

SMEUnited's position paper on Access to Data

This SMEUnited's Position Paper is the result of a consultation and discussion process with and between our member organisations that started in early 2019. It is divided in two parts: the first part contains SMEUnited's general views on access to data, in the second part we have put forward cross-sectorial principles for access to data.

PART I

1. Introduction

- Digital Single Market needs to function for all kinds of enterprises.
- SMEs manufacture products and offer services across the whole supply chain, and they are active in both online and offline economy.
- In the digital economy data is a pre-condition to compete, whoever has access to data has a greater ability to innovate and to bring new products and services onto the market, enjoying a competitive advantage. For SMEs, in their daily activities, access to data often means the ability to compete and continue their business or risking closing it down.
- Access to data is an issue for SMEs from all sectors, however in some it has already been more advanced/visible than in others (e.g. automotive value chain ¹as well as smart home). Thus, without control over machine-generated data and independent alternative offers, the end-user will lack a genuine alternative choice in services.
- SMEUnited calls for a fair data economy, which takes into account SMEs interests as manufacturers and service providers. A European data policy should provide the foundations for the access and use of data across different sectors in the EU (see *part II – Principles*) in an unrestricted and fair manner.

¹ For example, in the automotive sector there is no incentive for the manufacturer to provide adequate access to data to competitors in a way that enables effective competition and innovation.

- Concentration of information restricts competition and increases entry barriers to the market. In the assessment of a company's market power the availability of and control over data sets should thus be considered.

2. What data

- SMEs need equal access to all kind of data. Distinction between personal and non-personal data is often complex, especially in the case of "mixed datasets" which includes personal and non-personal data. However, we recognise the importance of protecting personal data in full alignment with GDPR.
- Large platform businesses use consent based approaches (like in PSD2) to expand their services to other sectors based on a large existing consumer pools. SMEs and any other legitimate entity should also have direct and real-time access to the user/customer data. it is necessary that the data obtained from the platform activities is not exclusively available to the respective platform. This would result in the platform being able to exclusively analyse and use the data in order to develop its own competing offers and thereby gain a competitive advantage over those using the platform as a procurement, communication and sales channel.
- Owner of the device or customer of the service should be empowered and make a decision who has access to his/her device data or with whom his/her data as customer is shared (+possibility to object). To prevent a vendor lock-in.
- Data ownership rights – narrowing discussion to data ownership rights is not a right approach. AI and new data models will be negatively impacted when data will have owners. Access to data and ownership of device customer of a service is the right approach to determine respective rights and obligations.

3. How to grant access to data

- Sharing data on a voluntary basis (even under the existence of a Code of Conduct) could be a good starting point, but there are cases, where this has shown to be insufficient. A voluntary access to data or a self-regulative

commitment by companies in the B2B sector as well as the establishment of a “data sharing support center” (as suggested by the European Commission) should be complimented by additional measures against data monopolies, which must be defined properly. This in order to effectively address the competitive disadvantage of SMEs.

- As manufacturers increasingly develop their own customer services or compete in various aftermarkets, they have no motivation to proactively and comprehensively enable access to data or technical units. This pushes SMEs out of the supply chain, limits consumer choice and free competition notably on e.g. aftermarkets in the European internal market. For example in the automotive aftermarket, to continue the ability to innovate and create competing offers e.g. for diagnostic, repair & maintenance or mobility services, independent service providers require legislation to ensure wireless access to the vehicle and its data, which enable them to provide services independently from the car manufacturer². SMEs need legally secured real time access to data in the B2B area. It is only on the basis of such data use that SMEs can offer their customers competitive services. The new legislation should ensure undistorted competition, support the ability to evolve for existing independent business models, as well as develop new alternative and innovative business models for ‘remote services’.
- Equally a “sector-specific right to data, which should only be granted if a market failure is identified or can be predicted in this sector and cannot be remedied by competition law alone” as stipulated in the European data strategy ³ is not enough. This reversed burden of proof, to identify and demonstrate a market failure and abuse of dominance, entails an incomprehensible obligation for SMEs and is simply discriminatory. SMEs have unequal bargaining power when it comes to data exchange and can hardly prove a market failure because the conditions for data exchange are laid down in private contracts.
- Contractual agreements do not guarantee equal access to data for SMEs, for reasons of asymmetry such as weaker position of SMEs during negotiations, limited expertise/knowledge of technical issues. At the end the stronger actor determines the terms and conditions for the access and use of data. SMEs risk being excluded from the economic use of the data that is increasingly necessary for their business models.
- SMEs need legal guarantees and/or oversight mechanisms to be enacted.

² Principles for fair digitalisation opportunities and access to data in the automotive aftermarket have been well documented (<https://www.direct-access.eu/manifesto>).

³ Page 13, footnote 39.

- Contractual clauses or general terms and conditions that secure exclusive claim on data for one or few selected companies should be prohibited by law.
- In some sectors (e.g. lifts and elevators), SMEs are granted access to data on informal and case by case basis, which is not a sustainable solution. At the end it is the owner of the device who should have the right to decide who has access to the data. To avoid lock-ins and reduce administrative burdens, one could think about an opt-out system.
- Model contractual clauses ⁴(model contracts) and terms for access to and sharing of data could serve as a guide for fair contract design and would enhance the negotiating power of smaller players.
- Access to data not necessarily for free. Under certain circumstances, SMEs can also pay for data or become involved in ecosystems/partnerships of sharing. There must be an incentive for parties to collect data. But the fees for the use of data must in any case be commensurate with the effort involved.

4. Who/Where to grant access to data

- Access to data needs to be technically possible. Devices or services need to have access to data possibility embedded already in design phases, with possibility for the user to freely give consent to the business of his/her choice to access the data. Fairness by design means that the interface must technically support the ability to give such consent and access to data.
- Access to data as a market access condition. In the EU internal market regulation it should be forbidden to place on the market devices/services that are not allowing access to data in uniform data formats and interfaces. A general obligation to convert data in certain formats could mean a market entry barrier. The requirements for technical standards on data formats may change fast – therefore a general standardisation in this area may result in out of date formats and reduced innovation.
- In certain sectors and chains trust is a key, there data sharing should be incentivised – and we also recognise the role of governments in this regard.
- We need more practical instruments for data sharing: operators, market platforms might be, in some cases but not all, solutions to exploit the potential of data economy.

⁴ Example from Technology Industries of Finland
<https://teknologiateollisuus.fi/en/ajankohtaista/news/model-terms-and-conditions-data-sharing-solution-socially-economically-and>

5. Standardisation activities

- The EU standardisation activities need to boost interoperability and portability (for all kind of data) to ensure the readability and thus usability of the respective data by means of relevant data analysis tools as well as the embedding of different systems in one value added process – i.e. eco-systems.
- The main issues that need to be tackled: quality of technical/interoperability elements (APIs - application programming interfaces, uniform data formats), open interfaces and readability, and ensuring that these and other existing standards are used.
- Address the security issues, when information goes across multiple systems/devices.
- The European Commission has begun to negotiate and specify only the enforceable, overarching framework with its legislative initiatives, while mandating the technical regulations on delegated acts and standardisation mandates. Instead of the regular legislative process, a far less transparent standardisation process has thus been initiated, in which SMEs cannot participate sufficiently.
- The Commission needs to ensure that standardisation requests provide the legal and policy framework for the development of EU standards in this area. These standardisation requests should also include as a requirement that SMEs are properly represented and participate in the standardisation process. Without the inclusion of a specific SME involvement requirement there is a danger of elaborating standards in standardisation bodies which only cater for the requirements of big companies and impose obligations on smaller companies, which they are not able to meet.

PART II

In SMEUnited's view a European data policy should provide the foundations for the access and use of data across different sectors in the EU. Therefore, we put forward cross-sectorial principles for data sharing, as a common ground that applies to all kinds of future legislation.

The cross-sectorial principles for data sharing (access to data and use of data):

Data governance mechanisms are needed to capture the enormous potential of data in particular for cross-sector data use.

- a) **Access by design.** Access to data according to various access rights (e.g. business-to-business, business-to-government, business-to-consumer) should be facilitated by technical or legal solutions, e.g. open interfaces (APIs), and practical support, e.g. open source model contracts.
- b) **Transparency:** The rules governing data access need to be transparent and understandable for all actors. They should identify in a transparent and simple manner (i) the persons or entities that will have access to the data that the product or service generates, the type of such data, and at which level of detail; and (ii) the purposes for using such data.
- c) **Portability:** The consent-based portability of personal data between services and platforms, as enabled by GDPR, needs to be respected and upheld. The principle of portability should also be extended to companies that wish to transfer the non-personal data created by the machines and services they use between equipment manufacturers and service providers. Clauses in the general terms and conditions, which prescribe a unilateral, exclusive use of non-personal data by one of the contracting partners, should be prohibited. The actual possibility of non-personal data access and transfer ought to be made possible through open or openly documented interfaces (APIs).
- d) **Shared value creation:** it should be recognised that, where data is generated as a by-product of using a product or service, several parties have contributed to creating the data and should therefore have equal access to it.

- e) **Respect for each other's commercial interests:** The rules governing data access should address the need to protect both the commercial interests and secrets of data holders and data users.

- f) **Ensure undistorted competition:** Access to data markets should be open to all on fair and non-discriminatory basis in order to foster innovation and growth and to limit market concentration and data monopolisation. The rules shaping data access should address the need to ensure undistorted and fair competition when exchanging data.

- g) **Reusable by default, minimised lock-in:** Data sets need to be interoperable, portable and harmonised in a structured format to enable flow of data in automated processes. The interoperability efforts, e.g. standardisation, need to be led by industry stakeholders. When appropriate and necessary, access to data should be provided and controlled through open or openly documented application programming interfaces (APIs). All new initiatives for the production, collection and processing of data should be based on the principle of interoperability and in mutual reciprocity.

- h) **Trust:** The European data economy needs to be built on trust. Building trust in data use and data-driven technologies requires strong respect for human rights, and transparency, reliability and the inclusion of all stakeholders, including SMEs both as data holders and data subjects.

- i) **Investment:** The EU should incentivise investments in technologies and safe infrastructures that enhance data access and use. The development of common European data spaces should be supported by the EU in strategic industry sectors and domains of public interest (industry/manufacturing, Green Deal, mobility, health, public administration, skills).

- j) **Secondary use of data:** Public authorities should do more to make available a broader range of sensitive data for R&I purposes for the public interest, in full respect of data protection rights. The legal rules on the purposes for which the data can be used should be clarified from the outset. Public authorities should be able to provide anonymisation of specific data for concrete use-cases and offer the possibility to process data within a secure environment it makes available, so that the user does not need to obtain a copy of the data.

k) Cloud computing: Cloud services offered in Europe should be secure, user friendly and compliant with privacy rules. The applicable rules should be implemented by service providers in an appropriate and transparent way. The cloud providers are often in a dominant position especially to their SME clients. It should be assessed whether the self-regulatory approach needs to be complemented with more binding rules.

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