

The EU Data Act: New data access rights – a first evaluation

Prof. Dr. Wolfgang Kerber
(University of Marburg)

3rd GRUR Expert Round Table Webinar 2022
18 May 2022

1. Introduction

- Critical analysis of Data Act Proposal only on data access/sharing rights of users with respect to IoT data (ch.II + III)
- I welcome the objectives, although they are not clear ...
- **I share many of concerns of position papers** from current “feedback”, esp.
 - + large burdens for firms; B2B: no clear market failure shown; problems with GDPR; many unclear terms and provisions, ...
 - + especially: **broad “one size fits all” approach does not fit ...** (in many ways)
- My paper: Kerber: Governance of IoT Data: Why the Data Act will not fulfill its Objectives (April 8, 2022; SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4080436)
 - + my economic perspective: What are the effects of the Data Act ?
 - + presumably not achievable:
 - > unlocking many data for innovation and competition (on aftermarket etc.)
 - > consumer empowerment (“meaningful control” over IoT data)
 - > fairness of allocation of value from IoT data
- My presentation: will focus on a few fundamental issues and concerns (and not much on details of DA proposal; see paper)

2. Why governance of IoT data is so important for us all (1)

How will our future world look like?

- IoT devices spread very fast, and exponential growth of collected data through IoT devices (and: no indication of an under-investment in IoT devices)
 - IoT devices will be **everywhere** (home, working place, public sphere), and **collect data on all of us all the time** (as persons but also on firms; „spying on us“)
- => Governance of IoT data is and will be a very critical issue in a digital society!
+ what data are collected, who has control over them, who can use them for what

Consumers: „Meaningful control“ over collection/use of IoT data from own devices?

- Does data protection law help us? => not really
 - + GDPR gives us theoretically strong rights but they are not effective
 - + “consent” does not work as effective instrument for controlling collection/use of our personal data (=> leading to discussions about PIMS etc.)
- Will competition (betw. IoT manuf.) work regarding agreements about use of data in initial sale contracts about IoT devices? (Art. 3(1), 4(6) DA) => very improbable
 - + we know that competition does not work with regard to privacy-friendly terms
 - + it cannot be expected that it will be different with these initial contracts

2. Why governance of IoT data is so important for us all (2)

Implications for initial contract between seller of IoT device and consumers?

- existence of serious market failures (esp. information and behavioral problems)
 - expected market result: consumers will (have to) accept contracts with very broad consent to the use of all collected data by the data holders for the entire life-cycle of IoT device
 - implies: consumers will be left with „non-waivable“ user rights of Art. 4 and 5 DA
 - Any other specific protections for consumers?
 - + only precontractual transparency rules but otherwise only freedom of contract
 - + no granular choice options, what data are collected, for what they are used, and which firms they are shared with; and: we as consumers are „locked in“
 - + many aspects of this contract are unclear (selling of IoT device, change of data holders, termination of contract etc.)
- => DA does not help to solve this market failure and „empower“ consumers for using this contract for „meaningful control“ over IoT data generated w. their own device
- Strange asymmetry: users are protected against exploitation by „third parties“ (coercion, deception, manipulation / dark patterns, and „profiling“ (Art. 6(2) DA) but not in a similar way protected against such behavior by manufacturers / data holders

3. Does DA introduce „exclusive property-like position“ on data?

DA starts with correct diagnosis of main problem regarding IoT data:

- Manufacturers of smart devices can **get through their own technical design exclusive de facto control** over all data generated by IoT device, leading to
- **access problems for:** + **users** who (co-)generate the data by using their device
+ **firms** for providing services / data-driven innovation
 - => - competition problems, e.g. on secondary markets
 - negative effects on choice of users for services etc.
 - negative effects on innovation / under-utilization of data
 - no fair sharing of the value of data
- exclusive „de facto control“ over non-personal data is the problem !
 - + See recital 6: „In order to realise the important economic benefits of **data as a non-rival good** for the economy and society, a **general approach to assigning access and usage rights on data is preferable to awarding exclusive rights of access and use**“.
 - + corresponds to „bundle of rights approach“, in which rights on data can be specified and assigned to multiple actors and stakeholders

3. Does DA introduce „exclusive property-like position“ on data?

What does exclusive „de facto control“ of data imply?

- de facto exclusivity can be achieved by technical design / protection, which ensures that only one entity (the „data holder“) has control over these data,
 - + can access and use them, and
 - + can make them de facto available to others (i.e., „licensing“ them)
- if technical control works, then de facto exclusivity grants data holder the same economic position like an absolute („inter omnes“) exclusive right on data
 - + one example for how „technology“ can replace „law“
 - + data holder gets an „exclusive property-like position“ on data !

What does the DA do with „exclusive de facto control“ over IoT data? (1)

- DA gives the manufacturers the right (and even recommends it) to choose a technical design for their IoT device, which ensures that they get the exclusive de facto control over the data generated by this device!
- => DA explicitly allows (and encourages) manufacturers to get an “exclusive property-like position” on IoT data !

3. Does DA introduce „exclusive property-like position“ on data?

What does the DA do with „exclusive de facto control“ over IoT data? (2)

- But: DA explicitly also clarifies that manufacturers have no „de jure“ rights on non-personal data and does not „confer“ any new „right“ to them (rec. 5)
- However: this is not a problem for data holders, because they do not need „de jure“ rights on non-personal data, as long as the law respects their exclusive de facto control position over the data, which is exactly what the DA is doing
- DA recognizes exclusive „de facto control“ over data as legitimate; with justification for preserving incentives (as typical justification for traditional IP rights)
- In addition, DA entails a long list of provisions that protect the exclusive de facto control position of data holders (e.g., „in-situ access“, Art. 5(4), 11 (1),(2)...)
 - => it looks like a protection of de facto exclusivity of data that is similar to IPRs
- Rules of Ch.III (e.g. reasonable compensation): extend such a legal recognition of exclusive control positions also to many other kinds of data (beyond IoT data)

3. Does DA introduce „exclusive property-like position“ on data?

Conclusions and analysis:

- DA seems to specify and assign the following „bundle of rights“ on non-pers. data:
 - (1) manufacturers (data holders) get a legally respected „de facto exclusive control“ position over IoT data (through technical design) = „exclusive property“
 - (2) users of IoT devices get these access and sharing rights (Art. 4, 5 DA)
- user rights limit the exclusivity but user access and sharing rights seem to be weak and rather ineffective => exclusivity for data holders is not much limited!
- But: What about Art. 4(6) about the initial contract, requiring that use of these non-personal data by data holders should be based upon a contract with users?
 - => this questions that DA assigns an „exclusive property“ position to data holders but this option for control might not work in reality (at least for consumers)
- important: if we abolish Art. 4(6), then we get de facto this „exclusive property“ ...

=> big mystery what the DA is doing here! Much need for clarification!

3. Does DA introduce „exclusive property-like position“ on data?

Other question: Should we have such an „exclusive property“ position of data holders on non-personal data (based upon exclusive de facto control)?

- IP law: + incentives as justification for IPRs
 - + but: balancing incentives for innovations vs. benefits of wide-spread use
 - + solving of the incentive problem with IPRs and ensuing monopoly prices comes with high welfare costs: „dead weight“ losses
 - + exclusivity of IPRs always limited: patent duration, „fair use“ etc.
- Problem: technical exclusive control over data is absolute (w/o any limitations)
 - + additional “user rights” can be understood similar to limitations in IP law
- What is the optimal bundle of rights on data / optimal data governance solution?
 - + discussion so far showed that
 - + „balancing between incentives for data generation and benefits of broad use of data“ can lead to very different optimal solutions,
 - + depending on the specific economic and technological conditions in different sectors and contexts

3. Does DA introduce „exclusive property-like position“ on data?

How large is the incentive problem for IoT data?

- Specific economic situation regarding IoT data:
 - + IoT devices are sold, rented or leased, i.e. the users are paying a price
 - + not clear why the costs of manufacturer for investing in IoT device and in data-generation should not be covered by the price (as other costs)
 - + if data generation necessary for IoT functionality, then users are willing to pay a price that covers these costs (what is the market failure here?)
 - => economic rationale for additional exclusive position as incentive is unclear
- Incentive argument very unclear in DA: no evidence for an under-investment
 - + Incentives for what? For (a) collecting data, (b) generating data, (c) investing in data-generating IoT devices, or (d) investing in extracting value from data?

Conclusions:

- => very unclear why „exclusive property“ (with or w/o user rights) should be the optimal solution in these very different IoT contexts
- => We should be very cautious about embarking on a path of (de jure or de facto) „exclusive property“ on data and allowing generally manufacturers to design their IoT products to get as much data as possible under their „exclusive control“

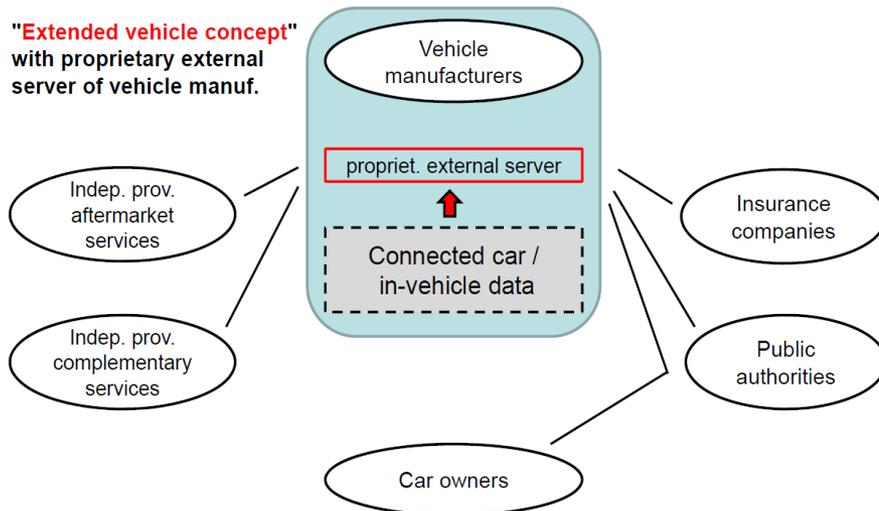
4. Effects of the DA on competition and innovation (1)

- Discussion about data in DA:
 - + not much discussion about what manufacturers / data holders do with their IoT data, over which they have exclusive control
 - + DA suggests they can do anything they have done so far (except Art.4(6) DA)
- If data holders have exclusive control over IoT data, they are free to
 - + use it for improving their products or new products and related services
 - + sell the access to the data to other firms (training algos, other innovation etc.)
 - > but also in a discriminatory way, e.g., also exclusivity agreements
 - + monetize them with monopoly prices („market value“) that can also lead to under-utilization of data and less innovation
 - + not use it themselves but also not making it available to others (e.g., as part of a strategy getting control over data in order that others cannot use them)
 - + use it for controlling other markets, for which the data is necessary, e.g.
 - > repair and (predictive) maintenance services / other complementary serv.
 - > getting gatekeeper position for entire IoT ecosystems with many markets

4. Effects of the DA on competition and innovation (2)

Example: Data in ecosystem of connected cars (Kerber 2018, 2019)

“Extended vehicle”: 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

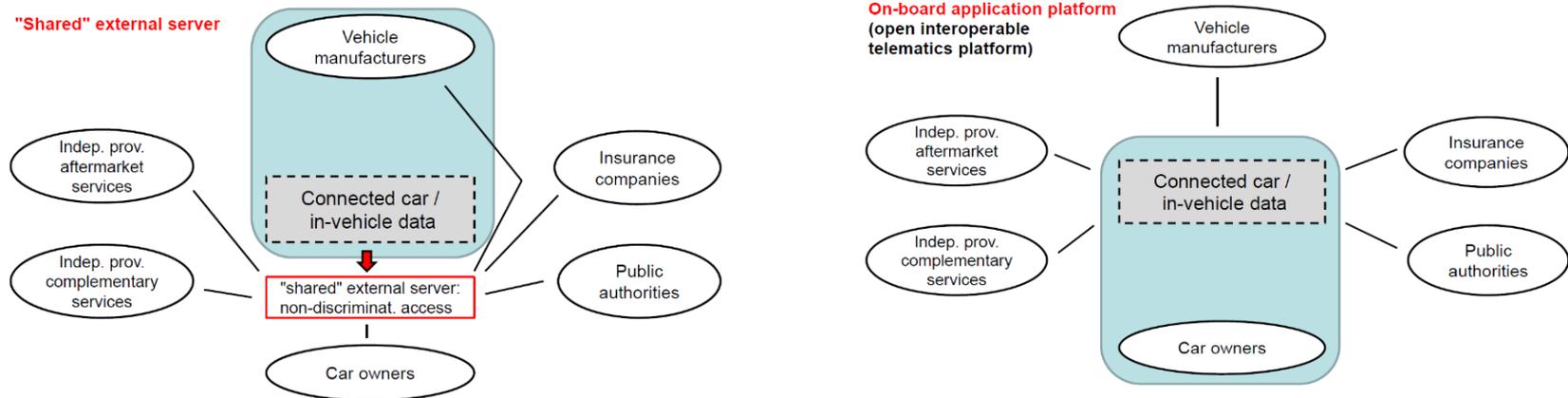
- **VMs can get control over all secondary markets in this ecosystem** and can foreclose independent service providers and leverage market power
=> **negative effects on competition, innovation, and consumer choice**
- Independent service providers and consumer associations demand a regulatory solution for these problems (policy discussion in the EU since 2016)
=> EU Commission has acknowledged the problem but so far no solution

4. Effects of the DA on competition and innovation (3)

- General question: Do user rights of Data Act solve problem and allow to provide
 - + aftermarket services etc. / effective competition on these secondary markets?
- huge problems: (Kerber 2022, 10-14)
 - + insufficient scope of data: only raw data but also derived/inferred data needed
 - + often access to (proprietary) software and tools needed for repair and maintenance services (=> technical interoperability not addressed at all in DA)
 - + innovation of new services will need access to aggregated data sets, which are hard to collect by using only individual data sharing
 - + a lot of hurdles for data sharing agreements of TP with data holders: bilateral negotiation, “in-situ” access, confidentiality agreements, technical protection, ...
 - + weak incentives for users of exerting these rights ...
- => data sharing right of users will not be sufficient for most repair / other services
- Example “connected car”: it is already clear that DA solution will not work
 - + currently new consultation about additional sector-specific regulation
- => much more far-reaching targeted FRAND-solutions necessary for direct access of firms to all data that they need, and also technical access to IT system (software etc.) (=> reforming type approval regulation for motor vehicles)

4. Effects of the DA on competition and innovation (4)

Alternative data governance solutions: (beyond „extended vehicle concept“)



- **data trustee solution:** "shared server" operated by neutral entity (Specht-Riemenschneider/Kerber 2022)
- **open interoperable telematics platforms:** data stored in the car, and car users have direct control over whom to give access to data and the car
 - => **both solutions would eliminate gatekeeper position of VM**
- TRL study 2017: both solutions superior to "extended vehicle" concept
 - => alternative data governance models that do not rely on exclusive de facto control of manufacturers (which is the standard data governance solution of the DA)
 - => **problem: DA does not consider alternative data governance models !**

4. Effects of the DA on competition and innovation (5)

Additional problems: **Data concentration, data power, and gatekeepers**

- legal recognition and protection of „exclusive de facto control“ positions can increase legal certainty for data holders, which can facilitate data markets
 - manufacturers can sell the future data stream from their sold devices, e.g. by selling the data holder position (or make exclusive licensing agreements)
 - + most manufacturers will not commercialize their IoT data themselves
 - it can be expected that large data companies, who specialize in extracting value from data / monetizing them, will build up entire portfolios of data streams from many IoT devices and combine them
 - + these data companies can also be GAFA / gatekeeper firms (DMA), which could combine the IoT data with their platform data
 - DA (Art.5(2)) prohibits the users to share the IoT data with gatekeeper firms, but no restrictions for manufacturers/data holders to sell the IoT data stream to them
- => „exclusive de facto positions“ can lead to a further huge increase of data concentration, data power, and economic power of very large digital firms (including gatekeeper firms / DMA)

4. Effects of the DA on competition and innovation (6)

Effects of DA on (data-driven) innovation:

- objective of „unlocking data“ for innovation
 - + unclear to what extent DA also wants to make data available for innovations unrelated to the IoT device and cross-sector
- due to the weak and often ineffective data access and sharing mechanism of user rights, very difficult for third-parties to get access to many data for innovation
 - + e.g., large data sets for training AI / algorithms
- Important option: enabling more supply to data markets
 - + Can users sell their IoT data to firms that can build aggregated (and combined) data sets, whose use can be offered on data markets to innovating firms?
 - + Can the user rights mechanism be used for „unlocking“ data as an additional supply to data markets (which also might lead to competition w. data holders)?
 - + What is the role of data intermediaries (DGA) in that respect?
- Considerable positive effects on innovation through DA only, if a large amount of data can be „unlocked“ through the user rights mechanism!
 - + this is very unclear and would require many improvements and clarifications ...

5. Conclusions (1): Assessment

- DA starts well with diagnosis of exclusive de facto control of manufacturers over data as main problem for not enough access and use of IoT data
 - Introducing additional rights is a good approach, but user rights mechanism is too weak and ineffective (need for additional direct access rights)
 - Too much strengthening of position of data holders by introducing a de facto „property-like“ protection of non-personal IoT data,
 - + which is not limited enough through these weak user rights and
 - + makes sharing of IoT data via users hard, expensive, and unattractive
 - + large concerns about more data concentration and data power in the future
 - far not enough unlocking of data for innovation and competition
 - nearly no consumer empowerment regarding collection/use of IoT data
 - fairness in allocation of value from data not really addressed in B2C situations
- => wrong balancing between objectives of the DA:**
- + too much emphasis on strengthening data holders
 - + not enough on innovation, competition, consumer empowerment, fairness
- => not clear whether Data Act is in line with objectives of European strategy for data**

5. Conclusions (2): What should we do?

- main problem of DA is **too broad horizontal approach**:
 - + one data governance solution (property-like „exclusive de facto control“ of manufacturers plus non-waivable user rights) is equally imposed as solution to very different problems and situations (with same data set and same rules)
 - + this leads both to too large costs and too small effectiveness

Few general recommendations:

- (1) Make different solutions for B2C and B2B, because type and extent of market failures are very different
- (2) Do not focus on one data set but on problem-oriented data access solutions (scope of data, access to software etc.) for provision of services, innovation, ...
- (3) Open the regulation and encourage also other data governance solutions that do not rely on „exclusive de facto control“ of manufacturers, e.g. data trustee solutions, and encourage other ways of solving possible incentive problems
- (4) Be very cautious not to introduce (unintentionally) a de facto exclusive property on non-personal data => dangerous path for innovation and data economy
- (5) Stick to objectives of more data for innovation/competition, more consumer empowerment / fairness, and not reduce ambitions to more repair services ...
- (6) Legislators should not rush to legislative decisions ... very complex problems