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Industry Contracts, the New Data Act and the Digital Green Transition

Juri Mattila
VTT Technical Research Centre of Finland

Timo Seppälä (editor)
ETLA Economic Research and Aalto University
timo.seppala@etla.fi

Alexander Bützow
Krogerus Oy

Kalle Hynönen
Krogerus Oy

Mika Puittinen
Krogerus Oy

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Abstract

In this brief, we analyse the implications of the new European Commission's Data Act from the perspective of both industry agreements and the digital green transition. In addition, we ask whether the new regulation of data will contribute to the emergence of data sharing practices and the digital green transition. It is worth noting that the new data regulation in its current form does not consider the specificities of the industry.

Tiivistelmä

Teollisuuden sopimukset, uusi datasäädös ja digivihreä siirtymä

Tässä muistiossa analysoimme uuden Euroopan komission datan sääntelyn (engl. data act) vaikutuksia sekä teollisuuden sopimusten, että vihreän siirtymän näkökulmista. Lisäksi kysymme, edistääkö datan uusi sääntely datan jakamisen käytänteiden syntymistä ja digivihreää siirtymää. Huomion arvoista on, että uusi datan sääntely ei nykymuodossaan huomioi teollisuuden erityispiirteitä.

D.Sc. (Tech.) **Juri Mattila** is a Senior Research Scientist at VTT Technical Research Centre of Finland Ltd.

D.Sc. (Tech.) **Timo Seppälä** is a Managing Researcher at Etla Economic Research and a Professor of Practice at Aalto University.

LL.M. **Alexander Bützow** is a Senior Associate at Krogerus Ltd.

LL.M. **Kalle Hynönen** is a Partner at Krogerus Ltd.

LL.M. **Mika Puittinen** is a Partner at Krogerus Ltd.

TkT **Juri Mattila** on Teknologian tutkimuskeskus VTT Oy:n vanhempi tutkija.

TkT **Timo Seppälä** on Elinkeinoelämän tutkimuslaitoksen johtava tutkija ja Aalto-yliopiston työelämäprofessori.

LLM **Alexander Bützow** on Krogerus Oy:n Senior Associate.

LLM **Kalle Hynönen** on Krogerus Oy:n Partner.

LLM **Mika Puittinen** on Krogerus Oy:n Partner.

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Avainsanat: Datasäädös, Data, Teollinen Data, Sopimukset, Datan jakaminen, Digitalisaatio, Digivihreä siirtymä

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ETLA 2018: Radical reforms needed in the data market

In our 2018 Digibarometer, we questioned the adequacy of current market structures in the market for sharing information (Digibarometer, 2018). We called for a radical reform of this market and for regulation of the information-sharing practices of the digital giants. At that time, we considered that this change, if successful, would increase productivity and at the same time bring a more even distribution of power by transferring it from the current digital giants back to private individuals and smaller players. The underlying issue that we identified in 2018 was the inability of the market and market participants to take into account the specific nature of information as a factor of production. We also stated that more incentives are needed for systematic information sharing. (Nikander et al, 2018.)

When concluding our previous analysis we asserted that, due to the nature of information and data as anti-rival factors of production, the data market should actively encourage all actors to share information. This is not currently the case, however, due to inadequate market structures. Although we believe that the forces of productive efficiency will sooner or later remedy this situation by creating new structures, we must make every effort to understand and contribute to the restructuring that is taking place, and to tackle the related problems. This will enable us to prepare for the changes that will take place over the coming years and decades, such as the green transition.

As previously stated, the key to promoting digitalisation and, most recently, the digital green transition is not primarily found in the use of particular digital technologies. In terms of the overall picture, it is instead of central importance to examine the framework for utilising digitalisation and sharing information. What does the regulatory framework for data sharing and the data economy in Europe look like, particularly in relation to implementing the digital green transition in industry? Alongside growing data regulation, we are also seeing an increase in regulation aimed at the green transition.

Cohesive data regulation for building a single market

The ultimate aim of the European Commission's legislative proposals on data and data utilisation is presumably to create a single market for data – one which guarantees, among other things, more equal rights to access and utilise data. In this respect, the proposals would serve to support the digital green transition. In addition, it can be assumed that the Data Act offers positive network effects and data sharing both between companies and between companies and consumers (Lehtonen et al., 2022). On the other hand, could the proposed changes actually lead to more restricted data sharing?

In recent years, Finnish industry has established practices for data-related agreements. The important question is whether the EU's new data legislation will significantly change existing agreement practices. Will agreements need elements that are currently lacking? Or will it become impossible to apply some of the existing contractual clauses or mechanisms?

The proposal is part of a wider regulatory package aimed at implementing the EU Data Strategy. The package also includes proposals for a Digital Markets Act, Digital Services Act, Data Governance Act and Artificial Intelligence Act. While it is not possible here to comprehensively cover this field as a whole, the Data Act proposal is already having a central influence on the model conditions for data agreements that are currently on the market. It should therefore be possible to weigh up its impact in a little more detail.

The Data Act increases mandatory regulation of data management

As a starting point, it should be stated that data itself cannot be unambiguously defined as an object of ownership, nor does not enjoy full protection against third parties. However, certain intellectual property rights, most commonly catalogue and database protection, may apply to particular data. If the process of compiling the data cros-

ses the threshold of originality, copyright may also apply, and protection of trade secrets may also come into play.

All in all, these rights have their limitations when it comes of data. Database protection, for example, only covers databases in cases where a significant investment of money or time has gone into their collection, verification or presentation. In such cases, the holder of the database right only has control over the content of the database as a whole or over a part assessed to be either qualitatively or quantitatively substantial. The right does not cover, for example, the individual data rows contained in the database (Section 49.1 of the Copyright Act (404/1961)). Granting trade secret protection to any particular data requires that (i) the content of the data is not generally known or readily accessible, (ii) the data has financial value and (iii) the lawful holder of the data has taken reasonable measures to protect it (Section 2 of the Trade Secrets Act (595/2018)). Because of these limitations, the data itself does not enjoy comprehensive non-contractual protection against, for example, third-party infringements – which is an essential part of the aforementioned protection against third parties. In practice, this means that appropriate agreements are needed for the effective protection and management of data.

A key element of the Data Act proposal concerns data-related contractual relationships between different actors in the data chain. Under the new Act, these relationships would be subject to significant obligations and restrictions. The proposal includes different levels of obligations on opening up data based on various criteria, such as the size of the company.

- One of the key aims of the Data Act proposal is that both data-collecting products that can communicate data via public, digital communications services and the related services without which the product cannot properly function must be designed in such a way that the user of the product or service has the right to access the data produced by the product or service easily, securely and without charge. Before entering into a contract with a user, the obligations of the provider of a product and/or service include stating what data the product or service produces, how the user has the right to have access to that data and how the provider itself intends to use that data.

- In addition, the user has the right to ask the data holder of the product or service to disclose the generated raw data to a third party, possibly as an ongoing, real-time data flow. A typical case for this would be, for example, the disclosure of data from an Internet of Things device for repair or diagnostics by a party other than the device manufacturer. The Data Act proposal imposes a number of obligations on the contractual relationship between the data holder and data recipient. These include the prohibition of discriminatory treatment of data recipients by data holders (Article 8) and restrictions on compensation for making data available (Article 9).

- However, the obligations described above do not apply to micro enterprises and small enterprises, whose position the Data Act proposal otherwise seeks to strengthen. This is also reflected in the fact that Chapter IV of the legislative proposal unilaterally prohibits the imposition of unfair data contract terms on SMEs. The underlying idea is that when agreeing on access to data, an SME normally has little bargaining power and thus has to accept the other party's standard terms and conditions.

- The Data Act proposal also has key implications for protection of data as intellectual property. According to Article 35 of the proposal, data generated by a product or service as defined in the regulation cannot receive database protection. However, the proposal does not make a similar exception with regard to trade secrets. The holder of the data would therefore not be obliged to disclose to the user or – at the user's request – to a third party any data classed as trade secrets unless the data holder and the user (Article 4(3)) and also the data holder and the recipient (Article 5(8)) are able to make agreement on the confidentiality of such data.

As a result of the above-mentioned changes, the scope of mandatory regulation of data management will increase significantly, meaning that agreeing on the use of data will require comprehension of challenging sets of legislation.

Data via APIs for use by third parties?

What, then, are the anticipated effects of regulation obliging a range of actors to make their data available to users and, via users, to third parties as well?

Perhaps a benchmark for the potential impact of the Data Act can be found in the EU's Second Payment Services Directive (PSD2). This Directive required financial operators to create APIs for their services which, for example, could be used by third-party services to initiate payment transactions within the bank's own systems. The implementation of the PSD2 has not, however, led to clear platform ecosystem developments in the financial sector, nor has the utilisation of APIs generated significant new business in the sector. What has happened is that the creation of such APIs has increased IT and administrative development costs for financial operators.

According to some estimates, the obligations contained in upcoming EU data legislation could single-handedly increase development costs for business IT systems, and particularly for administrative systems, by as much as 50–60% (Teknologiajuristi, 2022). If companies see only the costs and not the benefits of opening up their data, then the push for open data may fizzle out.

Is data regulation becoming self-defeating?

A growing problem with directly applicable EU legislation is that the fundamental concept or concepts in the directives is often unclear. In the case of the GDPR, the concept of personal data is unclear, which has led to significant problems when applying the regulation to areas such as assessments of data's potential for secondary use. As another example, the definition of Artificial Intelligence in the original Artificial Intelligence Act proposal would have included the majority of traditional computer software. This present Data Act proposal, meanwhile, seems to leave the concepts of product, service, user, data holder, data recipient and even the data itself without clear definitions. Although the proposal is focused on opening up the use of data generated by Internet of Things (IoT) devices, simply reading through the proposed regulation does not provide the reader with a clear picture of which products and services it would ultimately be suitable for.

The end result is a situation in which it is not possible to determine with certainty from the directive itself whether an activity meets the requirements of EU legislation. The most commonly used clarification mechanism consists of explanations and instructions provided by 'boards' enacted by the directives themselves, as exemplified in the work of the European Data Protection Board (EDPB) on GDPR-related matters. However, the legally binding nature of the interpretative guidelines issued by these boards has also been questioned. This can be seen, for example, in the Whatsapp case pending before the Court of Justice of the European Union at the time of writing (T-709/21), which primarily revolve around the question of whether the EDPB's interpretative guidelines on the GDPR are binding or not. As an alternative approach, other data-related EU legislative proposals confer significant delegated powers onto the European Commission. This is the case in the proposed Artificial Intelligence Act proposal in terms of which systems are classified as AI, and this in turn has a key impact on the scope of the Act.

It should also be stressed that directives implementing the EU's data strategy and the regulations closely related to them form a comprehensive and densely cross-referenced whole, which may lead to an accumulation of uncertainties. For example, Article 4(6) of the Data Act states that a data holder may use non-personal data generated by the use of a product or related service only on the basis of a contractual agreement with the user. Key to applying this clause in practice is the question of how broad the GDPR's concept of personal data is. This question is also one of the key issues in the above-mentioned Whatsapp case.

Overall, the package may pose significant challenges for maintaining legal certainty, as data strategy directives often include sanction mechanisms. According to Article 33(3) of the Data Act proposal, for example, a breach of Articles 3 to 12 may result in an administrative fine of up to EUR 20 million or 4% of the global turnover of the infringing company, whichever is the higher.

It is therefore legitimate to ask whether such regulation is actually self-defeating, as it could result in a situation where the only companies capable of meeting the obligations with sufficient legal certainty are the digital platform giants whose dominance the regulations are expressly seeking to break.

An important reference point in these matters is copyright regulation, where there has traditionally been a significant doctrinal difference between continental Europe and the United States in their approach to user rights. In the United States, there is the principle of 'fair use', under which user rights and exceptions to copyright are to a large extent shaped by case law. In continental European civil law countries, the starting point has been to regulate in more detail and on the basis of specific exceptions laid down in law.

Data legislation, starting with the GDPR and now continuing with the upcoming Data Act, seems to be partially moving in the 'fair use' direction, with legislation providing principle-based guidelines rather than precise boundaries. This has its advantages and disadvantages: the American system is held to be more flexible and more adaptable to technological developments, but at the same time offering less legal certainty and resulting in more court cases.

The solution being offered in EU data regulation, however, seems to be a kind of hybrid, with very specific individual elements, time limits and sanctions combined with abstract, conceptual-level regulation. Where it works, this regulation can genuinely transform the data market, but at worst this combination of abstract and specific regulation can breed a 'perfect storm' that will produce legal uncertainty for years to come.

In its current form, the Data Act could slow down both the emergence of data sharing practices and the digital green transition

If companies are obliged to open up data access to users in such a way that the exact content of the obligations is unclear, it is important to consider whether the products and services of larger companies may in future be increasing designed in ways that avoid being subject to such data regulations, such as by using devices that either do not collect data, do not transmit it, or transmit it only partially. It is important to keep in mind that processing data for tangible business benefit is far from being as simple as it is presently sometimes thought to be. The key question, in other words, is whether data regulation is slowing down the development of digital infrastructure that is precisely needed for achieving the digital green transition.

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Publisher: Taloustieto Oy

Tel. +358-9-609 900
www.etla.fi
firstname.lastname@etla.fi

Arkadiankatu 23 B
FIN-00100 Helsinki