

The ALI-ELI Principles and the proposed Data Act

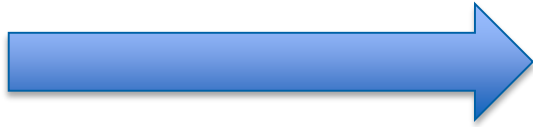
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ALI-ELI PRINCIPLES FOR A DATA ECONOMY - DATA TRANSACTIONS AND DATA RIGHTS -

Structure of the Principles



Part I: General Provisions

Part II: Data Contracts

Chapter A: Rules and Principles Governing Data Contracts

Chapter B: Contracts for Supply or Sharing of Data

Chapter C: Contracts for Services with regard to Data

Part III: Data Rights

Chapter A: Rules and Principles Governing Data Rights

Chapter B: Data Rights with regard to Co-Generated Data

Chapter C: Data Rights for the Public Interest

Part IV: Third Party Aspects of Data Activities

Chapter A: Protection of Others against Data Activities

Chapter B: Effects of Onward Supply on the Protection of Others

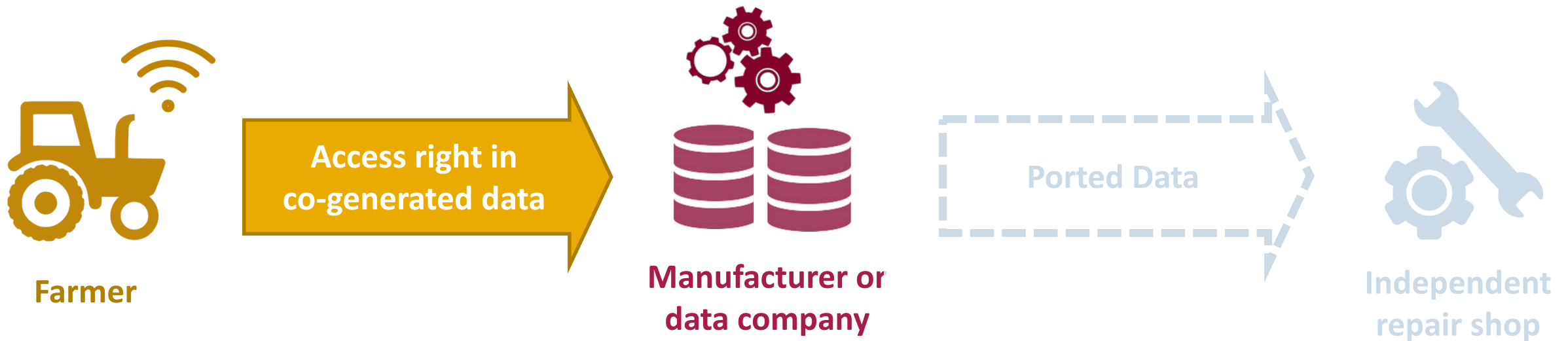
Chapter C: Eff. of Oth. Data Activities on the Protection of Third P.

Part V: Multi-State Issues

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The concept of data rights under the Principles

Rights in co-generated data



- Afforded to parties that have contributed to the generation of the data (i.e. it is also 'their' data)
- Arise from considerations of fairness and are potentially inherent in existing (un)fairness tests
- Follow a private / property law logic

Determining factors



Share in the generation of data



Weight of **grounds** put forward



Legitimate interests of **other parties**

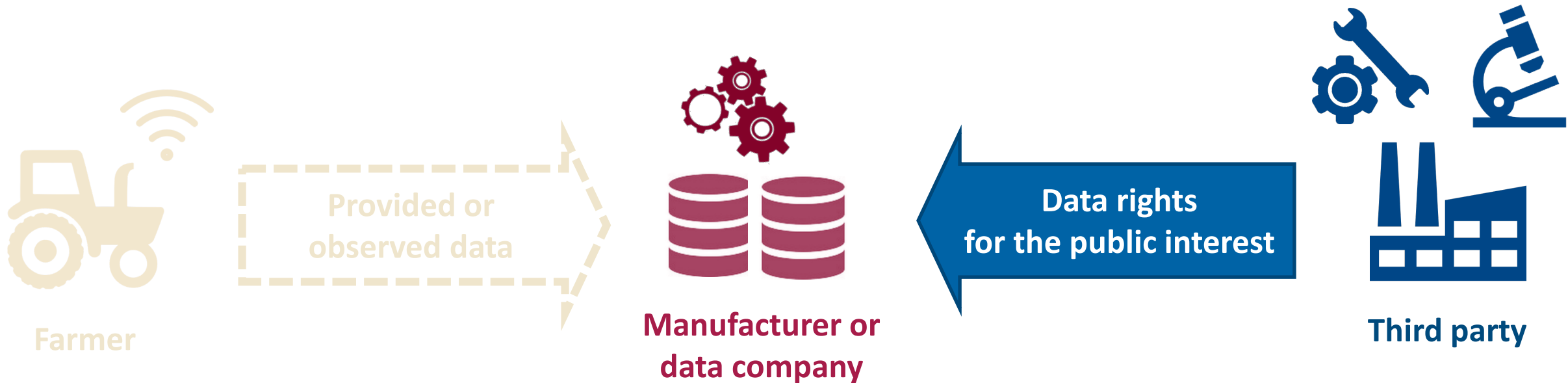


Relative power of parties involved



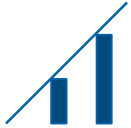
Public interests

Data rights for the public interest



- Afforded to third parties that have (normally) not contributed to the generation of the data
- Arise from (often sectoral) regulation
- Follow a market failure / competition law logic

Horizontal access modalities



Legitimate aim and **proportionality**



Access under **FRAND** conditions



Protection of **third party rights**



No-harm principle

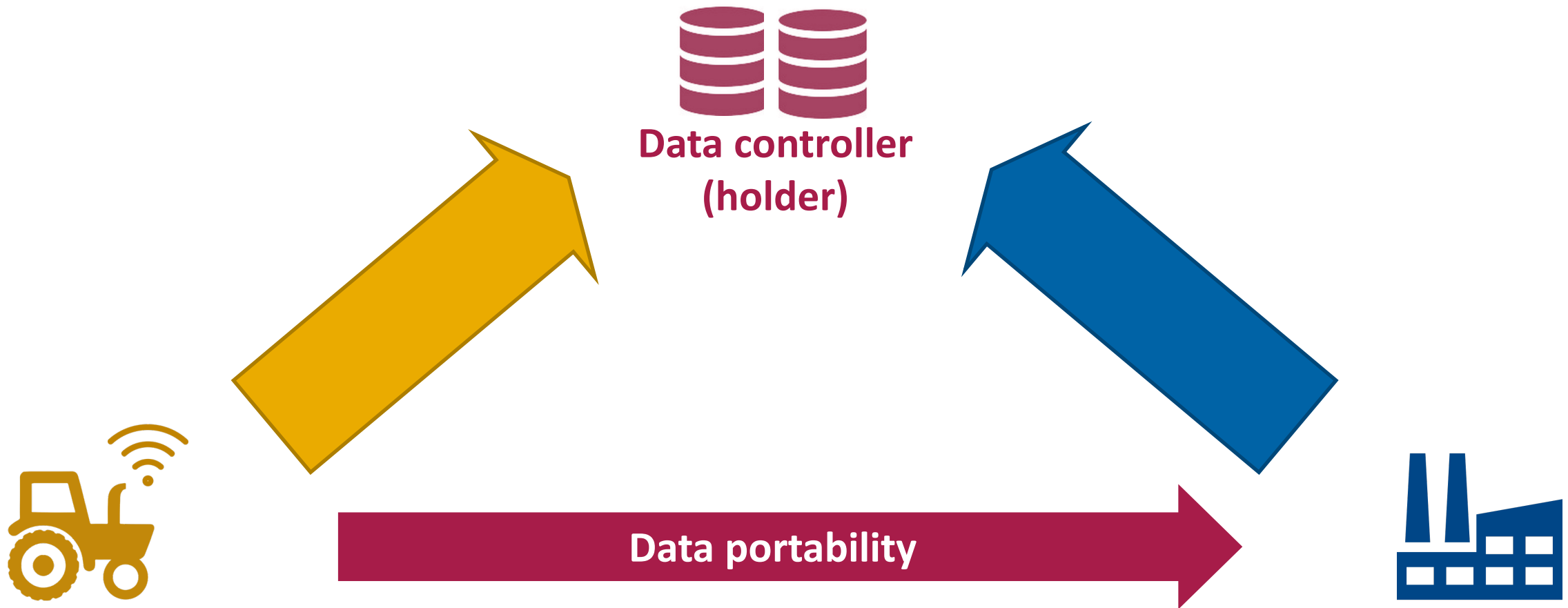


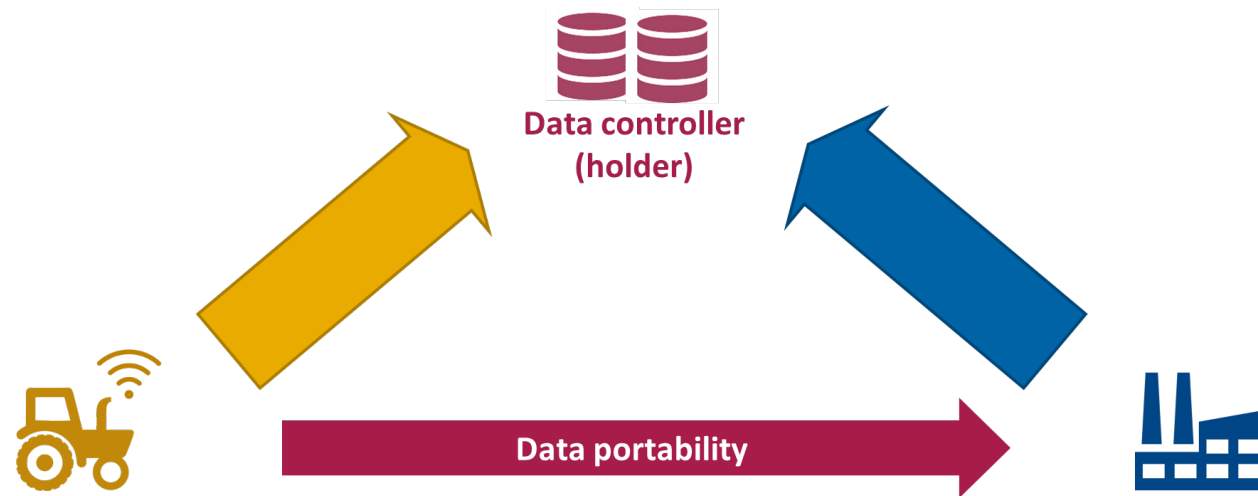
Reciprocity

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The corresponding concept under the Data Act Proposal

Proposed Data Act: 'Merger' of both concepts





Share in the generation of data



Weight of **grounds** put forward



Legitimate interests of **other parties**



Relative power of parties involved



Public interests



Legitimate aim and **proportionality**



Access under **FRAND** conditions



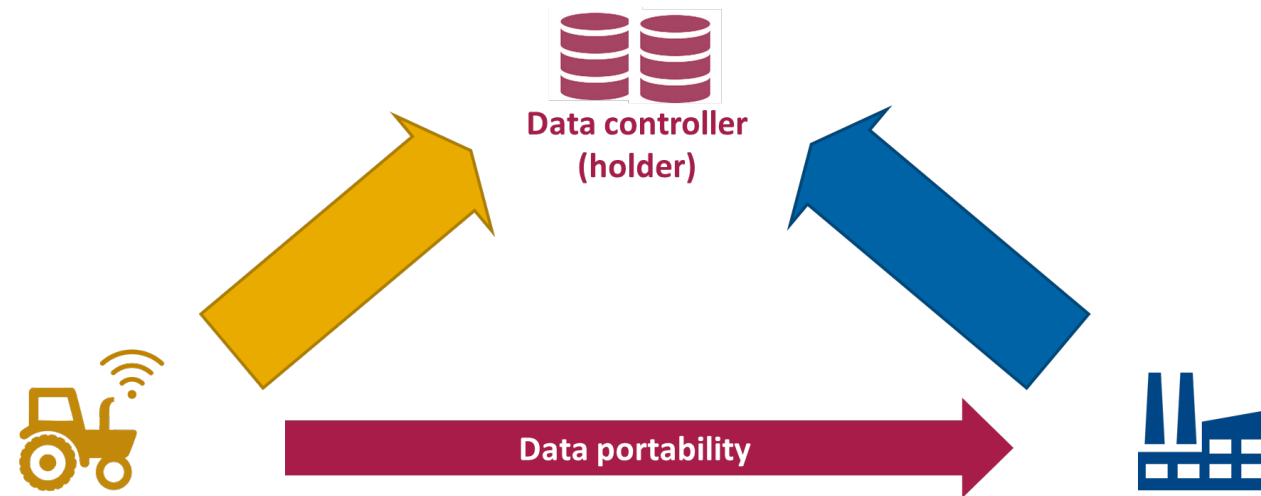
Protection of **third party rights**



No-harm principle



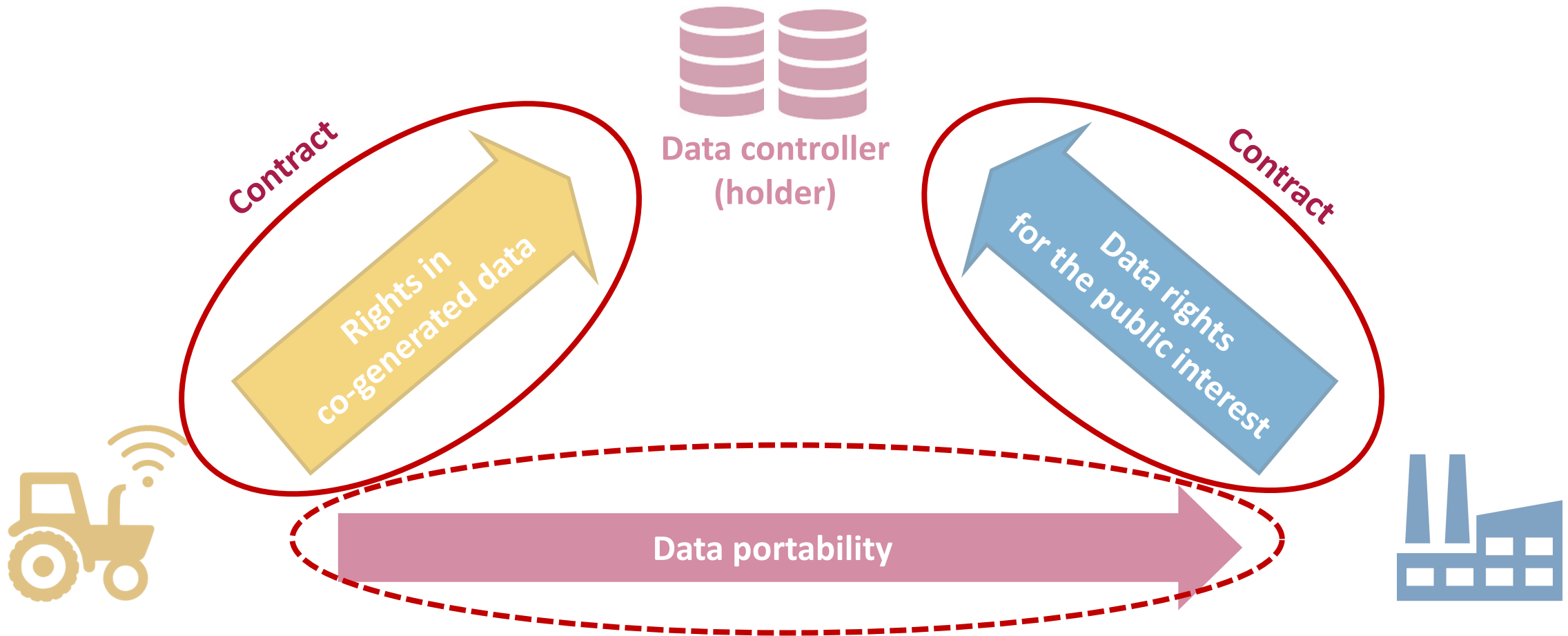
Reciprocity



The desire to liberate data for the data economy is a sufficient justification (replacing specific legitimate grounds such as seeking independent repair services)

The user's 'ownership' right and free decision is a sufficient justification for third party access (replacing legitimate aim and proportionality test)

The role of contracts



The provision in Article 4(6) DA

Article 4

The right of users to access and use data generated by the use of products or related services

1. Where data cannot be directly accessed by the user from the product, the data holder shall fulfil the user's request to access the data.
6. The data holder shall only use any non-personal data generated by the use of a product or related service on the basis of a contractual agreement with the user. The data holder shall not use such data generated by the use of the product or related service to derive insights about the economic situation, assets and production methods of or the use by the user that could undermine the commercial position of the user in the markets in which the user is active.

- Stricter protection for non-personal than for personal data?
- Relationship with e-privacy law?
- Unclear whether the user must be free to conclude this contract or not

- Unclear whether this only concerns the 'first data holder' (e.g. manufacturer) or also any third party, i.e. whether this is a quasi-IP right



Some reflections on 'open vs closed'

Competing gold standards

“Open” stands for a whole range of goals we hope to achieve with the help of data, including any of the 17 UN Sustainable Development Goals, transparency, democracy, etc.



Open by default

“... without
prejudice to ...”

Privacy by default

“Privacy” can be replaced by other private and public interests, including (other) fundamental rights, national security, law enforcement, IP protection, fair and effective competition, ...

Example 7

A municipality implements a large-scale project to collect mobility data using smartphone signals, with a view to facilitating traffic management Theoretically speaking, the data are ‘anonymized’; if the data sets are combined with other data sets and some additional knowledge, however, the owner can be identified with a confidence level of 95%. A number of different parties are interested in gaining access to these data; they include a researcher who wants to use them as a basis for identifying the optimal design of urban recreational areas, a start-up that wants to establish an online detective agency via which users can pay to access the mobility profile of their spouse, competitor, etc. and a research institute tasked by a foreign government with investigating the political activities of its citizens. ...

- The Proposal for a Data Act has taken up many of the core concepts and of the Principles for a Data Economy, in particular from its Part III and Part IV, and Part II may become relevant for the model contractual terms to be developed under the Data Act.
- As far as data sharing and the tension between ‘open’ and ‘closed’ is concerned, the Principles tend a bit more towards protection, by stressing the requirement of a legitimate ground, as well as rights vis-à-vis downstream recipients.
- The Principles do not require contractual relationships between the party exercising a right in co-generated data and the data holder or the data holder and the data recipient. Article 4(6) of the Data Act Proposal seems to raise some issues.