FCCR-Fachtagung

Daten als Ressource – Regulierung als Hindernis oder Motor der Innovation?

Thomas Weck

DATA EXCLUSIVITY AND DATA SHARING

Data Act covers access for 2 different reasons

- Solving the problem of who is entitled to data if data are **co-generated** by…
  - Manufacturers of a device (control access),
  - Professional operators of a device (e.g. aircraft operator), or
  - Private operators of a device (e.g., consumer running a car)

- (Data sharing in the **public interest**)

Is there a need for statutory sharing obligations for co-generated data?

Existing law

- Data access is based on contractual freedom
- Sharing is mandatory under special circumstances only (essential-facility doctrine)
    - Reason: Mandatory data sharing would undermine business interests in the collection of data (and innovation)

Problem & proposed solution (Data Act)

- Data sharing is inhibited by manufacturers' exclusive control of devices / unclear rights in data
- At the same time, machine-generated (e.g., aircrafts, car) data are not the core of the manufacturers' business → mandatory data sharing unlikely to disrupt business
- Art. 4 Data Act: data sharing obligation for "connected products"

What is to be shared?

Art. 4(1) Data Act

- Raw data and related metadata (uniform format?)
- Not: (1) information derived from the processing of data with complex algorithms or (2) algorithms to process data

Open question

- Need to modify scope of sharing obligations by Data Act based on:
  - Where data come from (= products) or
  - What data measure (= information value)?

What about special rights in data?

Rights of affected private parties (especially GDPR)

- Rights of affected third parties can thwart essential-facility claims under existing law
- Solution by Data Act: Not the businesses interested in access, but third-party users of connected devices are empowered to claim access/share data for defined purposes (Art. 4(1), 5(1) Data Act)
  - Example: consumers bringing their car to the repair shop
- General rules continue to apply where there is a discrepancy of interests between access claimant and affected third party

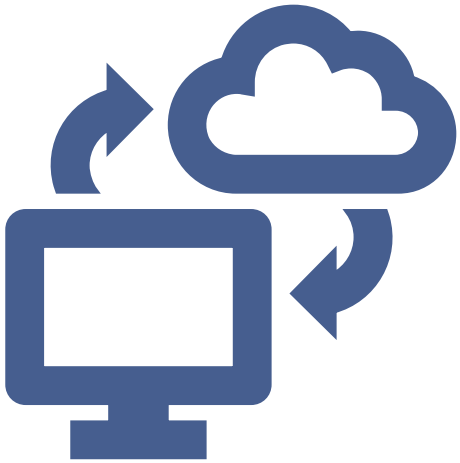
Trade secrets by data holders

- Since data are co-generated, trade secrets can generally only be recognized for the data holder's own added value
  - Note that knowledge of data alone will often not be enough to appropriate that added value
  - Extended rights may be necessary if data access facilitates exploitation of trade secrets
- Data Act limits reliance on trade secrets in Arts. 4-6 (controversial!)

DATA INFRASTRUCTURES AND DATA PORTABILITY

EU regulation covers two types of data infrastructures

- **Private infrastructures** (FFDR, Data Act, DMA)
  - Notably: infrastructures of cloud service providers (CSP)
- **(Public infrastructures** (FFDR, DGA))



Characteristics of private data infrastructures (CSP)

- CSP allow for data storage and for processing of stored data
- Development as **stand-alone** business **or** as **part of digital ecosystems**
  - Digital ecosystems operate as…
    - **Market participants** and
    - **Rule-setters** for other market participants
  - (Digital ecosystems may be built around so-called “core platform services” and shielded from outside competitive advances (→ DMA))

2 opposing trends

- **Modularization of software and decoupling of software functionalities**
  - Software functions are outsourced and provided as a single-purpose micro-services through an interface
  - Mix and match of specialized services

- **Concentration tendencies around intermediaries**
  - The offer of data storage space may be bundled with online market places for customized products and services, or benefit from being embedded in a digital ecosystem built around economic platforms (= network effects)
  - Benefits: single organization more efficient; large service providers can establish industry standards most easily (but: centralized standardization codifies the status quo)

Need for regulation?

- **Modularization trend** facilitates market entry for basic storage services and individualized processing services
  - But: modularization leaves less scope to individual service providers for creation of added value

- **Concentration trend** is unlikely to seclude markets for basic storage, but may contribute to permanent tipping of linked platform markets (market places)
  - This may contribute to unassailability of existing digital ecosystems

→ Safeguards necessary to keep market dynamic

Asymmetrical regulation of CSP (as part of large digital ecosystems)

- **DMA** imposes data access obligations on large digital ecosystem operators („gatekeepers“) to prevent self-preferencing (Art. 6(8)-(11) DMA)
- **Data Act** blocks access to data for „gatekeepers“ in terms of the DMA (Art. 5(2), 6(2) Data Act)

- But: access claims under Data Act are made **by users** of connected devices out of their **own interest**, not by ecosystem operators (see **sl. 6** above)

→ Restrictions in Data Act justified?

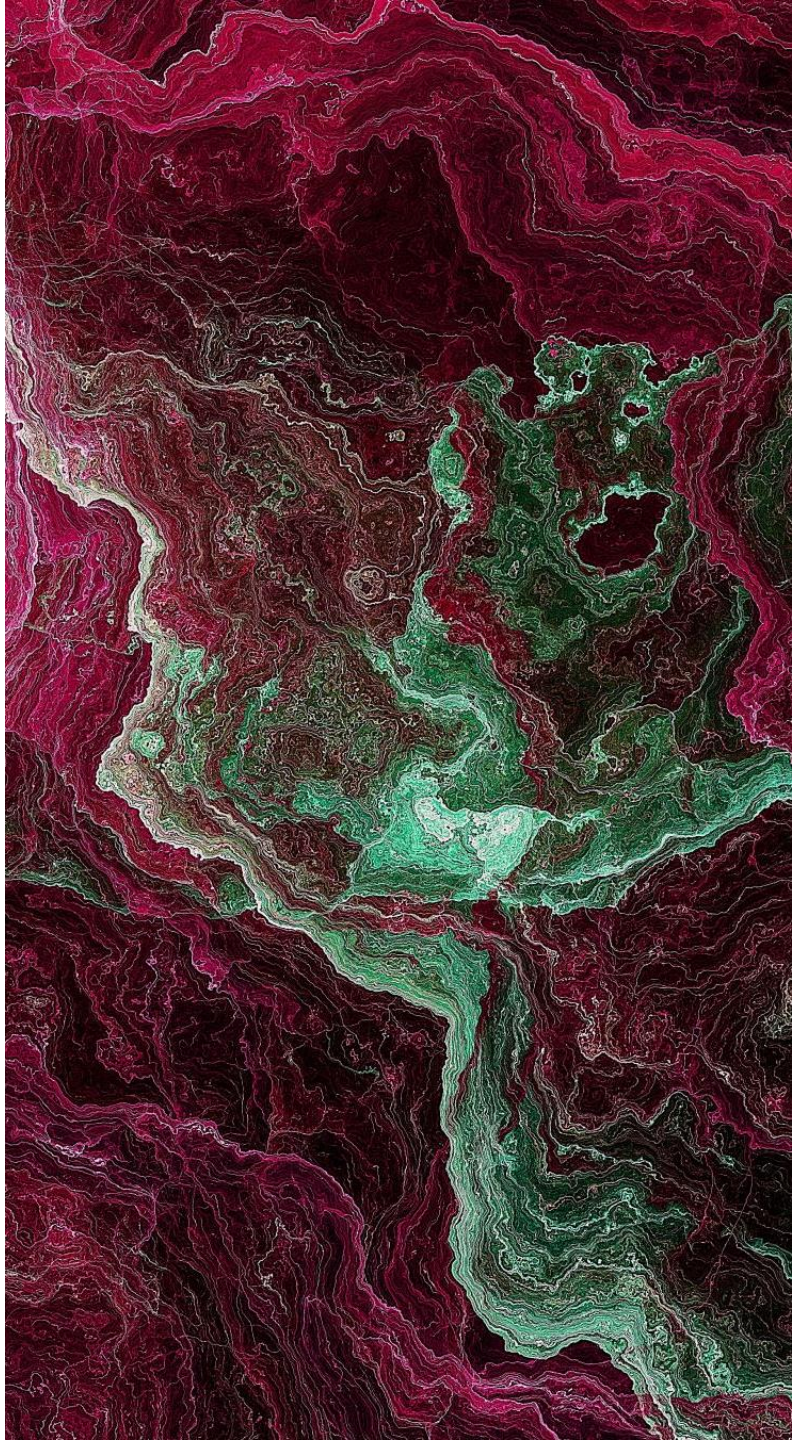
Topic 2

Switching of CSP and functional equivalence

- **DMA** addresses lock-in of private users of gatekeeper services with "data portability obligations" (Art. 6(9) DMA)
  - Similar: financial market rules allowing consumers to switch to another bank without service disruption
  - Similar: telecom rules allowing consumers to switch to another telecom provider without giving up their phone number

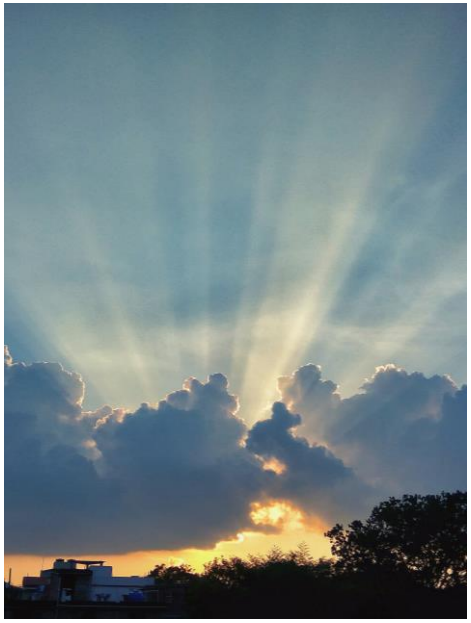
- **Data Act** facilitates switching by requiring CSP to ensure "functional equivalence" of own/target CSP services (Art. 22a ff.)
  - But: the majority of business customers of CSP multi-home, and basic CSP services are substitutable
  - Moreover, target CSP have their own interest to facilitate switching by business customers to the extent possible

→ Situations sufficiently comparable to justify the transfer of portability concepts from consumer-oriented regulation to business users?



Topic 3

Is regulation needed to facilitate switching or can we trust that markets will remain dynamic and correct themselves?



- At the level of **users**, the needs change and business users multi-home → existing lock-ins may increase, but also decrease due to shifting demand
- At the level of **CSP**, market standards (e.g. SWIPO codes of conduct) have been developed based on already existing EU regulation (FFDR)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