

**TOWARDS THE EU DATA ACT
- COMMENTS OF INDEPENDENT RETAIL EUROPE -**

3 September 2021



EXECUTIVE SUMMARY

Independent Retail Europe is the voice of groups of independent retailers in the food and non-food sectors at EU level. Our members are groups of SME retailers that usually operate under one brand name while maintaining their independence as individual businesses. We represent 24 groups and their 386.602 independent retailers, who provide more than 6,6 million jobs.

As the European Commission is expected to propose soon an EU Data Act, we would like to raise general considerations on the **main obstacles to the creation of new Business-to-Government (B2G) data sharing flows, while dispelling some misunderstandings about the value of data**. Besides, we invite the Commission to limit the intended scope of its future EU data act, as we see **no need for any provisions on national or cross-border mandatory B2G data sharing** for public interest purposes. We also consider that **safeguards are needed** to boost the development of new voluntary B2G data flows.

Concerning Business-to-Business (B2B) data sharing, we urge the European Commission to use the ongoing review of EU competition law instruments to **remove the obstacles faced by groups of independent retailers** operating under one brand to share data within the group. We see **no reason to regulate fairness in B2B data sharing** agreements. We invite the Commission to avoid duplication of EU legislation covering the use of data, to **ensure that data portability remains regulated by the GDPR** and to **clarify security and liability aspects** in data sharing agreements.

COMMENTS OF INDEPENDENT RETAIL EUROPE ON THE UPCOMING EU DATA ACT

B2B data sharing (and re-use) is already happening on a very wide scale and is working well in the retail sector. Within the limits of competition law, groups of independent retailers already share data with many of their suppliers (to optimize products and logistics, or to negotiate competitive prices) or within the groups with their member retailers (through aggregated anonymized insights that help to boost their performance in store). This is of direct benefit to all actors involved, including consumers, who ultimately benefit from better prices, enhanced shopping experiences and innovative products.

Any new regulatory framework, such as the upcoming EU Data Act should therefore as a priority avoid disrupting well-functioning data flows, both B2B and B2G, and should not create new burdens for economic actors. The EU Data Act should first and foremost aim to facilitate existing flows and create conditions to foster new flows, without regulating aspects that are working well.

B2G data sharing

1. Main obstacles to B2G flows

The most important obstacle to the growth of B2G data sharing actually lie in the lack of visibility for enterprises on the purpose and the benefit of data sharing. There is no enterprise that will consider 'per se' sharing data, whether B2G or B2B, without a clear purpose and a benefit that it values.

The lack of a public vision about concrete, useful and realistic purposes for the companies potentially involved, and the lack of clarity about what governments will do with the data obtained from the

private sector, constitute further obstacles to the private sector's willingness to share data, and make the benefits of the future EU Data Act nebulous and abstract.

To develop new B2G data sharing flows, the following is needed:

- Clear communication about the purpose of such data sharing;
- Clarity and visibility on the concrete benefits of such data sharing for the companies involved. Compensation should be foreseen to incentivise data sharing, usually in the form of payment of market price, although, depending on the purpose, other compensation could be acceptable;
- Visibility on/certainty about how the data will be stored, treated and used by the public sector;
- Clarity on and legal certainty about who will/can have access to the data when shared;
- Legal safeguards.

Moreover, to develop trust, the public sector needs to show to the private sector that it has the capacity and the means (human resources with a decent tech background, adequate hardware, etc.) to be able to handle, process and use the data for a goal that will also benefit the companies sharing the data.

2. Scope of the EU Data Act - B2G data sharing should remain voluntary

It is currently unclear whether the upcoming EU Data Act intends to regulate national B2G data sharing or cross-border B2G data sharing, and whether it intends to allow for compulsory B2G data sharing or not.

We consider that **the EU Data Act should not introduce provisions on compulsory B2G data sharing for public interest purposes**. Member States already have such power (by introducing national laws) for specific well-defined purposes vis a vis enterprises established in their country or having activities in their country. A new general compulsory B2G data sharing empowerment for public interest purposes would therefore very much sound like a general right of access to a company's data. In the absence of any suspicion of an infringement, such a generic power would inevitably raise major concerns as to its compatibility with the EU Charter of Fundamental Rights, especially in the absence of a very narrowly defined and specific concept of public interest.

Similarly, **the introduction of the possibility for public authorities to address compulsory B2G data sharing requests across the EU would be unworkable** given the number of public authorities that could use such possibility for an infinite number of issues.

In any case, the notion of public interest should first be defined (clearly and narrowly) before debating compulsory B2G data sharing - we reiterate that we are strongly opposed to the idea of including compulsory B2G provisions in the future EU Data Act.

Furthermore, **B2G data sharing should not be used as a proxy to pass the costs of activities of public authorities on to the private sector**. For instance, in some Member States, public authorities monitor prices in supermarkets by sending officials to collect prices in store. B2G data sharing should not be used as a proxy to request retailers to perform the task of data collection on behalf of the national

authorities. Hence the need for market condition compensations for most B2G data sharing. Market prices should remain the norm for B2G data sharing unless a company agrees to different conditions (for instance because it sees other benefits compensating the time, resources and efforts).

To increase the willingness to share, its purpose should be defined clearly, as well as which data are to be shared. To make it interesting for the companies involved, the objective and the benefits that the companies will extract from sharing, should be clear. The objective and the visibility on the benefits are key to incentivise data sharing.

B2B data sharing

1. B2B data sharing should remain voluntary – No need to regulate fairness in B2B

Private autonomy in B2B data sharing should be preserved and protected. Companies should be able to decide on their own with whom and what data they are willing to share. **B2B data sharing should always be voluntary.** Moreover, as every B2B relationship has a different nature and B2B data sharing can thus not be standardized for all, the terms need to be flexible.

Competition law should remain the prime tool to regulate admissible data sharing between competitors (e.g. between retailers and suppliers engaging in dual distribution, or within a group of independent retailers). **We see no reason to regulate fairness in or of B2B data sharing contracts.**

Given the wide range of existing data, and that their value/use will largely depend on each sector, any proposal for sectoral mandatory B2B data sharing requires a separate and targeted impact assessment and a separate legal act whereby the necessity, the proportionality, and the compatibility with the EU charter of fundamental rights (in particular article 16 on ‘freedom to conduct a business’ and article 17 on the ‘right to property’), are properly evaluated.

2. Fix the flaws of competition law for data sharing within groups of independent retailers

Competition law should also be reviewed to facilitate the possibility for groups of independent retailers operating under one brand to pool data from members, analyse it and share insights with members, to help them boost their performances in shop.

The specific nature of groups of independent retailers (whereby shops are run by independent retailers, while being part of a larger cooperative group where a central office exerts various functions on behalf of the member retailers) should be better taken into account in both the vertical and the horizontal competition rules. Currently, the lack of recognition of this specific but widespread model causes major obstacles for groups of independent retailers to share useful data, (although they are part of the same cooperative retail group) and puts them at a disadvantage versus competing integrated retail chains (who face no obstacles to pooling, analyzing and sharing data from their various points of sale within their operations).

We invite the European Commission to **use the ongoing review of EU competition law instruments (The Vertical Block Exemption Regulation, the vertical Guidelines and the Guidelines on horizontal agreements) to remove the obstacles faced by groups of independent retailers** operating under one brand to share data within the group.

Safeguards for B2G and B2B data sharing are needed

Safeguards are needed to incentivise data sharing and make it legally more certain. For instance, we believe that clear provisions are needed to:

- ensure that the data cannot be used for other purposes than the one agreed (e.g. through binding contractual arrangements);
- ensure that it will not serve for enforcement purposes against, or incriminate, the entity sharing the data
- define who can access the data and that the data will be correctly anonymized as to its origin (especially when only few companies have the data);
- ensure that business secrets/strategic information will not be unveiled, and that access to intellectual property rights will be preserved or that risks to reputation will be prevented; and
- provide a clear framework for liability.

General considerations on the value of data (for both B2G and B2B data sharing)

A clear distinction should be made between non processed/raw data and processed data. Raw data is valuable to a certain extent, but not as much as processed data. Processed data is the product of a company (as it takes time, investments and skills to process it to make something useful out of it). In data sharing, the value attributed to processed data must therefore be higher than the value attributed to raw data. The value of processed data will always represent **at least** the value of the investment (the time/efforts/skills/means used to collect and process it) with a fair return on investment at ordinary market conditions. This is particularly relevant for B2G data sharing, as enterprises will only see B2G data sharing positively if they perceive an added value.

Importantly, **data do not have a ‘price per kilo’, its value will largely depend on the specific market, what it is used for, as well as on the economic benefit or the competitive advantage that the buyer can/may obtain** from it.

The EU Data Act and other ‘data’ legislation

The EU Data Act should **avoid any duplication of existing laws** (e.g. GDPR, Open Data Directive, upcoming Data Governance Act, Artificial Intelligence Proposal, etc.). Its scope and its objective therefore need to be clarified and targeted.. Moreover, to avoid legal uncertainty and any undermining of the GDPR, **data portability should remain in the scope of GDPR.** Any change to data portability should be regulated in the GDPR or the Guidelines provided by EDPB.

Data sharing and security/liability

Companies are very concerned about the security and liability of data sharing (be it B2B or B2G). Uncertainty or legal/financial risks arising from unclear security or liability therefore also represent an important obstacle to data sharing. **A clear liability regime, as well as the establishment of adequate security measures** (to avoid any data breach/infringement on intellectual property or unveiling of business secrets) **are needed to provide trust.**

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*Established in 1963, **Independent Retail Europe** (formerly UGAL – the Union of groups of independent retailers of Europe) is the European association that acts as an umbrella organisation for groups of independent retailers in the food and non-food sectors.*

Independent Retail Europe represents retail groups characterised by the provision of a support network to independent SME retail entrepreneurs; joint purchasing of goods and services to attain efficiencies and economies of scale, as well as respect for the independent character of the individual retailer. Our members are groups of independent retailers, associations representing them as well as wider service organizations built to support independent retailers.

Independent Retail Europe represents 24 groups and their 386.602 independent retailers, who manage more than 753.000 sales outlets, with a combined retail turnover of more than 944 billion euros and generating a combined wholesale turnover of 297 billion euros. This represents a total employment of more than 6.603.270 persons.

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