the data in a complex environment (e.g. patient-doctor-health insurer relations).

Exception of data sharing rights for the gatekeepers

Chapter II includes provisions with a direct effect on competition, with the aim to prevent data hoarding and levelling the playing field for SMEs.

BEREC has analysed various aspects of the data economy with regard to competition and the role of ex-ante regulatory measures. In 2021, with a focus on the DMA, BEREC published the Report on the ex-ante regulation of digital gatekeepers.[5] In this report, BEREC underlines that gathering and combining end-user data from all or various business units where the gatekeeper is active and other third-party sources without consent unduly strengthen gatekeepers' ecosystem power. Gatekeepers benefit from economies of scale and scope as well as information asymmetries that cannot be duplicated by competitors, providing them with a privileged position to both access data and economically exploit the data obtained.

The right to share data with third parties in Article 5 of the Data Act can be analysed both from the competition perspective and as a user right.

Article 5(2) of the draft Data Act (along the same lines as Article 6(2)d) forbids data sharing with gatekeepers even when the user has given his consent or even requested the sharing.

[5] BoR (21) 131, https://berec.europa.eu/eng/document_register/subject_matter/berec/reports/10043-berec-report-on-the-ex-ante-regulation-of-digital-gatekeepers

Such a measure is intended to limit further data hoarding by the gatekeepers and, consequently, to lower their ability to increase their market power.

Nevertheless, the user's request to oblige the data holder to give access to the data to third party service providers is not only a pro-competitive measure[6] but also a user's right. In this sense, it should be duly considered whether the provisions do not, in an indirect way, restrict also the user's choice regarding the data and services usage, potentially leading to lock-in effects that would be contrary to the aims of the Data Act and the DMA. Ultimately, this may risk limiting the user's right to use a product or service of their choice and, in some cases, hinder innovation.

BEREC finds that the provisions on the exclusion of gatekeepers from receiving the user data require further analysis to ensure that both objectives are balanced as well as the proportionality of the obligations imposed.

Furthermore, it is worth noting that Article 6(2)e does not allow the third party receiving the data to further hand it over to a gatekeeper. It is nevertheless not clear enough whether there is still a general right of the gatekeeper to reach a commercial agreement with the data holder to access this data (under GDPR conditions applicable to all players) taking into consideration that Recital 36 indicates that gatekeepers can obtain the data through other lawful means.

An additional factor to consider is the interrelation between the Data Act and the recently agreed provisions of the DMA, which regulates the behaviour of gatekeepers.

The DMA also includes in its Article 5 provisions limiting the gatekeepers' ability to process, cross-use and combine data. However, in the case of the DMA, the user can give the consent to raise the legal constrains whereas the Data Act takes a stricter approach and access is not allowed even at the user's request.

In the Report on the ex-ante regulation of digital gatekeepers and the draft Report on the Internet Ecosystem, BEREC indicates that many gatekeepers operate within provider-specific ecosystems. That is, different types of services or products provided by the same undertaking either across more than one core platform service, or where the provision of these or other services/products is giving a significant advantage to the undertaking. This could be the case e.g. by bundling offers, sharing common inputs (such as data), or tying the use of one service/product to the use of another service/product. In this regard, it is necessary to clarify if the prohibition relates only to those services where the undertaking has been designated a gatekeeper, or if it is a general prohibition aimed at all services provided by the gatekeeper. The need to distinguish for which exact service the data was used might be complex and constitute a regulatory burden, in particular, in case of a later requirement to distinguish for which service exactly the data was used.

[6] BEREC notes that the general data sharing obligation include relevant safeguards for competition in Articles 6 and 8 of the draft Data Act which, together with the ones to be introduced in Article 5 of the DMA, enhance this pro-competitive aim. Even in the case of core platform services (as long as the data sharing prohibition does not aim at all services provided by the gatekeeper) identified under the DMA, such data sharing could facilitate the gatekeeper position being challenged by another company who is a gatekeeper only for other services fostering, ultimately, competition among Big Techs.

In this context it seems to be necessary to conduct a more profound analysis, regarding whether some exceptions or additional flexibility to the prohibitions related to gatekeepers could be envisaged to balance the need to protect competition as well as to promote users' choice and innovation. For instance, one such measure could be to add a provision specifying the possibility to lift this prohibition when it entails an important barrier to switching or accessing an aftermarket service

Clarification of Chapter II title

The title in Chapter II of the draft Data Act refers to Business-to-Consumer (B2C) and Business-to-Business (B2B) data sharing. Although BEREC understands why these commonly used expressions are included in the title, it notes that they are not further used in the provisions of the draft Act. Instead, the rights relate to a wider category: all "users" as defined under Article 2(5).[7] Therefore, the title could be misleading by naming only one category of users and should be streamlined by referring only to "users".

III. ***Obligations for data holders legally obliged to make data available***

The draft Data Act introduces general implementation rules related to data availability, applicable not only within the scope of the draft Act, but in every case that such access is required by the EU or national legislation implementing EU law. Such access to and use of the data shall be conducted under fair contractual conditions; it shall be non-discriminatory, non-exclusive, limited to what is necessary to fulfil the obligation and does not have to affect trade secrets. The draft Data Act includes a list of contractual terms imposed on SMEs, which are considered (or presumed to be) unfair.

The data holder is entitled to reasonable compensation for making data available. If the recipient is an SME, the compensation shall be cost-oriented. The data holder may also implement technical protection measures as long as those are not used to hinder data availability.

Disputes related to data availability may be solved by a dispute settlement body certified by the Member States against a fee. This procedure is voluntary (i.e. the parties may decide to directly submit their request before a Court) and would be binding only in the case that both parties agreed so beforehand. Decisions shall be issued within 90 days.

BEREC's views

BEREC supports the establishment of common general principles to fulfil data sharing obligations in a fair manner as such rules contribute to legal certainty and balance the relations between undertakings with different strengths.

[7] A natural or legal person that owns, rents or leases a product or receives a services.

Data access conditions

With regard to the economic incentive effects of the data access conditions, the compensation for making data available to data recipients which meet the SME criteria cannot exceed the directly related costs (that is, investments made in the data collection and productions cannot be considered to calculate the compensation). This provision can be understood to be a capped price with no profit opportunity. This may result in lower incentives for companies to collect data in the first place, but at the same time it should be assessed how their business model is affected by the transfer (it is possible that the potentiality of a data transfer does not affect the data holders own services). Furthermore, the fact that no compensation rights are provided for users of connected devices, resulting in a kind of altruistic data donation to data recipients, should be assessed when considering the costs.

The Data Act in this part does not further distinguish between data recipients in general and the third parties under Article 5. Nevertheless, a difference can be seen as the data transfer is solely invoked by the user and is in their interest. Therefore, making such a transfer cost-based would promote the right of the user to request data sharing with third parties. Legislators should consider this. At the same time, the question of compensation for the user would be irrelevant.

Finally, BEREC notes that the Data Act does not provide any reference on how costs should be calculated. Such an approach contrasts with the detailed cost accounting methodologies that have been developed in the field of electronic communications regulation. BEREC acknowledges the difficulties of homogenisation as the Data Act is a horizontal instrument to be applied to different services and circumstances. Nevertheless, such a broad reference to costs may require to be complemented by controls such as an enhanced dispute resolution procedure by a public authority (see below). This is another area where BEREC can contribute with its experience for the elaboration of best practices or guidance.

The dispute resolution procedure should be reinforced

BEREC welcomes that data holders and data recipients can settle disagreements via dispute resolution procedures.

Dispute resolution mechanisms to swiftly address very technical issues by specialised bodies have proven to be effective in the electronic communications sector. The EECC entrusts to NRAs with the resolution of disputes between undertakings. NRAs' decisions are issued within a maximum of four months and are always binding. These decisions are published together with a full statement of the reasons on which they are based providing further legal certainty to the sector by the enforcement body. In addition, a detailed cross-border dispute resolution procedure is established to ensure the consistent application of the framework across the EU, with the ultimate goal of further developing the internal market.

On the other hand, the specific dispute resolution procedure is only explained rudimentarily in the draft Data Act and would require more development in order to be fully effective for the involved parties and facilitate the best enforcement of the Data Act rules.

	EECC	DRAFT DATA ACT
SETTLEMENT BODY	Public authority (NRA) in charge of the enforcement of the Directive	Private certified body
PRICE	Free of charge	Against a fee
MAXIMUM TIME TO ISSUE THE DECISION	4 months	90 days
BINDING	In all cases	Only if decided beforehand by the parties
PUBLICATION OF THE DECISION	Yes	No
EU CROSS-BORDER PROCEDURE	Yes	No

Table 1: comparative facets of the draft Data Act and the EECC

BEREC recommends building on the experience gained in the enforcement of the sectoral electronic communications regulation and reinforcing the dispute resolution provisions in the Data Act by the establishment of a binding procedure led by the public authority in charge of the enforcement of the regulation, and the publication of those Decisions to enhance legal certainty. The procedure should envisage a cooperation mechanism for the resolution of cross-border disputes.

Complaints

Article 32 of the draft Data Act contemplates the possibility, both for natural and legal persons, to lodge a complaint with a competent authority. The complainant has the right to be informed of the progress of the procedure and the final decision. However, contrary to the dispute resolution proceedings, the complainant cannot actively participate in the process.

Although the draft Data Act does not clarify the scope of the complaint decision, typically, such decisions do not imply compensation for the affected party, but a penalty for the infringement of the Regulation. In this context, the incentives to lodge complaints for individual persons are lower compared to dispute resolutions. For the enforcement body, this entails the loss of a relevant source of information on the level of enforcement of the Data Act and the possibility to identify repeated issues that could require horizontal intervention.

In the case of complaints, cooperation between competent authorities is envisaged, albeit in very general terms. Furthermore, the draft Data Act does not clarify if this cooperation applies

only to cooperation between competent authorities within a Member State or if it also covers cross-border cooperation.

IV. Switching between data processing services

The draft Data Act includes a set of rules, including contractual, economic and technical conditions, aimed to lower barriers to switching between data processing services. Users will have an explicit right to switch between providers, enhanced by portability and compatibility obligations, and termination prerequisites favouring the user. In this context, the Commission would oblige processing service providers to remove commercial, technical and contractual restrictions that make it difficult for customers to switch, e.g. terminate a contract, conclude one or multiple new contracts with or port their data to another provider. Article 23 of the draft Data Act obliges providers of data processing services to remove obstacles to switching between services of the same service type. Articles 24-26 provide concrete requirements on how to remove those obstacles.

The draft Act envisages a progressive withdrawal of switching charges, and after three years of entry into force of the Data Act, providers of data processing services may not charge customers for the process of switching. From the date of entry into force of the Data Act until the withdrawal of charges in three years, providers can charge reduced switching process fees that do not exceed the costs.

The European Commission will monitor compliance with the obligations related to switching charges by means of a monitoring mechanism.

BEREC's views

Rules to facilitate switching ECS providers have proven to be a powerful tool to ensure users' rights to freedom of choice, prevent user lock-in, and foster competition, thus contributing to a dynamic and innovative telecommunications market. As more and more European enterprises increasingly depend on data processing services to remain competitive, the extension of switching rights to data processing services is timely and essential for a healthy development of these services. The draft Data Act ensures that free choice for users is increased, which may lead to reduced user lock-in and increased switching in the data processing services market. Current issues caused by user lock-in, such as a loss of innovation incentives and an increasingly consolidated market, will be reduced. The reduction and eventual removal of switching charges will lead to increased competition in the data processing services market.

BEREC has experience regarding switching of ECS, but the technical requirements and the level of information required when switching in the ECS market is considerably lower than the information transfer implied in moving data between data processing services. Given the nature and the volume of data that potentially could be ported from one provider to another, an appropriate level of security measures must also be put in place. In addition, the fact that these services are often bundled with artificial intelligence services adds another layer of complexity and poses additional challenges for the switching of providers. It could be

worthwhile to include guidance on this particular dimension in the Data Act or address potential issues with dedicated interoperability requirements.

While the technical requirements differ, increased switching in the data processing services market would entail equivalent benefits to those realised on the ECS markets.

*V. **Interoperability***

The draft Data Act establishes essential requirements on data spaces operators to facilitate interoperability of data, data sharing mechanisms and services and conditions for open interoperability specifications and European standards for the interoperability of data processing services.

BEREC's views

BEREC's Report on the Data Economy indicates that interoperability can help to maximise network effects, to the benefit of end-users, while weakening winner-takes-all effects. In general, interoperability has been key to stimulating the competition between Electronic Communication Networks and Services (ECN/ECS) providers, and it could have a similar stimulating effect on players in the data economy.

However, it can lower innovation incentives, as a requirement for interoperability could undermine current business models of ecosystem providers. It could also raise privacy questions. BEREC highlights the importance of carefully designed standards and notes that this requires technical specifications.

BEREC considers that interoperability is an essential precondition to achieving the objective of the Data Act. In a similar way as it does with other regulations, for example the DMA, interoperability plays an important role in facilitating competition for smaller providers in a market dominated by larger providers.

Interoperability increases openness.[8] Openness is regulated at the network layer by the Open Internet Regulation, but openness may be also limited in the overlying application layer. In particular, very large internet-based platforms generate large amounts of data, which gives them significant advantages.

Interoperability of data could be implemented unilaterally, by publishing data holder interfaces to access data, or it could be guaranteed multilaterally, by standardising such interfaces. In particular, the latter would increase the openness of data, by enabling data sharing between

[8] As defined in Draft BEREC Report on the Internet Ecosystem, openness refers to the potential of the internet to provide an open, easy-to-access and common infrastructure where non-proprietary, free software, contents and applications potentially governed by open communities, such as the internet protocols (i.e. TCP/IP), would enable the preservation and/or development of some digital services as common goods.

any data holder and data receiver complying with the standards. This would supplement the network layer openness to "access and distribute information and content".[9]

BEREC supports the emphasis on interoperability in the draft Data Act. The preparation of standardised data spaces should facilitate switching of cloud providers and stimulate the generation of added value through new services. Such a development would be a significant step towards a semantic web, with its goal to make data on the internet machine-readable.

To mitigate the downside of interoperability, the risk of stifling innovation through standards may be counteracted through extensible standards that are prepared for future evolution. Furthermore, the internet architecture has shown a high degree of innovative power which would also contribute to the development of the data economy over internet-based services.

Regarding the concerns related to security and privacy, standardised solutions provide an opportunity to cover such functions "by design" in the standards. This approach could increase the level of security and protection of privacy, compared to system design conducted by individual business users, which may be incentivised to implement simpler design to limit development cost.

In addition, related to the protection of privacy, there are strong legal requirements under the GDPR and the ePrivacy rules. In that regard, the architecture facilitating interoperability should consider the provision of built-in privacy protection for storage and transfer of personal information.

In BEREC's view, the approach outlined in the draft Data Act aiming to foster further cloud and data processing interoperability by setting essential requirements strikes the right balance between flexibility (to avoid hampering innovation) and preserving privacy as well as setting the basis for facilitating interoperability.

BEREC also emphasises the importance of prioritising the development of standards such as data spaces covering relevant sectors, contributing to the openness of the data economy. This would stimulate the innovation of internet-based services and platforms whereby newcomers and smaller providers may contest the dominating platforms.

BEREC would also like to stress that it has in-depth experience regarding facilitating the interoperability of ECS/ECNs and provides technical expertise on the implementation of new interoperability obligations introduced by the DMA. BEREC is willing to share its experience and expertise to contribute to the implementation of the interoperability requirements.

VI. ***Implementation and enforcement***

Member States will designate or establish independent competent authorities responsible for the application of the Data Act which fulfil certain requirements. In the case of switching obligations, the national competent authority shall have experience in the field of data and

[9] Open Internet Regulation Article 3(1)

electronic communications services. In the case that the Member State designates more than one competent authority, a coordinating competent authority shall be identified.

The independent national competent authorities will have to fulfil the following tasks:

a) promoting awareness of the rights and obligations contained in the Data Act,

b) investigating and handling complaints,

c) conducting investigations related to the application of the Data Act,

d) imposing penalties,

e) monitoring technological developments of relevance for the making available and use of data,

f) cooperating with competent authorities of other Member States to ensure the consistent application of the Data Act,

g) ensuring the online public availability of requests for access to data made by public sector bodies in the case of public emergencies,

h) cooperating with all relevant competent authorities to ensure that obligations related to switching are enforced consistently with other Union legislation and self-regulation applicable to providers of data processing service,

i) ensuring the enforcement of the provisions related to charges for the switching between providers of data processing services.

The draft Data Act will be applicable 12 months after its entry into force.

BEREC's views

Independence of the bodies entrusted with the application of the act

BEREC underlines the importance of independent bodies to shape stable and predictable regulatory environments, independent of short-term political cycles, industry as well as other stakeholders' pressures. Furthermore, considering that the draft Data Act deals with requests issued by public administrations, political independence becomes even more crucial. BEREC welcomes the introduction of independence as a requisite for the designation of the competent authority, including the reference to the sufficiency of resources, which is of extreme importance considering the workload and the expertise required to implement the Data Act.

BEREC suggests considering reinforcing such independence by including, for instance, some basic principles for the designation and removal of the members of decision-making bodies of these authorities, autonomy to design the internal organisation and in the implementation of their budget.

Establishment of cooperation mechanisms

At the EU level, cooperation with competent authorities of other Member States will be key for successfully applying the Data Act and providing the right basis to further advance the EU

internal market. The draft Data Act not only envisages cross-border requests of data access by public administrations but also regulates services that many times have a cross-border scope.

BEREC, based on its long experience, recommends that this cooperation is structured on a permanent basis by means of a forum gathering all national independent competent authorities. With this aim, the Data Act could have recourse to existing relevant fora such as the European Data Protection Board or BEREC itself.

To take the example of BEREC, use could be made of its accumulated experience of producing common approaches for the enforcement of EU law and well-established working procedures. The variety of coordination instruments used by BEREC that could also be relevant for the enforcement of the Data Act include, among others, issuing Opinions on draft national regulatory decisions or cross-border disputes, issuing guidelines for the application of the provisions of the EECC (e.g. on international roaming or open internet), the elaboration of best practices or agreeing on common specifications on technical matters.

Complementing the multilateral structural cooperation, bilateral cooperation procedures might also be required for the case-by-case enforcement of data sharing or switching.

In addition to cross-border cooperation, national cooperation will be key to the effective enforcement of the Data Act. The Act will require expertise from different fields - such as electronic communications, data protection, privacy, consumer rights, etc. - that may require a close cooperation between different authorities for its consistent application.

To sum up, the Data Act explicitly envisages cooperation among competent authorities with regard to complaints and the access to data by public authorities. However, cooperation among competent authorities and, in particular, cross-border cooperation is not foreseen for other matters, such as data access or switching. BEREC recommends the introduction of stable and structured cooperation mechanisms for the enforcement of all the Data Act provisions.

Avoidance of excessive fragmentation of the Data Act tasks

BEREC warns of the risk of excessive fragmentation of the tasks foreseen in the Data Act among national competent authorities, as that could undermine both the effective implementation of the rules, due to the difficulties to apply consistently the different provisions of the Regulation, and also hinder coordination at international level due to the heterogeneity of the national bodies.

The establishment of new authorities would be more complex, costly and time-consuming than relying on existing ones

The 12-month period for the applicability of the Act is a reasonable timeframe that should allow both private undertakings and Member States to prepare for implementation, including the capacity and resource planning for national competent authorities. However, meeting this deadline would be more feasible in the case of assigning new duties to those bodies already

in existence, as the establishment of new authorities would be complex, costly and time-consuming.

NRAs and BEREC are well placed to enforce several of the tasks foreseen in the Data Act

ECN/ECS provide the infrastructure over which data flow and a number of the services regulated under the draft Data Act are (typically) provided in a bundle with ECS/ECN. Ubiquitous, reliable, interoperable and secure high-speed transmission networks and services facilitate the collection and sharing of data everywhere. Therefore, the development of ECN/ECSs both directly and indirectly supports the growth of the data economy.

The BEREC Report on the Data Economy indicates that NRAs can draw on the experience gained in regulating ECS markets for dealing with the data economy. NRAs have considerable experience in dispute resolution and handling complaints, monitoring markets and technological developments, enforcing users' rights as well as implementing remedies, such as interoperability, switching and access obligations (including the application of non-discrimination, transparency, pricing and cost accounting measures) in the ECS markets. In addition, many NRAs have full competence, or work together with other relevant bodies, in the fields of e-Privacy, data protection and/or cybersecurity.

As emphasised throughout this document, the experience of NRAs and BEREC is particularly relevant and will be valuable in the development and enforcement of several provisions of the draft Data Act.