Data Access and Portability:

An Emerging Structure of EU Data Law

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I. Introduction

Over the past decade, EU law has gradually developed a growing number of rights that enable access to, or portability of, data between private parties.[1] These rights have not emerged as part of a single, coherent legislative project. Rather, they have been introduced incrementally, in response to concrete regulatory concerns in different policy areas.[2] Data access obligations appear in sector-specific instruments such as payment services, energy regulation, vehicle type approval, and chemicals law, as well

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[1] European Commission, Communication, 'A European Strategy for Data' COM(2020) 66 final of 19 February 2020, 2.

[2] On the policy debate and the shift from data ownership to data access, see *inter alia* Lothar Determann, 'No One Owns Data' (2018) 70 Hastings Law Journal 1 (39); Josef Drexl, 'On the Future EU Legal Framework for the Digital Economy: A Competition-Based Response to the "Ownership and Access" Debate' in Sebastian Lohsse, Reiner Schulze and Dirk Staudenmayer (eds), *Trading Data in the Digital Economy* (Nomos; Hart Publishing 2017) 235; Wolfgang Kerber, 'A New (Intellectual) Property Right for Non-Personal Data? An Economic Analysis' [2016] GRUR International 989 (997).

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as in horizontal acts such as the General Data Protection Regulation (GDPR), the Digital Markets Act (DMA), and the Data Act (DA). Each of these instruments pursues its own regulatory objectives and is embedded in a distinct legal and institutional context.[3]

As a consequence, the resulting landscape of data access and portability rights is marked by fragmentation. The provisions differ considerably in their wording, scope, addressees, and enforcement logic. Similar mechanisms are sometimes framed in different terms, while identical labels—such as "access" or "portability"—are used to describe rights that operate in structurally different ways. From the perspective of legal interpretation, this makes it difficult to assess how individual rights relate to one another, whether they pursue comparable objectives, and how they should be applied in situations where several instruments potentially overlap.

At the same time, a closer look reveals that this fragmentation is not absolute. Across the different instruments, certain patterns begin to recur. Similar factual situations reappear in different sectors, and comparable regulatory techniques are used to address them, even though they are articulated through different legal vocabularies.[4] These connections are not always explicit, nor do they amount to a fully coherent system. They nevertheless suggest that data access and portability rights are not merely isolated sectoral interventions, but part of a broader, still evolving structure within EU data law.

This article builds on that observation. It outlines a taxonomy of European data access and portability rights that has been developed in the author's doctoral thesis[5] and presents its core findings in a condensed form. The taxonomy distinguishes three types of data rights: access rights in co-generated data, access rights in the public interest, and data portability rights in the narrower sense. This distinction is based on structural features that determine how the rights operate in practice, including the role of contribution to data generation, the legal relationships established between

[3] Inge Graef, Martin Husovec and Nadezhda Purtova, 'Data Portability and Data Control: Lessons for an Emerging Concept in EU Law' (2018) 19 German Law Journal 1359 (1363); Inge Graef, Martin Husovec and Jasper van den Boom, 'Spill-Overs in Data Governance: The Relationship Between the GDPR's Right to Data Portability and EU Sector-Specific Data Access Regimes' [2020] EuCML 3.

[4] Heike Schweitzer and Robert Welker, 'A Legal Framework for Access to Data – A Competition Policy Perspective' in Bundesministerium der Justiz und für Verbraucherschutz and Max-Planck-Institut für Innovation und Wettbewerb (eds), *Data Access, Consumer Interests and Public Welfare* (Nomos 2021) 119; Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition Policy for the Digital Era' (2019) 86.

[5] Yannic Duller, *Data Access and Portability: A Taxonomy of European Data Rights* (Nomos 2025).

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the parties, the position of third-party recipients, and the justification for limiting the data holder's control.

The purpose of this taxonomy is not to impose an artificial order on a heterogeneous body of law. Rather, it aims to make visible the underlying logic of existing provisions and to provide a framework that allows them to be compared and interpreted in a more systematic manner. Moreover, by grouping rights that share core characteristics, the taxonomy helps clarify why certain design choices, such as free access, remuneration, or conditions based on the principle of fair, reasonable and non-discriminatory (FRAND) access, are used in some contexts but not in others. It also highlights points of tension and overlap, particularly where different instruments address similar practical problems through distinct legal techniques.

To connect the taxonomy to the regulatory challenges that have motivated legislative intervention, the article further identifies four recurring data access scenarios: the use of complementary products and services, switching and multi-homing, access for the internal purposes of co-generators, and access by third parties without a contribution to data generation. The argument advanced is that the three categories of data rights function as regulatory responses to these scenarios, each with different implications for competition, innovation, and the protection of private interests.

In doing so, the article does not claim that EU data law has already reached a state of coherence. Rather, it seeks to capture an intermediate stage of development, in which fragmented sectoral rules coexist with increasingly horizontal regulatory techniques. The taxonomy presented here is intended as an analytical tool to better understand this evolving landscape. A more detailed doctrinal analysis of the individual instruments, as well as a fuller discussion of their normative implications, is provided in the author's thesis. This article offers a stand-alone account of the central conceptual framework developed there, and aims to contribute to ongoing debates on the structure and future direction of European data law.

II. The Three Types of Access and Portability Rights

A. Access Rights in Co-Generated Data

The first category is access rights in co-generated data (CGD). The underlying problem these rights address can be described as follows. Where two parties have each played a meaningful role in producing a dataset, it is typically the party enjoying superior bargaining power that ends up housing the data on its own infrastructure—and thereby exercising sole *de facto* control. The other party, although equally implicated in the data's creation, finds itself unable to exploit that data for its own

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purposes without the cooperation of the controlling party. The resulting dependency can manifest in excessive access fees or an outright refusal to share.[6]

This situation can be observed in a variety of sectors. In the energy sector, for example, consumption data is usually held by the operator of electricity meters. Customers who wish to access this data for monitoring their consumption or evaluating alternative suppliers are therefore dependent on the operator's cooperation.[7] A similar dependency arises in digital advertising markets, where the platforms control the performance data that is necessary to assess the reach and effectiveness of advertisements. Without access to this data, advertisers are unable to independently evaluate the success of their campaigns and must rely on information selectively provided by the platform.[8]

The platform economy presents a further illustration of these dynamics. Platform providers accumulate large volumes of data reflecting user activity—how often and how long users interact, what content they engage with, and whom they communicate with. This information enables the provider to enhance its service, deliver targeted advertising, and spot emerging market trends. Yet business users who sell via such platforms and wish to gain insight into their customers' preferences, purchasing behaviour, or demographic profile cannot independently obtain these data; they remain reliant on the platform's discretion.[9] The same holds for end users seeking to audit their own usage patterns, strengthen their online presence, or migrate to a rival service—objectives that presuppose access to data held exclusively by the provider.[10]

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[6] Neil Cohen and Christiane Wendehorst, 'Principles for a Data Economy' (ALI/ELI 2023) <https://europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ALI-ELI_Principles_for_a_Data_Economy.pdf> accessed 28 August 2026, Principle 20; see also Bertin Martens and others, 'Business-to-Business Data Sharing: An Economic and Legal Analysis' (Joint Research Centre 2020) 9.

[7] Stephan Schmitt and Matthias Wissner, 'Die Liberalisierung des Messwesens – Verhindert das Abrechnungsentgelt freien Wettbewerb?' (2015) 39 Zeitschrift für Energiewirtschaft 171 (172).

[8] Competition and Markets Authority, 'Online Platforms and Digital Advertising: Market Study' (2020) 212, 297; Jason Furman and others, 'Unlocking Digital Competition: Report of the Digital Competition Expert Panel' (HM Treasury 2019) 46.

[9] Vera Demary and Christian Rusche, 'Data Sharing im E-Commerce: Rechtliche und ökonomische Grundlagen' (Institut der deutschen Wirtschaft 2019) 8; Lina M Khan, 'The Separation of Platforms and Commerce' (2019) 119 Columbia Law Review 973 (984).

[10] Christiane Wendehorst, 'Konsument:innen in der Datenökonomie' in Maria Raiffenstein and Beate Blaschek (eds), *Konsumentenpolitisches Jahrbuch* (Verlag Österreich 2023) 218; Inge Graef, Jeroen Verschakelen and Peggy Valcke, 'Putting the Right to Data Portability into a Competition Law Perspective' [2013] Law: The Journal of the Higher School of Economics, Annual Review 53 (57 f).

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Direct access rights in co-generated data respond to this imbalance and are premised on the idea that participation in data generation can justify a claim to access. The following subsections further elaborate the defining features of these rights.

1. Contribution to the Generation of Data

What distinguishes access rights in co-generated data (CGD) from access rights in the public interest is that access rights in CGD are afforded to persons who, in some way, have contributed to the generation of the data.[11] The relevance of contribution as a justificatory factor has first been emphasised in the American Law Institute's and the European Law Institute's Principles for a Data Economy, which identify four forms through which data can be regarded as co-generated: (a) being the subject of the data, or the owner or operator of an asset that is the subject of data; (b) pursuing an activity by means of which data has been produced; (c) assembling or structuring existing data in a way that creates something of a new quality; and (d) having produced or developed a product or service, which was used to generate the data.[12]

Until now, EU law has only afforded access rights in CGD to individuals or entities that have generated the relevant data through the first two forms of contribution, namely being the subject of the data or generating it through their activities. For example, the right to retrieve and transmit personal data under Article 20(1) GDPR is afforded to the person who is the subject of the personal data. The access right of advertisers vis-à-vis gatekeepers under the DMA applies to data that was generated by the advertising activities of the rightsholder. The access right under Article 20(e) of the Electricity Directive (ED),[13] which gives customers of energy providers the right to access their electricity consumption data, is the result of a combination of these two forms of contribution: energy consumption data relates to a specific customer and is generated through that customer's activities. The same applies to the access rights of end users and business users under Articles 6(9) and 6(10) DMA against gatekeepers. The data generated in the context of using a core platform service typically relates to those users and arises from their interaction with the service. In all these cases, the legislator treats the link between the person requesting access and the generation of the data as sufficiently strong to justify a direct access right.

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[11] Cohen and Wendehorst (n 6), cf. Chapters B and C.

[12] Cohen and Wendehorst (n 6), Principle 18.

[13] Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast), OJ L 2019/158, 125.

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The notion of co-generation also imposes an important limitation on the scope of these rights: access rights in CGD cover only data to the generation of which the rightsholder has directly contributed. This restriction is particularly evident in Article 6(8) DMA, which grants advertisers and publishers access only to data relating to the advertisements they have placed themselves. It does not extend to data concerning advertisements placed by other advertisers or publishers. The concept of contribution thus serves a dual function—it operates both as a threshold for entitlement and as a criterion for delimiting the material scope of access rights in CGD.

2. Two-Person Relationship

Direct access rights in CGD are also characterised by the bilateral nature of the legal relationship they create: one party holds the data and bears the obligation, while the other—the rightsholder—is entitled to claim it. The policy rationale is distributive. Because the rightsholder made a meaningful contribution to producing the data, granting access allows that party to realise value from its own contribution rather than leaving the data holder as the exclusive beneficiary. It is precisely this bilateral design that differentiates access rights in CGD from data portability rights in the narrower sense. Portability rights involve a triangular configuration in which the rightsholder instructs the data holder to transfer data to a designated third party. Under access rights in CGD, by contrast, no third party enters the picture: the rightsholder itself receives the data.

That said, nothing prevents subsequent onward transfer to a third party where no usage restrictions are attached to the access right and the rightsholder obtains full control over the data. This situation is commonly referred to as indirect portability. Depending on the modalities of the access right, indirect portability may be closer, in functional terms, either to access rights in co-generated data or to portability rights in the narrower sense (see C).

In cases where the access right allows only for a one-off provision of data, indirect portability primarily facilitates switching and multi-homing. Article 20(1) GDPR and Article 20(e) ED are examples of such an approach. They enable the data subject or customer to retrieve the data held by the data holder at the time of the request and subsequently transmit it to another party. This allows the rightsholder to migrate from the services or products of the original data holder to those of a third party. However, because these rights do not provide for continuous or real-time data flows between the initial data holder and the third party, they do not enable the use of data-dependent complementary services alongside the original product or service.

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Other access rights in co-generated data go further in this respect. Articles 6(9) and 6(10) DMA and Article 4(1) DA entitle the rightsholder to continuous—and, in certain cases, real-time—data provision by the data holder. If the rightsholder faces no restriction on onward transmission, they can construct a technical pipeline that immediately relays incoming data to one or several third parties on an ongoing basis. The practical result is difficult to distinguish from direct portability. What remains structurally different is that no direct legal nexus links the data holder to the downstream third party; the rightsholder stands between them, first receiving the data under its access entitlement and then contracting separately with the third party for onward supply.

3. Justification: Co-Generation Plus Legitimate Interest of the Rightsholder

Every data access or portability right necessarily curtails the data holder's interests—most notably the freedom to conduct a business as enshrined in Article 16 of the Charter of Fundamental Rights of the European Union (CFR), which extends to the freedom of contract[14]. An interference of this kind demands justification. Concerning access rights in CGD, the Principles for a Data Economy have rightly pointed out that contributing to the generation of the relevant data is one ground of justification, but additional factors should be considered when granting access to co-generated data.[15] In other words, just because a person has contributed to the generation of data does not automatically mean they should have access to the co-generated data.

Two broad categories of justification emerge from the Principles for a Data Economy. On one side stand individual interests of the rightsholder: Principle 20 cites, among others, the need to use, maintain, or resell a product or service, or to switch suppliers. An imbalance of bargaining power between the rightsholder and the data holder may likewise supply a legitimate individual ground for intervention. On the other side stand overarching public interests—particularly the maintenance of competitive markets and the promotion of innovation.[16]

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[14] Explanations Relating to the Charter of Fundamental Rights, OJ C 2007/303, 17.

[15] Cohen and Wendehorst (n 6), Principle 19 defines the following five grounds: (1) the share a party had in generating the data; (2) the weight of the grounds put forward by the party seeking data access; (3) the weight of any legitimate interests the controller or a third party may have in denying the data right; (4) any imbalance of bargaining power; and (5) any public interest, including the interest to ensure fair and effective competition.

[16] Cohen and Wendehorst (n 6), Principle 19(2)(e); see also Josef Drexl, 'Legal Challenges of the Changing Role of Personal and Non-Personal Data in the Data Economy' in Alberto De Franceschi and Reiner Schulze (eds), *Digital Revolution – New Challenges for Law: Data Protection, Artificial Intelligence, Smart Products, Blockchain Technology and Virtual Currencies* (Beck; Nomos 2019) 21, who argues that these four objectives need to be considered: (1) establishing a functioning and

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An analysis of the existing legal instruments suggests that both categories of justification are usually present. However, their relative weight differs depending on the type of data right. In the case of access rights in co-generated data, the individual interests of the rightsholder typically constitute the primary policy consideration, while public interests play a supporting role. This distinguishes them from access rights in the public interest, where the justification is driven predominantly by broader societal objectives.

For example, Article 20(1) GDPR gives individuals more control over their personal data, strengthens their informational self-determination and enables them – to some extent at least – to escape 'lock-in' situations. Releasing more data for the data economy and increasing competition are side effects but not the primary objectives. Article 20(1) GDPR neither addresses a concrete market failure nor ensures that the data is transferred to market entrants. Under the DMA, the access rights for advertisers, end users and business users are justified by their weak position vis-à-vis the gatekeeping platform. An additional ground of justification is to facilitate switching and multi-homing and enable advertisers and business users to monitor and improve the quality of their services and products. The overarching public interest is to ensure that gatekeepers do not limit innovation by undermining the contestability of the platform market and adjacent markets. However, the DMA's access rights in CGD benefit competitors of gatekeepers only indirectly, as there is no guarantee that users will actually switch to the services of another platform provider even if they have the right to retrieve and transmit their data. Similar considerations also apply to the access right under the ED. Electricity customers have a weak bargaining position, and they need access to their metering data to monitor their consumption and be able to evaluate whether to switch suppliers. The indirect effect on the public interest is that increased transparency enables energy suppliers to compete effectively with incumbents by offering better terms. The resulting competition leads to lower prices and thus also benefits those energy customers who have not made use of their right of access.

4. Modalities: Free of Charge and Full Control

Existing access rights in CGD share a further notable trait: they are, as a rule, exercisable at no cost to the rightsholder. Under Article 12(5) GDPR, personal data may be retrieved and transmitted free of charge unless the request is manifestly unfounded or excessive, in particular because of its repetitive nature. The ED takes

competitive market for the data economy; (2) promoting innovation; (3) protecting consumer interests with a particular focus on protecting the privacy of natural persons; (4) promoting additional public interests.

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a similar approach—Article 23(5) prohibits additional charges to final customers for accessing their data. The same principle applies under the DMA, where advertisers, business users, and end users incur no fee. Equally significant is that none of these rights restricts the rightsholder's subsequent use of the data; on the contrary, several instruments expressly permit onward transmission to third parties.

This design choice can be explained by the nature of the contribution that characterises the situations in which access rights in CGD have so far been introduced. The European legislator has limited these rights to cases in which the rightsholder's contribution to data generation is particularly strong, namely where the rightsholder is the subject of the data and/or generates it through their own activities. These two types of contributions not only provide a strong ground of justification for curtailing the interests of the data holder but also invalidate the traditional argument for charging for data access. Granting free data access is believed to allow free riding on the economic investments of data holders, which reduces the incentives for data holders to invest in data generation. This, in turn, leads to less data and consequently less innovation.[17] The objection loses its force, however, where the party requesting access has itself been instrumental in creating the data—such a party cannot sensibly be labelled a free rider when it uses co-generated data for a legitimate purpose. (The position is different for third-party recipients, discussed below.)

Consider Article 20 GDPR: because data subjects have themselves supplied the personal data, no disincentive for data generation arises from granting them access. The same is true under the access right of the ED, where the relevant data—electricity consumption figures and grid-feed information—is produced as an inherent feature of network operation and metering infrastructure. This serves regulatory and distribution-management functions that exist independently of any access right. Platform providers, for their part, collect user-generated data primarily because doing so improves their algorithms, sharpens their service offerings, and reveals behavioural trends—a commercial interest that is not diminished if users are allowed to access this co-generated data free of charge.

This is not to say that access rights in co-generated data could never be designed differently. It is conceivable that access rights could be granted to persons whose contribution to data generation is more limited, or in situations where access would enable direct competition with the data holder in a way that goes beyond mitigating an imbalance between co-generators. In such cases, restrictions on use or the requirement of remuneration might be warranted. However, the existing legislative

[17] Martens and others (n 6) 25.

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practice suggests a deliberate choice to confine access rights in co-generated data to situations in which the contribution and the individual interests of the rightsholder are sufficiently strong to justify free access and broad control.

The lack of remuneration under the existing access rights in CGD is also a significant point of difference from access rights in the public interest, which always require the rightsholder to pay a fee.

B. Access Rights in the Public Interest

Access rights in the public interest are characterised by a fundamentally different regulatory logic from access rights in co-generated data. As the name suggests, the central feature of data access rights in the public interest is that they are introduced by the European legislator when they are deemed to be a necessary and proportionate tool to achieve an objective in the public interest. In stark contrast to rights in CGD, they are not afforded to a person who has had a share in the generation of the data but to a third party. Often the public interest is the prevention of a market failure, but there are also other public interests that existing instruments seek to promote.

The Principles for a Data Economy of the American Law Institute (ALI) and the European Law Institute (ELI), which refer to these types of data rights as data rights in the public interest,[18] point out that such data rights follow more of a public law logic. The law does not attempt to strike a balance between competing private interests but encroaches on the interests of the holder if they are outweighed by a public interest.[19]

1. Justification: Public Interest

The justification for access rights in the public interest is therefore not derived from the individual interests or actions of the rightsholder, but from the objective that the access right is intended to serve. In other words, access to the data is not granted to the rightsholder for their own benefit or personal gain, but rather to benefit society as a whole.[20] In this respect, the underlying rationale is comparable to the consumer welfare approach in competition law.[21] *Ex post* competition law remedies, including mandatory data sharing based on the essential facilities doctrine, aim to preserve

[18] See Cohen and Wendehorst (n 6), Chapter C.

[19] See Cohen and Wendehorst (n 6), Principle 24.

[20] Cohen and Wendehorst (n 6) Principle 24.

[21] On the consumer welfare approach see Victoria Daskalova, 'Consumer Welfare in EU Competition Law: What Is It (Not) About?' (2015) 11 Competition Law Review 131.

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effective competition in order to promote consumer welfare. The protection of competitors against abusive behaviour by dominant undertakings is a way to achieve this goal; the individual interests of the competitors, however, are not the justification for legislative intervention.

The strong connection between competition law and sectoral data access rights in the public interest is highlighted by the fact that several of those access rights are designed to address some kind of market failure that would lead to higher prices, lower quality of services, less innovation, and less choice for consumers. For example, Article 61(1) of the Type Approval Regulation[22] obliges car manufacturers to grant independent maintenance and repair service providers access to the technical data necessary to perform these services. The rationale of this access right is that, due to the complexity of today's vehicles, independent repair service providers, as well as spare-part producers, can only offer their services and products if they have access to the necessary technical data. Similarly, Article 6(11) DMA obliges gatekeepers offering search engine services (such as Google) to provide access to ranking, query, click and view data generated by consumers through their online search engines to other undertakings. The aim is to ensure the contestability of the search market. Without access to this data, new entrants may face significant obstacles in improving their services and competing with entrenched gatekeepers.[23]

However, access rights in the public interest have a broader scope than competition law, because they can also be introduced for the protection of other public interests. Article 27 of the REACH Regulation,[24] for example, grants a registrant seeking to register a chemical substance the right to access testing data from manufacturers who have already registered such a substance, in order to avoid duplicating tests that harm the environment and animals.

[22] Regulation (EU) 2018/858 of the European Parliament and of the Council of 30 May 2018 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC, OJ L 2018/151, 1.

[23] Recital 61 DMA.

[24] Regulation (EC) 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, OJ L 2006/396, 1.

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2. Two-Person Relationship

Data access rights in the public interest establish a two-person legal relationship between the initial data holder and a third party that has not contributed to the generation of the data. This feature distinguishes access rights in the public interest from data portability rights in the narrower sense. Under portability rights, the third-party recipient receives the data only if the person entitled to portability decides to initiate the transfer. By contrast, access rights in the public interest put the third party in a considerably stronger position, as the entitlement to request access is granted directly to the recipient.

Typically, when affording access rights in the public interest only two interests need to be balanced against each other: the rights of the data holder versus the public interest. For example, under the Type Approval Regulation, the public interest to prevent a market failure of aftermarkets in the automotive sector outweighs the contractual freedom of car manufacturers and their freedom to conduct business (Article 16 CFR). However, there may also be situations where not only the data holder, but also other persons had a share in the generation of the accessed data. This is, inter alia, the case if the accessed data is personal data relating to someone who is not the data holder. Affording an access right to a third party also affects the rights and interests of the co-generators, such as the right to privacy and data protection. In the DMA, the European legislator resolved this issue by obliging the data holder to remove the contribution of other parties. According to Article 6(11) DMA, the gatekeeper shall anonymise the query, click and view data that constitutes personal data before transferring it to competitors.

However, data access rights in the public interest are not an appropriate policy tool if the removal of the contribution is not possible without defeating the purpose of the access right, and the public interest does not outweigh the interests of the co-generators.[25] In such cases, the data holder cannot serve as the sole access point for the necessary data for the public interest objective. The solution of the European legislator is to afford a data portability right in the narrower sense to the party that co-generated the data. By doing so, the decision whether to transfer the data to a third party is left to the discretion of the person who is affected by the access right. While this approach ensures that the interests of the co-generators are taken into account, the effectiveness of achieving the goal in the public interest is more limited (see below).

[25] Schweitzer and Welker (n 4) 134.

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3. Modalities: Access Based on FRAND Conditions

Regarding access conditions, data access rights in the public interest have drawn inspiration from the competition law concept of FRAND access.[26] For example, Article 6(11) DMA obliges gatekeepers to provide access on 'fair, reasonable and non-discriminatory' terms. Articles 27(3) and 30(1) REACH Regulation stipulate that data holders shall make every effort to ensure that the costs of sharing are determined in a 'fair, transparent and non-discriminatory way.' According to Article 61 Type Approval Regulation, car manufacturers shall provide non-discriminatory access but may charge reasonable and proportionate fees. Ensuring consistency between access rights in the public interest and access based on competition law is logical, because both instruments address a situation where the data recipient has not contributed to the generation of the required data.

What explains the fee requirement is the need to prevent uncompensated appropriation of value. The data holder has invested in generating and maintaining the dataset; allowing third parties to exploit it without charge would amount to free riding and could, over time, erode the incentive to produce such data in the first place. Non-discrimination performs a related but distinct function: by requiring equal treatment of all applicants regardless of their commercial relationship with the data holder, it safeguards the competitive process against distortions that could arise if certain recipients were granted preferential terms.

A further advantage of legislating ex ante access rights in the public interest is that they can spare parties the cost and delay of litigation. Defined statutory obligations afford greater certainty to both sides than ex post competition-law remedies, which require case-by-case adjudication. The FRAND model is, in theory, well suited to deliver on this promise. However, its weakness emerges in practice when the parties reach no consensus on the level of a fair and reasonable fee, since the resulting dispute may itself generate protracted proceedings. Only the REACH Regulation has confronted this difficulty head-on: Articles 27 and 30 supply cost-sharing rules for cases where voluntary agreement fails, complemented by a dedicated dispute resolution procedure. Scholars have urged that this model be extended to other public-interest access regimes. [27] Surprisingly, the DMA provides for alternative dispute settlement only for access to software application stores, online search

[26] See also the recommendation by Cohen and Wendehorst (n 6), Principle 25(1).

[27] Josef Drexl, 'Designing Competitive Markets for Industrial Data – Between Propertisation and Access' (2017) 8 JIPITEC 257, 290; see also Mathew Heim and Igor Nikolic, 'A FRAND Regime for Dominant Digital Platforms' (2019) 10 JIPITEC 38, 47.

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engines and online social networking services but not for access to ranking, query, click and view data. This undermines the very objective of rapid, reliable data access.

C. Portability Rights in the Narrower Sense

Direct data portability rights show traits of both access rights in CGD and access rights in the public interest and thus fall somewhere between the other two categories. The data covered by direct portability rights is co-generated by the data holder and the rightsholder. However, the co-generated data is not transmitted to the rightsholder, but directly to a third-party recipient designated by the rightsholder.

This structural feature distinguishes portability rights in the narrower sense from indirect portability. Indirect portability occurs where the rightsholder first exercises an access right vis-à-vis the data holder, receives the relevant data, and subsequently transmits it to a third party. By contrast, portability rights in the narrower sense establish a direct data flow between the data holder and the third party. As a result, they are capable of enabling continuous and real-time data transfers, which are often necessary where the rightsholder wishes to make use of data-dependent complementary services while continuing to use the original product or service. The analysis of the existing instruments also shows that enabling continuous and real-time data transfers to a third party is a characteristic that all the examined direct portability rights have in common – with the notable exception of Article 20(2) GDPR.

However, the obligation to enable real-time and continuous data transfers also entails a more severe interference with the interests of the data holder. Implementing direct portability in real time and on a continuous basis will usually require the data holder to make significant investments in information technology infrastructure, such as adopting new software, hardware, or network components and implementing appropriate application programming interfaces (APIs) and data transfer protocols.

1. Three-Person Relationship

What sets direct data portability rights apart structurally is that they establish a three-person relationship. The right to trigger the data transfer belongs to a party that participated in generating the relevant data. Once that party makes a request, the data holder must open a data channel to a third party designated by the rightsholder. Two consequences flow from this situation simultaneously. First, the rightsholder recovers practical control over data it helped produce but does not hold, unlocking the possibility of using complementary data-dependent services or switching providers without losing accumulated data. Second, the third-party recipient obtains a dataset it could not otherwise access, potentially lowering barriers to market entry and improving its competitive standing against the incumbent data holder. Where

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competition thereby intensifies, consumers may ultimately benefit through improved prices or quality. Crucially, however, both effects materialise only if the rightsholder elects to invoke the portability right; it is the direct and sole beneficiary, with third parties and consumers positioned as indirect beneficiaries.

Some portability rights leave the rightsholder broad discretion as to the choice of recipient. Under Articles 6(9) and 6(10) DMA, gatekeepers must provide access to "third parties authorised by an end user" or "third parties authorised by a business user". Article 5(1) Data Act similarly provides that the data holder shall make the data available to a third party as requested by the user. Other instruments restrict the group of potential recipients more explicitly. Under the Payment Services Directive (PSD II),[28] payers may have their account data transferred only to providers of payment initiation services or account information services. The ED provides for the transfer of electricity customer data to "eligible parties", with the details to be specified by the Member States. These differences illustrate that, while the three-person structure is common to portability rights in the narrower sense, the extent to which the rightsholder can determine the recipient varies across instruments.

2. Justification: Individual Interests of the Rightsholder and Public Interests

Data portability rights in the narrower sense are justified by a combination of individual interests of the rightsholder and broader public interests. In this respect, they share features with both access rights in co-generated data and access rights in the public interest. However, the relative weight of these two grounds of justification differs across instruments.

Instruments that are closer to access rights in co-generated data place the emphasis primarily on the rightsholder's individual interests, such as enhancing personal autonomy and control over data. Article 20(2) GDPR illustrates this approach. It seeks to strengthen the data subject's ability to control their personal data by enabling a direct transfer to another controller, thereby facilitating switching and reducing dependency on the original provider.

Other portability regimes are more closely aligned with the logic of access rights in the public interest, in the sense that they are primarily designed to achieve objectives that extend beyond the individual rightsholder. The portability right of the PSD II provides an example. While the rule strengthens the payer's ability to use innovative payment services by enabling the transfer of account data to third-party providers, its broader regulatory purpose lies in facilitating the development of safe, innovative,

[28] Directive (EU) 2015/2366 on payment services in the internal market, OJ L 2015/337, 35 (PSD II).

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and efficient digital payment services. At the same time, the choice to structure the mechanism as a portability right for payers, rather than as a direct access right for third-party providers, reflects an attempt to ensure that the interests of the co-generators of the data are not overridden. By making the data transfer dependent on the payer's decision, the regime ensures that the public interest in market innovation does not automatically prevail over the privacy and autonomy interests of individual users.

The portability rights granted under Articles 6(9) and 6(10) DMA reflect a more balanced combination of individual and public interests. They empower end users and business users by enabling switching and multi-homing and by facilitating the use of complementary services. At the same time, they serve the public interest of promoting contestability and innovation in digital markets by reducing barriers created by gatekeepers' control over user-generated data. However, the mechanism remains indirect from the perspective of competitors: providers of complementary services and potential market entrants can benefit from the data only if users actively exercise their portability rights. This stands in contrast to Article 6(11) DMA, which grants direct access to third parties in the public interest and therefore does not depend on user initiative. The distinction is significant because it means that the competitive effects of Articles 6(9) and 6(10) are contingent on user behaviour, whereas Article 6(11) operates independently of users' decisions.

3. Modalities: Two Types of Legal Relationships

The intermediate position of portability rights is also reflected in their modalities. Their three-person structure gives rise to two distinct legal relationships that are governed by different considerations.

The first relationship is between the rightsholder and the data holder. In line with the logic of access rights in co-generated data, portability rights are typically afforded to persons who have contributed to the generation of the relevant data. This justificatory link supports the view that the rightsholder should be able to exercise the portability right free of charge. Accordingly, existing portability rights generally do not require the rightsholder to remunerate the data holder for initiating the transfer.[29]

Turning to the second relationship—between the data holder and the third-party recipient designated by the rightsholder—parallels with access rights in the public interest become apparent. In both scenarios a party that played no role in generating the data nevertheless obtains it, and in both the justification lies outside that party's

[29] See Articles 6(9) and 6(10) DMA; Article 23(5) ED; Article 12(5) GDPR; Article 66(4)(c) PSD II.

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own interests, resting instead on the rightsholder's entitlement and on broader public policy goals. A critical difference in degree remains, however: under portability rights the decision whether the third party receives the data depends on the actions and choices of the rightsholder, whereas access rights in the public interest are granted directly to the third-party recipient. The free-riding risk is also structurally lower under portability rights. Because the underlying data is co-generated, the third party's gain rests partly on the rightsholder's contribution, not solely on the data holder's investment.

Even so, third-party recipients do derive a measure of benefit from the data holder's prior investment: they acquire control over data that would otherwise remain inaccessible, and that control strengthens their competitive hand against the original data holder. It is for this reason that several portability regimes authorise the data holder to charge a fee from the recipient. Article 23 ED, for example, leaves it to individual Member States to decide whether eligible parties must pay. Certain instruments—notably Articles 6(9) and 6(10) DMA—impose no payment duty on the recipient at all. However, the picture has shifted with the adoption of the DA. Article 9(1) DA establishes a default remuneration obligation: third-party recipients must agree on reasonable and non-discriminatory compensation with the data holder.[30] This requirement extends beyond data received under Article 5(1) DA to data received under any Union legislation entering into force after 12 September 2025 (Articles 12(1) and 50 DA). Going forward, therefore, third-party recipients will always bear a payment obligation unless the governing instrument explicitly stipulates that the portability right is free of charge for the recipient and not only for the rightsholder.

III. Concluding Remarks

This article has outlined a taxonomy first proposed in the author's doctoral thesis to describe European data access and portability rights in a more systematic way, without losing sight of the considerable diversity of the underlying instruments. Rather than treating each provision as an isolated, sector-specific intervention, the taxonomy tries to identify recurring structural patterns that reappear across the acquis. It distinguishes between access rights in co-generated data, access rights in the public interest, and data portability rights in the narrower sense. The categories are not derived from legislative labels, which remain inconsistent across instruments. Instead, the categories are derived from functional and structural criteria such as contribution

[30] Axel Metzger and Heike Schweitzer, 'Shaping Markets: A Critical Evaluation of the Draft Data Act' [2023] ZEuP 42 (48).

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to data generation, the configuration of parties involved, the justificatory logic of the intervention, and the modalities governing access.

By grouping provisions that share core characteristics, the taxonomy provides a coherent framework that serves legislators, courts, and practitioners alike. For legislators, it offers a template for designing future data rights: the categories make visible why certain design choices—such as free access, remuneration, or FRAND-based conditions—are used in some contexts but not in others, and they clarify the consequences of choosing one regulatory technique over another.[31] For courts, the taxonomy facilitates cross-instrument comparison and may support a more coherent interpretation of provisions that pursue comparable objectives but are embedded in different legislative acts.[32] For practitioners, it reduces the complexity of a legal landscape and provides orientation when advising on rights that may overlap or interact in ways that are not immediately apparent from their respective statutory frameworks.

The taxonomy also highlights points of tension. It reveals, for instance, that introducing both access rights and portability rights in the same instrument—as the Data Act does—can create overlaps that introduce new competitive imbalances or undermine the effectiveness of one right at the expense of the other. Similarly, the default remuneration obligation for third-party recipients under Article 9(1) of the Data Act, which extends to any future Union legislation entering into force after 12 September 2025, will require careful calibration to avoid unduly restricting the data flows that portability rights are designed to facilitate.

Looking at the bigger picture, EU data law currently finds itself at a crossroads. Sector-specific rules continue to exist alongside newer, more broadly applicable instruments. This development is similar to the one that could be observed in EU consumer law, where initially isolated interventions gradually consolidated into a more coherent system built around recognisable pillars, such as withdrawal rights and unfair terms control.[33] Data access and portability rights seem to be moving in the same direction, transitioning from scattered regulatory tools into core building blocks of European data law. This observation does not imply that EU data law has already reached a state of full coherence. However, it suggests that the taxonomy presented

[31] For a more detailed analysis of the design choices associated with each category, see Duller (n 5) Ch 10.

[32] On the potential for cross-instrument interpretation, see Graef, Husovec and van den Boom (n 3).

[33] Martijn W Hesselink, 'Private Law, Regulation, and Justice' (2016) 22 European Law Journal 681.

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here may serve as a starting point for future efforts towards greater systematic alignment.

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