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EU rewriting the rules for the Internet of Things and Cloud Computing

EU Commissions submits proposal for a Data Act

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1 Introduction

In February 2020, the EU Commission presented its strategy to create a single market for data.[1] Having had a strong focus on the area of personal data, the Commission is now taking a broader perspective, including both personal and non-personal data. The EU data economy is estimated to grow from €301 billion to staggering €829 billion in 2025, constituting an estimated 5,8 % of EU GDP[2] and creating an enormous potential for growth, innovation and welfare.

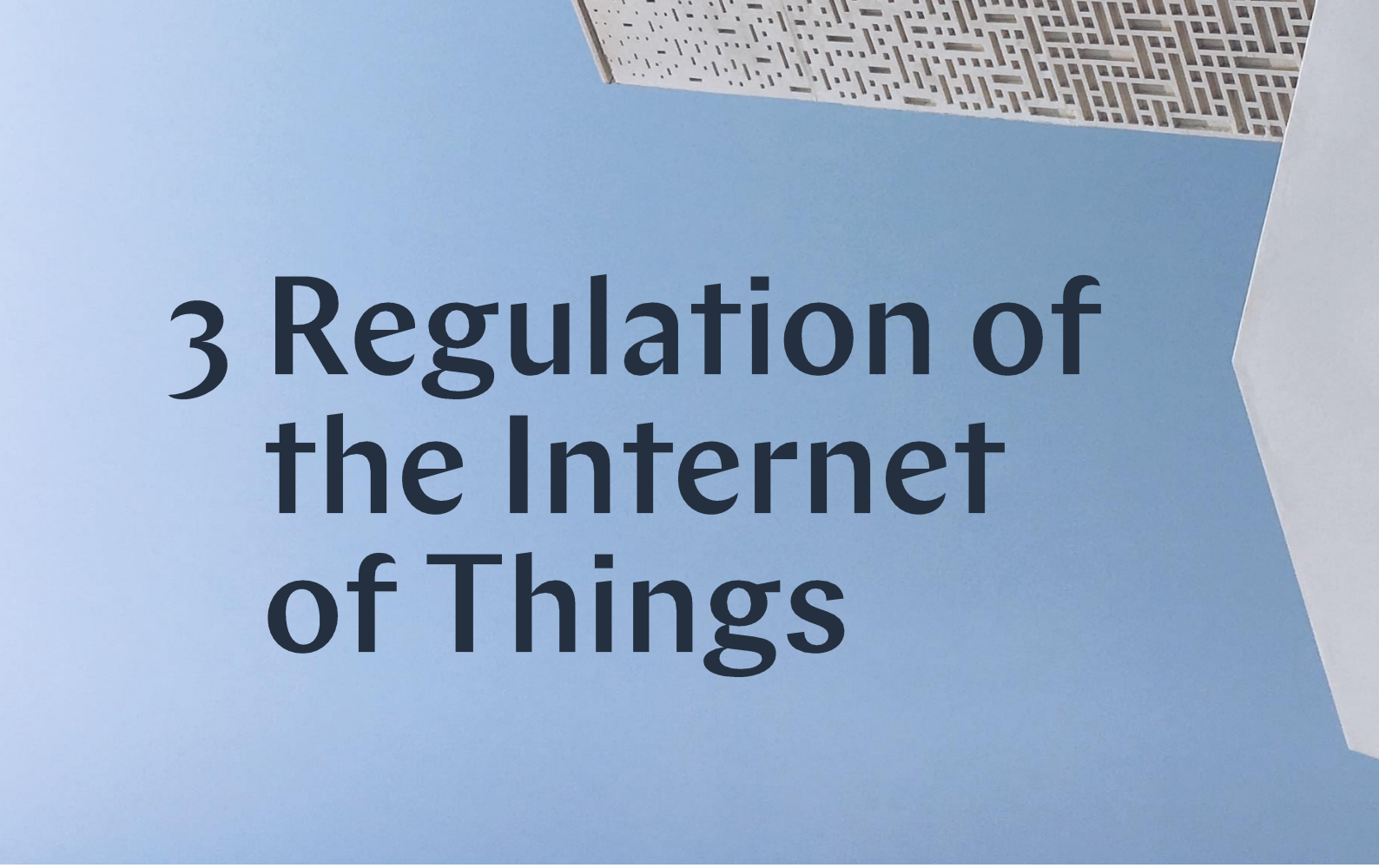
On 23 February 2022, the Commission submitted a proposal for a Data Act, more specifically a regulation on harmonised rules on fair access to, and use, of data. The proposed regulation focuses on Internet of Things, i.e. data generated by products and related services, as well as cloud services. When implemented, the Data Act will rewrite the rules for the EU data economy. All companies conducting or planning to conduct business based on the use of data generated by products will need to adapt to these new rules of the data game.

[1] https://digital-strategy.ec.europa.eu/en/policies/strategy-data

[2] https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/european-data-strategy_en#projected-figures-2025

2 Summary

- The proposed Data Act affects all market players engaged in the Internet of Things as well as cloud service providers.
- The Internet of Things is transforming the economy, including sectors such as life science and health care, energy, real estate, automotive and manufacturing.
- The proposed Data Act sets out rules for increased data sharing between Users, Data holders and third parties wanting to provide services based on data. These rules include rights and obligations to get/provide access to data, restrictions in the freedom of contract in data sharing agreements and price regulations.
- The proposed Data Act sets out rules obligating cloud service providers to facilitate customers switching between providers as well as restrictions on third country transfers of non-personal data.



3 Regulation of the Internet of Things

Value potentials and barriers

The Internet of Things is transforming the economy. Few sectors will be unaffected by the increased use of sensors, virtual assistants and other products generating enormous amounts of data. To take a few examples:

In the **life science and health care sectors**, the Internet of Things is used in e.g. remote health care monitoring, clinical trials and emergency notification systems.

In the **energy sector**, the Internet of Things is used e.g. to create smart grids and optimize wind farms.

In the **real estate sector**, the Internet of Things is e.g. used in proptech solutions for smart buildings.

In the **automotive sector**, the Internet of Things is e.g. indispensable in the development autonomous vehicles.

In the **manufacturing industry**, the Internet of Things is a fundamental technology in the shift towards Industry 4.0.

There are thus few industries and sectors that will not be affected or even fundamentally transformed by the power of Internet of Things and companies all over the world are developing IoT strategies and solutions to gain and keep competitive advantage.

However, according to the EU Commission, there are important barriers to data sharing preventing an optimal allocation of data to the benefit of society, including lack of incentives for data holders to enter into data sharing agreements, uncertainty about rights and obligations in relation to data, bottlenecks impeding data access etc.[3] These barriers form the background to the Data Act and the purpose is to reduce or eliminate them.

Who owns the data?

One of the reasons for the existing barriers identified by the EU Commission is unclarity as regards ownership of data. Who owns the data generated by products and related services? In most, if not in all, EU countries the answer is: no one. While there are rules, for example in the GDPR, laying down restrictions on the use of data, data cannot be owned in the typical legal sense of the word, giving the owner the legal right to exclude everyone else from using it. The EU intellectual property right laws *can* also cover data, but typically *do not*, expect for when data is also a trade secret.

To settle any uncertainties as to the status of data from an EU intellectual property law perspective, the proposed Data Act intends to make it clear that databases containing data obtained from, or generated by, products or related services are not even covered by the so-called *sui generis* right under the Database Directive.[4]

With that as a starting point the proposed Data Act intends to establish not rules of ownership to data but rights and obligations between the market players and the public sector regarding access and use of data.

[3] Section (2) of the preamble to the proposed Data Act.

[4] See article 35 of the proposal and directive 1996/9/EC.

Users, Data holders and Third parties

There are three main categories of market players in the part of the proposal covering the Internet of Things:

Users, meaning a natural or legal person owing, renting or leasing a product or receiving a service.

Data holders, meaning a legal or natural person having legal rights or obligations, or the ability to make certain data available (through the technical design of the product).

Third parties, meaning any third parties to which a Data holder makes data available at the request of a User.

The proposal contains rules about the relationships between Users, Data holders and Third parties as regards data generated by products and related services. It also contains rules about certain rights for public bodies to obtain access to data under certain exceptional circumstances, which are not covered in this white paper.

Data sharing between Data holders and Users

The proposed Data Act contains important restrictions for Data Holders on how they can process, commercialise and in other ways use data generated by their products or related services.

Data access rights for Users

The proposed Data Act sets out a general obligation for Data Holders to **make data** generated by its products or related services **accessible** to the Users, free of charge.[5] This obligation shall, however, not apply to Data Holders being enterprises qualified as micro or small enterprises under Recommendation 2003/361/EC.

[5] Article 4.1 of the proposed Data Act.

Legal basis for Data Holders to use data

The proposed Data Act establishes, together with the already existing GDPR, that the Data Holder can **use data only provided there is a legal basis for it**. The legal basis for processing of *personal data* is set out in article 6 of the GDPR, e.g. consent from the data subject or that processing of personal data is necessary to performance of a contract with the data subject.

In the proposed Data Act, the Data holder will only be entitled to use *non-personal data* on the bases of a contractual agreement with the User.[6]

Contractual restrictions in relation between Data holder and Users

The freedom of contract between the Data holder and User is restricted. There are three categories of such contracts:

Consumer contracts, which are subject to the restrictions of Directive 93/13/EEC on unfair terms in consumer contracts.[7]

Contracts with micro, small or medium-sized enterprises (SME)[8] which, according to the proposed Data Act, are unfair shall be non-binding.[9] This requires that the Data Holder unilaterally imposes the terms upon the SME. Examples of unfair clauses are clauses that exclude the limit of liability for intentional acts or gross negligence, or excludes remedies in case of non-performance of contractual obligations.

For **all other contracts**, only general rules such as competition law rules etc applies.

[6] Article 4.6 of the proposed Data Act.

[7] Implemented under Swedish law by the Consumer Contracts Act (Sw. *Lag (1994:1512) om avtalsvillkor i konsumentförhållanden)*.

[8] According to Article 2 of the Annex to Recommencation 2003/361/EC.

[9] Article 13 of the proposed Data Act.

Data sharing between Data holders and Third parties

Right and obligation to share data with Third parties

A Data Holder may *not* share data generated by its products or related services unless the User so requests. However, *if requested*, the data shall be shared with the appointed Third party, free of charge to the User. If the data contains personal data, a legal basis in the GDPR is needed and here, Data holders need to think about if it is the User who is the data subject or not.

This is a key point in the proposed Data Act, where the Commission wants to promote new businesses based on processing of data generated by Data Holders. However, the proposed Data Act restricts a third party's ability to use the received data. The data may e.g. not be used for profiling or to develop products competing with the Data holder.[10]

Contractual restrictions and price regulation

The data sharing agreement between the Data holder and data recipient will be subject to certain restrictions. The contractual terms must e.g. be fair, reasonable and non-discriminatory.[11] The compensation must be reasonable and shall, for data recipients being micro, small or medium enterprises, not exceed the costs directly related to making the data available.[12] Just as with contracts between Data holders and Users, unfair contractual terms unilaterally imposed upon micro, small or medium-sized enterprises shall be non-binding.[13]

[10] Article 6 of the proposed Data Act.

[11] Article 8 of the proposed Data Act.

[12] Article 9 of the proposed Data Act.

[13] Article 13 of the proposed Data Act.

4 Obligations for cloud service providers to facilitate switching and to restrict third country transfers

In addition to regulating the Internet of Things, the Commission intends to lay down certain rules for cloud service providers, in addition to the rules in the GDPR. In the Commission´s view, the right to data portability, set out in article 20 of the GDPR, has not met the ambition lowering the switching costs for customers between cloud service providers. It is clear that the Commission is concerned by the high concentration of market shares to a few Big Tech companies, few of which are of EU origin.

Obligations to remove obstacles to switching providers

The proposed Data Act therefore contains obligations for cloud service providers to remove obstacles to effective switching between providers, e.g. by proscribing contractual rules not allowing customers to terminate the contract after a maximum notice period of 30 days.[14]

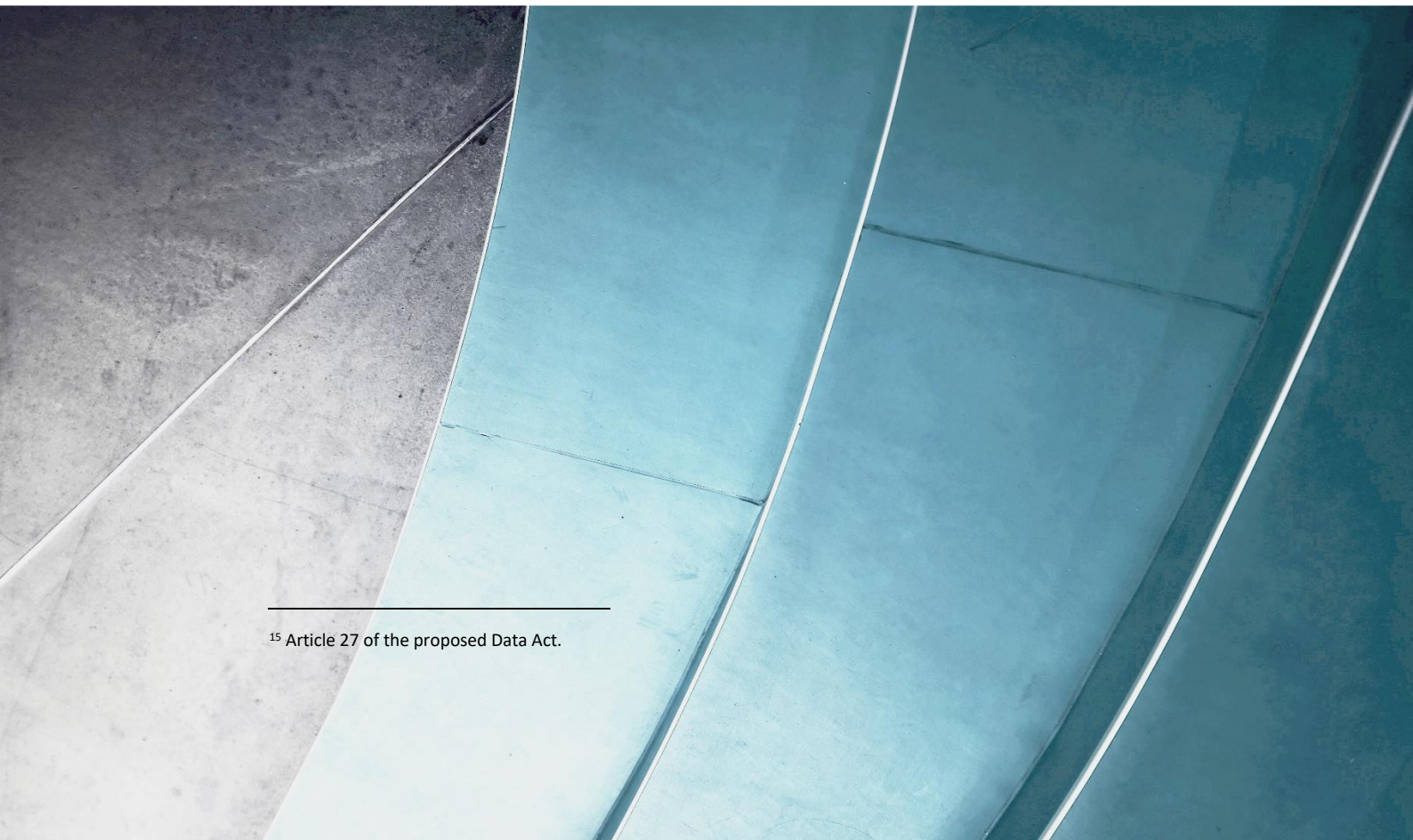
[14] Article 23 of the proposed Data Act.

Contractual terms regarding switching

In addition, the proposal contains obligations to include contractual obligations e.g. allowing customers to switch to another cloud service provider and exhaustive specifications of exportable data and application categories. It seems that the EU Commission´s intention is to have standards of open operability developed to facilitate switching between cloud service providers.

Restrictions on third country transfers

Furthermore, the proposed Data Act contains rules regarding transfer of non-personal data to countries outside the EU. Such transfer requires an international agreement between the exporting and importing country or otherwise under certain conditions, such as a right of the addressee of an administrative decision regarding a third country transfer to have reasoned objections regarding the transfer.[15]



[15] Article 27 of the proposed Data Act.

5 Sanctions

Entities breaching the proposed Data Act may be subject to administrative decisions and penalties. For many of the rules the penalties match the high sanctions set out in the GDPR.

6 Timeplan

It is not yet known when the proposed Data Act will enter into force. The proposal will now be processed and agreed by the EU Council and the European Parliament.

7 Consequences for businesses

The consequences of the proposed Data Act will vary depending on role and position in the market.

Product manufacturers and all other Data Holders having a strategy to commercialize data generated by its products will have to take the Data Act's data sharing obligations and restrictions in contractual and pricing terms into account.

For **service providers** intending to develop and provide services to customers based on data retrieved from Data holders, the proposed Data Act will create a great number of commercial opportunities, where, however, the restrictions in usage of retrieved data must be taken into account.

Users of data generated by products will want to look at increased opportunities to generate benefits from the data generated by owned or leased products, for example by sharing data with service providers or entering into data sharing agreements with product manufacturers.

Cloud service providers will have to take into account the stronger rights to switch to other providers granted by the proposed Data Act.

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A common denominator for all relevant market players is that the Data Act will impose restrictions on the freedom of contract. When entering into force, important contractual and commercial terms may no longer be binding and will have to be subject to renegotiations. Companies need to take this into account well before the Data Act enters into force.

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