

Specifying and Assigning “Bundles of Rights” on Data

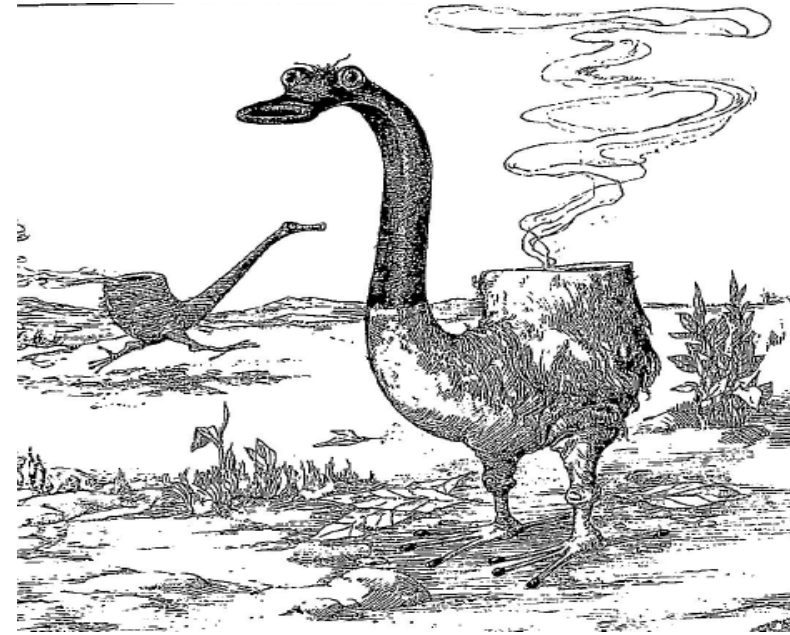
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**Governance of Data-driven Business Strategies under
Competition Law or Sector-specific Regulation**
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1. Introduction

Data as new key resource in digital economy

- but data is also a strange animal ...
 - + ... for the law
 - + ... and for economics
- How to deal with data?
 - + data ownership, data sharing, data access/portability, open data
 - + fair sharing of the value of data
 - + what governance do we need for data?
- Research questions:
 - + Thesis: "bundle of rights" approach can help us to solve the complex problems of data governance due to its flexibility!
 - + Application to current data policy discussions



(Kurt Halbritter: Halbritters Tier- und Pflanzenwelt, Hanser: München 1975, p. 21: "Kurzfüßiger Pfeifenraucher")

[based upon: Kerber, Wolfgang, Specifying and Assigning 'Bundles of Rights' on Data: An Economic Perspective (April 26, 2021). Available at SSRN: <http://dx.doi.org/10.2139/ssrn.3847620>]

2. Property rights theory and the "bundle of rights"-approach

- Property rights-approach: Coase (1960), Demsetz (1967), Furubotn/Pejovich (1972), ..
- "property" deconstructed as a "bundle of rights" on a good
 - + right to use, right to earn income from the good, right to sell the good etc.
 - + different actors can be holders of different rights of the same good
 - + but also several actors can have rights to use the same good
- Question: What is optimal specification and assignment of the bundle of rights?
 - + who should have what specific rights?
- Old property rights theory: applied this only to rivalrous goods
 - + rivalry in use: => advantage of assigning rivalrous goods to one owner
(with right to exclude others / physical property)
- Intellectual property rights: (innovation / creative works)
 - + non-rivalry in use, but innovation incentive problem (due to imitation problem)
 - + IPRs with limited duration of exclusivity before innovation in public domain
(balancing of innovation incentives and benefits of using it broadly)

3. The new world of bundles of rights on data (1)

- How are data protected in the law?
 - + personal data: bundle of rights of data subjects (data protection law / GDPR)
 - + non-personal data (often only trade secret law)
- Question: Do we need a new IP-like exclusive right on (non-personal) data?
 - + non-rivalry in use (data should be used as much as possible)
 - + but: excludability (secrecy, technical measures, no general copy problem)
 - => **exclusive de facto control** over data possible, which can solve problems of incentives for collecting / investing in data (which can be low or high)
 - => conclusion: no new exclusive right on data necessary!
- But: Exclusive de facto control over data can lead to a lot of problems
 - + under-utilization of data (rationale for more data sharing for innovation ...)
 - + access to certain data sets can be important for market entry / competition
 - + difficult problems in IoT-ecosystems with many stakeholders
- => policy discussion about more data access / sharing, open data, data intermediaries, data trustees etc. (voluntary / mandatory solutions)

3. The new world of bundles of rights on data (2)

Applying the „bundle of rights“ approach to the governance of data:

- optimal specification of bundles of rights on certain data sets and to whom these rights should be assigned
- Due to the non-rivalry of data it is very unclear whether an exclusive assignment of the bundle of rights to one actor is efficient and appropriate, i.e. **de facto exclusivity can be a big problem**
 - => often more complex solutions might be better, in which several, many or all actors have (usage) rights on certain sets of data (multi-stakeholder problem)
- Important: optimal bundles of rights for data can be very different
 - + due to different economic / technological conditions (+ normative objectives)
 - + requires a deep problem-specific analysis and balancing of the benefits and costs of different solutions for the bundles of rights on data
- For this also economic analyses are necessary that take into account the different types of market failure problems (competition, information asymmetry, transaction costs etc.) as well as other objectives as privacy, distributional aspects, ...)

3. The new world of bundles of rights on data (3)

Specification and assignment of data rights is often not sufficient:

- For effectiveness of a complex bundle of data rights (data sharing / access / portability) often additional complementary regulatory solutions are necessary
- **Interoperability / standardisation:**
 - + data interoperability
 - + technical interoperability with complementary products / services
- **Minimum standards for safety / security, data protection**

Therefore:

- Data governance often as integrated (often sector-specific) combinations of
 - + optimal specified and assigned bundles of rights on data with
 - + a package of additional complementary regulations (and a regulator)
 - + example: „Second Payment Service Directive“ (PSD2) with access to bank account data

4. Data policy as specification and assignment of bundles of data rights (1): Overview

- **Data protection law** (GDPR) specifies and assigns a bundle of rights to data subjects about their personal data
 - + have also some degree of excludability due to need for „consent“ (Art. 6(1)a)
 - + but also legal grounds to process personal data w/o consent of data subject (e.g. Art. 6(1)f: „legitimate interests“)
 - + data protection / privacy laws define very complex bundles of rights
- **Data access rights in competition law:**
 - + refusal to grant access as abusive behavior (e.g. Art. 102 TFEU)
- **Data portability rights:**
 - + Art. 20 GDPR (what scope of data?, feasibility? Etc.)
 - + as part of Australian „consumer data rights,“
- **Open data:**
 - + opening of data sets, which everybody can use (public domain)
 - + „data as infrastructure“ (e.g., public sector information)

4. Data policy as specification and assignment of bundles of data rights (2): Data access and portability rights in the DMA (1)

Digital Markets Act:

- Art. 6(1) a, Art. 6(1)i, Art. 6(1)h DMA: changes the bundle of rights on a specific set of data, namely those generated on the platform by business users and end users
 - Problem: Amazon marketplace collects data about transactions between business users and end users, and has de facto exclusive control over these data
 - + It does not make these data available enough to business and end users, and
 - + can use these data for their own competition with business users
- => DMA changes this bundle of rights between gatekeeper, business and end users

4. Data policy as specification and assignment of bundles of data rights (3): Data access and portability rights in the DMA (2)

- Art. 6(1)a: gatekeeper is not allowed to use these data in its competition with the business users (unfair competitive advantage with foreclosure effects)
=> limitation of the use of a data set for Amazon
- Art. 6(1)i: gatekeeper has to give business users access to these data (free of charge, aggregated and non-aggregated data, real-time, interoperability)
=> business users have far-reaching right to access these data
- Art. 6(1)h: End users have far-reaching data portability rights (aggregated and non-aggregated data, also non-personal data, real-time, etc.) for data they have generated on the platform
=> their bundle of rights is now much larger than bundle of rights (Art. 20 GDPR)
- What is the explanation?
 - + very important: these data are seen as been generated by business and end users, and therefore they should benefit from them („reward“)
 - + assigning these rights to business and end users and limiting the rights of the gatekeeper (matter of fairness but also positive for competition)

4. Data policy as specification and assignment of bundles of data rights (4): Data in IoT ecosystems and Data Act proposal (1)

Data in IoT-ecosystems / smart devices:

- Problem that manufacturers of smart devices get exclusive control over all data that are generated in the device,
 - and users, who (co-)generate the data by using the device, and independent service providers do not get access to these data
- => can be a problem both in B2C and B2B contexts !

New Data Act proposal (Feb 23, 2022): wants to address this problem

- objectives:

In this context, the Commission puts forward the proposed Data Act with the aim of ensuring fairness in the allocation of value from data among actors in the data economy and to foster access to and use of data.

Facilitate access to and the use of data by consumers and businesses, while preserving incentives to invest in ways of generating value through data. This

4. Data policy as specification and assignment of bundles of data rights (5): Data in IoT ecosystems and Data Act proposal (2)

Ch. II: B2C and B2B data sharing

Art.3 para.1: Obligation to make data generated by the use of products or related services accessible

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.

Art.4 para.1: The right of users to access and use data generated by the use of products or related services

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

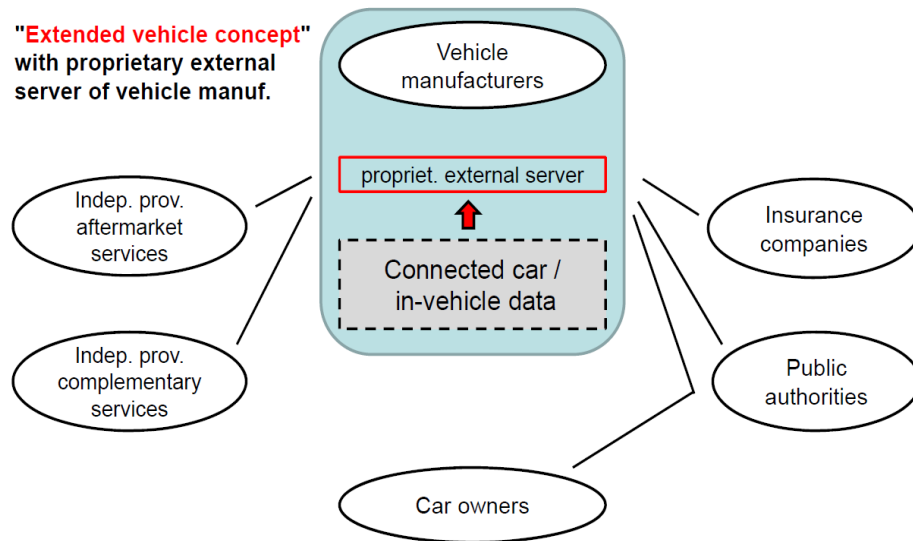
Art.5 para.1: Right to share data with third parties

Upon request by a user, or by a party acting on behalf of a user, the data holder shall make available the data generated by the use of a product or related service 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.

4. Data policy as specification and assignment of bundles of data rights (6): Data in IoT ecosystems and Data Act proposal (3)

Example: Data in ecosystem of connected cars

Current data governance concept of Vehicle manufacturers (VM):



- all data are directly transmitted to a proprietary server of the VM
- VM has exclusive control over
 - 1) access to the data and
 - 2) technical access to the car (closed system / no interoperability)
 => Gatekeeper Position

- VMs can get control over all secondary markets in this ecosystem and can foreclose independent service providers and leverage market power
- negative effects on competition, innovation, and freedom of choice of consumers on secondary markets (no fair and undistorted competition)

4. Data policy as specification and assignment of bundles of data rights (7): Data in IoT ecosystems and Data Act proposal (4)

Interpretation of different solutions as bundles of rights on data:

- **Extended vehicle:** Through exclusive de facto control the **VM** have a „property“-like exclusive position regarding the data, and are „de facto free“ how to use, share, and sell them to others (w/o „de jure“ rights) (=> gatekeeper position)
- Implementation of **open interoperable telematics platform** as different technological (!) solution, which would enable that car users have exclusive de facto control over the data, i.e. the **car users** would have an exclusive „property-like“ position and are free to use, share, and „license“ the data to others
- **Data trustee solution („shared server“):** all data are put under the governance of a neutral data trustee that allows access and use of data according to certain principles and objectives of the legislator (Specht-Riemenschneider/Kerber 2022)
- **Mandatory data access solutions to data**, e.g. through a sector-specific regulation (e.g. type approval regulation with a regulator), which ensure FRAND access to the data and the car (interoperability);
=> here still exclusive de facto control of VM over data (gatekeeper position) but it is limited through regulated access rights of service providers

4. Data policy as specification and assignment of bundles of data rights (8): Data in IoT ecosystems and Data Act proposal (5)

Solution of the „Data Act“: VM keep their gatekeeper position

- car users get a right to access the data and share the data with a third-party, but it is - in my view - not a data portability right (and can presumably not sell the data)
- data-sharing with service providers according to FRAND principles
- But:
 - + unclear whether these data are sufficient for service provider (also non-personal data but only raw data / no inferred data etc.)
 - + negotiation process with VM about fees (with dispute settlement process)
 - + no solution for technical interoperability
- => will not be sufficient for protecting competition on secondary markets
 - + option: combination with reform of type approval regulation for motor vehicles
- Bundle of rights on car data (preliminary analysis):
 - + VM keep with Data Act their exclusive control on all data generated in the car and can monetize them freely (car users do not benefit from value of car data)
 - + users get only weak rights to use and share these data for certain specific purposes but have no control over these data