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Legal evaluation of decentralization based de-identification procedures for personal and non-personal data in the automotive sector

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The development of the European Strategy for Data[1] is taking on a more and more concrete form. Following the Proposal[2] and the adoption of a Data Governance Act[3], the European Commission presented a Data Act-Proposal on 23rd February 2022. In it, the Commission proposes a cross-sector regulation of access to and use of (largely) non-personal data. Instead of a data ownership-right[4], access rights for "users" are formulated. Moreover, the draft also regulates the relationships between the "data holder" and the "user", "third parties" and the "data processing services". The legislator intended the proposal to be guided by the overarching goal of exploiting the economic potential of data generated in products or related services in the Union.[5]

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[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European strategy for data, COM(2022) 66 final.

[2] Proposal for a Regulation of the European Parliament and of the Council on European data governance (Data Governance Act), COM(2020) 767 final.

[3] Regulation (EU) 2022/868 of the European Parliament and of the Council on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act) [2022] OJ L152/1.

[4] Cf. the according discussion in the legal literature: Lothar Determann, 'Gegen Eigentumsrechte an Daten' [2018] ZD 503; Karl-Heinz Fezer, 'Dateneigentum' [2017] MMR 3; Karl-Heinz Fezer, 'Dateneigentum der Bürger' [2017] ZD 99; Artur-Axel Wandtke, 'Ökonomischer Wert von persönlichen Daten' [2017] MMR 6; Louisa Specht-Riemenschneider, 'Ausschließlichkeitsrechte an Daten – Notwendigkeit, Schutzumfang, Alternativen' [2016] CR 288.

[5] Explanatory memorandum, p. 1.

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A. Proposal for a Data Act

I. Legal policy background

The proposal for a Data Act is part of a whole range of legislative activities[6] that have their common starting point in the European Strategy for Data. In 2020, the Commission announced various legal acts in addition to the promotion of investments in the European data economy and the creation of common European data spaces.[7]

First of all, the already existing legal framework consists of the following regulations: In addition to the ePrivacy Directive[8] (and the efforts towards an ePrivacy Regulation[9]), the Free Flow of Data Regulation[10] are to be mentioned as cross-sectoral legal acts. To continue, data protection law, trade secrets law, IP law and antitrust law have to be considered in this regard. Furthermore, data security law and security of information systems have to be taken into account as well. For the automotive sector in particular, the Type Approval Regulation provides for a sector-specific regulation, containing special regulations for access to repair and maintenance data. The legislator has just recently launched an initiative to revise this Regulation.[11] A concrete proposal for a new version is expected around the middle of 2023.[12]

Second, the European legislator also introduced new legal acts. These included, on the one hand, the proposal for a Data Governance Act in 2020, which has since come into force and provides a framework to enhance trust in voluntary data sharing for the benefit of businesses and citizens. The Data Act Proposal, on the other hand, is intended in particular to lay down rules on access to data generated in the operation of connected products and related services.[13] In addition, the proposal contains requirements for the terms of contracts that must be concluded

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[6] For an analysis of the before 2020-period cf. Wolfgang Kerber, 'Governance of IoT Data: Why the EU Data Act Will Not Fulfill its Objectives' [2022] GRUR International 1 (2) <https://doi.org/10.1093/grurint/ikac107> accessed 30 December 2022.

[7] European Commission, 'A European Strategy for Data', COM (2020) 68 final.

[8] Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L201/37.

[9] Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), COM(2017) 10 final.

[10] Regulation (EU) 2018/1807 of the European Parliament and of the Council on a framework for the free flow of non-personal data in the European Union [2018] OJ L303/59.

[11] Cf. 'Access to vehicle data, functions and resources' <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13180-Access-to-vehicle-data-functions-and-resources_en> accessed 25 November 2022.

[12] For more details cf. below B.

[13] Angelica Fernandez, 'The Data Act: The Next Step in Moving toward a European Data Space' [2022] EDPL 108.

when a data owner passes on data to third parties to fulfill data access claims.[14] Finally, the Proposal includes safeguards for non-personal data in the international environment and interoperability requirements. With the Data Act Proposal, the European legislator – following an intensive debate in the legal literature[15] – deliberately decided against an exclusive right to data and in favor of contractual access rights.[16] With this decision, it attempted to strike a sensible balance between the incentive effect inherent in exclusive rights to create intellectual property on the one hand and the possibility of using data and promoting innovation through access on the other.[17] In this respect, the legislator assumes that up to 80% of the collected data remain unused, leaving their economic potential unexploited.[18] At the same time, however, there is a growing need for high-quality data that can be used, for example, to combat societal challenges like pandemics or climate change. Moreover, the use cases developed by the project partner also show that data access and use is highly relevant for the automotive sector and that there is a wide range of possible applications. The Data Act Proposal picks up on this observation and tries to create uniform cross-sectoral regulation.[19] It is currently assumed that the regulations contained therein will have to be implemented by the companies after the adoption of the regulation and a transition period of 12 months, presumably from 2025 or 2026.[20]

II. Regulatory concept of the Data-Act-Proposal

As has already been pointed out[21], the Proposal is to be understood as part of a European Data Economy Law. Therefore, the relationship of the proposed regulation to the already existing legal framework is of particular importance. Accordingly, this chapter places the proposal in

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[14] On the role of contracts in the DA-P cf. Axel Metzger and Heike Schweitzer, ‘Shaping Markets: A Critical Evaluation of the Draft Data Act‘ [2023] ZEuP 1 (17).

[15] Josef Drexel, ‘Designing competitive markets for industrial Data – Between Propertisation and Access‘ [2017] JIPITEC 4; Herbert Zech, ‘Industrie 4.0 – Rechtsrahmen für eine Datenwirtschaft im digitalen Binnenmarkt’ [2015] GRUR 1151; Karl-Heinz Fezer, ‘Dateneigentum - Theorie des immaterialgüterrechtlichen Eigentums an verhaltensgenerierten Personendaten der Nutzer als Datenproduzenten‘ [2017] MMR 3; Thomas Hoeren, ‘Dateneigentum - Versuch einer Anwendung von § 303a StGB im Zivilrecht‘ [2013] MMR 486.

[16] Commission staff working document on the free flow of data and emerging issues of the European data economy Accompanying the document Communication Building a European data economy SWD(2017) 2 final, p. 34.

[17] Axel Metzger and Heike Schweitzer, ‘Shaping Markets: A Critical Evaluation of the Draft Data Act‘ [2023] ZEuP 1 (2).

[18] European Commission, ‘Data Act: Commission proposes measures for a fair and innovative data economy‘, Press release IP/22/1113, 23 Feburary 2022.

[19] Recital 4 DA-P; Axel Metzger and Heike Schweitzer, ‘Shaping Markets: A Critical Evaluation of the Draft Data Act‘ [2023] ZEuP 1 (3).

[20] Thanos Rammos and Timo Wilken, ‘Der Data Act – Chancen und Risiken für Unternehmen durch das geplante europäische Datengesetz‘ [2022] DB 1241.

[21] Inge Graef and Raphael Gellert, 'The European Commission's Proposed Data Governance Act: Some Initial Reflections on the Increasingly Complex EU Regulatory Puzzle of Stimulating Data Sharing' <https://papers.ssrn.com/abstract=381 4721 > accessed 30 December 2022.

the broader context of the European Data economy law. Afterward, the structure of the Proposal will be briefly summarized.

1. Relationship to other legislation

a. General Data Protection Regulation

Of particular importance is first the relationship to GDPR. According to Art. 1 (3) DA-P, the Regulation shall not affect the applicability of Union law on the protection of personal data, in particular Regulation (EU) 2016/679.[22] Instead, the DA-P is intended to complement the GDPR with respect to such data generated by the user during the use of a product or related service.[23] Neither the GDPR nor the DA-P is therefore to be regarded as lex specialis and thus as primarily applicable. Nevertheless, due to the sanctions provided for in both the GDPR and the DA-P for breaches of the Regulations, the distinction between personal and non-personal data becomes even more important.[24] The extent to which there is actually potential for conflict here is discussed in more detail under III.2.

b. Relation to other legislation

Looking beyond the GDPR, there are also overlaps with other legislative acts. For example, the DA-P is intended to be complementary to the Directive 2002/58/EC as well as the forthcoming e-Privacy Regulation which is meant to replace it.[25] In addition, the recently adopted Digital Markets Act and the Data Governance Act are to be complemented by the DA-P without creating contradictory regulations in the respective legal acts.[26]

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[22] Similar Explanatory Memorandum, p. 3.

[23] Moritz Hennemann and Björn Steinrötter, 'Data Act – Fundament des neuen EU-Datenwirtschaftsrechts?' [2022] NJW 1481 para. 9; Louisa Specht-Riemenschneider, 'Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G' [2022] MMR 809 (811).

[24] Louisa Specht-Riemenschneider, 'Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G' [2022] MMR 809 (811).

[25] Angelica Fernandez, 'The Data Act: The Next Step in Moving toward a European Data Space' [2022] EDPL 108 (112).

[26] Explanatory Memorandum, p. 4 et seq; cf. for a critique Matthias Leistner and Lucie Antoine, "IPR and the use of open data and data sharing initiatives by public and private actors", Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Legal Affairs, 2022, p. 11 et seq.; Rupprecht Podzun and Clemens Pfeifer, 'Datenzugang nach dem EU Data Act: Der Entwurf der Europäischen Kommission' [2022] GRUR 953 (954).

In addition, the DA-P also contains provisions relating to data that qualify as trade secrets within the meaning of the Trade Secrets Directive. In this respect, too, the DA-P is intended to supplement the directive. The overlaps with the Trade Secrets Directive are addressed below where they become relevant.[27]

The application of competition law (in particular Articles 101, 102 TFEU) is also not to be affected by the DA-P. Instead, the measures provided for in the DA-P are not to be used to restrict competition in a manner contrary to the TFEU.[28]

Finally, the relationship of the DA-P to the *sui generis* right set forth in Art. 7 of the Database Directive[29] is clarified in Article 35 of the DA-P. Accordingly, the right does not apply to databases containing data obtained from or generated by the use of a product or a related service.

2. Structure of the Proposal

The Proposal provides for a clear structure: In chapter 1, the legislator starts with general provisions, including the scope of application and the main definitions. This is then followed by the provisions on B2C and B2B data sharing as well as the according obligations for the data holder, who is legally obliged to make data available (chapter 2, 3). Chapter 4 then turns towards unfair terms related to data access and use between enterprises, especially between small and micro-sized enterprises. To continue, provisions on the data access of public sector bodies (B2G) are displayed in chapter 5. The following chapters provide for a series of rather special provisions, including provisions on the Portability of data between data processing services (chapter 6), the international exchange of non-personal data (chapter 7)[30] and the interoperability of data (chapter 8). Finally, the implementation and the enforcement of the Directive and special provisions on the sui generis right under Directive 1996/6/EC are governed in chapter

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[27] Cf. below A.IV.2.b and A.IV.4.c.

[28] Recital 88 DA-P; Louisa Specht-Riemenschneider, 'Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G' [2022] MMR 809 (811).

[29] Directive 96/9/EC of the European Parliament and of the Council on the legal protection of databases [1996] OJ L77/20.

[30] Cf. for more details in this regard Angelica Fernandez, 'The Data Act: The Next Step in Moving toward a European Data Space' [2022] EDPL 108 (113).

9[31] and 10[32]. Chapter 11 concludes the structure of the proposal with final provisions, including the application of the regulation 12 months after it has entered into force (Art. 42 (2) DA-P).

III. Scope of application of the Proposal

With the Data Act, the Commission wants to introduce a common European regulation, in particular for access to data generated in connected products and related services, and to establish efficient enforcement mechanisms so that data can flow freely within the EU and easily across sectors. To achieve this goal, the Draft prescribes a very broad scope of application: According to Art. 1 (1) DA-P the "Regulation lays down harmonized rules on making data generated by the use of a product or related service available to the user of that product or service, on the making data available by data holders to data recipients and on the making data available by data holders to public sector bodies or Union institutions, agencies or bodies, where there is an exceptional need, for the performance of a task carried out in the public interest." In this way, the European legislator attempts to delimit the subject matter of the regulation, introducing an abundance of constituent elements, which in turn must now be defined. This section takes up the terms used and gives them an initial definition. In addition to the practical use cases described by the legislator as examples, the first connecting factors with the use cases are also shown.

1. Data generated by the use of a product or related service, Art. 1 (1), Art. 2 (1) DA-P

To begin with, the regulation should only apply to data generated by the use of a product or a related service. In this respect, "data" is to be understood as any digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audio-visual recording (Art. 2 (1) DA-P). According to Recital 17 DA-P, this includes three kinds of data: First, data that is generated intentionally by the user while using the product or related service. Second, data that is generated unintentionally by the user but comes as a by-product of the product or related service (e.g. diagnostics data). Third, data generated without any action by the user including when the product is in "standby mode" or even turned off.

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[31] Cf. for more details in this regard Axel Metzger and Heike Schweitzer, 'Shaping Markets: A Critical Evaluation of the Draft Data Act' [2023] ZEuP 1 (25 et seqq.).

[32] Cf. for more details in this regard Josef Drexel and others, 'Position Statement of the Max Planck Institute for Innovation and Competition of 25 May 2022 on the Commission's Proposal of 23 February 2022 for a Regulation on harmonised rules on fair access to and use of data (Data Act)', 254 et seqq. <https://ssrn.com/abstract=4136484> accessed 30 December 2022.

2. Personal and non-personal data in the Proposal

While this initially outlines a conceivably broad scope of application, the DA-P is *primarily* concerned with non-personal data. This is expressed on the one hand in Art. 4 (1) DA-P, which grants a data access claim exclusively in relation to corresponding non-personal data. In addition, this can also be derived from Art. 4 (5) Data-A-P in conjunction with Art. 6, 9 DSGVO, which contain a prohibition on the processing (and provision) of personal data unless there is a justification under data protection law. In the future, the distinction between personal and non-personal data will therefore become much more important. What the relationship will look like has not yet been conclusively clarified.[33] This is also due to the strict standards established by the European Court of Justice which are applied when assessing if data is to be classified as personal data.[34]

First, Art. 1 (3) DA-P outlines the basic relationship: the DA-P is without prejudice to Union legislation on the protection of personal data (in particular the GDPR). In addition, Recital 7 DA-P states that no provision of the Data Act should be applied or interpreted in such a way that the protection of personal data or the right to privacy and confidentiality of communications is reduced or restricted.

Interestingly, the DA-P does not even contain a definition of the term “non-personal data”. Instead, the draft seems to consider the term "data generated during the use of a product or associated service" as a generic term.[35] This data can then either be personal data, which is subject *primarily* to the GDPR, or other data, which is subject *primarily* to the DA-P. This means that, in principle, it is also possible to apply the GDPR and DA-P at the same time.

a. User requests data access to himself or to a third party and is the data subject

For example, in the case where a user asserts his or her right to information against the data holder, non-personal data is (also) linked to this request for information, which generally makes this data personal data – ultimately leading to the application of the GDPR. In this respect, it is

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[33] Wolfgang Kerber, ‘Governance of IoT Data: Why the EU Data Act will not fulfill its objectives‘ [2022] GRUR International 7 <https://doi.org/10.1093/grurint/ikac107> accessed 30 December 2022.

[34] Cf. for example ECJ C-582/14 *Breyer* [2016] ECLI:EU:C:2016:779; similar Axel Metzger and Heike Schweitzer, ‘Shaping Markets: A Critical Evaluation of the Draft Data Act‘ [2023] ZEuP 1 (28).

[35] Thanos Rammos and Timo Wilken, ‘Der Data Act – Chancen und Risiken für Unternehmen durch das geplante europäische Datengesetz‘ [2022] DB 1241 (1242).

suggested that the data access request already constitutes (at least implied) consent to the processing of personal data within the meaning of Article 6 (1) lit. a GDPR.[36] This would result in the data access claim having to meet the (high) requirements of the GDPR for effective consent.[37] Accordingly, the consent of the data subject must be freely given, specific, informed and an unambiguous indication of the data subject's wishes by which he or she, by a statement or by clear affirmative action, signifies agreement to the processing of personal data relating to him or her.[38] Whether consent is actually freely given here, however, can be doubted in view of the lack of alternatives.[39] This is due to the fact that the data holder is not able to comply with the access claim if he does not know which person is requesting access to "their" data. Moreover, the processing of the corresponding personal data of the data subject is therefore inevitable for the execution of the access claim. Consequently, consent in this context is at least an uncertain solution.

Moreover, the processing of personal data could also be in the legitimate interest of the data controller and consequently lawfully based on Art. 6 (1) lit. f GDPR. First, the processing would have to be necessary, meaning that there should be no other means available, to achieve the goal of the data processing. As previously shown, the processing of certain categories of personal data is inevitable for the fulfillment of the access claim, making the processing necessary within the meaning of Art. 6 (1) lit. f GDPR. Finally, the controller's interest in processing personal data must prevail over the data subject's interest in protecting that data. In this respect, the individual case has to be taken into account. In general, however, it must also be considered that the legislator has already given considerable weight to the interest in data access with the provision of corresponding rights under Art. 3 (1) and Art. 4 (1) DA-P. Therefore, the balancing of interest will often favor the controller's interest in processing personal data.[40]

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[36] Axel Metzger and Heike Schweitzer, 'Shaping Markets: A Critical Evaluation of the Draft Data Act' [2023] ZEuP 1 (28); Louisa Specht-Riemenschneider, 'Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G' [2022] MMR 809 (810).

[37] Cf. Gerald Spindler, 'Final Report: Legal evaluation of decentralization based de-identification procedures for personal data in the automotive sector' [2021].

[38] Cf. Art. 4 No. 11 GDPR.

[39] Other opinion: Louisa Specht-Riemenschneider, 'Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G' [2022] MMR 809 (810).

[40] Similar Axel Metzger and Heike Schweitzer, 'Shaping Markets: A Critical Evaluation of the Draft Data Act' [2023] ZEuP 1 (28).

b. User is not the data subject and requests data access to himself/herself

To continue, in cases where the user is not the data subject and requests data access to himself, the processing of personal data could also be lawful if the processing is necessary for compliance with a legal obligation to which the controller is subject (Art. 6 (1) lit. c GDPR). Furthermore, if the data controller processes the data for the performance of a task carried out in the exercise of official authority (in particular public authorities), or if the data processing is in the public interest, the legal basis in Art. 6 (1) lit. e GDPR has to be considered. Finally, the data processing may again be in the legitimate interest of the controller within the meaning of Art. 6 (1) lit. f DSGVO.

c. User is not himself/herself a data subject and requests data access to a third party

If the user is not the data subject himself and requests data access to a third party, the consent of the data subject may be considered as justification for the data processing. If consent is not given, the fulfillment of a legal obligation pursuant to Art. 6 (1) lit. c GDPR could also come into consideration. However, according to Recital 24 p. 3 DA-P the legislator explicitly did not made use of this possibility. Instead, the DA-P "does not create a legal basis under Regulation (EU) 2016/679 for the data holder to provide access to personal data or make it available to a third party when requested by a user that is not a data subject and should not be understood as conferring any new right on the data holder to use data generated by the use of a product or related service"[41]. In practice, therefore, the legitimate interests of the data controller within the meaning of Art. 6 (1) lit. f GDPR will again be of great relevance.[42]

d. Conclusion

In summary, there still seems to be a lot of unclarified details here. In particular, the importance of data subjects' consent to the processing of personal data will require further consideration.

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[41] Recital 24 p. 3 DA-P.

[42] Louisa Specht-Riemenschneider, 'Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G' [2022] MMR 809 (811).

The relationship between the DA-P and the GDPR is also unclear when it comes to other aspects, such as the GDPR's right to data portability (Art. 20 GDPR).[43] In case of conflict, however, priority should be given to the GDPR. This is also reflected in Art. 1 (3) DA-P.[44]

3. Product, Art. 2 (2) Data-A-P

This data must either be generated by the use of a product or a related service. A product "means a tangible, movable item, including where incorporated in an immovable item, that obtains, generates or collects, data concerning its use or environment, and that is able to communicate data via a publicly available electronic communications service and whose primary function is not the storing and processing of data" (Art. 2 (2) DA-P). According to Recital 14 p. 1, 2 DA-P this includes "physical products that obtain, generate or collect, by means of their components, data concerning their performance, use or environment and that are able to communicate that data via a publicly available electronic communications service[45]. In this respect, it is irrelevant whether the data collection is necessary for the functionality of the product. Instead, all generated data is covered by the scope of application.[46] Recital 14 p. 3 DA-P explicitly names vehicles, home equipment and consumer goods, medical and health devices or agricultural and industrial machinery as examples of products within the meaning of Art. 2 (2) DA-P. In contrast, certain products that are primarily designed to display or play content, or to record and transmit content are excluded from the scope of application. Such products include for example personal computers, servers, tablets and smart phones, cameras, webcams, sound recording systems and text scanners.[47] The legislator justifies this delimitation by stating that the excluded products require a human input to produce various forms of content, such as text documents, sound files, video files, games, digital maps.[48] In practice, however, products consisting of combinations of covered and non-covered products are highly relevant. This includes for example cars with integrated cameras or road sign recognition systems. Whether this category

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[43] Cf. for more details in this regard Inge Graef and Martin Husovec, 'Seven Things to improve in the Data Act' [2022] SSRN 1 <https://ssrn.com/abstract=4051793> accessed 30 December 2022.

[44] Axel Metzger and Heike Schweitzer, 'Shaping Markets: A Critical Evaluation of the Draft Data Act' [2023] ZEuP 1 (29).

[45] Electronic communications services include land-based telephone networks, television cable networks, satellite-based networks and near-field communication networks, cf. Recital 14 p. 2 DA-P.

[46] Opening this question Torsten J. Gerpott, 'Vorschlag für ein europäisches Datengesetz Überblick und Analyse der Vorgaben für vernetzte Produkte' [2022] CR 271 (275); Louisa Specht-Riemenschneider, 'Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G' [2022] MMR 809 (814).

[47] Recital 15 p. 2 DA-P.

[48] Recital 15 p. 3 DA-P.

should also fall within the scope of application remains open in the current draft version.[49] Furthermore, it is also unclear whether access to all data must ultimately be provided under the data access rights or only with respect to that data generated in the product component covered by the DA-P.

To continue, the data generated by the use of a product can be generated in different locations. In addition to internal generation and recording in the product itself, external storage locations can also be considered. Depending on the data generated, this could be smartphones or other products of the user or, with regard to movement data, satellites or aircraft.[50] In this respect, the DA-P does not provide an incentive for either internal or external generation and recording of the data. Instead, due to the fundamentally broad scope of application, all data generated during the use of a product will probably be covered.[51]

Finally, an important limitation of the scope arises with regard to the distinction between primary and secondary data. Data generated directly during the use of the product (primary data) is covered. In contrast, secondary analysis results (secondary data) should not be covered. According to Recital 17 DA-P, this includes data resulting from any software process that calculates derivative data from the "original" data generated by the use of the product.[52] However, the strict distinction causes delimitation problems. Regarding contemporary AI applications for example, it may be possible to reconstruct the original training data from a neural network, resulting in the limitation of the scope of application intended by the distinction having no effect.[53]

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[49] David Bomhard and Marieke Merkle, 'Der Entwurf eines EU Data ActsNeue Spielregeln für die Data Economy' [2022] RDi 168 (170); Thanos Rammos and Timo Wilken, 'Der Data Act – Chancen und Risiken für Unternehmen durch das geplante europäische Datengesetz' [2022] DB 1241 (1242).

[50] David Bomhard and Marieke Merkle, 'Der Entwurf eines EU Data ActsNeue Spielregeln für die Data Economy' [2022] RDi 168 (171, Rn. 11).

[51] David Bomhard and Marieke Merkle, 'Der Entwurf eines EU Data ActsNeue Spielregeln für die Data Economy' [2022] RDi 168 (171).

[52] Will Douglas Heaven, AI fake-face generators can be rewound to reveal the real faces they trained on, [2021] MIT Technology Review <https://www.technologyreview.com/2021/10/12/1036844/ai-gan-fake-faces-data-privacy-security-leak/> accessed 30 December 2022; Xin Dong, Hongxu and others, 'Privacy Vulnerability of split computing to data-free model inversion attacks' [2022] >https://arxiv.org/pdf/2107.06304.pdf> accessed 30 December 2022; Ran Webster and others, 'This Person (probably) exists. Identity membership attacks against GAN generated faces' [2021] https://arxiv.org/pdf/2107.06018.pdf accessed 30 December 2022.

[53] David Bomhard and Marieke Merkle, 'Der Entwurf eines EU Data ActsNeue Spielregeln für die Data Economy' [2022] RDi 168 (171, Rn. 13).

4. Related Service, Art. 2 (3) Data-A-P

The data can also be generated by the use of a related service. According to Art. 2 (3) DA-P, a "related service means a digital service, including software, which is incorporated in or interconnected with a product in such a way that its absence would prevent the product from performing one of its functions". In contrast to the previously discussed products, data collection must now form an integral part of the related service, enabling the functioning of the connected product in the first place.[54] Again, the data can be generated both intentionally and unintentionally by the user.[55] Excluded from the scope of application is only such data resulting from any software process that calculates derivative data.[56] Moreover, the data collection ability of the related service is not restricted to the according ability of the connected product, but may independently generate data of value to the user.[57] Examples include the maintenance of connected cars, the collection of data from connected electricity meters at fixed dates, and the delivery of groceries triggered by connected refrigerators when their owners' stock levels fall below specified limits.[58] According to Recital 16 p. 2 DA-P, "such related services can be part of the sale, rent or lease agreement", even if the "related service (…) is not supplied by the seller, renter or lessor itself, but is supplied, under the sales, rental or lease contract, by a third party"[59].

5. People involved

The multi-person relationship[60] that is characteristic of the data economy becomes clear already with regard to the plethora of definitions of persons involved.[61] The DA-P basically distinguishes between the user (Art. 2 (5) DA-P) of the product or related service and the data owner (Art. 2 (6) DA-P). On the part of the data holder, a distinction may sometimes also be made with regard to the manufacturer (Art. 1 (2) lit. a DA-P). In addition to the user, access to the data, for instance, can also be requested to any third party, which is referred to as data recipients

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[54] Cf. Torsten J. Gerpott, 'Vorschlag für ein europäisches Datengesetz Überblick und Analyse der Vorgaben für vernetzte Produkte' [2022] CR 271 (275); Louisa Specht-Riemenschneider, 'Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G' [2022] MMR 809 (814).
[55] Recital 17 p. 1, 2 DA-P.
[56] Recital 17 p. 3 DA-P; this is similar for (connected) products, cf. above at A.III.3.
[57] Recital 16 p. 3 DA-P.
[58] Torsten J. Gerpott, 'Vorschlag für ein europäisches Datengesetz Überblick und Analyse der Vorgaben für vernetzte Produkte' [2022] CR 271 (274).
[59] Recital 16 p. 4 DA-P.
[60] Axel Metzger and Heike Schweitzer, 'Shaping Markets: A Critical Evaluation of the Draft Data Act' [2023] ZEuP 1 (8).
[61] An overview of the people involved and the according roles is provided by Max von Grafenstein, 'Reconciling Conflicting Interests in Data through Data Governance' [2022] HIIG Discussion Paper Series 2022-02, p. 11 <https://ssrn.com/abstract=4104502>, accessed 30 December 2022.

in the draft regulation (Art. 2 (7) DA-P) and which are not excluded from the scope.[62] Last but not least, both public sector bodies (Art. 2 (9) DA-P) and data processing services (Art. 2 (12) DA-P) are given an independent definition.

a. User, Art. 2 (5) Data-A-P

According to Art. 2 (5) DA-P, a user "means a natural or legal person that owns, rents or leases a product or receives a service". In addition to this enumeration, the recitals also mention the sale of a product as a suitable contractual basis.[63] Recital 18 p. 2 DA-P explains somewhat more abstractly that the user should be the person, who bears the risks and enjoys the benefits of using the product or related service – he is therefore the person who becomes entitled or obligated under a contract.

The exact definition will also be important for the automotive industry. For example, it must be clarified whether, in addition to the owner of the vehicle, the driver or even possible bystanders are to be classified as users within the meaning of the draft regulation.

(1) Contractual theory

On the one hand, in order to classify a "user", reference can be made to the types of contracts mentioned in Art. 2 (5), Recital 18 p. 1 DA-P. Accordingly, the user would be a person, who is party to a rent, lease or sales-contract of a product or related service. Regarding the use cases, this certainly includes the owners of the vehicles. In use case 3 (Vehicular Object Detection), policemen and individuals who take photos will probably also qualify as a user. However, possible bystanders and vehicle drivers are excluded from the scope of application, because they often do not conclude contracts before using the product or related service or getting in touch with it.

(2) Property law theory

On the other hand, however, the legislator does not seem to be concerned with specific types of contracts, but rather with the underlying legal proprietary relations.[64] Accordingly, the user would be anyone who legitimately possesses the product, whereby the contractual basis serves as the legitimation. This is supported by the fact that the types of contracts mentioned in the text of the regulation and in the recitals are not uniform. What these contracts have in common,

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[62] Cf. below at A.IV.4.

[63] Recital 18 p. 1 DA-P.

[64] Louisa Specht-Riemenschneider, 'Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G' [2022] MMR 809 (814).

however, is that they lead to legitimate possession under property law.[65] In addition, only this ownership theory does sufficiently support the DA-P's claim to achieve the broadest possible scope of application for the benefit of the broadest possible value creation. In any case, those persons who unlawfully possess the product or unlawfully use the related service shall be disqualified as users.

Regarding the automotive context, people like the vehicle owner and the vehicle driver will qualify as a user under the property law theory. This is also true for the owners and drivers of parked vehicles in use case 4 (Parking Space Estimation), who share the computing resources of the vehicle to the Parking Lot Operator while the vehicle is parked.[66] Possible bystanders, however, who do not possess a product on a contractual basis but are simply present by instance, are not covered. This includes, for example people who can be seen on pictures taken by policemen or other individuals in use case 3 (Vehicular Object Detection).[67] However, the scope of application of the GDPR could be opened in this case with regard to the personal data of the person pictured.

(3) Contracting parties

Although both Art. 2 (5) DA-P and Recital 18 p. 1 DA-P refer to contracts, the DA-P does not further specify which persons must be parties to the contract. In this regard, it may be argued that a contract between the user and the data holder is necessary. In practice, however, the data holder will frequently also be the manufacturer of the products, who has often not concluded a contract with the user. This is due to the fact, that the product will often be sold by a retailer or another third person, which is not identical to the manufacturer/data holder). In conclusion, restricting the requirement to a contract between the data holder and the user would unnecessarily narrow the scope of application.

Moreover, Art. 20 p. 2 et seq. DA-P states that data access can be guaranteed via user accounts, which typically allow "for identification of the user by the manufacturer as well as a means to communicate to exercise and process data access requests".[68] However, such accounts would

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[65] Louisa Specht-Riemenschneider, 'Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G' [2022] MMR 809 (814).

[66] Cf. for the relevant procedure and the technical details Xumin Huang et al., 'FedParking: A Federated Learning Based Parking Space Estimation With Parked Vehicle Assisted Edge Computing' [2021] IEEE Transactions on Vehicular Technology 9355.

[67] Cf. for the relevant procedure and the technical details Xiangjie Kong et al., 'A Federated Learning-Based License Plate Recognition Scheme for 5G-Enabled Internet of Vehicles' [2021] IEEE Transactions on Vehicular Technology 8523; the DA-P is also applicable to data generated by the use of a product, that is in standby-mode or even turned off, cf. above A.III.1.

[68] Recital 20 p. 3 DA-P.

not be necessary if the user and the data holder/manufacturer had already concluded a contract, which would have identified the contracting parties in the first place. Moreover, the relationship to the GDPR remains unclear as such an account allows for the identification of the user, thus, creating personal data.

Finally, Recital 20 p. 2 DA-P provides for the possibility that one product or related service may be used by several users. If the respective persons are to be qualified as users within the meaning of Art. 2 (5) DA-P, all persons shall also have access to the generated data.

Thus, in the multi-person relationship described above, it is the relationship of the individual person to the product or associated service that is important. However, only the user and not the data holder must always be party to the contract.

b. Data Holder, Art. 2 (6) Data-A-P

According to Art. 2 (6) DA-P, the „data holder means a legal or natural person who has the right or obligation, in accordance [with the DA-P], applicable Union law or national legislation implementing Union law, or in the case of non-personal data and through control of the technical design of the product and related services, the ability, to make available certain data". Thus, two conditions must be cumulatively fulfilled: First, the person must have de facto control over the technical design of the product and related services. This will usually be the manufacturer of the product, which is mentioned in Art. 1 (2) DA-P but is not subject to its own definition within the Proposal. Secondly, the person must also have technical factual control over the data. Technical factual control means that the data holder stores the data either in its own sphere of control or in that of a third party, in which case the third party must make the data available to the data holder upon request.[69] Sensor data as well as data from third-party apps in the connected vehicle can thus only be covered by the data access rights directed against the manufacturer if they are stored either in the manufacturer's own technical-factual sphere of control or in the technical-factual sphere of control of a third party who processes the data according to the manufacturer's specifications and must therefore make them available to the manufacturer upon request.[70]

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[69] Louisa Specht-Riemenschneider, 'Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G' [2022] MMR 809 (813).

[70] Louisa Specht-Riemenschneider, 'Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G' [2022] MMR 809 (813); S. auch Stellungnahme des BDI zum Legislativvorschlag des Data-A-P, S. 10.

The technical-factual control ultimately ends if the data is deleted. Consequently, an access request cannot refer to data that has already been deleted. Overall, the DA-P does not impose any obligation on the data holder to store the data. If data is generated but not stored, it can only be made available directly in accordance with Art. 3 (1) Data-A-P, insofar as this is relevant and appropriate. Although no storing obligation is imposed, a product or related service, which is deliberately designed in such a way that any data were deleted before the user can request access, might also infringe Art. 3 DA-P.[71]

c. Manufacturer, Art. 1 (2) DA-P

According to the basic concept of the DA-P, it is conceivable that manufacturer and data holder are different persons. However, the draft does not provide a respective definition. Nevertheless, the manufacturer of the product or related service may be subject to the obligation under Art. 3 (1) DA-P. Accordingly, products shall be designed and manufactured and related services shall be provided in such a manner that data generated by their use are, by default, easily, securely and, where relevant and appropriate, directly accessible to the user.

Since there is no clear definition of the manufacturer yet, it remains to be seen if the legislator provides for clarification in the final version of the regulation – either by introducing an individual definition for the data economy law regime or by applying already existing definitions.[72]

d. Data recipient, Art. 2 (7) Data-A-P

„Data recipient" means a legal or natural person, acting for purposes which are related to that person's trade, business, craft or profession, other than the user of a product or related service, to whom the data holder makes data available, including a third party following a request by the user to the data holder or in accordance with a legal obligation under Union law or national legislation implementing Union law. The rights and obligations of third parties are outlined in particular below at IV.4.

e. Public sector body, Art. 2 (9) Data-A-P

'Public sector body' means national, regional or local authorities of the Member States and bodies governed by public law of the Member States, or associations formed by one or more such authorities or one or more such bodies. Art. 14 et seqq DA-P create a harmonized framework for the use by public sector bodies and Union institutions, agencies and bodies of data

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[71] Axel Metzger and Heike Schweitzer, 'Shaping Markets: A Critical Evaluation of the Draft Data Act' [2023] ZEuP 1 (9).

[72] In this regard, reference may be made to Art. 2 lit. e Directive 2001/95/EC of the European Parliament and of the Council on general product safety [2001] OJ L11/4.

held by enterprises. Data access is, however, restricted to situations where there is an exceptional need or a public emergency. This includes public health emergencies or major natural or human-induced disasters.[73]

f. Data processing service, Art. 2 (12) Data-A-P

"Data processing service" means a digital service other than an online content service as defined in Article 2(5) of Regulation (EU) 2017/1128, provided to a customer, which enables on-demand administration and broad remote access to a scalable and elastic pool of shareable computing resources of a centralized, distributed or highly distributed nature.

According to Article 2(5) of Regulation (EU) 2017/1128, an 'online content service' means a service as defined in Articles 56 and 57 TFEU that a provider lawfully provides to subscribers in their Member State of residence on agreed terms and online, which is portable and which is:

> (i) an audiovisual media service as defined in point (a) of Article 1 of Directive 2010/13/EU, or
>
> (ii) a service the main feature of which is the provision of access to, and the use of, works, other protected subject-matter or trans- missions of broadcasting organizations, whether in a linear or an on-demand manner.

Data processing services are subjected to a series of regulations in Chapter VI DA-P, which contain, in particular, technical-organizational specifications as well as mandatory specifications for contract content.[74]

IV. Key regulatory subjects

In particular, the DA-P is to be understood as a measure of the European legislator to interconnect products, services, actors and markets across all industry and sector boundaries in order to make use of the great (economic) value of data generated within the European Union.[75] To accomplish this goal, the legislator proposes an access by design right for users (Art. 3 DA-P) and subsequently a right to access to data generated by the use of a product or related service (Art. 4 DA-P). This also includes the user's right to grant access to third parties (Art. 5 DA-P).

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[73] Explanatory memorandum, p. 15; cf. for a critique of the far reaching data access rights for public bodies Rupprecht Podzun and Clemens Pfeifer, 'Datenzugang nach dem EU Data Act: Der Entwurf der Europäischen Kommission' [2022] GRUR 953 (958).

[74] Art. 23, 24 DA-P.

[75] Recital 4 DA-P; Explanatory memorandum, p. 3 DA-P.

Finally, the use of non-personal data by the data holder will soon be depended upon consent of the user (Art. 4 (6) DA-P). These key regulatory subjects will now be discussed in more detail.

1. Access by design, Art. 3 Data-A-P

a. Design and manufacturing obligation, Art. 3 (1) DA-P

First of all, products shall be designed and manufactured, and related services shall be provided, in such a manner that data generated by their use are, by default, easily, securely and, where relevant and appropriate, directly accessible to the user. It is particularly noteworthy that the data does not have to be transmitted to the user by default, although the DA-P intended to strengthen the user's position.[76] Instead, the manufacturer must only provide the possibility to access (and not transmit[77]) data, which may be done via user interfaces, for instance.[78] Consequently, the term "data accessibility by default" is sometimes used.[79] Moreover, it remains completely open, when direct data access should be classified as "relevant and appropriate".

The obligation to design and manufacture products in such a way as to grant access to the data applies first and foremost to the manufacturer of the product. He alone can have sufficient influence on the relevant processes and is therefore held responsible within the meaning of Art. 3 (1) DA-P.

The (technical) specifics of data access are described in more detail in Recital 21 DA-P. Access to the on-device data storage may be enabled via cable-based or wireless local area networks connected to a publicly available electronic communications service or a mobile network.[80] The server may be the manufacturer's own local server capacity or that of a third party or a cloud service provider who functions as data holder.[81] Due to the conceivable multitude of persons involved, it will be particularly relevant in practice to precisely determine the respective function of the individual persons. Thereby the proper allocation of the obligations provided for in

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[76] Louisa Specht-Riemenschneider, 'Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G' [2022] MMR 809 (815 et seq.); Rupprecht Podzun and Clemens Pfeifer, 'Datenzugang nach dem EU Data Act: Der Entwurf der Europäischen Kommission' [2022] GRUR 953 (957).

[77] Thereby, the status quo is remained: Axel Metzger and Heike Schweitzer, 'Shaping Markets: A Critical Evaluation of the Draft Data Act' [2023] ZEuP 1 (3); Louisa Specht-Riemenschneider, 'Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G' [2022] MMR 809 (815).

[78] Louisa Specht-Riemenschneider, 'Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G' [2022] MMR 809 (815).

[79] Louisa Specht-Riemenschneider, 'Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G' [2022] MMR 809 (815).

[80] Recital 21 p. 3 DA-P.

[81] Recital 21 p. 4 DA-P.

the DA-P may be ensured. The data access may finally be designed to permit the user or a third party to process the data on the product or on a computing instance of the manufacturer.[82] Furthermore, Recital 20 p. DA-P already stated, that data access must be possible to each user individually, when the product is used by several users. Separate or joint accounts can be used for this purpose.[83]

Finally, it is also unclear whether Art. 3 (1) DA-P is actually intended to establish a right for the user in the sense of an independent claim[84], or whether the construction or manufacturing obligation would have to be taken into account in the context of the respective national law on material damages, thus presupposing a contractual basis.[85] Regarding Germany, the obligation may be considered within the objective requirements for the product within the meaning of Section 434 (1), (3) German Civil Code.[86]

However, there seems to be little clarity here – in total, the DA-P devotes only one section of Art. 3 DA-P and one recital explicitly to this obligation. Thus, there is still a lot of room for maneuver in the ongoing legislative process.

b. (Precontractual) information obligation, Art. 3 (2) DA-P

Article 3 (2) stipulates information duties that have to be fulfilled before concluding a contract for the purchase, rent or lease of a product or a related service. The information must be provided in a clear and comprehensible format and must include, among others, information on the nature and volume of the data likely to be generated by the use of the product or related service (Art. 3 (2) lit. a DA-P) as well as how the user may access those data (Art. 3 (2) lit. c DA-P). Moreover, the user must be provided with the information on the identity of the data holder, such as its trading name and the geographical address at which it is established (Art. 3 (2) lit. e DA-P) and the means of communication which enable the user to contact the data holder

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[82] Recital 21 p. 5 DA-P.

[83] Benedikt Karsten and Marie Winnroeder, 'Der Entwurf des Data Act - Auswirkungen auf die Automobilindustrie' [2022] RAW 99 (100).

[84] In this direction Wolfgang Kerber, 'Governance of IoT Data: Why the EU Data Act will not fulfill its objectives' [2022] GRUR International 5 et seq. <https://doi.org/10.1093/grurint/ikac107> accessed 30 December 2022.

[85] Dirk Staudenmayer, 'Der Verordnungsvorschlag der Europäischen Kommission zum Datengesetz Auf dem Weg zum Privatrecht der Datenwirtschaft' [2022] EuZW 596; Axel Metzger and Heike Schweitzer, 'Shaping Markets: A Critical Evaluation of the Draft Data Act' [2023] ZEuP 1 (5).

[86] Matthias Leistner and Lucie Antoine, "IPR and the use of open data and data sharing initiatives by public and private actors", Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Legal Affairs, 2022, p. 85; Benedikt Karsten and Marie Winnroeder, 'Der Entwurf des Data Act - Auswirkungen auf die Automobilindustrie' [2022] RAW 99 (100).

quickly and communicate with that data holder efficiently (Art. 3 (2) lit. f DA-P). In practice, it is of particular importance that these information requirements are additional and not alternative to the requirements[87] of the GDPR.[88] In other words, the "obligation to provide information under the DA-P does not affect the obligation for the controller to provide information to the data subject pursuant to Article 12, 13 and 14 GDPR".[89]

2. Right of users to access and use data, Art. 4 (1)-(5) Data-A-P

Moreover, the user has an additional subsidiary right to access and use the data generated by the use of the product or related service, whereby he or she is only restricted to a limited extent with regard to the permitted uses.[90]

a. General requirements

According to Art. 4 (1) DA-P, "where data cannot be directly accessed by the user from the product, the data holder shall make available to the user the data generated by its use of a product or related service without undue delay, free of charge and, where applicable, continuously and in real-time. This shall be done on the basis of a simple request through electronic means where technically feasible."

The data has to be made available free of charge, because the user should enjoy the benefits from using products and related services which generate data during its use. "The user should therefore be entitled to derive benefit from data generated by that product and any related service".[91]

The data holder has to provide for a simple request mechanism in order to make the data available to the user. Again, this may be ensured via user accounts, which are necessary for the operation of many IOT products anyway.[92] For the means of identification of the user who

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[87] Cf. the information obligations in Art. 13, 14 GDPR.

[88] Axel Metzger and Heike Schweitzer, 'Shaping Markets: A Critical Evaluation of the Draft Data Act' [2023] ZEuP 1 (10); Matthias Leistner and Lucie Antoine, "IPR and the use of open data and data sharing initiatives by public and private actors", Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Legal Affairs, 2022, p. 85.

[89] Recital 23 p. 3 DA-P.

[90] Cf. below A.IV.2.b and A.IV.2.c; critical in this respect, because also commercial uses are permitted: Josef Drexel and others, 'Position Statement of the Max Planck Institute for Innovation and Competition of 25 May 2022 on the Commission's Proposal of 23 February 2022 for a Regulation on harmonised rules on fair access to and use of data (Data Act)', 254 et seqq. <https://ssrn.com/abstract=4136484> accessed 30 December 2022.

[91] Recital 18 p. 3 DA-P.

[92] Recital 20 DA-P; Matthias Leistner and Lucie Antoine, "IPR and the use of open data and data sharing initiatives by public and private actors", Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Legal Affairs, 2022, p. 86.

requests data access, the data holder shall not require the user to provide any information beyond what is necessary to verify the quality as a user.[93] Consequently, the requirements for both the user 's request and identification of the user are rather low.[94] However, security precautions must still be provided to prevent misuse.[95] In this respect, password-protected user accounts should be sufficient – whether additional security measures such as two-factor authentication must also be provided is not clear from the proposal.

Moreover, according to Art. 4 (2) p. 2 DA-P, "the data holder shall not keep any information on the user's access to the data requested beyond what is necessary for the sound execution of the user's access request and for the security and the maintenance of the data infrastructure".

The access right covers data that is generated during the use of the product or related services. For connected vehicles, for example, mileage, fuel consumption, GPS data, acceleration and braking behavior, the number of starts and also status reports from vehicle batteries are covered.[96] However, this list is not exhaustive. Instead, each date must be examined individually to determine whether it falls within the scope of Art. 4 DA-P.

Furthermore, it is unclear whether Art. 4 DA-P contains a right to data portability that goes beyond the in-situ access known from Art. 3 DA-P:

On the one hand, Recital 21 p. 4 DA-P clarifies that the data access "may be designed to permit the user or a third party to process the data on the product or on a computing instance of the manufacturer". On the other hand, however, how an equitable distribution of value creation in the data economy is to be achieved with mere in-situ access is questioned.[97] In this respect, the final version of the regulation should be awaited.

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[93] Art. 4 (2) DA-P.

[94] Louisa Specht-Riemenschneider, 'Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G' [2022] MMR 809 (815).

[95] Matthias Leistner and Lucie Antoine, "IPR and the use of open data and data sharing initiatives by public and private actors", Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Legal Affairs, 2022, p. 86.

[96] Henrike Weiden, 'Aktuelle Berichte – März 2022' [2022] GRUR 313; Benedikt Karsten and Marie Winnroeder, 'Der Entwurf des Data Act - Auswirkungen auf die Automobilindustrie' [2022] RAW 99 (102).

[97] Louisa Specht-Riemenschneider, 'Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G' [2022] MMR 809 (815).

Finally, similar to the precontractual information obligation known from Art. 3 (2) DA-P, the user must again be informed about his or her right under Art. 4 DA-P. In this regard, the same requirements as in Art. 3 (2) DA-P apply.[98]

b. Trade secrets, Art. 4 (3) DA-P

According to Art. 4 (3) DA-P, trade secrets can also be subject to the right under Art. 4 (3) DA-P. Insofar as trade secrets have to be disclosed, "all specific necessary measures are taken to preserve the confidentiality of trade secrets in particular with respect to third parties"[99]. Furthermore, according to Art. 4 (3) p. 2 DA-P, the data holder and the user can agree on additional measures to preserve the confidentiality of the shared data, whereby in particular the passing on of the data to third parties can be considered.[100] Art. 2 (1) Trade Secrets Directive[101] stipulates, that "trade secret means information which meets all of the following requirements:

- it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
- it has commercial value because it is secret;
- it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret."

The data generated by the user when using the product or related service are regularly aggregated and structured by the data holder and will often fall within the scope of Art. 2 (1) Trade Secrets Directive. Thus, they often enjoy corresponding protection. However, it should again be noted that the right of access relates exclusively to the raw data and not to secondary data derived from it. Nevertheless, despite the necessity for a case-by-case distinction, already the information e.g. about the source and type of the generated data will often have to be classified as a trade secret.[102] At times, it might also be difficult to access in advance (ex ante), whether

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[98] Recital 23 DA-P; Kritisch dazu Louisa Specht-Riemenschneider, 'Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G' [2022] MMR 809 (816).
[99] Art. 4 (3) p. 1 DA-P.
[100] Matthias Leistner and Lucie Antoine, "IPR and the use of open data and data sharing initiatives by public and private actors", Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Legal Affairs, 2022, p. 86.
[101] Directive (EU) 2016/943 of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (Trade Secrets Directive) [2016] OJ L157/1.
[102] Matthias Leistner and Lucie Antoine, "IPR and the use of open data and data sharing initiatives by public and private actors", Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Legal Affairs, 2022, p. 87.

certain data will fall within the scope of Art. 2 (1) Trade Secrets Directive[103], ultimately leading to legal uncertainty.

However, measures, procedures and remedies according to Art. 4 (1) Trade Secrets Directive can only be initiated if the acquisition, use or disclosure of the trade secret is unlawful. This is the case if not "all specific necessary measures are taken to preserve the confidentiality of trade secrets" within the meaning of Art. 4 (3) DA-P. In this respect, non-disclosure agreements are likely to be the most important factor both in the relation between user - data holder (Art. 4 (3) p. 2 DA-P) and between third party data recipients - data holder (Art. 5 (8) p. 2 DA-P).[104] However, how compliance with these agreements is to be monitored, demonstrated and enforced is left open in the draft.[105]

All in all, the user's right to access the data takes precedence over the data owner's protection of trade secrets. This is especially problematic with regard to the affected fundamental rights.[106] Ultimately, however, the protection of trade secrets is not a novelty of the DA-P. With the measures provided for, the DA-P fits into the existing protection system of the Trade Secrets Directive.[107] However, as in the Product Liability Directive Proposal[108] and the AI Liability Directive Proposal[109], the DA-P again leaves open which measures are specifically expected to protect trade secrets.[110]

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[103] Wolfgang Kerber, 'Governance of IoT Data: Why the EU Data Act will not fulfill its objectives' [2022] GRUR International 7 <https://doi.org/10.1093/grurint/ikac107> accessed 30 December 2022; Matthias Leistner and Lucie Antoine, "IPR and the use of open data and data sharing initiatives by public and private actors", Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Legal Affairs, 2022, p. 8086-8.

[104] Moritz Hennemann and Björn Steinrötter, 'Data Act – Fundament des neuen EU-Datenwirtschaftsrechts?' [2022] NJW 1481 para. 18.; Louisa Specht-Riemenschneider, 'Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G' [2022] MMR 809 (816).

[105] BDI-Stellungnahme zum Legislativvorschlag eines DA-E, S. 15.

[106] BDI-Stellungnahme zum Legislativvorschlag eines DA-E, S. 15; Louisa Specht-Riemenschneider, 'Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G' [2022] MMR 809 (816).

[107] Matthias Leistner and Lucie Antoine, "IPR and the use of open data and data sharing initiatives by public and private actors", Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Legal Affairs, 2022, p. 88.

[108] EU Commission, Proposal for a Directive of the European Parliament and of the Council on Liability for Defective Products (Product Liabiltiy Directive Proposal) COM(2022) 495 final.

[109] EU Commission, Proposal for a Directive of the European Parliament and of the Council adapting the rules on non-contractual civil liability in artificial intelligence (AI Liability Directive Proposal) COM(2022) 496 final.

[110] Cf. Gerald Spindler, 'The EU Commission's Proposals for Regulation of Artificial Intelligence – Product safety and liability' [2022] Report for the Verband der Deutschen Automobilindustrie, p. 46 et seqq., p. 56 et seqq.

c. Prohibition of using the data for developing a competing product, Art. 4 (4) DA-P

The DA-P attempts to strike a fair balance between the user's interest in recovering value from data while at the same time avoiding to undermine the investment incentives for the type of product from which the data are obtained, for instance, by the use of data to develop a competing product.[111] Therefore, besides the protection of trade secrets, Art. 4 (4) DA-P stipulates another protective means. Accordingly, the "user shall not use the data obtained pursuant to a request referred to in Art. 4 (1) DA-P to develop a product that competes with the product from which the data originate". However, neither the text of the regulation nor the recitals explain when a product competes with the product from which the data originate.[112] Simultaneously, it is not explained how the relevant (after) market is to be determined[113] or who has to bear the burden of proof.[114]

Moreover, the regulation in its current version "only" prohibits the development of a product. However, associated services or virtual assistants remain exempt. A clarification is expected here in the final version.[115]

Finally, it is questionable why this prohibition was included in the DA-P without exceptions. So far, no practicable solution seems to have been found, for example, for cases in which the manufacturer of the original product has no ambition to operate on downstream markets. After all, the protective interest in the specific case would then no longer apply.[116]

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[111] Recitals 6, 28 p. 6, 7 DA-P.

[112] Louisa Specht-Riemenschneider, 'Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G' [2022] MMR 809 (816).

[113] Matthias Leistner and Lucie Antoine, "IPR and the use of open data and data sharing initiatives by public and private actors", Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Legal Affairs, 2022, p. 88.

[114] Inge Graef and Martin Husovec, 'Seven Things to improve in the Data Act' [2022] SSRN 2 <https://ssrn.com/abstract=4051793> accessed 30 December 2022; Rupprecht Podzun and Clemens Pfeifer, 'Datenzugang nach dem EU Data Act: Der Entwurf der Europäischen Kommission' [2022] GRUR 953 (957).

[115] Matthias Leistner and Lucie Antoine, "IPR and the use of open data and data sharing initiatives by public and private actors", Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Legal Affairs, 2022, p. 88.

[116] Wolfgang Kerber, 'Governance of IoT Data: Why the EU Data Act will not fulfill its objectives' [2022] GRUR International 13 et seq. <https://doi.org/10.1093/grurint/ikac107> accessed 30 December 2022; Matthias Leistner and Lucie Antoine, "IPR and the use of open data and data sharing initiatives by public and private actors", Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Legal Affairs, 2022, p. 88.

d. Conclusion

In conclusion, both access rights provided for in Art. 3 and Art. 4 DA-P maintain the status quo, which is the de facto control of the manufacturers or data holders over the data.[117] However, this is now complemented with access rights of the user of the product or related service. It remains to be seen whether access rights can meaningfully limit de facto control, or whether they are merely an ineffective instrument.

3. Use of non-personal data by the data holder, Art. 4 (6) Data-A-P

To continue, Art. 4 (6) DA-P aims to provide for great change in the data economy. Accordingly, the data holder shall only use any non-personal data generated by the use of a product or related service on the basis of a contractual agreement with the user. The data holder shall not use such data generated by the use of the product or related service to derive insights about the economic situation, assets and production methods of or the use by the user that could undermine the commercial position of the user in the markets in which the user is active.

Especially in comparison to data protection law, which knows other justifications for the processing of personal data besides consent (Art. 6, 9 GDPR), the regulation in Art. 4 (6) DA-P seems very progressive – at least at first glance.[118] However, the requirements for effective consent within the meaning of Art. 4 (6) DA-P are extremely low:

According to the will of the legislator, the data holder is bound by the data use license to be agreed with the user. In principle, freedom of contract applies to the conclusion of such licenses. However, unlike consent under data protection law in Art. 6 (1) lit. a GDPR, Art. 4 (6) DA-P does not provide for any safeguards in favor of the user. In particular, there are no transparency requirements and the prohibition of tying does not apply here either. Furthermore, despite the fact that Recital 26 p. 1 DA-P declares the application of Directive 93/13/EEC to the terms of the contract between data holder and user in order to ensure that a consumer is not subject to unfair contractual terms, this protection will not achieve the desired purpose.[119] This is due to

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[117] Axel Metzger and Heike Schweitzer, ‘Shaping Markets: A Critical Evaluation of the Draft Data Act‘ [2023] ZEuP 1 (7).

[118] Moritz Hennemann and Björn Steinrötter, ‘Data Act – Fundament des neuen EU-Datenwirtschaftsrechts?‘ [2022] NJW 1481 para 15; David Bomhard and Marieke Merkle, ‘Der Entwurf eines EU Data Acts - Neue Spielregeln für die Data Economy‘ [2022] RDi 168 para. 50; Louisa Specht-Riemenschneider, ‘Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G‘ [2022] MMR 809 (816).

[119] Louisa Specht-Riemenschneider, ‘Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G‘ [2022] MMR 809 (816 et seq).

the fact, that permission to use data will often be the user's primary contractual obligation. However, according to Art. 4 (2) Directive 93/13/EEC the Directive does not apply to primary contractual obligations. Ultimately, therefore, the user will also have to agree to total buy-out contracts if he wants to use the product or the related service.[120] Contrary to what the wording suggests, Art. 4 (6) DA-P thus further consolidates the already existing technical-factual possibility of the data holder to use the data.[121]

The DA-P also does not contain any information on possible form requirements of the contract. Since the contract would in any case be subject to national law[122], which also does not contain any corresponding specifications, the documentation of contracts is problematic in cases where the contract was only concluded by implied consent.[123] However, what advantage a contract has in which the data owner is allowed to play out his strong position at will and which does not even have to be recorded remains open. The legislator cannot have been concerned with pure transparency regulations, because the information obligations already result from Art. 3 (2) DA-P. It is possible that the intention of the regulation was that the right of use of the data holder should supplement the right of access of the user to the effect that both can use the co-generated data as long as the individual interests are not violated.[124] If this is the case, however, the wording of Art. 4 (6) DA-P would be at least misleading.

4. Right to share data with third parties, Art. 5 Data-A-P

Cumulatively[125] to the right to data access in Art. 4 DA-P, the user can also demand from the data holder to grant a third party access to the data. As described above[126], third parties are so

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[120] Wolfgang Kerber, 'Governance of IoT Data: Why the EU Data Act will not fulfill its objectives' [2022] GRUR International 6 <https://doi.org/10.1093/grurint/ikac107> accessed 30 December 20; Louisa Specht-Riemenschneider, 'Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G' [2022] MMR 809 (816).

[121] Louisa Specht-Riemenschneider, 'Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G' [2022] MMR 809 (816).

[122] Matthias Leistner and Lucie Antoine, "IPR and the use of open data and data sharing initiatives by public and private actors", Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Legal Affairs, 2022, p. 93.

[123] Axel Metzger and Heike Schweitzer, 'Shaping Markets: A Critical Evaluation of the Draft Data Act' [2023] ZEuP 1 (11).

[124] Matthias Leistner and Lucie Antoine, "IPR and the use of open data and data sharing initiatives by public and private actors", Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Legal Affairs, 2022, p. 93 et seq.; Axel Metzger and Heike Schweitzer, 'Shaping Markets: A Critical Evaluation of the Draft Data Act' [2023] ZEuP 1 (11).

[125] Louisa Specht-Riemenschneider, 'Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G' [2022] MMR 809 (816).

[126] Cf. above A.III.5.d.

called data recipients – however, core platform services within the meaning of Art. 2 (2) Digital Markets Act[127] are exempt from the scope of Art. 5 DA-P.[128] This met criticism in the literature, because this exclusion might limit the practical impact of the proposed Regulation.[129] According to Art. 5 (1) DA-P, the data generated by the use of a product or related service must be provided to a third party without undue delay, free of charge to the user, of the same quality as is available to the data holder and, where applicable, continuously and in real-time. The data holder is not required to process or structure the data.[130]

a. Request or authorization by the user

Data access to a third party can be granted upon request of the user (Art. 5 (1) DA-P). However, the third party may not coerce, deceive, or manipulate the user to perform this act in any way that undermines or interferes with the user's autonomy, freedom of choice, or ability to make choices, including by means of a digital interface with the user (Art. 6 (2) lit. a DA-P). In addition, the request can also be made by a party acting on behalf of the user. How consent and, above all, the corresponding proof are to be implemented in practice remains an open question. As is already the case with personal data, consent management systems could be established in this regard.[131] According to Recital 25 DA-P, the user should be given the necessary technical interface to manage permissions, preferably with granular permission options (such as “allow once” or “allow while using this app or service”), including the option to withdraw permission.

b. General requirements

The data covered by the right under Art. 5 DA-P is no different from the data that must be made available to the user under Art. 4 (1) DA-P.[132] In addition, Art. 5 DA-P is also designed as an

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[127] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1.

[128] Art. 5 (2) DA-P; According to Recital 36 DA-P, this is because of the ‘unrivalled ability‘ of the the gatekeepers, to acquire data; cf. in this regard Axel Metzger and Heike Schweitzer, ‘Shaping Markets: A Critical Evaluation of the Draft Data Act‘ [2023] ZEuP 1 (14).

[129] Inge Graef and Martin Husovec, ‘Seven Things to improve in the Data Act‘ [2022] SSRN 3 <https://ssrn.com/abstract=4051793> accessed 30 December 2022.

[130] Louisa Specht-Riemenschneider, ‘Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G‘ [2022] MMR 809 (816); Torsten J. Gerpott, ‘Vorschlag für ein europäisches Datengesetz Überblick und Analyse der Vorgaben für vernetzte Produkte‘ [2022] CR 271 (275).

[131] Matthias Leistner and Lucie Antoine, “IPR and the use of open data and data sharing initiatives by public and private actors”, Study commissioned by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the Committee on Legal Affairs, 2022, p. 97.

[132] Louisa Specht-Riemenschneider, ‘Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G‘ [2022] MMR 809 (816).

in-situ access right and not as a transmission right. The data must have the same quality as is available to the data holder and, where applicable, access must be granted continuously and in real-time.

c. Trade Secrets, Art. 5 (8) DA-P

Moreover, according to Art. 5 (8) DA-P, the trade secrets of the data holder must also be taken into account in relation to the third party. Accordingly, trade secrets shall only be disclosed to third parties to the extent that they are strictly necessary to fulfil the purpose agreed between the user and the third party. Thus, a contract between the user and the third party is necessary, which bindingly defines the purposes of data access.[133] However, this agreement provides for potential for abuse, because it can be agreed independently of the data holder.[134] In addition to this agreement, the third party and the data holder may agree to specific measures to preserve the confidentiality of the trade secret.[135]

d. Prohibition of using the data for developing a competing product, Art. 6 (2) lit. e DA-P

Similar to Art. 4 (4) DA-P, Art. 6 (2) lit. e DA-P stipulates, that the third party shall not use the data it receives to develop a product that competes with the product from which the accessed data originate or share the data with another third party for that purpose. Due to the fact, that the wording so far only covers data generated by the use of products and not also by related services, a clarification in this respect is to be expected in the final version.

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[133] Matthias Leistner and Lucie Antoine, "IPR and the use of open data and data sharing initiatives by public and private actors", Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Legal Affairs, 2022, p. 97.

[134] David Bomhard and Marieke Merkle, 'Der Entwurf eines EU Data Acts - Neue Spielregeln für die Data Economy' [2022] RDi 168 (172, Rn. 23).

[135] Art. 5 (8) p. 1 DA-P.

5. Obligations for data holders legally obliged to make data available

a. FRAND terms for making data available, Art. 8 DA-P

The scope of application of Art. 8 (1) DA-P is limited to cases, where a data holder is obliged to make data available to a data recipient under Art. 5 DA-P or under other Union law or national legislation implementing Union law.[136] Provided that he grants access to the data voluntarily, Art. 8 DA-P therefore does not apply.[137] According to Art. 12 (2) DA-P, any contractual term in a data sharing agreement which, to the detriment of one party, or, where applicable, to the detriment of the user, excludes the application of Chapter III DA-P, derogates from it, or varies its effect, shall not be binding on that party. If the requirement laid down in Art. 8 (1) DA-P is met, the data holder and the data recipient shall agree on fair, reasonable and non-discriminatory terms and in a transparent manner in accordance with the provisions of this Chapter III and Chapter IV DA-P. When compensation is fair, is determined in accordance with Art. 9 DA-P.[138] In addition, the terms and conditions agreed on a contractual basis, with regard to the regulations on data access, data use, liability and legal remedies in the event of a breach of data-related obligations, are subject to content control pursuant to Art. 13 DA-P.[139]

Moreover, according to Art. 8 (3) DA-P, the data holder shall not discriminate between comparable categories of data recipients, including partner enterprises or linked enterprises, as defined in Art. 3 Annex to Recommendation 2003/361/EC, of the data holder, when making data available. In case of doubt, it is for the data holder to proof non-discrimination.[140] In addition, neither should he make data available to a data recipient on an exclusive basis unless requested by the user under Chapter II DA-P (Art. 8 (4) DA-P).

b. Compensation, Art. 9 DA-P

According to Art. 9 DA-P, the data owner may demand compensation for the provision of the data. However, any compensation agreed between a data holder and a data recipient for making

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[136] Cf. for a comparison to FRAND-requirements in other EU digital law Peter Georg Picht, 'Caught in the Acts: Framing Mandatory Data Access Transactions under the Data Act, further EU Digital Regulation Acts, and Competition Law' [2022] Max Planck Institute for Innovation and Competition Research Paper No. 22-12, 26 et seqq.
[137] Art. 12 (1) DA-P; Louisa Specht-Riemenschneider, 'Der Entwurf des Data Act - Eine Analyse der vorgesehenen Datenzugangsansprüche im Verhältnis B2B, B2C und B2G' [2022] MMR 809 (820).
[138] Cf. below at A.IV.5.b.
[139] Art. 8 (2) DA-P.
[140] Art. 8 (3) p. 2 DA-P.

data available shall be reasonable.[141] The DA-P does not explain which compensation is reasonable.[142] With regard to small and medium-sized enterprises, Art. 9 (2) DA-P also contains a special provision. Accordingly, any compensation agreed shall not exceed the costs directly related to making the data available to the data recipient and which are attributable to the request. What compensation is to be paid for with regard to small and micro-sized enterprises is explained in Recital 42 p. 2 DA-P. "These provisions should not be understood as paying for the data itself, but in the case of micro, small or medium-sized enterprises, for the costs incurred and investment required for making the data available."[143] The preference for small and medium-sized enterprises can be justified, moreover, by the fact that it might be commercially too difficult for them to develop and run innovative business models. With other words: they should be protected from excessive economic burdens.[144]

For other enterprises other than small and medium-sized enterprises Recital 31 p. 9 DA-P stipulates that the data holder is allowed to set reasonable compensation to be met by third parties, but not by the user, for any cost incurred in providing direct access to the data generated by the user's product. Therefore, reasonable compensation will be based on both the value of the data and the scope of the use rights granted to the third party.[145]

Finally, Art. 9 (4) DA-P provides for a transparency requirement: The data holder must always provide the data recipient with information setting out the basis for the calculation of the compensation in sufficient detail so that the data recipient can verify that the requirements of Art. 9 (1) DA-P and, where applicable, Art. 9 (2) DA-P are met.

c. Other Obligations

Furthermore, data holders and data recipients shall have access to dispute settlement bodies in order to settle disputes in relation to the determination of fair, reasonable and non-discriminatory terms for and the transparent manner of making data available.[146] Dispute bodies shall be certified by the Member States pursuant to Art. 10 (2) DA-P.

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[141] Art. 9 (1) DA-P.
[142] Wolfgang Kerber, 'Governance of IoT Data: Why the EU Data Act will not fulfill its objectives' [2022] GRUR International 7 <https://doi.org/10.1093/grurint/ikac107> accessed 30 December 2022, stating that there is no similar provision such as in Art. 20 GDPR or in the PSD2, which generally says that the compensation equals zero.
[143] Recital 42 p. 2 DA-P.
[144] Recital 44 p. 1 DA-P.
[145] Matthias Leistner and Lucie Antoine, "IPR and the use of open data and data sharing initiatives by public and private actors", Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Legal Affairs, 2022, p. 103.
[146] Art. 10 (1) DA-P.

Moreover, according to Art. 11 (1) DA-P the data holder may apply appropriate technical protection measures, including smart contracts, to prevent unauthorized access to the data and to ensure compliance with Art. 5, 6, 9 and 10 DA-P, as well as with the agreed contractual terms for making data available.[147] However, such technical protection measures shall not be used as a means to hinder the user's right to effectively provide data to third parties.

B. Conclusion and Future Prospects

With the DA-P, the Commission has taken the first step toward a horizontal and cross-sectoral legal framework for the European Data Economy. Despite many new incentives and regulations, however, some points, as shown, are only subject to unsatisfactory regulation. Here the final version will have to wait.[148]

In addition, the automotive industry in particular must also follow the current EU initiative to set a sector-specific legal framework for access to in-vehicle data, functions and resources.[149] Some sector-specific amendments to the already existing legal framework are expected in this respect. This may include new EU rules for services that are based on access to repair and maintenance data, but will also go beyond the current European type approval legislation to open it up to more in-vehicle data-based services.[150] Accordingly, the legislator might introduce novel regulations in the fields of car sharing, mobility as a service and in the insurance sector.[151] In general, the initiative is also part of the European strategy for data[152] and is closely related to the DA-P, because it is meant to build upon its principles while simultaneously address some sector-specific issues, including the bi-directional access to vehicle resources and the interplay

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[147] Axel Metzger and Heike Schweitzer, 'Shaping Markets: A Critical Evaluation of the Draft Data Act' [2023] ZEuP 1 (24).
[148] Angelica Fernandez, 'The Data Act: The Next Step in Moving toward a European Data Space' [2022] EDPL 108 (114).
[149] Cf. 'Access to vehicle data, functions and resources' <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13180-Access-to-vehicle-data-functions-and-resources_en> accessed 25 November 2022.
[150] Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, A European strategy for data, COM(2020) 66 final, p. 28.
[151] Cf. 'Access to vehicle data, functions and resources' <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13180-Access-to-vehicle-data-functions-and-resources_en> accessed 25 November 2022.
[152] Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, A European strategy for data, COM(2020) 66 final, p. 27 et seq.

between access to data and cybersecurity.[153] At the moment, the adoption of the Commission Proposal in this regard is expected for the 2nd quarter of 2023.

Against this backdrop, the use cases developed in the project may also become relevant again. This is especially due to the fact, that all use cases provide for applications and services using data generated either by the use of a vehicle or at least in a different source while operating a vehicle. Thus, both the DA-P and the revised Type Approval Regulation might be applicable with regard to non-personal data and the GDPR might be applicable with regard to personal data. However, the exact delineation between the Acts is yet open.

In particular, use cases like traffic flow prediction, parking space estimation or eco routing which have in common that they aim at improving the efficiency of traffic organization and energy usage, might have to be subject to a reevaluation under the future legal framework.

In conclusion, it is to be expected that the already existing complex legal framework of data access and data processing will be supplemented once again by another comprehensive legislative act.

[153] EU Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, 'Commission seeks views on possible measures on access to in-vehicle data', 30 March 2022, <https://single-market-economy.ec.europa.eu/news/commission-seeks-views-possible-measures-access-vehicle-data-2022-03-30_en> accessed 05 January 2023.

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