



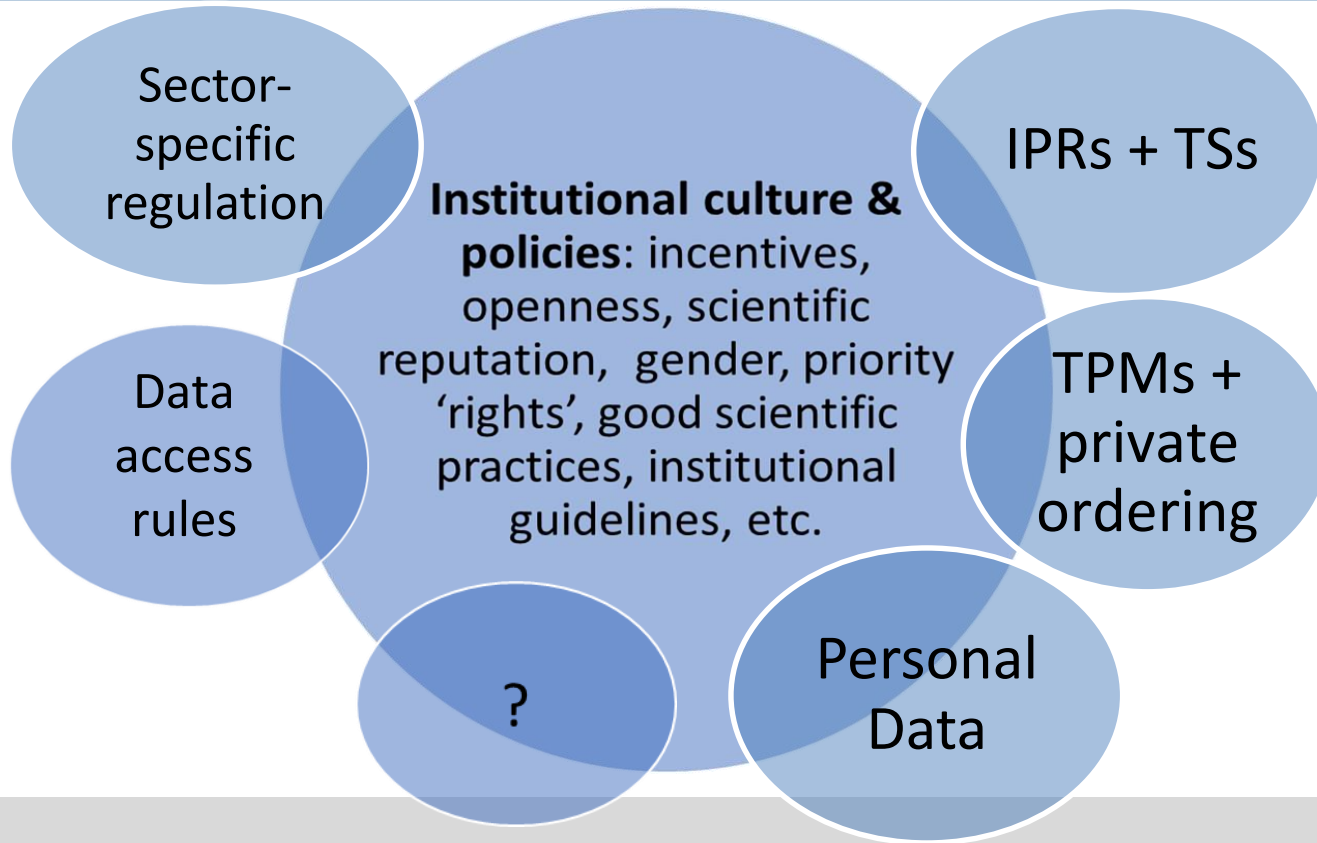
Max Planck Institute
for Innovation and Competition

EU Data Access Rules and protection of TPMs in the Field of Scientific Research

Community over Commercialization
Open Science, Intellectual Property and Data
27 October 2023

Valentina Moscon

Governance of Science



Governance of Science



Governance of Science

International level
Arts. 19 and 27 UDHR
Art. 15 ICESR

European level
Art. 11(1); 13; 17(2)
and 52(1) EU CFR

National Constitutions
e.g. Art. 44 Spanish C.
e.g. Arts. 33 and 9
Italian C.

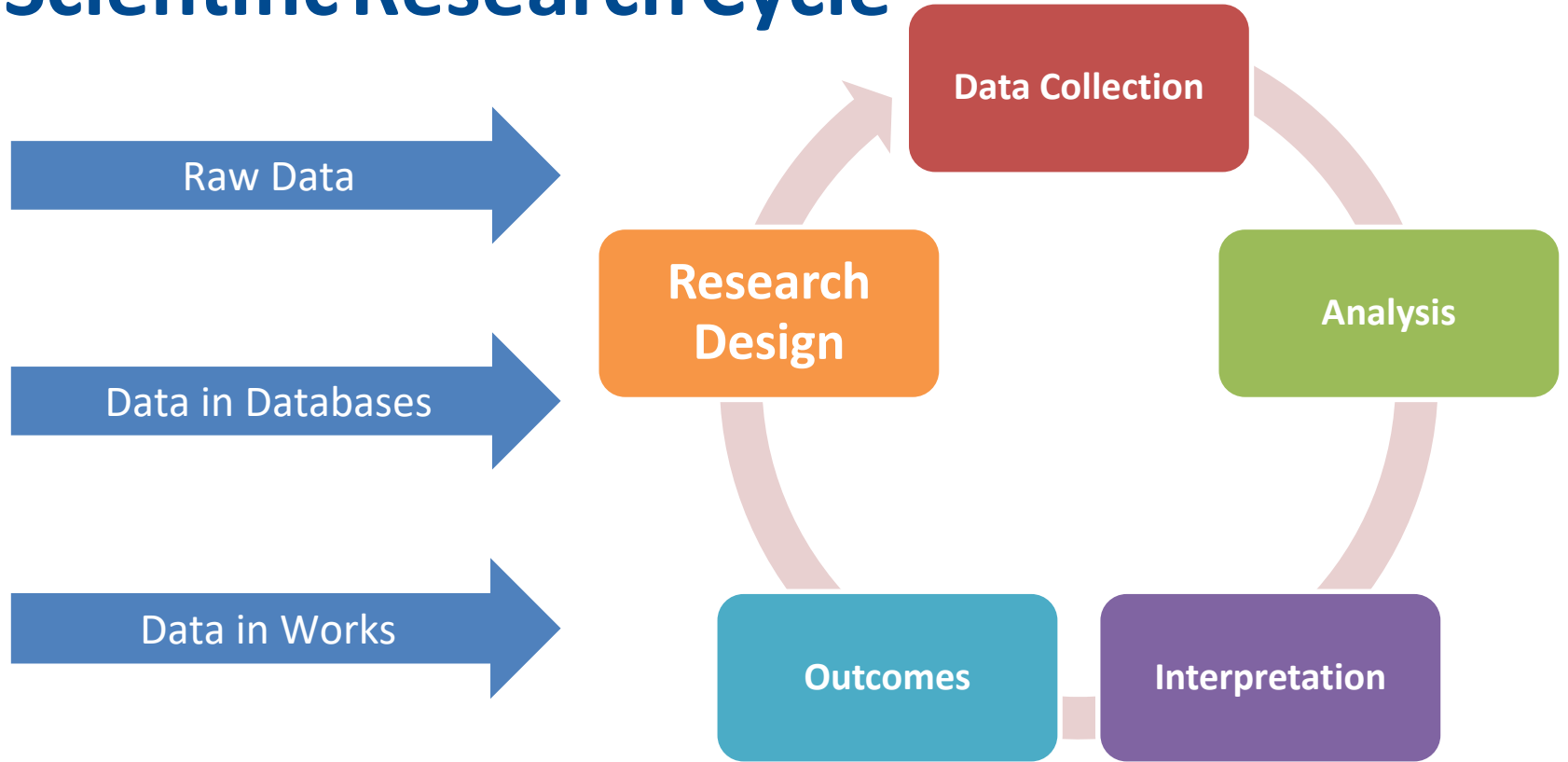


Protection of IPRs

Freedom of research

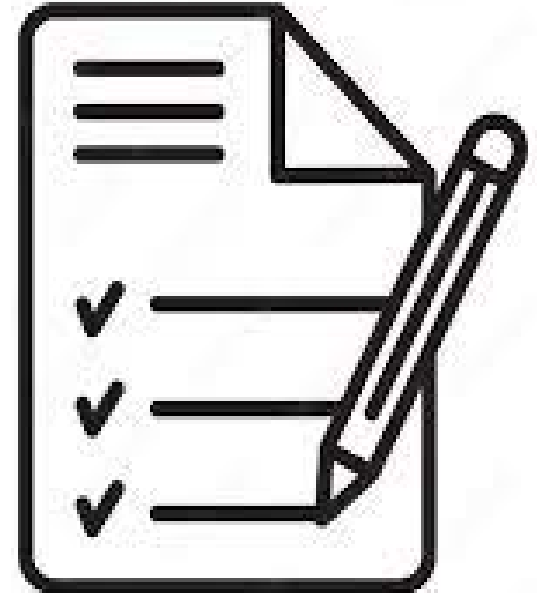


Scientific Research Cycle



Agenda

- Problem Statement
- Focus 1: Data Act Proposal
- Focus 2: TDM
- Assessment and Ways Out



Problem Statement

- Data access rules in EU law
- *De facto* control via TPMs
- Legal protection of TPMs
 - in ©opyright
 - in Data

DA (2022); EHDS (2022)
DGA (2022); ODD
(2019); FFNPDR (2018);
DSA (2022); DMA
(2022); AI Act (2021);
Art 3&4 CDSM-D
(2019); GDPR (2016); AI
Liability Dir.p (2022);
Revised Product Liability
Dir.p (2022)



Problem Statement

- Data access rules in EU law
- *De facto* control via TPMs
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Problem Statement

- Data access rules in EU law
- *De facto* control via TPMs
- Legal protection of TPMs in
 - in ©opyright
 - in Data 

Art. 6 InfoSoc Dir.
Art. 7 Software Dir.
Art. 11 DA

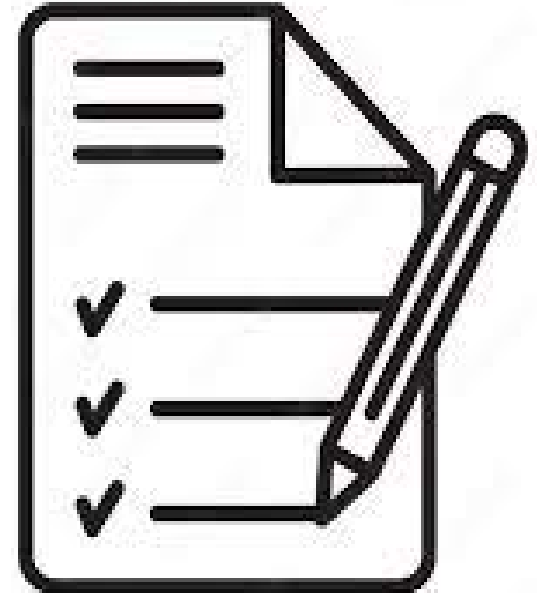


Problem Statement



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Data Act Proposal: overview

- Draft **regulation** in final stage
- **Complex** law (more than 100 p) with several rules on data (sectorial and horizontal)
- Approach chosen: **not property-based** but data access rules



Data Act Proposal: why it is important

In the research field

1) IoT data (pervasive)

■ Data Centers ■ Edge



Ex. research fields:

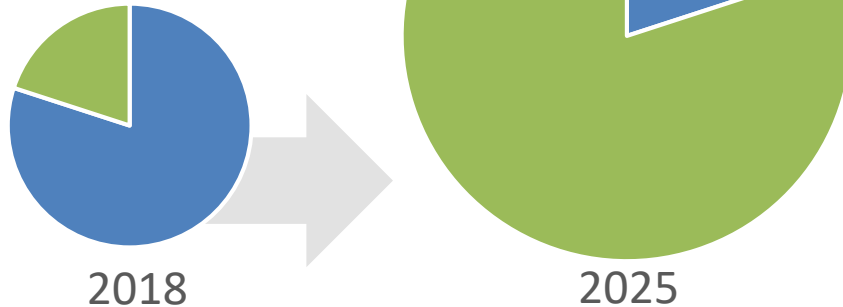
- Medical
- Behavioural (domotic)
- Farming – Agricultural – Nutrition
- Mobility
- Insurance
- Environmental
- Energy
- Etc.

Data Act Proposal: why it is important

In the research field

1) IoT data (pervasive)

■ Data Centers ■ Edge



2) Exceptional needs (e.g. Covid 19)

Ex. research fields:

- Medical
- Behavioural (domotic)
- Farming – Agricultural – Nutrition
- Mobility
- Insurance
- Environmental
- Energy
- Etc.

Data Act Proposal: content

- Article 5

User of IoT devices

→ can be shared with third parties (*such as an enterprise, a research organisation, a not-for-profit organisation or an entity acting in a professional capacity - Rec. 29*)

- Articles 14 and 21

Public bodies for exceptional needs of data (not just IoT)

→ can be shared with individuals or organisations for carrying out scientific research or analytics (shall act not-for-profit or in public interest mission)



Data Act Proposal: Criticisms

Data in Works

- **Art. 1(4c) DA:** Without prejudice to IPRs (except for Art. 35 DA)

Data in Databases

- Scope of **Art. 35 DA** (not applicable to non-IoT data)

Raw Data

- Data **access/trade secrets** interface (e.g. Art. 8(6) DA)

- **TPMs**



a) Copyright TPMs

- © TPMs for **copyright** and related rights
(Art. 6 InfoSoc Dir.)

- © TPMs for **software**
(Article 7(1)(c) Software Dir.)



b) Data TPMs

Art. 11 DA

- ✓ New protection against circumvention of TPMs on data
- ✓ Any private sector data that is subject to statutory data sharing obligations (Art. 1 DA)



Art. 11 DA

1. A data holder **may apply appropriate technical protection measures**, including **smart contracts** and **encryption**, to prevent unauthorised access to the data, including metadata, and to ensure compliance with Articles 5, 6, 8, and 9, as well as with the agreed contractual terms for making data available.[...]



Art. 11 DA

1. [...] Users and third parties **shall not alter or remove** such technical protection measures unless agreed by the data holder.



Art. 11 DA

Parr. 2-2b: Users, data recipients, and third parties (=anyone)

shall

- Erase data
- Pay compensation

in case of

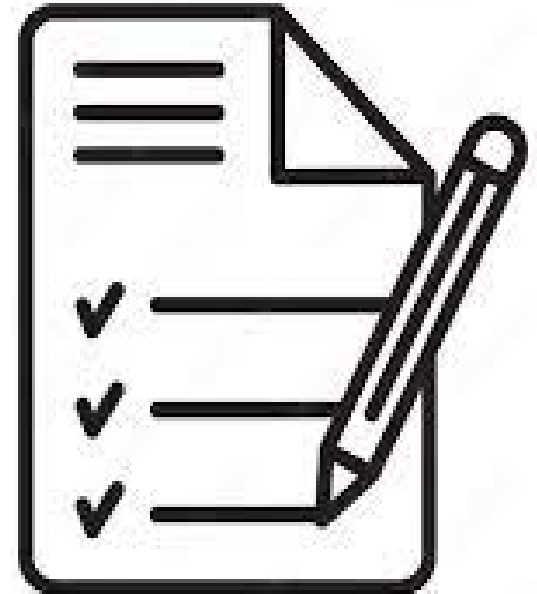
Oversimplifying!

- ✓ Abuse of gaps in the technical infrastructure
- ✓ Alteration or removal of TPMs applied by the data holder
- ✓ Not maintenance of technical and organizational measures agreed
- ✓ Unlawfully disclosure of data



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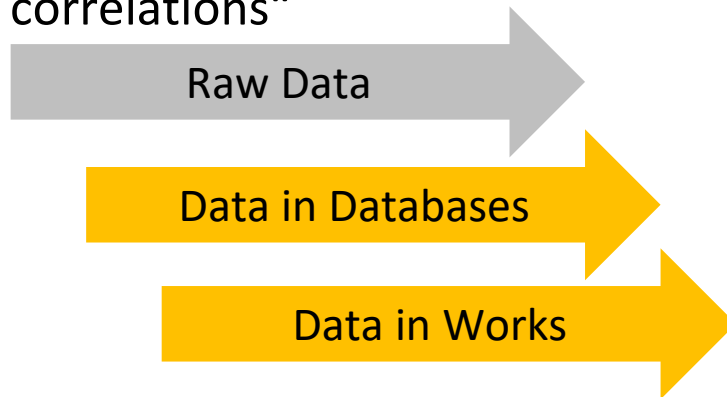


Copyright DSM Directive

- New © **exceptions** for TDM:

- Art. 2

„any automated **analytical technique** aiming to **analyse text and data** in digital form to generate information such as patterns, trends and correlations“



Copyright DSM Directive

- New © **exceptions** for TDM:
 - Art. 3 – TDM for scientific research
 - Art. 4 – General exception for TDM



Text and Data Mining and TPMs

- **Art. 3 – TDM for scientific research**

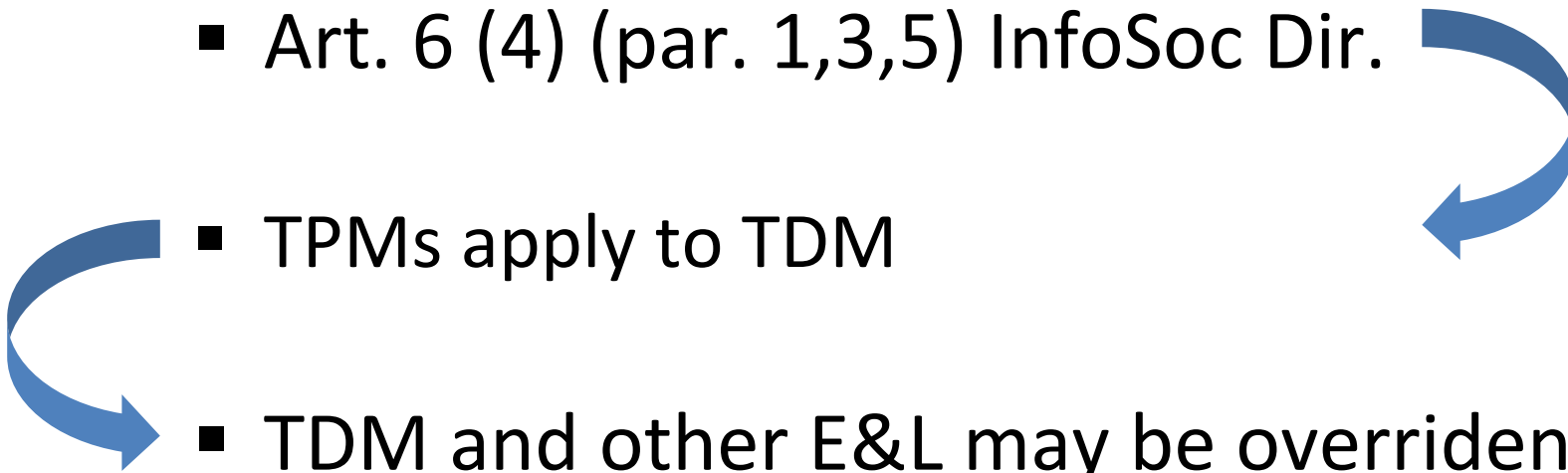
Par. 3. Rightholders shall be allowed to apply **measures to ensure the security and integrity of the networks and databases** where the works or other subject matter are hosted. Such measures shall not go beyond what is necessary to achieve that objective.

- **Art. 7(2) – Common provisions**

The first, third and fifth subparagraphs of **Article 6(4) of Directive 2001/29/EC** shall apply to Articles 3 to 6 of this Directive.



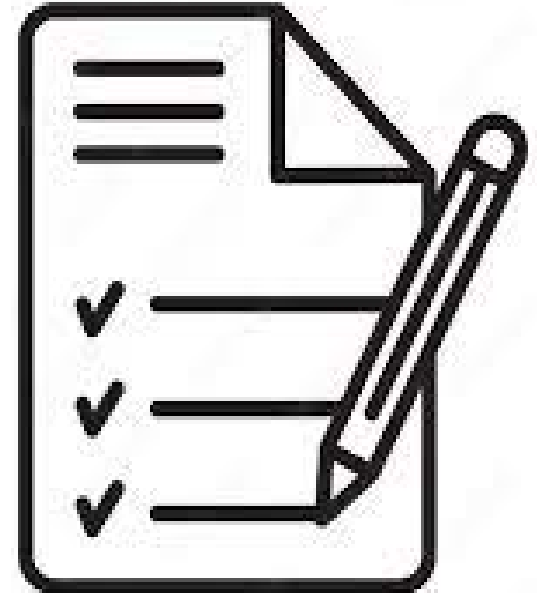
Text and Data Mining and TPMs

- Art. 6 (4) (par. 1,3,5) InfoSoc Dir.
 - TPMs apply to TDM
 - TDM and other E&L may be overridden by TPMs
- 
- The diagram consists of three blue curved arrows. One arrow on the right points from the first bullet point down to the second. A second arrow on the left points from the second bullet point down to the third. A third arrow on the right points from the first bullet point down to the third, indicating a direct relationship between the legal provision and the override clause.

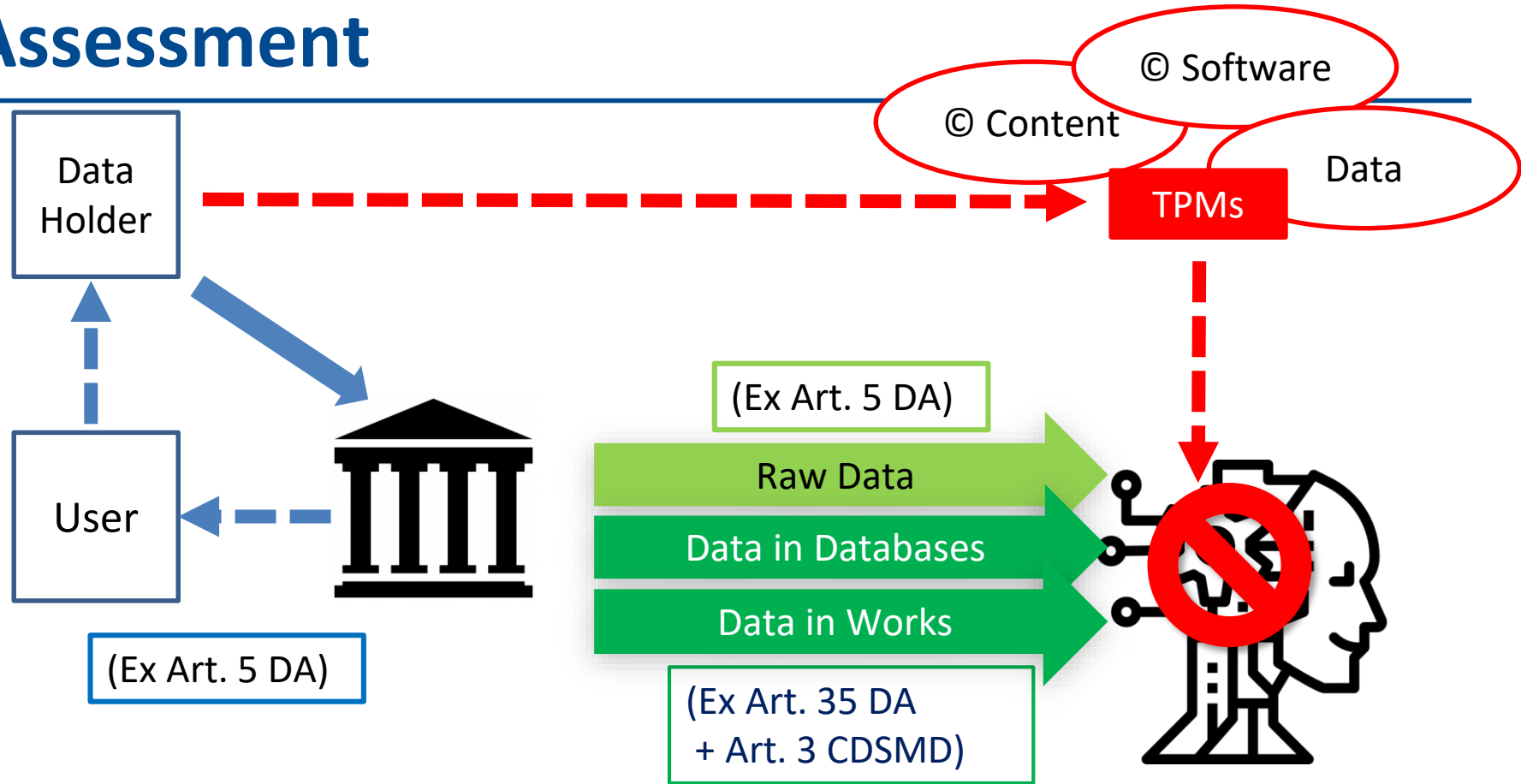


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Assessment



Assessment



Ways out

- Assessing consistency of Art. 11 DA with proportionality principle (Art. 52(1) Charter of Fundamental Rights of EU; Art. 5(4) TEU).
- With regard to research, also assessing consistency of Art. 11 DA with Arts. 11 & 13 CFR EU.
- Interpreting Art. 11 in line with the „right“ to do TDM under Art. 3 CDSM-D (= the „right“ should prevail over the protection of TPMs over data).
- For both © content and data introducing new effective legal tools to contrast TPMs misuse (e.g. right to circumvent).



Thank you!

