

Position Paper

UEAPME¹ position on Communication on “Building the European Data Economy” (COM(2017)9)

Executive summary

Following the Publication of the European Commission’s Communication on Building the European Data Economy, UEAPME would like to share its Position on the challenges of the data economy for SMEs.

The most urgent priority is to ensure legal certainty and to avoid monopolies of companies holding data by ensuring equal access to data for all stakeholders. A monopolisation of data will otherwise cause negative effects on the economic development including the development of new businesses.

At the present time, there is no agreement as to who owns machine-generated, non-personal data. This lack of certainty leads to a situation in which it is primarily the general terms and conditions that determine the use of data. As a result, the stronger negotiating position predominantly determines who can and who cannot use data. This may be particularly detrimental for SMEs, which could risk being excluded from the economic use of the data they produce or that are produced by others.

As UEAPME, we believe that contractual freedom must be accompanied by initiatives to enhance fair competition, allowing access to data for all relevant parties, even weaker players. The adoption of model contractual clauses could serve as a guide for fair contract design and would enhance negotiating power for weak stakeholders and users.

Moreover, UEAPME supports the principle that data localisation requirements should be abolished inside the European Union in order to create a level-playing field among EU companies.

Further investigation on existing law and monitoring of concrete cases will be necessary to help defining who owns the liability for defective products.

The issue of access to data is already a priority for some specific sectors, such as the repair and maintenance sector. A sectorial approach for the mostly affected sectors might be a possible solution if market assessment shows that a horizontal legislative approach is not necessary.

General Remarks

New data-driven business models are an opportunity for Europe’s economy. Small and medium-sized companies from all sectors can benefit from these new business models and develop innovative products and services.

Indeed, the Internet of Things is not the future anymore, it is already the present and a part of the everyday life. Whether it is the production robots in the automotive sector, vehicles or the washing machine in the consumer household, today machines already produce large amounts of non-personal data.

¹ UEAPME subscribes to the European Commission’s Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is 55820581197-35.

However, legal certainty regarding the requirements to fulfil in order to process non-personal data is necessary. At the present time, there is no agreement as to who owns or has the right to access and use machine-generated, non-personal data. However, there are always many actors interested in machine-generated/non-personal data: the manufacturer, the maintenance service, the dealers, individuals owing the machine, etc. Interestingly enough, most individuals owning a machine (for example a car) believe that this machine-generated data is their data.

This lack of certainty leads to a situation in which it is primarily the general terms and conditions that determine the use of data. As a result, the stronger negotiating position predominantly determines who can and who cannot use data. This may be particularly detrimental for SMEs, which could risk being excluded from the economic use of the data they produce or that are coming from other sources.

The potential under consumption of data could be a consequence of the ultimate nature of the market for data: a rapidly evolving, young and dynamic market in which the (exact) value of data has not been recognised by all economic actors or is simply not clear. Data is sometimes just regarded as residual product; the data owner is not able to accurately determine a price for its data; or the data owner wants to keep the data to itself for possible further use, but does not prioritise this further use. The market could benefit from improvements in transparency when it comes to the availability of data.

1. Localisation of data for storage and/or processing purposes

In general, UEAPME supports the principle that data localisation requirements should be abolished inside the European Union. Indeed, the free flow of data within the European Union is often constrained by national requirements on the storage and usage of data. These requirements directly or indirectly determine that data should be stored or processed within a certain geographical area, mostly a single country. The requirements find their origin in the belief that data stored within national borders is more secure than data stored abroad, and that national supervisors would be able to access the data easier when stored within the country.

National security could indeed be a legitimate reason for storing data within national borders. However, the framework of these exceptions with regard to National Security has to be clear.

Companies should have the possibility to choose the most optimal location for storing and processing data within the Internal Market. The abolishment of data localisation requirements could bring a level playing field among EU businesses, improve the functioning of the internal market and boost economic growth through cross-border digital and data-driven business.

However, the issue of transferring data outside the EU should also be linked to the assessment of data localisation restrictions. Indeed, since the data economy is global, the fact that requirements on the localisation of data are common in non-European areas as well is also relevant to this analysis.

Indeed, the possible abolishment of European restrictions on the free flow of data could eventually contribute to a European level playing field, but not to a global one. Companies from outside Europe could operate unhindered in the European Union, but European companies would still be required to host their data in these non-EU countries. This lack of reciprocity harms the level playing field between European and non-European companies and leads to a competitive disadvantage for EU-businesses.

Therefore, UEAPME would recommend the European Commission to further investigate the effects of data localisation requirements on a global level and the possibilities to conclude agreements achieving equal policies on data localisation with third countries and reciprocity. The possibility to incorporate this in the framework of the World Trade Organisation (WTO) could also be investigated.

2. Access to and re-use of non-personal data

The use of digital products and services produces even more data. Mobile phones, televisions, cars, agricultural machines and payment transactions, constantly generate new data. Increasingly, this data is the basis for developing new innovative services, smart processes and product innovation. The economic and societal potential benefit of data and its application is far greater than the actual current use of the available data. The Commission rightly points out that innovative services require pooling of data sources.

The characteristic of data is that it can be re-used and distributed simultaneously and by different entities. The costs of distribution and reproduction (the marginal cost) are minimal. But at this time, there is no automatic, ultimate ownership of raw data. In other areas, ownership is accounted for in certain specific information goods, such as copyright, patents or trademark law. However, in most cases there is no consensus on ownership of data. Indeed, there is a real lack of legal definition and specific legislation, both at national and European level.

Indeed, in many cases more emphasis should be put on access and usage of data rather than on ownership. In practical terms, it is in the interest of SMEs (for example in the repair and maintenance sector) to have access to the relevant data and not to own it.

Data is used in very diverse ways which differ between sectors. Therefore, in current practice regarding raw data, a common solution is the stipulation of a contractual agreement on the access, use and distribution of data. This means that the parties need to negotiate on terms and conditions with regard to the access, use and distribution of data.

There are cases in which these negotiations work out, taking the interests of all parties into account.

A specific case in the production chain of milk (from sensor data of cows to the milk in the supermarket) in the Netherlands, shows the success of sharing data in complex relationships with lots of parties involved. By contractual arrangements a legal structure was erected to organise collective access to the data for all parties concerned. In this case, data has been pooled in a foundation, which has worked out very well. In this case, the farmer was chosen to be the ultimate owner of all the data about his cows collected by the fully automatic dairy farm.

However, this is not the case in other sectors. One of the sectors mostly affected is the repair and maintenance one; this being independent car repairers and dealers or small independent repairers of computers or electronics. We are aware that a similar situation is also present in the lift sector, where independent lift repairers have not access to relevant maintenance and diagnostic data from the manufacturer.

This is why as UEAPME, we believe that contractual freedom must be accompanied by initiatives to enhance fair competition, allowing access to data even for weaker players. A possible solution could be the **adoption of model contractual clauses that would serve as a guide for fair contract design** and would enhance equal negotiating power for weak stakeholders and users. Indeed, there is the risk that weaker actors will be disadvantaged in contract negotiations. **It is a reality that in some sectors, SMEs are being denied to access data, especially predictive diagnostic data.** And when data is made available, prices are prohibitive.

In general, manufactures of data-producing machines as well as the users of such machines should both be entitled to use the non-personal data. There should be more transparency. Clauses in terms and conditions, prescribing a unilateral, exclusive use of non-personal data by one of the contracting partners, should be prohibited.

Indeed, there is the concern that the manufacturers of data recording machines, as well as platform operators, might obtain the sole power to use the data obtained. Manufacturers of products that generate data (e.g. vehicles, routers, mobile phones, industrial manufacturing machines, etc.) can impose end-users clauses in purchase or leasing agreements for the sole use of the data volume. These clauses for the exclusive use of data volume are disadvantageous for the purchaser or owner of the machine as they impede the economic exploitation of the data obtained by the purchaser or owner of the devices themselves. They also prevent a demand-side competition from the use of the occurring usage and sensor data.

A clear guidance by the European Commission on how to access, use and re-use data might limit legal uncertainties and enhance competition. SMEs would then have a clear framework on how they should deal, and how they should be treated in contractual negotiations, in contracts regarding the access and use of data.

Moreover, the European Commission should carefully assess whether, to what extent and in which specific sectors or domains market imperfections might arise which might legitimise broad legislative interventions.

A sectorial approach for the mostly affected sectors might be a possible solution if market assessment shows that a horizontal legislative approach is not necessary. In particular in the automotive aftersales market a set of rules establishing fair contract terms would be more effective than a non-binding regulation.²

3. Liability

The European Commission correctly points out that current rules concerning liability might not suffice in the era of upcoming technologies such as the Internet of Things (IoT). Products or services are increasingly dependent on other products, services or sensors (not being part of the original product). Examples are software applications from third parties that consumers install on cell phones and that the cell phone producer has no knowledge of. Such a software product could potentially harm the functioning of the hardware without any possibility for the original producer to influence or repair it. In this case, it is hard to prove the exact liable party. The increasing scale of artificial intelligence and self-learning systems will complicate these matters even further. In these complex constellations it will become increasingly hard to pinpoint the cause of the problem.

In most of the cases, the current legislation on products and services still provide a good framework. Indeed, the responsibility of the producer seems to be the right starting point. The producer places the assembled product (combining tangible products, digital parts and services) on the market. Suppliers of hardware and software are not always fully informed about the exact use and configuration of their products in the final result. Moreover, the producer can make legal arrangements with the suppliers and maker agreements about liability issues to mitigate or manage liability risks.

However, this solution will not fit for all products. Therefore, UEAPME suggests further investigating existing law and monitoring concrete cases that will arise, this way the problem with existing legislation will become more explicit and may be adjusted, if necessary, to these examples.

4. Portability of non-personal data, interoperability and standards

Portability and interoperability are important and vital to spread data across society and the economy. In this way, consumers and companies are enabled to easily switch to a different supplier. The lower costs of switching supplier should lead to better market competition. Standards for portability and interoperability could contribute to this and are thus desirable. This should be a market-led development though. SME concerns must be sufficiently considered and their involvement in the standardisation process has to be ensured.

At the moment, the nature and severity of the lack of data portability is not clear for certain sectors. In the automotive sector, there is a clear need for interoperable, standardised and secure open platforms.

² For further information on the automotive sector, please visit our sectorial member Figiefa's website: <https://www.figiefa.eu/free-flow-of-data-building-a-eu-data-economy/>

Before laying down general requirements, the issues need to be assessed together with all relevant stakeholders, including SMEs. Moreover, the implications of portability are severe. The portability requirements for personal data in the new privacy legislation GDPR already prove very difficult and costly to implement. Meaningful portability of (raw) data will require equal formats for data throughout an enormous volume of different services. That would require a complete built-up of an alternative IT-structure and seems to be a bridge too far. The same goes for interoperability.

In general, UEAPME believes that these standards and interoperability should be market driven and affordable and user-friendly for SMEs. The Commission could however stimulate the establishment of standards and interoperability by for instance issuing guidance, sharing best practices and stimulating market led initiatives.

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