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The broadening of the right to data portability for Internet-of-Things products in the Data Act: who does the act actually empower? (Part I)

BY [TEODORA LALOVA-SPINKS](#) AND [DANIELA SPAJIĆ](#) - 16 JUNE 2022

Data Act Blog Post Series

In its [European strategy for data](#), the European Commission strives for the empowerment of individuals in exercising their data subject's rights. Particularly the right to data portability is said to offer great potential for increasing the availability of data by fostering new data flows. The recently released legislative proposals, i.e. the [Data Act](#), the [Data Governance Act](#), and the [European Health Data Space Regulation](#), seem to promote an 'enhanced' right to data portability as a central tool for empowerment. Part I of this blog post will explore the novelties arising from the broadening of the right to data portability laid down in these frameworks. [Part II](#) will elaborate on selected legal challenges that stem from this broadening under the Data Act. The text builds upon the discussion [about Chapter II of the Data Act](#), also part of the Data Act Blog Post Series.

Introduction

In light of the European Commission goal to create a data-agile economy, the empowerment of data subjects is currently at the centre of new EU policy initiatives (see [A European strategy for data](#)). The notion of empowerment is often equated with the strengthening of control over one's own personal data. It typically pertains to individuals and their empowerment through tools such as consent and the data subjects' rights. Especially the right to data portability enshrined in Article 20 [General Data Protection Regulation](#) (GDPR) is increasingly promoted as an

important tool, perhaps even as the main tool, to 'further strengthen' control of data subjects ([A European strategy for data](#), p. 10, 20). Yet, the [Data Act](#) (DA) introduces a substantial shift in the discourse about the data portability right and individual empowerment.

The Data Portability Right: Version 1.0, 2.0, 3.0,...

The GDPR was the first EU regulation to introduce a right to data portability. Pursuant to Article 20 GDPR, data subjects have the right to receive personal data concerning them, and to transmit those data to another controller. The scope of the right, however, is fairly limited: first, the right can only be exercised where the processing of personal data is based on consent or on contract, and carried out by automated means (Article 20(1)(a-b) GDPR). Second, it applies only to personal data that was provided by the concerned data subject. Third, the transmission from one controller to another has to be technically feasible (Article 20(2) GDPR).

Despite its limited field of application, data portability as a tool is considered to be a key enabler to foster data sharing and to advance the data economy (see [A European strategy for data](#), p. 20-21). Therefore, it is not a surprise that the Data Act aims to broaden its scope in order to enable the re-use of data in a larger set of contexts.

Data portability in the Data Act

Put in concrete terms, the Data Act 'enhances' the data portability right for Internet-of-Things (IoT) products in the following ways:

- 1) the proposal extends the right to data portability from natural to legal persons;
- 2) the legal basis for the original processing of personal data is no longer limited to consent or contract, but applicable to data processing based on any legal basis;

3) the right applies not only to the use of personal, but also to that of non-personal data, as the applicable provision refers to any *'data generated by the use of a product or a related service'* (Article 4(1));

4) the DA explicitly specifies that the right applies to both 'actively provided' data, as well as 'passively observed' data (Recital 31 DA), and finally;

5) the proposal mandates and ensures the technical feasibility of third party access for all types of data (personal and non-personal) (see Recital 31 DA), thus going beyond the technical obligations prescribed in Article 20 GDPR (only for personal data).

Although the Data Act is the proposal that imposes the most significant changes to the right to data portability, the recently published proposal for a European Health Data Space (EHDS) and the Data Governance Act (DGA) deserve mention as all three frameworks complement each other.

Data portability in the European Health Data Space

It is important to note that the recently published proposal for an EHDS broadens the scope of the right to data portability for the health sector yet again, thereby creating sort of a third version of the concept. The proposal aims at ensuring that *'data subjects can transmit their electronic health data, including inferred data, irrespective of the legal basis for the processing of the electronic health data'* (Recital 12 EHDS). Unlike the DA, EHDS' provisions afford the right to portability only to natural persons. But, same as the DA, the right is applicable to both personal and non-personal data, as the EHDS introduces the notion of 'electronic health data' encompassing both personal and non-personal (electronic health) data (see Article 2(2)(a-c) EHDS). Additionally, whilst the Data Act excludes 'inferred' or 'derived' data from its scope of application (see Recital 14 DA), the EHDS includes 'inferred' and 'derived' data (e.g. data obtained during a medical examination) as well as 'observed' and recorded data by automatic means into the scope of the right to data portability (Recital 5 EDHS). The Article 29 Working Party provided some clarification on these notions (see WP 242 rev.01, p. 10), but it remains

unclear how the terms ‘inferred’, ‘derived’, and ‘observed’ data (used in the EHDS proposal) relate to the concepts of ‘actively provided’ and ‘passively observed’ data (under the DA), as the DA does not define the latter.

What about the Data Governance Act?

With a view to the DGA, data portability is expected to be one of the key enablers of altruistic data sharing and the re-use of personal data for the purpose of scientific research (see [CiTiP White Paper on the DGA](#), p. 38). Notably, the right to data portability is not embedded in the DGA as such. Rather, the European data altruism consent form builds on this right since it should foster data portability ‘*where the data to be made available is not held by the individual*’ (DGA, p. 8). For the empowerment of individuals, the DGA foresees the help of data intermediaries in supporting them with regard to the enforcement of their rights related to their personal data (Recital 23 DGA).

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