

Data Act & GDPR

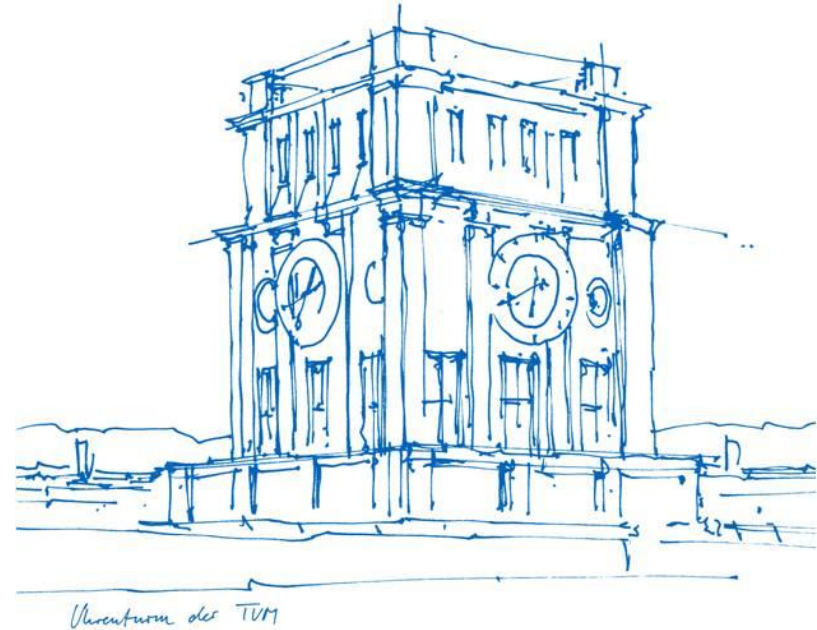
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Agenda

Part I – Dogmatic Foundations

1. Introduction and Key Issues
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3. Literal Analysis
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5. Processing of Personal Data
6. Summary and Outlook

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1. Introduction to the Data Act
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Part I – Dogmatic Foundations

1. Introduction and Key Issues

State of Play

Table 1: Overview of EU Legislations in the Digital Sector

Research & Innovation	Industrial Policy	Connectivity	Data & Privacy	IPR	Cybersecurity	Law Enforcement	Trust & Safety	E-commerce & Consumer Protection	Competition	Media	Finance
Digital Europe Programme Regulation (EU) 2021/5864	Recovery and Resilience Facility Regulation (EU) 2021/5864	Frequency Bands Directive (EC) 1997/372	efficiency Directive (EU) 2023/218, 2017/0003(CO)	Database Directive (EC) 1996/94	Regulation for a Cybersecurity Act (EU) 2019/1987, 2023/0508(CO)	Law Enforcement Directive (EU) 2016/680	Product Liability Directive (PLD) (EU) 2023/0072, 2023/0508(CO)	Unfair Contract Terms Directive (UCTD) (EC) 1993/73	EC Merger regulation (EC) 2004/139	Satellite and Cable Directive (EC) 1993/68	Common VAT system (EC) 2006/112, 2022/0407(CO)
Horizon Europe Regulation (EU) 2021/5864	InvestEU Programme Regulation (EU) 2021/5864	Radio Spectrum Decision (EC) 2002/976	European Statistics (EC) 2005/16, 2023/0427(CO)	Community Design Directive (EC) 2009/100, 2022/0391(CO)	Regulation to establish a European Cybersecurity Competence Centre (EU) 2021/6867	Directive on combating fraud and counterfeiting of non-cash means of payment (EU) 2018/772	Toy Regulation (EU) 2023/0508(CO)	Price Indication Directive (EC) 1998/68	Technology Transfer Block Exemption (EU) 2014/315	Information Society Directive (EC) 2000/13	Administrative cooperation in the field of taxation (EU) 2011/16
Regulation on a pilot regime for distributed ledger technology (EU) 2022/858	Connecting Europe Facility Regulation (EU) 2023/1133	Open Internet Access Regulation (EU) 2015/2120	General Data Protection Regulation (GDPR) (EU) 2016/679	Enforcement Directive (EU) 2006/48	NIS 2 Directive (EU) 2022/2526	Regulation on interoperability between EU information systems in the field of terrorism and law enforcement (EU) 2019/817	European Standardisation Regulation (EU) 2017/1025	E-commerce Directive (EC) 2000/31, 2023/0508(CO)	Company Law Directive (EU) 2017/1132, 2023/0508(CO)	Audio-visual Media Services Directive (AVMSD) (EU) 2010/13	Payment Service Directive 2 (PSD2) (EU) 2015/2366, 2023/0508(CO)
Regulation on High Performance Computing Joint Undertaking (EU) 2022/1173	Regulation on High Performance Computing Joint Undertaking (EU) 2022/1173	European Electronic Communications Code Directive (EECC) (EU) 2018/1972	Regulation to protect personal data processed by EU institutions, bodies, offices and agencies (EU) 2018/1725	Directive on the protection of trade secrets (EU) 2016/943	Cybersecurity Regulation (EU) 2019/1987	Regulation on terrorist content online (EU) 2021/786	Radio Equipment Directive (RED) (EU) 2016/875	Unfair Commercial Practices Directive (UCPD) (EC) 2005/29	Market Surveillance Regulation (EU) 2019/1020	Portability Regulation (EU) 2017/1326	Digital Operational Resilience Act (DORA) (EU) 2022/2534
Regulation on Joint Undertaking under Horizon Europe (EU) 2021/5864	Regulation on Joint Undertaking under Horizon Europe (EU) 2021/5864	Aviation-based domain Regulation (EU) 2019/117	Regulation on the free flow of non-personal data (EU) 2018/1807	Design Directive (EU) 2023/0392(CO)	Information Security Regulation (EU) 2023/0508(CO)	Temporary CSAM Regulation (EU) 2021/7232, 2022/0135(CO)	eIDAS Regulation (EU) 2014/519	Directive on Consumer Rights (CRD) (EU) 2011/83	P2B Regulation (EU) 2017/1380	Satellite and Cable II Directive (EU) 2019/789	Crypto-assets Regulation (DAC4) (EU) 2023/1174
Decision on a path to the Digital Decade (EU) 2022/2581	Decision on a path to the Digital Decade (EU) 2022/2581	Roaming Regulation (EU) 2022/512	Open Data Directive (ODA) (EU) 2019/1024	Compulsory Roaming of patients (EU) 2023/0392(CO)	Cyber Resilience Act (EU) 2022/726(CO)	E-evidence Regulation (EU) 2023/1543	Regulation for a Single Digital Gateway (EU) 2018/1724	e-Invoicing Directive (EU) 2016/55	Single Market Programme (EU) 2019/560	Copyright Directive (EU) 2019/790	Financial Data Access Regulation (EU) 2023/0508(CO)
European Chips Act (EU) 2022/1781	European Chips Act (EU) 2022/1781	Union Secure Connectivity Programme (EU) 2023/1988	Data Governance Act (EU) 2023/968	Standard essential patents (EU) 2023/0392(CO)	Cyber Solidarity Regulation (EU) 2023/0508(CO)	Digitalisation of cross-border judicial cooperation (EU) 2023/0508(CO)	General Product Safety Regulation (EU) 2023/988	Regulation on cooperation for the enforcement of consumer protection laws (EU) 2022/2494	Vertical Block Exemption Regulation (VBER) (EU) 2022/720	European Media Freedom Directive (EU) 2024/1083	Payment Services Directive 3 (PSD3) (EU) 2023/0508(CO)
Establishing the Strategic Technologies for European Performance (STEP) (EU) 2022/4739	Establishing the Strategic Technologies for European Performance (STEP) (EU) 2022/4739	Global Infrastructure Act (EU) 2024/1369	European Data Act (EU) 2023/2804	Standard essential patents (EU) 2023/0392(CO)	Cyber Solidarity Regulation (EU) 2023/0508(CO)	Directive on combating violence against women (EU) 2023/0508(CO)	Machinery Regulation (EU) 2023/1430	Geo-Blocking Regulation (EU) 2018/302	Digital Market Act (DMA) (EU) 2022/1925	Declassification of documents from third countries for research (DMS) (EU) 2023/1083	Digital euro (EU) 2023/0508(CO)
European critical raw materials act (EU) 2023/1322	European critical raw materials act (EU) 2023/1322	Radio spectrum, policy, and infrastructure (EU) 2023/1322	Interoperable Europe Act (EU) 2024/5023	Regulation on data collection for short-term rental (EU) 2024/1026	Regulation on data collection for short-term rental (EU) 2024/1026	Directive for combating sexual abuse and child sexual abuse material (EU) 2023/0508(CO)	AI Act (Regulation) (EU) 2023/0508(CO)	Digital content Directive (EU) 2019/779	Regulation on disruptive foreign subsidies (EU) 2022/2580	Horizontal Block Exemption Regulation (HBER) (EU) 2023/1083	Regulation on copyright law enforcement (EU) 2023/0508(CO)
Net Zero Industry Act (EU) 2023/0081(CO)	Net Zero Industry Act (EU) 2023/0081(CO)	Digital Networks Act (EU) 2023/1322	Regulation on data collection for short-term rental (EU) 2024/1026	Regulation on data collection for short-term rental (EU) 2024/1026	Regulation on data collection for short-term rental (EU) 2024/1026	Qualification of legal documents (EU) 2023/0508(CO)	Eco-design Regulation (EU) 2023/0508(CO)	Directive on certain aspects concerning contracts for the sale of goods (EU) 2017/773	Digital Market Act (DMA) (EU) 2022/1925	Platform Work Directive (EU) 2023/0508(CO)	Regulation on copyright law enforcement (EU) 2023/0508(CO)
EU Space Law	EU Space Law	EU Space Law	European Health Data Space (Regulation) (EU) 2023/0508(CO)	European Health Data Space (Regulation) (EU) 2023/0508(CO)	European Health Data Space (Regulation) (EU) 2023/0508(CO)	AI Liability Directive (EU) 2023/0508(CO)	AI Liability Directive (EU) 2023/0508(CO)	Digital Services Act (DSA) (EU) 2022/2065	Platform Work Directive (EU) 2023/0508(CO)	Single Market Emergency Instrument (SMEI) (EU) 2023/0508(CO)	Regulation on copyright law enforcement (EU) 2023/0508(CO)
			Harmonisation of GDPR enforcement procedures (EU) 2023/0508(CO)	Harmonisation of GDPR enforcement procedures (EU) 2023/0508(CO)	Harmonisation of GDPR enforcement procedures (EU) 2023/0508(CO)			Political Advertising Regulation (EU) 2024/906	Single Market Emergency Instrument (SMEI) (EU) 2023/0508(CO)		
			Access to vehicle data, functions and resources (EU) 2023/0508(CO)	Access to vehicle data, functions and resources (EU) 2023/0508(CO)	Access to vehicle data, functions and resources (EU) 2023/0508(CO)			Right to repair Directive (EU) 2023/0508(CO)			
			Green Data Act (EU) 2023/0508(CO)	Green Data Act (EU) 2023/0508(CO)	Green Data Act (EU) 2023/0508(CO)			Consumer protection, standardised, information, cooperation (EU) 2023/0508(CO)			

State of Play

- The EU's recent digital legal acts concern or require the **processing of data**. Such data processing (especially) includes the processing of **personal data**.
- The legislative processes were characterized by the conflict of various interests. A (necessary) differentiated debate on the scope of and restrictions to the GDPR was not possible due to **fears of a softening of the level of data protection**.
- Interim result and initial thesis: **Conflict-of-law rules** between GDPR and EU digital law **do not adequately reflect the complexity of interplay** and (at best) partially meet the practical challenges.

2. Conflict-of-Law Rules

Art. 1(5) Data Act (DA)

This Regulation **is without prejudice to** Union and national law on the protection of personal data, privacy and confidentiality of communications and integrity of terminal equipment, which shall apply to personal data processed in connection with the rights and obligations laid down herein, **in particular Regulations (EU) 2016/679** and (EU) 2018/1725 and Directive 2002/58/EC, including the powers and competences of supervisory authorities and the rights of data subjects.

[...]

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(3) Data Governance Act (DGA)

Union and national law on the protection of personal data shall apply to any personal data processed in connection with this Regulation. In particular, this Regulation is without prejudice to Regulations (EU) 2016/679 and (EU) 2018/1725 and Directives 2002/58/EC and (EU) 2016/680, including with regard to the powers and competences of supervisory authorities.

In the event of a conflict between this Regulation and Union law on the protection of personal data or national law adopted in accordance with such Union law, the relevant Union or national law on the protection of personal data shall prevail.

This Regulation does not create a legal basis for the processing of personal data, nor does it affect any of the rights and obligations set out in Regulations (EU) 2016/679 or (EU) 2018/1725 or Directives 2002/58/EC or (EU) 2016/680.

Art. 2(4) Digital Services Act (DSA)

This Regulation **is without prejudice to** the rules laid down by other Union legal acts regulating other aspects of the provision of intermediary services in the internal market or specifying and complementing this Regulation, **in particular, the following:**

(...)

g) **Union law on the protection of personal data**, in particular **Regulation (EU) 2016/679** and Directive 2002/58/EC;

Art. 2(7) Artificial Intelligence Act (AI Act)

Union law on the protection of personal data, privacy and the confidentiality of communications applies to personal data processed in connection with the rights and obligations laid down in this Regulation.

This Regulation shall not affect Regulation (EU) 2016/679 or (EU) 2018/1725, or Directive 2002/58/EC or (EU) 2016/680, without prejudice to Article 10(5) and Article 59 of this Regulation.

Interim Findings

- Data Governance Act, Digital Services Act and Data Act are “without prejudice to” the GDPR; the GDPR remains applicable in parallel.
- AI Act “shall not affect” the GDPR.
- Data Act and Data Governance Act contain an explicit event-of-conflict regime in favor of the GDPR; in such cases, the GDPR “shall prevail”.
- Data Governance Act “does not create a legal basis for the processing of personal data”.

Key Questions

- What does “is without prejudice to” mean?
- When can we assume an “event of conflict” in the aforementioned sense?
- What is the relationship to Art. 6 GDPR?
 - Can the acts of digital law justify processing of personal data on the basis of Art. 6(1)(c) or (e) in connection with Art. 6(3) GDPR?
 - Can the acts of digital law justify the existence of a legitimate interest under Art. 6(1)(f) GDPR?
- Can the GDPR – especially its indeterminate terms, elements and concepts – be interpreted – by using such legal acts of EU digital law?

3. Literal Analysis

Version 1: “is without prejudice to” (DGA, DSA, DA)

- Applicability:** GDPR remains **applicable**. Data Governance Act, Digital Services Act and Data Act do not constitute *leges speciales* to the GDPR, neither as a whole nor with regard to individual provisions.
- Interpretation:** The expression “is without prejudice to” **does not** by itself impose **any restriction on the effect of the legal acts on the interpretation of the GDPR**.
- Conclusion:** **Interpretation** of the GDPR in light of these legal acts is **possible**. However, **“hard” legal requirements of the GDPR represent strict limits**.

Version 2: “shall not affect” (AI Act)

- Applicability:** GDPR remains **applicable**. AI Act does not constitute a *lex specialis* to the GDPR, neither as a whole nor with regard to individual provisions.
- Interpretation:** The term “shall not affect” indicates a more **comprehensive restriction of the influence** of the AI Act on the interpretation of the GDPR (compared to the other legal acts of EU digital law).
- Conclusion:** The potential of **interpreting the GDPR using the AI Act** is limited. However, **the legislative rationale underlying the AI Act** may have an effect **on the interpretation of the GDPR re open/vague legal concepts/terms**.

4. In-the-Event-of-a-Conflict

“In the event of a conflict”

Art. 1(3) Data Governance Act (DGA)

In *the event of a conflict* between this Regulation and Union law on the protection of personal data or national law adopted in accordance with such Union law, the relevant Union or national law on the protection of personal data *shall prevail*.

Art. 1(5) Data Act (DA)

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*.

Note: Only in the DGA and DA, other EU digital laws do not contain equivalent provisions.

“In the event of a conflict”

What constitutes a “conflict”?

At least if the GDPR and the other legal act diverge explicitly and substantially.

However: Due to the open legal terms and the GDPR’s case-by-case concept, the existence of such “open” conflicts will only occur in exceptional cases.

In addition, fundamental incompatibilities would / should have already become apparent during the legislative procedure.

“In the event of a conflict”

What constitutes a “conflict”?

Considerations from “outside the GDPR” will not in themselves constitute a “conflict”: Since all processing of data will be based on an interest outside of data protection.

Does the law lead to a rule of “*in dubio pro data protection*”? No: The GDPR itself does not contain such a statement / valuation (cf. Art. 1(1) and Art. 1(3) GDPR).

That is the **GDPR is prioritised, but not the fundamental right to data protection**. However, the GDPR is a regulatory means of reconciling conflicting interests.

5. Processing of Personal Data

Art. 6 GDPR – Lawfulness of Processing

1. Processing shall be lawful only if and to the extent that at least one of the following applies:

(...)

(c) processing is necessary for **compliance with a legal obligation** to which the controller is subject;

(...)

(e) processing is necessary for the **performance of a task carried out in the public interest** or in the **exercise of official authority** vested in the controller;

(...)

f) processing is necessary for the purposes of the **legitimate interests** pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

Legitimate Interest (lit. f)

“processing is necessary for the purposes of the **legitimate interests** pursued by the controller or by a third party, **except where such interests are overridden** by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.”

- Proposition 1: An **objective clearly pursued by a legal act of EU digital law**, in principle, may constitute a *legitimate interest*.
- Proposition 2: At least **in standard scenarios**, we may derive from the *telos* of the legal act and the principle of *effet utile* that the intended **processing should generally be possible**.

6. Summary and Outlook

1. The central aim of the conflict-of-law rules is to clarify that the GDPR is not superseded by a *lex specialis* understanding of the legal acts of EU digital law. The GDPR remains wholly **applicable in parallel**.
2. An **interpretation** of the GDPR, in particular of its undefined legal terms, using and taking into account the legislative objectives pursued in the digital legal acts **is permissible and necessary**. However, due to divergent wording, the AI Act may form an exception here.
3. There is **no general primacy of data protection**. Moreover, a primacy of data protection must be **discerned strictly** from primacy of the GDPR.
4. The acts of digital law may **justify** any data processing in conjunction with **Art. 6(1)(c) or (e) GDPR**, provided that the digital legal acts contain sufficiently specific obligations.
5. The **legislative considerations underlying** the acts of digital law are likely to lead to at least “standard” data processing being **justified / justifiable** under **Art. 6(1)(f) GDPR**.

Part II – Data Act & GDPR

1. Introduction to the Data Act

Background

- Access to data as a key issue of the digital transformation. EU data strategy: Establishing an efficient and innovative data market / data economy
- Problem(s): Lack of incentives, high transaction costs, substantial (market) power and information asymmetries, technical obstacles
- Status quo: untapped potential for innovation and growth
- Timeline: Entry into force on January 11, 2024 – applicable from September 12, 2025 – obligations from Art. 3(1) applicable from 12 September 2026

2. Scope of Application and Definitions

Scope of Application and Subject Matter

Art. 1(1)(a) DA:

“making available of product data and related service data to the user of the connected product or related service”

→ covers both personal and non-personal data (Art. 1(2)(a) DA)

→ Product data & related service data

→ List of definitions in Art. 2 DA

Definitions, Art. 2 DA

- No. 12: 'user' means a **natural or legal** person that **owns** a connected product or to whom temporary rights to use that connected product **have been** contractually **transferred**, or **that receives** related services;
- No. 13: 'data holder' means a **natural or legal person** that **has the right or obligation**, in accordance with this Regulation, applicable Union law or national legislation adopted in accordance with Union law, **to use and make available data**, including, where contractually agreed, product data or related service data **which it has retrieved or generated during the provision of a related service**;
- No. 14: 'data recipient' means **a natural or legal person**, acting for purposes which are related to that person's trade, business, craft or profession, other than the user of a connected product or related service, **to whom the data holder makes data available**, including a third party following a request by the user to the data holder or in accordance with a legal obligation under Union law or national legislation adopted in accordance with Union law;

3. B2C and B2B Data Access

Art. 3 DA – Data Access by Design and Default

- Connected products shall be designed and manufactured, and related services shall be designed and provided, in such a manner that product data and related service data, including the relevant metadata necessary to interpret and use those data, are, by default, easily, securely, free of charge, in a comprehensive, structured, commonly used and machine-readable format, and, where relevant and technically feasible, directly accessible to the user. (Art. 3(1) DA)
- Pre-contractual information obligations, Art. 3(2 and 3) DA

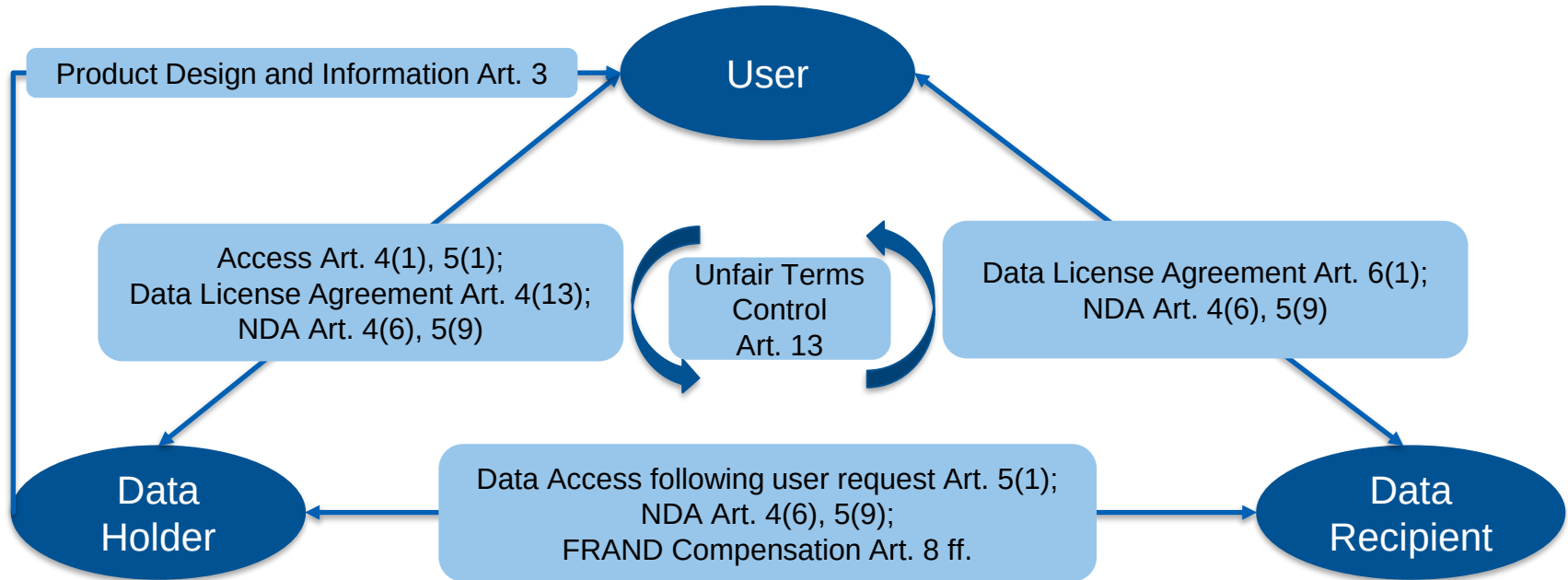
Art. 4 DA – Data Access for Users

- Where data cannot be directly accessed by the user from the connected product or related service, data holders shall make readily available data, as well as the relevant metadata necessary to interpret and use those data, accessible to the user without undue delay, of the same quality as is available to the data holder, easily, securely, free of charge, in a comprehensive, structured, commonly used and machine-readable format and, where relevant and technically feasible, continuously and in real-time. This shall be done on the basis of a simple request through electronic means where technically feasible (Art. 4(1) DA)
- Starting point for the right to data access: the user's request – user-centered approach

Art. 5 DA – Data Access for Third Parties

- Upon request by a user, or by a party acting on behalf of a user, the data holder shall make available readily available data, as well as the relevant metadata necessary to interpret and use those data, to a third party without undue delay, of the same quality as is available to the data holder, easily, securely, free of charge to the user, in a comprehensive, structured, commonly used and machine-readable format and, where relevant and technically feasible, continuously and in real-time. (Art. 5(1) DA)

Data Access Framework / Contractualisation



4. Relationship between Data Act and GDPR

Recap

Art. 1(5) DA

- Data Act is “without prejudice to” the GDPR → does not prevent interpretative influence, especially via GDPR’s (vague) concepts / texts
- Under “event-of-conflict-rule”, the GDPR shall prevail → only (very) little practical impact

Recital 7 DA

- Data Act complements GDPR (e.g. Art. 15 & 20 GDPR)
- Data Act is “without prejudice to” the GDPR
- No weakening or restriction of the right to protection of personal data by the Data Act

Inherent Tension between Data Act and GDPR

Data economy law

Access and utilization of data

vs.

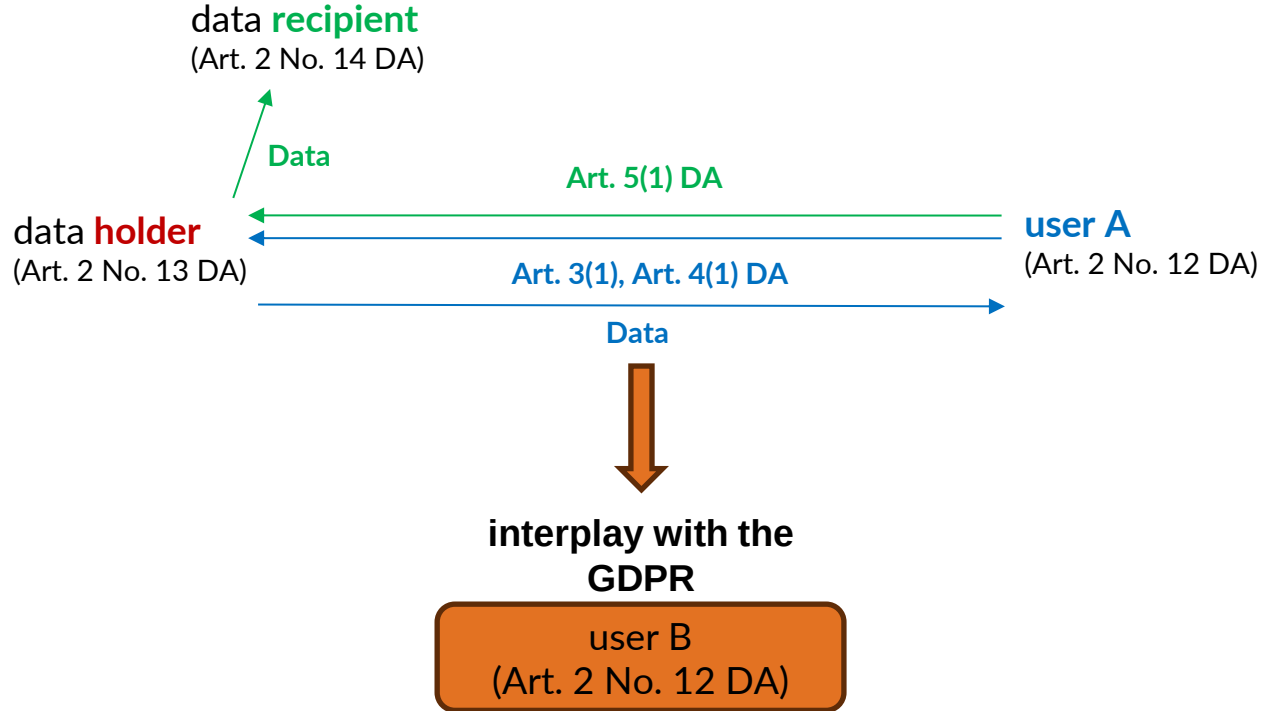
Data protection law

Protection of personal data

Degree of tension depending on:

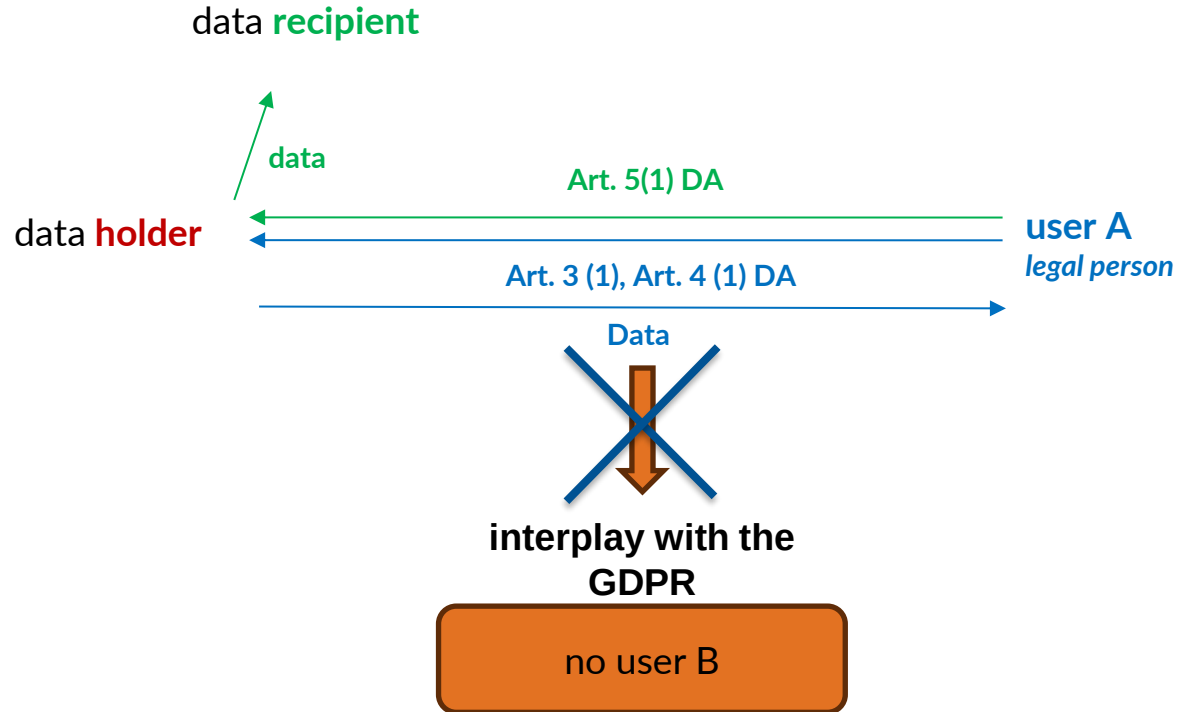
- type of data
- parties involved
- interests affected

Access Rights and Parties Involved

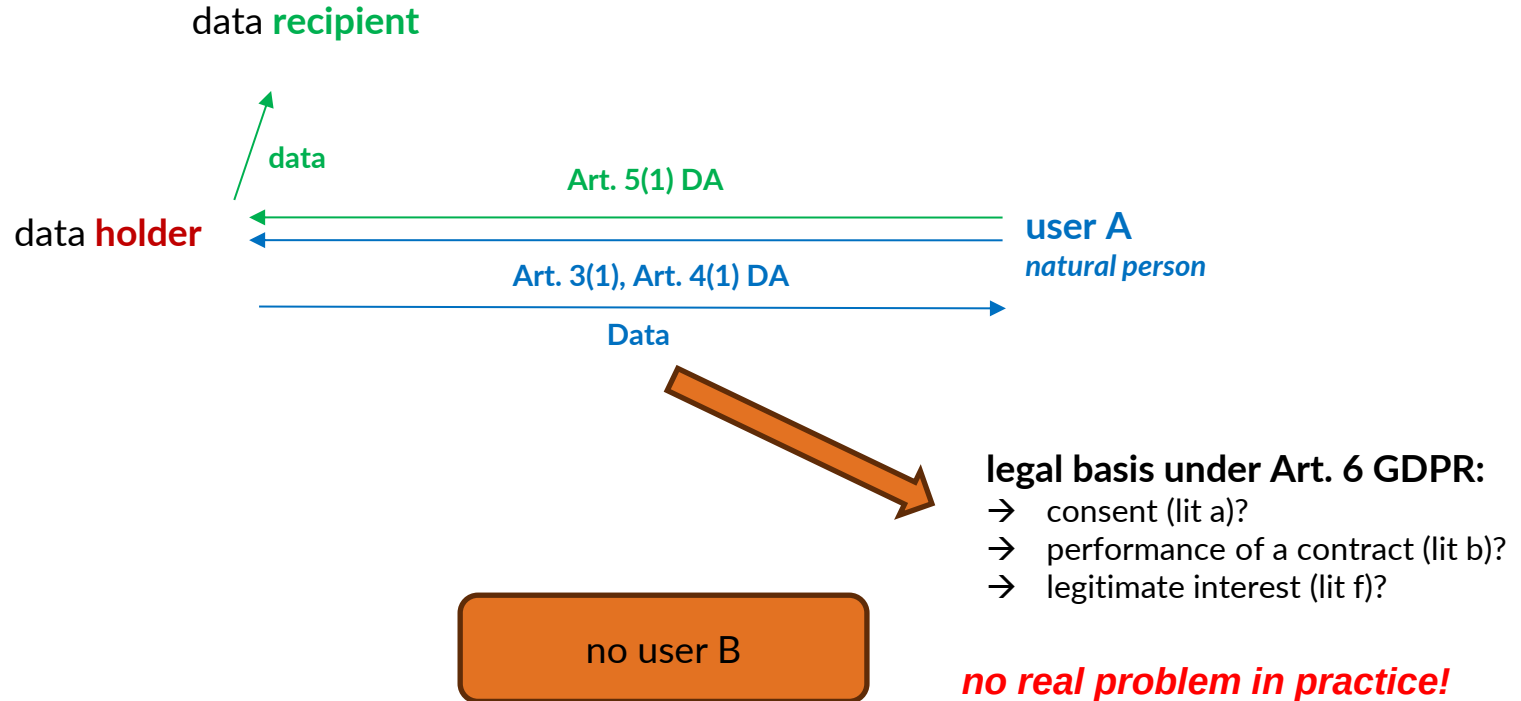


5. Exemplary Scenarios

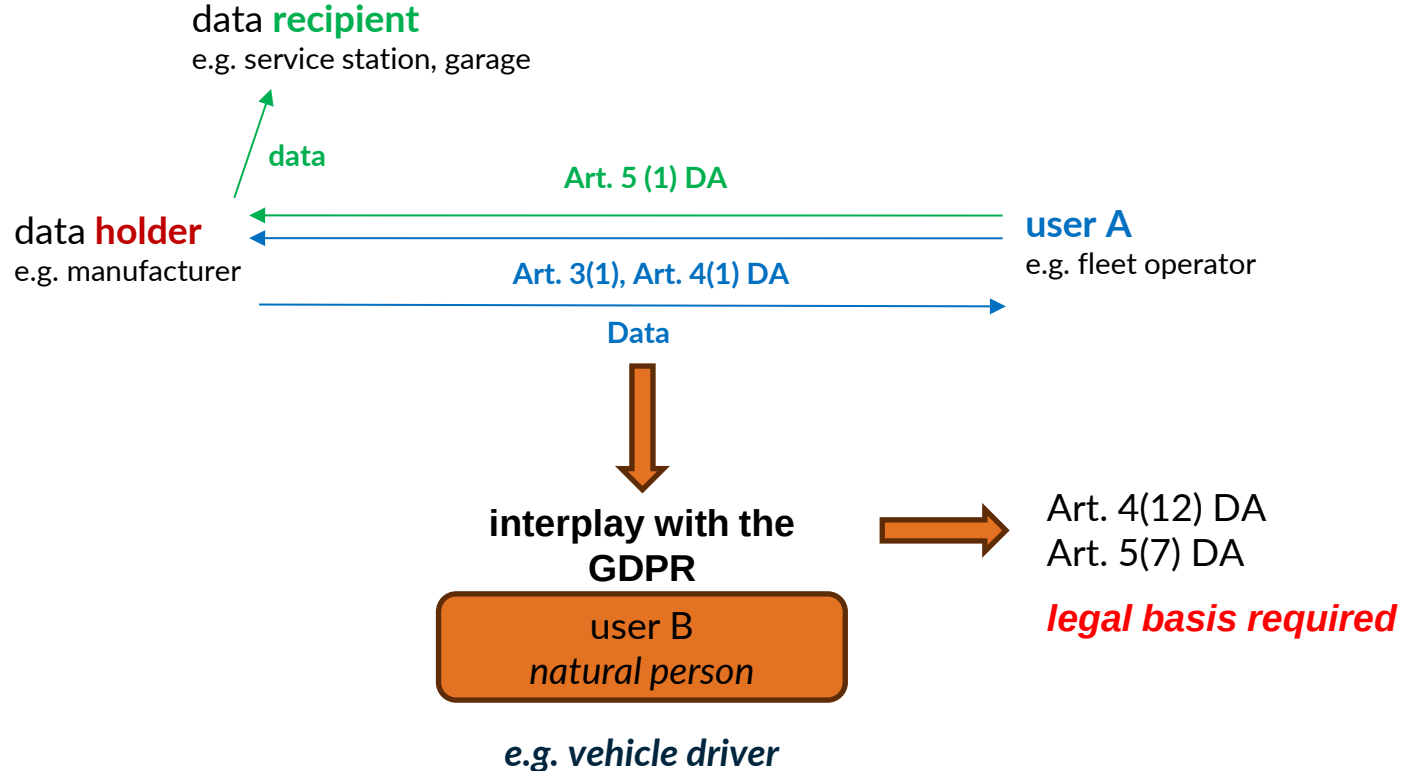
Scenario I



Scenario II



Scenario III



Scenario III

→ Art. 4(12) DA:

→ “Where the user is not the data subject whose personal data is requested, any personal data generated by the use of a connected product or related service shall be made available by the data holder to the user only *where there is a valid legal basis for processing under Article 6 of Regulation (EU) 2016/679 (...)*”

→ Art. 5(7) DA:

→ “Where the user is not the data subject whose personal data is requested, any personal data generated by the use of a connected product or related service shall be made available by the data holder to the third party *only where there is a valid legal basis for processing under Article 6 of Regulation (EU) 2016/679 (...)*”

Interim Findings

- Double dilemma for data holders when third party personal data is involved:
 - Risk of GDPR violation when fulfilling a Data Act access request
 - Risk of Data Act violation when refusing to fulfill a Data Act access request
- Necessity of qualifying data as (non-)personal – which may be difficult to do (mixed data sets, anonymization requirements)
- Data holders may have substantial incentives and good reasons to refuse granting data access – is there a “data protection defense” ?!

Compliance Strategies

→ Recital 7 DA

- [Anonymization](#) of data
- [Restrict access](#) exclusively to data from user A

→ [Conclusion of a data contract](#)

- Recital 7 DA: "[...] *In these cases, it could be in the interest of the user to enable compliance with the requirements of Article 6 of Regulation (EU) 2016/679.*"
- Between user A and the data holder: [Obligation](#) of user A vis-à-vis the data holder to [guarantee](#) the [existence of an legal basis](#)

There are even more Problems...

- Data minimisation
- Data transfer to data recipients in third countries
- Data protection roles (who is the data controller / data processor?)
- etc.

6. Summary and Outlook

Five Findings on the Data Act

1. Insufficient (legal) economic foundation with a considerable increase in complexity
2. Substantial transaction costs // disadvantages of user-centricity (incentive structure)
3. Contractual solutions dominate (i.e. contractualisation) // only little technical solutions
4. Interplay with other areas of law (in particular GDPR)
5. Practical challenges regarding coherency and legal certainty

Thank you very much!



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