New data access rights in the digital age

DRAFT OF THE EUROPEAN COMMISSION'S DATA ACT: RULES FOR A "FAIR AND INNOVATIVE DATA ECONOMY"?

Executive summary

- On 23 February 2022, the European Commission published its proposal for a "Data Act".
- The intention of this planned EU regulation is to introduce the principle that all users should have access to the information and data that they have helped to generate in the digital sphere. Users should be able to use this data themselves or share it with third parties – including private companies – free of charge. Furthermore, public sector bodies should also be granted data access rights.
- According to the European Commission, this should promote a competitive data market and open up opportunities for innovative services.
- However, there is still a considerable need for discussion and improvement, especially in the areas of confidentiality of information, protection of trade secrets and protection of database rights from competitors.

Introduction

On 23 February 2022, the European Commission presented its proposal to regulate the sharing of device data generated by users as a further building block in its data strategy on what it calls the "path to the digital decade". According to this draft, the aim of the Data Act is not only to establish data access and usage rights across sectors in order to exploit the economic potential of this data, but also to ensure fairness in the digital sphere, promote a competitive data market and open up new opportunities for data-driven innovation.

I. Background and objectives

Data is generally considered to be the oil of the 21st century. The European Commission views data as the beating heart of the digital economy and projects significant potential for the expansion of the European Single Market based solely on the exchange, processing and refinement of data as well as its further use and – provided there is corresponding regulation – GDP growth in the EU totalling 270 billion euros by 2028. At the same time, 120 billions euros alone could be saved in the European healthcare sector and savings of 10 to 20% could be achieved in the transport, building and industrial sectors through real-time data analytics. The Commission estimates the value of new data-related services at 5 to 11 trillion euros and expects 5 to 10% faster productivity growth for companies that invest in data-driven innovation.[1]
This treasure trove of data, which is expected to reach 175 zettabytes by 2025 due to the increasing use of networked objects and the "Internet of Things", which is equivalent to a fivefold increase compared to 2018, is still largely untapped and its potential is far from exhausted. The draft of the Data Act which has just been presented is intended to remedy this, in particular through the following measures:

- Granting users and public sector bodies the right to access and use data generated by users and to share this data with third parties
- Regulation of standard data licensing agreements to rebalance power asymmetries between contracting parties
- Making it easier to switch between different data-processing services such as cloud and edge services

[1] You can find the European Commission's overview of the data at https://digital-strategy.ec.europa.eu/en/library/data-act-factsheet.

II. The measures in detail

1. Rights of users to access and use data generated by them

Users of technical devices – such as fully networked coffee machines, self-driving cars or industrial machinery – generate performance, environmental and usage data when they are in use. In most cases, solely the manufacturers of these devices have access to this data, which is often regulated by contractual provisions. The Data Act aims to break this monopoly on user-generated data. It therefore grants all users who contribute to the generation of this data both the right to access this data free of charge from the data holder (the device manufacturer) and the right to use this data themselves and for their own purposes. In addition to the right to access and use this data, users will be entitled to release this data to third parties – on a continuous basis and in some cases in real time. Furthermore, device manufacturers shall be required to design their devices in such a way that the device data is easily accessible and usable from the outset ("access by design").

However, if the data pertains to trade secrets, the data holder is only required to do this if the user or the third party has taken sufficient precautions to maintain confidentiality. Likewise, this user-generated data should not be used to develop products that could compete with the devices from which the data originated.

Micro-, small and medium-sized enterprises (SMEs)[2] shall be exempt from the above obligations so as not to impose an excessive burden on them. Conversely, "gatekeepers" of the digital economy, i.e. particularly large and influential companies such as Google or Facebook, should not be able to profit from the growing wealth of data and therefore shall not be entitled to receive any of this user-generated device data.

2. Protecting SMEs from "unfair" contract clauses

According to the European Commission, SMEs are often not in a position to negotiate fair data sharing contracts with more powerful market players. This in turn significantly hinders the flow of data and the potential for this data to lead to innovation and value creation. In order to protect SMEs from abusive standardised contract clauses in data use and licensing agreements and to rebalance existing power asymmetries between the parties, the Data Act therefore prohibits "unfair" contract clauses – modelled on the existing law on general terms and conditions. Standard exemptions from liability for intent and gross negligence, certain warranty limitations and other clause provisions specifically listed in the Data Act shall therefore be deemed invalid from the outset and shall not form part of the contract, while the rest of the contract shall remain unaffected. Model contractual terms are being developed by the Commission.

3. Right of public sector bodies to access and use data

Data holders shall also be required to provide user-generated data to public sector bodies free of charge if there is an "exceptional need" to do so, for example, so that real-time data can be used to immediately respond to and manage a public emergency, such as a sudden natural disaster. Data holders are also required to disclose data if this data could be used to prevent such a disaster in advance or the data is required to fulfil the public sector body's legal functions in the public interest. In such cases, however, the public sector body is required to pay a fee.

4. Making it easier to switch between cloud and edge providers

In addition to the measures proposed in the Digital Services Act, the Data Act includes new rules to make it easier for consumers to switch between different data-processing services, such as cloud and edge services, with a focus on preventing or getting around lock-in effects. For instance, service providers are required to remove all obstacles – whether they be technical, contractual or organisational – that make switching more difficult or simply

[2] See the European Commission's recommendation of 6 May 2003 (2003/361/EC), available at https://eur-lex.europa.eu/eli/reco/2003/361.

unappealing to consumers. In particular, the Act also requires that there be a certain degree of interoperability between different services so that data can be transferred easily from one cloud to another, that consumers can change providers free of charge and that the corresponding service agreements have a notice period of no more than 30 days.

5. Relationship to other regulations

According to the European Commission, the Data Act should fit seamlessly into and build on the existing regulations on data collection, use and disclosure. In particular, there are no overlapping data protection provisions and – insofar as the user-generated data are personal data within the meaning of the General Data Protection Regulation (GDPR) – the specific requirements for the processing of such data pursuant to Art. 6 GDPR must still be observed. However, there is a restriction on the ancillary copyright granted to database producers under Sec. 87a et seq. of the German Act on Copyright and Related Rights to protect their investment in the structured presentation of data. This makes it clear that this ancillary copyright shall not preclude the obligation to disclose the data.

III. Outlook

The Data Act is still currently in draft form and has just been submitted to the European Parliament and the European Council for discussion and approval. However, if it were adopted, the Data Act would not need to be transposed into Member State law; as an EU regulation, it has the same validity as a Member State parliamentary act.

Since almost every player in the digital economy will be affected by this EU regulation, its scope and impact can hardly be underestimated; the project cannot be described as anything other than an essential and consistent step on the "path to the digital decade". The European Commission's intention to create harmonised rules for fair access to and use of data is to be welcomed in principle. That being said, the Data Act in its current draft form raises a number of questions and concerns. It contains many vague legal terms and unclear provisions, especially with regard to the protection of trade secrets. It is unclear how the risk of the shared data being exploited to develop competing products can really be prevented. The disclosure of data envisaged under the Data Act could also lead to database protection rights being largely devalued. A competitor could abuse this disclosure obligation to reconstruct a company's protected database. The planned prohibition of certain rules in standard data sharing contracts should also be critically examined.

With this in mind, it remains to be seen how the further discussions and votes on the Data Act will develop. However, we can generally assume that the Data Act will be passed. Therefore, companies should start to familiarise themselves with the basic ideas and objectives of these new obligations, prepare for considerable adjustments in their data management procedures and draw up data licensing agreements.

Jörg Kahler
Lawyer, Partner
Berlin
joerg.kahler@gsk.de

Jörg Wünschel
Lawyer, Senior Associate
Berlin
joerg.wuenschel@gsk.de