II. Introduction

On February 23 2022, the Commission unveiled its long-awaited Proposal for a Data Act[1]. From there on, the debate gained significant momentum – including intense and fierce political and academic discussions about the conceptual clarity, the aims pursued, the instruments chosen, and the structural roads taken of and by the Act.[2] Finally, on January 11 2024, the regulation[3] came into force.[4] The Data Act[5] is part (and fundamental cornerstone) of a greater legislative agenda of the EU Commission which was laid down in the European Strategy on Data[6] in 2020.[7]

The Data Act combines provisions in substance (e.g., access rights), provisions targeted at tech regulation (e.g., with regard to interoperability) as well as provisions on enforcement structures (e.g., *public enforcement* and alternative dispute settlement mechanisms). The new Act includes access rights to datasets to the benefit of both private and public entities, and accentuates a contractual angle into regulating the exchange and use of data in the digital economy. It strives for general accessibility, interoperability, and portability of data with technical safeguards (e.g., smart contracts) and

1 Commission, 'Proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access and use of data (Data Act)' COM(2022) 68 final.

2 Cf. e.g., – and with further references to the debate – Hennemann, M. / Steinrötter, B., *NJW* 2024, 1 (6 et seqq.) as well as the critique from an economics point of view by Krämer, J., Improving The Economic Effectiveness of the B2B and B2C Data Sharing Obligations in the Proposed Data Act, CERRE, 2022; Kerber, W., *GRUR-Int* 2023, 120; Eckardt, M. / Kerber, W., Property rights theory, bundles of rights on IoT data, and the EU Data Act (December 2023).

3 Supporting this approach (and not the instrument of a directive) Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, p. 72.

4 Commission, 'European Data Act enters into force, putting in place new rules for a fair and innovative data economy', https://digital-strategy.ec.europa.eu/en/news/european-data-act-enters-force-putting-place-new-rules-fair-and-innovative-data-economy.

5 Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act).

6 Commission, 'A European strategy for data' COM(2020) 66 final. Cf. in detail Veil, W. / Weindauer, F., in: Hennemann, M. (ed.), Global Data Strategies, 2023, pp. 51 et seqq.

7 For an overview on different data strategies worldwide see Hennemann, M. (ed.), Global Data Strategies, 2023.

sets limitations for re-use in and along the data lifecycle (e.g., by starting with the product design, Art. 3(1)).[8] Generally, the Data Act thereby mirrors the non-rival nature of data / codified information. Rec. 1 rightly highlights: "The same data may be used and reused for a variety of purposes and to an unlimited degree, without any loss of quality or quantity."

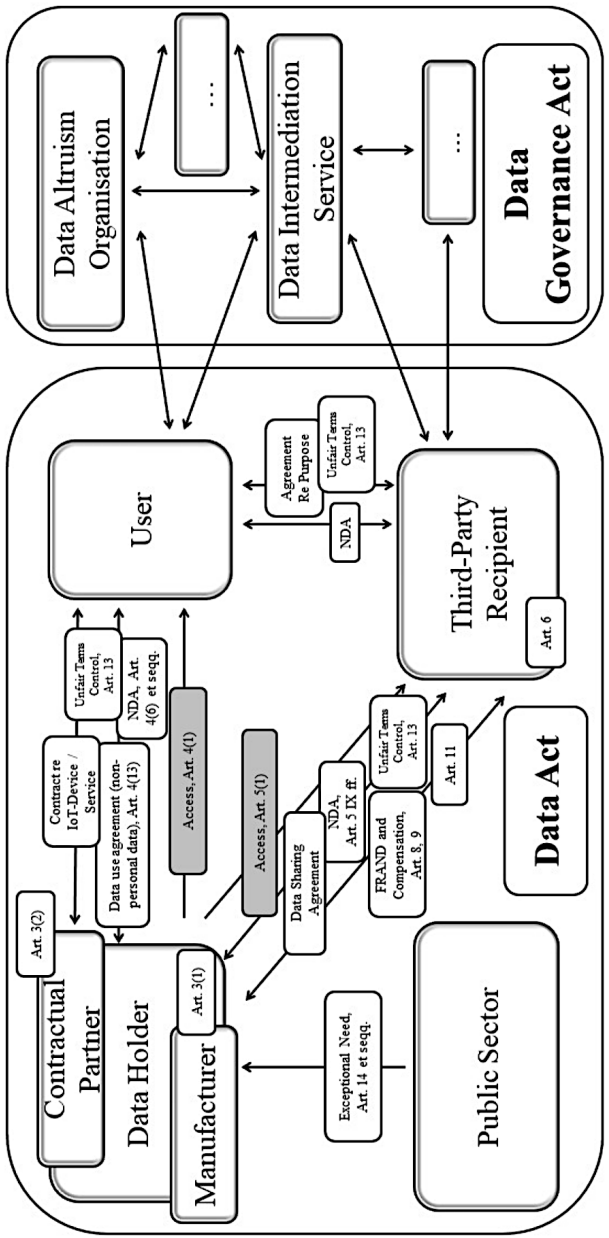
The Act aims to unleash the enormous potential of data. Especially, the Data Act fosters data trade with respect to non-personal data, but is targeted – in conjunction with the Data Governance Act (DGA)[9] – at all societal dimensions of non-personal and personal data usability, data use, data sharing, and data innovation.[10] The key instruments and elements of the new data access, data use, and data sharing regime established by the Chapters II. – V. of the Data Act and by the Data Governance Act are illustrated by figure 1:

8 See Hennemann, M. / Steinrötter, B., *NJW* 2024, 1 (3).

9 Regulation (EU) 2022/868 of the European Parliament and of the Council on European data governance.

10 Cf. also rec. 1.

Figure 1: © Hennemann, M. / Steinrötter, B., NJW 2024, 1 (2) (translated version).



Despite its name, however, the Data Act does not regulate all legal aspects with respect to data (as the Data Governance Act does not regulate all aspects of data governance). Rather, the Data adds specific instruments to the existing legal setting – and empowers thereby actors in specific scenarios. The Data Act and its provisions must therefore be read as (important) puzzle pieces to the landscape of existing (and future) data-relevant norms and legal regimes (*inter alia* the general legal framework for data contracts and the Data Governance Act as well as competition law and Regulation (EU) 2022/1925 (Digital Markets Act)[11]).

In light of the increasing legislative complexity, this introduction to the Data Act hopefully contributes to a better understanding how this legislative piece fits with the broader legislative setting. Against this background, this volume engages with the Data Act in detail as well as engages with the cumbersome literature on the Data Act proposal. Additionally, this volume also makes references to the legislative debate which has led to the final version.[12]

11 Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector.

12 Cf. *inter alia* Parliament Committee on Industry, Research and Energy, 'Draft report on the proposal for a regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act)', 14 September 2022; Parliament Committee on the Internal Market and Consumer Protection, 'Draft Opinion on the proposal for a regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act)', 4 October 2022; Parliament Committee on Legal Affairs, 'Draft Opinion on the proposal for a regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act)', 6 October 2022; Parliament Committee on Civil Liberties, Justice and Home Affairs, 'Draft Opinion on the proposal for a regulation of the European Parliament and of the Council on Harmonised rules on fair access to and use of data (Data Act)', 19 October 2022. Council Presidency, 'Note on the Proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act) - Second Presidency compromise text (Chapters I-V)', 21 October 2022; Council Presidency, 'Note on the Proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act) - Second Presidency compromise text (Chapters VI-XI)', 3 November 2022; Council Presidency, 'Note on the Proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (Data Act) – Third Presidency compromise text', 8 December 2022.

1. General Setting and Goals

The challenges to be tackled by and the goals pursued with the Data Act are diverse.[13] The Act is mainly pointing to the unwillingness to share data by those who have access and is targeted at fostering data sharing, especially to boost innovation in aftermarkets.[14] Although the most prominent part of the Act is directed at *internet of things*-products and related services (Art. 4 et seq.), the Act is not primarily concerned with competition on these primary markets.[15]

Rec. 1 highlights:

> "In recent years, data-driven technologies have had transformative effects on all sectors of the economy. The proliferation of products connected to the internet in particular has increased the volume and potential value of data for consumers, businesses and society. High-quality and interoperable data from different domains increase competitiveness and innovation and ensure sustainable economic growth. The same data may be used and reused for a variety of purposes and to an unlimited degree, without any loss of quality or quantity."

On this basis, rec. 6 sets the general regulatory setting of the Act:

> "Data generation is the result of the actions of at least two actors, in particular the designer or manufacturer of a connected product, who may in many cases also be a provider of related services, and the user of the connected product or related service. It gives rise to questions of fairness in the digital economy as the data recorded by connected products or related services are an important input for aftermarket, ancillary and other services. In order to realise the important economic benefits of data, including by way of data sharing on the basis of voluntary agreements and the development of data-driven value creation by Union enterprises, a general approach to assigning rights regarding access to and the use of data is preferable to awarding exclusive rights of access and use. This Regulation provides for horizontal rules which could be

13 Cf. also rec. 31 and 119.

14 See Krämer, J., Improving The Economic Effectiveness of the B2B and B2C Data Sharing Obligations in the Proposed Data Act, CERRE, 2022, p. 5, who has strong doubts whether the Act's design will fulfil this goal (cf. p. 19).

15 Krämer, J., Improving The Economic Effectiveness of the B2B and B2C Data Sharing Obligations in the Proposed Data Act, CERRE, 2022, p. 6.

> followed by Union or national law that addresses the specific situations of the relevant sectors."

Rec. 2 outlines the main "[b]arriers to data sharing" the Act is willing to tackle and which "prevent an optimal allocation of data for the benefit of society":

> "a lack of incentives for data holders to enter voluntarily into data sharing agreements, uncertainty about rights and obligations in relation to data, the costs of contracting and implementing technical interfaces, the high level of fragmentation of information in data silos, poor metadata management, the absence of standards for semantic and technical interoperability, bottlenecks impeding data access, a lack of common data sharing practices and the abuse of contractual imbalances with regard to data access and use."

Rec. 4 underlines that the Act "respond[s] to the needs of the digital economy and (…) remove[s] barriers to a well-functioning internal market for data" (the latter is inter alia underlined by the rules on switching between data processing services according to Art. 23-31). The Data Act seeks to promote innovation by access and to incentivise data production. Rec. 32 elaborates in this regard:

> "The aim of this Regulation is not only to foster the development of new, innovative connected products or related services, stimulate innovation on aftermarkets, but also to stimulate the development of entirely novel services making use of the data concerned, including based on data from a variety of connected products or related services. At the same time, this Regulations aims to avoid undermining the investment incentives for the type of connected product from which the data are obtained, for instance, by the use of data to develop a competing connected product which is considered to be interchangeable or substitutable by users, in particular on the basis of the connected product's characteristics, its price and intended use. (…)"

Rec. 30 additionally points to – also with regard to the protection of trade secrets – that "[i]t is important to preserve incentives to invest in products with functionalities based on the use of data from sensors built into those products."

2. From a Reaction to Market Failures to a new Market Design

The various aforementioned drivers in favour of the Data Act underline a general tendency in European Data Law. First, the different instruments do not – and do not want to – fit neatly into specific fields of law. Central questions, e.g., the nature of specific rights, remain open. They often combine different, not always directly connected, fields aspects of data governance. This is especially true for the Data Governance Act which tackles only selected fields like public sector information, data intermediation services, and data altruism – and does not strive to set coherent rules.

Second and most importantly, it has already become clear from the Data Governance Act that the legislator does not only strive to counter perceived or actual market failures – as a traditional Economics perspective would advise to do.[16] Rather, the Acts must be described as a form of *market design law* or *market infrastructure law*.[17] The different Acts are not only meant as setting boundaries for specific activities – neatly underlined by the fact that the Acts pursue a horizontal approach and are not only e.g., applicable to a specific sector[18] or only to dominant undertakings[19]. The Data Act is consequently described as a "horizontal fundamental piece of regulation for all sectors"[20]. Therefore, the Acts are rather directed at establishing and boosting distinct market actors (e.g., users, data intermediation services)

16 See Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, p. 77. Cf. in detail on the economic justification of the Act, Max Planck Institute for Innovation and Competition, Position Statement, 2022, pp. 15 et seq. n. 32 et seq.

17 Hennemann, M. / Steinrötter, B., *NJW* 2024, 1 (6); Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, p. 78; Schweitzer, H. / Metzger, A. / Blind, K. / Richter, H. / Niebel, C. / Gutmann, F., The legal framework for access to data in Germany and in the EU, BMWK, 2022, p. 117; Schweitzer, H. / Metzger, A., *ZEuP* 2023, 42 (50). Cf. also Max Planck Institute for Innovation and Competition, Position Statement, 2022, pp. 17 et seq. n. 39.

18 Demanding respective complementary sectoral rules, Krämer, J., Improving The Economic Effectiveness of the B2B and B2C Data Sharing Obligations in the Proposed Data Act, CERRE, 2022, p. 6; Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 3 n. 3.

19 Schweitzer, H. / Metzger, A. / Blind, K. / Richter, H. / Niebel, C. / Gutmann, F., The legal framework for access to data in Germany and in the EU, BMWK, 2022, pp. 211, 213; Max Planck Institute for Innovation and Competition, Position Statement, 2022, pp. 15 et seq. n. 33.

20 Podszun, R. / Pfeifer, C., *GRUR* 2022, 953 (955).

as well as shaping existing and in part creating new markets.[21] Contrary to traditional doctrine, but in line with modern Economics approaches of market shaping (*Mazzucato*)[22], the legislative instruments are to be understood – and might be regarded as justified – as being targeted at a distinct *transformation* of underlying market structures[23].[24]

Finally, however and in contrary, this is not to say that the Data Act – next to its *market design* approach – does not actually address market failures in question.[25] The opposite is true. The Act for example tackles the fact that "access [to data] is frequently restricted where one actor holds them in the system or due to a lack of interoperability between data, between data services or across borders." (rec. 3).

3. "Contractualisation" of Data (Economy) Law

The Acts strives "to realise the important economic benefits of data, including by way of data sharing on the basis of voluntary agreements and the development of data-driven value creation by Union enterprises" and supports "a general approach to assigning rights regarding access to and the use of data" (rec. 6). Such an approach is regarded as superior to the award of "exclusive rights of access and use" (rec. 6). Accordingly – and referring to the broad debate on "data property" or absolute rights to data – rec. 5 states that the Act "should not be interpreted as recognising or conferring any new right on data holders to use data generated by the use of a connected product or related service."[26] (cf., however, the discussion

21 Schweitzer, H. / Metzger, A. / Blind, K. / Richter, H. / Niebel, C. / Gutmann, F., The legal framework for access to data in Germany and in the EU, BMWK, 2022, p. 116; Hennemann, M. / Steinrötter, B., *NJW* 2024, 1 (6).

22 Mazzucato, M., A collective response to our global challenges: a common good and market-shaping approach, UCL Institute for Innovation and Public Purpose Working Paper 2023-01, pp. 9 et seq.

23 Cf. also rec. 6 and 32.

24 Schweitzer, H. / Metzger, A. / Blind, K. / Richter, H. / Niebel, C. / Gutmann, F., The legal framework for access to data in Germany and in the EU, BMWK, 2022, p. 116.

25 See in detail Kerber, W., *GRUR Int.* 2023, 120 (121).

26 Similar rec. 25: "This Regulation should not be understood to confer any new right on data holders to use product data or related service data."

on Art. 4(13) below).[27] Voluntary agreements are also not barred by the new access regime (Art. 1(10)).

On that basis, the Data Act is driven by a *contractualisation* of the relevant relationships between data holder, data user, and data recipient.[28] The Act underlines that data (economy) law is driven by contract law. Rec. 5 stipulates respectively that "[p]rivate law rules are key in the overall framework for data sharing" and that "[t]herefore, this Regulation adapts rules of contract law and prevents the exploitation of contractual imbalances". Accordingly, the Data Act does not introduce a (direct) right to access of a competitor / third party that is fully independent of a user or its contractual relationship(s) (cf. also Art. 4(13) and (14)).[29]

As a default, the Act refers to a scenario where a product or service is used on a contractual basis and data is generated in the context of this very contract.[30] However, it has to be borne in mind that the data holder (being obliged to grant access) and the contractual partner of the user might be two different persons (cf. also Art. 3 (3)(d)). Furthermore, data access is generally combined with underlying (bilateral) contracts / agreements enabling data use.[31] The Act is consequently fostering contractual agreements between (nearly) all relevant parties (data use agreement, data access contract (on FRAND terms), non-disclosure-agreements (NDAs; cf. rec. 31) (cf. figure 1 above).[32] *Leistner* and *Antoine* correctly point to a "contractual design and enforcement in larger, multipolar networks" (and the missing rules of the Data Act in this regard).[33] Furthermore, the definition of a user as well as the operationalisation via user accounts (cf. rec. 21) mirrors the contractual setting. In addition, the contract law approach is strongly underlined by the fact that – on the basis of Art. 41 – model contractual

27 Cf. also Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 16 n. 34.

28 Cf. Hennemann, M. / Steinrötter, B., *NJW* 2024, 1 (4 et seq., 6 et seq.). For a detailed account Staudenmeyer, D., *EuZW* 2022, 596 (596 et seq.). Cf. also Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 27 n. 68; Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, p. 74.

29 Hennemann, M. / Steinrötter, B., *NJW* 2022, 1481 (1483).

30 Hennemann, M. / Steinrötter, B., *NJW* 2022, 1481 (1483).

31 Staudenmeyer, D., *EuZW* 2022, 596 (596); Hennemann, M. / Steinrötter, B., *NJW* 2024, 1 (6 et seq.).

32 Staudenmeyer, D., *EuZW* 2022, 596 (596 et seq.); Hennemann, M. / Steinrötter, B., *NJW* 2024, 1 (6 et seq.).

33 Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, p. 75.

terms and standard contractual terms shall be developed. The provisions on *smart contracts* (Art. 11(1), 36(1)) complement this contractual strive.

Despite this process of *contractualisation*, the Data Act does provide data contract law rules only to a limited extent.[34] Substantial aspects are missing.[35] This gap does not only refer to substantial rules, but it is also rightly criticised that the Data Act does not stipulate any conflicts of law-provisions.[36]

However, the rules on the unfair terms control (Art. 13) stipulate first parameters in substance, but do not contain rules for data contracts vis-à-vis consumers (leaving this dimension to the member states). Furthermore, the Act does not regulate substantially the central data use agreement according to Art. 4(13).[37]

Finally, and also with the new Art. 14 et seqq. in mind, Art. 1(6) Sentence 1 clarifies that the Data Act "does not apply to or pre-empt voluntary arrangements for the exchange of data between private and public entities, in particular voluntary arrangements for data sharing."[38]

4. User Activation

The Data Act heavily relies on an activation of the user.[39] Thereby, the access regime of the Data Act adopts a similar approach as the right to data portability according to Art. 20 Regulation (EU) 2016/679 (General Data Protection Regulation (GDPR))[40] does (which is faced with many obstacles and is said to be ineffective and / or under-used in practice).

34 Hennemann, M. / Steinrötter, B., *NJW* 2024, 1 (4).
35 Hennemann, M. / Steinrötter, B., *NJW* 2024, 1 (7).
36 See in this regard Hennemann, M. / Steinrötter, B., *NJW* 2024, 1 (7 et seq.).
37 Bomhard, D. / Merkle, M., *RDi* 2022, 168 (174); Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, p. 74.
38 Council Presidency 2022/0047(COD) – 13342/22, p. 36.
39 Hennemann, M. / Steinrötter, B., *NJW* 2024, 1 (6).
40 Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

The user has – not only formally[41] – a central role in the Data Act framework.[42] A processing of non-personal data by the data holder is only possible on the basis of a contractual agreement with the user (Art. 4(13)). Only the user may request access to the data generated by the user's use of an IoT-product – in favour of himself / herself (Art. 4(1)) or to the benefit of a third party (Art. 5(1)). The user is also free to use both rights cumulatively.[43] Any access of a third party is dependent on the user (Art. 5(1)) – and consequently oftentimes on a respective contractual agreement with the user. The third party will practically have to set (financial) incentives in order to 'activate' the user respectively.[44] Furthermore, the third party may not hinder the user to grant access to further third parties (Art. 6(2)(h)).

In addition and finally, Art. 4 (14) underlines the strong position of the user by stipulating that "[d]ata holders shall not make available non-personal product data to third parties for commercial or non-commercial purposes other than the fulfilment of their contract with the user."

It was and will be heavily discussed whether this activation will actually on will work in practice.[45]

5. Monetarisation of Data?

Furthermore, the final version of the Data Act provides us with some clarity on the central question whether and to what extent a monetarisation of personal and – especially – non-personal data shall be possible.[46]

The general purpose of the Act, the different access rights stipulated by the Act as well as a well-understood interplay with data intermediation services generally – and rightly – foster an understanding towards a monet-

41 Cf. also Podszun, R. / Pfeifer, C., *GRUR* 2022, 953 (956). Cf. also Kerber, W., *GRUR-Int.* 2023, 120 (121).

42 Cf. for the respective discussion Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, pp. 80, 98.

43 Specht-Riemenschneider, L., *MMR-Beil.* 2022, 809 (816).

44 Krämer, J., Improving The Economic Effectiveness of the B2B and B2C Data Sharing Obligations in the Proposed Data Act, CERRE, 2022, p. 15.

45 Cf. e.g., Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, pp. 81, 97; Podszun, R. / Pfeifer, C., *GRUR* 2022, 953 (956).

46 Cf. Hennemann, M. / Steinrötter, B., *NJW* 2024, 1 (7). In detail with regard to the proposal Max Planck Institute for Innovation and Competition, Position Statement, 2022, pp. 7 et seq. n. 14 et seq.

arisation.[47] Especially, Art. 4(13) and Art. 6(2)(h) might be interpreted in such way that these provisions point to the user as being the prime actor to monetarise.[48] Also, Art. 4 (14) and also Art. 6(2)(c) give ground in this regard (cf. also rec. 5, 7, 25, 26, 33).[49]

Different follow-on rules of the access right (e.g., Art. 4(10), 5(6), 6(2)(c) and (e)), however, limit – next to data protection law – a full monetarisation.

6. Enforcement

The Data Act is generally rather silent on mechanisms of *private enforcement* and / or contractual consequences of violations of the Act's obligations.[50] Whereas rec. 9 highlights that national contract law shall not be affected, it is often not clear whether and to which extent obligations following from the Act are of a contractual nature.[51] Provisions like, *inter alia*, Art. 13(1), (7) and (9), however, underline the private law effects of the Act.

Furthermore, Art. 47 and 48 transports the Data Act to the (collective) enforcement mechanism of Regulation (EU) 2017/2394[52] and Directive (EU) 2020/1828 (Directive on Representative Actions)[53] which annexes are amended respectively.

47 In detail Hennemann, M. / Steinrötter, B., *NJW* 2024, 1 (7).

48 See also Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 18 n. 42. Cf. for doubts from an Economics perspective in this regard Krämer, J., Improving The Economic Effectiveness of the B2B and B2C Data Sharing Obligations in the Proposed Data Act, CERRE, 2022, p. 21.

49 Cf. Hennemann, M. / Steinrötter, B., *NJW* 2024, 1 (7).

50 Hennemann, M. / Steinrötter, B., *NJW* 2024, 1 (8); Bomhard, D. / Merkle, M., *RDi* 2022, 168 (174); Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, pp. 13, 74; Max Planck Institute for Innovation and Competition, Position Statement, 2022, pp. 4 et seq. n. 6 and 8. This is also criticized from an Economics perspective, cf. Krämer, J., Improving The Economic Effectiveness of the B2B and B2C Data Sharing Obligations in the Proposed Data Act, CERRE, 2022, p. 10.

51 Cf. also rec. 5, 42, 104.

52 Regulation (EU) 2017/2394 of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws.

53 Directive (EU) 2020/1828 of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers.

In addition, in the context of a third-party recipient access specific provisions on alternative dispute settlement and on further protection measures are stipulated by Art. 10 and 11 (cf. also rec. 52 et seqq.).

To the opposite, the Act provides detailed provisions on *public enforcement*. Art. 37 points to the respective (mandatory) authorities and data coordinators.[54] Art. 40 stipulates rules on sanctions to be provided with the national implementing laws.[55]

7. Trade Agreements / Other Union Legal Acts Governing Rights and Obligations on Data and Use (Art. 44) / Options for Member States

Trade Agreements

Rec. 4 underlines that the Data Act and Union law "should be without prejudice to obligations and commitments in the international trade agreements concluded by the Union."

Union Law

Furthermore, the Data Act should not affect specific provisions of acts of the Union adopted in the field of data sharing between businesses, between businesses and consumers and between businesses and public sector bodies that were adopted prior to the date of the entering into force of the Data Act, Art. 44(1).

Most prominently, the Data Act is without prejudice to future Union law that specifies further requirements with regard to sector specific legislation, to the common European data space regulation, and to areas of public interest, Art. 44(2). Art. 44(2) points explicitly to "technical aspects of data access" (lit. a), "limits on the rights of data holders to access or use certain data provided by users" (lit. b), and "aspects going beyond data access and use" (lit. c) (see also rec. 115).

54 Cf. also rec. 107 et seqq.
55 Cf. rec. 109.

Member States

In addition, the EU as well as the member states may further regulate ("with the exception of Chapter V") access to and use of data for scientific research purposes, Art. 44(3) (cf. also rec. 115 as well as 49, 63, and 76 in this regard).

Furthermore, however, rec. 4 states that member states "should not adopt or maintain additional national requirements regarding matters falling within the scope of this Regulation" in order to guarantee the "direct and uniform application" of the Act. Exceptions must be explicitly named within the Act. Next to Art. 44(3) this is *inter alia* the case in Art. 18(2) pointing to sectoral legislation. In addition, rec. 4, 6, 20, 25, 27, 52, and 115 point to further options. For example, only within the recitals (rec. 25), it becomes apparent that the Act allows – in the context of the compulsory data licence agreement according to Art. 4(13) – for rather broad sector-specific deviations[56]:

> "Moreover, this Regulation does not prevent sector-specific regulatory requirements under Union law, or national law compatible with Union law, which would exclude or limit the use of certain such data by the data holder on well-defined public policy grounds."

Rec. 27 elaborates in this regard the sector-specific demands and challenges:

> "In sectors characterised by the concentration of a small number of manufacturers supplying connected products to end users, there may only be limited options available to users for the access to and the use and sharing of data. In such circumstances, contracts may be insufficient to achieve the objective of user empowerment, making it difficult for users to obtain value from the data generated by the connected product they purchase, rent or lease. Consequently, there is limited potential for innovative smaller businesses to offer data-based solutions in a competitive manner and for a diverse data economy in the Union. This Regulation should therefore build on recent developments in specific sectors, such

56 Cf. Podszun, R. / Pfeifer, C., *GRUR* 2022, 953 (955); Specht-Riemenschneider, L., *MMR-Beil.* 2022, 809 (811). Demanding respective rules from an Economics perspective, Kerber, W., *GRUR-Int.* 2023, 120 (135); Krämer, J., Improving The Economic Effectiveness of the B2B and B2C Data Sharing Obligations in the Proposed Data Act, CERRE, 2022, p. 6. Cf. also Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, p. 78.

as the Code of Conduct on agricultural data sharing by contract. Union or national law may be adopted to address sector-specific needs and objectives."

Outside the Scope of Union Law

Art. 1(6) Sentences 4 and 5 add that the Act shall not apply to fields of law that do not fall into the scope of Union law (e. g., defence, national security, tax matters).

8. Evaluation and Review (Art. 49)

By September 12 2028, the Commission has to carry out an evaluation of the Data Act, Art. 49. Art. 49(1)(a)-(m) list the content of the respective report.[57] The evaluation shall serve as the basis to revise the Act.[58]

9. Entry into Force and Application (Art. 50)

Art. 50 regulates – differently for different chapters – the application of the Act. The Data Act generally applies from September 12 2025 "[i]n order to allow actors (…) to adapt to the new rules", Art. 50(1) and rec. 117. Obligations according to Art. 3(1) should apply to connected products and related services placed on the market from September 12 2026 onwards, Art. 50(2). The provisions of Chapter IV should apply to contracts concluded after September 12 2025; an exception is, however, made for contracts concluded on or before September 2025. If they are of indefinite duration or have an expiry date of at least January 11 2034, Chapter IV applies from September 12 2027, Art. 50.

57 Cf. Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, p. 122; Specht-Riemenschneider, L., *MMR-Beil.* 2022, 809 (826).

58 Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, p. 122.

10. Competence

With regard to the competence of the EU, the Data Act is based on Art. 114 TFEU. Rec. 119 adds in this regard that "the objectives of this Regulation, namely ensuring fairness in the allocation of value from data among actors in the data economy and fostering fair access to and use of data in order to contribute to establishing a genuine internal market for data, cannot be sufficiently achieved by the Member States". It is underlined that these goals "can rather, by reason of the scale or effects of the action and cross-border use of data, be better achieved at Union level". Rec. 119 further points to the legislator's assessment that the principle of subsidiarity has been met and that the Data Act "does not go beyond what is necessary in order to achieve [the aforementioned] objectives".