The ALI-ELI Principles and the proposed Data Act
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ALI-ELI Principles for a Data Economy
- Data Transactions and Data Rights -
Part I: General Provisions

Part II: Data Contracts
- Chapter A: Rules and Principles Governing Data Contracts
- Chapter B: Contracts for Supply or Sharing of Data
- Chapter C: Contracts for Services with regard to Data

Part III: Data Rights
- Chapter A: Rules and Principles Governing Data Rights
- Chapter B: Data Rights with regard to Co-Generated Data
- Chapter C: Data Rights for the Public Interest

Part IV: Third Party Aspects of Data Activities
- Chapter A: Protection of Others against Data Activities
- Chapter B: Effects of Onward Supply on the Protection of Others
- Chapter C: Eff. of Oth. Data Activities on the Protection of Third P.

Part V: Multi-State Issues
The concept of data rights under the Principles
Rights in co-generated data

- Afforded to parties that have contributed to the generation of the data (i.e. it is also ‘their’ data)
- Arise from considerations of fairness and are potentially inherent in existing (un)fairness tests
- Follow a private / property law logic
Determining factors

- **Share** in the generation of data
- Weight of **grounds** put forward
- Legitimate interests of **other parties**
- Relative power of parties involved
- Public interests

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Data rights for the public interest

- Afforded to third parties that have (normally) not contributed to the generation of the data
- Arise from (often sectoral) regulation
- Follow a market failure / competition law logic
Horizontal access modalities

- Legitimate aim and proportionality
- Access under FRAND conditions
- Protection of third party rights
- No-harm principle
- Reciprocity
The corresponding concept under the Data Act Proposal
Proposed Data Act: ‘Merger’ of both concepts

Data controller (holder)

Data portability
The desire to liberate data for the data economy is a sufficient justification (replacing specific legitimate grounds such as seeking independent repair services)

The user’s ‘ownership’ right and free decision is a sufficient justification for third party access (replacing legitimate aim and proportionality test)
The role of contracts

- Data controller (holder)
- Data rights for the public interest
- Data portability
- Rights in co-generated data

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The provision in Article 4(6) DA

- Stricter protection for non-personal than for personal data?
- Relationship with e-privacy law?
- Unclear whether the user must be free to conclude this contract or not
- Unclear whether this only concerns the ‘first data holder’ (e.g. manufacturer) or also any third party, i.e. whether this is a quasi-IP right
Some reflections on ‘open vs closed’
“Open” stands for a whole range of goals we hope to achieve with the help of data, including any of the 17 UN Sustainable Development Goals, transparency, democracy, etc.

“Privacy” can be replaced by other private and public interests, including (other) fundamental rights, national security, law enforcement, IP protection, fair and effective competition, ...

Open by default

“... without prejudice to ...”

Privacy by default
Example 7

A municipality implements a large-scale project to collect mobility data using smartphone signals, with a view to facilitating traffic management .... Theoretically speaking, the data are ‘anonymized’; if the data sets are combined with other data sets and some additional knowledge, however, the owner can be identified with a confidence level of 95%. A number of different parties are interested in gaining access to these data; they include a researcher who wants to use them as a basis for identifying the optimal design of urban recreational areas, a start-up that wants to establish an online detective agency via which users can pay to access the mobility profile of their spouse, competitor, etc. and a research institute tasked by a foreign government with investigating the political activities of its citizens. ...

Cited from: Opinion of the German Data Ethics Commission, 2019
Conclusions

- The Proposal for a Data Act has taken up many of the core concepts and of the Principles for a Data Economy, in particular from its Part III and Part IV, and Part II may become relevant for the model contractual terms to be developed under the Data Act.

- As far as data sharing and the tension between ‘open’ and ‘closed’ is concerned, the Principles tend a bit more towards protection, by stressing the requirement of a legitimate ground, as well as rights vis-à-vis downstream recipients.

- The Principles do not require contractual relationships between the party exercising a right in co-generated data and the data holder or the data holder and the data recipient. Article 4(6) of the Data Act Proposal seems to raise some issues.