

+32 2893 0235

office@digitalsme.eu

Rue Marie-Thérèse  
21, 1000 Brussels,  
Belgium

VAT: BE0899786252

EU Transparency  
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# Position Paper on the Data Act

On 14 March 2022 the European Commission published a legislative proposal for a European Data Act. This document provides comments from the SME perspective with regards to the importance of the data economy, data access, contractual fairness and an overall beneficial data economy.

## Executive Summary

- **DIGITAL SME welcomes this initiative**, as it addresses key concerns raised in the past and supports a more competitive data economy.
- DIGITAL SME explicitly welcomes the SME-friendly angle of this proposal, exemplified in its promotion of the **FRAND** (fair, reasonable and non-discriminatory) **conditions**. Furthermore, policymakers should consider **extending the exemptions** currently devised for micro and small enterprises to all SMEs, so that data sharing obligations towards public entities are not applied to **medium companies**.
- In order to avoid a one-size-fits-all approach, while still respecting legal consistency, it is necessary to simultaneously deploy a **horizontal and sector-specific** perspective regarding data access requirements.
- To complement regulatory measures, a **successful transition** to data-driven business models and, more generally, the data economy requires **skills and investment** at **all levels** of the organisation.
- **Data portability and interoperability**, crucial for data-sharing between different market players, requires **standards** that work for all companies. However, SMEs are often **under-represented** in standard-setting committees. We recommend their further inclusion in all relevant oversight bodies, such as the European Data Innovation Board established by the Data Governance Act.
- Ensuring **coherence** across the different **pieces of legislation** that are of relevance for the digital transition, as well as **providing support and points of contact to SMEs**, are crucial in guaranteeing SMEs' **ability to comply, develop and innovate**.
- The European Commission should investigate how the **Data Act may interact** with a potential **"Right to Repair"** and **"Right to Update"**. Device owners should have the right to access any data necessary for the primary function of a device, and be able to provide access to after-sales services. The European Commission must ensure that manufacturers do not restrict access and repairability of their devices.
- Finally, in order to ensure a competitive after-sales market in **MLOps (Machine Learning Operations)**, **data traceability** needs to be guaranteed. Access to the training data, or alternatively, to a list of its sources, is highly recommendable.

## Introduction

On 14 March 2022 the European Commission published a [legislative proposal for a European Data Act](#).

The Data Act aims at:

- ensuring fairness in how the value from using data is shared among businesses, consumers and accountable public bodies;
- to facilitate access to and use of data, including business-to-business and business-to-government;
- to review the rules on the legal protection of databases
- to seek the right balance between rights to access data and incentives to invest in data, without changing the current data protection rules.

With this position paper, DIGITAL SME would like to provide views and suggestions on the Data Act from the perspective of SMEs active in the ICT sector from across Europe. It has been prepared in response to the [European Commission consultation on the Data Act](#). The position paper provides comments from the SME perspective with regards to the importance of the data economy, data access, contractual fairness and an overall beneficial data economy.

## Background

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 become leaders with innovative products and services.

However, some barriers to the uptake of these business models exist. In a survey among DIGITAL SME's Focus Group AI, **access to data was named as a key barrier to AI development & deployment**. Similarly, uncertainties with regards to how to delimit the application of GDPR to machine-generated data in interaction with individuals seem to curtail SMEs' willingness to take risks. Intellectual property concerns have also been named as a limitation to the use of data sets.

In 2016, the European DIGITAL SME Alliance **called for a solid and clear legal framework for the data economy**, specifically for legal certainty of the requirements to process non-personal data. In the [2016 position paper](#), DIGITAL SME had formulated three key demands:

- Manufacturers of data-producing machines as well as the users of such machines should both be entitled to use the non-personal data.

- Clauses in the terms and conditions, which prescribe a unilateral, exclusive use of non-personal data by one of the contracting partners, shall be prohibited. At the same time, contracts negotiated individually between two parties, and thus the general contractual freedom, should remain unaffected.
- Mandatory open or openly documented interfaces provided by all manufacturers of data producing machines should enable the actual possibility of non-personal data usage.

Some of these requests have been met in the proposed Data Act.

A [2020 position paper by SMEunited](#), supported by DIGITAL SME, focused on the importance of standards to ensure data access and interoperability. The paper recognised that access to data is a growing issue for all SMEs, while it is more problematic in some sectors (such as automotive, maintenance and repair, hospitality industry). While a right to access data was considered important, this needed practical technical implementation to be enforceable.

Over the past years, evidence points to a need to increase SMEs' weight in commercial relationships, notably with the rise of platform-dependent relations, where SMEs provide goods and services either in the supply chain or via gatekeepers in different industries. Nonetheless, the specific situation may differ from industry to industry, therefore requiring a mix of a **minimum access right and conditions** and a careful assessment of the situation in different sectors, where more stringent rules may be needed.

## DIGITAL SME Main Comments

Overall, DIGITAL SME welcomes this initiative. It addresses key concerns raised in the past, e.g., in the [2016 DIGITAL SME position paper](#), and supports a more competitive data economy. For instance, it provides a framework to ensure that manufacturers of data-producing machines, as well as the users of such machines, are both entitled to use the non-personal data.

### Business-to-Governments Data Sharing Obligations

DIGITAL SME explicitly welcomes the SME-friendly angle of the Data Act. In the course of the legislative proposal, policymakers need to ensure that **no additional obligations** stemming from this legal act **other than those already derived from existing legislation** on data protection and data (e.g. for data-sharing) are extended to SMEs. This includes the exemption for micro and small enterprises from data sharing obligations towards public sector bodies. This exemption should be extended to all SMEs and their products due to the disproportionate administrative burdens it would place on medium-sized enterprises.

Regarding the obligation to make data available to public sector bodies in “**exceptional circumstances**”, further information is required as to what would be considered as such. Their ability to purchase data at below market rates could lead to **market distortions** and affect the profitability of investments into the collection and use of certain data that is more likely to be considered of “public interest”. Further to this, **more information is required** as to the determination of why a public body is **not able to purchase at market rates**; who decides the rate that the public body will pay; and whether companies have the right to refuse if granting data access or performing transfers would cause them to incur a loss.

**Protection is needed** so that companies’ investments in generating and processing data are not undermined via public sector requisition, particularly if they are engaged with other private sector bodies to process and use said data, who may gain an **unfair competitive advantage** through accessing data at below market rates. Similarly, the concept of “public emergency”, which would give the public administration the exceptional prerogative to use data held by private companies, should be further specified in order to avoid legal uncertainty.

### Fair Contract Terms

We welcome the adoption of **FRAND** (fair, reasonable and non-discriminatory) **conditions and contract terms**. The question of what constitutes FRAND conditions is complex. The Data Act foresees the development of model contractual terms that will assist SMEs to negotiate **fair**

and **balanced data sharing contracts**. Moreover, the proposal contains a list of terms deemed to be unfair which render the contract non-binding. As a result, the Data Act provides clear guidance and instructions to SMEs.

## Key Elements for the Digital Transition

In addition to regulatory measures, a **successful transition to data-driven business models requires skills and investment at all levels of the organisation**. In a position paper of 2020, together with partners, DIGITAL SME developed suggestions for steps and measures to support the transition to a successful data economy in terms of providing skills for key technologies, including Big Data.

We welcome the perspective mentioned in the regulation preamble (paragraphs 31 - 33) on making **data generated by the use of a product and related service available upon the request of the user**. Third parties are obliged to only process the data for the **purposes agreed with the user** and only share data with a third party if this is necessary to provide the **service requested by the user**. This perspective may place additional constraints on SMEs. However, the benefits to European citizens will far outweigh the costs of these constraints. We believe that these provisions can have the same net positive effect as the General Data Protection Regulation (GDPR).

## Standards

**Standards** are a fundamental instrument for **sharing data**. They ensure **interoperability and data portability**, which encourages market players to easily share data. However, SMEs are often under-represented in the respective technical committees. Standardisation processes need to include SME participation by providing financial support and any other necessary instruments.

## Regulatory Coherence

SMEs in the data economy will have to deal with a host of digital legislation either already in place, or coming into effect, ranging from the GDPR, Data Governance Act, Digital Markets Act, Digital Services Act, AI Act, etc. In addition, cybersecurity and information security requirements need to be met, which inevitably connect to issues about how to deal with data. While many of the laws are beneficial to SMEs, it may be **difficult for smaller companies to maintain an overview of the rules that may potentially affect them**. Therefore, the European Commission should **ensure utmost consistency** across the different pieces of legislation and



**provide support measures and points of contact for guidance to SMEs.** These should be made available to SMEs by national authorities for free.

Data spaces are the way to ensure data will be made available. Currently, the development of those **data spaces is not yet mature enough to be able to evaluate their effectiveness.** For instance, a European Health Data Space proposal will be presented by the European Commission, with a focus on interoperability and standards. The European Commission should further investigate the interaction of the data spaces with the Data Act. The openness and suitability of the relevant infrastructure for SMEs should be one of the main subjects of this investigation.

## The Right to Repair

The European Commission is investigating a future “Right to Repair”. In the ICT sector, electronic devices often become **obsolete due to a lack of updates.** Specifically, providers of operating systems or essential hardware may not provide the necessary updates. This leads to a situation where a device is either **no longer secure, or may not function anymore** with a specific operating system, thus becoming obsolete. While the Data Act regulates access to data, it does not tackle the access to the actual device to carry out updates or repairs, or to load a third-party software on the device, where this is demanded by the consumer. The European Commission should **investigate how the Data Act may interact** with a potential “Right to Repair” and “Right to Update”. Ultimately, the device owner should have the right to access the data, to provide access to others, and to have freedom of choice as to the providers of after-sales services.

There is a risk that Original Equipment Manufacturers (OEMs) may impose complex security standards to ensure that access to a device is carried out in a safe manner. This can lead to a factual market-access barrier to SMEs. For many services and repairs, “read-only” remote access is sufficient to allow SMEs to offer after-sales services. However, other repairs require “write-mode” access, thus offering novel business opportunities. The European Commission has to ensure that the **after-sales market remains open and competitive**, and that relevant **security provisions imposed via standards do not allow OEMs to limit access to SMEs.** One way to ensure this is the introduction of simplified cybersecurity schemes that are tailored to SMEs,

which can be easily implemented and would guarantee the same level of conformity in terms of security requirements.

**Machine Learning Operations (MLOps)** offer a case of special relevance. In order to enable SMEs' access to the **after-sales market** – as well as to foster further **innovation** and the **auditability** of ML models – it is important to ensure **data traceability**. The ability to track the final product back to the training datasets is key to testing, fixing and improving ML models. Therefore, making the training **data accessible** – or, alternatively, **listing the original data sources** – should be a priority, provided that these requirements don't place too high of an administrative burden on SMEs.

#### About DIGITAL SME

The European DIGITAL SME Alliance (DIGITAL SME) is the largest network of small and medium sized enterprises (SMEs) in the ICT sector in Europe, connecting more than 45,000 digital SMEs. The Alliance is the joint effort of 30 national and regional SME associations from EU member states and neighbouring countries to put digital SME at the centre of the EU agenda.

#### For questions about this Position Paper, please contact:

Ms. Naira López Cañellas  
AI Researcher  
[n.lopez@digitalsme.eu](mailto:n.lopez@digitalsme.eu)

Mr. Giorgos Verdi  
Junior Policy Officer  
[g.verdi@digitalsme.eu](mailto:g.verdi@digitalsme.eu)