



*Employers entrusted to deliver
Sustainability Growth Innovation*

Position Paper

Proposal for Data Act

Brussels, 25 October 2022

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The Data Act is an essential pillar of the European data strategy. It aims to create a broader, more open European data market, governed by conditions set by the European Union, and shared between the various players. It will make a major contribution to achieving Europe's digital transformation goal during this decade, by establishing rules for the fair use of data generated by the "Internet of Things".

SGI Europe welcomes the Commission's proposal on a Data Act and the challenges raised by the proposed regulation, which will stimulate the development of a market for data from competitive connected objects and innovation based on this data.

With this contribution, SGI Europe puts forward the key messages from employers and providers of services of general interest (SGIs) from across Europe. As one of the cross-industry EU social partners, SGI Europe represents its members active in fields of, healthcare, telecommunications, waste management, and water distribution, amongst others. By providing services essential to the well-being of EU citizens and businesses, SGIs facilitate upward convergence across Europe while providing the infrastructures at the heart of the digital and green transition. Our economy benefits significantly from the public infrastructures operated and provided by service providers of general interest across Europe. Providers of services of general interest have to deliver services to all citizens and by doing that they generate meaningful data. On the other hand, for fulfilment of their mission of benefitting to the society at large, they also need to benefit from the data that is generated but not yet shared.

In a fast-developing world, where data is becoming one of the most essential assets, ensuring fairness in allocating value from data among all actors is of paramount importance. SGI Europe is also convinced of the importance and the need to encourage the widespread use of Internet of Things data. However, as currently drafted, the scope and objectives of the proposal are not clearly identified. It is indeed difficult to determine precisely what data is covered by the proposal, although the stated objective of the Commission is to tackle data from the Internet of Things. It is necessary to specify the scope of the Data Act which therefore currently lacks clarity and precision.

1. Specificities of providers of services of general interest

Data Act has a great potential to optimise functions and services delivery processes of the providers of services of general interest. Internet of things can bring huge costs gains in terms of maintenance of infrastructure. Proactive and predictive maintenance, maximization of uptime, avoiding outage and optimising economic value. However, there are some SGI specific concerns and a need to target digital solutions appropriately in order to meet a real need and provide an added value to users.

Many providers of services of general interest are operators of critical infrastructures and thus have a special responsibility regarding the sensitivity of data, which they have to handle with utmost care in comparison to other economic sectors. Therefore, in order to preserve access to essential services, these sectors cannot be seen as equal to other "non-essential" sectors. A way to tackle this could be creation of overarching classification scheme for data defining which categories of data have to be handled in specific ways and which have to be protected. A specific clause for rejection of data access requests for critical and sensitive data is therefore required.

Ensuring that the sectoral legislation has a primacy over the horizontal is of crucial importance. For example, Directive 2019/944/EU on common rules for the internal market for electricity ("Electricity Directive") in Articles

23 and 24, sets rules for an easier data access and exchange, facilitating the full interoperability of energy services within the EU.

There should be a clear exemption of data that is subject to the Data Act from the Open Data Directive (2019/1024/EU). This should in particular apply to the data that should be provided by the public undertakings. The Open Data Directive obliges Member States to further regulate data obtained by the public bodies. Due to the imprecision of the notion of “public sector” also public undertakings fall within the obligations of the Directive. However, public undertakings (on the contrary to the public sector) often compete in the markets.

An exemption from the Open Data Directive is needed in order to prevent situations where data obtained by public undertakings through the Data Act, would have to be made available under the provisions of Open Data Directive to any third party, regardless of their original access rights. If public undertakings are users or third parties within the meaning of the Data Act, the data obtained in this way should be excluded from the provisions of the Open Data Directive. If there would be no clear exemption, it could endanger protection of trade secrets of the data holders as it follows from Article 4 (3).

2. Clarity of definitions

Furthermore, some definitions, which are very broad, could create risks of legal uncertainty. The definitions of “products” and “related services” seem broader than the intended field but do not define what a connected object or the Internet of Things (IoT) is. It is crucial that products whose primary function is the storing and processing of data does not fall under the regulation. However, a further clarification regarding the meaning of primary function would be appreciated. We insist on the importance of mentioning technological neutrality to avoid disparities in treatment which would be linked more to types of use rather than to a type of technology, which alone can guarantee a level playing field. This imprecision on “connected objects” is particularly troublesome for companies given the obligations arising from these definitions in the various chapters of the Data Act, but also from the fact that certain sectoral texts seem to want to rely on the Data Act. The definition of “related services” should be addressed to services that are directly related to the product offering and the functionalities of the product itself.

The stated objective of the Data Act is to harmonize the conditions for the provision and use of industrial data generated in the EU. This text does not sufficiently define the notion of “data” in the specific context of the IoT. A clearer definition of the content and scope of non-personal data from the Internet of Things is therefore necessary, as well as clarification on the format in which data needs to be provided. It is also necessary to distinguish raw data (as a result of an isolated analogue measurement, unprocessed and uncontextualised) from processed data (information interpreted and contextualised with regard to a purpose). In the latter case, the data results from the transformation of raw data due to know-how or experience to respond to a specific use, which requires an initial investment (financial, technical or human) resulting from the know-how of a company in order to respond to a specific use, which requires an initial investment (financial, technical or human). The sharing of such data could therefore have serious consequences on the activity of the holding company.

Regarding sharing of personal data, SGI Europe sees it fundamental to keep the human centric approach, preserving the rights and freedoms of the individuals. Sharing of personal data, generated by the use of a product or service by any entity other than data subjects, that allow precise conclusions to be drawn concerning their private lives, should be clearly limited and restricted.

Finally, as pointed out by the European Commission's Regulatory Scrutiny Board, the notions of "public emergency" and "exceptional need" lack precision and should be able to be better distinguished and differentiated.

As long as the definition of "data holder" is limited to the manufacturers, SGI Europe welcomes Article 3.1. , which **obliges manufacturers (data holders) to design products** so that data generated by the use of the products can be easily and securely accessible. This is a prerequisite for an effective sharing of meaningful data and preventing the circumvention of rules from the very beginning. Furthermore, it will allow access to the data without the necessity for requesting it from the data holder.

3. B2C and B2B data sharing obligations

Data act should distinguish between users' own data and additional proprietary data insights that the data holder may invest in generating and therefore be entitled to a fair and reasonable compensation for such data. However, more clarity on how to calculate the reasonable compensation would be appreciated. SGI Europe considers it important that the undertakings are incentivised to further generate data. Such compensations, however, should not exceed the purpose of the incentive.

The provisions on the sharing of data along the value chain of the IoT may need to be adapted to consider the specificities of different sectors and the need to protect Intellectual Property Rights such as trade secrets. As the Data act states that measures should be taken regarding the exchanges of sensitive data that protects trade secrets, the concrete forms of these measures remain unclear. A possible solution to that could be a classification system to all data that is released regarding their sensitivity and what kind of consequences apply to different regimes.

Furthermore, the responsibilities in cases where multiple data holders can be identified (articles 4 and 9) need to be clarified. More clarity, in particular regarding the obligation of accommodating the request of the user and financial compensation.

Since the Commission's proposal aims to **strengthen companies with weak negotiating positions**, SGI Europe sees it positively that the scope of B2C and B2B data sharing obligations is limited only to manufacturers which qualify as large enterprises. Moreover, we especially appreciate that the proposal **excludes publicly owned small enterprises from the data-sharing obligations by referring to Article 2 of the Annex to Recommendation 2003/361/EC**. Similarly, we are glad to see such formulation in Article 13 concerning **unilaterally imposed contractual terms** on micro, small or medium-sized enterprises and in Article 9, which sets out the compensation for making data available.

However, as we on the one hand support the exclusion of the micro and small enterprises from the B2B-data sharing obligations, we would like to point out that such exclusion should remain limited only to them. From the perspective of SGI providers, it is important that the medium-sized enterprises remain obliged to share data, as a sizeable share of data generating devices and sensors used in the provision of SGIs are manufactured by medium enterprises. Excluding those enterprises from the data act would significantly reduce data availability and should therefore be avoided.

The proposal foresees the provision by data holder to data user/recipient where applicable and in real-time. The fulfilment of this measure would necessitate the creation of an extensive administrative and technical infrastructure to potentially comply with a multitude of access requests at the same time and on a rolling basis.

Such a formulation would have significant impact on bandwidth and monitoring of such agreements.

Lastly, the liability for the completeness or correctness of the data disclosed to users or third parties should be limited. Too stringent obligations regarding the liability for data, which was in the first place not generated for further use, could disincentivize businesses to collect data. In order to avoid this, data holders should be liable only for gross negligence and intent regarding the quality of data.

4. B2G data sharing obligations

SGI providers, such as telecommunications, utilities etc., have a long history of cooperation with public administrations. For instance, the telecommunications have long been providing insights based on aggregated and anonymised network data to tackle the pandemics and other societal damages. The energy and water sector are already subject to comprehensive reporting and monitoring obligations. B2G data sharing is important for equipping the public authorities with the necessary data that can improve creation of policies that benefit the provision of services of general interest or responding to the public emergencies. However, this needs to be achieved with the introduction of proportionate measures that balance the interests of data holders and beneficiaries.

A framework on data of general interest should ensure that the sharing of company data takes place under conditions that guarantee trust. It is imperative to respect the rights of the natural and legal persons concerned and to ensure fair competition between economic players. We support the principle of making company data, public or private, available to public sector bodies, provided that this is done within strictly delimited frameworks, for uses clearly defined upstream, with real reflection concerning the fair remuneration of the contributors. However, as it stands, the proposed regulation does not seem to offer all the technical guarantees necessary to secure the data before, during and after it is shared with public sector bodies.

SGI Europe welcomes the transparent manner for which purposes data provided to public authorities is used. In particular: purpose of the request, specified intended use and its duration.

5. Entry into force

Data Act is introducing important novelties in the area of B2B, B2C and B2G data sharing. In order to allow all the actors to sufficiently prepare themselves to the upcoming obligations, SGI Europe suggests prolonging the foreseen deadline for entry into force, from 12 months to 24 months.