FRAND Access to Data: Perspectives from the FRAND Licensing of Standard-Essential Patents for the Data Act Proposal and the Digital Markets Act

Erik Habich

Accepted: 12 September 2022 / Published online: 10 October 2022 © The Author(s) 2022

Abstract This article evaluates how the principles developed for the fair, reasonable and non-discriminatory (FRAND) licensing of standard-essential patents could be applied to FRAND data access as envisaged under the Digital Markets Act and the Data Act and proposes a negotiation scheme to specify the FRAND obligations. Firstly, this article describes the access rights under the Data Act and identifies its four layers to accelerate data sharing (Section 2). Secondly, the role of FRAND data sharing in the EU Data Package is described, and the specifics of FRAND in the context of the Data Act and the Digital Markets Act are developed (Section 3). Based thereon, the differences and commonalities of data sharing as envisaged in the Acts with respect to the FRAND licensing of standard-essential patents are described, and a negotiation scheme for FRAND terms under the current Data Act Proposal is developed under adaptation of the principles from *Huawei/ZTE* (Section 4).

Keywords FRAND · Standard-essential patents · Data sharing · Data Act · Digital Markets Act
1 Introduction

With its Digital Regulation package, the European Union aims to regulate the emerging digital economy and to mold the principles of digitization in the years to come. In particular, the EU has recently adopted the Digital Markets Act regulating core platform services, and the Commission has proposed the Data Act introducing inter alia access rights for users to data generated by their use. While both acts (hereafter “the Acts”) are horizontal and non-sector-specific in their approach, apart from regulating certain parameters of contractual relationships such as a prohibition of self-preferencing or free access in sub-constellations, both refer to fair, reasonable and non-discriminatory (FRAND) terms for access conditions.

The concept of FRAND access has been applied and litigated in the context of the licensing of standard-essential patents (SEPs) for which a FRAND commitment has been issued. The legal principles of FRAND predominantly rest on a contractual FRAND commitment by the patentee and on competition law addressing dominant undertakings, in particular the Huawei/ZTE negotiation scheme, as well as on contract law related to the FRAND commitment during the standardization process for a safe harbor under Art. 101 TFEU (Sect. 4.1). Consequently, regulatory FRAND access to data as envisaged under the Acts differs from contractual and competition law-based SEP licensing in fundamental factual and legal aspects.

In this context, this article evaluates how the principles of SEP FRAND licensing could be applied and adapted to FRAND data sharing under the Acts, proposing a negotiation scheme to specify FRAND in the future realm of the Data Act. Therefore, this article first describes the data access rights and rights to exclude under the Data Act Proposal and continues to identify four layers to incentivize data sharing (Sect. 2). Secondly, the role of FRAND data sharing in the EU Data Package is sketched out and the specifics of FRAND in the Acts explored (Sect. 3). Based thereon, the differences and commonalities of data sharing as envisaged in the Acts to the FRAND licensing of SEPs are described. Finally, an adapted negotiation scheme for finding a FRAND compensation under the current Data Act Proposal is proposed, inspired by the principles of Huawei/ZTE (Sect. 4).
2 Data Access Rights and Data Exclusivity Under the Data Act

2.1 Factual Exclusivity, Right to Exclude and Right to Data Access

The Data Act Proposal introduces access rights of the user and authorized third parties to usage data that are in possession of a data holder. With this access right, the Proposal aims to make data more easily sharable and transferable horizontally across sectors in the digital economy.\footnote{EU Commission, Proposal for a Regulation on harmonized rules on fair access to and use of data (Data Act) of 23 February 2022, COM(2022) 68 final, 2022/0047 (COD), Explanatory Memorandum, 1.} The proclaimed goal of the Act is to ensure fairness in the allocation of value derived from data among actors and to foster access to and the use of data while preserving incentives to invest in value generation through data.\footnote{EU Commission, Proposal for a Regulation on harmonized rules on fair access to and use of data (Data Act) of 23 February 2022, COM(2022) 68 final, 2022/0047 (COD), Explanatory Memorandum, 2, 3; critical on the incentive to generate data objective, Kerber (2022), pp. 16–18; noting the significance of data protection and privacy to these goals, Picht and Richter (2022), p. 401.}

The legal nature of data and the scope of rights on data, in particular data ownership or a bundle of rights, have already been topics of abundant academic debate.\footnote{Drexl et al. (2016); Zech (2015), p. 144 et seq.; Amstutz (2018), p. 544; Kerber (2016).} In the absence of factual exclusivity of a physically rivalrous nature protected under a property right or absolute legal exclusivity conferred by an intellectual property right, incentives to share data are limited by the non-rivalrous nature of data unprotected by an absolute right.\footnote{Cf. on this “social rivalry” in certain constellations, Opderbeck (2007), p. 85.} As contractual data sharing is not protected with effect to third parties against non-consensual use and breach of contract, a data holder is incentivized to retain factual exclusivity to maintain the value of data.\footnote{Cf. e.g. Kerber (2022), p. 4; on the role of data confidentiality, Picht (2022), p. 10.} As a result, this absence of legal protection of (non-personal) data increases the data holder’s transaction cost for monetization through third-party data sharing, and incentivizes the extraction of value by self-monetization and vertical integration. Regarding third-party data licensing, the data holder can generally protect its original data only to a limited extent by contractual rights or technical means. This potentially lowers welfare by decreasing incentives to transactionally share data, likely chilling innovation from data licensing between undertakings and competition on secondary markets using components of the original data input.\footnote{Recital 2 EU Commission Proposal for the Data Act; with further details on the potential effects, Kerber (2022), p. 4.} At the same time, if incentives for data creation are maintained, there is significant potential for welfare gains from data sharing, as non-rivalrous data are apt for reuse by sharing without marginal costs proportional to the additional value that access could create.\footnote{OECD (2019); Jones and Tonetti (2020).}

Furthermore, factual impediments to data access may exist due to technical product or service design, e.g. for security reasons. However, factual barriers to data
sharing may also be created by strategic behavior of data holders who do not wish to share data.

2.2 Four Layers of the Data Act to Incentivize Data Sharing

To mitigate these shortcomings and to incentivize data sharing while maintaining a value-based allocation of rents for the generation and use of data, the Data Act proposes to introduce four regulatory layers, namely (i) information duties of data holders, (ii) user rights to exclude from data generated by their use, (iii) user access rights to data held by data holders, and (iv) guidelines for the technical implementation of these layers:

(i) As a first layer to enable data transferability, Art. 3(1)(a), (2) DA introduces information duties on data holders to enable users to assess the scope of data generated by their use of a product or service. This is a prerequisite for their disposition over these data by informed consent and allocative decision making.15

(ii) A second layer to enhance the transferability of data is the creation and restatement of a user right to exclude others from using or receiving data generated by the use of a product or service.16

For personal data, the data subject’s right to exclude is established in Arts. 6(1), 9 and 21 GDPR17 by the principle of informed consent combined with the prohibition on processing personal data outside the scope of the consented purpose except for certain exceptions.18 The Data Act, in Arts. 4(5) and 5(6), repeats the prevalence of this right, as the data holder may not make personal data available to users without a legal basis under the GDPR. For non-personal data, the Data Act, in Art. 4(6), proposes that the data holder shall only use non-personal usage data based on a contractual arrangement with the user. Similarly, third parties shall only use data made available under Art. 5 DA for the purpose agreed with the user and shall delete data unnecessary for that purpose (Art. 6 DA). This inalienable user right allows the user to determine the fate of usage data with respect to the data holder.19

While the manufacturer of a product or provider of a service will with the user’s purchase of a good or service generally reserve the right to exploit usage data, based on Art. 4(6) DA the user will have the right to terminate any agreement of continuing obligations under the respective national contract

---

14 Cf. Recitals 2, 5 EU Commission Proposal for the Data Act.
15 Identifying difficulty with the identification of data as an inhibitor to access, Picht (2022), pp. 12, 30.
16 On the role and limits of consent to control data, Reimsbach-Kounatze (2021), pp. 41–42; cf. also the interesting remark in Recitals 5, 6 EU Commission Proposal for the Data Act noting the balance between access rights and the right to exclude.
17 Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation, GDPR), OJ 2016 L 119/1.
18 Cf. Martens (2021), p. 73.
19 Also noting the eminence of this initial contractual relationship, Kerber (2022), pp. 6, 20 et seq.
law, e.g. in the statutory notice period unless contractually altered.\textsuperscript{20} If interoperability between a physical product and the generation of user data is available, the user thus, in principle, has the option to form a new contractual agreement with a different data holder.

With this \textit{erga omnes} user right to exclude by limiting the contractual purpose of the agreement with the data holder, as well as the data holder’s interest being protected under Art. 11 DA, the use and sharing of both personal and non-personal data will be subject to the respective user’s consent. If the data holder breaches the user’s consent by using usage data outside the scope of the contractual purpose, the data holder not only violates the user’s subjective right with effect for the contractors but also an absolute right under Art. 4(6) DA. This enables the user to exert choice regarding the sharing of usage data, as well as to exchange consent for reaping part of the economic value generated by data access. For example, the user is entitled under Art. 4(6) DA to exclude the data holder from monetization through reuse in vertical integration and/or third-party data sharing.

Nonetheless, it remains to be seen and is doubtful whether users will be able to exert this choice vis-à-vis data holders.\textsuperscript{21} Based on pre-emptive general terms and conditions, data holders will likely be able to monetize usage data independently of user choice. In competitive primary markets for products or services, this will benefit the user through lower prices and/or increased quality. Nonetheless, with respect to third parties, user choice in combination with FRAND access to non-personal data will exert restraint on data holders’ factual exclusivity over usage data, as the user is entitled to break up this exclusivity by commanding data sharing with third parties. Furthermore, the fact that data access must occur under FRAND conditions with user consent will likely enhance price competition for autonomous third-party sharing by the data holder. Apart from that, if the user is a micro, small or medium-sized enterprise, it will benefit from the fairness test in Art. 13 DA on the content of the initial data licensing contract with the data holder if unilaterally imposed. Notably, for designated gatekeepers under Art. 6(1)(a) DMA in respect of core platform services, the gatekeeper is not allowed to use publicly unavailable data generated or provided by business users or their end users in competition with the former, irrespective of user consent.

Overall, this layer conceptually breaks up the data holder’s factually exclusive data possession. Yet, it does not limit the incentive for the data holder to rely on factual means and subjective rights to exclude others from value creation by data generated from the use of its product or service. Rather, the data holder will be incentivized to impede access by factual means. This will be tackled by layer (iv).

\textsuperscript{20} Noting the issue more pessimistically, Kerber (2022), p. 20 \textit{et seq.}, also with reference to Recital 25 EU Commission Proposal for the Data Act.

\textsuperscript{21} Critical, Kerber (2022), p. 15 \textit{et seq.; cf.}, however, the referral to sectorial regulation for this purpose in Recital 25 EU Commission Proposal for the Data Act.
(iii) As a third layer, the user of a product or service has the right to directly access usage data where relevant and appropriate (Art. 3(1) DA) and for data to be made available free of charge (Art. 4(1) DA). Furthermore, the user has the right to request usage data to be made available to a third party (Art. 5(1) DA). While this must be free of charge to the user, the data holder is allowed to monetize access to non-personal data vis-à-vis the third party on FRAND terms. This enables the user to participate in vertical value creation from usage data, as it can allocate data access to third parties by exerting choice if no trade secrets are concerned.

While it was legitimately criticized that the FRAND obligation in Art. 8(1) DA only extends to third parties and not to users, it must be noted that users enjoy access free of charge under Art. 4(1) DA. As far as usage data relate to an identifiable natural person (Art. 4(1) GDPR), data subjects possess the right to data portability under Art. 20 GDPR and the access right under Art. 15 GDPR.

For core platform services, the gatekeeper must provide data portability and access to the aggregated and non-aggregated data generated in the context of the use of the platform or linked service not only to end users and business users but also free of charge to third parties authorized by these users (Art. 6(1)(h), (i) DMA). To any third-party online search engine, the gatekeeper must grant FRAND access to ranking, query, click and view data in relation to search data generated by end users on the gatekeeper’s search engine (Art. 6(1)(j) DMA). Moreover, the gatekeeper must publish and apply FRAND general conditions of access for business users to its application store, online search engine and online social networking service (Art. 6(1)(k) DMA).

(iv) With a fourth layer, the Data Act safeguards its legal access regime by regulating interoperability criteria curbing the factual barriers to data transferability against commercially strategic behavior of data holders. In particular, the Data Act requires an accessible product or service design (Art. 3(1) DA), and interoperability descriptions by operators of data spaces in Art. 28(1) DA, and delegates to the Commission the formulation of sector-specific interoperability requirements or standards. However, it remains to be seen how effectively the rather vague requirements of Art. 28 DA will enable technical interoperability, which will be a prerequisite for effective achievement of the Data Act’s objectives. In this respect, a decisive factor will

---

22 Recital 38 EU Commission Proposal for the Data Act.
23 For the justification of this access right, cf. Recital 18 EU Commission Proposal for the Data Act; on its limits to a vertical or cross-sectorial nature, Recital 35 EU Commission Proposal for the Data Act. As a matter of scope, this article carves out the delicate issue of the delineation of an adequate scope of trade secret protection vs. effective access rights.
24 Picht (2022), p. 21, criticizing the under-inclusive scope of Art. 8(1) DA, however, arguing for access free of charge as a subcategory of FRAND at pp. 27–28; Heim and Nikolic (2019), para. 72.
25 Arguing for a lack of clarification between GDPR data portability and the Data Act, Graef and Husovec (2022), p. 1.
26 Cf. already Richter and Slowinski (2019), p. 17.
likely be the scope of Art. 11(1) DA, as well as the action and rigidity of the competent Member State authorities under Art. 31 DA, and whether the Commission will effectively use its powers to implement delegated acts under Arts. 28(2) and 38 DA.

For core platform services, Art. 6(1)(f) DMA includes the obligation, to be specified under Art. 7 DMA, to allow free of charge, effective interoperability of the features controlled via the gatekeeper’s operating system that are available to its own services or hardware. At the same time, the gatekeeper is allowed to take strictly necessary and proportionate measures to ensure that interoperability will not compromise features provided by the gatekeeper. Article 6a DMA contains further interoperability requirements.

Overall, this results in a triangular relationship. The user possesses an access right and, at least in theory, the right to exclude others from usage data based on the initial contract with the data holder. Therefore, it can benefit from contractually allowing third parties or the data holder to use these data. The data holder cannot legally, and only to a limited extent factually, exclude authorized third parties from usage data that the user decided to share. The data holder can monetize usage data by improving its primary product or service, by vertical integration if contractually allowed, by third-party sharing at its own discretion if contractually agreed with the user, and on FRAND terms vis-à-vis a third party if shared at the request of the user. The user will be incentivized, at least on competitive primary markets, to consent to the data holder’s data usage for vertical integration or autonomous sharing by increased quality or lower prices of products or services. The third party accessing at the request of the user will be able to increase the quality of its product or service by data access. This enables the third party to create new markets or to compete on existing secondary markets whereby the data reuse generates additional welfare. The data holder will be able to benefit from this additional value by the access compensation on FRAND terms.\textsuperscript{27}

Moreover, the Data Act proposes distinguishing the rights and obligations of undertakings of different sizes and market positions. The access and exclusivity obligations do not apply to data generated by using products or services of micro or small enterprises while these benefit from the user and third-party rights (Art. 7(1) DA). However, it remains to be seen whether these undertakings will in fact benefit from this exclusion, as from the user’s perspective a lack of data shareability will likely constitute a competitive disadvantage. Furthermore, as micro and small enterprises are not subject to the obligations of Chapter II according to Art. 12(1) DA, they are not bound by the non-discrimination and reasonability obligations (see Sects. 3.2 and 3.3).

Conversely, gatekeepers providing core platform services (Art. 3 DMA) are not allowed to benefit as a third party from the user’s data access rights under Arts. 5(2) and 6(2)(d) DA, yet they are subject to the access obligations under the Data Act and DMA.\textsuperscript{28} In this latter respect, in line with the DMA’s goal of contestable and

\textsuperscript{27} Skeptical on the effectiveness of this user right mechanism, Kerber (2022), p. 10 \textit{et seq.}

\textsuperscript{28} Critically on the lack of effectiveness of this carve out, Graef and Husovec (2022), pp. 2–3.
fair markets (Art. 1(1) DMA),

the DA Proposal appears to be willing to sacrifice short-term user choice and increased innovation by gatekeepers for the benefits of a less centralized market structure, more long-term user choice, and more dynamic competition between market actors.

3 FRAND Access in the Data Act

3.1 The Role of FRAND Access in the Digital Regulation Package

A duty for compensation on FRAND terms was proposed by the Commission in several of its latest proposals for regulation concerning the digital economy. This article will focus on the Data Act and the DMA.

The Digital Markets Act aims to regulate the provision of core platform services of designated gatekeepers in the digital economy to prevent unfair practices and to tackle weak contestability of these services (Art. 1(1) DMA). The DMA addresses platform services with particularly strong market power, or the tendency to develop such consolidated dominance, manifested by operating gateways to customers and which enjoy or are expected to enjoy an entrenched and durable market position (Art. 3(1), (6) DMA).

A regulatory duty to grant access on FRAND terms has been proposed for core platform services of designated gatekeepers on several occasions. The DMA in Art. 6(1)(d) introduces an obligation susceptible of further specification under Art. 7 for core platform services to refrain from self-preferencing in ranking and to apply transparent, fair and non-discriminatory conditions to the ranking of third-party services and products. Article 6(1)(j) introduces an obligation further to be specified for gatekeepers’ core platform services to provide third-party online search engines with access to ranking, query, click and view data of end users on fair, reasonable and non-discriminatory terms. Furthermore, according to Art. 6(1)(k), gatekeepers shall be obliged to apply FRAND general conditions of access for business users to its designated software application store, online search engines and social networking services. Additionally, the DMA includes several provisions specifying the content of FRAND in certain contexts, such as that in some constellations access must be granted free of charge or that termination can be exerted without undue difficulty.

Procedurally, Arts. 6 and 7 DMA adopt a bottom-up, decentralized approach to concretizing FRAND, as the obligations in Art. 6 are susceptible of being further specified. The gatekeeper is initially free to adopt measures at its own discretion to ensure compliance with Art. 6 and must annually report on compliance (Art. 9a(1) DMA). The gatekeeper can ask the Commission for advice by submitting a reasoned submission on how its measures comply with the obligations according to Art. 7(2), (2a) DMA. If the Commission decides, at its discretion, to engage in this dialogue of mutual reasoning, it must communicate its preliminary findings within three months and explain the measures that it considers to take or that the

---

29 On the notion of contestability and fairness, cf. Schweitzer (2021), pp. 511–522.
gatekeeper should take (Art. 7(4) DMA). The gatekeeper is entitled to offer commitments under Art. 23 DMA while the Commission can reject commitments only in a reasoned manner. The Commission may by non-compliance specify the measures the gatekeeper shall implement to effectively achieve the objectives of the relevant obligations proportionate to the specific circumstances (Art. 7(2), (5) DMA), again triggering an obligation by the gatekeeper to reason how it plans to comply (Art. 25(3), (4) DMA).

Although the distinction between specific obligations under Art. 5 and obligations yet to be specified under Art. 6 has been criticized,\footnote{Schweitzer (2021), p. 531 \textit{et seq.}} for the concept of FRAND this procedure appears sensible.\footnote{Critically, however, Picht and Richter (2022), p. 397.} As is the general consensus in the context of SEP licensing, there is more than one set of FRAND conditions in the specific context.\footnote{\textit{Cf. e.g.} Picht (2017b), p. 579; UK CA, 23 October 2018, Case No. [2018] EWCA Civ 2344, paras. 118–123 – \textit{Unwired Planet}; \textit{cf.} 227 BGHZ 305 [52 IIC 1465 (2021)], para. 70 – \textit{FRAND-Einwand II}; 225 BGHZ 269 [52 IIC 1446 (2021)], para. 81 – \textit{FRAND-Einwand I}.} The decentralized approach of Art. 6 DMA leaves the gatekeeper free to specify its own FRAND terms, and frames a procedure for their reasoning in dialogue with the Commission in respect of the market particularities. The alternative would be a more rigid, top-down regulatory approach directly subjecting the gatekeeper to sanctions. Rather, this procedure encourages mutually interdependent reasoning on how the conduct interplays with the goals of the Act, hopefully leading to more concise results and increased judicial reviewability. This results in a less rigid market interference by the obligations of Art. 6, as the Commission issues a judicially reviewable decision to adhere to before applying sanctions, thereby decreasing the chilling of potentially procompetitive behavior. Contrarily, the directly sanctionable obligations of Art. 5 DMA, despite also being subject to the gatekeeper’s right to be heard (Art. 30 DMA), are subject to fines without the obligations’ previous specification under Art. 7(2) DMA, causing more deterrence. As a result, for less specific duties or conduct with more ambiguous and context-specific effects such as adherence to the general concept of FRAND, the procedure in Arts. 6 and 7 DMA appears sensible.

Substantively, Art. 7(6) DMA suggests that the legislators regard access conditions to core platform services as non-FRAND if the gatekeeper’s measures do not ensure that an, assumedly preexisting, imbalance of rights and obligations on business users is not eliminated or if the measures themselves confer a disproportionate advantage to the gatekeeper. The FRAND obligations of the DMA must be understood in the context of its regulatory approach to the potential for an entrenched market position emerging from the economics of platform services (Art. 1(1) DMA). Regulating access terms to core platform services and self-preferencing\footnote{On self-preferencing in recent debate in competition law, Colomo (2020).} chills the over-enhanced incentives to compete with these services to the benefit of competition on secondary markets. In this context, the legislators favor the regulation of competition on these core platform services to competition for the markets of these services.
The spirit of practices limiting the contestability of core platform services is abstracted in Art. 10(2) DMA, also affecting the notion of FRAND in the DMA: Art. 10(2) mentions that this is the case if (a) there is an imbalance between the rights and obligations and a disproportionality of the obtained advantage from business users and the service provided or (b) if the conduct is capable of impeding innovation and limiting the choice of business and end users. The latter, often difficult to balance and thus opaque specification is clarified by exemplifying that innovation and choice are negatively affected if based on conduct whereby the contestability of a service in the digital sector is affected on a lasting basis due to the creation or strengthening of barriers to enter or expand, or if it prevents other operators from having the same access to a key input as the gatekeeper. However, it must be noted that prong (b) will only be of limited significance for the substantiation of the overarching concept of FRAND, for example in the Data Act, as it is specific to the DMA’s goal of tackling a lack of contestability. Thus, without the potential or existence of an entrenched market position, the effects on innovation and choice will often be ambiguous and multifaceted.

In the Data Act, Chapter III introduces a regulatory FRAND right and a limitation on the data holder requesting compensation from third parties for making non-personal\textsuperscript{34} usage data available at the request of the user.

While Art. 8(1) DA limits the data holder to demanding no more than fair, reasonable, and non-discriminatory terms in a transparent manner from third parties acting under the authorization of the user, it signals that the data holder is allowed to monetize usage data vis-à-vis third parties within and beyond the realm of its obligation to make data available. It follows that the duty in Art. 5(1) DA to share data with third parties free of charge to the user only applies in the direct relationship to the user, as the compensation between the third party and the data holder will in some regard be covered indirectly by the user’s contractual equilibrium with the third party.\textsuperscript{35} Notably, if the data holder is a gatekeeper, it must share data springing from the usage of its core platform service with third parties authorized by the user for free, and with other third parties on FRAND terms (Art. 6(1)(i) DMA).

Importantly, the application of the Data Act, the DMA and competition law is not mutually exclusive,\textsuperscript{36} as all regulate overlapping constellations of mandatory access. Namely, Art. 8(1) DA extends the FRAND obligations of Chapters III and IV DA not only to data holders obliged to make data available under the Data Act, but to all data holders obliged to make data available under Union law. As a result, where the DMA does not contain specific or diverting obligations on data access, Chapters III and IV DA apply to gatekeepers. This includes the information, substantiation and reasoning obligations, the duties towards micro, small and medium-sized enterprises, the provisions on dispute settlement bodies, and the rules on unilaterally imposed unfair trading conditions. Even beyond this, these substantive provisions will likely be instructive for the specification of the duties under the DMA.

\textsuperscript{34} Recital 38 EU Commission Proposal for the Data Act.
\textsuperscript{35} Kerber (2022), p. 22.
\textsuperscript{36} Cf. also Recital 88 EU Commission Proposal for the Data Act.
The remainder of this article will focus on the meaning and potential of FRAND within the Data Act Proposal. Nonetheless, as the Data Act and the DMA conceptually interlink and both refer to FRAND access to data, the following Sections bear meaning for the concretization of FRAND in both Acts.

3.2 Non-Discrimination

Article 8(3) DA introduces a substantive non-discrimination requirement and allocates the burden of demonstration.

On the one hand, Art. 8(3) DA imposes a non-discrimination obligation for comparable categories of third parties, as well as a prohibition of preferring “partner enterprises or linked enterprises” of the data holder. This substantive non-discrimination obligation is conceptually distinct from EU competition law as the latter addresses dominant undertakings while the former applies to all data holders, shifts the burden of demonstration, and covers self-preferencing. Also, the fact that the FRAND duty is regulatorily imposed on the data holder, as opposed to the contractual FRAND commitment submitted by a patentee in the standardization procedure, must bear consequences on the substantive non-discrimination requirement. In contrast to the market-specific relevance of competitive harm and/or the scope of the contractual commitment in the context of FRAND SEP licensing, for FRAND data access as imposed by the Act it will have to be clarified how proposed access conditions in effect promote or interfere with the Act’s regulatory purpose. While, in this context, the regulatory purpose and the parameters for FRAND access are more refined and targeted in the DMA, the Data Act Proposal remains to some extent ambiguous and potentially conflicting in its regulatory purposes. In this regard, it must be the goal to flesh out a clearer, more refined, well-founded, and non-conflicting regulatory purpose of the Data Act as well as the FRAND obligation over the course of the legislative procedure, as this will bear on transaction costs in future data access negotiations and resulting disputes.

Furthermore, the non-discrimination obligation in the Data Act may potentially differ from the obligations under the DMA due to their different purposes, with the DMA regulating a powerful and entrenched market position. Nonetheless, both Acts and competition law have compatible goals, and generally aim to enhance pro-competitive access and competition within their specific context yet adding their own nuances. In disputes, it will have to be argued how the differentiation between comparable undertakings promotes or impedes the regulatory goals of the Data Act, e.g. by fostering access through differing conditions or raising market barriers and preventing the reuse of data by offering particularly unfavorable access conditions to a comparable undertaking.

In line with the Data Act’s purpose of enhancing access to usage data (Art. 1(1) DA), its non-discrimination requirement is linked to the goal of empowering user choice over the allocation and reuse of its usage data. The constellation is not without resemblance to a position of relative market power of the data holder to the

---

37 Cf. in this regard also Picht (2022), p. 21; on self-preferencing, Colomo (2020).

38 Referring to “objective reasons”, Recital 41 EU Commission Proposal for the Data Act.
third party. As the data are usage-specific, the data holder has the potential to distort competition on secondary markets that rely on user-specific data as input. In line with this regulatory purpose, the non-discrimination requirement seeks to ensure the data holder cannot extract supra-competitive rents for access to these data from comparable but weaker negotiation partners acting on behalf of the user, which would raise entry barriers to data-driven secondary markets. With the Data Act’s purpose to enable cross-sectorial data sharing, to ensure fairness in the allocation of value of data among actors, and to foster access to and the use of data while preserving incentives to invest in ways of generating value of data (see Sect. 2.1), there is an argument for the comparability criterion to differentiate between sectors. Such differentiation will preserve market-driven incentives to invest in secondary markets with below-average potential of value creation, warranting preferential access conditions for the same input data as other secondary markets.

Furthermore, the prohibition of discrimination in Art. 8(3) DA prohibits self-preferencing of a non-dominant yet vertically integrated data holder, referring to the entity definition of Art. 3 of the Annex to the Commission Recommendation 2003/361/EC.40

At the same time, the non-discrimination requirement under the Data Act must be construed less strictly than under the DMA. With regard to the purpose and mechanism of the DMA, the role of its non-discrimination requirement is to regulate the entrenched market position for competition on the market instead of competition for the market (Sect. 3.1). At the same time, the non-discrimination requirement of competition law warrants a finding of anticompetitive effects, while under the DMA with its prospective regulatory approach no such effects may have materialized yet.41 Similarly, the DMA additionally applies a particular procedure for a finding of discrimination under the DMA, as described above.

Finally, Art. 8(3) DA includes a reversal of the burden of demonstration, as it is for the data holder to demonstrate the absence of discrimination if the data recipient considers access conditions to be discriminatory. However, neither the data holder nor the data recipient will be required to provide information beyond what is necessary to verify compliance with the substantive obligations (Art. 8(5) DA). Consequently, it will be for the data holder to argue how the information provided in the context of its non-discrimination obligation includes all necessary information to fulfil its FRAND duty, and for the third party to argue how further information is necessary for a legitimate purpose.

3.3 Reasonability

The reasonability requirement in the Data Act is introduced in Arts. 8(1) and 9(1) DA, stating that any compensation shall be reasonable. This criterion links the compensation of access to the provision of the reason why compensation is

39 Also Tombal (2020).
40 EU Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises 2003/361/EC, OJ 2003 L 124/36.
41 Picht (2022), p. 17.
reasonable to the economic value of access and the resulting incentives. However, the same caveats with regard to the regulatory purpose of the Act, as well as the FRAND access regime as mentioned above, apply to the non-discrimination criterion (Sect. 3.2).

For micro, small or medium-sized data recipients, as defined in Art. 2 of the Annex to Recommendation 2003/361/EC, the criterion is specified by linking reasonability to the data holder’s attributable cost of making the data available (Art. 9(2) DA). In this case, if the data recipient considers the conditions to be unreasonable, the burden of demonstration for reasonableness lies with the data holder. Apart from that, micro, small and medium-sized enterprises are protected from a set of unilaterally imposed contractual terms listed in Art. 13 DA either declared or presumed to be unfair.

This leaves medium-sized enterprises in the position that they are, contrary to micro and small enterprises, subject to the obligations of Chapter II (Art. 7 DA) and consequently the FRAND duty of Art. 8(1) DA, while they benefit from the cost-link of Art. 9(2) DA. Micro and small enterprises, however, are subject to neither the Chapter II nor the FRAND obligation under Art. 8 DA, and may thus deny access to the user and third parties or discriminate between comparable data recipients.

The cost reference in Art. 9(2) DA suggests *e contrario* that for all other undertakings, the attributable costs shall not necessarily determine the reasonability of compensation. Rather, with reference to the Data Act’s legislative goals to enable cross-sectorial data sharing, to ensure fairness in the allocation of value of data among actors, and to foster access to and the use of data while preserving incentives to invest in ways of generating value from data (see Sect. 2.1), the existence of market-based incentives to the collection of data as well as the fairness of value allocation among data actors will determine the reasonability of compensation. For this purpose, material reasoning on value allocation and comparable access agreements will be instructive.

The role of informatory duties to find reasonable compensation is emphasized in Art. 9(4) DA, according to which the data holder shall provide information setting out the basis for the calculation of the compensation in sufficient detail so that the

---

42 Cf. also the definition of “reasonable” as “based on or using good judgment and therefore fair and practical” of the Cambridge Dictionary, www.dictionary.cambridge.org/dictionary/english/reasonable (accessed 31 May 2022).

43 On the scope of Art. 13 DA, Picht (2022), p. 38 et seq.

44 Cf. also Recital 46 EU Commission Proposal for the Data Act.

45 Also linking the reasonability to the incentive function, Kerber (2022), p. 12, with reference to Recital 42 of the EU Commission’s Data Act Proposal, however, critical of the weight of the incentive to create data at pp. 16–18; identifying potential for a notion of FRAND including only the cost for compliance with the access right, Graef and Husovec (2022), p. 3.

46 For an overview of the adaptation of valuation methods in the context of SEP licensing to data access transactions, cf. Picht (2022), p. 32; Tsilikas (2020), p. 889; for an overview of potential valuation factors in the context of data access, Schmidt (2020), p. 530 et seq.; generally regarding FRAND, Heim and Nikolic (2019), para. 73; cf. also Recital 46 EU Commission Proposal for the Data Act.
data recipient can verify that the requirements of Art. 9(1), (2) are met. Data holders are required to make data available in a transparent manner (Art. 8(1) DA).

For data access to micro, small or medium-sized enterprises at the request of the user, reference to the attributable costs will initially be sufficient. If the undertaking considers the conditions, e.g. the access costs, to be unreasonable, it is the data holder who has to demonstrate that it complies with the cost nexus of Art. 9(2) DA. This will be achieved by providing more detailed information on its cost structure and on how that cost-relationship as an upper boundary is reasonable itself (on the negotiation procedure, see Sect. 4.2).

Regarding sharing at the request of the user with all other undertakings, however, further information on the calculation of reasonable compensation is to be provided under Art. 9(4) DA. Such information will consist of comparable agreements and how the compensation is reasonable in proportion to the value of the data access. However, in accordance with the general burden of demonstration, it is the data recipient who must argue how compensation is unreasonable (Sect. 4.2).

Nonetheless, neither the data holder nor the data recipient shall be required to provide any information beyond what is necessary to verify compliance with their obligations (Art. 8(5) DA). Accordingly, both will have to argue how further information is necessary when requesting information from the opposite party.

Furthermore, the duty to make data available cannot legitimize the disclosure of trade secrets within the meaning of the EU Trade Secrets Directive (Art. 8(6) DA). This concerns information that is secret, has commercial value because of its secrecy, and has been subject to reasonable steps to be kept secret (Art. 2(1) Trade Secrets Directive).

Assuming the right to a FRAND compensation is separate from the obligation of making data available at the request of the user (Sect. 3.4), comparable data sharing (master) agreements protected under a confidentiality agreement will not fall under the primacy of the Trade Secrets Directive of Art. 8(6) DA, as such agreements are not inseparably linked to data access. Rather, Art. 8(3), (5) as well as Art. 9(4) DA provide “otherwise” in the sense of Art. 8(6) DA. The latter would also be the case if the right to a FRAND compensation was assumed to be inseparable from the access obligation. As has been explored in the context of SEP licensing, for comparable access agreements to be protected, the data holder must conclude a confidentiality agreement with the data recipient by demonstrating how this is necessitated by the legitimate protection of its confidentiality interests. If no agreement can be achieved, the data holder will have to argue with its FRAND offer

47 Directive (EU) 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, OJ 2016 L 157/1; arguing for more refined balancing guidelines and mechanisms, Graef and Husovec (2022), p. 4; on the justification for trade secret protection, Recital 28 EU Commission Proposal for the Data Act; cf. also supra note 23.

48 For a confidentiality framework safeguarding the access right including FRAND data license contracts, also Picht and Richter (2022), p. 402.

49 Düsseldorf Court of Appeal, 25 April 2018, Case No. I-2 W 8/18, paras. 8–12; 22 March 2019, Case No. I-2 U 31/16, para. 176 – Improving Handovers; Düsseldorf District Court, 13 July 2017, Case No. 4a O 16/16, para. 368 – Kommunikationsvorrichtung; further references to German FRAND case law, Picht et al. (2023), as well as Habich (2022).
how it can refrain from sharing the purportedly confidential information under a reduced burden of substantiation caused by the refusal to conclude a confidentiality agreement, and how its legally protected confidentiality interests would be compromised under full substantiation. Furthermore, in the context of FRAND SEP licensing, some German courts have considered the technology implementer’s delaying behavior regarding confidentiality agreements in the evaluation of its willingness to license on FRAND terms. Contrarily, the patentee’s duty to substantiate the content of third-party licensing agreements, but not necessarily to provide the agreements themselves, was considered part of its reasoning duties in its offer.

The reasonability of compensation for comparable data recipients is curbed by the non-discrimination requirements of Art. 8(1), (3) DA. These two requirements are intertwined insofar as the comparison and differentiation of agreements act as an anchor for determining the market-based finding of reasonable compensation. Conversely, the determination of reasonability will influence the arguments on how categories of data recipients are comparable under the non-discrimination obligation.

Taking a glimpse at the meaning of FRAND in the Digital Markets Act, Art. 7(6) DMA specifies that the Commission shall assess whether the measures implemented by the gatekeeper to comply with its FRAND access duty ensure that no imbalance of rights and obligations on business users remains and that these measures do not confer an advantage on the gatekeeper disproportionate to the service provided to business users. This points to the essence of FRAND as a procedure leading to a context-specific balancing of benefits and obligations. Such balance is achieved when the parties’ rights and obligations are not disproportionate, respectively. Whilst this does not prescribe an absolute value, the reference to disproportionality must be read so that the opportunity for mutual value-based reasoning must be provided to both parties. For concretization of substantive value, Arts. 5 and 6 DMA may be instructive of absolute value judgments as well as the abstract principles in Art. 10 DMA. Notably, Art. 6(1)(i) DMA concretizes the reasonability of compensation for access to data resulting from the use of a core platform service to be provided free of charge. In the context of the DMA, for example, adjustment clauses for data portfolio volatility, as an established

\[\text{50 Düsseldorf Court of Appeal, 25 April 2018, Case No. 1-2 W 8/18, paras. 18–19; Düsseldorf District Court, 13 July 2017, Case No. 4a O 16/16, paras. 373–395 – Kommunikationsvorrichtung; Munich District Court I, 13 August 2019, Case No. 7 O 3890/10, paras. 9–32.}\]

\[\text{51 Karlsruhe Court of Appeal, 9 December 2020, Case No. 6 U 103/19, paras. 338–341 – Mobilstation; Munich District Court I, 9 September 2021, Case No. 7 O 15350/19, para. 284 – Sprachsignalcodierer; differently, Düsseldorf District Court, 13 July 2017, Case No. 4a O 16/16, paras. 368–373 – Kommunikationsvorrichtung.}\]

\[\text{52 Karlsruhe Court of Appeal, 30 October 2019, Case No. 6 U 183/16, paras. 133–134 – Datenpaketverarbeitung, with reference to CJEU, 16 July 2015, Case No. C-170/13, EU:C:2015:477, para. 63 – Huawei/ZTE; Mannheim District Court, 18 August 2020, Case No. 2 O 34/19, para. 230 – Lizenz in Wertschöpfungskette.}\]

\[\text{53 Cf. with further references, Habich (2021), p. 286.}\]
component of FRAND content in the case law on SEP licensing,\(^{54}\) will generally not be necessary due to Art. 6(1)(ka) DMA enabling the termination and renegotiation of an access agreement. As far as general terms and conditions in the sense of Art. 6(1)(k), (ka) DMA are concerned, the dialogue with the Commission (Sect. 3.1) to some extent institutionalizes, complements, and replaces the bilateral negotiation process.

### 3.4 Procedural Aspects and Enforceability of the FRAND Duty

The Data Act provides in Art. 10(1) for the establishment of dispute settlement bodies for disputes on FRAND compensation. However, settling disputes before such body requires mutual consent to its binding nature by the disputants (Art. 10(8) DA). Motives to choose private dispute settlement will be its expedited nature (Art. 10(7) DA) and confidentiality interests. Experience in SEP disputes has illustrated that for large disputes or when a party has an interest in delaying the finding of FRAND compensation, courts may still be the preferred forum for developing the FRAND legal framework.\(^{55}\) Private settlement bodies will likely be a forum for smaller disputes or when weighty confidentiality interests are at stake.

Notably, Art. 6(1)(k) DMA states that gatekeepers with respect to access for business users to their software application stores, online search engines and online social networking services shall publish an alternative dispute settlement mechanism. The dispute settlement bodies under Art. 10 DA will likely serve as such bodies required under the DMA. A declaration under Art. 6(1)(k) DMA would have to specifically name at least one such body and include consent to its binding nature in the sense of Art. 10(8) DA.

Non-trivial is the relationship of the data holder’s right to demand a FRAND compensation for data access under Art. 8(1) DA and its access duty to a third party at the request of the user without undue delay in Art. 5(1) DA.\(^{56}\) The data holder’s duty to share may be either dependent or independent of the third party providing compensation on FRAND terms. In consequence, the data holder may either be allowed to withhold access until the dispute on the FRAND compensation is resolved, meaning that there is no FRAND objection available to the third party against the data holder, or be obliged to grant access independently of any dispute on the compensation but based on the user’s request, meaning that a FRAND objection is available.

To put the availability of a FRAND objection in context, in SEP licensing the technology implementer usually invokes a FRAND objection against the patentee’s cease-and-desist claim. Conceptually, e.g. under German law, the FRAND objection is based on the principle of good faith that “*dolo agit, qui petit, quod statim redditurus est*”.\(^{57}\) If the patentee is abusing its dominant position under

---

\(^{54}\) On this point, *e.g.* Picht (2022), p. 31.

\(^{55}\) *Cf.* *e.g.* EU Commission, 2017, p. 4.

\(^{56}\) For the availability of FRAND as an objection, Picht and Richter (2022), p. 398.

\(^{57}\) *Cf.* regarding the compulsory licensing defense in general, 118 BGHZ 312, paras. 24–28 – *Orange-Book-Standard*. 

---

\(^{1358}\) E. Habich
Art. 102 TFEU by suing for infringement to enforce this abusive refusal to license, the implementer can counter this claim with the FRAND objection, as a court cannot prescribe a conduct prohibited under competition law. As a result, the patentee will not be granted injunctive relief (qui petit) for as long as its refusal to license is abusive conduct under competition law (quod statim redditurus est). However, the refusal is only abusive under a set of conditions derived from competition law or the patentee’s voluntary contractual commitment to license on FRAND terms, acting as the substantive legitimation for the implementer’s access right based on a theory of competitive harm or contract law.

For data access under the Data Act, the constellation is quite different. Firstly, the data holder does not possess an exclusive right to the data with no legal alternatives to licensing but rather data can, if not factually at least legally, be accumulated by all market participants. Even more distinctively, under the current Proposal the user possesses the legal ability to preclude others from using usage data, the access right and the right to have access granted to third parties. Secondly, the third party’s access right is not based on a theory of competitive harm but on the regulatory access regime of the Data Act (Sect. 3.2). Consequently, the right to exclude and the access right both rest with the user, not falling apart as in SEP constellations. However, for the data holder to enforce its right to a FRAND compensation, it could potentially possess a right of retention of usage data towards the user or an independent right to exclude the third party from access for as long as no FRAND compensation is provided. As this will be a matter of Member State contract law, this article limits its scope to acknowledging the potential of these constructs while time will tell under which legal constructs the access regime will be enforced. In this context, a negotiation mechanism for a FRAND compensation will be sketched out below (Sect. 4.2).

As far as personal data are concerned, Art. 5(7) DA states that disagreement on the arrangements for transmitting data between the data holder and the third party shall not prevent or interfere with the rights of the data subject under the GDPR, in particular the right to data portability under Art. 20 GDPR. Article 20(2) GDPR stipulates the right for data subjects to have their personal data transmitted directly from one controller to another where technically feasible. Therefore, despite the factual hindrances to data portability that have emerged, conceptually the Data Act accepts the prevalence of access in due time for personal data. For non-personal data, the relationship is less clear. It could be argued for the availability of a refusal of access that Art. 5(7) DA does not refer to non-personal data. However, it may be difficult to distinguish personal from non-personal data for cases with ambiguous delineation. Overall, denying the data holder’s right to FRAND compensation to prevail over access would result in more conceptual coherence within the GDPR and the Data Act, increased legal certainty and overarching principles for the data economy.

58 E.g. Krämer et al. (2020).
59 Cf. also Recital 38 EU Commission Proposal for the Data Act.
60 Cf. e.g. Picht (2022), p. 19.
Furthermore, according to Arts. 8(2) and 12(2) DA, the contractual terms for data access shall not be binding if they negatively affect user rights. This includes the user’s right to have its data shared without undue delay (Art. 5(1) DA). Structurally, the FRAND compensation is addressed in separate Chapters: Chapter II introduces the user’s right to data sharing while Chapter III, in particular Art. 8 DA, presupposes the existence of the data holder’s obligation to make data available at the request of the user. The wording of Art. 9 DA in the current Proposal as “compensation” appears to indicate the prevalence of the compensatory element of the access royalty, and the compensation’s liability rather than its property character. Additionally, as contractual terms varying the effect of the FRAND duty shall not be binding on the deprived party (Art. 12(2) DA), data access will take place irrespective of and potentially before the determination of FRAND compensation.

Understanding the data holder’s duty to share at the request of the user to be separate from its right to a FRAND compensation for non-personal data would also be in line with the principles of the second layer of enabling data transferability in the Act (Sect. 2.2). The Data Act is built on the principle that the user possesses a right to exclude third parties as well as the data holder from usage data. According to Coase, the contractual rent allocation between the user and the producer/service provider on the primary market, i.e. the data holder, will under perfect market conditions take place independently of the initial allocation of property rights. In this light, to facilitate more efficient bargaining, allocating the initial right to exclude to the user instead of making the user’s right dependent on the data holder’s agreement on FRAND compensation with the third party minimizes transaction costs by a more clear allocation of property rights. Otherwise, the user and the data holder could de facto only exert exclusivity in common. Rather, under the mechanics of the Data Act, the rent resulting from the additional value created by the user’s unilateral exertion of its access right in sharing the data with a third party must be distributed between the data holder and the third party on FRAND terms. It is this additional value for which the data holder shall be remunerated to incentivize data collection on primary markets for the macroeconomic benefit of reusing this data on secondary markets. The argument that from this compensation no additional incentive likely results for the data holder to collect data on the primary market even confirms the finding that the user should be enabled to execute its right independently of the data holder’s right to FRAND compensation, as such right to refuse access does not protect any incentive function.

Overall, the data holder’s duty to make data available to a third party at the request of the user must be assumed to be separate from and independent of its right to demand FRAND compensation. As a result, the data holder will in principle (Sect. 4.2) be required to share data with the third party even if no FRAND compensation has been agreed yet. However, to achieve the regulatory purpose of the Data Act and to minimize incentives for third parties to hold out on the data

---

61 Generally, Calabresi and Melamed (1972); critically in the context of IP, Lemley and Weiser (2007).
62 Coase (1969), p. 19; critically in respect of the social externalities, Martens (2021), p. 73.
63 Kerber (2022), pp. 16–18.
holder’s right to a FRAND compensation, this article in its remaining part proposes a negotiation scheme to arrive at FRAND compensation. This negotiation scheme links the access right to the determination of FRAND compensation only if the parties fail to agree on compensation for access due to uncooperative behavior. For this purpose, the remainder of this article draws its inspiration from the negotiation scheme developed in the context of the licensing of SEPs.

Notably, if data access on FRAND terms is to be granted under Art. 6(1)(j) DMA by a gatekeeper to a third party without a user request, it remains to be argued for or against an independent access obligation in consideration of the regulatory goals and provisions of the DMA.

4 The Limited Transferability of the Case Law on Standard-Essential Patents to Data Sharing

4.1 Differences and Commonalities

While multiple issues regarding the implementation of the right to a FRAND compensation for non-personal data ⁶⁴ under the Data Act remain open and arguable, it appears convenient to take a glimpse at the principles developed in the abundant case law on the licensing of SEPs under a FRAND commitment to infer the scope and limitations of FRAND under the Data Act where adequate. ⁶⁵ While a comprehensive discussion of all facets remains beyond the scope of this article, the following Chapter sketches out parallels and differences before cross-fertilizing the subject matters.

As evidenced by the abundant case law, the principles and details of FRAND SEP licensing are far from obvious or settled. ⁶⁶ Generally, potential for holding up and holding out has been identified with FRAND as a mechanism to balance these interests yet causing increased transaction costs due to regulatory requirements and uncertainties. In this direction, the EU Commission’s Communication on SEPs, ⁶⁷ while successfully identifying shortcomings, failed to solve the issues, which is why a Regulation on the principles of SEP licensing is currently in preparation. ⁶⁸

The FRAND licensing of SEPs historically springs from the EU telecommunications monopolies, ⁶⁹ but is now conceptually an access instrument based on competition law as well as the patentee’s voluntary contractual commitment during

⁶⁴ Recital 38 EU Commission Proposal for the Data Act.
⁶⁵ Referring to the potential of IP licensing as a starting point for principles of data access, Picht (2022), p. 10 et seq., 35; Richter and Slowinski (2019), p. 18.
⁶⁶ Diagnosing imperfections in the context of IP licensing, Picht (2022), pp. 27–9, noting the dangers of too broad an interpretation of FRAND access at p. 29.
⁶⁷ EU Commission (2017), pp. 7, 9.
⁶⁸ EU Commission, Proposal for a regulation on a new framework for standard-essential patents, www.ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13109-Intellectual-property-new-framework-for-standard-essential-patents_en (accessed 31 May 2022); on shortcomings in the EU Commission’s Communication, also Podszun (2019), p. 735 et seq.
⁶⁹ Cf. Barnett (2019), pp. 227–30.
the standardization procedure. The patentee’s FRAND commitment originates from the Horizontal Guidelines, offering a safe harbor to potentially restrictive standardization agreements under Art. 101(1) TFEU which despite their competitive benefits risk creating market power based on patented technology. The promise to license all potential licensees on FRAND terms ensures effective access to the standard.\(^{70}\) Thus, the root of the FRAND commitment is the horizontal cooperation for patented technology standardization. The commitment seeks to ease the effects of cooperatively aggregated market power by regulating a refusal to license on FRAND terms. In this respect, it is important that, due to the patent protection, no legal alternative exists to licensing the patented right for market access.\(^{71}\) Nonetheless, it was recently criticized that the root of this FRAND concept lacks legal certainty and substantive application criteria for facilitating access.\(^{72}\)

The CJEU’s leading case on the matter, *Huawei/ZTE*, concerned the abuse of a dominant position by a patentee’s infringement action to effectuate its allegedly abusive refusal to license.\(^ {73}\) In this context, the CJEU developed a negotiation mechanism to reconcile the opposing interests and to minimize competitive harm by limiting the availability of the parties’ arguments that their opponent refused to negotiate. The Court offered a safe harbor to SEP enforcement by a dominant patentee if a negotiation procedure was followed to prevent an abusive refusal to license. After the patentee’s infringement notice and the implementer’s expression of willingness to license on FRAND terms, the patentee must submit an offer for a license on FRAND terms specifying the royalty and its calculation.\(^ {74}\) Conversely, for the implementer to invoke the FRAND defense of an abusive refusal to license, it must respond to that offer diligently and without delaying tactics by accepting the offer or by promptly submitting a counteroffer corresponding to the FRAND terms and providing appropriate security after rejection of that counteroffer.\(^ {75}\) Notably,

---

\(^{70}\) EU Commission guidelines on horizontal cooperation agreements, OJ 2011 C 11/01, paras. 275–291.

\(^{71}\) Note, however, that this legal as well as factual impossibility rests on the legal and factual assumptions of the market power evaluation in the context of SEPs. Thus, it could be argued that the legal impossibility of market access without the patented technology rests on the premise that the law does not regard the long-term possibility for market access by substitution of the patented technology, e.g. by the successor technology, as a viable access option to exert competitive pressure on the SEP holder. Therefore, the law invokes “exceptional circumstances”, as access without the patented technology is deemed legally impossible as a matter of competitive value judgment. While the constellation for data access is fundamentally different, as data can in principle be accumulated without any legal impossibility by any other data holder, thereby exerting competitive pressure, the regulatory approach of the Data Act must be understood as justifying access for the purpose of the Act by overruling the data holder’s factual possessory interest. Yet, this eminent difference in incentives and factual as well as legal options must be carefully considered when comparing both FRAND access regimes, and bear consequences on its implementation.

\(^{72}\) EU Commission (2021), pp. 55–56.

\(^{73}\) CJEU, 16 July 2015, Case No. C-170/13, EU:C:2015:477 – *Huawei/ZTE*; on the theory of harm, cf. Conde Gallego and Drexl (2018), p. 147 *et seq.*; Tsilikas (2017), p. 169 *et seq.*; with an overview over the application of FRAND in competition law, merger review and other fields, Heim and Nikolic (2019).

\(^{74}\) CJEU, 16 July 2015, Case No. C-170/13, EU:C:2015:477, paras. 61–64 – *Huawei/ZTE*.

\(^{75}\) CJEU, 16 July 2015, Case No. C-170/13, EU:C:2015:477, paras. 65–67 – *Huawei/ZTE*.

---
Huawei/ZTE states that Art. 102 TFEU does not prevent the patentee from an action for damages by acts of past use.\textsuperscript{76}

While many courts in current and former Member States refined questions on reasonability and non-discrimination as the content element of FRAND, consensus recently emerged that a market-based concretization can only be achieved by imposing negotiation and reasoning duties on the parties as a conduct element, inducing them to a consensual solution while enabling the judicial assessment of the diverging perspectives on what FRAND terms are.\textsuperscript{77} Thus, in recent German case law, the parties’ willingness to license has been at the center of the examination of whether the patentee abused its dominant position by enforcing its SEP.\textsuperscript{78} The substantive goal of the sketched out procedure is to arrive at licensing terms that bear a relationship to the economic value of the technology.\textsuperscript{79}

Structurally, however, the constellation in SEP disputes is different from access under the proposed Data Act in the respects that (i) the patentee’s dominant position is protected by an absolute right over a specific subject matter and prevails except for exceptional circumstances, such as an abusive refusal to license under a FRAND commitment according to a theory of competitive harm,\textsuperscript{80} (ii) the standard implementer uses the technology without a licensing agreement at its own discretion without consent of the right holder, (iii) the patentee subject to the FRAND duty sues to cease and desist countered by the implementer’s FRAND defense that it was refused the negotiation of a FRAND license, potentially causing exclusionary and exploitative effects under Art. 102 TFEU, and (iv) the original patentee provided a FRAND commitment within the standardization procedure.

In non-personal data access, however,\textsuperscript{81} (i) the data holder’s position is not protected by an absolute right at its own disposal, but consists only of a right to demand a FRAND compensation for usage data over which the user exerted discretion, (ii) the data recipient is allowed to use the data at the discretion of the user in the realm of their mutually agreed purpose but is not able to receive the data without the data holder’s cooperation, (iii) the data holder is legally not entitled yet factually able to refuse data access at its own discretion, and thus usually does not sue to cease and desist (Sect. 3.4), (iv) the data holder is not bound by a contractual FRAND commitment but by the regulatory duty in Art. 8(1) DA, and (v) there is no absolute IP right preventing market entry but the data can be duplicated by any undertaking without any legal, yet potentially factual or economic, limitations.\textsuperscript{82}

\textsuperscript{76} CJEU, 16 July 2015, Case No. C-170/13, EU:C:2015:477, para. 76 – Huawei/ZTE.
\textsuperscript{77} EU Commission (2017), p. 6, on the sublime relevance of the conduct element, also Picht (2022), p. 34.
\textsuperscript{78} 227 BGHZ 305 [52 IIC 1465 (2021)], para. 54 – FRAND-Einwand II; 225 BGHZ 269 [52 IIC 1446 (2021)], paras. 72, 83 – FRAND-Einwand I; further references to German FRAND case law, Peter et al. (2023), as well as Habich (2022).
\textsuperscript{79} EU Commission (2017), p. 6.
\textsuperscript{80} Noting the link to competition theory as a legal interpretation to enable the application of the “empty” private concept of FRAND, Drexl (2017), n. 198.
\textsuperscript{81} Also drawing differences between data access and SEP licensing, however, with respect to data as essential input, Richter and Slowinski (2019), p. 20 et seq., as well as Drexl (2017), para. 138.
\textsuperscript{82} In this respect, cf. supra note 71.
Nonetheless, both mechanisms share the common banner of FRAND with the goal of achieving a fair balance of interests, and attaching contractual conditions through negotiation by mutual reasoning to the economic value of the good. Aiming to bring this general purpose of FRAND in line with the DMA’s regulatory goal of contestable markets and unfair practices, the DMA notes that FRAND aims to remedy an imbalance of rights and obligations and disproportionate advantages (Art. 7(6) DMA), as well as impediments to choice and innovation by the accessing party (Art. 10(2) DMA). While the DMA contains – yet likely hard to specify – substantive references to what FRAND terms seek to achieve in terms of content, the Data Act focuses on the conduct element of FRAND, with the exception of the limitations on unilaterally imposed obligations on micro, small and medium-sized enterprises in Art. 13 DA. In line with the Data Act’s regulatory goal of a “fair” allocation of value from data, it is still the abstract link of compensation to a mutually agreeable “economic reason” that defines and overarches FRAND.

However, the structural differences must bear on the specifics and implementation of FRAND. The data holder’s legal inability to foreclose access to usage data yet to exploit its privileged position conferred by the factual possession of data must bear effect on the negotiation duties. Taking this context into account, the access and negotiation mechanism must be carefully distinguished and evaluated against the regulatory goals of the Data Act (Sect. 3.2). As a result, the regulatory goals of the Act may potentially interfere with the non-regulatory values of competition law, and consequently tilt the balancing of interests for access aimed at the prevention of competitive harm. However, it may be argued that the regulatory access regime under the Act must be understood as intended to be as compatible with the principles of EU competition law as possible, which may call for a more flexible adaptation in the implementation of the Act’s access right depending on the market environment for data access.

Yet, despite the lack of an exclusive right, the data holder might potentially factually refuse to share data if no FRAND compensation can be agreed. If the third party will subsequently sue for access with reference to the Data Act, the data holder will likely counter-sue for the determination of a FRAND compensation for access (on potential legal foundations for a right to refuse access, see Sect. 3.4). With these or other legal approaches by the parties to enforce their interests, the following negotiation scheme could serve as a mechanism to reconcile and balance the interests to arrive at FRAND terms for data access.

4.2 Proposal for a Negotiation Scheme Under the Data Act

Despite the legal and contextual differences to FRAND SEP licensing, the right to FRAND compensation for the sharing of non-personal data proposed in the Data Act similarly refers to a concept of access on certain qualitative terms. The remainder of this Section intends to identify fruitful cross-references and insights

---

83 On a more general notion of the FRAND concept, also Heim and Nikolic (2019), para. 65.
84 Arriving at this conclusion, also Picht and Richter (2022), pp. 397–398.
85 Recital 38 EU Commission Proposal for the Data Act.
that could benefit the application of FRAND principles to the Data Act and the Digital Markets Act from the experience gained in the field of SEP licensing.  

Glancing at the legislative goal of the current Proposal for the Data Act, compensation must be considered non-FRAND if it allocates value from data unfairly among actors in the data economy, prevents access to and use of data or undermines the incentives to invest in ways of generating value through data (Sect. 2.1).

Regarding the described differences, mandatory data access suggests an adaptation of the Huawei/ZTE negotiation scheme. Nonetheless, as both refer to the overarching concept of FRAND for a reconciliation of interests, the following negotiation concept is proposed for the bilateral determination of FRAND compensation under the proposed Data Act:

1. Under Art. 5(1) DA, it could be either the data holder approaching the data recipient at the request of the user, or the recipient on behalf of the user approaching the former to make data available. To facilitate access, the data holder must know whether the data recipient is a gatekeeper under the DMA with limited recipient rights, or a micro, small or medium-sized enterprise with extended recipient rights. The data recipient must provide all information necessary to verify its status (Art. 5(3) DA).

2. Data access must be facilitated under Art. 5(1) DA “without undue delay” and regardless of the negotiations on the compensation for access (Sect. 3.4). Therefore, the parties must agree on the technicalities of access in the context of the interoperability landscape (Sect. 2.2), as well as the identification and implementation of access.

Moreover, under the current Proposal, if the respective data are a trade secret, the data holder and the third party must, previously to the granting of access, agree to specify the nature of the respective data as a trade secret, to what extent disclosure is strictly necessary to fulfil the purpose agreed between the user and the third party, and all necessary measures to preserve confidentiality (Art. 5(8) DA). In this respect, while Art. 5(1) DA restricts trade secret protection towards the third party within the meaning of Art. 3(2) of the Trade Secret Directive, Art. 5(8) DA re-extends the protection to data that were lawfully acquired under the Data Act towards all other parties.

If personal data are concerned, adherence to the requirements of the GDPR must be ensured before access under the Data Act (Art. 5(6) DA).

3. In addition to the agreement facilitating access, the data holder and the third party must agree on a compensation for making the data available. Within their access agreement, the parties must observe the limits of Chapter IV restricting the use of unfair contractual access terms unilaterally imposed on a micro, small or medium-sized enterprise in Art. 13 DA. However, contractual terms defining the contract’s main subject matter,

86 With further references to German FRAND case law, Picht et al. (2023), Habich (2022), and Picht (2017a).
87 Similarly, Drexl (2017), para. 151; Früh (2018), p. 537; Heim and Nikolic (2019), para. 38; Tombal (2020), p. 94.
including the price, are excluded from this unfairness criterion under Art. 13(7) DA. For these terms, the cost-based approach in Art. 9(2) DA applies as an upper limit for reasonability (Sect. 3.3).

As was noted above (Sects. 3.1 and 4.1), the data holder’s market position and the regulatory goals of the Data Act are, despite a partial overlap, conceptually distinct from a dominant position and competition law in the context of SEP licensing, and therefore from the setting and legal norms considered in Huawei/ZTE.

The Commission’s Data Act Proposal is not explicit on whether the data holder or data recipient must initiate the negotiation of FRAND compensation envisaged in Art. 8(1) DA. As in SEP licensing, where the patentee must submit the initial offer including all information enabling the formulation of a FRAND counteroffer based thereon, it could be for the data holder to submit an initial offer. However, due to the different market positions of the actors under the Data Act as well as the structurally different position of limited enforceability of the data holder’s right to FRAND compensation, it would be conceivable that the data recipient should formulate the initial offer based on the information previously provided by the data holder in fulfilment of its informative duties. After all, it would have to be argued by either party with reference to the Act’s regulatory goal which party must submit the initial offer until best practices have emerged.

As it is the data recipient benefitting from the unresolved dispute if access has been granted, it will be for the recipient to request the data holder to provide all information associated with the data holder’s duty to grant access for FRAND compensation and that it is willing to pay compensation “on whatever terms are in fact FRAND”. Such information includes what is necessary for the data recipient to preliminarily evaluate the non-discrimination obligation (Art. 8(3), (5) DA – see Sects. 3.2 and 3.3) as well as information setting out the basis for the calculation of the proposed compensation in line with Art. 9(4) DA to verify unreasonableness. If data sharing is requested by a non-micro or small enterprise where a micro, small or medium-sized enterprise is concerned, information on the cost of access will have to be requested (Art. 9(2), (4) DA – Sect. 3.3).

Conversely, the data recipient will have to provide all necessary information on its characteristics as a micro, small or medium-sized enterprise in its market segment to be compared under the non-discrimination obligation. Additionally, it will have to elaborate on what value will likely be generated by the access as an input to its product or service to determine the reasonability of compensation. Yet, trade secret protection by confidentiality agreements may be warranted in this respect.

While it is not obvious which party must make the initial offer, the data holder

---

88 227 BGHZ 305 [52 IIC 1465 (2021)], para. 54 – FRAND-Einwand II; 225 BGHZ 269 [52 IIC 1446 (2021)], paras. 72, 83 – FRAND-Einwand I; CJEU, 16 July 2015, Case No. C-170/13, EU:C:2015:477, para. 55 et seq. – Huawei/ZTE; cf. Habich (2021), p. 285.

89 225 BGHZ 269 [52 IIC 1446 (2021)], paras. 70 et seq., 82–83 – FRAND-Einwand I.
must satisfy a range of informational duties towards the data recipient irrespectively. The data holder obliged to make data available must, according to Art. 9(4) DA, provide information setting out the basis for the calculation of FRAND compensation in such detail that the data recipient can verify whether the compensation would be reasonable. In this context, to achieve the Data Act’s regulatory purpose, the data holder will have to reason how its calculation allocates value fairly, does not prevent access to and the use of data, and does not undermine the incentives to invest in ways of generating value through data (see Sect. 2.1). If the data recipient is a micro, small or medium-sized enterprise, the data holder must additionally provide information on how the compensation does not exceed the cost directly attributable to data access under Art. 9(2) DA.

For the non-discrimination requirement, it will be sufficient to offer nondiscriminatory terms according to the data holder’s individual informational horizon and to provide the necessary information for verification (Art. 8(3), (5) DA), as the meaning of FRAND will be specified during the negotiation process.90

Against this backdrop, it will regularly be practical for the data holder to initiate the negotiations with a specific contractual offer instead of merely providing the required information without an offer. Burdening the data holder with the formulation of the initial offer would also be in line with its duty to provide cost-based data access to micro, small and medium-sized enterprises, as these will have no insight into the data holder’s cost.

Additionally, the data holder may, or must under Art. 6(1)(k) DMA, offer to agree to dispute settlement under Art. 10(1) DA. Nonetheless, a substantive contractual offer must still be submitted, as without the rejection of such offer no dispute in the sense of Art. 10(1) DA exists. Notably, the data holder would be advised to specify the dispute settlement body/bodies, since in case of blanket consent within the meaning of Art. 10(8) DA the data recipient will be able to unilaterally determine the body (Art. 10(5) DA).

Overall, the data holder cannot be considered to have refused access to data for FRAND compensation if it has fulfilled its information obligations, potentially by submitting a contractual offer. All information is required from which it can legitimately be expected to be necessary for arriving at a contract to make data available on FRAND terms (Art. 8(1), (5) DA).91 No refusal undermining access on FRAND terms exists if the information or the offer enables the data recipient to formulate a counteroffer.

This negotiation mechanism, however, causes considerable transaction cost to the negotiation of agreements. Therefore, model contract terms for data sharing agreements, as envisaged in Art. 34 DA, could within this described FRAND procedure streamline negotiations and achieve results similar to contract negotiations from scratch. These model terms could act as a default position

90 227 BGHZ 305 [52 IIC 1465 (2021)], paras. 54, 59 – FRAND-Einwand II.
91 Cf. in the context of SEP licensing, 227 BGHZ 305 [52 IIC 1465 (2021)], para. 58 – FRAND-Einwand II; 225 BGHZ 269 [52 IIC 1446 (2021)], paras. 72, 80 – FRAND-Einwand I.
from which parties can deviate where deviation is justifiable.\footnote{E.g. EU Commission (2018).} This justification of deviation would act in a similar manner as the justificatory function of the FRAND procedure, which is why it will make sense to incorporate model contract terms to decrease transaction costs.\footnote{Cf. Reimsbach-Kounatze (2021), pp. 48–49.}

4. At the same time, it is the data recipient who benefits from the unsettled dispute on a FRAND access compensation. Therefore, based on the information provided by the data holder, the data recipient must either accept the offer or submit a specific counteroffer within a short period of time.\footnote{In the context of SEP licensing, CJEU, 16 July 2015, Case No. C-170/13, EU:C:2015:477, para. 66 – Huawei/ZTE; 227 BGHZ 305 [52 IIC 1465 (2021)], para. 58 – FRAND-Einwand II.}

If rejecting the data holder’s offer, a duty to submit a counteroffer in due time follows from the fact that the data recipient has already benefitted from access without consideration.\footnote{Cf. 227 BGHZ 305 [52 IIC 1465 (2021)], para. 77 – FRAND-Einwand II.} Such offer will have to include reasoning, referring to the provided information, on how the data holder’s contractual offer warrants consideration of discrimination which the latter would subsequently have to rebut (Art. 8(3) DA), as well as how the data holder’s offer is unreasonable.\footnote{In the context of SEP licensing, 227 BGHZ 305 [52 IIC 1465 (2021)], para. 74 – FRAND-Einwand II.}

Both reasoning prongs would have to refer to the Act’s regulatory purpose for substantive arguments.

In this light, the right to submit a counteroffer follows from the fact that there is no single set of FRAND terms\footnote{Picht (2017b), p. 579; UK CA, 23 October 2018, Case No. [2018] EWCA Civ 2344, paras. 118–123 – Unwired Planet; cf. 227 BGHZ 305 [52 IIC 1465 (2021)], para. 70 – FRAND-Einwand II; 225 BGHZ 269 [52 IIC 1446 (2021)], para. 81 – FRAND-Einwand I.} but an initially broad range of reasonable and non-discriminatory conditions to be concretized in negotiations, by additional information and exchanging substantive arguments on value and preferences.\footnote{Cf. 227 BGHZ 305 [52 IIC 1465 (2021)], paras. 59, 74 – FRAND-Einwand II.}

To substantiate the data recipient’s unreasonableness claims where, apart from arguments based on the data holder’s information under Art. 9(4) DA, the data recipient refers to additional circumstances, the latter must introduce the information in the negotiations (Art. 8(5) DA).\footnote{Where such information is conceptually not available to the data recipient, the data holder may be burdened with a secondary burden of substantiation (sekundäre Darlegungslast) under the respective legal criteria, or its equivalent in Member States other than Germany.}

This latter right and duty to formulate arguments on the reasonability of compensation is particularly important to achieve a fair allocation of value, as it is the data recipient who generates additional value from access (Sect. 2.1). Therefore, the data recipient is better situated than the data holder to determine the incremental value contributed by access to the input data to its product or service, affecting the reasonability of compensation. In turn, it will be for the data holder to argue how the non-discrimination requirement and other reasonability considerations, such as comparable access agreements and the
intrinsic value of the data, warrant a different FRAND compensation (on reasonability, see Sect. 3.3).

Notably, micro, small and medium-sized enterprises may offer below-cost compensation if they argue how such compensation would be reasonable. This may be the case if such enterprise acts as a pioneer with decreasing access cost. If such enterprise claims that the compensation offered by the data holder exceeds its cost of data access, the data recipient is not required to substantiate this claim (Art. 9(2), (4) DA).

Regarding non-discrimination, the data recipient in the counteroffer can voice its view on how it considers the offered conditions to be discriminatory, with reference to the information provided by the data holder or by introducing additional information (Art. 8(5) DA). Therefore, the data recipient can argue how it is comparable to recipients different from the data holder’s offer. The data holder will then, with reference to this reasoning, have to demonstrate, potentially by introducing further information necessary to verify compliance (Art. 8(3), (5) DA), how these considerations are unfounded and how the terms are non-discriminatory with respect to the purposes of the Act.

While the data holder will a priori not be able to legally refuse access (Sect. 3.4), the data recipient when granted access before an agreement on a FRAND compensation will in anticipation of its contractual duties, similarly to the legal principles in Orange Book Standard where the German Federal Supreme Court held that whoever anticipates its contractual benefits must also anticipate its contractual duties, have to provide security for what it considers FRAND compensation.

At the same time, if rejecting the data holder’s offer, the data recipient can accept the data holder’s dispute settlement offer. If no such procedure was offered, it may offer a dispute settlement procedure according to Art. 10 DA in parallel, but not alternatively, to its counteroffer.

5. The data holder can either accept or reject the counteroffer on the grounds that the data holder does not concur with the recipient’s arguments of unreasonableness or discrimination. Concerning non-discrimination, the data holder must demonstrate in response to the recipient’s arguments that there is no discrimination (Art. 8(3) DA) in respect of the Act’s regulatory purpose. Similarly, if data access for micro, small and medium-sized enterprises is concerned, the data holder must demonstrate in response to the data recipient’s legitimate considerations how the compensation does not exceed its access costs. In response to legitimate arguments raised by the data recipient, the data holder will likely have to submit another (amended or unamended) reasoned offer to fulfil its duty to grant access on a FRAND compensation. This follows with respect to allegations of excess cost towards micro, small and medium-sized enterprises or discrimination from the duty to demonstrate the absence of such circumstances under Arts. 9(2) and 8(3) DA. For general reasonability, the

---

100 On potential arguments, Picht (2022), p. 33, with reference to Schmidt (2020), p. 530 et seq.
101 118 BGHZ 312, para. 33 – Orange-Book-Standard.
102 Habich (2021), pp. 287–288.
duty to (re-)submit an offer follows from the fact that a reasonable price in the individual case can only be determined by reasoning and negotiation, or at least by reference to the reasoning in comparable agreements.\textsuperscript{103} Therefore, while the data holder may reject the counteroffer’s arguments of unreasonability as such, it must refute such arguments in a reasoned manner with reference to the Act’s regulatory goal or potentially amend its offer in response.

The advantage of conducting the described FRAND procedure to balance the parties’ interests is that by way of mutual reasoning the discussion about substantive differences in the negotiators’ arguments is enabled.\textsuperscript{104} This equally serves the finding of mutual grounds and compromise as well as the objectification of the parties’ subjective value of data access for subsequent dispute resolution or litigation.\textsuperscript{105}

If the data holder fulfilled all its duties under Arts. 8 and 9 DA, and in particular enabled the data recipient to conclude an access agreement on FRAND terms by way of responsive reasoning and consideration of the data recipient’s counteroffer, it has fulfilled its part in making the usage data available on FRAND terms. If, at this point, the data recipient is not willing to agree on FRAND terms for data access (Art. 8(2) DA), the data holder should be allowed to refuse and/or terminate access despite the user’s request.\textsuperscript{106} In this context, FRAND terms refer to terms that resulted from a process in compliance with these duties described in the Data Act, and if applicable the obligations of the DMA and/or what corresponds to the result of the respective negotiation procedure in comparable market processes. This breach with the principle of separation (Sect. 3.4) between the access duty and the right to FRAND compensation would be in line with the Act’s purpose of achieving a fair allocation of value and maintaining investment incentives.

Nonetheless, many questions concerning data access on FRAND terms will remain to be answered, such as the exact scope of confidentiality protection, the notion of willingness to agree to FRAND compensation, the role of data intermediaries and the availability of damages. Notably, the Data Act as a horizontal regulation of the data economy will act as the status quo for non-personal data access constellations in a wide array of different sectors and verticals. While sectorial differences must be considered during the concretization of the Act itself when assessing the circumstances of the individual case and will likely lead to differing outcomes on the meaning of FRAND, sectorial regulation and standards may prescribe specific access conditions.\textsuperscript{107}

\textsuperscript{103} Cf. 227 BGHZ 305 [52 IIC 1465 (2021)], para. 70 – FRAND-Einwand II; 225 BGHZ 269 [52 IIC 1446 (2021)], para. 81 – FRAND-Einwand I; regarding comparables, Picht (2022), p. 32.
\textsuperscript{104} Habich (2021), p. 288.
\textsuperscript{105} Cf. 227 BGHZ 305 [52 IIC 1465 (2021)], para. 74 – FRAND-Einwand II.
\textsuperscript{106} Cf. in this regard on the importance of maintaining the availability of factual exclusivity, Drexl (2021), p. 21.
\textsuperscript{107} Pro sector-specific access regulation complementing the Data Act, see also Kerber (2022), p. 13; Picht (2020), p. 974; Hoffmann (2021), p. 400.
5 Conclusions

The Data Act will be a seminal piece of legislation apt to shape the future of the European data economy in many fundamental aspects. While in response to the policy debate emerging from the Commission’s Proposal substantial changes during the legislative process are likely to occur, the concept of FRAND access to data has already been introduced by the DMA and is likely to persist in one form or another as a regulatory instrument for data access. However, despite the rich case law on the FRAND licensing of SEPs, the conceptual and contextual differences as well as current failures in the SEP licensing framework must not be neglected. This paper proposes a negotiation framework to implement such a FRAND concept for data access and provides a starting point to fill the acronym with content and purpose for the data economy. Notably, the concept of FRAND approximating negotiation conduct and contractual content of functioning markets and competition inherently comprises a specificity to individual context and a variability of processes and outcomes. This means that the open concept of FRAND will be specifiable to individual circumstances only through practice in negotiations, contracting, reasoning and litigation over time, and experience by market actors and courts. However, existing principles may offer guidance for this process, hopefully empowering an inclusive and value-driven data economy in the 21st century.

Acknowledgements The author would like to thank the Swiss National Science Foundation (P000PH_207169/1) and the UZH Candoc Grant (K-21000-69) for their generous funding, as well as the UB Zurich for open access financing.

Funding Open access funding provided by University of Zurich.

Open Access This article is licensed under a Creative Commons Attribution 4.0 International License, which permits use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons licence, and indicate if changes were made. The images or other third party material in this article are included in the article’s Creative Commons licence, unless indicated otherwise in a credit line to the material. If material is not included in the article’s Creative Commons licence and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder. To view a copy of this licence, visit http://creativecommons.org/licenses/by/4.0/.

References

Amstutz M (2018) Dateneigentum. AcP 218:438–551. https://doi.org/10.1628/acp-2018-0017
Barnett JM (2019) Antitrust overreach: undoing cooperative standardization in the digital economy. Michigan Technol Law Rev 25:163–238
Calabresi G, Melamed AD (1972) Property rules, liability rules, and inalienability: one view of the cathedral. Harv Law Rev 85:1089–1128
Coase R (1969) The problem of social cost. J Law Econ 3:1–44
Colomo PI (2020) Self-preferencing: yet another epithet in need of limiting principles. World Compet 43:417–446
Conde Gallego B, Drexl J (2018) IoT connectivity standards: how adaptive is the current SEP regulatory framework? IIC 50:135–156. https://doi.org/10.1007/s40319-018-00774-w
Drexl J (2017) Designing competitive markets for industrial data: between propriatisation and access. JIPITEC 8:257–292

Drexl J (2021) Data access as a means to promote consumer interests and public welfare – an introduction. In: German Federal Ministry of Justice and Consumer Protection, Max Planck Institute for Innovation and Competition (eds) Data access, consumer interests and public welfare. Nomos, Baden-Baden, pp 11–23. doi:https://doi.org/10.5771/97837348924999

Drexl J, Hilty RM, Desaunettes L, Greiner F, Kim D, Richter H, Surblyté G, Wiedemann K (2016) Data ownership and access to data: position statement of the Max Planck Institute for Innovation and Competition of 16 August 2016 on the current European debate. Max Planck Institute for Innovation and Competition Research Paper No. 16-10. www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2833165. Accessed 31 May 2022

EU Commission (2017) Setting out the EU approach to standard essential patents of 29 November 2017. COM(2017) 712 final. www.ec.europa.eu/docsroom/documents/26583. Accessed 29 May 2022

EU Commission (2018) Guidance of 25 April 2018 on sharing private sector data in the European data economy. SWD(2018) 125 final. www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD%3A2018%3A125%3AFIN. Accessed 31 May 2022

EU Commission (2020) A European strategy for data of 23 February 2020. COM(2020) 66 final. www.eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0066&from=de. Accessed 31 May 2022

EU Commission (2021) Staff working document of 6 May 2021 evaluation of the horizontal block exemption regulations. SWD(2021) 103 final. www.eur-lex.europa.eu/legal-content/EN/ALL/?uri=SWD:2021:103:FIN. Accessed 31 May 2022

EU Parliament Committee on Industry, Research and Energy (2021) Report on the Data Governance Act of 22 July 2021. A9-0248/2021. www.europarl.europa.eu/doceo/document/A-9-2021-0248_EN.html. Accessed 31 May 2022

Früh A (2018) Datenzugangsrechte. sic! 521–539

Graef I, Husovec M (2022) Seven things to improve in the Data Act. www.papers.ssrn.com/sol3/papers.cfm?abstract_id=4051793. Accessed 31 May 2022

Habich E (2021) Die Suche nach dem gerechten Interessenausgleich zwischen Safe Harbour und Missbrauchsverbot in FRAND/SEP-Lizenzverhandlungen – Perspektiven aus Huawei/ZTE und FRAND-Einwand I & II für die dritte Konstellation. WuW 71:282–288. https://doi.org/10.5167/uzh-202399

Habich E (2022) Systematischer Überblick über das deutsche Fallrecht zwischen 2017 und 2019 zur FRAND Lizenzierung standardessentieller Patente und dem kartellrechtlichen Zwangslizenzeinwand. www.papers.ssrn.com/sol3/papers.cfm?abstract_id=4081308. Accessed 31 May 2022

Heim M, Nikolic I (2019) A FRAND regime for dominant digital platforms. JIPITEC 10:38–55

Hoffmann J (2021) Safeguarding innovation in the framework of sector-specific data access regimes: the case of digital payment services. In: German Federal Ministry of Justice and Consumer Protection, Max Planck Institute for Innovation and Competition (eds) Data access, consumer interests and public welfare. Nomos, Baden-Baden, pp 343–400. doi:https://doi.org/10.5771/97837348924999

Jones CI, Tonetti C (2020) Nonrivalry and the economics of data. Am Econ Rev 111:2819–2858. https://doi.org/10.1257/aer.20191330

Kerber W (2016) A new (intellectual) property right for non-personal data? An economic analysis. GRUR Int 65:989–998

Kerber W (2022) Governance of IoT data: why the Data Act will not fulfill its objectives. www.papers.ssrn.com/sol3/papers.cfm?abstract_id=4080436. Accessed 31 May 2022

Krämer J, Senellart P, de Streel A (2020) CERRE Report June 2020 Making data portability more effective for the digital economy. doi:https://doi.org/10.2139/ssrn.3866495

Lemley M, Weiser P (2007) Should property or liability rules govern information? Texas Law Rev 85:783–841

Martens B (2021) Data access, consumer interests and social welfare – an economic perspective on data. In: German Federal Ministry of Justice and Consumer Protection, Max Planck Institute for Innovation and Competition (eds) Data access, consumer interests and public welfare. Nomos, Baden-Baden, pp 69–102. doi: https://doi.org/10.5771/97837348924999

OECD (2019) Enhancing access to and sharing of data: reconciling risks and benefits for data re-use across societies. doi:https://doi.org/10.1787/276aca8-en
Opderbeck D (2007) Socially rivalrous information: of candles, code, and virtue. Seton Hall Public Law Research Paper No. 1008500. www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1008500. Accessed 31 May 2022

Picht PG (2017a) "FRAND Wars 2.0" – Rechtsprechung im Anschluss an die Huawei/ZTE-Entscheidung des EuGH. www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2916544. Accessed 31 May 2022

Picht PG (2017b) Unwired Planet v. Huawei: a seminal SEP/FRAND decision from the UK. GRUR Int 66:569–579

Picht PG (2020) Towards an access regime for mobility data. IIC 51:940–976. https://doi.org/10.1007/s40319-020-00974-3

Picht PG (2022) Caught in the acts: framing mandatory data access transactions under the Data Act, further EU Digital Regulations Acts, and competition law. Max Planck Institute for Innovation and Competition Research Paper No. 22-05. papers.ssrn.com/sol3/papers.cfm?abstract_id=4076842. Accessed 31 May 2022

Picht PG, Cotter T, Habich E (2023) FRAND: German case law and global perspectives. Edward Elgar, Cheltenham, Forthcoming 2023

Picht PG, Richter H (2022) EU Digital Regulation 2022: data desiderata. GRUR Int 71:395–402. https://doi.org/10.1093/grurint/ikac021

Podszun R (2019) Standard essential patents and antitrust in the age of standardisation and the internet of things: shifting paradigms. IIC 50:720–745. https://doi.org/10.1007/s40319-019-00831-y

Reimsbach-Kounatze C (2021) Enhancing access to and sharing of data: striking the balance between openness and control over data. In: German Federal Ministry of Justice and Consumer Protection, Max Planck Institute for Innovation and Competition (eds) Data access, consumer interests and public welfare. Nomos, Baden-Baden, pp 27–68. doi: https://doi.org/10.5771/9783748924999

Richter H, Slowinski PR (2019) The data sharing economy: on the emergence of new intermediaries. IIC 56:5–29. https://doi.org/10.1007/s40319-018-00777-7

Schmidt S (2020) Zugang zu Daten nach europäischem Kartellrecht. Mohr Siebeck, Tübingen

Schweitzer H (2021) The art to make gatekeeper positions contestable and to know what is fair: a discussion of the Digital Markets Act proposal. ZEuP 29:503–544

Tombal T (2020) Economic dependence and data access. IIC 51:70–98. https://doi.org/10.1007/s40319-019-00891-0

Tsilikas H (2020) Emerging patterns in the judicial determination of FRAND rates: comparable agreements and the top-down approach for FRAND royalties determination. GRUR Int 69:885–892. https://doi.org/10.1093/grurint/ikaa100

Tsilikas H (2017) Huawei v. ZTE in context – EU competition policy and collaborative standardization in wireless telecommunications. 48 IIC 151–178. doi:https://doi.org/10.1007/s40319-017-0560-7

Zech H (2015) Daten als Wirtschaftsgut – Überlegungen zu einem. Recht des Datenerzeugers 31:137–145. https://doi.org/10.9785/cr-2015-0303

Publisher’s Note Springer Nature remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.