

Position Paper

# A Responsible and Innovation-Friendly Approach to Building a European Data Economy



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Approach to Building a European Data Economy**

German Electrical and Electronic  
Manufacturers' Association  
European Office  
Rue Marie de Bourgogne 58  
1000 Brussels, Belgium

Contact:  
Dr Oliver Blank  
Phone: +32 2 8924-621  
Fax: +32 2 8924-629  
E-mail: [blank@zvei.org](mailto:blank@zvei.org)  
[www.zvei.org](http://www.zvei.org)

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# 1. Overview

On 10 January 2017 the European Commission published its communication on building a European data economy (COM/2017/9 final). The initiative's purpose is to promote cross-border data flows, allow new data-driven business models to emerge and grow, and to discuss the important legal questions concerning the handling of non-personal data within the European Single Market. The initiative announces measures intended to enable the free flow of non-personal data by removing data localisation restrictions. It also examines important issues around data use, rights of data generators, data transfers, data access, portability, interoperability and liability. In the view of ZVEI, the German Electrical and Electronic Manufacturers' Association, the debate on how to build a flourishing European data economy is of fundamental importance. ZVEI encompasses both manufacturers and users of intelligent digital solutions in five leading markets: Industrie 4.0, Energy, Mobility, Buildings and Health. Our companies are driving digitalisation and the cross-border, global data economy it is creating. ZVEI represents a key sector for innovation and digital transformation, and also acts as an important catalyst for other sectors and industries. The strength of ZVEI companies results first and foremost from freedom and flexibility provided by an innovation-friendly legal framework. Any form of regulation – whether national, European or international – should do the utmost to provide such a framework for the benefit of growth, innovation and, ultimately, consumers. ZVEI therefore believes that it has a duty and responsibility to contribute to the EU-led debate in order to help shape the building of a values-based European digital union. ZVEI sees the European Commission's data economy initiative of high importance and thus wants to contribute in order to shape and create an innovation-friendly and value-based European Digital Union.

## 2. Free Flow of Data

The free exchange of non-personal data within the European Single Market is a major component of industrial value added. Any form of unjustified legal fragmentation that creates obstacles and barriers to data traffic within the EU is thus to be avoided. The European Commission is sending the right political signals to the Member States in this respect. Consequently, unjustified data localisation restrictions should therefore be removed in all Member States. At the same time, far-sightedness and caution on the part of legislators is essential. The priority should be to exhaust the existing legal framework, especially the Electronic Commerce Directive (2000/31/EC), the Services Directive (2003/123/EC) and the Directive laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (2015/1535). ZVEI is therefore advocating an in-depth examination and transparent clarification of data localisation restrictions in the Member States. For this reason, ZVEI welcomes the consultation process initiated by the European Commission, forming the basis for all further legislative steps in removing such restrictions.

### 3. Handling Data Responsibly in the Age of Industry 4.0

Handling data in a trustworthy, responsible way is crucial to the global competitiveness and future of European industry. Industry 4.0 involves integrated production and the exchange of immense quantities of data across value networks and industry boundaries. The digital transformation of our economy and society is therefore closely connected to regulatory and legislative arrangements for handling personal and non-personal data. Information and communication security, along with appropriate privacy protection, are top priorities here. From May 2018, handling of personal data will be subject to EU's General Data Protection Regulation agreed last year, and will therefore be legally harmonised across the EU. In contrast, handling of non-personal, industrial and machine-generated data has not yet been subject to any comprehensive, EU-wide legal harmonisation. Depending on their characteristics some forms of data-sets may already be protected under national, European or international legislation (copyright, patent law, database law, trade and business secrets, data protection law, criminal law, etc.), though possibly indirectly so. Companies sharing non-personal, industrial and machine-generated data also conclude data usage agreements governing access to and exchange of data. Such contractual solutions do not depend on the legal treatment of machine-generated data under property-like rights, and are flexible and better able to take into account specific circumstances and interests involved than a rigid legal regulation.

From ZVEI's perspective, industrial and machine-generated data have become a major component of our companies' value added. The use of digital technology and software is enabling the development of new business models and innovations. Data-analysis techniques to process machine-generated data enable companies to enhance their products and production processes and to provide customer-focused services. Given the priorities of the current European Commission and the goals of EU's strategy for digitalising industry, this innovative potential must be accompanied by support at the political level. Political initiatives of any form must therefore be approached with special caution and carefulness. Maximum flexibility, ensuring entrepreneurial businesses' autonomy to conclude contracts, should be the touchstone for European good data governance. For ZVEI's member companies, it is vital that legislation within the framework of a European data policy takes the following principles into account:

- Legal certainty and clarity are indispensable prerequisites for digitalisation.
- Locational advantages are of pivotal importance to companies. The Member States and the EU should therefore provide the best possible environment for contractual agreements on innovative Industry 4.0 business models and remove existing uncertainties (e.g. regarding general terms and conditions in German law).
- The dynamics of the digital transformation must be taken into account. This requires flexibility in rules on who can access what data and when.

- The existing legal framework is sufficient to build a European data economy. This includes contract law, consumer protection, competition law, protection of business secrets and intellectual property, as well as legislation to prevent unfair business practises.
- Prompt action should be taken where there is a tendency to misuse data monopolies. European antitrust and competition law as well as the application of the Unfair Commercial Practices Directive (2005/29/EC) form an appropriate legal basis for this purpose.

## 4. Data Access and Data Use

ZVEI is sceptical about Europe-wide data ownership legislation and is instead calling for a discussion on substantially more relevant issues concerning data access and data use.. Simply transferring existing legislation on physical property to the digital world is impractical given the difficulties in precisely defining the things to be protected, the near impossibility of physical checks to enforce such property rights, the essentially unlimited reproducibility of data (in contrast to scarcity of physical commodities and resources) and the imprecisions in ascribing value to data. The value of data is subject to many factors (the combination of data packages, the timeliness and reusability of data, etc.) that depend on the context in which data exist and are created. The arrangements for accessing and using data should be contractually agreed upon by the parties concerned. Industrial production already generates large amounts of raw data (e.g. machine data) for which there are many possible uses. Focussing on the broader social dimension is therefore an important contribution to the political debate on how technical data should be handled. In ZVEI's view, the debate on data access and data usage must therefore take the following aspects into account:

- Separate treatment of data under ownership law should be regarded with great scepticism. Legal classification of data beyond the current legal framework should take place cautiously if at all, or should at least not be rushed. It seems doubtful, where classifying data is concerned, that abstract legislative provisions will be able to satisfactorily reflect the countless different individual circumstances and provide a lasting solution.
- Access to and use of data should be primarily governed by contracts. Companies' corresponding experiences B2B commerce have been overwhelmingly positive. Should sector-specific data monopolies emerge in future, the European Commission would be in a position to take countermeasures using sector-specific regulation (after exhausting available remedies under competition law and carefully examining the regulatory impact); horizontal regulatory measures should be avoided in such cases.

- Difficulties may arise where there is insufficient contractual freedom, as is the case in Germany, for example, under the legislation on general terms and conditions (AGB). In these cases, contract law governing B2B transactions should be made more flexible, especially in view of the development of Industry 4.0 and the digitalisation of production.
- The European Commission should create positive incentives for more voluntary data exchange and data access, especially for SMEs. This could take the form of incentive-based regulation (research funding, tax relief, etc.), for example. Such measures would reduce transaction costs between companies and enable innovation. There should, however, be no legal obligation to disclose data.
- The way in which data access and exchange of data is organised and licensed should be left to companies. Application Programming Interfaces (APIs) are one among many other possibilities for data exchange. The EU could use research projects to promote and expand these and other technologies in a targeted way (e.g. through Horizon 2020 and the ninth research framework programme, FP9).
- Establishing rigid standard agreements should be avoided: contractual terms will become established in the form of best practises as companies compete for business using their terms and conditions; standard agreements cannot provide the necessary flexibility for B2B contracts.
- Data protection and safeguarding IP, expertise and business secrets should be priorities.
- Advancing integration of business processes is transforming linear value chains into more complex value networks, in which ever more parties will have a legitimate interest in accessing data from networked components. In this context, we support further important dialogue on modalities and rules of data access from various stakeholder perspectives.

#### ZVEI: Representing the High-tech Industry in Germany

The German Electrical and Electronic Manufacturers' Association (ZVEI – Zentralverband Elektrotechnik- und Elektronikindustrie e.V.) represents the common interests of the electronics industry and associated service companies in Germany and internationally. Some 1,600 companies, the majority of them medium-sized enterprises, have joined the ZVEI.

The sector employs more than 850,000 people in Germany and 704,000 in other countries. In 2016, its revenues grew to 179 billion euros.

The electronics industry is one of the most innovative parts of the German economy. Each year, the industry spends 16.2 billion euros on R&D, 6.2 billion euros on investments and 2 billion euros on training and development. One-third of the industry's turnover comes from product innovations. One in three innovations in the entire manufacturing sector originates in the electronics industry. A fifth of all private-sector R&D expenditure in Germany comes from the electronics industry.





German Electronic and Electrical  
Manufacturers' Association  
Lyoner Strasse 9  
60528 Frankfurt am Main, Germany  
Telephone: +49 69 6302-0  
Fax: +49 69 6302-317  
E-mail: [zvei@zvei.org](mailto:zvei@zvei.org)  
[www.zvei.org](http://www.zvei.org)