Initial assessment of the proposal for a Regulation on harmonised rules on fair access to and use of data (Data Act)

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Introduction

VDMA represents more than 3,400 German and European companies of the mechanical engineering industry. The industry stands for innovation, export orientation and medium-sized businesses. The companies employ around four million people in Europe, more than one million of them in Germany. Mechanical and plant engineering represents a European turnover volume of around 800 billion euros. With a net value added of around 270 billion euros, it contributes the highest share of the entire manufacturing sector to the European gross domestic product.

Our member companies are solution providers for digital manufacturing and are core enablers for Industry 4.0. Consequently, the exchange and usage of industrial data is of high importance for the innovation capacity and global competitiveness of our members. Our B2B sector is also characterised as a heterogenous and SME-dominated sector, supplying a wide range of customers with various business models.

To match the requirements of industrial B2B data exchange and use, in VDMA’s view, the Data Act, as proposed by the Commission, still needs substantial improvements. We have listed below the necessary key improvements, based on our initial assessment. We encourage the EU institutions to consider these improvements during the legislative process.

Key improvements that are needed in the Data Act, based on our initial assessment

- **The importance of freedom of contract and entrepreneurial freedom**

  The obligation to make data available and a fairness test imposed on contractual agreements are fundamental changes of the rules in the data economy. The Data Act, as proposed by the Commission, interferes substantially with the freedom of contract and entrepreneurial freedom.

  VDMA has in its sector not identified general structural imbalances or gaps, which could hamper the exchange of industrial data between a manufacturer and its customer. Data requirements in our industrial B2B-sector can in general best be addressed by tailor-made contractual arrangements between the parties involved (machine and component manufacturers, and customers). The “one size fits all”, a very broad horizontal approach of the Data Act, will inherently lead to mostly unnecessary regulation in our sector. Companies in our sector should be able to decide and to negotiate themselves to what extent and under which conditions they will share their data with third parties. There are many good examples in our B2B sector of data-driven businesses, which have been established by entrepreneurial initiative and which are based upon the freedom of contract. We fear that data relationships between industrial partners, which already work well in practice, will be jeopardized and that the Data Act will lead to legal uncertainties and irritations. Moreover, the fairness test will lead to legal uncertainty.

  The Data Act should thus refrain from interfering with – mostly well working – business relations in complex industrial data value chains and leave sufficient room for tailor-made solutions. If there are any imbalances or gaps, they should be addressed by EU competition law or sector specific legislation. Another possibility would be to apply the Data Act only to those other sectors where there is a clear market failure.

- **Improving legal certainty and clarifying the notion of “data”**

  The Data Act defines data in a rather generic way (“data means any digital representation”). However, data generated in machinery is not homogenous. Data coming from industrial machines can vary in terms of elaboration (raw data vs. analysed or elaborated data), exposure of trade secrets and know-how and the commercial and technical feasibility of making them available. Therefore, the Data Act must provide for a
differentiated treatment of machine data, taking into account the type of data as well as the feasibility and side-effects of making them available.

- **Reducing negative consequences for medium-sized companies**

In mechanical engineering, the “data holder” is often a smaller entity without any dominant position. Therefore, for smaller manufacturing companies the Data Act is not only an opportunity, but also a risk. Investments in data-driven services, interoperability and business models might be undermined and the competitive position might be weakened (in particular, when know-how is exposed to competitors in world markets).

The unrestricted technical and legal obligation to make data available will be a substantial burden for smaller enterprises - and in particular for those who produce in small quantities and who cannot benefit from economies of scale. It is positive that micro and small enterprises will be exempted from the obligations of Chapter II of the proposed Data Act, but this exemption must at least also apply to medium-sized enterprises.

Furthermore, we believe an (limited) exclusivity right regarding data might strike a balance between the interests of the parties involved, as this would not reduce the incentive for further investments on the one hand but would also not limit the access to data per se. Such exclusivity could be limited with respect to B2B constellations or certain industry sectors.

- **No additional bureaucracy and product design constraints**

The Data Act introduces new requirements concerning the functionalities of products (“access by design”), which is a limitation of entrepreneurial freedom and which will be an additional burden, in particular for SMEs. We believe that additional bureaucratic requirements, such as extensive information obligations of the manufacturer of products and interoperability obligations of the manufacturer of products, should be avoided. Furthermore, our industry often provides tailor-made, customised or even personalised products. Any additional burdens or costs, therefore, cannot be scaled, leading to competitive disadvantages.

- **The protection of intellectual property rights and trade secrets**

The intellectual property rights and trade secrets of our companies are not properly safeguarded by the proposed Data Act. We are of the opinion that these rights must be better protected against unauthorised access.

- **The standardization process must remain industry-driven**

In the context of Industry 4.0, a series of interoperability standards have been developed or are under development. For example, VDMA and its member companies are driving forward the development of the world language of production based on OPC UA technology. The standardization process must remain industry-driven, bottom-up and pragmatic. The Data Act should not interfere with these developments and should not try to invent the wheel again. It should build upon these developments and use existing, proven and industry-driven interoperability standards.

- **Taking the complexity of industrial B2B-value chains into account**

Industrial value chains do not correspond to the model “data holder” and “user”, as described in the Data Act. In Industry 4.0, machine manufactures, software and component providers as well as customers work together, exchange data and share the benefits. The Data Act leaves many questions open on how the approach should work in this industrial context.
• The role of the Commission

The role of the Commission should be limited to adopting measures, which would encourage data sharing in our sector and which would lead to a data eco-system, where for example voluntary model contract terms that are recommended by the Commission play an important role.

EU competition law can in principle also be used to strengthen the sharing of data in the B2B sector. Competition law in our view can address demonstrable market failures, if any at all.

• Key recommendations based on our initial assessment

The Data Act should refrain from a general and undifferentiated obligation to make B2B-machine data available. Data sharing in a B2B-context in general should remain voluntary and should be based upon contractual freedom and market incentives.

One must differentiate which data should be made available. It is technically, economically or legally not feasible for all data to be shared.

The Data Act must not come at the expenses of SMEs as data holders or manufacturers. An obligation to share data might endanger Research and Development investments and weaken the position of smaller technology providers towards bigger customers. Moreover, an EU fairness test will lead to legal uncertainty.

The provisions for the protection of trade secrets and know-how are insufficient, which might negatively affect the competitive position of smaller companies.

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