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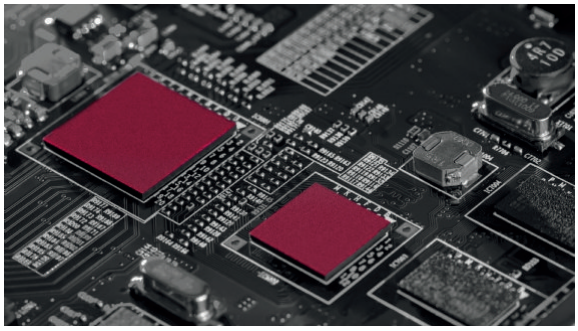

EU Data Act: Relevance for companies – IoT and beyond

Dear Reader,

On 27 June 2023, the EU reached a political agreement on the Data Act. The regulation aims at establishing harmonized rules on "fair access to and use of data". It is clear already that the Act will go well beyond regulating the „Internet of Things" (IoT).

Please find below our Tech Law Briefing.

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Tech Law Briefing:

EU Data Act: Relevance for companies – IoT and beyond

On 27 June 2023, the EU reached a political agreement on the Data Act. The regulation aims at establishing harmonized rules on "fair access to and use of data". It is clear already that the Act will go well beyond regulating the „Internet of Things" (IoT).

I. Overview

The key elements of the act will be:

- **Data Sharing**: Provisions obligating so-called data holders to share data collected by "connected products" or "related services" with the user, or with third parties designated by the user („data recipients"). These measures – laid down in Chapter II and III of the Act – are meant to empower the user, and to encourage more actors, regardless of their size, to participate in data economy. However, the far-reaching and detailed obligations will mean that "data holders" have to make massive efforts to design their connected products and related services in a way which is compliant with the Act. The Act requires data holders to make data from connected or related services accessible free of charge and, where applicable, continuously in real-time. As of today, many connected products and related services are not designed that way. Small enterprises (less than 50 employees or EUR 10 million in annual revenue) and companies that have just met the threshold for medium-sized enterprises are generally exempt from B2C and B2B data sharing obligations.

- **Unfair contractual terms**: Provisions on unfair contractual terms related to data access and use between enterprises (Chapter IV) are meant to prevent the abuse of contractual imbalances that hinder fair data sharing. The rationale is very close to competition law and the Digital Markets Act. Technically, though, the Act just introduces a regime on unfair terms in B2B contracts. Contractual terms are unfair, for instance, if they limit liability for the quality of the data provided, and exclusive rights conferred upon one party are problematic.

- **Data for public sector**: Making data available to public sector bodies on the basis of exceptional need (Chapter V), with a focus on non-personal data.

- **Regulating data processing services, especially cloud services**: New rules meant to make it easier for customers to effectively switch between different providers of the same type of data processing services (Chapter VI). The definition of "data processing services" covers, inter alia, Software as a Service (SaaS), Infrastructure as a Service (IaaS), and Platform as a Service (PaaS). Essentially, these rules are meant to open up the EU cloud market. Provisions regulate, inter alia, technical details, but also contractual clauses (e.g. on termination rights).

- **International data transfer and interoperability**: Provisions meant to prevent unlawful international governmental access and transfer of non-personal data (Chapter VII), and on interoperability (Chapter VIII).

II. Last minute changes to definitions

The law-making process for the Act started in early 2022. There were material changes literally until the last minute, even for provisions such as the definitions of "connected product" and "related services", which are essential for defining who qualifies as a "data holder" and is, thus, addressed by numerous obligations. The European Commission's initial draft excluded devices such as PCs, Smartphones, and game consoles. In the political agreement which has been reached last week, they are no longer excluded.

The definition of "connected product" now reads:

- 'connected product' means an item that obtains, generates or collects, data concerning its use or environment, which is able to communicate product data via an electronic communications service, a physical, connection or on-device access and whose primary function is not the storing, processing or transmission of data on behalf of third parties, other than the user;

- 'related service' means a digital service other than an electronic communications service, including software, which is connected with the product at the time of the purchase in such a way that its absence

would prevent the 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 product.

III. Trade secrets

The obligation to share data can even extend to trade secrets, although there have been some last minute changes here, too. According to the political agreement, for example, the data holder can refuse to make business secrets available on a case-by-case basis if it can demonstrate that serious and irreparable harm is done by disclosing the business secret – but in this case the data holder must not only inform the user about the refusal, but also the competent national authority.

VI. What about GDPR?

Unlike the GDPR, the Act applies to both non-personal data and personal data. It is without prejudice to the GDPR, i.e. it cannot lower the protection afforded by the GDPR to personal data, and it cannot serve as a legal basis for data processing under the GDPR. In practice, this will likely be more difficult than it seems at first sight, especially if a connected product or a related service collects personal and non-personal data – in this case the latter may have to be shared, but the former may not (as far as individuals other than the user are concerned).

V. Timeline

The final text of the Act is not publicly available yet (this article is based on information available to us as of 30 June 2023). The rules which now have been agreed upon are unlikely to change, and a near-to-final text should be available soon, although formal adoption may not come until November. It will be directly applicable in all EU member states 20 months later (with the obligations regarding the design of connected products and related services only applying to such products and services placed on the market after another 12 months). For potential "data holders", though, 20 months is not much to prepare for, as there will be fundamental changes in how connected products and related services must be designed.

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