POLICY PAPER

SMEunited position paper on European Data Governance Act (COM(2020) 767 final)

Introduction

SMEunited welcomes the opportunity to comment on the European Commission's proposal on the European Data Governance Act (COM(2020) 767 final), published on 25 November 2020. We find that the objectives of the Data governance act proposal can be strongly supported in order to creating the EU single market for data and enhancing access and use of data. It is important to avoid fragmentation in the European data economy and therefore common EU-wide solutions and coordination are needed.

Access to data holds considerable potential within the EU and is an essential factor for the future competitiveness of companies, especially SMEs, as it can serve both to improve existing processes and to develop new business models. Encouraging companies to exchange data on a voluntary basis is welcomed and burdensome measures should be avoided.

SMEunited believes that the data governance act could lead to enhanced data use, sharing and access to data.

The special role of SMEs should be recognized when regulating data access and use. SMEs do not often have large data reserves or means to acquire them. Therefore, SMEs should be supported to fully embrace the potential of the single market of data. Activating SMEs to actualise available data potential would benefit the whole society through novel SME innovations and growth.

SMEs need simplified processes to access data. Clear rules on data access will help SMEs in realising the potential of the data economy. Special focus should be paid to market barriers that arise from the lack of interoperability. While building the regulatory framework for data access, data sharing and interoperability, it is important to secure investments made by private sector to the data economy. New regulation should not disincentivise nor slow private investments in the data economy.

To ensure that the opportunities created are effectively used, clear regulations are needed to eliminate ambiguities and create legal certainty. Some provisions of the proposed regulation therefore require further specification.

Recitals

Given the fact that most data is related to more than one person and that it is nearly impossible for individuals to exercise their rights to data portability without affecting the rights of others, SMEunited is wondering why it was decided to limit the scope of rights under Regulation (EU) 2016/679 to individuals and not to include data cooperatives (Recital 24).

Chapter I – general provisions (Arts. 1-2)

The present proposal supports the use of data provided under existing rules without changing these rules or creating new sectoral obligations. Fundamental rights to data protection, privacy and property remain unaffected[1].

The differentiation from existing legal acts must be clear and unambiguous so as not to further complicate the already complex legal assessment of the transfer of data through the interaction of multiple regulations. Therefore, definitions should be expanded and specified in order to create clarity, certainty and coherence with existing legislation such as GDPR.

In practice, ambiguous terms lead to problems; for example, "held by public sector bodies" can be problematic in the case of individual "data sets", since it is not always legally clear even within a Member state 'who can provide access to data'; in some cases "there may also be several 'data holders' of a single data set.

Chapter II - re-use of certain categories of protected data held by public sector bodies (Arts. 3-8)

In order to enhance the re-use of public sector data, especially by SMEs, it is important that the mechanisms of acquiring such data are simple. There should also be support and guidance mechanisms in place for the re-users of such data. Terms and conditions on the re-use of data should be made publicly available as early as possible so that the potential re-users could evaluate the possibilities and potential for re-use.

The fees for the re-use of data should be limited so that SMEs could have equal opportunities in benefiting from them. It is positive that the proposal takes quite well into consideration SMEs position and that the public operators have been mandated to take actions that support the re-

[1] It complements the Open Data Directive (PSI Directive) and seeks to find solutions for the re-use of data that is, for example, subject to commercial confidentiality or data protection or protected by intellectual property rights and therefore outside the scope of the PSI Directive. Neither an obligation nor a right to reuse is granted, only the general framework and underlying conditions if they are reused, are specified.

use of data by SMEs. It is essential that the responsibility to ensure data protection, privacy and confidentiality when re-using data stays with the public operators.

While the creation of special incentives for SMEs is welcomed, data should generally (and not only in these exceptional cases) be made available at the lowest possible cost or free of charge. This is the only way to unleash the maximum societal and economic benefits. In any case, the scheme for charging fees should be as uniform as possible throughout the EU.

Even though Article 6 stresses that fees shall be proportionate and that when public sector bodies ask for a fee, they shall take measures to incentivize re-use of data for SME's, we would like to see this clarified. The regulation aims for maximum harmonisation but leaving the height of the fees to the Member state may create unfair competition between SME's in different Member states. Excessive fees in general create high thresholds for SME's. One might consider an exemption of fees for SME's. Providing free of charge data for SMEs would encourage them to access and make use of public sector data.

The framework for the reuse of certain categories of protected data held by public sector bodies, such as (i) prohibition of exclusive arrangements with exceptions, (ii) prohibition of discriminatory, disproportionate, and objectively unjustified conditions for re-use, permission of the condition of pseudonymization or anonymisation of data (in line with the GDPR), (iii) permission of re-use only in compliance with intellectual property rights, (iv) prohibition of discriminatory, disproportionate, and objectively unjustified fees, are worth supporting, as they create an actual possibility of re- use. In general, the re-use of data must not be restricted to sectors or certain circles; rather, the possibility of re-use must be open to everyone equally and under the same conditions.

Establishing a national contact point can support innovative companies to find relevant data for re-use. Public sector bodies must be effectively and technically equipped in such a way that data protection, privacy and confidentiality are fully preserved. Creating a single contact point that clarifies decisions regarding the re-use of data, e.g., data protection issues, based on harmonized requirements is therefore supported. It is important to create a framework that adequately supports the re-use of data (particularly by promoting legal certainty and providing technical advice for public sector bodies and companies). The respective single bodies of the Member states should be interoperable and avoid the use of different technology, interfaces, and rules (e.g. through uniform guidelines). Regarding interoperability, synergy potential should also be exploited in relation to data sharing services.

The single information point, where information about the fees and the conditions for re-use of data should be published, will be very important. The information should be easily available and simple to understand in order for SME's to take full advantage of the platform. A request should be approved or denied in a shorter time span than two months. Article 8 does not clarify whether a request to re-use data can be filed electronically via the SIP. This should be a minimum requirement.

In order to provide legal certainty for SMEs across all markets, we welcome the possibility of adopting implementing acts declaring that third countries provide equivalent levels of protection of data (Recital 15, Articles 5(9) and 22(1)).

Finally, Member states should also offer sufficient support to entrepreneurs, SMEs and innovators who want to work with public sector data, for example through information campaigns, a data utility company and practical guidance. The Commission could investigate to what extent this is already happening in the Member states and make recommendations based on the findings.

Chapter III - requirements applicable to data sharing services (Arts. 9 -14)

It should be ensured that SMEs can in practice acquire data also from data sharing services. The procedures must therefore be accessible and the expenses of using such services should be moderate. It is essential to work on identifying and assessing all possible factors that might hinder SMEs capabilities of using data sharing services.

It is proposed that the data sharing services could also operate as data cooperatives formed by SMEs and natural persons. These cooperatives could be delegated a mandate to negotiate terms and conditions of data processing. This could enhance SMEs position in negotiations with bigger data operators (for example big online platforms).

The notification procedure for data intermediaries may not lead to excessive administrative and financial burden for those businesses. The notification procedure as such should be clarified as well. Again, differences in fees, to be determined by the competent authorities, may create unfair competition between data intermediaries.

The providers of data sharing services should be established in the EU.

Moreover, the chapter needs clear definitions and concrete regulations. The following examples in particular are not (sufficiently) defined and unclear:

- "intermediation service" (e.g. brokerage services, search & analysis requests from customers, etc.);
- "service providers" possibility of filings for a group of companies as e.g. parent company. For example, in the case of holding companies, subsidiaries, etc., is a single registration sufficient or must it be per company?;
- "neutrality of data sharing services", especially regarding the requirement of separate legal entity and their role according to the GDPR;
- "information", which should serve to verify compliance with Arts. 10 and 11, is not clearly defined.

The provision allowing national competent authorities to impose dissuasive financial penalties, which may include periodic penalties with retroactive effect, is too disproportionate for those data sharing providers which are SMEs. Periodic penalties with retroactive effect should be proportionate and should take into consideration the size of the provider and the severity of the breach.

We welcome the inclusion of ex post monitoring of compliance with the requirements of the Regulation by the competent authorities of the Member states, as provided by Arts. 13 and 21. It is appropriate that the burden of monitoring compliance lies with the competent authorities to avoid placing disproportionate regulatory burdens on SMEs.

Chapter IV. Data altruism (Art 15-22)

Data sharing by individuals or companies on a voluntary basis for the benefit of the general public needs to be facilitated. This approach of data altruism is therefore expressly welcomed.

We support the idea of bringing data sharing services and the not-for-profit data operators into a light regulative and surveillance framework. This will enhance the trust of SMEs in the data economy so that they will be more inclined to use the data services and participate actively in the data market.

The GDPR places high demands on the validity of consents, particularly regarding the specificity as well as the foreseeability of data processing purposes. The creation of a "European data altruism consent form" to reduce the costs of obtaining consent and facilitate data portability is welcomed in any case, provided that this effect is in fact achieved by the draft regulation. The fact that consent must be revocable at any time must be considered.

We would welcome the development of a European data altruism consent form to be drafted by the Commission to be included in the DGA proposal itself instead of having to depend on the Commission's adoption of implementing acts. It would lighten the administrative burden of all enterprises but especially SMEs to have such an European harmonised consent form in place. Moreover, such consent form should be up to date, regarding for instance changes in the GDPR.

With regards to transparency requirements for recognised data altruism organisations, it should be noted that the "purpose of such processing" should not be understood too narrowly. Especially in the research area, this purpose may also be subject to change. Here, an explicit exception for research activities or a reference and facilitation would be needed.

The European Commission could consider incentives that encourage voluntary data sharing. Tax cuts or administrative simplification could be ways in which altruism could be triggered.

It should also be carefully considered whether the process is not too burdensome. A registration procedure and transparency and security obligations are necessary, but with the additional

certification mentioned in the text, the process may require too much effort for SMEs. To encourage altruism, it seems important to us that the burden is kept to a minimum.

Chapter VI - European Data Innovation Board (Art 26-27)

The introduction of an innovation board made up of experts and representatives from the field is expressly welcomed, as it will help to establish a framework process for coordinated action and enhanced interoperability in the European data market. It is important that the composition of the board is balanced and diverse and that the selection of the board members is well thought-out. For example, SMEs and entrepreneurs must also be part of the group.

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