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Data Economy: an open data market unleashing the untapped potential of SMEs

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, this requires a solid and clear legal framework. **The European DIGITAL SME Alliance calls for legal certainty of the requirements to be fulfilled in order to process non-personal data.**

- > 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.
- > Mandatory open or openly documented interfaces provided by all manufacturers of data-producing machines should enable the actual possibility of non-personal data usage.

Contracts negotiated individually between two parties, and thus the general contractual freedom, remain unaffected. These rules are not to be applied to personal data that are covered by the General Data Protection Regulation.

The importance of data in the future

The Internet of Things is not a term from the future, but a part of our 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.

Today, business models often are still based on the manufacturing and sale of products. However, it is undeniable that in the near future, those business models need to change. Data will become essential

for offering innovative services and for new business models.

The information obtained from the data will create more value than the products themselves. Thus, the power over the business model will be with those who can gain economically relevant information from the data, for example in order to run platforms. Manufacturers will become only interchangeable suppliers for the business models.

No clear legal regulation for processing non-personal data

At the present time, there is no agreement as to who owns machine-generated, non-personal data. Ownership-related rights to the processing of the non-personal data can be linked to the ownership of the data carrier or the data-producing machine. But the rights of use of data could also be derived from copyrights.

This lack of certainty leads to a situation in which it is primarily the general terms and conditions, which determine the use of data. As a result, the stronger negotiating position predominantly determines who can and cannot use data.

Thus, the most important business model of the future is determined by contractual conditions that depend on the market power of the parties involved. Hence, weak stakeholders such as consumers and SMEs risk to be excluded from the economic use of the data they produce.

Therefore, DIGITAL SME calls for the creation of an open market for data-driven business models with respect to the use of non-personal sensor and usage data in the Internet of Thing.

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The absence of rules jeopardizes a future-oriented data economy

The essential prerequisite for an open market is that the owners or users of data recording devices have the right to access and use those data.

However, there is a 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 on end-users clauses in purchase or leasing agreements for the sole use of the data volume. This might be done through pre-formulated clauses within the general terms and conditions. Such clauses for the exclusive use of the data volume are disadvantageous for the purchaser or owner of the machine, since they

- > constitute an enduring contractual obligation;
- > impede the economic exploitation of the data obtained by the purchaser or owner of the devices themselves; and
- > prevent a demand-side competition from the use of the occurring usage and sensor data.

Furthermore, there is a danger that SMEs, which undertake data-driven business models, will have fewer chances to conclude alternative contracts for the use of the sensor and usage data with the owners or users of the data recording machines.

How can an open market be designed?

DIGITAL SME therefore calls for the enabling of an open market for data-driven business models by securing the freedom of use of the owners and users (or renters) of data recording devices.

1. For this purpose, the appropriate legislative instrument is a ban on exclusive right of use to the accumulated data in the terms and conditions, within the framework of the provisions of the Civil Code.
2. Furthermore, there is the risk of undermining the freedom of contract for suppliers and users

of sensor and usage data due to the fact that, apart from the manufacturer, no other participant is able to technically access the data obtained.

3. Therefore, at the same time a legal obligation shall be established for the manufacturers of the data-producing machines to document the data interfaces. Simultaneously, the measures described above will protect the users as they ensure the user's power of use of the data.

A legislative intervention on the use of non-personal data should, anyhow, not undermine the general freedom of contract. In individual contractual negotiations, there should still be the freedom to agree on all conceivable – also on unilaterally exclusive – rights of use for data, for all contractual partners.