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General Secretariat

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**LIMITE**

**TELECOM**

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## **MEETING DOCUMENT**

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| From:    | General Secretariat of the Council                          |
| To:      | Working Party on Telecommunications and Information Society |
| Subject: | Data Act Regulation PL comments on 2nd compromise text      |

Delegations will find in the annex the PL comments on the 2nd compromise text on Data Act Regulation.

**POLAND'S** comments on second compromise proposal on DA  
(document 14019/22)

| Reference   | Third compromise proposal                                                                                                                                                                                                                                                                                                                                                                                                 | Drafting suggestion                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | Comment                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
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|             |                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | General comment: we would like to draw the TELECOM attention to the Council Conclusions on EU statistics (doc. 14274/22) which state that: <i>The Council REITERATES the importance of increased and sustained access for producers of official statistics to new data sources. The Council TAKES NOTE of the ESS position paper on the future Data Act proposal, and TAKES NOTE of the discussion on the forthcoming Data Act to support the establishment of a sustained and legally framed access to privately held data for the compilation of timely and more detailed official statistics. Furthermore, the Council LOOKS FORWARD to a possible proposal by the Commission on the revision of Regulation No°223/2009 on European statistics, addressing in particular the issue of access to new data sources from the specific perspective of European statistics as well as ways to ensure increased agility and responsiveness of the ESS.</i> |
| Article 14a | <b>(14-a) Data generated by the use of a product or related service include data recorded intentionally by the user. Such data include also data generated as a by-product of the user's action, such as diagnostics data, and without any action by the user, such as when the product is in 'standby mode', and data recorded during periods when the product is switched off. Such data should include data in the</b> | <b>(14-a) Data generated by the use of a product or related service include data recorded intentionally by the user. Such data include also data generated as a by-product of the user's action, such as diagnostics data, or sensor-generated data, and without any action by the user, such as when the product is in 'standby mode', and data recorded during periods when the product is switched off. Such data should include data in the form and format in which they are generated by the product, but not pertain to data resulting</b> | We propose to add another variant of the data generated by the product which is also the result of measuring process to make the scope of the regulation clearer.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |

| Reference  | Third compromise proposal                                                                                                                                                                                                                                                                                                                                                         | Drafting suggestion                                                                                                                                                                                                                                                                                                                                                                        | Comment                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
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|            | form and format in which they are generated by the product, but not pertain to data resulting from any software process that calculates derivative data from such data as such software process may be subject to intellectual property rights.                                                                                                                                   | from any software process that calculates derivative data from such data as such software process may be subject to intellectual property rights.                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| Recital 16 | It is necessary to lay down rules applying to connected products that <b>at the time of the purchase, rent or lease agreement</b> incorporate or are interconnected with a service in such a way that the absence of the service would prevent the product from performing <b>one of</b> its functions, <b>without being incorporated into the product.</b>                       | It is necessary to lay down rules applying to connected products that <del>at the time of the purchase, rent or lease agreement</del> incorporate or are interconnected with a service in such a way that the absence of the service would prevent the product from performing <b>one of</b> its functions, <b>without being incorporated into the product.</b>                            | <p>The current wording will exclude from the scope of the DA related services which were added <u>after</u> the sale, rent or lease of a product, by means of a software update. Updating of product software is increasingly common and could include the addition of related services. Access to the data generated by such post-sale services would be important. Furthermore, the wording could potentially increase the risk of abuse by data holders, though the deployment of services post-sale, as a means of avoiding data sharing obligations.</p> <p>It is therefore worth going back to the original version of the recital.</p> |
| Recital 22 | Virtual assistants play an increasing role in digitising consumer environments and serve as an easy-to-use interface to play content, obtain information, or activate physical objects connected to the Internet of Things. Virtual assistants can act as a single gateway in, for example, a smart home environment and record significant amounts of relevant data on how users | Virtual assistants play an increasing role in digitising consumer environments and serve as an easy-to-use interface to play content, obtain information, or activate <b>products</b> <del>physical objects</del> connected to the Internet of Things. Virtual assistants can act as a single gateway in, for example, a smart home environment and record significant amounts of relevant | <p>Data gathered by virtual assistants is in scope of the DA only if it is generated as a consequence of interaction with the products. It might be misleading if other words (like “physical objects”) are used instead of a product. Striking out “home” indicates that this sentence relates to all kinds of smart services and is not limited to “smart home” ones.</p>                                                                                                                                                                                                                                                                   |

| Reference  | Third compromise proposal                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | Drafting suggestion                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | Comment                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
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|            | interact with products connected to the Internet of Things, including those manufactured by other parties and can replace the use of manufacturer-provided interfaces such as touchscreens or smart phone apps. The user may wish to make available such data with third party manufacturers and enable novel smart home-services.                                                                                                                                                                                                                                                                                     | data on how users interact with products connected to the Internet of Things, including those manufactured by other parties and can replace the use of manufacturer-provided interfaces such as touchscreens or smart phone apps. The user may wish to make available such data with third party manufacturers and enable novel smart home services.                                                                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| Recital 22 | Such virtual assistants should be covered by the data access right provided for in this Regulation also regarding data recorded before the virtual assistant's activation by the wake word and data generated when a user interacts with a product via a virtual assistant provided by an entity other than the manufacturer of the product. However, only the data stemming from the interaction between the user and product through the virtual assistant falls within the scope of this Regulation. Data produced by the virtual assistant unrelated to the use of a product is not the object of this Regulation. | Such virtual assistants should be covered by the data access right provided for in this Regulation <del>also regarding data recorded before the virtual assistant's activation by the wake word and data generated when a user interacts with a product via a virtual assistant provided by an entity other than the manufacturer of the product.</del> However, only the data stemming from the interaction between the user and product through the virtual assistant falls within the scope of this Regulation. Data produced by the virtual assistant unrelated to the use of a product is not the object of this Regulation. | The Data Act should not discourage companies from using privacy preserving technologies in the IoT sector such as storing data on-device and not force companies to collect more data than necessary to provide functionalities of their products and services to users. Therefore, GDPR data minimisation principles should remain intact. The current inclusion of “standby data” or “data recorded before the virtual assistant's activation” in the scope of the regulation is worrying. Virtual assistants are intentionally designed with privacy in mind, whereby the virtual assistants are waiting in standby mode until they detect an activation word. While in standby mode, virtual assistants won't send what users are saying to anyone since this data is processed on device, where it is frequently overwritten.<br>To make this data available to a user it has to be transferred to manufacturer's |

| Reference       | Third compromise proposal                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | Drafting suggestion                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | Comment                                                                                                                                                                                                        |
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|                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | server. This situation is in our opinion contrary to the GDPR data minimization principle and requires serious consideration.                                                                                  |
| Recital 74      | Data processing service providers should be required to offer all assistance and support that is required to make the switching process <b>to a service of a different data processing service provider</b> successful, <del>and</del> effective, <b>and secure</b> including in cooperation with the data processing service provider of the destination service. Data processing service providers should also be required to remove <u>existing</u> obstacles <b>and not impose new</b> for customers wishing to switch, <u>also</u> , to an on-premise system. | Data processing service providers should be required to offer all assistance and support that is required to make the switching process <b>to a service of a different data processing service provider</b> successful, <del>and</del> effective, <b>and secure</b> . In order to facilitate switching between cloud computing services, providers of destination cloud computing services should cooperate in good faith with the provider of source cloud computing services with a view to enabling the timely transfer of necessary items such as data or applications, <del>including in cooperation with the data processing service provider of the destination service</del> . Data processing service providers should also be required to remove <u>existing</u> obstacles <b>and not impose new</b> for customers wishing to switch, <u>also</u> , to an on-premise system. | The amendment makes it clear that the obligation to cooperate is addressed in equal parts to both destination and source providers and corresponds with new article 24a we propose to add.                     |
| Recital 74a new |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | Certain cloud computing services, such as cloud computing services, which have been custom built to facilitate a specific customer's need, or cloud computing services that operate on a trial basis or only supply a testing and evaluation service for business product offerings, should be exempted from the obligations applicable to cloud computing service switching.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | There are certain data processing services that due to their characteristics should be exempted from the DA's obligations. The new recital corresponds with article 26a we propose to be added to the project. |
| Article 2(3)    | 'related service' means a digital service, including software, which is <b>at the time</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | 'related service' means a digital service, including software, which is <del>at the time of the purchase</del> ,                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | The current wording will exclude from the scope of the DA related services which were                                                                                                                          |

| Reference       | Third compromise proposal                                                                                                                                                                                                                                                                                                                                                                     | Drafting suggestion                                                                                                                                                                                                                                                                                                                                                                                                                                 | Comment                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
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|                 | of the purchase, rent or lease agreement <del>incorporated in or</del> inter-connected with a product in such a way that its absence would prevent the product from performing one of its functions;                                                                                                                                                                                          | <del>rent or lease agreement incorporated in or</del> inter-connected with a product in such a way that its absence would prevent the product from performing one of its functions;                                                                                                                                                                                                                                                                 | added <u>after</u> the sale, rent or lease of a product, by means of a software update. Updating of product software is increasingly common and could include the addition of related services. Access to the data generated by such post-sale services would be important. Furthermore, the wording could potentially increase the risk of abuse by data holders, though the deployment of services post-sale, as a means of avoiding data sharing obligations.<br><br>It is therefore worth going back to the original version of the definition.                                                 |
| Article 2(4)    | ‘virtual assistants’ means a software that can process demands, tasks or questions including <b>those</b> based on audio, written input, gestures or motions, and <b>that</b> , based on those demands, tasks or questions, provides access <b>to other</b> <del>their own and third party</del> services or controls <b>connected physical</b> <del>their own and third party</del> devices; | ‘virtual assistants’ means a software that can process demands, tasks or questions including <b>those</b> based on audio, written input, gestures or motions, <del>and that, based on</del> <b>to the extent that</b> those demands, tasks or questions, <del>provides access to other their own and third party services or controls connected physical</del> <b>its own and third party products</b> <del>their own and third party devices</del> | The stated focus of the Data Act is the interactions between virtual assistants and products. Recital 22 states that “only the data stemming from the interaction between the user and product through the virtual assistant falls within the scope of this Regulation. Data produced by the virtual assistant unrelated to the use of a product is not the object of this Regulation.” Including service-to-service interactions in the scope of the Act is inconsistent with this expressly stated focus. Including devices that are not “products” in the scope of the Act is also inconsistent. |
| Article 3.3 new |                                                                                                                                                                                                                                                                                                                                                                                               | <b>3. Where on-device access is technically supported, the manufacturer shall make this means of access</b>                                                                                                                                                                                                                                                                                                                                         | We propose to add this new paragraph to the article 3 as we are of the opinion that without such a provision, manufacturers                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |

| Reference        | Third compromise proposal                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | Drafting suggestion                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | Comment                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
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|                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | also available to third-party service providers in a non-discriminatory manner.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | could use the on-board access themselves but grant only (slow/high latency) off-board access to third parties. The consequence is that innovative use cases requiring high-speed real-time data would be made impossible for competing third parties. To avoid such discrimination, on-device access should be made available where technically supported to third-party service providers.                                                                                                                                                              |
| Article 15(c)(1) | <p>An exceptional need to use data within the meaning of this Chapter shall be <b>limited in time and scope</b> and deemed to exist <b>only</b> in any of the following circumstances:</p> <p>...</p> <p>(c) where the lack of available data prevents the public sector body, <del>or Union institution, agency or body</del> <b>the Commission, the European Central Bank or Union bodies</b> from fulfilling a specific task in the public interest, <b>such as official statistics</b>, that has been explicitly provided by law; and</p> <p>(1) the public sector body <del>or Union institution, agency or body</del> <b>the Commission, the European Central Bank or Union body</b> has exhausted all other means at its</p> | <p>An exceptional need to use data within the meaning of this Chapter shall be <b>limited in time and scope</b> and deemed to exist <b>only</b> in any of the following circumstances:</p> <p>...</p> <p>(c) where the lack of available data prevents the public sector body, <del>or Union institution, agency or body</del> <b>the Commission, the European Central Bank or Union bodies</b> from fulfilling a specific task in the public interest, <b>such as official statistics</b>, that has been explicitly provided by law; and</p> <p>Option 1:</p> <p>(1) the public sector body <del>or Union institution, agency or body</del> <b>the Commission, the European Central Bank or Union body</b> <u>has exhausted all other means at its disposal</u> <del>has been unable to obtain such data by alternative means</del>, including, <b>if relevant but not limited to, by purchasing</b> <u>of the</u></p> | <p>PL - we do not think that the new wording changed the sense of the previous one (purchase is still one of the conditions). Therefore, if it is not possible to introduce a new provision exempting official statistics from this condition, as PL proposed so far, we would suggest the following 2 options of the text modification (<b>marked in yellow</b>). It will make an exemption for all the situations in which there is legal impossibility to pay for data, as it takes place in relation to official statistics, at least in Poland.</p> |

| Reference | Third compromise proposal                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | Drafting suggestion                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | Comment |
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|           | <p><del>disposal has been unable to obtain such data by alternative means, including, but not limited to, by purchasing of the data on the market at by offering market rates or—by relying on existing obligations to make data available, and or the adoption of new legislative measures which could guarantee cannot ensure the timely availability of the data; or</del></p> <p>(2) obtaining the data in line with the procedure laid down in this Chapter would substantively reduce the administrative burden for data holders or other enterprises.</p> | <p>data on the market <del>at</del> <u>by offering</u> market rates or <del>by</del> relying on existing obligations to make data available, <del>and or</del> the adoption of new legislative measures <u>which could guarantee cannot ensure</u> the timely availability of the data; or</p> <p>Option 2:<br/>...</p> <p>(c) where the lack of available data prevents the public sector body, <del>or Union institution, agency or body</del> <u>the Commission, the European Central Bank or Union bodies</u> from fulfilling a specific task in the public interest, <b>such as official statistics</b>, that has been explicitly provided by law; and</p> <p>(1) the public sector body <del>or Union institution, agency or body</del> <u>the Commission, the European Central Bank or Union body</u> <b>has exhausted all other means at its disposal</b> <del>has been unable to obtain such data by alternative means, including, but not limited to, by purchasing of the data on the market at by offering market rates or—by relying on existing obligations to make data available, and or the adoption of new legislative measures which could guarantee cannot ensure the timely availability of the data; or</del></p> <p>(2) obtaining the data in line with the procedure laid down in this Chapter would substantively reduce the administrative burden for data holders or other enterprises.</p> <p><b>(3) obtaining data is necessary for official statistics purposes.</b></p> |         |

| Reference        | Third compromise proposal                                                                                                                                                                                                                                                                                                                                                             | Drafting suggestion                                                                                                                                                                                                                                                                                                                                                                      | Comment                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
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| Article 16.1     | 1. This Chapter shall not affect obligations laid down in Union or national law for the purposes of reporting, complying with information requests or demonstrating or verifying compliance with legal obligations, <del>including in relation to official statistics the obtaining of data for the purpose of compiling official statistics, not based on an exceptional need.</del> | 1. This Chapter shall not affect obligations laid down in Union or national law for the purposes of reporting, complying with information requests or demonstrating or verifying compliance with legal obligations, <b>including in relation to official statistics the obtaining of data for the purpose of compiling official statistics, not based on an exceptional need.</b><br>... | PL - our preference is to come back to the previous compromise version (indicated in the third column in red/yellow). If the new wording is to be maintained – word “compiling” should be changed for “collecting” – to be consistent with the 223/2009 regulation and the last part “not based on an exceptional need” should be removed.                                                                                                                                                                                                                                                                                                                                                                      |
| Article 19.1 (c) | ...<br>(c) <del>erase destroy</del> the data as soon as they are no longer necessary for the stated purpose and inform the data holder <b>without undue delay</b> that the data have been <del>erased destroyed</del> .                                                                                                                                                               | ...<br>(c) <del>erase destroy</del> the data as soon as they are no longer necessary for the stated purpose and inform the data holder <b>without undue delay</b> that the data have been <del>erased destroyed</del> . <b>Official statistics authorities are exempted from the latter obligation</b>                                                                                   | In our opinion it is necessary to include the exception for official statistics. Therefore, the provision should be supplemented by the sentence: “Official statistics authorities are exempted from the latter obligation”. Informing the owner about the destruction of data, as provided for by this obligation, may be difficult to implement by official statistics. The exception of that kind is already included in GDPR (Art. 17.3(d)).<br>With regard to data collected by official statistics, which always uses them for statistical purposes, it should be also clarified whether the re-use of the data can be considered as a purpose compatible with the one for which the data were collected. |

| Reference    | Third compromise proposal                                                                                                    | Drafting suggestion                                                                                                    | Comment                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
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|              |                                                                                                                              |                                                                                                                        | <p>Referring to the TELECOM Presidency suggestions of 11.11.22 on the issue of shared data deletion (Erasure of the data after they fulfil the purpose of the original request (Article 21)) - we consider both options presented by the TELECOM Presidency as not sufficient for statistical needs and are against. If the DA provisions are to be extended in light of any of them (our preference is then for the second one - with 6 months) we consider necessary to add to it the exception for official statistics – to address the specificity of statistical surveys, when sometimes the longer time perspective is needed to adequately analyse phenomena being observed. We propose to use one of the following 2 alternative wordings:</p> <p><i>The time of erasing data may be extended if they are necessary for official statistics purposes./ By way of exception the erasing time may be extended if data are necessary to fulfil tasks of the official statistics.</i></p> |
| Article 20.1 | 1. Data made available to respond to a public emergency pursuant to Article 15, point (a), shall be provided free of charge. | <p>Option 1 :</p> <p>1. Data made available to respond to a public emergency pursuant to Article 15, point (a) and</p> | <p>PL – we maintain our view that it is necessary to include there an exemption for official statistics – otherwise all the other than emergency situations DA provisions will be a dead law for official</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |

| Reference         | Third compromise proposal                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | Drafting suggestion                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | Comment                                                                                                                                                                                                                                                                                                                                                                                                                            |
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|                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | <p>for the official statistics needs, shall be provided free of charge.</p> <p>...</p> <p>Option 2 – relevant to option 2 for Art. 15:</p> <ol style="list-style-type: none"> <li>1. Data made available to respond to a public emergency <b>and to official statistics purposes</b> pursuant to Article 15, point (a), <b>and point (c) (3)</b>, shall be provided free of charge.<br/>(...)</li> </ol>                                                                                                                                                                                                                                    | <p>statistics – as we do not possess legal tools to pay for data, even only in the compensation mode. So if the new point related to statistics (as proposed in option 2) is not to be added to Art. 15, we propose the following modification for Art. 20 (in yellow).</p>                                                                                                                                                        |
| Article 24.1 (a)  | <p>clauses allowing the customer, upon request, to switch to a data processing service offered by another provider of data processing service or to port all data, applications and <b>other</b> digital assets generated directly or indirectly by the customer to an on-premise system, in particular the establishment of a mandatory maximum transition period of 30 calendar days, <b>to be initiated after the maximum notice period referred to in Article 23 point (aa)</b>, during which <b>the service contract remains applicable and</b> the data processing service provider shall:</p> | <p>(clauses allowing the customer, upon request, to switch to a data processing service offered by another provider of data processing service or to port all data, applications and <b>other</b> digital assets generated directly or indirectly by the customer to an on-premise system, <b>without undue delay</b> in particular the establishment of a mandatory <del>maximum transition period of 30 calendar days</del>, <b>to be initiated after the maximum notice period referred to in Article 23 point (aa)</b>, during which <b>the service contract remains applicable and</b> the data processing service provider shall:</p> | <p>The 'one size fits all' approach is not feasible for data processing services. While simple migrations can be finished within a single day, complex projects could last well beyond a few months. Forcing the provider to complete the switching process within a closed timeframe may have dire consequences on the customer's business operations.</p> <p>See also the corresponding amendments we propose in article 24.</p> |
| Article 24.1 (aa) | <p><b><u>(aa) a maximum notice period for termination of the contract by the user, which shall not exceed 2 months;</u></b></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | <p><b><u>(aa) a maximum notice period for termination of the contract by the user, which shall not exceed 2 months, unless otherwise negotiated and agreed between the data processing service provider and the client;</u></b></p>                                                                                                                                                                                                                                                                                                                                                                                                         | <p>The time involved when a customer switches from one cloud service provider to another are highly variable and dependent on numerous factors and choices made by the customer that a cloud service provider does not control or have visibility into, including the</p>                                                                                                                                                          |

| Reference                   | Third compromise proposal                                                                                                                                                                                                                                                                                                                               | Drafting suggestion                                                                                                                                                                                                                                                                                                                                           | Comment                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
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|                             |                                                                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                                                                                               | complexity of a customer's solution, the practical changes required and the necessity of technical assistance. Cloud service providers are not in a position to complete the switching process end-to-end or make any guarantees with respect to the timing of a switch due to these factors. Instead, cloud service providers can simply make tools and services available to assist in data transfers and help customers understand how they can use these tools and services. By ensuring transparency, customers can make informed choices regarding the switching cloud providers. |
| Article 24.1<br>(ac)<br>new |                                                                                                                                                                                                                                                                                                                                                         | (ac) obligation to complete the switching process within the transition period which may not exceed 6 months, provided that the customer acts in good faith. The customer shall retain the right to extend this period, if needed, prior or during the switching process;                                                                                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| Article 24.1.<br>(ba)       | an exhaustive specification of categories of metadata specific to the internal functioning of provider's service that will be exempted from the exportable data under point (b), where a risk of breach of business secrets of the provider exists. These exemptions shall however never impede or delay the porting process as foreseen in Article 23; | an exhaustive specification of categories of metadata specific to the internal functioning of provider's service that will be exempted from the exportable data under point (b), where a risk of breach of trade business secrets of the provider exists. These exemptions shall however never impede or delay the porting process as foreseen in Article 23; | So called business secrets is not a legal notion, better "trade secrets" as stipulated in many provisions before.                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| Article 24.1<br>(c)         | (c) a minimum period for data retrieval of at least 30 calendar days, starting                                                                                                                                                                                                                                                                          | (c) a minimum period for data retrieval of at least 30 calendar days, unless otherwise negotiated                                                                                                                                                                                                                                                             | see our comment to art. 24.1 point aa                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |

| Reference        | Third compromise proposal                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | Drafting suggestion                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               | Comment |
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|                  | after the termination of the transition period that was agreed between the customer and the service provider, in accordance with paragraph 1, point (a) and paragraph 2-;                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | <u>and agreed between the data processing service provider and the client,</u> starting after the termination of the transition period that was agreed between the customer and the service provider, in accordance with paragraph 1, point (a) and paragraph 2-;                                                                                                                                                                                                                                                                                                                                                                                                                                                 |         |
| Article 24.1 (d) | (c) a minimum period for data retrieval of at least 30 calendar days, starting after the termination of the transition period that was agreed between the customer and the service provider, in accordance with paragraph 1, point (a) and paragraph 2-;                                                                                                                                                                                                                                                                                                                                                                                        | (c) a minimum period for data retrieval of at least 30 calendar days, starting after the termination of the transition period that was agreed between the customer and the service provider, in accordance with paragraph 1, point (a) and paragraph 2-;                                                                                                                                                                                                                                                                                                                                                                                                                                                          |         |
| Article 24.2     | 2. <b>The contract as defined in paragraph 1 shall include provisions providing that w</b> Where the mandatory transition period as defined in paragraph 1, points (a) and (c) of this Article is technically unfeasible, the provider of data processing services shall notify the customer within 7 working days after the switching request has been made, duly motivating the technical unfeasibility with a detailed report and indicating an alternative transition period, which may not exceed 6 months. In accordance with paragraph 1 of this Article, full service continuity shall be ensured throughout the alternative transition | <del>2. The contract as defined in paragraph 1 shall include provisions providing that w</del> Where the mandatory transition period as defined in paragraph 1, points (a) and (c) of this Article is technically unfeasible, the provider of data processing services shall notify the customer within 7 working days after the switching request has been made, duly motivating the technical unfeasibility with a detailed report and indicating an alternative transition period, which may not exceed 6 months. In accordance with paragraph 1 of this Article, full service continuity shall be ensured throughout the alternative transition period, against reduced charges referred to in Article 25(2). |         |

| Reference          | Third compromise proposal                                     | Drafting suggestion                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | Comment                                                                                                                                                                                   |
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|                    | period, against reduced charges referred to in Article 25(2). |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                           |
| Article 24a<br>new |                                                               | <p>Article 24a</p> <p>Obligations of the providers of data processing services</p> <p>The provider of destination data processing services shall comply with the following obligations towards the customer:</p> <ul style="list-style-type: none"> <li>a) shall provide information on available procedures for switching and porting to the data processing service when it is a porting destination, including information on available porting methods, formats as well as known restrictions and technical limitations;</li> <li>b) shall cooperate in good faith with the provider of source data processing services to enable the timely transfer of necessary items such as data or software via commonly used, machine-readable format and by means of the open standard data portability interface, unless otherwise agreed by both parties.</li> </ul> | Set of the obligations strengthening customers' position, highlighting that the switching process involves and requires good cooperation from the provider of destination cloud services. |
| Article 26a<br>new |                                                               | <p>Article 26a</p> <p>Exemptions for certain data processing services</p> <p>The obligations set out in this Chapter shall not apply to:</p> <ul style="list-style-type: none"> <li>a) data processing services, which have been custom-built to facilitate a specific customer's need;</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | There are certain data processing services that due to their characteristics should be exempted from the DA's obligations                                                                 |

| Reference    | Third compromise proposal                                                                                                                                                                                                                                                                                                                                                                                                | Drafting suggestion                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | Comment                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
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|              |                                                                                                                                                                                                                                                                                                                                                                                                                          | b) data processing services that operate on a trial basis or only supply a testing and evaluation service for business product offerings.                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| Article 27.1 | Providers of data processing services shall take all reasonable technical, legal and organisational measures, including contractual arrangements, in order to prevent international transfer or governmental access to non-personal data held in the Union where such transfer or access would create a conflict with Union law or the national law of the relevant Member State, without prejudice to paragraph 2 or 3. | Providers of data processing services shall take all <b>necessary</b> reasonable technical, legal and organisational measures, including contractual arrangements, in order to prevent <del>international transfer or</del> governmental access <b>or transfer</b> to non-personal data held in the Union where such transfer or access <del>would create a conflict with</del> <b>constitutes a violation of</b> Union law or the national law of the relevant Member State, without prejudice to paragraph 2 or 3. | <p><b>1) international transfer or governmental access</b></p> <p>It aligns the wording in article with the chapter's title. It also makes it clear that both the access and the transfer are limited to the instances of governmental access and transfer only.</p> <p>The amendments make it clear that Article 27 applies as underlined in the title only to data access requests coming from third country governmental bodies to law enforcements purposes and in consequence it does not aim to curb international data flows. This way the provision would focus on the need to counteract illegal access to EU data by government agencies of third countries and it would not limit the economic and social benefits that can be achieved through the uninterrupted transfer of non-personal data to countries with standards analogous to the EU (e.g. WTO members).</p> <p>If the current wording is deliberate and in consequence the aim of the Presidency is to cover all international non personal</p> |

| Reference | Third compromise proposal | Drafting suggestion | Comment                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
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|           |                           |                     | <p>data transfers by data processing service providers to e.g. business partners outside the EEA, it should be stated clearly in relevant recitals and some additional international data transfer mechanism should be provided for in art. 27 (e.g. standard contractual clauses, binding corporate rules or code of conducts, similar to GDPR).</p> <p>While Article 27.3 only applies in the rare event that a service provider is addressee of a foreign judgment or decision, Article 27.1 in current wording might affect the entire business of a service provider that operates globally. This rule might create an effect similar to that of a data localisation rule since this obligation may well force data processing service providers to completely refrain from transferring data to countries outside the EU and granting access to data from such countries.</p> <p><b>2) all reasonable measures</b></p> <p>In addition we propose to replace “all reasonable measures” with “necessary measure”. The former too broad term and can create uncertainty in its practical implementation. We point out that such</p> |

| Reference    | Third compromise proposal                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       | Drafting suggestion                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | Comment                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
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|              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | <p>amendment was also suggested by the European Data Protection Supervisor and the European Data Protection Board in their Joint Opinion 02/2022.</p> <p><b>3) conflict with Union law or the national law</b></p> <p>This term is puzzling as it would be clearer and more correct to stipulate that the transfer of data to third country or granting access to data from such countries constitutes a violation of the law for which the service provider could be held liable.</p>                                                                                                                                                                                                               |
| Article 27.3 | <p>3. In the absence of such an international agreement, where a provider of data processing services is the addressee of a decision of a court or a tribunal or a decision of an administrative authority of a third country to transfer from or give access to non-personal data within the scope of this Regulation held in the Union and compliance with such a decision would risk putting the addressee in conflict with Union law or with the national law of the relevant Member State, transfer to or access to such data by that third-country authority shall take place only:</p> <p>...</p> <p>The addressee of the decision may ask the opinion of the relevant national body</p> | <p>3. In the absence of such an international agreement, where a provider of data processing services is the addressee of a decision of a court or a tribunal or a decision of an administrative authority of a third country to transfer from or give access to non-personal data within the scope of this Regulation held in the Union and compliance with such a decision would risk putting the addressee in conflict violation with Union law or with the national law of the relevant Member State, transfer to or access to such data by that third-country authority shall take place only:</p> <p>...</p> <p>The addressee of the decision may ask the opinion of the relevant national body or authority competent for international cooperation in legal matters, whether these conditions are met, notably when it</p> | <p>For the conflict/violation see the comment for article 27.1</p> <p>We have also some reservation to the final part of article 27.3. the provision does not specify what the consequences of the opinion of the competent body or authority on whether the conditions for non-personal data access/transfer are fulfilled are and what is its nature (is it binding or not?). In this context, it should be clarified whether the addressee of the request is obliged to deny or grant data access/transfer in case the opinion concludes that the conditions for such access/transfer are not met. If such an opinion is not binding, it should be further clarified whether the addressee of</p> |

| Reference     | Third compromise proposal                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | Drafting suggestion                                                                                                                                                                                                                                                                                                                                                                | Comment                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
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|               | <p>or authority competent for international cooperation in legal matters, whether these conditions are met, notably when it considers that the decision may relate to commercially sensitive data. If the addressee considers that the decision may impinge on national security or defence interests of the Union or its Member States, it shall ask the opinion of the national competent bodies or authorities with the relevant competence, in order to determine whether these conditions are met.</p>                                                                                                                                                | <p>considers that the decision may relate to commercially sensitive data. If the addressee considers that the decision may impinge on national security or defence interests of the Union or its Member States, it shall ask the opinion of the national competent bodies or authorities with the relevant competence, in order to determine whether these conditions are met.</p> | <p>the access/transfer request should justify their decision to deviate from that opinion.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| Article 33.1a | <p>Member States shall take into account the following non-exhaustive and indicative criteria for the imposition of penalties for infringements of this Regulation, where appropriate:</p> <ul style="list-style-type: none"> <li>(a) the nature, gravity, scale and duration of the infringement;</li> <li>(b) any action taken by the infringer to mitigate or remedy the damage caused by the infringement;</li> <li>(c) any previous infringements by the infringer;</li> <li>(d) the financial benefits gained or losses avoided by the infringer due to the infringement, insofar as such benefits or losses can be reliably established;</li> </ul> |                                                                                                                                                                                                                                                                                                                                                                                    | <p>We are looking forward to concrete proposals regarding penalties. Since it has been decided that the legal form of the DA is to be a regulation, the amount of financial penalties should be regulated directly in the act – the good example of the correct legislative practice is the GDPR.</p> <p>The Data Act should establish a level playing field throughout the UE. By its very nature, a regulation should unify the rules rather than exacerbate further fragmentation. Otherwise, fundamental question arises about the rationale for choosing a regulation as a correct legal for the DA and not, for example, a directive.</p> <p>We have observed similar tendency to shift the responsibility for regulating</p> |

| Reference  | Third compromise proposal                                                                    | Drafting suggestion                                                                                  | Comment                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
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|            | (e) any other aggravating or mitigating factors applicable to the circumstances of the case. |                                                                                                      | <p>essential matters onto the Member States while working on the DGA file. Nevertheless, we think that referring to a past defect does not justify committing the same again.</p> <p>The consequences of not regulating the amount of penalties in the DA directly may negatively impact the uniformity of the European single market as so called “forum shopping” effect will no doubt occur. Against this background Poland strongly supports point 3.9 of EDPB-EDPS Joint Opinion 02/2022 on the DA proposal.</p> |
| Article 42 | It shall apply from [12 months after the date of entry into force of this Regulation].       | It shall apply from [12 <del>24</del> months after the date of entry into force of this Regulation]. | The regulation as a whole should be applicable 24 month after entering into force to leave enough time for all parties concerned both public and private to get ready.                                                                                                                                                                                                                                                                                                                                                |

Kindly indicate the Member State you are representing in the Title and when renaming the document. For specifying the relevant provision, please indicate the relevant Article or Recital in 1<sup>st</sup> column and copy the relevant sentence or sentences as they are in the current version of the text in 2<sup>nd</sup> column. For drafting suggestions, please copy the relevant sentence or sentences from a given paragraph or point into the 3<sup>rd</sup> column and add or remove text. **Please do not use track changes**, but **highlight your additions in yellow** or use ~~strikethrough~~ to indicate deletions. You do not need to copy entire paragraphs or points to indicate your changes, copying and modifying the relevant sentences is sufficient. For providing an explanation and reasoning behind your proposal, please take use of 4<sup>th</sup> column.