

On 3 October 2018, Cullen International and the University of Namur hosted a *Data sharing and re-use* seminar as part of the 15th anniversary of their series of Bits Seminars. The approximately 50 participants came from across industry, the EU institutions, supervisory authorities and academia.

This seminar moved beyond data sharing from the public to the private sector as embodied by the Public Sector Information (PSI) Directive that is currently being recast, to consider the future of data sharing through so-called “*reverse PSI*” or business-to-government (B2G) and business-to-business (B2B) models.

Slides from the seminar are available for download [here](#) under the “agenda”.

Setting the scene

The seminar, chaired by Philippe Defraigne, began with a discussion of how data, as well as data-driven innovation and data sharing, contribute to greater economic and social welfare. Speakers described the current regulatory landscape and importance of considering data contextually. As there is no general data ownership right, they framed the issue in terms of control and usage rights. Data openness was the theme of the day, spanning a continuum that can implicate data markets (through data portability, voluntary data sharing arrangements and open data).

Christian Reimsbach-Kounatze (OECD), the lead author of an [OECD report](#) published in 2015, explained ([slides](#)) that countries could get more out of data analytics by reducing barriers to cross-border data flows. The report also found that in the private sector, large firms are much more likely to use the big data analytics that are facilitated by data sharing.

Mr Reimsbach-Kounatze introduced the basic premise that data may be shared without diminishing its value, while acknowledging exceptions. Rather than comparing data to oil, it should be seen as infrastructure.

Thomas Tombal (University of Namur & CRIDS) explained ([slides](#)) the significance of machine-generated data (MGD) created by computers or sensors processing information sent from an IoT device. This definition appears in the European Commission's [communication](#) on a European data economy.

Given neighbouring legal regimes and competing interests of stakeholders, the broad question is not just how, but when to construct a European legal framework for MGD. In this regard, Mr Tombal explained that there is no general obligation for private undertakings to share their data with other companies (B2B) or the public sector (B2G). Data sharing and re-use thus widely remain in the realm of contractual freedom.

For B2B, depending on the kind of data, businesses can choose between various data sharing models that include, but are not limited to:

- bilateral contracts;
- data marketplaces (ex. DAWEX);
- industry and business-specific data platforms (ex. AIRBUS);
- open data sharing (ex. Elering); and
- “*data loans*” allowing to train another company's algorithm.

From a regulatory perspective, the European Commission currently limited itself, in its [Communication](#) on a common European data space ([Flash](#)), to adopting non-binding key principles for B2B data sharing agreements, as this market is still in its infancy. As it matures, additional steps might have to be taken by the Commission to correct potential market failures.

For B2G, Mr Tombal pointed out that 88% of the respondents to the European

Commission's public consultation pertaining to the revision of the PSI Directive were in favour of the inclusion of a “reverse-PSI” provision (access, by public sector bodies, to privately held data of public interest). However, due to strong opposition from associations of private undertakings regarding the proposal's lack of precision, the Commission decided not to include such a reverse-PSI provision in the recast PSI Directive.

From a regulatory perspective, the European Commission also limited itself, in its Communication on a common European data space, to adopting key principles for the supply of private sector data to public sector bodies under preferential conditions. The next revision of the PSI Directive, due to take place in four years, might be the right time to implement a reverse-PSI provision.

Sectoral case studies

Sectoral case studies then drove discussions on the different sectoral approaches currently in play. One way to think of data contextually is to consider the sector it originates from, and a common message was that no sector wants to be singled out for further regulatory treatment, including on data sharing.

On energy

Kalle Kukk (Elering) ([slides](#)) described Elering, the Estonian Transmission System Operator (TSO) which has developed a national energy data exchange platform. The energy sector's data comes principally from customers' meters, the electricity grid and the market. The sector is subject to the Clean Energy Package, which has provisions mandating easy access by consumers to their data and consumer consent to share data. Perhaps most striking is that the concept of data ownership already exists in electricity markets regulation.

While the TSO's mission is to make users' data easily available to them or to other people they authorise, it is also making non-personal, as well as aggregated personal data, public. When sharing data with other countries or with other sectors, interoperability is a major, but also manageable concern.

On banking

Noémie Papp (European Banking Federation) emphasised ([slides](#)) the vast array of data collected and used by banks, as well as the possibilities with open banking based on an application programming interface (API).

Banks are of course one of the sectors subject to mandatory data sharing with governments. Additionally, the Second Payment Services Directive (PSD2, [Tracker](#)) imposes obligations on banks, when they have customer consent, to share payment account data with third party providers.

On health

Bruno Schröder (Microsoft) spoke ([slides](#)) of the potential that data brings to early detection of disease, prevention of suicide, identification of “*patient twins*”, and controlling the spread of infectious diseases. However, sharing data has a potential dark side since the same data from someone's medical records may be used both for healthcare prevention and for insurance companies to assess the eligibility of a client. Data breaches in this field have the potential to negatively impact data subjects (for instance limiting job prospects), but also their descendants.

Advances in medical and healthcare service will require more and more data, which is driving start-ups to set up subsidiaries in China, where they can access larger data pools necessary to train their algorithms without facing the same constraints in terms of privacy law. Finally, a closing question was whether a PSD2-type framework would work for healthcare.

On automotive industry

Joost Vantomme (European Automobile Manufacturers Association) explained (slides) how automotive data/vehicle generated data range from those that are traffic safety related to more commercial use cases with a driver's behaviour and other personal data use. The automotive industry has implemented a model for safe and secure access to and exchange of data. Furthermore, traffic safety related B2G data (vehicle-to-road authority) are already embedded in a delegated regulation of 2013. Other data exchanges are numerous and are B2B and B2G.

Mr Vantomme explained that no *ex-ante* regulatory intervention is needed in the connected and automated mobility ecosystem. Competition authorities are well equipped for tackling situations where issues of abuse of dominant position or anticompetitive agreements would arise. He also explained that the concept of data ownership is flawed and should be replaced by data stewardship. The European Commission, instigated by the European Parliament, is now working on a Recommendation on access to vehicle generated data. Authorities appear to be increasingly interested in the data captation possibilities offered by connected and automated vehicles.

Policy panel

Data sharing is not just a European issue, so Mr Reimsbach-Kounatze mentioned the policy approaches in Japan and Australia as useful models to consider. Also, Mr Schröder previewed the policy discussion in his call for the use of standards to ensure agreement in what are, for instance anonymized data, citing standard ISO/IEC 19944 of the International Organization for Standardization (ISO).

Federico Milani (DG Connect) spoke of the European Commission's current interest in the B2B and B2G issue of how to ensure that shared data are used only for the intended purposes.

The European Commission is funding research in data sharing through Horizon 2020, issuing a call to fund projects on personal and industrial data platforms. The Commission is also reviewing applications for experts to form an [expert group](#) on B2G data sharing, which will help them understand governmental demand and current experiences when requesting data from the private sector.

With respect to the proposed amendments to the PSI Directive, the Commission is also working on a list of high value datasets (e.g. geographical data), which the public sector would have to make particularly accessible.

Yves Poulet (University of Namur, NADI-CRIDS) analysed certain crucial legal challenges to even the most fundamental categorisations of data: privacy, intellectual property (IP) and the PSI Directive.

As regards data protection issues, he underlined the number of problems raised by the application of the GDPR. More fundamentally, he pinpointed how the distinction between personal and non-personal data has not been set once and for all, but rather evolves with the progress of information technologies (AI, big data...). He also highlighted the tensions between the GDPR which calls for the data subject's consent to be given for a specific purpose and Artificial Intelligence which is often described as a general-purpose technology (such as the steam engine or electricity).

Regarding IP, Prof. Poulet warned against the apparent incoherency of policies pursued by the European Commission. The consecration of intellectual property as a fundamental right (EU Charter on fundamental rights) leads to a reinforcement and the multiplication of IP, notably through the recognition of *sui generis* IP rights, such as the Database or the Business Secrets Directives. This reinforcement will result in clashes with policies aimed at sharing data. He also discussed the way by which it might be possible to reconcile IP and innovation through exceptions imposed on the IP rights holders.

Finally, he welcomed the reverse PSI encouraged by the Commission Communication dated from April 2018 even if the text poses questions of inequality of treatment

between the public sector's vast obligation to make their databases freely accessible in an open format and the light obligations imposed on the private sector. Prof. Poulet raised the issue of the lack of financial incentives for the public sector to share its data.

Paul-Olivier Dehaye (PersonalData.IO) is working on maximising data “fluidity”, for instance thinking of ways we could transfer our consent data between platforms. This would be moving away from the need to contextualize the conditions under which consent has been given, and instead creating a level playing field for when there is consent and how it is controlled.

Cecilia Zappalà (Facebook). Facebook is directly confronting the question of access to the user data that it holds, trying to find the right spot on the scale between openness and security/privacy. As regards the GDPR data portability right, they are part of the open source [Data Transfer Project](#) along with Google, Microsoft and Twitter to allow for direct data transfer between these platforms. The project, whose scope does not include other kinds of data like system performance data or data that impacts the privacy of other users, is looking to expand to include more organisations and their platforms. Facebook has also started a Data for Good Project to provide data to NGOs, public sector bodies and researchers.

Christian Reimsbach-Kounatze (OECD) finally presented his key takeaways of the day. He stressed the importance of defining categories of data at sectoral level, rather than putting them all in the same bucket. Regarding reverse PSI, more work is required on the concept of public interest (the key criteria to mandate the provision of data held by the private sector to the government) to guard against possible misuse.

On data ownership, there is a consensus to say that this is not a sound concept in law or public policy, but many corporations behave as if they were owning the data. Mr Reimsbach-Kounatze also warned of the potential danger of using the data sharing debate to address industrial policy concerns such as Europe lagging behind China and the US in the field of internet platforms. Finally, he highlighted the challenges posed by the interoperability of different IT systems in the sharing of data.