



European Materials Handling Federation

European Commission proposal for a “Regulation on harmonised rules on fair access to and use of data (Data Act)” (COM (2022) 68 final)

**FEM position paper
08/07/2022**

Executive Summary

- With data as an essential innovation driver for the materials handling industry, FEM welcomes the European Commission’s intention to foster the EU data economy. While supporting the objectives of the proposed Data Act, FEM believes that some of its provisions would create disproportionate obligations for companies in sharing data they are generating and that serves their own innovation and competition purposes. FEM therefore suggests a number of modifications.
- Business-to-Business (B2B) and Business-to-Consumer (B2C) relations have different features, which should be reflected in the legislation through a differentiation between B2B and B2C data transactions. Particularly, in a B2B data economy, freedom of contract is a long-established and essential principle. FEM opposes mandatory data sharing, as freedom of contract is a sufficient basis for an efficient flow of data. Moreover, products that are leased or rented should be excluded from the scope of the Data Act.
- Better definitions of ‘data’, ‘data holder’ and ‘data processing service’ are required.
- The legislation should include rights for manufacturers to access and use data from the products or related services they offer, without the need for users’ consent, in the limits given by the GDPR. Such data is an essential innovation driver, enabling our companies to improve products and services, and ultimately benefitting consumers.
- The safeguards proposed throughout the Data Act should be strengthened and extended to include non-patented know-how. Stakeholders should be free to agree by private contracts on the ownership and use of data of the inventions resulting from joint activities.
- Exchange of data from and to Europe, and from and to non-European countries should be clarified in the legislation. The respect of EU legislation on exchange of data from non-EU market players shall be ensured by EU authorities, to support competitiveness and a level playing field.
- The Data Act should avoid overlaps and be coherent with EU legislation, whether existing or under revision, addressing data. Notably, alignment of the Data Act should be ensured with the Free Flow of Data Regulation, the General Data Protection Regulation, the Machinery Product Regulation and the AI Act.
- More harmonisation efforts are needed in the context of penalties applications.
- A minimum 36-month transitional period is necessary, in line with the General Data Protection Regulation.
- The reasons for different treatment between small and micro enterprises, and large enterprises, should be clarified.



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Introduction

Materials handling, lifting and storage equipment enables the movement, storage, control and protection of materials, goods and products. Our industry delivers organisational and technical solutions for efficient and sustainable logistics, whether in production or distribution processes.

FEM welcomes the Commission's intent to foster the EU data economy. The EU transition to a data-driven economy will positively impact on the future growth and competitiveness of European industries, including the materials handling industry. Materials handling equipment in operation has already become smart. Sensors and other connecting devices make it possible to monitor equipment's activity and performance and also carry out some services remotely, such as maintenance and repair. Materials handling equipment consequently generates substantial quantities of industrial data. Data has now become an essential innovation driver. It has also changed our companies' business models, from manufacturers of equipment to providers of complex and tailor-made logistic solutions.

FEM supports the objectives of the proposed Data Act and welcomes the Commission's proposal on a horizontal approach to data. However, FEM believes that some of its provisions would disproportionately limit the potential for our companies to use data to drive their innovation and competitiveness. A data-driven economy cannot function efficiently without a legal framework that stimulates a competitive data market, allowing companies to create value from the data they generate through equipment and related services.

FEM therefore suggests a number of modifications on different parts of the proposal: scope; definitions; safeguards, IPRs and trade secrets; international flow of non-personal data; overlaps with existing legislation and transitional period.

1. Scope

Business-to-Business (B2B) and Business-to-Consumer (B2C) relations have different features, which should be reflected in the legislation through a differentiation between B2B and B2C data transactions. Industrial B2B data transactions are very sensitive from an economic and trade secrets point of view, and therefore should be regulated by ensuring a more equitable balance between data holder and data user, allowing for data usage on both sides under conditions of contractual freedom.

FEM believes that freedom of contract is necessary in a B2B data economy. Freedom of contract is the optimal principle for contractual arrangements to be tailored to the specificities of every market scenario. We therefore oppose the mandatory data sharing in a B2B context, as freedom of contract is a sufficient basis for an efficient flow of data.

Moreover, FEM believes that rights for manufacturers to access and use the data from the products or related services they offer (e.g., data giving the user insights on their performance, potential optimisation or benchmarks; such as predictive maintenance), without the need for users' consent, in the limits given by the GDPR, should be included in the legislation. Such data is an essential driver of our companies' innovation, enabling them to improve products and services, ultimately benefitting consumers.

Furthermore, products that are leased or rented should be excluded from the scope of the Data Act. Therefore, the legislation should only apply to products that the owner owns on a contractual basis. Data that manufacturers use to control and monitor the usage of the machine is crucial for the development of new business models (e.g. contractual conditions of use and pay-per-use). Sensitive information should be disclosed carefully and extending this to products that are leased or rented would not be sustainable.



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2. Definitions

The definition of **'data'** provided by the Commission in Article 2(1) is too general. The definition should clearly state that this regulation applies only to **raw, unprocessed data on a higher level (e.g. user commands)**, taking into account the state-of-the-art, the nature, scope, complexity and cost of the access process; and notwithstanding the necessary safeguards that should also apply to the sharing of raw data. This is essential for companies both to be able to safeguard their competitive assets and to endure compliance with competition law.

Moreover, in the definition of **'data holder'**, the term "ability" needs to be accompanied by clarification, specifying that the term refers to a technical ability, rather than a legal ability to make available data. Related responsibilities should be clarified, as they were with regards to personal data in the General Data Protection Regulation.

Finally, the definition of **'data processing service'** needs to be further clarified.

3. Obligation to share data with third parties

FEM is concerned about the obligation to share data with third parties (Article 5) applying both to B2B and B2C scenarios, as in B2B companies can already share data with third parties based on contracts.

The scope of the obligation to share data with third parties should be considered carefully, as there are significant financial, commercial and confidentiality implications in the imposition of data sharing with third parties, especially when such data are shared with companies outside the EU Single Market.

4. Safeguards, IPRs and trade secrets

In a progressive and competitive economy, trade secrets and IPRs are the cornerstone of companies' business models. Sharing data can pose a risk for companies, exponentially increasing their vulnerability and impacting on their ability to compete internationally. Requiring industries to continuously share data with multiple parties (including competitors) might disincentivise companies to participate in the data economy.

FEM thus thinks that the safeguards proposed throughout the Data Act are not sufficient. These should be strengthened and extended to include non-patented know-how. In this respect, FEM calls for an alignment with Directive (EU) 2016/943, on the protection of undisclosed know-how and business information against their unlawful acquisition, use and disclosure.

Stakeholders should be free to agree on the ownership and use of data of the inventions achieved in joint activities by private contracts.

5. Unfairness test

FEM believes that the application of the unfairness test (Article 13) needs to be restricted to B2C only, as it interferes with the principle of freedom of contract. The definitions of 'unfair contractual term' and 'presumed unfair contractual term' need to be clarified, to prevent causing a significant amount of legal uncertainty. Moreover, the use of terms "proportionate manner", "reasonable period", "unreasonably short notice" and "an attempt to negotiate it", leave room for interpretation which is particularly prejudicial to "the contracting party that supplied a contractual term" and which "bears the burden of proving that that term has not been unilaterally imposed".



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6. International flow of non-personal data

Exchange of data from and to Europe, and from and to non-European countries should be clarified in the legislation and be aligned with the 'general principles for transfer' laid out in Article 44 of the General Data Protection Regulation. It is particularly important for European industries to have security in terms of their ability to exchange non-personal data with third countries, as the data economy is by nature borderless.

The respect of EU legislation on exchange of data from non-EU market players shall be ensured by EU authorities, to support competitiveness and a level playing field.

7. Overlaps with existing legislation

The Data Act should avoid overlaps and be aligned with EU legislation, whether existing or under revision, addressing data. Notably, alignment of the Data Act should be ensured with the Free Flow of Data Regulation, the General Data Protection Regulation, the Machinery Product Regulation and the AI Act, providing a clearer link between AI based solutions and the use of data.

8. Penalties

The proposal assigns the enforcement and applicable penalties of the Data Act to one or more authority per Member State. This increases the possibility for fragmented application of the Regulation across countries. To deliver its full potential, the EU Single Market for data needs further harmonisation efforts.

9. Transitional period

The transitional period before the start of application of this regulation should be at least 36 months after the date of its entry into force. The new requirements for the design of connected products need a sufficient compliance period, and many businesses will have to reconsider their entire data strategy under the new rules. This will require analysis, important decisions on their business models, and then adaptation of their manufacturing processes, all which necessitates much more than the proposed 12 months.

Moreover, FEM believes it would be unjustified to request a technical change to existing connected devices already in use to enable data access. Technical changes need contractual changes which are difficult and costly and create extra administrative burdens.

10. Other provisions

FEM believes there is a need for clarification on the reasons for different treatment between small and micro enterprises, and large enterprises, notably in the context of obligation exemptions provided in Article 7, 9, 13 and 14.

The respect of the contractual relationship, whether B2B or B2C, and the rights and obligations attached to the data should not depend on the size of the enterprise that produced the product or service generating the data. The size of a companies is not always proportionate to its dominating position in a business relationship.



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About FEM

FEM has represented European manufacturers of materials handling, lifting and storage equipment since it was founded in 1953. One of the largest mechanical engineering sectors, the European materials handling industry employs nearly 300,000 people and generates more than €60bn annual turnover.

More information: www.fem-eur.com