Access to and use of data under the Data Act

A brief overview for practitioners

Access to and use of data under the Data Act

The main provisions of the Data Act will apply from **12 September 2025**. This regulation provides a new legal basis for the use and exchange of data in the EU. The main objectives of the EU Data Act (also “DA”) are

– promoting data availability to increase innovation and competition,
– preventing data monopolies and lock-in effects, especially in relation to large providers, and
– strengthening user rights.

The Data Act’s extensive provisions affect various economic and legal areas:

Areas governed by the Data Act

I. Overview of the regulation

Chapters I-IV of the Data Act contain rules on data sharing in the B2C and B2B sectors (in particular, data access rules), obligations for data holders who are required under Union law to provide data and a prohibition of unfair contractual terms for B2B contracts concerning data access and use.

The main duties include:

– **Product development – access by design (Article 3(1) DA)**

  Connected products and related services must be designed in such a manner that product data and related service data are directly accessible to the user without the intervention of the data holder or another party.

– **Implementing data access rights (Article 4(1) and Article 5(1) DA)**

  Readily available data must be made available to the user without delay upon request. The user may request the data holder to share data with third parties.

– **Securing own data use (Article 4(13) DA)**

  Data holders require the consent of the user in order to be able to continue to use non-personal, readily available data themselves (data licence).

– **Fulfilling pre-contractual information obligations (Article 3(2) and (3) DA)**

  Sellers/providers must provide users with certain information before concluding a contract for the purchase, rent or lease of a connected product or a contract for the provision of related services.

– **Reviewing business models – FRAND conditions and reasonable compensation (Articles 8 and 9 DA)**

  Data holders who are required to provide data to other companies under Union law – not only under the DA – must do so on fair terms and may only charge reasonable fees.

– **Reviewing model contracts – prohibition of unfair contractual terms (Article 13 DA)**

  Companies are prohibited from unilaterally stipulating unfair clauses concerning data access and use in any B2B contract (e.g. in general terms and conditions).

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II. Product development – access by design (Article 3(1) DA)

Article 3(1) DA stipulates that connected products must be designed and manufactured, and related services must 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 ("*access by design*").

The obligations in Article 3 DA, as well as those in Articles 4 and 5 DA, do not apply to small and medium-sized enterprises (SMEs) under certain conditions set out in Article 7(1) DA. Apart from that, the requirements in Article 3(1) DA must from now on be taken into account by companies as part of product development.

Due to this rather strong intervention and the preparation time that may be required for the adaptation of products and services, this obligation only applies to connected products and related services that are placed on the market after **12 September 2026** (Article 50 DA).

All in all, the requirements of the GDPR are not overridden by the Data Act.

– **Connected products**: The Data Act defines a connected product as "*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, 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*". Examples include connected cars, smart household appliances and connected industrial machines and systems.

– A **related service** is one "*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"*. It is important that the related service influences the functioning of a connected product and that there is a two-way exchange of data. Examples include smartphone apps for controlling a smart thermostat, diagnostic software for connected agricultural machinery and industrial systems.

– **Virtual assistants**: This is "*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*". Examples of this include voice controls. Article 1(4) DA also brings virtual assistants that interact with a connected product or related service within the scope of the Data Act.

– **Product data and related service data:** Product data is "*data generated by the use of a connected product that the manufacturer designed to be retrievable, via an electronic communications service, physical connection or on-device access, by a user, data holder or a third party, including, where relevant, the manufacturer".* This includes data that is designed in such a way that it can be accessed by anyone, not necessarily the data holder or the manufacturer(e.g. also physically on the device). Related service data is "*data representing the digitisation of user actions or of events related to the connected product, recorded intentionally by the user or generated as a by-product of the user's action during the provision of a related service by the provider*".

– **Directly accessible to the user:** Access is provided automatically via the interface created by the data holder without the intervention of the manufacturer or data holder.

– **Restriction of access**: In contrast to Articles 4(1) and (5)(1) DA, Article 3 DA does not contain any provisions allowing direct *access by design* to be restricted. Accordingly, manufacturers and developers must be able to protect personal data or data containing trade secrets. Here, it should be considered whether such categories of data should perhaps only be made available "indirectly" in accordance with Article 4(1) of the Data Act.

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III. Implementing data access rights (Article 4(1) and Article 5(1) DA)

Article 4(1) DA provides that where data cannot be directly accessed by the user from the connected product or related service, data holders must 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**.

The right of access therefore exists as a safeguard should direct access under Article 3(1) DA not be possible. Access must be granted **through electronic means** on the basis of a **simple request** where technically feasible.

The data holder must implement technical measures to make the data available in a user-friendly manner (e.g. via APIs or downloads). Provision of data through third parties, such as data intermediaries, is also possible.

Irrespective of whether the user can access the data under Article 3(1) DA, **Article 5(1) DA** allows the user to request that the data holder provide a **third party** with all readily available data and required metadata in the prescribed format. The specific terms of data access and use are then contractually agreed between the data holder and the third party (data recipient), with the data holder adhering to the requirements of Articles 8 and 9 DA (see below).

A third party under Article 5(1) DA can generally be any third party designated by the user. However, the Data Act restricts this by excluding companies designated as **gatekeepers** under the Digital Markets Act (DMA designated gatekeepers). The provision of data to the third party must be free of charge for the user. However, the data holder may demand remuneration from the third party (within the scope of Article 9 DA).

Unlike Article 3(1) DA, the rules on access rights will apply as from **12 September 2025**, even to connected products and related services **already on the market**.

– **Readily available data**: According to the DA, this is "*product data and related service data that a data holder lawfully obtains or can lawfully obtain from the connected product or related service, without disproportionate effort going beyond a simple operation*".

– **Restrictions on the right of access**: Unlike under Article 3(1) DA, the Data Act allows for contractual agreements or limitations on data access claims under Articles 4(1) and 5(1) DA. In certain exceptional cases, the data holder may restrict or completely suspend access (e.g. to protect trade secrets in highly exceptional circumstances).
Access may also be denied if third-party personal data is involved, unless GDPR-compliant (e.g. through anonymisation or consent).

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Overview of relevant data:

Type of data	Status of processing	Not covered
All data generated through the use of connected products and related services	Raw data/primary data	Text, audio or audiovisual content; unrelated software
Personal and non-personal data	Metadata	Data made available for the purposes of storage or processing by third parties
It is sufficient if the data are designed to be retrievable	Pre-processed data	Data that have been further processed, derived or compiled

Difference:
Investments to derive information from the data

NOERR

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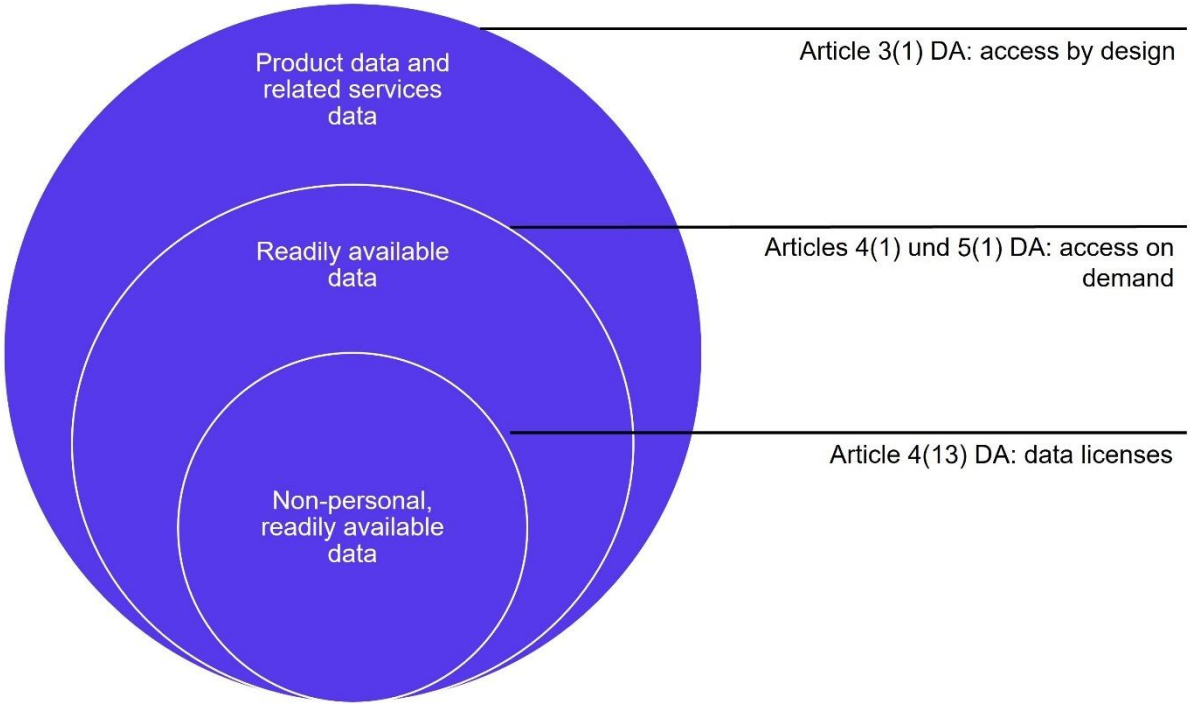
Not covered:

- Information derived
- Product data and related services data from microenterprises and small enterprises



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IV. Securing own data use (Article 4(13) DA)

In future, a data holder may only use any readily available data (see re Articles 4 and 5 DA above) that is non-personal data on the basis of a contract with the user. This means that even for purposes like product improvement or enhancement, a **data licence** specifying permitted uses is required.

In particular, the data licence must specify the purposes for which the data is to be used in the future. This requires an evaluation of existing purposes of use and business models based on product-generated data. It is also necessary to identify the relevant user groups and possible points of contact with them. For products typically used by multiple users, data holders face significant challenges, as often not all users are known to the data holder. To address this, the EU Commission proposes imposing contractual obligations on the "primary user" in the data licence.

Furthermore, the data holder may not use data, despite the existence of a data licence, to derive insights about the economic situation, assets and production methods of, or the use by, the user in any other manner that could undermine the commercial position of that user on the markets in which the user is active.

A legal basis under data protection law is still required for the processing of personal data.

The above rules will also apply from 12 September 2025 to readily available data from connected products or related services that have already been placed on the market.

– **User:** Under the DA a user is "*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*". Despite ambiguities in the (German) wording, this includes owners of connected products. It also covers individuals or entities with contractual usage rights. Use within the scope of purely informal arrangements (favours) likely falls outside the definition. It is unclear whether gratuitous usage agreements, such as loan for use agreements, also trigger user status under the Data Act. Employees who use their employer's products or related services in the course of their employment are not likely to be considered users. In the case of related services, the user is the person who uses the related service.

V. Implementing pre-contractual information obligations (Article 3(2) and (3) DA)

From 12 September 2025, providers who distribute connected products or provide related services will be subject to extensive pre-contractual **information obligations**.

In the case of connected products, it is not the data holder but the contractual partner, i.e. usually the seller or lessor, who is responsible for providing the information. For related services, the obligation falls to the service provider, who is often also the data holder.

The information must be provided in a clear, comprehensible and accessible form. This can be done via a permanent URL, a web link or a QR code that directs the user to a website containing the required information. The decisive factor is that the user can view the information, save it permanently and reproduce it unchanged before entering into a contract.

The specific content of the information obligations varies depending on the context:

Article 3(2) DA lays down rules for the information that must be provided before connected products are made available.

Article 3(3) DA relates to information that must be made available prior to the provision of related services.

The information that must be provided to the user includes, but is not limited to:

– Information on the nature, volume and collection of data generated by the product or service

– Information about the data creation process

– Information about the storage of this data

– Information on access to the generated data, including technical modalities

In practice, this information can usually only be reliably compiled by the data holders themselves. If products are distributed via intermediaries (e.g. retailers), the relevant information must be provided to them in a timely manner so they can fulfil their obligations towards end users.

Since compiling the required information may – depending on the product and data structure – involve considerable internal effort, it would be advisable to start the process at an early stage.

VI. Reviewing business models – FRAND conditions and reasonable compensation (Articles 8 and 9 DA)

Data holders should promptly review their existing business models with regard to how they make data available or use data. Chapter III of the Data Act contains provisions that are intended in particular to ensure the fair provision of data and will therefore directly affect the terms and conditions under which companies offer or obtain data within its scope.

Article 8 DA provides that a data holder who is obliged to provide data to a data recipient under Article 5(1) DA or under other applicable Union law or national legislation adopted in accordance with Union law must provide the data under fair, reasonable and non-discriminatory terms and conditions and in a transparent manner ("*fair, reasonable and non-discriminatory*" – FRAND terms).

The scope of application is therefore comparatively broad and also covers other cases beyond the Data Act where data holders are legally required to share data. If contractual terms of the data holder concerning access to and the use of data, or liability and remedies for the breach or termination of data-related obligations violate the FRAND terms, they will be ineffective and non-binding if they are unfair within the meaning of Article 13 DA (see below) or if, to the detriment of the user, they restrict the effect of the user's rights under Chapter II of the Data Act.

Article 9 DA provides that the data holder may demand compensation from the data recipient for making data available if this is non-discriminatory and reasonable. The data holder is generally permitted to make a profit from such compensation. However, if the data recipient is an SME or a non-profit research institution, the fees charged must not exceed the costs and investments incurred in making the data available. In these cases, no profit margin is permitted. Existing fee models must therefore be reviewed to determine whether future adjustments are necessary. It should be noted in particular that the data holder is subject to certain disclosure and information obligations in relation to its compensation structure (Article 9(7)).

Chapter III only applies in relation to **obligations to make data available** under Union law or national legislation adopted in accordance with Union law **that enter into force after 12 September 2025** (Article 50 DA).

VII. Reviewing model contracts – prohibition of unfair contractual terms (Article 13 DA)

Chapter IV of the Data Act **prohibits unfair contract terms** concerning access to and use of data or the legal consequences of breaches of obligations in all **unilaterally imposed B2B contracts**. The provisions apply to all data from the private sector that is made available or used on the basis of contractual relationships between companies.

The scope of application of Article 13 DA thus goes beyond the situations where the Data Act grants a specific right of access to data. It covers all contracts between companies concerning data access or data use, provided they are entered into **after 12 September 2025** (there are transitional arrangements for existing contracts). The provision is therefore generally applicable to all B2B data transactions, regardless of whether a right to have data made available arises directly from the Data Act or not. Companies are therefore required to review the content of their existing and future standard contractual clauses on the use and making available of data.

According to **Article 13 DA**, unilaterally imposed contractual clauses, in particular general terms and conditions, are subject to strict review for unfair content if they contain provisions on access to and the use of data or liability and remedies for the breach or termination of contract.

Unfair terms are not binding on the contracting party affected. A clause is considered unfair if it grossly deviates from good commercial practice in data access and use or is contrary to good faith and fair dealing (general clause in Article 13(3) DA). The Data Act then provides in Article 13(4) and (5) a non-exhaustive list of clauses that are unfair (paragraph (4) – "black list") or

where there is a rebuttable presumption of unfairness (paragraph (5) – “grey list”).

– **Unilaterally imposed**: Contractual clauses are considered unilaterally imposed within the meaning of this Article if they are introduced by one contracting party and the other contracting party cannot influence their content **despite attempting to negotiate**. The party using the clause must prove that it was not unilaterally imposed.

VIII. Guidance on navigating the Data Act and drafting contracts:

The EU Commission will provide non-binding model clauses in accordance with Article 41 DA. Extensive drafts have already been published by the EU Commission’s Expert Group, which you can access here. However, these will only simplify, rather than replace, an individual review and adjustment of the relevant contracts.

The EU Commission has also published extensive FAQs that provide further guidance, which you can access here.

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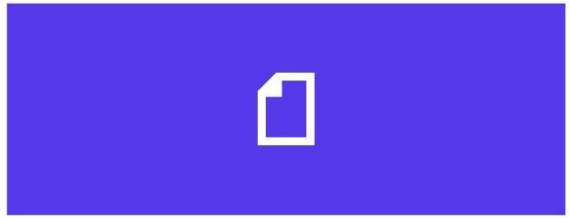
Where is there a need for action by companies?

Review data business models?

Check whether products and services data could be affected?

Establish structures for data requests and data exports



Review model contracts:

Certain contracts entered into before 12 September 2025 and new contracts entered into after that date must comply with the DA.

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