

Prof. Dr. Louisa Specht-Riemenschneider

Data Sharing in B-C and C-B

—

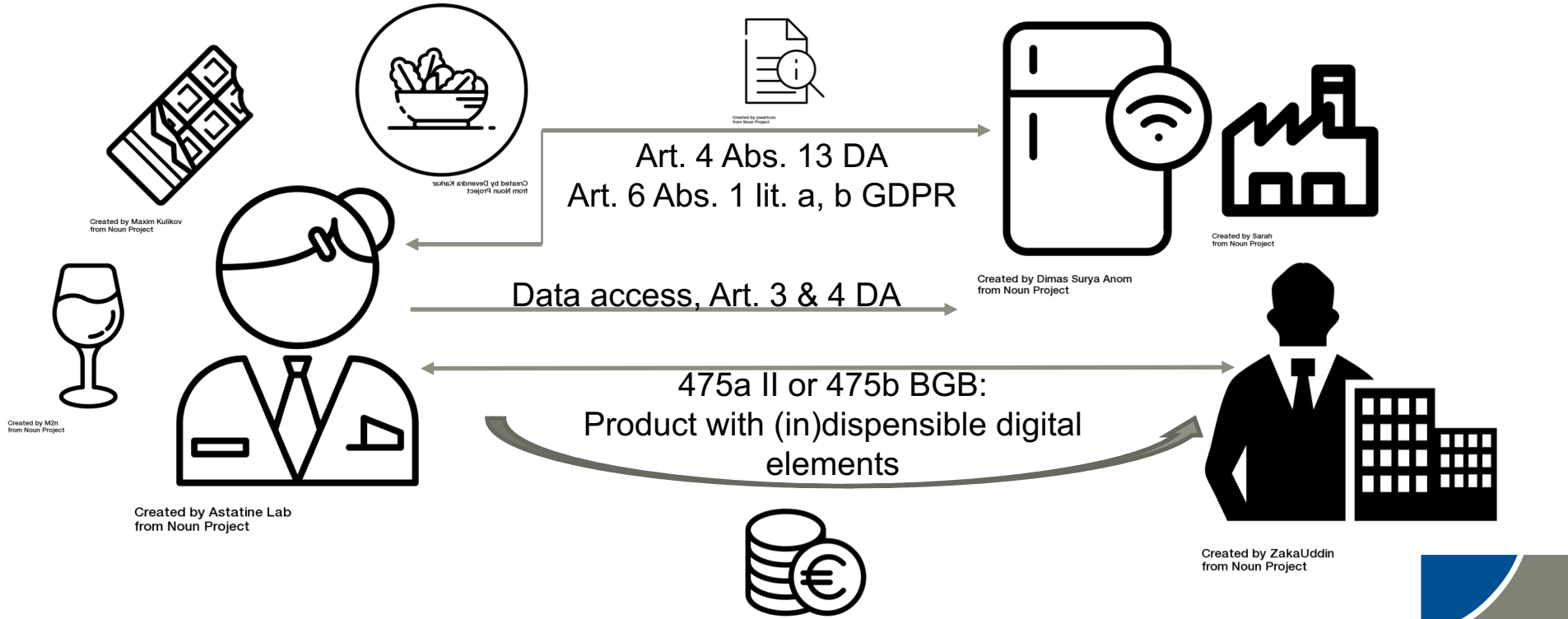
How to better serve the consumer  
or:

The way to consumer data autonomy

8th Münster Colloquia on EU Law  
and the Digital Economy

1. The use of IoT: Legal situation
2. Identifying consumer issues by surveys
3. Solving the identified consumer issues
4. Identifying consumer issues by expert workshops
5. Solving the identified consumer issues
6. Summary

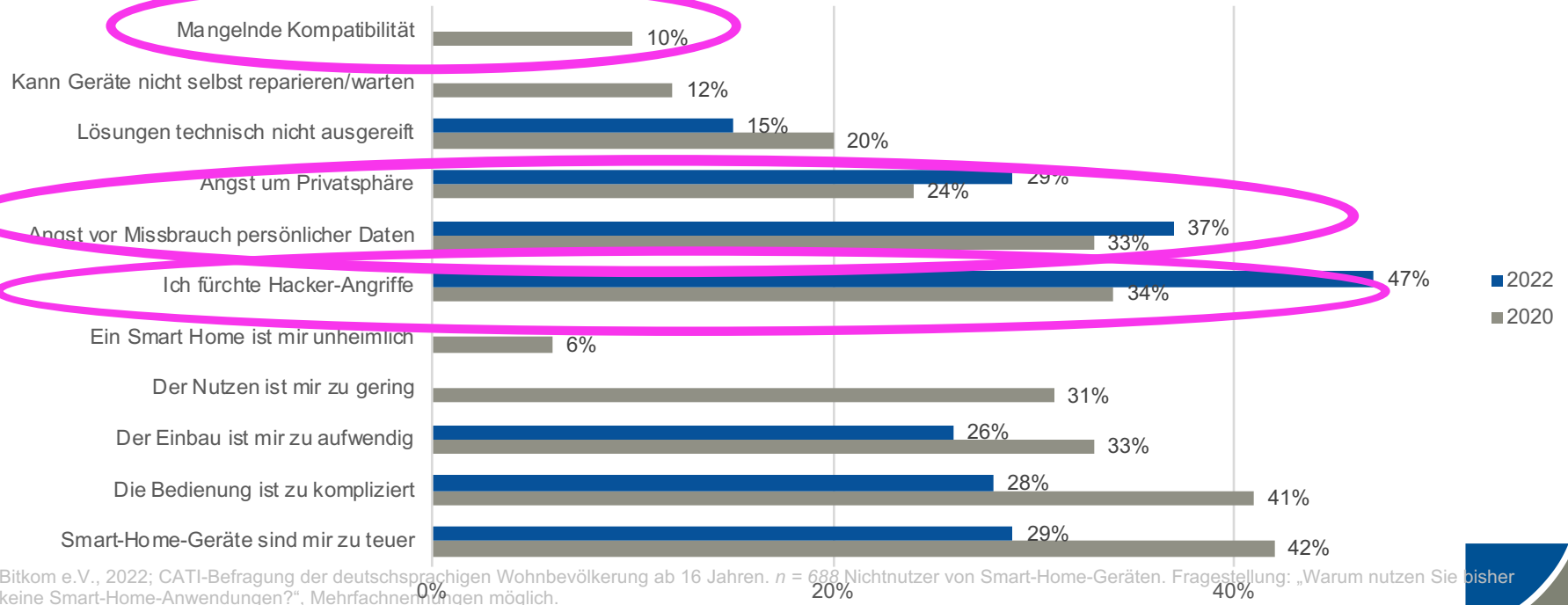
## THE USE OF IOT: LEGAL SITUATION



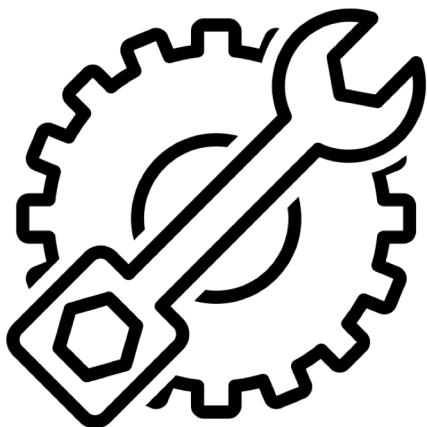
1. The Data Act should aim at consumer data autonomy and therefore provide for better consumer protection requirements.
2. Consumer data autonomy could be achieved mainly by preventing bricking and a right to data collection-free products.
3. Legislators should revisit and implement a „data tax“ already discussed in 2018.



# IDENTIFYING CONSUMER ISSUES BY SURVEYS: WHY SMART HOME APPLICATIONS ARE NOT USED

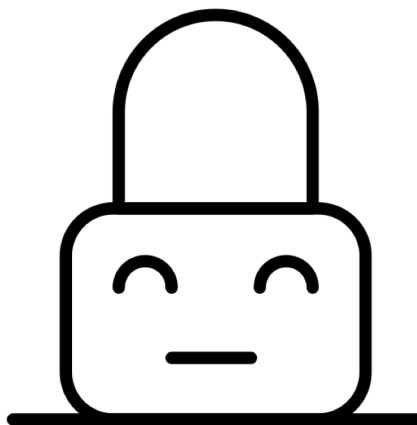


Bitkom e.V., 2022; CATI-Befragung der deutschsprachigen Wohnbevölkerung ab 16 Jahren. n = 688 Nichtnutzer von Smart-Home-Geräten. Fragestellung: „Warum nutzen Sie bisher keine Smart-Home-Anwendungen?“, Mehrfachnennungen möglich.



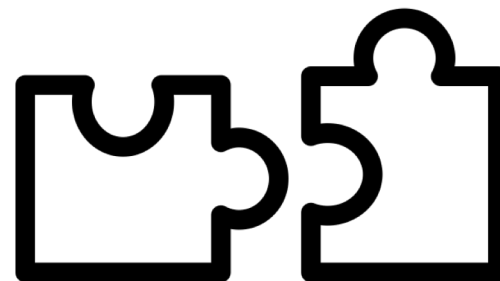
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IT security



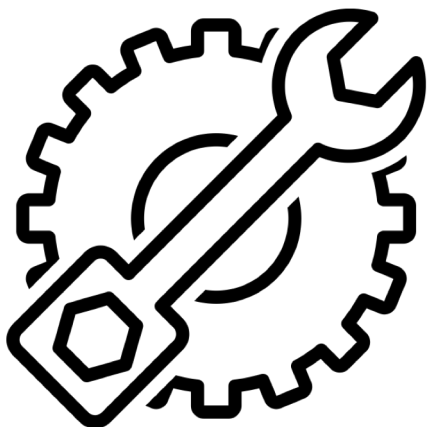
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Data control



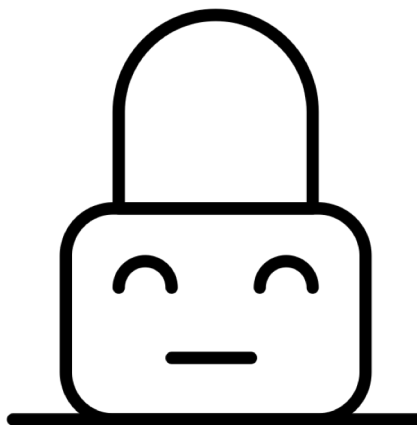
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Interoperability



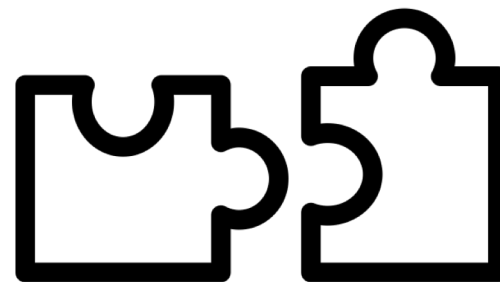
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It-Security laws



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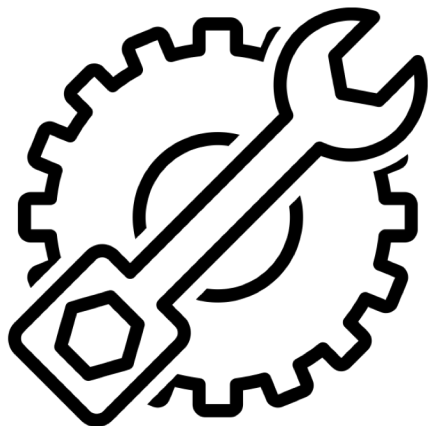
GDPR & Data Act



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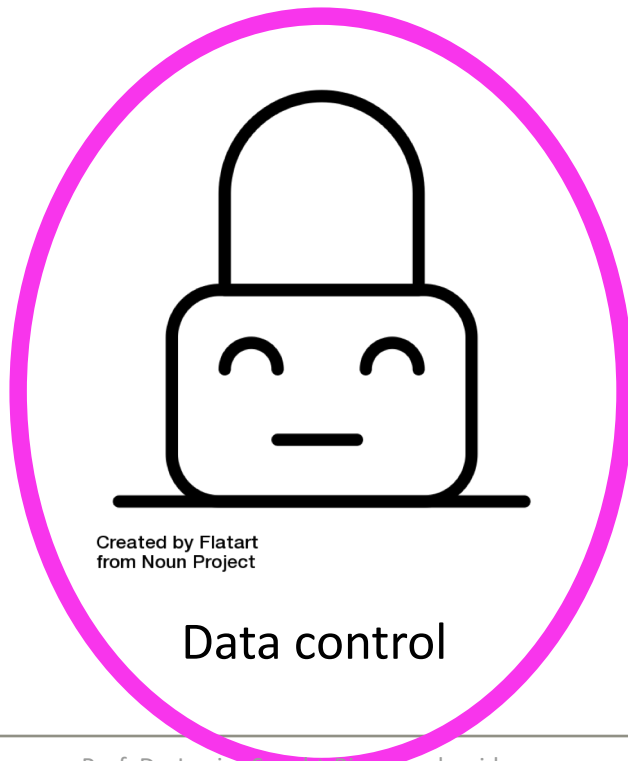
Data Act & DCD

# SOLVING IDENTIFIED CONSUMER ISSUES: IS THE CURRENT REGULATION SUFFICIENT TO SECURE...



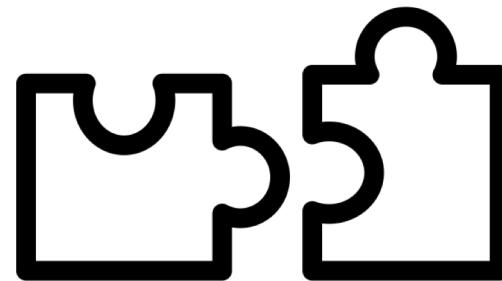
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interoperability

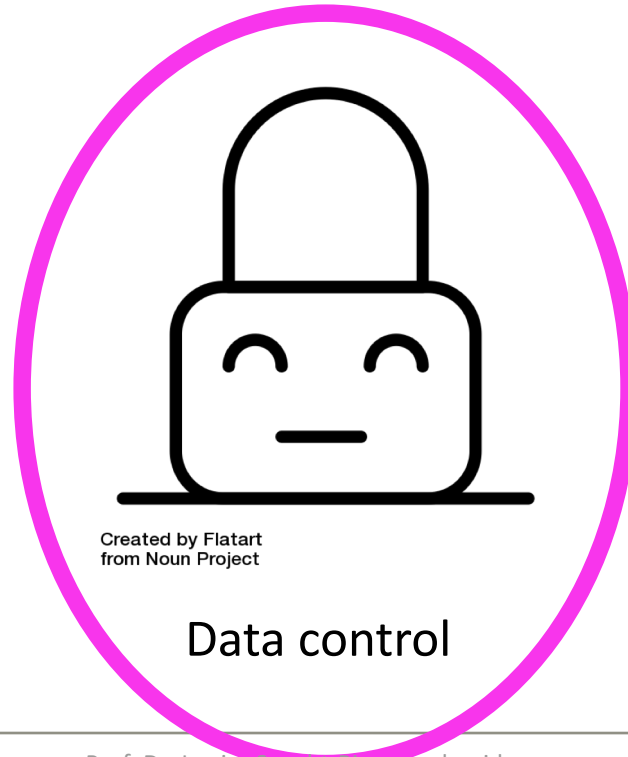


# SOLVING IDENTIFIED CONSUMER ISSUES: SECURING DATA CONTROL BY GDPR AND DATA ACT?

## GDPR

obligations securing  
the data subject's  
control of data (+)

Effective enforcement  
(-)



Data control

## Data Act

obligations securing  
the user's control of  
data (-)

Effective enforcement  
(-)

- Design of data access (data transfer or in situ right)
- Design of access ways (information or button)
- Data categories which can be accessed
- Exceptions to data access which limit user control
- Regulation of the contract according to Art. 4 (13) to secure „real“ private autonomy

## – Data Access right

- No access to derived data
- No mandatory design specification (e.g. button)
- In situ data access possible
- Far-reaching limitations esp. for trade secrets
- **No regulation of the contract according to Art. 4 (13)**

- Regulation of the contract under Art. 4 (13)
  - De lege lata: none except Unfair Terms Directive 93/13/EEC
  - That means for non personal „user data“ (for example anonymized data, sensor data)
    - Data holder can tie the functioning of the product and the signing of the contract which allows him to use the data
    - Data holder can dictate the conditions of the data use (e.g. total buy-out)
    - Data holder can brick the product when the user does not consent

- How to better serve the consumer
  - General terms and conditions esp. for “data use contracts“ which contain for example
    - A prohibition to tie the functioning of a product and the signing of the contract
    - A prohibition for buy-out clauses
    - A prohibition for clauses which allow undifferentiated bricking of the product

# IDENTIFYING CONSUMER ISSUES BY EXPERT WORKSHOPS



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- Methodological approach
  - Principal Agent Theory
  - Theory of sociotechnical systems
- 10 experts with consumer research background
- Duration 2 hours
- Goal: Identification of consumer issues in IoT use

Vertragsphase	Anbahnung	Vertragsbeginn	Vertragslaufzeit (Anpassung und Kontrolle als zweite Phase)	Vertragsende	Prolongation
<b>Problembereich</b>					
Hidden Characteristics/ Hidden Information Adverse Selektion (Informationsasymmetrie bezüglich bestimmter Leistungsmerkmale (aus Verbrauchersicht))					
Hidden Actions /Moral Hazard (Aktivitäten des Vertragspartners, die der Verbraucher nicht beurteilen kann und die ihm schaden können)					
Hidden Intentions /Hold Up (Informationsasymmetrie bezüglich der Absichten des anderen Beziehungspartners (z. B. Gewinn-orientierung vs. Kulanz des Unternehmens))					

- The user may not know...
  - ...that the device is smart
  - ...that he needs to conclude a second contract to make the device function
  - ...that this second contract is not free of charge. If he does not need to pay he needs to transfer data
  - ...that software-updates are necessary and where to get them
  - ...that the manufacturer is able to brick the device
  - ...that he can use the device also without data collection, as long as the smart function is not necessary to fulfil the main function of the device.
  - which data to what extent is collected and transferred to whom and for which purpose



- The data holder may...
  - ...sell the data without compensating the user
  - ...process the data after the determination of the contract
  - ...force the user to prolong the data-contract because otherwise he will brick the device
  - ...design a platform/interface in such a way that the exercise of consumer rights is difficult
  - ...use dark patterns.

- The data holder may...
  - ... pretend to use the data in a non-profit-oriented way, but does the opposite
  - ... try to use lock-in-effects by making the data available only to the own product group

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# SOLVING IDENTIFIED CONSUMER ISSUES: WHAT THE LEGISLATOR SHOULD FOCUS ON

- Design specifications for the exercise of user rights (Button)
- Observing dark patterns and the adequacy of regulating them
- Shaping information obligations pursuant to Art. 3 (2) DA with regard to the requirement and remuneration of a second contract necessary for the functionality of the IoT product
- Regulation of bricking in GTC and mandatory law
- Prohibition to tie the functioning of a product and the signing of the contract
- A prohibition for buy-out clauses
- Data-collection-free usage options of the product (information obligation according to Art. 3 (2) DA and mandatory law)
- Compensating the user



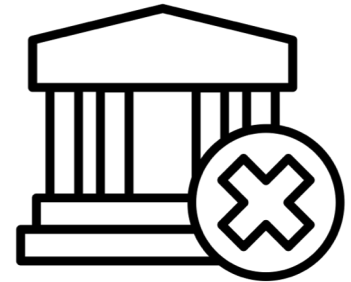
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Ability to change or switch off  
the smart function of smart  
devices via remote access



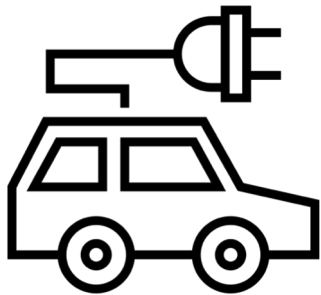
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Ability to punish undesired  
consumer behaviour by  
private technical enforcement



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Does not require legal  
proceedings, and even less  
a title



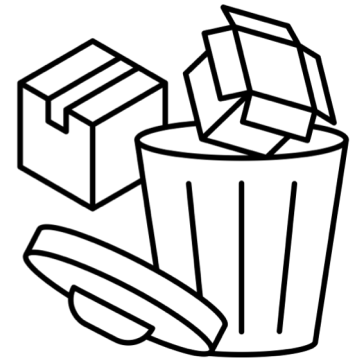
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Addressing bricking generally in  
GTC Law

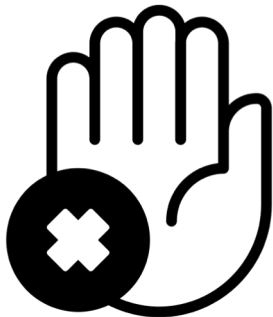


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Prohibiting planned  
obsolescence by ways of  
bricking



# SOLVING IDENTIFIED CONSUMER ISSUES: RIGHT TO DATA COLLECTION-FREE PRODUCTS



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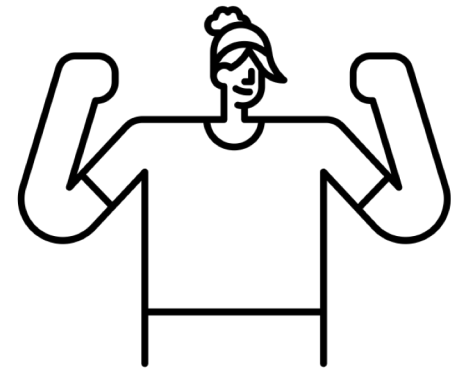
Prohibition to tie the  
functionality of the product to  
non necessary data collection



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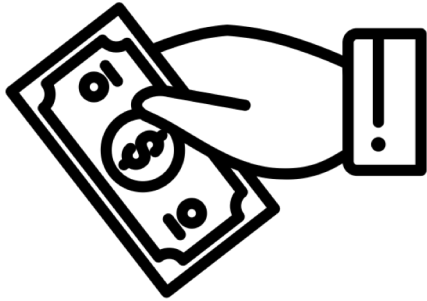
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Information that the product can  
be used data collection-free



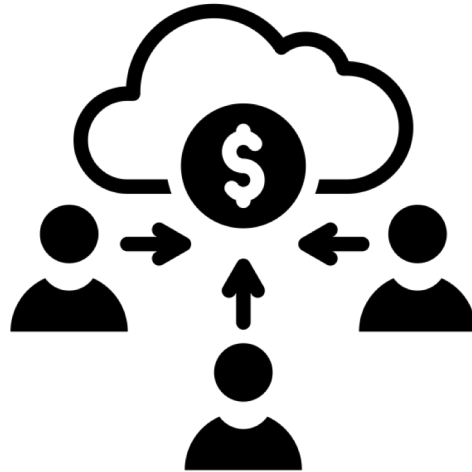
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Result: Data autonomy



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Individual remuneration



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Collective remuneration



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Data Tax

- The current data act does not provide for appropriate consumer protection measures and therefore needs to be amended.
- The consumer must be enabled by law to exercise private autonomy, otherwise the data holder will dictate the conditions (which we know from the 1960s discussion)
- The data act should therefore aim at consumer data autonomy by
  - Design specifications for the exercise of user rights (Button)
  - Shaping information obligations pursuant to Art. 3 (2) DA with regard to the requirement and remuneration of a second contract necessary for the functionality of the IoT product
  - Addressing bricking generally in GTC Law
  - Prohibiting planned obsolescence by ways of bricking
  - Prohibiting to tie the functionality of the product to non necessary data collection
  - Information that the product can be used data collection-free
- A Data tax should be closer considered