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MEETING DOCUMENT

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

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

PT comments on second compromise proposal on DA
(document 14019/22)

Reference	Third compromise proposal	Drafting suggestion	Comment
Recital 18	The user of a product should be understood as the legal or natural person, such as a business or consumer, but also a public sector body, which has purchased, rented or leased the product <u>on other than short-term basis</u>. Depending on the legal title under which he uses it, such a user bears the risks and enjoys the benefits of using the connected product and should enjoy also the access to the data it generates. The user should therefore be entitled to derive benefit from data generated by that product and any related service. <u>An owner, renter or lessee should equally be considered as user, including when several entities can be considered as users. In the context of multiple users, each user may contribute in a different manner to the data generation and can have an interest in several forms of use, e.g. fleet management for a leasing company, or mobility solutions for individuals using a car sharing service.</u>		According to Article 2(5), a “user” is “a natural or legal person, including a data subject, that owns, rents or leases a product or receives a related service”. Although a user can be an owner, renter or lessee, the opposite is not necessarily true. Therefore, we consider it relevant to amend the new text proposal (“An owner, renter or lessee should equally be considered as user, including when several entities can be considered as users.”) in accordance with Article 2(5), to ensure consistency.

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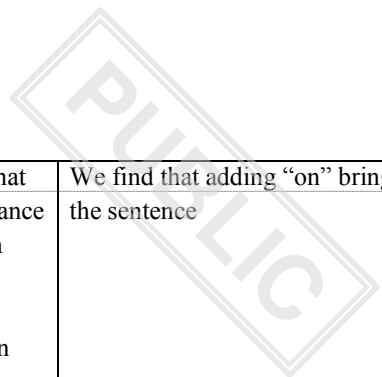
Recital 39	Based on the principle of contractual freedom, the parties should remain free to negotiate the precise conditions for making data available in their contracts, within the framework of the general access rules for making data available. Such terms could include technical and organisational issues, including in relation to data security.	Such terms should include technical and organisational issues, including in relation to data security.	Contracts obey to contractual freedom but in this case, contracts concerning data, in our opinion should include always technical and organisational issues related to data security.
Article 2	(19) ‘interoperability’ means the ability of two or more data spaces or communication networks, systems, products, applications or components to exchange and use data in order to perform their functions;	(19) ‘interoperability’ means the ability of two or more data spaces or communication networks, systems, products, applications or components to exchange and use data without changing the content , in order to perform their functions;	The interoperability definition should be aligned with all legal interoperability definitions. Despite of it, it is crucial to declare the restriction of changing content
Article 2 Definitions		Should include definition of metadata .	This regulation should include definition of metadata even if it refers to the definition existing in another regulation and to dispel any doubts with the definition of “‘readily available data”.

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Article 4	3) Trade secrets shall only be disclosed provided that the data holder and the user take all specific necessary measures are taken in advance prior to the disclosure to preserve the confidentiality of trade secrets in particular with respect to third parties. Where such measures do not suffice, The data holder and the user can shall agree additional measures, such as technical and organisational measures, to preserve the confidentiality of the shared data, in particular in relation to third parties. The data holder shall identify the data which are protected as trade secrets.	Trade secrets shall only be disclosed provided that all specific necessary measures are taken in advance to preserve the confidentiality of trade secrets in particular with respect to third parties. The data holder and the user can agree on measures to preserve the confidentiality of the shared data, in particular in relation to third parties. The data holder shall identify the data which are protected as trade secrets.	We find that adding “on” brings clarity to the sentence
Article 5	Upon request by a user, or by a party acting on behalf of a user, the data holder shall make available the data generated by the use of a product or related service that are accessible to the data holder to a third party, as well as the relevant metadata, without undue delay, free of charge to the user, of the same quality as is available to the data holder, easily, securely, in a structured, commonly used and machine-readable format and, where applicable, continuously and in real-time. This shall be done in accordance with Articles 8 and 9.		Since within the definitions listed, there are references to the definitions of personal data and non-personal data and admitting that the definition of "relevant metadata" it might be useful to include a definition regarding "metadata" and machine-readable format”

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Article 8	1. Where, in business-to-business relations, a data holder is obliged to make data available to a data recipient under Article 5 or under other Union law or national legislation implementing adopted in accordance with Union law, it shall do so under fair, reasonable and nondiscriminatory terms and in a transparent manner in accordance with the provisions of this Chapter and Chapter IV.		We suggest adding “in accordance with ethical guidelines”.
Article 15	An exceptional need to use data within the meaning of this Chapter shall be limited in time and scope and deemed to exist only in any of the following circumstances:		“An exceptional need to use data” and “shall be limited in time and scope” remains very unclear.
Article 15	(...) (c) where the lack of available data prevents the public sector body, or Union institution, agency or body the Commission, the European Central Bank or Union bodies from fulfilling a specific task in the public interest, such as official statistics , that has been explicitly provided by law; and (1) (...)	(....) (c) where the lack of available data prevents the public sector body, or Union institution, agency or body the Commission, the European Central Bank or Union bodies from fulfilling a specific task in the public interest, such as official statistics , that has been explicitly provided by law; and (1) (...)	As previously commented, PT appreciates the reference to official statistics. However, instead of including official statistics as an example in this point (c) we suggest adding a specific point 3 under (c), dedicated to official statistics data needs. This would clearly separate official statistics from the provision in point 1 within which the purchasing of data on the market at market prices is foreseen. Official statistics are a public good, available to

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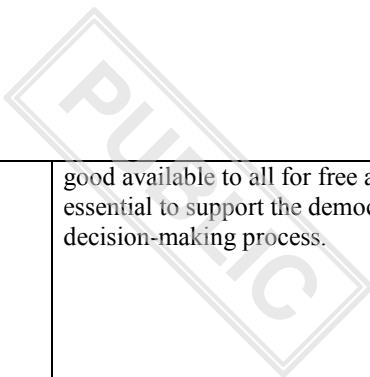
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	(2) obtaining the data in line with the procedure laid down in this Chapter would substantively reduce the administrative burden for data holders or other enterprises.	(2) obtaining the data in line with the procedure laid down in this Chapter would substantively reduce the administrative burden for data holders or other enterprises; or (3) obtaining data is necessary for official statistics purposes.	all for free. The access to private data should not be paid for official statistics purposes, as this access is aimed to produce official statistics for the benefit of all the society. The same principle applies as regards to the access of data from respondents and from administrative records.
Article 18	Without prejudice to specific needs regarding the availability of data defined in sectoral legislation, the data holder may decline or seek the modification of the request without undue delay and not later than within 5 working days following the receipt of a request for the data necessary to respond to a public emergency and without undue delay and not 14019/22 EA/ek 52 TREE.2.B LIMITE EN later than within 15 working days in other cases of exceptional need, on either of the following grounds:	Without prejudice to specific needs regarding the availability of data defined in sectoral legislation, the data holder may decline or seek the modification of the request without undue delay and not later than within 5 working days following the receipt of a request for the data necessary to respond to a public emergency and without undue delay and not 14019/22 EA/ek 52 TREE.2.B LIMITE EN later than within 15 working days in other cases of exceptional need, on either of the following grounds:	Throughout the regulation the expression “without undue delay” is constantly used without mention any period of time. Here the expression is used with reference to 5 working days. If “without undue delay” means 5 working days, which we are not sure then, in this text, should only say “without undue delay” If this expression does not mean 5 working days, in this part the text should address one of the expressions or another but not the two of them as it is now, in our opinion.
Article 20	1. Data made available to respond to a public emergency pursuant to Article 15, point (a), shall be provided free of charge.	1. Data made available to respond to a public emergency and to official statistics purposes pursuant to Article 15, point (a), and point (c) (3) , shall be provided free of charge.	As expressed in our comments to article 15, privately held data required for the production of official statistics should, as a principle, be provided free of charge. This rule applies to other data sources used for statistical purposes, having in mind that official statistics are a public

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			good available to all for free and are essential to support the democratic decision-making process.
Article 22			<i>Can the Commission comment on the following interpretation?</i> A data holder can only be contacted directly by the relevant competent authority of the member state where that data holder is based. Thus, Union bodies & institutions and other MS cannot request data from a data holder, but rather request the competent authority of a MS to relay the request to said data holder. Moreover, we suggest language clarifications in this article to clarify requests <u>for data</u> to a data holder from requests <u>for examination</u> to the competent authority of a MS

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Article 22(3)	Where a public sector body intends to request data from a data holder established in another Member State, it shall first notify the competent authority of that Member State as referred to in Article 31, of that intention and transmit to it the request for examination. This requirement shall also apply to requests by Union institutions, agencies and bodies.		Could you explain the reason why the public sector body is the only one required to notify the competent authority? Art. 14 states “public sector bodies, the Commission, the European Central Bank or a Union body can request data”; and the following paragraph mentions that “the relevant competent authority shall advise the requesting public sector body, the Commission, the European Central Bank or a Union body of the need (...) to cooperate... <i>[which the competent authority can only comply if it has received a request for examination from the Commission, ECB or Union body”]</i> So, is there a lapse in the article? If not, what is the rationale?
Article 22(4)	After having examined the request in the light of the requirements under Article 17, having been notified in accordance with paragraph 3, the relevant competent authority shall may :		This provision means that the relevant competent authority shall respect all of the following conditions or only some of them?

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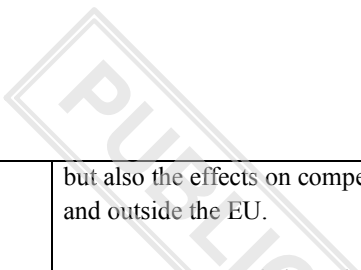
Article 22(4.a)	transmit the request to the data holder;	transmit the request for data to the data holder;	In line with the above comments, would it make sense to clarify “requests for data” from “requests for examination”?
Article 22(4.c)	The requesting public sector body shall take the advice of the relevant competent authority into account before resubmitting the request.	The requesting public sector body shall take the advice of the relevant competent authority into account before resubmitting the request for examination.	Which request? A request for examination? In should be clarified. <i>Mutatis mutandis</i> , the same applies to the following article 22(4.d)
Article 22(4)	(...) <u>The competent authority shall act without undue delay.</u>		Suggestion to set a specific time period instead of “ <i>undue delay</i> ”, to introduce more regulatory certainty and clarity.
Article 27 International access and transfer			We believe it is not clear what the economic consequences are for cloud companies (including users) of potentially limiting effects on the transfer of non-personal data from the EU to third countries, especially in view of the limitation of access to high-end services and price increases for the end consumer,

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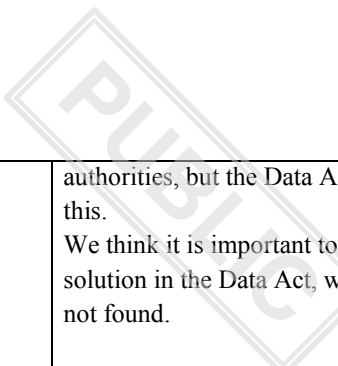
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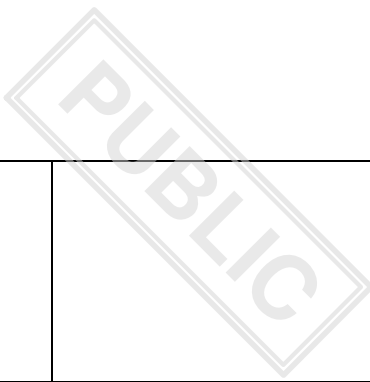


			but also the effects on competition within and outside the EU. - We are concerned about the scope of the wording in paragraph 1, 'all reasonable technical, legal and organisational measures', which we think needs a much clearer definition, also for the purposes of legal certainty, and specifically for data storage companies, which are not necessarily aware of the content of the data they hold. - It is also unclear what effect this Article 27 has in relation to commitments and rules, including on non-discrimination, in GATS and other EU Free Trade Agreements. - We would like to understand better what constitutes "provider of data processing services"? Is it just cloud companies, platform providers, or any company? - It seems to us that a situation is created where companies will be obliged by law in a third country to transfer data to the
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			authorities, but the Data Act prohibits this. We think it is important to have a solution in the Data Act, which we have not found. In line with the above, we would highlight that mentions to international transfers and to the fact that the data is held in the Union seem superfluous to the goal of preventing unlawful third country government access to data. Therefore, a way of making the language less broad would be to remove these references, as the main goal is to prevent unlawful government access. This change would not be insignificant, of course, as it would go a long way towards preventing perceived infringements of trade agreement commitments.
Article 39	39) Based on the principle of contractual freedom, the parties should remain free to negotiate the precise conditions for making data available in their contracts, within the framework of the general access rules for making data available. Such terms could include technical and	39) Based on the principle of contractual freedom, the parties should remain free to negotiate the precise conditions for making data available in their contracts, within the framework of the general access rules for making data available. Such terms should include technical and organisational issues, including in relation to data security.	Although parties establish contracts between themselves, subject to the free will of the parties, it is our understanding that references in those contracts to technical and organizational measures related to data security must be part of these contracts. So instead of "could" the text should state "should".

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	organisational issues, including in relation to data security.		
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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 1st column and copy the relevant sentence or sentences as they are in the current version of the text in 2nd column. For drafting suggestions, please copy the relevant sentence or sentences from a given paragraph or point into the 3rd 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 4th column.