

Bld. Brand Whitlock 114 / B-1200 Brussels
E: hello@applia-europe.eu

Federica Lavoro

federica.lavoro@applia-europe.eu



Data Act's trade secrets protection woes risk crippling EU industry

Brussels, 8 March 2023 - As EU lawmakers and the bloc's governments get ready to close in on their final negotiations of the EU's proposed Data Act, uncertainty about the scope and practicality of application of this complex, radical, data-sharing law risks eroding the competitiveness of the industry in Europe.

The obligation to make data available shall be based on a clear definition of data generated by the use of the product. According to the proposal, manufacturers would have to design their products in a way that allows the user to access the generated data *easily*, by default. But what kind of data? With appliances generating an unprecedented amount of information as we perform daily tasks, their importance must not be underestimated. "A distinction is needed between the data generated by the user, like the washing programme, the selected temperature or the cycle weight and those who are instead the very internal processes of the machine to comply with the request from the user," explained Paolo Falcioni, APPLiA Director General. While consumers have the right to access data they generate, this should not be the case for the process behind it, as that entails a series of information that should not be disclosed to avoid hindering the competitiveness of the company producing it. From here, the need for a definition of what kind of data generated by the use of the product would be subject to data-sharing obligations, that excludes all processes that are strictly necessary to ensure the proper functioning of the product and related services.

The compromise text tabled by the Swedish presidency of the EU Council, marks a step in the right direction. The new version tries to clarify the regulation's scope of the proposal¹, by introducing a clause leaving out all data possibly disclosing industry know-how or infringing intellectual property rights of data holders. "A critical principle that should also be well reflected in the legal text, to be truly effective," commented Falcioni.

Safeguards shall be introduced to avoid the divulgation of trade secrets and intellectual property (IP) rights. The inner workings of a product are usually the result of substantial investment in research and development. Essential and confidential information resides in the very way home appliance manufacturers design products, playing a key part of the industry know-how, in the effort to deliver cutting-edge digital innovations to consumers. At present, there is still much uncertainty about how effectively trade secrets would be protected, raising concerns that sensitive commercial information might be exposed. The introduction of strengthened safeguards, in combination with a clear definition of the scope of the regulation, would thereby avoid a situation where increased access to data is used by competitors to retro-engineer applications. Similarly, data holders shall be entitled to refuse access to

¹ Recital 14a of the fifth iteration of the Swedish compromise text

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data identified as trade secret, or IP rights. An assessment that shall be made on a *case-by-case basis* and not exclusively under exceptional circumstances.

Trade secrets are protected by law, under the EU Trade Secret Directive and GDPR. In many cases, these are just as important as patents and trademarks. But what use is this protection if relevant information can no longer be kept secret because it *must* be shared with others?

The European Commission's Data Act would compel businesses to share data with users and third parties with an eye to ensure fairness in the allocation of value from data and overall foster access to and use of data. The draft Act sets out general rules on making data accessible across all economic sectors to create a Single Market for data. The Parliament is due to debate and vote at the plenary session on 14 March.

APPLiA - Home Appliance Europe represents home appliance manufacturers from across Europe. By promoting innovative, sustainable policies and solutions for EU homes, APPLiA has helped build the sector into an economic powerhouse, with an annual turnover of EUR 53 billion, investing over EUR 1.6 billion in R&D activities and creating nearly 1 million jobs.

