

## Privacy Unpacked – Episode

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### *Podcast transcript – Data Act Decoded*

In our fourth episode of Privacy Unpacked, Tobias Bräutigam (Partner, Data Protection & Data Regulation) and Berend Van Der Eijk (Partner, Data Protection & Data Regulation) joined by Milla Keller (Privacy Legal Counsel, Telia) break down the current legislative status, explaining what the Data Act means for your organisation and outline the essential next steps for staying ahead of data compliance.

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#### **Milla Keller:**

Welcome to the fourth episode of Privacy Unpacked from Bird and Bird. I'm Milla Keller joining today on this podcast as a guest host. I work as a lawyer at Telia, a Nordic and Baltic telco. I'm also hosting a podcast called PrivacyPod.

I will be having a conversation today with Tobias and Berend who are partners within the privacy and data protection team in Finland and the Netherlands.

Hello Tobias.

#### **Tobias Bräutigam**

Hi Milla.

#### **Milla Keller**

And hi there Berend.

#### **Berend Van Der Eijk**

Hi Milla.

#### **Milla Keller**

Good to have you both here today. And in this episode, we will be discussing actually the Data Act. The Data Act is one of the big five regulations coming from the EU right now. And Tobias, actually, where are we in the legislative process of the Data Act right now?

#### **Tobias Bräutigam**

Yeah, we are actually very far it has been approved. A deal was done. Yeah, for a long time it was a little bit open. A deal was struck in June this year, both Parliament and the Council officially approved the deal, Council just a few weeks ago, and we're still waiting for the publication in the official journal, but it is going to come. And after 20 months of the publication, which probably will be in autumn 2025, it's going to be applicable.

#### **Milla Keller**

Right, so one and a half years, if I calculate really quickly with my lawyer math here.

#### **Tobias Bräutigam**

About 20 months? Yeah. A little bit more.

### **Milla Keller**

Sure, sure. Good, and ok, so it has been approved now, it has fared much better than the eprivacy regulation, maybe better than the AI act. That remains to be seen, I guess. But Berend, and could you briefly describe the Data Act for those that have never heard of it?

### **Berend Van Der Eijk**

Sure. It's called the Data Act, and it is about data but it's a very broad piece of legislation and broad in the sense that it covers a number of, I would say, on its own standing topics and themes, but it's a common denominator that it is about data, but if you ask me, it could have well been two or three or even four different pieces of legislation. So also for that reason, I will cover half of these obligations or themes, and Tobias will cover the remaining themes of the Data Act.

So to start, a first set of obligations really is for the manufacturers that they design their connected products in such a way that users can have an easy access to the data generated by the products. Secondly, that they also inform those users about the main characteristics of the products in terms of what data is generated and how the user can access it. So it is really data access by design, it's a design thing, but also that if the users cannot readily access the data, that they have a right to request access to data generated by their IoT products, by their connected products. This might be a good moment for me to explain that this part of the Data Act is not only about connected products, but it's also about what's called related services.

Related services are services that our services without which the connected product will be prevented from performing one or more of his core functionalities. An example of a related service could be a dashboard, which allows you to control the products or an application for the same. These are also in scope and the data that they generate is also in scope of these obligations under the Data Act.

So I've talked about the obligations from designing and manufacturing the products that you need to open up that data for the users of the product, so it can be business users, as well as consumers, natural persons, there's a third set of obligations and debts around third party access. So this is when the user grants access to a third party to perform certain functionalities. So for example, if you have a machine, and under, let's say, three

Data Act scenarios the machine could only be repaired, maintained, by the manufacturer of the product, following the Data Act, that's at least the goal, you can also engage a third party not being the manufacturer, and share certain data that allows a third party to repair or maintain your connected products. So that's the third main obligation of this section of the Data Act and that's allowing access, access for the user is free, but access for such a third party would typically be under friend terms, so fair, reasonable and non-discriminatory terms. And of course, that's something that can open up to litigation. I'll now hand over to Tobias as to cover the other parts of the Data Act.

### **Tobias Bräutigam**

Yes, that's the interesting part that everyone's talking about the connected devices and that's a big part, but there's at least two, if not three other parts, and the first of those other parts is the access from the government to data that organizations have. That is, as always, in case of exceptionally but usually also in cases of public emergency, and then the data holder must make data available. It's also means already for some organization planning for that, also, in some cases in a non-public emergency, then if there's a specific task in the public interest, the data can also be asked from organizations but that's only for non-personal data. That is a big part and that was also discussed quite a lot. And then there's a whole other part, which is switching between data processing services, data processing services are digital services enabling ubiquitous and on demand network access to a shared pool of configurable, scalable and elastic computing resources. In other words, cloud computing, which covers all types of cloud computing, and there's a whole range of obligations for data processing services in the Data Act, such as you need to remove obstacles, might be technical, might be contractual, and also contracts between the provider of data processing services and the customer must include certain clauses and you could even see this as a sort of standard term control, B2B, which in some member states is really, really new and unusual, for example, in Finland.

And then there is also two other chapters, maybe you could briefly mention here. One is the rules on international data transfers, and so far if they are used for governmental access, you can think of it as like a milder version of article 48 GDPR for the privacy pros among us. So basically saying that a request should only be honoured if based on international agreements, or if a foreign government would like to have some data, even

non personal data, then it should only be based on international agreement, but then there are a lot of loopholes provided. Plus, in that chapter also a lot of technical organizational measures that organizations need to have in place to protect the data that are based in Europe. The last bit of the Data Act is on inter-operability, and it applies for participants in data spaces, which actually, the commission is pushing quite ahead. Health status pages may be known to some, also some recent announcements there. Data spaces is basically an IT infrastructure, to pool access, process, and use data shared with others in a secure manner, with the aim to make high quality data available to others. And this last chapter on interoperability includes certain minimum rules on datasets, so that you need to basically document, describe the content, how to get access, and so forth.

### **Milla Keller**

Thank you both. I think that's one of the most important things really to understand about the Data Act that instead of the completely totally comprehensive set of rules, it has these quite distinctive parts actually and going by the chapters, reading the chapters in the beginning is a very useful way to get into this split of different parts in the Data Act.

### **Tobias Bräutigam**

Fully agree, I sometimes think, is it like a box of chocolates? Or is it even like only chocolate in the box, or also something else? Like an orange, or something else.

### **Milla Keller**

Yeah, you wanted just chocolate and you get also an assortment of fruit, which is a bit disappointing, but here we are.

### **Tobias Bräutigam**

Depends on what you like.

### **Milla Keller**

Yeah, indeed. But yeah, so we have the part about connected products and related services and the data sharing related to those, we have the governmental access to data and then we have the interoperability part or more like this switching between cloud services. So those I would say, are the main parts, Berend, regarding this, these obligations related to connected products and related services, what kind of data exactly has to be then provided under these rules?

### **Berend Van Der Eijk**

Thanks. That's the million dollar question almost. Like I said, if you talk about connected products, there's an obligation to make product data, related service data, including relevant metadata available, and that is based on the recycles data which is not substantially modified so data in raw form source data, primary data, but also pre processed data. So data that is processed for the purpose of making it understandable. What it doesn't cover is inferred data or data derived from source data, which is the result of complex algorithms and so on. So, values and insights are not covered but I must say, other than that it's a pretty broad definition, when the data cannot be accessed directly from the connected product or the related service, you have to look at readily available data that should be made available to the user and when needed to the third party and readily available data is data that the manufacturer itself can readily get off the device or the related service.

And maybe a final thing to ask there are, as with any good law also, exemptions, you can rely on a certain security exemptions, or you can rely on trade secrets that prevent you as a manufacturer from providing certain data to either a user or a third party but in many cases, that's done on a very much on a case by case basis. And you may also have an obligation to inform the competent authority of any refusal to share the data with the user or the data recipient, the third party

### **Milla Keller**

Yeah, you mentioned that some of the data might be proprietary information of the company and I think that's an interesting point, because that's what organizations are looking at then, that okay, we have to share some of the data, we don't want to share all of the data, can we refer to trade secrets, can we refer to security issues, so it's going to be interesting to define what data to share.

All of us on this call right now, we have a extensive background in privacy and data protection, Tobias, how do you see the Data Act relation with the GDPR?

### **Tobias Bräutigam**

Yeah, I would like to see them as equal, but that is actually not the case, it's very clear in the Data Act that the GDPR takes precedence. It is several times also stated that the Data Act does not establish an own legal basis for processing, that's relevant for the sharing, the part that Berend

covered, and is both stated in the recitals, and then for good measure, again in the text in Article 5, which means that the full GDPR applies, of course it only applies if you have personal data. In case you have a mixed data set however, the GDPR applies as well, because as soon as, so to speak, personal data pollutes the whole data set, then the GDPR is applicable which by the way also means that the data protection authorities will be the competent authorities to rule.

### **Milla Keller**

The data protection authorities shall rule. Okay, okay, Berend, what kind of questions are you seeing from clients related to the Data Act right now? I know that in my organization, we have a project going on to kind of figure out how does this apply to us? But, what are other organizations doing?

### **Berend Van Der Eijk**

Yeah, that's a really good question, so what I've seen in the past year is that even though the Data Act was somewhat on the radar, for some, I feel that it has been very much overshadowed by what we call the summer of AI, everybody was talking about AI and the AI Act, and that might still be the case to some extent, but the Data Act, in my view, didn't get as much attention as it should have had, and I think now more and more companies are starting to wake up and understand that it has a material impact on how they run their business and on how they should design their products. Like I said, there have been some companies, especially I feel in the automotive industry that have been very much on top of this, and who are already negotiating, for example, these access fees, but for I would say a very significant number of companies. This is new, but it's also relevant.

### **Tobias Bräutigam**

Yeah, it's absolutely essential. One example is termination rules, which are addressed in the Data Act.

### **Berend Van Der Eijk**

So it gives a background I think, more companies should make an initial assessment of where the Data Act could be relevant for them also, given that it doesn't only cover data sharing, but also the topics that need to be discovered.

### **Tobias Bräutigam**

Yeah, I think we're already at the end here. Thank you Milla, it was great to see you again. We hope

you found this episode of privacy unpacked useful if you have a question for Berend or for me or for someone else in our team, or even a suggestion for a future episode, please do get in touch. We look forward to your joining us next time.

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