

## Allied for Startups on the Data Act

### Executive Summary

The European Commission proposal on harmonised rules on fair access to and use of data, published on 23th of February 2022, known as the [Data Act](#), will lay down rules and obligations for the treatment of non-personal data in the EU and beyond.

The Data Act is built on ambitions that Allied for Startups shares and has the potential to bring a key resource, data, to more startups. However, data sharing obligations should be in line with the technical and financial realities of startups. Moreover, attempts to curb international non-personal data transfers would be very detrimental to startup ecosystems. Lastly, horizontal data portability & interoperability provisions should be designed to bolster startups' innovation potential.

Allied for Startups hopes that key improvements can be made and encourages legislators to use the following litmus test for the Data Act: Will this Data Act make more entrepreneurs want to launch and build their data-intensive startups in the EU or not?

### Principles

Startup entrepreneurs think global from day one. This is not just because in some cases their domestic market is not big enough. It is a fundamental characteristic of startups to want to reach the world, one user at a time. The outlook and ambition of startup founders are what policy makers should leverage when they seek to address global challenges such as climate change and poverty.

Startups are founded in interconnected ecosystems that provide entrepreneurs with products and services which, in turn, enable them to focus on building highly innovative new products and services. Startups attract talent everywhere. Even a small startup might have a marketer in Brazil and a developer in India. The fact that startups are able to choose the best services around the world, regardless of whether their provider is big or small or where they are based, has proven to create value for startups, for the markets in which they operate, and ultimately for consumers in the markets.

Startups are born from a concrete problem that entrepreneurs seek to address by means of technological innovation. Startups do not have large existing consumer bases or locked-in clients. They have less means than established players and are seeking to disrupt incumbent businesses, both digital and analog. They can only succeed in doing so by making a better

offer than what is currently on a market. In other words, startups have to be the most customer-obsessed entities ever.

Data plays a crucial role in digital societies and economies, including for startups. Data allows startups to comprehend the past, to make better decisions in the present and to predict events in the future. Startup founders are therefore always looking for access to more high-quality data, while at the same time acknowledging the investments needed to build and clean such datasets.

Startups support the creation of global, harmonised markets. They have less resources to deal with legal complexity and fragmentation. The creation of a common set of rules is, in principle, easier to navigate for startups and would free up resources to focus on innovation.

### **Data Sharing**

Having more access to data is, in principle, never harmful for startups. Policies that encourage the creation, maintenance and sharing of datasets are certainly welcomed as they can be key ingredients for innovation. Startup-friendly data policies should, however, balance the incentives and costs involved in the value-chain of dataset creation and maintenance.

Opening up datasets through mandatory sharing could send adverse signals to those who are looking to or have invested limited resources in developing datasets. There is room for improvement when it comes to sharing best-practices, creating better incentives for data access & re-sharing, storytelling and SME digitisation.

Specifically, to ensure the data sharing chapters in the Data Act empower startups, the following amendments should be made:

- **“Clarifying key concepts and avoiding overcomplication”** to avoid legal uncertainty and unnecessary lawyering up of startups.
  - (Articles 2 & 4) The vast majority of datasets are mixed, containing personal and non-personal data. Policymakers should take into account the complexity of designating what is personal or non-personal. If there is a political move to increase data sharing, there should be clarity regarding what datasets this would include. There should not be contradictions (or opposing incentives for entrepreneurs) to share or not share.

- (Article 13) At EU and Member States level several legal frameworks already exist to address unfair practices. Current analysis does not sufficiently explain how to avoid overlap and overcomplication between the EU and the national level on key provisions.
  - (Articles 5 & 6) It is unclear what has justified the addition of the Gatekeeper definition in this file and what the added value of this clause is. As consumers, competitors and complimentary services of Gatekeepers (and potential gatekeepers themselves), a thorough impact assessment on using these thresholds across digital files is needed.
- **“Reconsider B2G data sharing scope & reach”** to avoid setting an open-ended precedent leading to legal uncertainty. The scope of “exceptional circumstances” in B2G data sharing should be narrowed down as much as possible, for instance to established definitions of ‘force majeure’. It should be considered that in an interconnected global society and economy facing global challenges like climate change, war and migration, it is likely that there will constantly be exceptional circumstances. However, rules are not exceptional if they become permanent. Secondly, the scope should clarify which public entities are to be recipients in B2G data sharing arrangements. Semi-public actors who might be incumbent competitors that startups are trying to disrupt should not gain an advantage through data-sharing obligations in the Data Act. It should be avoided that government entities or statistical and survey organizations would be allowed to request access to data with relatively light justifications, with no safeguards or redress for trade secrets and intellectual property rights. B2G provisions need to be more balanced and take into account the potential risks of data sharing for all the players involved.
  - **“Incentivise Data sharing by design”** (Articles 3 & 4) should focus on enabling the entrepreneur to share or provide access to non-personal data generated by the use of its product. This should be done via incentives and not mandatory provisions. The latter would, especially for small startups, pose big design challenges and distract an early-stage entrepreneur from understanding if their business model is even feasible.
  - **“Design clear protections for trade secrets”** (Article 4, 5, 8, 17 & 19) with clear specifications on how trade secrets are protected in case of data sharing. A data holder is not able to retain control over how data will be used by a potential competitor once shared. The Data Act needs to specify how the rights and commercial interests of data holders are safeguarded in the case when a data recipient (government or business) misuses non-personal data containing trade

secrets. A clearer definition of what a competing service is would also strengthen this section.

Moreover, as access to data and sharing provisions have been included in recent legislation such as the Digital Services Act, the Digital Markets Act and the Platform to Business (P2B) Regulation, it would be advisable to conduct a thorough evaluation of these instruments before adding more rules on top. This would be simpler and help avoid duplication.

### **Data Flows**

International flows of non-personal data underpin startup ecosystems worldwide. Most startups share data between EU and non-EU jurisdictions to perform internal business or administrative functions, research and development/innovation functions, medical research, sales or marketing.

Fundamentally, moving from the current status quo to a system in which international non-personal data transfers are hampered would be challenging for small players. Startups should not be burdened with having to figure out what measures to take or what legal analysis to make to determine whether or not they conduct international data flows. Because it would be difficult for startups to comply with such complex requirements, they would look for costly approaches, such as hiring new legal expertise and building infrastructures to run duplicated processes in different jurisdictions.

Other perceived solutions might be investing in data centers in the EU, reducing cross-border data flows in the company and reassessing suppliers based on place of domestication. While the prospect of investing in EU data centers may appear attractive in the short run, there are serious long-term considerations that outweigh these. Effectively, this provision rolls back the integration of the global data economy that has provided growth and value to businesses and consumers in the EU. EU data centers should be attractive to startups because of the strengths of their services and not because laws force businesses to use them.

Restrictions on international non-personal data flow also risk:

- Hampering the innovation and uptake of key technologies like AI, which rely on large globally sourced datasets;
- Throttling startup growth (more costly alternatives) and uptake of greener solutions, as they would have to prioritise location of data storage over other criteria;

- Undermining the spirit and ambition of the data sharing chapters in the Data Act, especially since startups operate in global ecosystems;
- Retaliation by other regions, which would lead to more fragmentation.

Instead of putting the legal onus on startups to undertake complex legal assessments, policy makers should create a framework that encourages taking benefit of the global data economy. Following the example set by the Free Flow of non Personal Data Regulation<sup>1</sup>, the EU can be a pioneer for a globally interconnected digital economy.

The Data Act should support the free flow of non-personal data in principle (Article 27.1), unless there are justified national security concerns that the Commission identifies. This would allow policy makers to follow-through on their goal of avoiding the exploitation of non-personal data by foreign governments while not putting constraints on startups. Free flow of data comes naturally to startups that have a global mindset and orientation.

### **Data Portability & Interoperability**

Developing new cross-sectoral innovative products and services, startups support portability and interoperability principles. To promote the rollout of new technologies, these principles can encourage takeup and mass-adoption of new products and services.

Portability empowers consumers to switch easily from one service to another. Interoperability ensures that portability is practically feasible. Startups support more portable non-personal data sets and generally welcome more interoperability between different services and platforms. Startups and their representative organisations are willing and needed to contribute to the standardization process.

When discussing portability and interoperability in a horizontal context, a principle of caution should be applied. In a specific vertical, for instance, the Electronic Health Data Space (EHDS), the key actors and needs can more easily be identified, as can the types of data that should be portable/interoperable. Horizontally, however, this is far harder to do. Especially when considering that startups are trying new things in new ways, it is hard to prescribe interoperability across the board. One business's opportunity can easily become one sector's technical limit, which is why doing no harm should be the first priority.

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<sup>1</sup> [Regulation \(EU\) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union](#)

Interoperability and portability imply varied technical considerations that need to be reconciled, especially for smaller players. In its current form, the process of increasing switching capacity as designed in the Data Act risks unintended negative effects. Specifically, there should be a specific understanding of what 'functional equivalence' means in practice. Such provisions and requirements should be as clear as possible to avoid ambiguity.

Startups come up with groundbreaking and innovative technologies and strongly support interoperability and portability provisions. However, policymakers should consider that in certain circumstances interoperability across different services may turn out to be technically impossible or highly unfeasible. What if, for instance, a customer decides to switch services because they are looking for new functionalities? Interoperability requirements should be selected bearing in mind that the market of new technologies is highly diversified and that going for a certain approach instead of another can completely change the rules of the game, or lock-in certain standards that might become inefficient over time.

### **Conclusion**

The Data Act is built on the idea that the more misallocated or underutilised non-personal data is being shared, the more virtuous cycles in the data economy can be triggered. Allied for Startups fully supports this ambition. Data is a vital asset, especially in startup ecosystems. Startups can make the most out of simplified data accesses and seamless data flows. But policymakers should ask themselves if the Data Act is on track to delivering this.

Since the Data Act will horizontally impact all non-personal data holders with numerous provisions and obligations, it is important that a more cautious approach is taken. Effectively, compulsory data sharings, mandatory rules on interoperability and restrictions on international non-personal data flows will work contrary to the intended target.

Having more startups and scaleups in the EU than ever before shows that much is already working. The Data Act should be more about fine-tuning the data-sharing environment than a wholesale reconfiguration of the EU's digital economy. The Data Act should adjust specific shortcomings in the rulebook with a targeted approach. It should not create legal uncertainty with unclear definitions, broad mandatory obligations or unnecessary restrictions.

The litmus test of the Data Act should be: Will this Data Act make more entrepreneurs want to launch and build their data-intensive startups in the EU or not?