

Bird & Bird & IDS

Contributions to the IDS Handbook

– Joint Controllership and Data Governance Act

TF Legal Framework workshop

28 October 2021

Dr. Alexander Duisberg

Introduction

Dr. Alexander Duisberg, Partner, Commercial, Munich

- Comprehensive advice in the field of digitalisation with a focus on data-driven business models, Industrie 4.0, transactional data protection, cyber security and AI
- Long-standing advice to a broad client portfolio, especially from the IT industry, automotive industry, industrial manufacturing and insurance industry

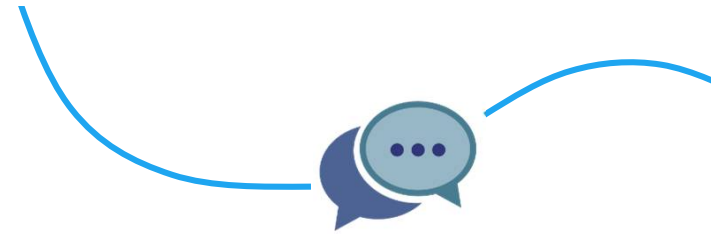
My committee work

- Member of WG 4 Legal Framework of Platform Industrie 4.0
- Member of the IDSA
- Participation in various committees of the German Federal Government, such as the projects "Trusted Cloud" and "Smart Data", in order to further develop the legal framework for the digital transformation



Agenda

- Intro to the IDS Handbook
- Roles and GDPR obligations in data spaces
- Data Governance Act
- Q&A



IDS Handbook: Designing Data Spaces – The Ecosystem Approach to Competitive Advantage

- Edited by Prof. Dr. Boris Otto, Prof. Dr. Michael ten Hompel, Prof. Dr. Stefan Wrobel (Fraunhofer-Institut)

Legal Aspects of IDS
Dr. Alexander Duisberg

- Open access publishing out Springer Nature

- Expected date of publication Q4 2021

- Contribution to "Data sovereignty – what does it imply?"

Data sovereignty – what does it imply?

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Roles and data protection obligations in data spaces

Who's who?



Data Controller

A person who (either alone or jointly or in common with other persons) **determines the purposes and means of processing** personal data.

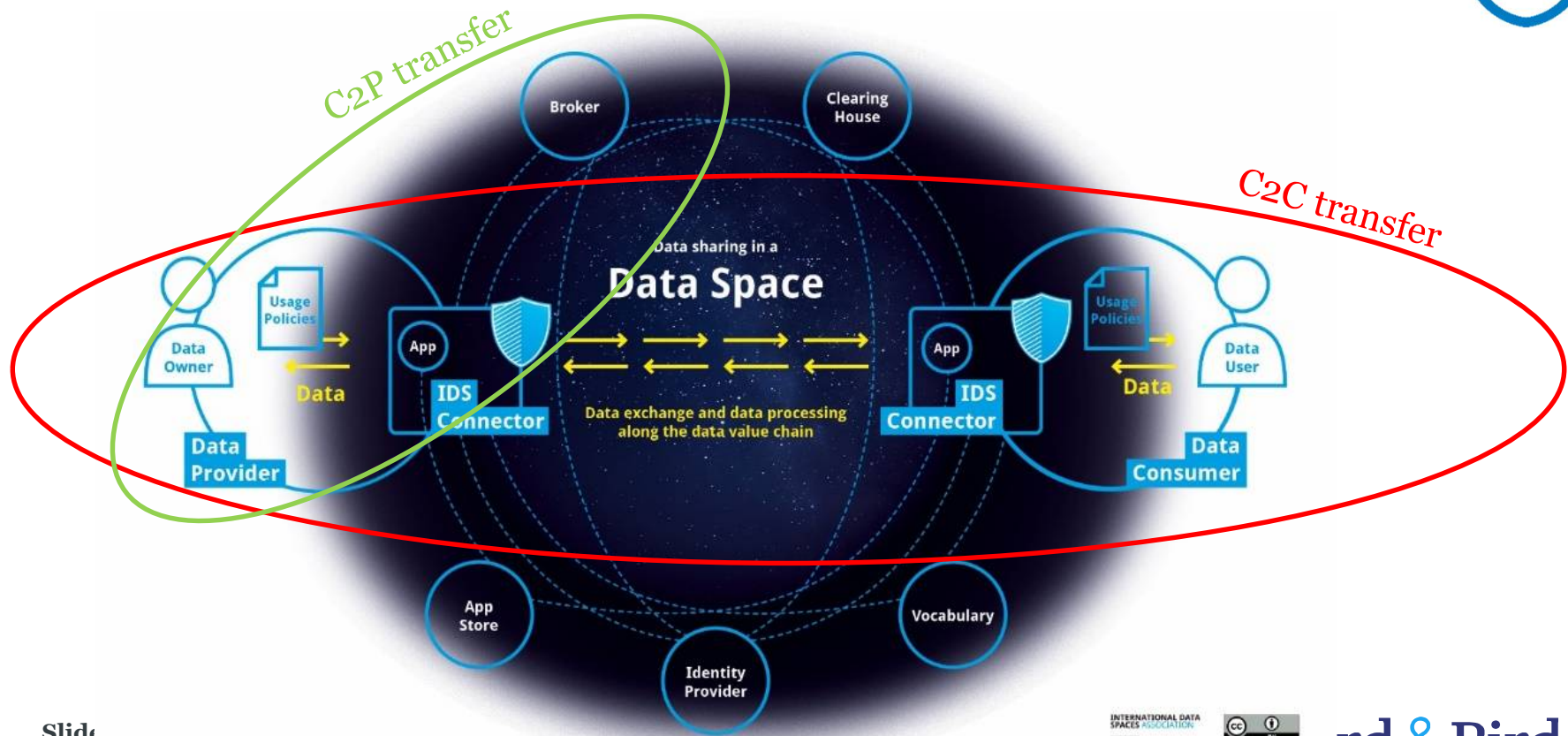
Data Processor

Any person (other than an employee of the data controller) who processes the data **on behalf** of the controller.

Data Subject

A **living person** about whom the data controller holds personal data.

Roles from a DP perspective



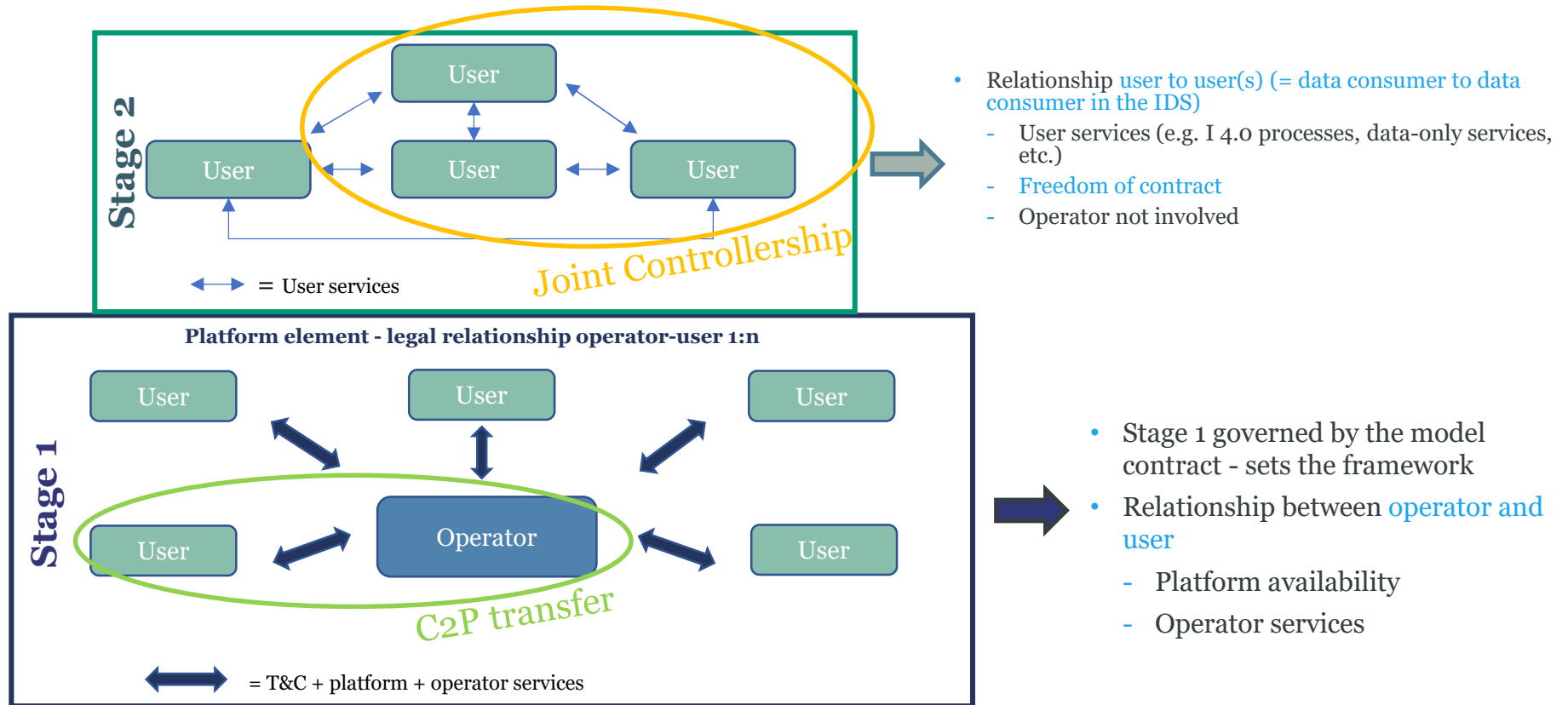
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Data sharing in a data space. © 2021, International Data Spaces Association [CC-BY].

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Plattform Industrie 4.0 Recht Testbed – Structure - Stage Model



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Joint Controllership



Joint responsibility by facts

- Jointly determining means and purposes of processing
 - Optional only for elements in processing chain
 - Work-sharing processing possible
- ⇒ Especially in multilateral or consorted data sharing scenarios

Flexibility in contract design

- Shared liability
- Partial responsibility
- Internal recourse

Article 26 GDPR

Joint controllers

1. Where two or more controllers **jointly determine the purposes and means of processing**, they shall be **joint controllers**. They shall in a transparent manner **determine their respective responsibilities for compliance with the obligations under this Regulation**, in particular as regards the exercising of the rights of the data subject and their respective duties to provide the information referred to in Articles 13 and 14, **by means of an arrangement between them** unless, and in so far as, the respective responsibilities of the controllers are determined by Union or Member State law to which the controllers are subject. The arrangement may designate a contact point for data subjects.
2. The **arrangement** referred to in paragraph 1 **shall duly reflect the respective roles and relationships of the joint controllers vis-à-vis the data subjects**. The essence of the arrangement shall be made available to the data subject.
3. Irrespective of the terms of the arrangement referred to in paragraph 1, the **data subject may exercise his or her rights under this Regulation in respect of and against each of the controllers**.

Data processing agreement (DPA)

Article 28 GDPR

Processor

1. Where processing is to be carried out **on behalf of a controller**, the controller shall use only processors providing sufficient guarantees to implement appropriate technical and organisational measures in such a manner that processing will meet the requirements of this Regulation and ensure the protection of the rights of the data subject.
2. The processor shall not engage another processor without prior specific or general written authorisation of the controller. In the case of general written authorisation, the processor shall inform the controller of any intended changes concerning the addition or replacement of other processors, thereby giving the controller the opportunity to object to such changes.
3. **Processing by a processor shall be governed by a contract or other legal act under Union or Member State law, that is binding on the processor with regard to the controller and that sets out the subject-matter and duration of the processing, the nature and purpose of the processing, the type of personal data and categories of data subjects and the obligations and rights of the controller.** That contract or other legal act **shall stipulate, in particular**, that the processor:
 - (a) processes the personal data **only on documented instructions from the controller**, including with regard to transfers of personal data to a third country or an international organisation, unless required to do so by Union or Member State law to which the processor is subject; in such a case, the processor shall inform the controller of that legal requirement before processing, unless that law prohibits such information on important grounds of public interest;
 - (b) ensures that persons authorised to process the personal data have **committed themselves to confidentiality** or are under an appropriate statutory obligation of confidentiality;
 - (c) takes all **measures** required pursuant to **Article 32**;
 - (d) respects the **conditions** referred to in paragraphs 2 and 4 for **engaging another processor**;
 - (e) taking into account the nature of the processing, **assists the controller by appropriate technical and organisational measures**, insofar as this is possible, for the fulfilment of the controller's obligation to respond to requests for exercising the data subject's rights laid down in Chapter III;
 - (f) assists the controller in ensuring compliance with the obligations pursuant to Articles 32 to 36 taking into account the nature of processing and the information available to the processor;
 - (g) at the choice of the controller, **deletes or returns all the personal data to the controller after the end of the provision of services** relating to processing, and deletes existing copies unless Union or Member State law requires storage of the personal data;
 - (h) **makes available to the controller all information** necessary to **demonstrate compliance** with the obligations laid down in this Article and allow for and contribute to audits, including inspections, conducted by the controller or another auditor mandated by the controller.

With regard to point (h) of the first subparagraph, the processor shall immediately inform the controller if, in its opinion, an instruction infringes this Regulation or other Union or Member State data protection provisions.

DP obligations of the data provider (Controller)

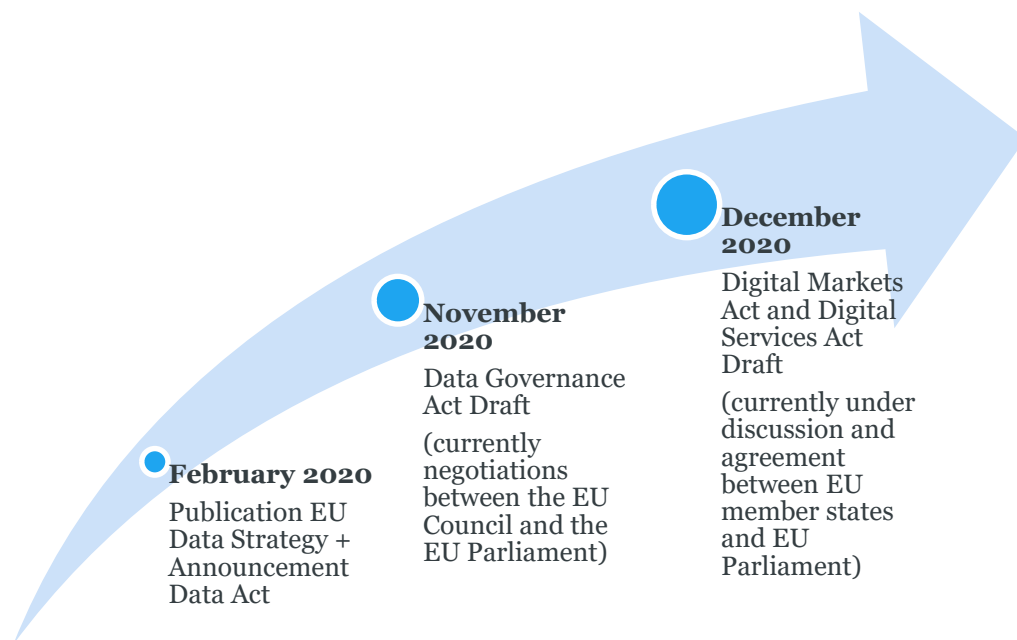
- **Legal basis** for making data available to the data consumer (Art. 6 GDPR)
 - Consent of data subject
 - Performance of a contract
 - Compliance with legal obligation
 - Protection of vital interest of data subjects/natural persons
 - Public interest
 - Legitimate interest
 - **Information obligations** (privacy notice Art. 13, 14 GDPR)
 - **Safeguarding data subjects' rights** (Art. 15 et. seq.)
 - **Documentation obligations** (records of processing activities Art. 30 GDPR)
- ⇒ **Multilateral data sharing – legal basis for each data consumer separately!**

Data Governance Act

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European Data Strategy



- Investing in Europe's data capacities and infrastructures
- Shared European data spaces in 9 strategic areas, including mobility, industrial manufacturing, agriculture, health and energy

Objectives

- Cross-sectoral governance framework for data access and use (enable a legislative framework of the governance of common European data spaces)
- Making available more high-quality public sector data for re-use
- Data act for horizontal data sharing across sectors

Data Governance Act (DGA)

Objectives

- Data should be findable, accessible, interoperable and re-usable
- Making public sector data available for re-use where data is subject to rights of others (e.g. privacy rights, IP rights, trade secrets)
- Sharing data among businesses, against remuneration in any form
- Use of personal data with the help of a personal data-sharing intermediary (which safeguard data subject rights e.g. through personal data rooms or data wallets)
- Data use on altruistic grounds

- European model for sharing of personal and non-personal data through "neutral data intermediaries" (providers of data sharing services)
 - ⇒ **Alternative to market power of integrated tech platforms**
- No limitation to public sector

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Brussels, 25.11.2020
COM(2020)767 final
2020/0340 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on European data governance
(Data Governance Act)

(Text with EEA relevance)

{SEC(2020) 405 final} - {SWD(2020) 295 final} - {SWD(2020) 296 final}

EN

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Data Governance Act – Neutrality of data intermediaries

European Data Innovation Board (Art. 26 DGA)

- Improve interoperability of data sharing services
- Ensure consistent practice for public sector data

Requirements applicable to data sharing services

- Obligation for data sharing service providers to submit a notification to competent authority (Art. 10 DGA)
 - ⇒ No approval by authority, but mechanism to determine conditions for data intermediary services and establish supervisory control for compliance with conditions
- ⇒ Intermediary defines the scope of services
- ⇒ Value-added services based on aggregation of data / metadata analysis (Art 11 (1) and (2) DGA)?
- Establishment in EU or representative
- Conditions for providing data sharing services
- No benefit from resale, but fees for transactions possible

⇒ **Accentuates role + responsibility of operators of data spaces**

Conditions for providing data sharing services

Article 11 DGA Conditions for providing data sharing services

The provision of data sharing services referred in Article 9 (1) shall be subject to the following conditions:

- (1) the **provider may not use the data for which it provides services for other purposes** than to put them at the disposal of data users and data sharing services shall be placed in a separate legal entity;
- (2) the **metadata** collected from the provision of the data sharing service **may be used only for the development of that service**;
- (3) the provider shall ensure that the **procedure for access to its service is fair, transparent and non-discriminatory** for both data holders and data users, including as regards prices;
- (4) the provider shall **facilitate the exchange of the data in the format in which it receives it from the data holder** and shall convert the data into specific formats only to enhance interoperability within and across sectors or if requested by the data user or where mandated by Union law or to ensure harmonisation with international or European data standards;
- (5) the provider shall have procedures in place to **prevent fraudulent or abusive practices** in relation to access to data from parties seeking access through their services;
- (6) the provider shall ensure a reasonable **continuity of provision of its services** and, in the case of services which ensure storage of data, shall have sufficient **guarantees in place** that allow data holders and data users to obtain access to their data in case of insolvency;
- (7) the provider shall put in place **adequate technical, legal and organisational measures** in order to prevent transfer or access to non-personal data that is unlawful under Union law;
- (8) the provider shall take measures to ensure a **high level of security for the storage and transmission** of non-personal data;
- (9) the provider shall have procedures in place to ensure compliance with the Union and national rules on competition;
- (10) the provider offering services to data subjects shall act in the data subjects' best interest when facilitating the exercise of their rights, in particular by **advising data subjects on potential data uses and standard terms and conditions** attached to such uses;
- (11) where a provider provides tools for obtaining consent from data subjects or permissions to process data made available by legal persons, it shall specify the jurisdiction or jurisdictions in which the data use is intended to take place.

Data Governance Act and IDS

- DGA endorses approach and key elements of IDS
 - Approach towards neutral intermediaries
 - Relying on reference architecture and connector technology

IDS reference architecture and information model coherent with DGA requirements regarding data formats and interoperability

Q & A



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- Who's Who Legal, 2020

"listed as a Global Leader in the fields of Information Technology and Data Privacy & Protection"

- Who's Who Legal, 2020

Thank you & Bird & Bird



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