

WHITEPAPER



Regulatory trends regarding the data economy and industrie 4.0

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Central ordering service for publications of the Federal Government:

Email: publikationen@bundesregierung.de

Tel.: +49 30 182722721

Fax: +49 30 18102722721

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Aiming for “too much at the same time”? – A plea and an invitation

A plea for profound thought on such a comprehensive regulation, and on the Data Act’s maturity status. How is a draft legislation with key definitions still under debate, which raises questions about the nature and scope of duties to act, supposed to provide a sound legal playing field for investment decisions in the data economy? Industry representatives from Plattform Industrie 4.0¹ offer policymakers to share their views on how to promote data and product security, data sharing, interoperability and data portability.

The challenges in developing the “data economy” encompass an extremely wide-ranging complex of regulatory ambitions with a simultaneous data-economy, digital-strategy, and platform-regulation orientation. With due regard to the complexity of the topic, this leads to very difficult conflicts between different goals and objectives. All these initiatives have in common that they seek to strengthen the data economy and digitization in the EU, with a view to global markets. As such and in principle, this is explicit-

ly welcomed. However, we note that the approach taken is increasingly directed towards a general governmental market regulation that threatens to interfere in a decisive manner with the entrepreneurial freedom of industry, without underlying empirical evidence confirming a real need for that approach.

Now, it is notably the draft Data Act which is creating considerable risks not only in regard to handling personal data², but also – crucially from the Industrie 4.0 point of view – in regard to exposure of sensitive corporate data, i.e., non-personal data. It seems these risks, which do more and more emanate as probable consequence of the ever-tightening regulation, were not sufficiently explored during the drafting process. Namely in the area of sensitive corporate data, including related trade secrets and their importance for developing the local industrial environment, there is simply too much at stake for these risks to be accepted without further ado.

1 Hereinafter: “Industrie 4.0”.

2 Cf. the official position of the European Data Protection Board (EDSA) and the European Data Protection Supervisor (EDPS) on the Data Act of 05 May 2022: [EDPB-EDPS Joint Opinion 2/2022 on the Proposal of the European Parliament and of the Council on harmonised rules on fair access to and use of data \(Data Act\)](#) | European Data Protection Board ([europa.eu](#)).

The suggested regulatory approach, in its current form, and the resulting efforts and costs of implementation and administrating the regulatory requirements are cumbersome and sending a wrong signal to industry. The outcome is likely to trigger additional burden and cost, especially for data holders, rather than providing a substantial relief and ease for companies that are already under pressure to become more digital. From an economic and legal perspective, we note that the need for the suggested measures, in particular in Chapters II, IV, VI and VII Data Act are not sufficiently supported by any identified market failure that would prevent in particular the European SME segment from accessing and participating in digital ecosystems at a horizontal level, or that would make this access significantly more difficult for them. In case sector-specific market failures should emerge, they should be countered on a case-by-case basis by means of antitrust law, which has already been reformed to a large extent³. From the point of view of a forward-looking regulation for the purpose of facilitating the development of new markets at a broader scale, the draft Data Act cannot be upheld either. On the contrary, this form of regulation would be disproportionate. The Data Act would impose substantial burdens on the parties obligated (implementation efforts, restrictions on freedom of contract, risks to trade secrets, etc.), and it seems that the drafting process lacks sufficient consideration of

- the need for such comprehensive regulation,
- the impact on the obligated parties and
- potential alternatives to the respective obligations.

The key request of industry remains: to leave it to business partners concerned how to handle and legally safeguard corporate data among each other, based on the rules of freedom of contract.

These considerations are given, in particular, due to the fact that this field is outside and beyond the concerns of consumer protection.

Also, in that context, a catalogue on new terms and conditions, as planned under the Data Act, and open for varying

interpretation of the Courts of the Member States, is more problematic than helpful in B2B context.

In fact, the legislative initiatives oscillate between promulgating contractual autonomy and – at the level of actual implementation – regulatory intervention. Moreover, the overlap between national and EU legislative initiatives creates a mixed situation that is increasingly confusing for industry. Not everything appears coordinated and “all of a piece”. This is exemplified by the large number of recent initiatives, all of which have an impact on the areas of the data economy relevant in the industrial environment (in chronological order; not exhaustive):

- DSM Copyright Directive, and its implementation
- Regulation on the Free Movement of Non-Personal Data (FFoD Regulation)
- Data Governance Act (DGA) of the EU Commission
- IP Action Plan of the EU Commission
- Digital Markets Act (DMA) of the EU Commission
- Digital Services Act (DSA) of the EU Commission
- Data Act of the EU Commission

Against the backdrop of abundant regulatory tendencies, there are considerable concerns from industry’s point of view that a “regulatory cosmos” is building up, which – with all due concern as to whether the proposed regulations are coordinated with each other (e.g.: do we really still need the FFoD Regulation?) – is foremost increasing legal uncertainty and transaction costs in the field of the data economy. Therefore, we see an urgent need to emphasize the relevance of predictability for entrepreneurial planning and investment, as well as contractual autonomy for industry in the data economy as key concerns and to warn against overregulation. In case of doubt, it would be better to give the current legislative processes sufficient thought, and by no means to rush them through. It appears that the draft Data Act is possibly aiming for “too much at the same time” without the need for prescriptive regulation having been established or even proven in detail.

³ Cf. Plattform Industrie 4.0, How the law keeps pace, October 2016, under “Data in the context of Industrie 4.0”, p. 21 ff., esp. p. 23 left column: www.plattform-i40.de/IP/Redaktion/DE/Downloads/Publikation/i40-wie-das-recht-schritt-haelt.html; see also the corresponding new edition of Feb. 2021 at www.plattform-i40.de/IP/Redaktion/DE/Downloads/Publikation/IP-Recht.html, there p. 12.

Therefore, we would like to draw particular attention to the following points:

1. Exposure of sensitive business data due to overbroad data access and data sharing obligations, including sharing with 3rd parties (Art. 4 and 5).

Just as an example, for the established use cases of condition monitoring and remote access in the area of smart manufacturing, the planned Data Act leads to extremely high exposure of machine run times and, thus, of sensitive know-how deductible without further from such information. In this context, the role of the “data holder” as the obligated party to grant data access and enable data sharing appears to depend, in case of non-personal data, on whether the latter has at least *de facto* control over the data (thus, just as a machine manufacturer, a machine operator or any other party dealing with machine data could qualify as “data holder”); on the other hand, the related obligations of the “data holder” appear to depend on the civil law construct of the usage rights of a machine (e.g., purchase/rent/ lease as possible civil law construct).

We doubt that a regulatory approach can create market balance in the sense that a machine operator (i.e. the industrial company) as the supposedly “weaker contracting party” can be protected from unwanted disclosure, especially if this information does not reach the level of protection of secrets in the sense of the Trade Secrets Act.⁴

If the machine manufacturer integrates the monitoring of his customer’s machine run times into his service model (predictive maintenance), he becomes the “data holder”, especially if he runs a business model in which he provides the machine to his customer under an (operate) leasing model. Now, the machine operator can call up the complete run time information from the data holder via the data access right (Art. 4) and, if necessary, also make it available to a third party authorized by him, such as an alternative machine manufacturer (competitor) (data sharing under Art. 5).

At the same time, however, the machine operator is possibly only protected to a very limited extent if a “user” directly contacts the manufacturer and in turn exercises his data access right vis-à-vis the manufacturer: According to our impression of Art. 2 para. 5, the “user” requiring such data access could be someone else than the machine operator. In particular, it could be a direct competitor of the machine operator, who is receiving the same kind of “related service” from the manufacturer.

1.1 Protection of trade secrets underweighted

- More recent versions have tried to fix the provisions on trade secret protection, but not yet in a practicable way.⁵
- The disclosure of trade secrets might fall under the obligation of data sharing (Art. 5 para. 1, para. 8). Even if such disclosure is limited to the “absolutely necessary extent” in the context of a contractual agreement between the data holder and the third party (commissioned by user), this provision represents a significant encroachment on the protected position of the company obligated to share certain data, by way of forcing the data holder to enter into an agreement with a third party not selected by the data holder, in regard to its own trade secrets, or potentially even affecting trade secrets of other parties hosted by the data holder. Against this background, we have considerable doubts as whether this provision is compliant with constitutional law.

1.2 Adequacy of comprehensive data access and data sharing below the scope of protection of trade secrets remains questionable.

- We also note that company-sensitive information (e.g., machine run times) does not always meet the threshold for protection of secrets, respectively that data holders are not always in a position to implement the necessary technical protective measures.

4 On the importance of protecting secrets in the area of Industrie 4.0, see “Protection of trade secrets in the context of Industrie 4.0” dated January 25, 2022 (<https://www.plattform-i40.de/IP/Redaktion/DE/Downloads/Publikation/geschaeftsgeheimnisse.html>).

5 On the importance of protecting secrets in the area of Industrie 4.0, see “Protection of trade secrets in the context of Industrie 4.0” dated January 25, 2022 (<https://www.plattform-i40.de/IP/Redaktion/DE/Downloads/Publikation/geschaeftsgeheimnisse.html>).

- The question arises for these “middle grounds of substantive information” as to whether the entitlement to data access and sharing actually provides the appropriate incentive for growing the data economy, as a macroeconomic objective. In particular, we query whether burdening only the data holder with the related expenses (free of charge according to Art. 4 para.1) is reasonable and can be adequately implemented at the business level. That leads to the question what consideration or at least indirect benefit the data holder should have for preparing and providing the data.
- In that context, we take a particularly critical view on the recent stipulation whereby the data holder should also make the relevant metadata accessible in the context of data access (Art. 4 para.1, Art. 5 para. 1, Art. 8 para. 1). We see this as opening the door to complete transparency of sensitive corporate data that does not fall under trade secret protection. Such a “binary” regulatory structure (trade secret protection yes/no) does not seem reasonable and appropriate.

2. A new law on “terms and conditions” of the data economy (Art. 13)?

- Regarding terms and conditions of the data economy, we raise question of competence, i.e. whether the restrictions on general freedom of contract as a central regulatory matter of substantive civil law (outside consumer protection law) is at all amenable to regulation by the EU in the extent described. We have considerable doubts.
- The wording describes a basic desire for balanced and fair contract terms (who would object to that?), however: the considerable problems and restrictions that e.g. German rules on terms and conditions create for B2B relations, as well as the challenges of taking into account industry practices and “leaving the beaten track “ and re-establishing contractual freedom, in our view, are rather a deterrent than suited to serve as a role model for a EU-wide regulation.
- Given that Art. 13 sets requirements for the drafting of contracts that are open for review by the courts, we anticipate a patchwork at the member state level of would or should constitute “unfair contract terms”,

etc. We query whether it is helpful, also in that perspective, to restrict freedom of contract in business dealings with an EU-wide regulatory approach (not to mention that the Data Act is designed to apply as a uniform regulation).

- Finally, it is questionable and ultimately incompatible with the basic idea of freedom of contract, particularly in commercial transactions (in addition to the aspect of EU competence in that subject matter area), to establish the competence and structure of a supervisory and complaints authority to safeguard compliance with the Data Act, including the authority to investigate any inadmissible contractual terms (Art. 31) and possibly even to sanction them (Art. 33 para. 1 vs. para. 3?). This cannot be the right approach in regard to business relations.

3. Provisions on “Cloud Switching” and Interoperability

The ability to efficiently switch between data processing services is an important concern also for industry, be it for reasons of processing or analysing data in different data landscapes, be it for reasons of data sovereignty, or be it for purposes of data sharing. We note that the most recent core initiatives out of Industrie 4.0, e.g., Gaia-X, Catena-X and Manufacturing-X, do already concentrate on these needs through industry-led solutions. These solutions are mainly “PaaS” and “SaaS” oriented. It is common to all these solutions that they are based on industry participants’ operational capabilities, and their freedom to choose business processes that are often unique and of competitive importance for them.

All industry self-regulatory solutions to enable data switching are highly scalable as to the underlying scenarios, as well as to (sub-)sets of data that may be relevant in each scenario.

Beyond this, the Commission’s cloud switching approach taken in Chapter VI of the draft Data Act is tailored to switch entire customer data landscapes under a complete contract termination scenario. This makes it a much more far-reaching instrument.

Plattform Industrie 4.0 is mostly speaking for the “B2B” cosmos. Here, a number of Industrie 4.0 participants would like to welcome the EU-Commission’s goal to facilitate switching between providers of cloud computing services when it comes to enable competition on

the market of cloud providers. These initiatives should be supported in segments where there is proven market failure, e.g., user lock-in due to practices of charging excessive exit fees or other vendor-created obstacles made to prevent a cloud customer to switch the provider.

At the same time, the following has been rightly recognised in the meantime.⁶

“(..). While the Commission’s proposal highlights the right principles, its implementation seems quite challenging: the proposal does not recognise that the use of cloud services differs between market participants. How these services are deployed within the network of customer’s other services, applications and dependencies is rarely identical. (...)”

These findings are notably true for B2B cloud computing services that are tailored to enable specific business customers’ needs. Customers’ needs are spanning over all kinds of businesses and industries, with highly customised applications, so that a “one size fits all” approach is simply not possible here. For not putting European B2B customers’ own interests at risk, there is trust in the EU-legislator not to place obligations that are just impossible to comply with for all market participants.

Now, in due regard of the above, and to best target situations driven by market failure, applicability of the cloud switching provisions under the Data Act should mainly focus on stakeholders that would also qualify as gatekeepers under the Digital Markets Act⁷. Those gatekeepers, because of their market power on cloud markets, adopt practices that become de facto (proprietary) standards. Whereas regarding other cloud providers, local B2B industries would like to voice their strong preference, recommendation, and support for a robust compatibility initiative covering products and businesses, by focusing on standardisation and related interoperability aspects. Here, an important distinction needs to be drawn:

- Interoperability and integration functions are anyway well standardised and supported by B2B industries in both software and cloud products in terms of

allowing cloud service customers to procure and integrate many different products from different vendors (“vertical integration”).

- Beyond, when it comes to envisage compatibility in terms of business processes and higher-level data structures between companies across different sectors (“horizontal integration”), which vary significantly, ultimately only the sectors themselves can specify their requirements and implement them. Therefore, on that level, standardisation for the sake of data switching and interoperability must imply a careful gap analysis specifying the sectors concerned, and, just as importantly, identifying a real demand from application areas and sectors. Based on that, stakeholders should agree on a suitable approach for standardisation with advisable focus on creating a consensus-process based standard to support cloud procurement, migration and switching including the creation of a common terminology for supplier requirements.

Plattform Industrie 4.0 members count on the EU-Commission, Parliament, and Council to clarify the provisions on Cloud Switching and Interoperability in the draft Data Act to support B2B industry’s businesses and running initiatives in appropriate way.

We recommend detailed discussions with industry representatives, in order to promote progress in regard to data, product and related services security, data sharing, interoperability and especially data switching and portability, without ultimately achieving the opposite. We believe that emphasis should be placed on the innovative and technological forces of industry in the field of the data economy, rather than pushing for overreaching regulation.

We would be glad to discuss this topic in more detail. Representatives of the Plattform Industrie 4.0 stand ready to support policymakers in understanding the relevant background not only from a legal perspective, but also from an economic and technical perspective, based on the business and operational models currently developing in the data economy.

6 EU Parliament, draft IMCO opinion of Oct. 4, 2022, www.europarl.europa.eu/doceo/document/IMCO-PA-736701_EN.pdf, “Short Justification” at p. 3.

7 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector (Digital Markets Act).

AUTHORS

Dr. Bernhard Fischer, SAP SE | Dr. Alexander Duisberg, Bird & Bird LLP | Angela Busche, Oppenhoff & Partner Rechtsanwälte | Martin Busch, Deutsche Telekom AG | Dr. Philipp Haas, Robert Bosch GmbH | Dr. Claudia Pappas, thyssenkrupp

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