

# 2<sup>nd</sup> GRUR Expert Round Table – “The EU Data Act”

The EU Data Act - Improving fairness and competition in  
the data economy,  
including potential modifications of the existing framework (Database  
Directive and Trade Secrets Directive)

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# Big Data on the farm

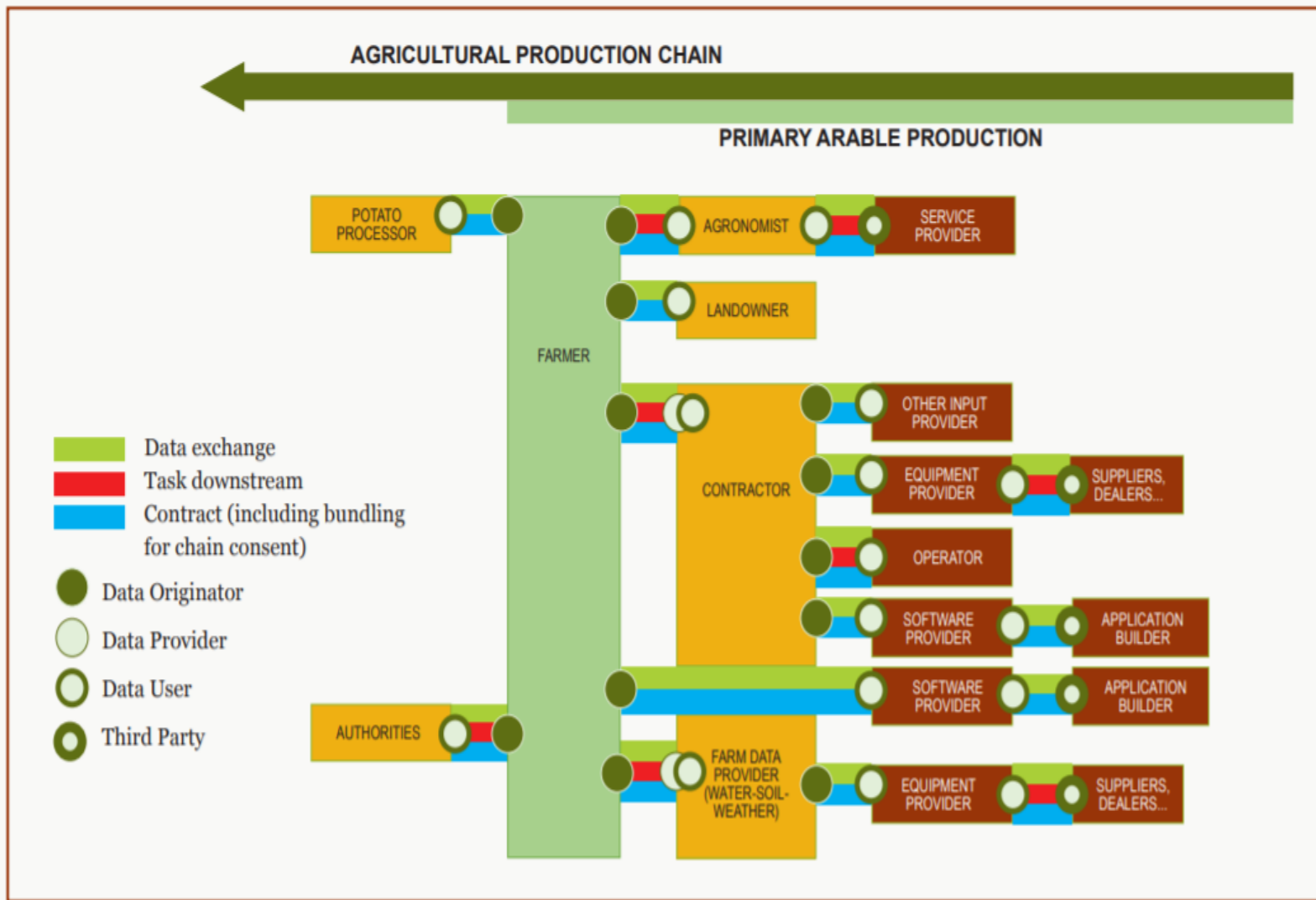


Bunge, Big Data on the farm, Wall Street Journal, 8 March 2014

# Stakeholders on access and usage of farming data

- ❑ Farmers and employees
- ❑ Producers of machines and equipment
- ❑ Agricultural contractor
- ❑ Agricultural advisers
- ❑ Producers of seeds, pesticides, fertilizers
- ❑ Food industry
- ❑ Cloud service providers, platform operators
- ❑ Banks
- ❑ Data traders, exchanges, investors
- ❑ Big Data Analytics
- ❑ State





# Data platforms emerging

## □ Airbus Skywise

- Web based Industry data platform for Data Sharing with airlines
- Skywise Airbus is collecting the data like a hub from the airlines
- What they get is added value in form of an advice how to improve their operations, e.g., maintenance, stemming from the inferences Airbus can draw from the multitude of collected data.

## □ Data sharing ecosystem als win-win tool für all participants, not as additional source of income

- Airlines retain „ownership“, granulated data access
- General Terms of Use
- Airlines don't have access to the data, no transfer to 3rd parties

# Interviews among 1 000 farmers in Australia 2017

## *What keeps farmers from Data Sharing?*

- ▣ Lack of transparency of licensing conditions
- ▣ Uncertainty about data ownership and data sharing
- ▣ Data protection concerns
- ▣ Uneven bargaining power between farmer and agritech companies
- ▣ Lack of distribution of the benefits of data sharing between data contributors and data aggregators

**“These matters are best addressed through open and transparent governance frameworks”**

# Data and the digital economy

- ▣ Special characteristics of information
  - non-rivalness, non-excludability
  - Economies of scope: combining data from multiple sources may create more value than the values in isolation
- ▣ EU Commission:
  - problem is the inefficient and insufficient availability of data for use within the economy, which prevents the non-rival nature of data being fully exploited
    - > promote data sharing
- ▣ Reasons for underutilisation:
  - lack of clarity regarding rights on data,
  - economic factors (disparity in negotiating power, market foreclosure),
  - technical issues (lack of interoperability between sectoral data ecosystems and data processing infrastructures) or
  - transversal nature (limited access to fair and trustworthy cloud services).

# EU: Digital Single Market Strategy

- Digital Single Market strategy for Europe, COM(2015) 192 final
- Communication Building a European data economy, COM(2017) 9 final
- Data access and transfer
  - ▣ Producers and other participants have control towards users,
  - ▣ through factual control, superior bargaining power, imposing standard contracts and technical measures,
- Set of instruments
  - ▣ Technical solutions, Model contracts, Best practices, CoC,
  - ▣ Data producer's right,
  - ▣ Access rights to data



# The regulatory ecosystem

- Open Data Directive 2019/1024
  - Re-use of **public sector information**
  - Exceptions for IP, trade secrets, data protection
  
- Data Governance Act COM(2020) 767 final (Draft Agreement 11-30-2021)
  - a) Public sector bodies information, Art. 3-8
    - supporting data sharing by **non-legal measures**
    - Art. 5(3), creating **secure processing environments** for data access
    - Art. 8 provides for a central **single information point** as a one-stop-shop for taking applications for data re-use

# Data Governance Act

## b) Data intermediation services as a new business model, Art. 9-14

- **Data intermediation services** (multilateral exchange, platforms or databases, infrastructures) and **data cooperatives**
- increase trust and lower transaction costs linked to B2B and C2B data sharing by creating a **notification regime** and **requirements**, in particular
  - to remain **neutral** as regards the data exchanged
  - commercial separation of own services, **anti-bundling**
  - ensure **fair**, transparent, non-discriminatory **access** for data holders and users
- A competent authority responsible for monitoring compliance

-> Related concept of **data trustee** as intermediary to enable access to personal data

## c) Governance model for **data altruism**, Art. 15-22

# Digital Markets Act (DMA) COM(2020) 842 final

- Directed at **gatekeeper platforms** in their relation to businesses on the platform
  - ▣ online intermediation service, search engines, social media, cloud services etc.;
  - ▣ 6,5 billion € annual turnover, at least 3 member states, Art. 3 (1) b), 45 millions “active” end users and 10.000 business users; or case-by-case assessment)
- Art. 6(1)(h) provides **effective portability of data** generated through the activity of a business user or end user;
- Art. 6(1)(i) provides business users, free of charge, with **effective, real-time access and use** of aggregated or non-aggregated data, generated in the context of the use of the platform services by those business users or their products or services

# P2B Regulation 2019/1150

- **Online intermediation services** (i.e. offered to business users to allow them to offer goods or services to consumers facilitating direct transaction between business users and consumers) and **search engines**
- Reduce **imbalance** of power between business user and the platform
- **Transparency about access to data**: The general conditions must include a description of the technical access that the platforms as well as business users will have to the personal or other data provided by the business users or consumers in the context of the service, Art. 9.

# The Data Act - General Objective

- The Data Act's general aim is to make more data in the EU usable to support sustainable growth and innovation across all sectors in the data economy.
- It will seek to achieve this aim by opening opportunities and removing barriers for access to data, to both private and public sector bodies, while preserving incentives to invest in data generation

# The Data Act - Problems identified

- **B2B** data sharing: Low levels of data availability for creating added value in B2B relations
- **Consumers** have limited control over data generated by their use of products and services – enhance consumer sovereignty and improve competition
- **Governments** do not have the data they need to serve pressing public interest goals – B2G data sharing
- Fairness and trustworthiness of **data infrastructures**
  - **Smart contracts** – lack of harmonized standards
  - Establishing more competitive markets for **cloud computing services** – interoperability and data and application portability
  - Safeguards for non-personal data in **international contexts**

# The Data Act – objectives and possible measures

## To increase consumers' and businesses' legal certainty on access to data:

- **Rights to access** beyond DMA:
  - **Businesses and consumers** using a product or service -> all the data they generate
  - **Service providers and manufacturers** -> data produced by products and services
  - Businesses and consumer may **allow access for service providers**, e.g. repair services and spare part suppliers.
  - **Extend** to organisations with legitimate interest of access, e.g, co-generators of data?
  - **Limitations** and right to object?
- **Technical means** (smart contracts, APIs) promoting interoperability across sectors

# The Data Act – objectives and possible measures

## To prevent abuse of contractual imbalances:

- Introducing a **fairness test** for B2B data sharing contracts – which types of contracts, criteria?
- Supplemented by **transparency obligations** on generated data

## To facilitate B2G data sharing:

- **Which data** for which **(public) purposes**?
- **Mandatory** instruments?
- **Compensation**, under which regime?
- **Measures** for facilitating sharing -> Data Governance Act



# The Data Act – objectives and possible measures

## To enhance trust in data processing services:

- “Art. 20 GDPR Plus”: expand **data portability** (personal, non-personal) beyond Art. 6 DMA and Art. 16(4) DCSD - Providers of cloud and other data processing services -> ensure ‘switchability’ by guaranteeing a minimum level of functionality of cloud services across different providers to avoid lock-in
- framework for data processing services **interoperability standardisation**
- providers should **prevent access** or transfer **from third country** jurisdictions in conflict with EU or national law, extending Art. 30 DGA.

## To improve the interoperability of data:

- the Commission would endorse **data interoperability requirements** elaborated by standardization bodies or industry for selected common European data spaces in delegated acts.

# Review: Database right

- “Outdated legal framework” (2018 Evaluation) ?
- Is the database right preventing access to and usage of data?
  - ▣ Factual control over data complemented by legal protection of databases
  - ▣ May prevent aggregation and added value and lead to market failure
- Key question: excluding machine generated data ?
  - ▣ 2004 CJEU: distinction generation / collection of data
  - ▣ → legal uncertainty as to status of MGD
  - ▣ processes performed on raw data after their generation may be inextricably linked with the creation process -> no separate investment in collection for databases
  - ▣ Who is database owner?
    - > exclusion of MGD

# Review: Database right

## □ Definition MGD

- ▣ data *”created “without the direct intervention of a human by computer processes, applications or services, or by sensors processing information received from equipment, software or machinery, whether virtual or real”*

(2017 Communication “Building A European Data Economy)

## How to exclude?

Statutory exclusion

Excluding relevant investments

Specifying minimum level of substantial investments

# Review: Database right

## □ Assessment

### □ Exclusion MGD

- provide legal clarity
- leave raw data free and support data access and data sharing, esp. in cases of sole-source databases
- obviate need to identify the rightholder

### □ Inclusion MGD

- obviate establishing a legal definition of MGD
- evade problem of “mixed databases”
- but necessitates drawing the line of relevant investment into generating MGD and the devices used for it
- positive effect that rightholders would be more willing to license the data relying on the IP protection (?)

# Review: Database right

- Adapting limitations?
  - ▣ Adopt general copyright limitations
  - ▣ Carve out new specific limitations?
- CJEU *CV-Online v Melons*
  - ▣ **fair balance** to be struck between ”on the one hand, the legitimate interest of the **makers** of databases in being able to **redeem** their substantial **investment** and, on the other hand, that of **users and competitors** of those makers in having **access to the information** contained in those databases and the possibility of **creating innovative products** based on that information”
  - ▣ “the main criterion for balancing the legitimate interests at stake must be the **potential risk to the substantial investment** of the maker..., namely the risk that that investment may not be redeemed”
    - Case C-762/19, *ECLI:EU:C:2021:434*

# Review: Trade Secret protection

- Trade Secret protection of raw data/MGD?
- Secrecy
  - ▣ Challenges from horizontal and vertical IT-induced integration
  - ▣ Legal, organisational, technical measures
  - ▣ Data analytics and (permitted) reverse engineering
    - TS owners may insert anti-reverse engineering clauses
- Perspective: Encryption is key
  - ▣ Homomorphic cryptography, Secure Multiparty Computation (SMC)
    - third party can process the data without being able to see it
  - ▣ High costs, security issues

# Review: Trade Secret protection

- Possible conflict with Data Act
  - ▣ Excluding MGD?
  - ▣ Aligning access rights
    - use and disclosure of information must be “unlawful”, Art. 4 TS Dir.
    - alleged acquisition, use or disclosure of the trade secret was carried out [...] for the purpose of protecting a legitimate interest recognised by Union or national law, Art. 5(d) TS Dir.
    - B2G mandatory data sharing: exception for trade secrets?
    - B2B sharing: appropriate procedure to determine infringement and weighing of interest as to extent of sharing
      - Art. 5 Data Governance Act – secure processing environments for data sharing
      - Art. 9 TS Dir – court proceedings to keep secrecy

# Some tentative thoughts

- Main focus of Data Act:
  - ▣ Access and usage rights on generated data
  - ▣ Establishing access rights for government against business
  - ▣ Securing fairness in contractual relations B2B
  - ▣ Promoting standardisation and interoperability
  
- Regulatory Instruments
  - ▣ Broad range of measures of different intensity and effectiveness available
  - ▣ Effectiveness vs. consequences for the market and fundamental freedoms
  - ▣ Identification of market failures in dynamically emerging markets – fine-tuning as to specifics
  - ▣ Concreteness vs. flexibility



# Some tentative thoughts

- Horizontal vs. sectoral regulation
  - Depends on specifics of markets and consequences, e.g.,
    - B2G → OpenDataDir: list of principles, supplemented by list of high value data sets and delegated power for specific regulation
  - Increasing sharing needs across sectors
  
- Regulatory patchwork of proposals
  - Extending and supplementing existing approaches
  - Systematic coherence and regulatory clarity necessary as to scope and measures
  - Alignment with legal environment, contract law, competition law
  
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# Some tentative thoughts

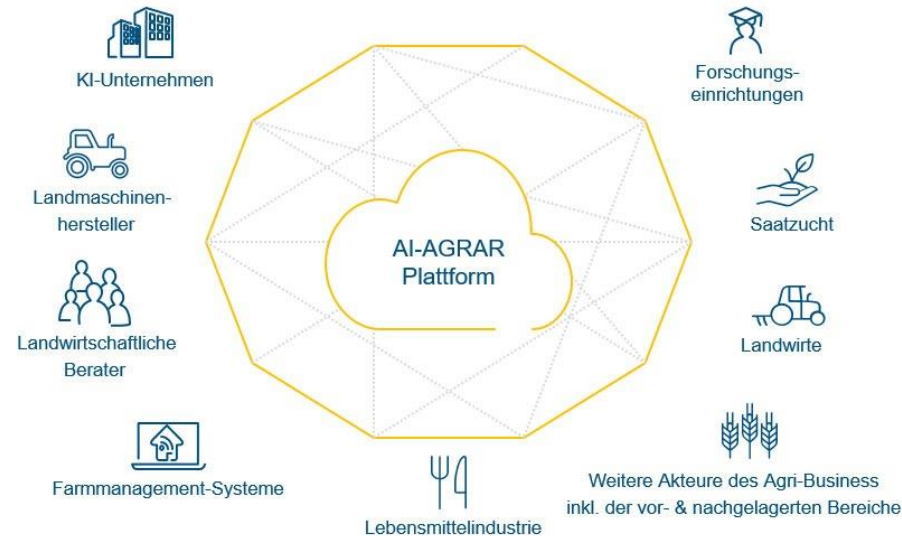
- IP vs. access rights – fair sharing
  - ▣ Access and usage rights instead of exclusive rights to facilitate trade
  - ▣ „data sovereignty“ instead of „ownership“ ?
  - ▣ Fine tuning: Access rights sufficiently tailored for fair sharing of value?
  - ▣ Concrete standards of fairness?
- Concordance with GDPR/ePrivacy Regulation
  - ▣ Carefully tailored conflict provisions
  - ▣ Anonymisation and consent management, Art. 5 Data Governance Act
- Holistic governance approach (legal, institutional, infrastructure)
  - ▣ Portability and standards not provided by the market
  - ▣ Appropriate mix of instruments of different levels and obligations

# Towards European data space(s)

- European Data Strategy COM(2020) 66 final: “single European data space”
  - ▣ European common data space, COM(2018) 232 final
  - ▣ series of principles, with guidance on B2B and B2G data sharing
- Sector-specific: agricultural data space
  - ▣ A common data space for agricultural data based on existing approaches towards data sharing could lead to a **neutral platform for sharing and pooling agricultural data**, including both private and public data. This could support the emergence of an **innovative data-driven ecosystem** based on **fair contractual relations** as well as strengthen the capacities for monitoring and implementing common policies and **reducing administrative burden** for government and beneficiaries

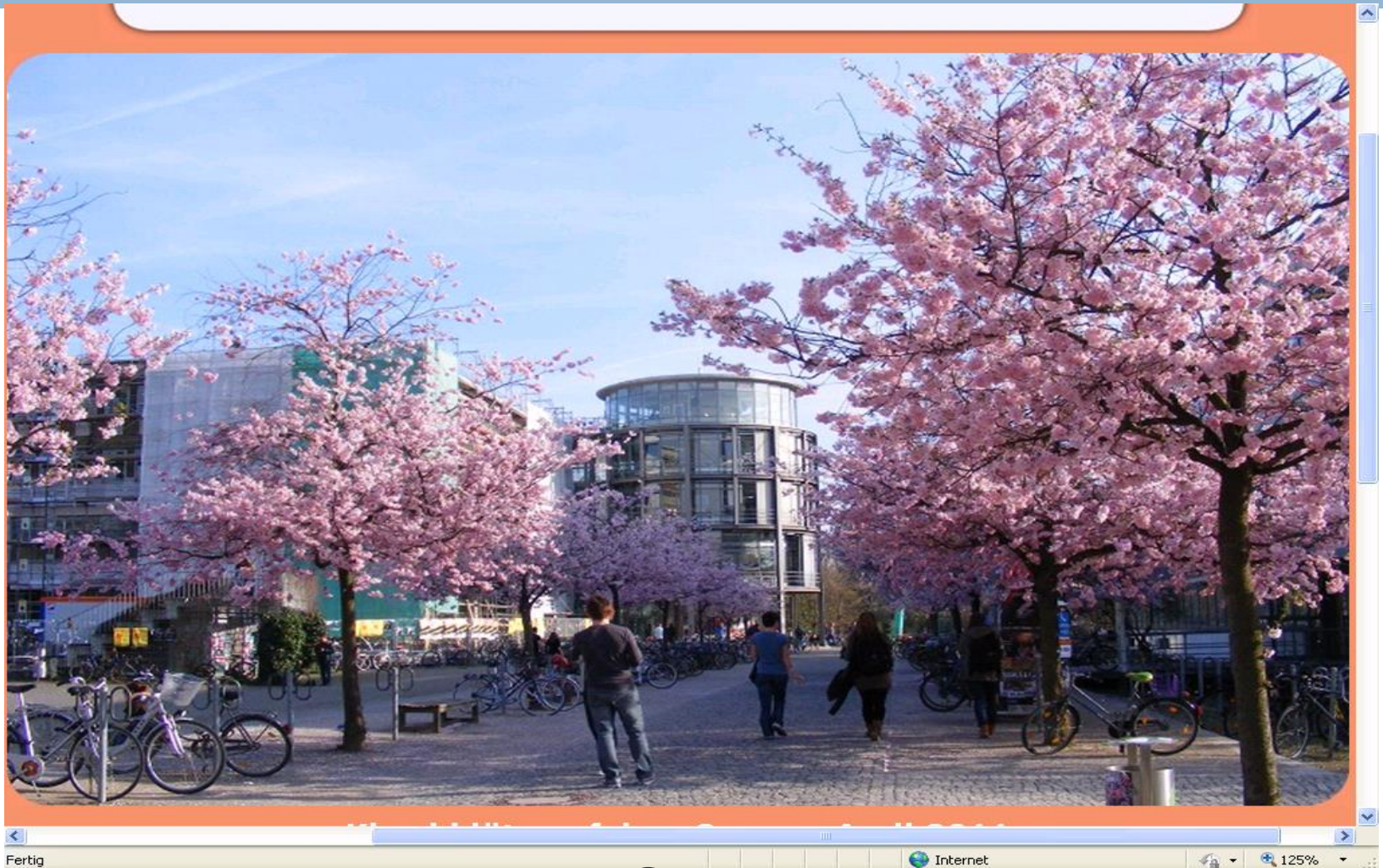
# The future?

## □ Agri-Gaia



- Open AI-ecosystem: data and services exchanging network ready to implement value adding activities
- GAIA-X based standardisation allows the farmer to move his data freely between cloud platforms and use them efficiently himself
- Granulated control: private/share/public
- Decentralisation/Multi-Cloud und Edge-Support - „federated cloud system“
- Data security and data protection „by design“
- Certification bodies for auditing and certification
- Implementation of regulatory framework?

Thank you very much !



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