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Swedsoft comments

Comments regarding the European Commisson's proposal for a regulation on harmonised rules on fair access to and use of data (The Data Act)

Swedsoft gathers Swedish software in an independent non-profit organization that works to increase the competitiveness of Swedish software development and software. Our members are companies, academia, and the public sector in Sweden. Together, we strive to ensure that Sweden is world leading in the development of software, software-intensive products, systems, and services.

Swedsoft has taken part of the proposal for a regulation on harmonised rules on fair access to and use of data (The Data Act) and welcomes the initiative to provide a coordinated EU-wide approach to data-sharing, interoperability and portability as opposed to regulation at Member State level that risks fragmenting the internal market further. Swedsoft supports the comments from the Confederation of Swedish Enterprise (dated June 2nd, 2022) and in addition to this specifically wishes to highlight the following points:

- The proposal is aimed at "*ensuring fairness in the allocation of value from data among actors in the data economy"* (p. 2). The value of data is derived not from its volume but from its structure (turning data into information) and from the ability to identify relevant classes of patterns that can support knowledge creation and decision-making (which in turn contributes to generating new data).[1] Consequently, different actors may generate very different value from the same set of data and while the marginal cost of collecting and storing increasing volumes of data is low, the cost of structuring it grows exponentially. Thus, the ambition of distributing the value-creation from data more evenly is potentially in conflict with the protection of business secrets needed to promote investments in data-driven development and innovation. The proposal requires clearer wording on the protection of business secrets pertaining to data-driven services, development and innovation as well as demarcation between user data and structured or processed data that is part of a firm's intellectual property. The proposed Data Act should focus on identifying and regulating harmful practices, rather than attempting to steer or shape the outcome in the market.

[1] See for example:
Wernberg, J. (2021). Innovation, competition and digital platform paradoxes. Policy papers on technology, Economics and Structural change 2021.01. Swedish Entrepreneurship Forum.
Wired (2013). "Beware the Big Errors of 'Big Data'" (accessed 2022-05-24): https://www.wired.com/2013/02/big-data-means-big-errors-people
Farnam Street (2013). "The Big Errors of Big Data" (accessed 2022-05-24): https://fs.blog/2013/02/the-big-errors-of-big-data/

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- In the proposal, data is treated as a potentially universal and/or neutral resource that can easily be separated from the structuring and processing that constitutes business secrets, but this is far from always the case. Data collection entails the design of measurements and structure of the data being collected that is intimately linked to business secrets. Consider for example the data needed to run Google's initial version of the PageRank algorithm. Unlike other search engines, Google relied on data concerning the incoming and outgoing links to and from websites because these quantities were essential to the algorithm at the core of their search engine. There is no standard "natural" or fully unrefined state of data – personal or non-personal – that can be considered a neutral resource which is easily separated from the investment that goes into structuring data into information and knowledge that constitute business secrets. The proposal lacks clear definitions of and demarcations between these different types or states of data, meaning there is a considerable risk of legal uncertainty and adverse effects. Such definitions and demarcations are necessary if data sharing is to be regulated at the market level rather than between contractual parties within that market. This is also a reason for reconsidering and possibly limiting the scope of the proposed regulation to areas where there is a proven market failure.

- The proposal builds on the assumption that *"Data generation is the result of at least two actors, the designer or manufacturer of a product and the user of that product"* (p. 18). This approach completely leaves out the growing trend in synthetic data generation, which is arguably a form of innovation or development that is directed specifically at driving further data-driven innovation and development.[2] Not only does this mean that the proposed regulation fails to capture the current scope of the European data economy, but also that it fails to take into account developments that may substantially shift the way data is generated and utilized within the economy. This point further emphasizes the need to limit the scope of the proposed regulation and to introduce clear definitions and demarcation for type of data is included within that scope.

- Increased regulatory burden (compliance costs) and regulation that is hard to interpret is likely to have negative economic impact predominantly on micro, small and medium-sized enterprises that lack the necessary resources, whereas larger actors manage to turn compliance costs into a regulatory moat for future competition. Recent evidence from a study on the effects of the GDPR suggest that although the intention of such regulation is often to support small and medium-sized enterprises, adverse effects tend to hit these firms the hardest, regardless of

[2] Campbell, M. (2019). Synthetic Data: How AI Is Transitioning From Data Consumer to Data Producer... and Why That's Important. *Computer*, *52*(10), 89-91.

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whether or not they are the main target of the regulation.[3]

- Large digital platforms (designated gatekeepers in the Digital Markets Act, DMA) are exempt from being an eligible third party under the proposed users' right to share data with a third party (Article 5). In other words, users are free to request data from data holders and share it with third parties, as long as they do not share it with the largest digital platforms, for no other reason than because they are designated gatekeepers (because they are large). In practice, this limits both the intention of giving users more control of their data and the potential for them to derive consumer value by sharing said data with other service providers. Any such regulation should apply equally to all actors in the market. A large number of SMEs rely on digital platforms to leverage digital tools at a scale that would otherwise be unattainable to them – this is part of their digitalization. [4] This became even more evident during the pandemic when SMEs reported relying heavily on digital platforms for their recovery.[5]

- The risk for adverse effects aimed at digital platforms and service providers is added to by the regulation of international access and transfer (Article 27.1), which attempts to restrict international transfer and governmental access in combination. This is ill-advised since the latter should reasonably fall out of scope of the proposed regulation (and be regulated elsewhere), while the former is increasingly essential to providers of platform services, cloud services and software as a service (SaaS) that aim to cater to international markets. With this type o phrasing European firms, especially SMEs, may be reluctant to use international data-driven services. Instead, what is needed is harmonized regulation and trade agreements to make the international transfer of data easier, not harder.

- Micro- and small enterprises are exempt from several parts of the proposed regulation. While this may ease the regulatory burden on smaller firms, there is also a risk of adverse effects. Users may be reluctant to engage with smaller service providers if they perceive that their data might be locked-in in a way it would not with a larger service provider. While smaller providers can choose to abide by a code of conduct similar to the regulation, they are still exempt from the institutionalised trust that the regulation is intended to establish in the market. This would be unfortunate because much of the potential value with data sharing undoubtedly lies in enabling smaller actors to share data with each other or

[3] Chen, C., Frey, C. B., & Presidente, G. (2022). *Privacy Regulation and Firm Performance: Estimating the GDPR Effect Globally* (No. 2022-1). The Oxford Martin Working Paper Series on Technological and Economic Change.
[4] OECD (2021). The Digital Transaformation of SMEs. OECD Studies on SMEs and Entrepreneurship.
Wernberg, J. (2021). David vs. Goliath or Standing on the Shoulders of Giants? - A comment on The Digital Markets Act (DMA) with respect to SMEs and startups. Swedish Entrepreneurship Forum:
https://entreprenorskapsforum.se/wp-content/uploads/2021/11/Kronika_Wernberg_David-vs-Goliath.pdf
[5] Wernberg, J. (2021) Små och medelstora företags digitala omställning efter pandemin. Entreprenörskapsforum, Stockholm.

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networks of small actors. Given that firms in digital services can scale quickly, there is an even stronger need for an equal playing field with the same rules for everyone. Efforts should therefore be directed towards making sure that the regulatory burden generated by the proposed Data Act is kept to a minimum so that exemptions for smaller firms can also be minimal.

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