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

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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 II of this blog post will elaborate on selected legal challenges arising from the broadening of the right to data portability under the Data Act. Check Part I for a description of the novelties introduced by the Data Act and the EHDS proposal. The text builds upon the discussion about Chapter II of the Data Act, also part of the Data Act Blog Post Series.

Questioning the data portability new clothes

On the surface, the new 'enhanced' versions of the right to data portability appear to serve the goal of individual empowerment, by remedying the limitations enshrined in the General Data Protection Regulation (GDPR). However, a careful critical discussion of the broadened scope(s) of the right appears highly necessary in order to ensure that the ones who will be empowered with the mechanisms are, indeed, the individuals. For the purpose of this blog post, we focus on highlighting

several key uncertainties created through the broadening of the scope under the Data Act (DA).

Quid individual empowerment?

While the broadening of the scope of the data portability right may be generally welcome, it raises issues in terms of the notions of individual empowerment and data control. Both of these notions were in the GDPR firmly linked to the personal data protection of data subjects, whereas the Data Act suggests extending data subjects' rights to legal persons. More specifically, the DA moves away from the legal terminology introduced by the GDPR and establishes instead the notion of *'user',* which refers to a '*natural or legal person that owns, rents or leases a product or receives a service*' (Article 2(5) DA). Users are afforded a right to access and use data generated by the use of products or related services (Article 4) that could be perceived as a broadened right to data portability which could be exercised by commercial businesses (EDPB-EDPS Joint Opinion 02/2022, p. 10). This can be concluded based on a combined reading of the explanatory memorandum, the Impact assessment report that accompanies the DA, and relevant recitals in the DA (e.g., Recital 31 DA), even if it is not explicitly named as such in the law.

The opening of the data portability right to legal persons under the Data Act needs to be carefully examined. The DA does establish safeguards against potential misuse of the portability right by legal persons, namely by stating that where a user is not a data subject, but personal data is generated through the use of a product or a service, there must be a valid legal basis under Article 6(1) and 9 GDPR (see Article 4(5) DA). However, would this be sufficient to ensure that no misuse occurs? Moreover, the reasoning of focusing on 'user' empowerment (in contrast to individual empowerment) is not made clear in the DA and its accompanying documents, especially as regards to the empowerment of legal persons over the use and portability of data subjects' personal data.

Data portability for personal and non-personal data

Furthermore, the broadening of the data portability right and its application irrespective of the legal ground on which the data processing is initially based, raises questions as regards to how the DA has to be read or applied in conjunction with the GDPR. In regards to data portability, the Data Act gives users a right to share data (meaning in general terms any personal or non-personal data) with third parties irrespective of the legal ground based on which the processing of personal data takes place (Article 5 DA). However, the enforcement of the data portability right by individuals under the GDPR is limited, so that only personal data can be ported when the data processing activity is based on consent and contract. Hence, there is an obvious tension between Article 20 GDPR and Article 5 DA regarding the scope of application, creating legal uncertainty with regard to the porting or sharing of personal data requested by data subjects. This tension leads to the question as regards to the application of the DA vis-à-vis the GDPR: should the DA be applied as 'lex specialis'? The DA appears to speak against such a view, as Article 1(3) DA refers to Article 20 GDPR and states that the DA '*shall complement the right under Article 20'* GDPR where the personal data of users who are data subjects are concerned (see also Article 5(7) DA, and EDPB-EDPS Joint Opinion 02/2022, p. 9). Consequently, if Article 20 GDPR is the relevant provision to be relied upon for the porting of personal data, then the provisions of the GDPR will collide with the DA due to the limited scope of the data portability right under the GDPR.

Conclusion

With the entry into force of the DA and the EHDS, we will have in total three different versions of the data portability right at our disposal. However, the rights are differing not only in terms of scope, but also by the terminology employed to describe them and enshrine them under the law. It remains to be explored how the three rights would apply in practice, and even more so how the technical interoperability thereof will be guaranteed.

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