III. Regulatory Scope (Art. 1-2, Art. 43)

Chapter I ('General Provisions'; Art. 1-2) frames the Act in terms of scope and terminology, defining key concepts, and the complementary relationships with applicable legislation on e.g., data protection, electronic communications, and criminal matters. It is complemented by Chapter X ('*Sui Generis* Right under Directive 1996/9/EC'; Art. 43), which explicitly denies protection granted to databases (by way of the *sui generis* right) "when data is obtained from or generated by a connected product or related service falling within the scope of [the Data Act] (…)."

1. Scope (Art. 1 paras. 1-3)

Material Scope

Art. 1(1) lays down the material scope of the Data Act. In substance, the Data Act provides for different, but intertwined instruments.[59] Rec. 5 summarises:

> "This Regulation ensures that users of a connected product or related service in the Union can access, in a timely manner, the data generated by the use of that connected product or related service and that those users can use the data, including by sharing them with third parties of their choice. It imposes the obligation on data holders to make data available to users and third parties of the user's choice in certain circumstances. It also ensures that data holders make data available to data recipients in the Union under fair, reasonable and non-discriminatory terms and conditions and in a transparent manner. (…) This Regulation also ensures that data holders make available to public sector bodies, the Commission, the European Central Bank or Union bodies, where there is an exceptional need, the data that are necessary for the performance of a specific task carried out in the public interest. In addition, this Regulation seeks to facilitate switching between data processing services and

59 Hennemann, M. / Steinrötter, B., *NJW* 2022, 1481 (1482).

to enhance the interoperability of data and of data sharing mechanisms and services in the Union."

Art. 1(2) provides chapter-by-chapter details on the respective scope of application. Chapters VIII-XI are not explicitly mentioned as they are of a supporting nature to the other chapters. Art. 1(2) first and foremost highlights that the Data Act, in general, regulates personal and non-personal data.[60] In the following, however, precise differentiations are made with regard to the scope of application:

- Chapter II: data concerning the performance, use and environment of connected products and related services (but without content) (lit. a)
- Chapter III: private sector data relevant for the statutory data sharing obligations (lit. b)
- Chapter IV: private sector data accessed and used on the basis of b2b-contract (lit. c)
- Chapter V: private sector data, but "with a focus on non-personal data" – this (probably) refers to the fact that Art. 15 is mainly targeted at non-personal data (lit. d)
- Chapter VI: data and services processed for data processing services (lit. e)
- Chapter VII: non-personal data held in the Union by data processing service providers (lit. f)

Personal and Territorial Scope

Following this setting, Art. 1(3) defines the personal and territorial scope of the Act. Art. 1(3) lists the different (major) actors regulated by the Data Act:

- *manufacturers* of connected products placed on the market in the Union (irrespective of the place of establishment) (lit. a)
- *providers* of related services (irrespective of the place of establishment) (lit. a)
- *users* in the Union of connected products or related services (lit. b)
- *data holders* (irrespective of their place of establishment) that make data available to data recipients in the Union (lit. c)

60 This approach is mostly welcomed, cf. e.g., Krämer, J., Improving The Economic Effectiveness of the B2B and B2C Data Sharing Obligations in the Proposed Data Act, CERRE, 2022, p. 9.

- *data recipients* in the Union to whom data are made available (lit. d)
- *public sector bodies*, the Commission, the European Central Bank and Union bodies that request data holders to make data available where there is an exceptional need for those data for the performance of a specific task carried out in the public interest and to the data holders that provide those data in response to such request (lit. e)
- *data processing service providers* (irrespective of their place of establishment) providing such services to customers in the Union (lit. f)[61]
- *participants* in data spaces[62] and *vendors* of applications using smart contracts and *persons* whose trade, business or profession involves the deployment of smart contracts for others in the context of executing an agreement (lit. g)

It is important to note that Art. 1(3) combines the personal and territorial scope of the Data Act.[63] With references to products and services "placed on the market in the Union" (lit. a) as well as to "providing such services to customers in the Union" (lit. f) the Data Act mirrors the well-known market principle. At first sight, the Data Act should be interpreted in line with existing data regulation – inter alia Art. 3(2)(a) and rec. 23 GDPR as well as Art. 11(3) and rec. 42 DGA (with its reference to "envisage offering services" (rec. 23 GDPR)).[64]

Virtual Assistants

Art. 1(4) clarifies that "[w]here this Regulation refers to connected products or related services, such references are also understood to include virtual assistants insofar as they interact with a connected product or related service." According to Art. 2(31) virtual assistant refers to "software that can process demands, tasks or questions including those based on audio, written input, gestures or motions, and that, based on those demands, tasks or questions, provides access to other services or controls the functions of connected products".

Rec. 23 underlines and elaborates on the central role virtual assistants play in today's connected society. The recital further clarifies the data

61 Cf. the (different) terminology and the concept sub Ch. VI. below. Cf. also Hennemann, M. / Steinrötter, B., *NJW* 2022, 1481 (1482).
62 Cf. also rec. 27 and 103 as well as Art. 30 lit. h DGA.
63 Hennemann, M. / Steinrötter, B., *NJW* 2022, 1481 (1482).
64 Hennemann, M. / Steinrötter, B., *NJW* 2022, 1481 (1482).

covered ("only the data arising from the interaction between the user and a connected product or related service through the virtual assistant should be covered by this Regulation.").

2. Interplay with Existing Rules (Art. 1 paras. 5 and 6, Art. 43)

Manifold questions arise regarding the interplay of the Data Act with existing rules in other fields of laws.[65]

Contract Law

Rec. 9 underlines that the Data Act "does not affect national contract law, including rules on the formation, validity or effect of contracts, or the consequences of the termination of a contract."[66] In addition, Art. 1(10) stresses that the Data Act "does not preclude the conclusion of voluntary lawful data sharing contracts, including contracts concluded on a reciprocal basis, which comply with the requirements laid down in this Regulation." Furthermore, Art. 1(6) Sentence 1 clarifies that "[t]his Regulation 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."[67]

Unfair Terms Law and Consumer Law

Art. 1(9) underlines that the Data Act only complements and is without prejudice to EU consumer law – in particular the Directive 2005/29/EC

65 Cf. Hennemann, M. / Steinrötter, B., *NJW* 2024, 1 (5 et seq.) as well as Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 96 n. 267 et seq. See also Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, pp. 73 et seq. Questions of Trade Secrets Law are discussed below in the context of the relevant norms. Cf. in detail in this regard Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 100 n. 277 et seq., for questions with regard to private international law cf. pp. 120 et seq. n. 333 et seq.

66 Council Presidency 2022/0047(COD) – 15035/22, p. 9.

67 Council Presidency 2022/0047(COD) – 13342/22, p. 36.

(Unfair Commercial Practices Directive)[68], the Directive 2011/83/EU[69], and the Directive 93/13/EEC[70].[71] Rec. 28 underlines especially that Art. 13 does not apply to b2c-contracts, but that respective contracts are subject to Directives 93/13/EEC and 2005/29/EC.

Intellectual Property Law

Fundamentally, Art. 43 curbs protection granted to databases by way of a *sui generis* right within the ambit of the Act.[72] Art. 7 of Directive 96/9/EC (Database Directive)[73] shall not apply to databases containing data obtained from or generated by the use of a product or a related service. The goal of this provision is in particular that the exercise of the access (and use) right of users according to Art. 4 and the right to share such data with third parties according to Art. 5 is not hindered.[74] However, the scope of Art. 43 remains unclear.[75] Rec. 112 underlines that the Data Act is seeking to "eliminate the risk that holders of data (…) claim" the *sui generis* right and rec. 71 refers – in the context of the Art. 14 et seqq. – to the fact that "[w]here the sui generis database rights under [Database Directive] (…) apply in relation to the requested datasets, data holders should exercise their rights in such a way that does not prevent the public sector body, the Commission, the European Central Bank or Union body from obtaining the data, or from sharing it, in accordance with this Regulation."

68 Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market.

69 Directive 2011/83/EU of the European Parliament and of the Council on consumer rights.

70 Directive 93/13/EEC on unfair terms in consumer contracts. Directive (EU) 2019/2161 of the European Parliament and of the Council amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules.

71 Cf. also rec. 9.

72 Cf. in detail for intellectual property rights beyond Art. 43 Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 96 n. 268 et seq. as well as Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, p. 76.

73 Directive 96/9/EC of the European Parliament and of the Council on the legal protection of databases.

74 Cf. also rec. 112.

75 Cf. for a discussion in detail Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 90 n. 254 et seq.

Data Protection Law

The omnipresent question of the interplay between the Data Act – as applying to personal and non-personal data alike – and data protection law[76] sought to be answered by Art. 1(5). According to Art. 1(5) Sentence 1, the Data Act shall not affect the applicability of Union law on the protection of personal data, in particular the GDPR and Directive 2002/58/EC (ePrivacy Directive)[77] (including the powers and competences of supervisory authorities). Rec. 7 confirms that these acts (as well as the Regulation (EU) 2018/1725[78] mentioned there) "provide the basis for sustainable and responsible data processing, including where datasets include a mix of personal and non-personal data".

The Data Act obligations are – as far as the processing of personal data is concerned – added to the existing data protection law duties of processors[79]: "In the event of a conflict between this Regulation and Union law on the protection of personal data or privacy, or national legislation adopted in accordance with such Union law, the relevant Union or national law on the protection of personal data or privacy shall prevail." (Art. 1(5) Sentence 4)[80]

Rec. 7 explicitly underlines that "[n]o provision of this Regulation should be applied or interpreted in such a way as to diminish or limit the right to the protection of personal data or the right to privacy and confidentiality of communications."[81] In many cases, it needs to be evaluated carefully

76 Cf. for a discussion in detail Max Planck Institute for Innovation and Competition, Position Statement, 2022, pp. 105 et seq. n. 291 et seq.

77 Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector.

78 Regulation (EU) 2018/1725 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data.

79 Hennemann, M. / Steinrötter, B., *NJW* 2022, 1481 (1482); Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, p. 91.

80 Cf. also Art. 6(2)(b).

81 But cf. Art. 18(5) and 21 (sub VIII. 6. and 9.).

whether and to what extent a joint controllership (Art. 26 GDPR) exists (cf. also rec. 34).[82]

Rec. 8 additionally highlights the data protection law principles of data minimisation[83] and data protection by design and by default as well as the technical and organisational measures going along with these principles (cf. inter alia Art. 24 and 32 GDPR).[84] With respect to respective measures rec. 8 insists that "[s]uch measures include not only pseudonymisation and encryption, but also the use of increasingly available technology that permits algorithms to be brought to the data and allow valuable insights to be derived without the transmission between parties or unnecessary copying of the raw or structured data themselves."

In Particular: Legal Basis According to Art. 6(1)(c) and (3) GDPR

One of the main disputes around the Data Act is whether and to what extent the obligations set by the Act, especially to grant access, are to be read a constituting a legal obligation according to Art. 6(1)(c) (as well as Art. 6(1)(e) and (3)) GDPR – justifying the respective data processing (transfer to user and / or third party).[85] It is obvious that the route taken in this regard is fundamentally shaping the effectiveness of the Data Act.[86] The matter was clarified (to some extent) during the legislative process.[87] It is fair to say that many uncertainties remain. Rec. 7 stipulates[88]:

> "Any processing of personal data pursuant to this Regulation should comply with Union data protection law, including the requirement of a valid legal basis for processing under [Art. 6 GDPR] and, where relevant, the conditions of [Art. 9 GDPR] and of [Art.] 5(3) of Directive 2002/58/EC."

82 Cf. in this regard Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, pp. 90 et seq., 99.
83 Cf. also rec. 20.
84 Cf. also rec. 24 with regard to the duration of data storing.
85 Strongly in favour Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, pp. 90 et seq.; Specht-Riemenschneider, L., *MMR-Beil.* 2022, 809 (810 et seq.).
86 Cf. also Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, p. 75.
87 Cf. also the proposal by LIBE, PE737.389, pp. 23 et seq.
88 Cf. also rec. 20 and 24.

With regard to the access regime in Art. 4 et seq. rec. 7 further highlights:[89]

> "This Regulation does not constitute a legal basis for the collection or generation of personal data by the data holder. This Regulation imposes an obligation on data holders to make personal data available to users or third parties of a user's choice upon that user's request. Such access should be provided to personal data that are processed by the data holder on the basis of any of the legal bases referred to in [Art. 6 GDPR]. Where the user is not the data subject, this Regulation does not create a legal basis for providing access to personal data or for making personal data available to a third party and should not be understood as conferring any new right on the data holder to use personal data generated by the use of a connected product or related service."

Rec. 7, however, also slightly opens the door for a legal basis according to Art. 6(1)(f) GDPR: "it could be in the interest of the user to facilitate meeting the requirements of [Art. 6 GDPR]."

With regard to the access regime in Art. 14 et seq. rec. 69 underlines:

> "In accordance with [Art. 6(1) and (3) GDPR], a proportionate, limited and predictable framework at Union level is necessary when providing for the legal basis for the making available of data by data holders, in cases of exceptional needs, to public sector bodies, the Commission, the European Central Bank or Union bodies, both to ensure legal certainty and to minimise the administrative burdens placed on businesses."[90]

In Particular: Art. 20 GDPR

Art. 1(5) Sentence 2 confirms that the right to access (Art. 15 GDPR) and especially the right to data portability (Art. 20 GPDR) remain untouched ("complement") by what is prescribed in Chapter II of the Act – despite the similar nature of the right to access according to Art. 4(1) and 5(1). No such complementary relationship with Art. 20 GDPR is stated for the rights in relation to switching between data processing services under Chapter VI of the Act.[91]

89 Cf. also rec. 69 and 72 as well as Art. 17(1)(h).
90 Cf. in detail below sub VIII. 11.
91 Cf. in detail below sub IX. 9.

Data Governance Act

Whilst the Commission proposal was rather silent on the interplay with the Data Governance Act, the final version of the Data Act now rightly – in rec. 26 and 33 – highlights the prospects and needs in this regard:

> "[d]ata intermediation services[92], as regulated by [the Data Governance Act] could facilitate [the] data economy by establishing commercial relationships between users, data recipients and third parties and may support users in exercising their right to use data, such as ensuring the anonymisation of personal data or aggregation of access to data from multiple individual users."

as well as

> "[b]usiness-to-business data intermediaries and personal information management systems (PIMS), referred to as data intermediation services in [the Data Governance Act], may support users or third parties in establishing commercial relations with an undetermined number of potential counterparties for any lawful purpose (...). They could play an instrumental role in aggregating access to data so that big data analyses or machine learning can be facilitated, provided that users remain in full control of whether to provide their data to such aggregation and the commercial terms under which their data are to be used."

This is not to say that these recitals seem sufficient. Although the Data Act clarifies that data intermediation services may be a third-party recipient according to Art. 5 (cf. rec. 39), the Data Act does not substantially tackle the relationship to and its interplay with the Data Governance Act[93] (rec. 70 being an exception clarifying the relationship between the Art. 14 et seq. and the Data Governance Act). A minor (positive) fragment in this regard is rec. 30 where it is highlighted that the user may use data intermediation services to act on the user's behalf in the context of exercising the Data Act rights and any (subsequent) data sharing.

In general, specific rules are missing and no incentives are set. As data intermediaries do fulfil a central function in order to enable data

92 Cf. also Art. 2(10).

93 Cf. e.g., 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. 236.

exchanges / data contracts, this gap opposes the general aim of the Data Act to enhance and foster data sharing and data use.

Some further aspects with regard to public sector information, the European Data Innovation Board (EDIB), the committee procedure, and the evaluation process are, however, regulated by Art. 17(3), 33(11), 42, 46, 49(1)(a) (see also rec. 103).

Free Flow of Data-Regulation

The Data Act complements the Regulation (EU) 2018/1807 (Free Flow of Data Regulation) (Art. 1(7)) – especially by the additional requirements for cloud switching (cf. also rec. 79).

Competition Law

According to rec. 116, the Data Act does not touch Competition Law (Art. 101 et seq. TFEU).[94] The instruments spelled out in the Act shall not be used in way that does not comply with Art. 101 et seq. TFEU.[95]

Criminal Law / Criminal Procedural Law / Digital Services Act

Art. 1(6) Sentence 2 states in addition that the Act shall not affect criminal law and related fields (cf. also rec. 10).

This shall include Regulations (EU) 2021/784[96], (EU) 2022/2065 (Digital Services Act)[97] and (EU) 2023/1543 and Directive (EU) 2023/1544[98] as well

94 Cf. also on the question whether competition law instruments are granting adequate solutions for the situations tackled by the Data Act Proposal Max Planck Institute for Innovation and Competition, Position Statement, 2022, pp. 17 et seq. n. 36 et seq.

95 Cf. also Bomhard, D. / Merkle, M., *RDi* 2022, 168 (172).

96 Regulation (EU) 2021/784 of the European Parliament and of the Council on addressing the dissemination of terrorist content online.

97 Regulation (EU) 2022/2065 of the European Parliament and of the Council on a Single Market For Digital Services.

98 Directive (EU) 2023/1544 of the European Parliament and of the Council of 12 July 2023 laying down harmonised rules on the designation of designated establishments and the appointment of legal representatives for the purpose of gathering electronic evidence in criminal proceedings.

as international cooperation in this regard. Rec. 10 refers to the Budapest Convention[99] in particular.

Furthermore, the Data Act does not apply to collection, sharing, access or use of data with regard to Regulation (EU) 2015/847[100] and Directive (EU) 2015/849[101].

Product Safety / Accessibility Requirements for Products and Services

Rec. 11 and 12 confirm respectively that product-specific regulations regarding physical design and data requirements as well as accessibility requirements on certain products and services (in particular Directive 2019/882[102]) shall remain unaffected.

3. Definitions (Art. 2)

Art. 2 defines a vast number of terms to which will be referred within the following chapters. The central ones shall be highlighted in the following.[103]

Data

According to Art. 2(1) data means "any digital representation of acts, facts or information and any compilation[104] of such acts, facts or information, including in the form of sound, visual or audio-visual recording".[105] Data therefore encompasses personal as well non-personal data. This definition

99 Council of Europe 2001 Convention on Cybercrime.

100 Regulation (EU) 2015/847 of the European Parliament and of the Council on information accompanying the transfer of funds.

101 Directive (EU) 2015/849 of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering and terrorist financing.

102 Directive (EU) 2019/882 of the European Parliament and of the Council on the accessibility requirements for products and services.

103 Details are also discussed, where relevant, in the following chapters.

104 Cf. in regard this rather vague term Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 23 n. 57.

105 Similar to ISO-Norm ISO/IEC 2382:2015, IT Vocabulary, 2121272. Cf. also in general Zech, H., Information als Schutzgegenstand, 2012, pp. 32 et seq.; Zech, H., *CR* 2015, 137 (138 et seq.).

is a sensible one – as it does not just equal data to information (as Art. 4(1) GDPR does).[106] It is underlined that data is a "transport layer" for information.[107] Art. 2(3), however, defines personal data in line with the Art. 4(1), whereas Art. 2(4) stipulates more broadly that non personal data is data other than personal data.

The Act further provides definitions for metadata (Art. 2(2)), for product data (Art. 2(15)) and related service data (Art. 2(16))[108] as well as for readily available data (Art. 2(17) and rec. 20), and exportable data (Art. 2(38) and rec. 82). Rec. 15 stipulates further details in this regard, also with respect to "data in raw form", "pre-processed data", and "information inferred or derived from such data".

The term data must be separated from the term "digital assets" which is defined in Art. 2(32) as "elements in digital form, including applications, for which the customer has the right of use, independently from the contractual relationship with the data processing service it intends to switch from" – relevant in the context of Art. 23(c), 25, 29(5) (cf. also rec. 83).

Connected Product

According to Art. 2(5) a connected product is referring to "an item that obtains, generates or collects data concerning its use or environment and that is able to communicate product data via an electronic communications service[109], physical connection or on-device access, and whose primary function is not the storing, processing or transmission of data on behalf of any party other than the user". This definition mainly refers to Internet of Things-products.[110] Rec. 14 confirms and clarifies in this regard:

> "Connected products that obtain, generate or collect, by means of their components or operating systems, data concerning their performance, use or environment and that are able to communicate those data via an electronic communications service, a physical connection, or on-device

106 Hennemann, M. / Steinrötter, B., *NJW* 2022, 1481 (1482).
107 Hennemann, M. / Steinrötter, B., *NJW* 2022, 1481 (1482).
108 But cf. also rec. 20 and potential definitions of relevant data by further Union law and national law.
109 Rec. 14 explains that „electronic communications services include, in particular, land-based telephone networks, television cable networks, satellite-based networks and near-field communication networks."
110 Hennemann, M. / Steinrötter, B., *NJW* 2022, 1481 (1482).

> access, often referred to as the Internet of Things, should fall within the scope of this Regulation, with the exception of prototypes. (…) Connected products are found in all aspects of the economy and society, including in private, civil or commercial infrastructure, vehicles, health and lifestyle equipment, ships, aircraft, home equipment and consumer goods, medical and health devices or agricultural and industrial machinery."

Different to the original proposal of the Act, the definition of connected products is not further specified. Rec. 16, however, underlines that the Act does not cover settings of specific products (by narrowing the definition of – *inter alia* – relevant 'product data' – also mirroring the scope set by Art. 1(2)(a)):

> "It is important to delineate between, on the one hand, markets for the provision of such sensor-equipped connected products and related services and, on the other, markets for unrelated software and content such as textual, audio or audiovisual content often covered by intellectual property rights. As a result, data that such sensor-equipped connected products generate when the user records, transmits, displays or plays content, as well as the content itself, which is often covered by intellectual property rights, inter alia for use by an online service, should not be covered by this Regulation. This Regulation should also not cover data which was obtained, generated or accessed from the connected product, or which was transmitted to it, for the purpose of storage or other processing operations on behalf of other parties, who are not the user, such as may be the case with regard to servers or cloud infrastructure operated by their owners entirely on behalf of third parties, inter alia for use by an online service."

Related Service

According to Art. 2(3) related service is referring to "digital service, other than an electronic communications service, including software, which is connected with the product at the time of the purchase, rent or lease in such a way that its absence would prevent the connected product from performing one or more of its functions, or which is subsequently connected to

the product by the manufacturer or a third party to add to, update or adapt the functions of the connected product".[111]

Definitional References to Other Legal Acts

The Act frequently references other pieces of EU (digital) legislation. For example, Art. 2(3), (11) and (20) point to the GDPR definitions for personal data, data subject, and profiling. Art. 2(10) transplants the notion of data intermediation services from Art. 2(11) DGA[112], as do Art. 2(18) and (19) for the concept of trade secrets and trade secret holder introduced in Art. 2(1) and (2) of Directive (EU) 2016/943. These definitions and references do support a coherent interpretation of the relevant terms under European data law.

111 Cf. also rec. 15, 17 and 18.

112 Cf., in detail, Specht-Riemenschneider, L., in id. / Hennemann, M. (ed.), *Data Governance Act*: *DGA*, Nomos 2023, Art. 2 para. 64 et seq.