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MEETING DOCUMENT

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

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

IE Member State comments on the second compromise proposal on the Data Act
(document 14019/22)

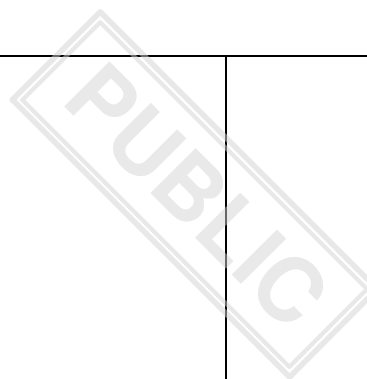
Reference	Third compromise proposal	Drafting suggestion	Comment
			General comments: We wish to maintain our scrutiny reserve on the text. We consider that there is a need to lengthen the period of time before the proposal comes into effect and that further discussion is necessary. • IE still has some remaining concerns as to how the Data Act will complement and overlap with other legislation such as the SMEI and GDPR. • We still have concerns about reasonable compensation and look forward to receipt of the Commission's study on compensation and dispute resolution. Our additional comments and concerns are listed below.

Reference	Third compromise proposal	Drafting suggestion	Comment
Recital 14	Physical products that obtain, generate or collect, by means of their components or operating system , data concerning their performance, use or environment and that are able to communicate that data via a publicly available electronic communications service (often referred to as the Internet of Things) should be covered by this Regulation. Electronic communications services include in particular land-based telephone networks, television cable networks, satellite-based networks and near-field communication networks. Such products may include vehicles, home equipment and consumer goods, medical and health devices equipment and wearables or agricultural and industrial machinery.		IE This recital lists the electronic communications services that enable the connectivity of IoT products covered by the Regulation, it should be clarified that the services named under this recital are examples.
Reference	Third compromise proposal	Drafting suggestion	Comment

Recital 59	This Regulation should not apply to, nor preempt, voluntary arrangements for the exchange of data between private and public entities. Obligations placed on data holders to provide data that are motivated by needs of a non-exceptional nature, notably where the range of data and of data holders is known, including in cases of complying with the targeted information requests under the single market emergency instrument (SMEI) and or where data use can take place on a regular basis, as in the case of reporting obligations and internal market obligations, should not be affected by this Regulation. Requirements to access data to verify compliance with applicable rules, including in cases where public sector bodies assign the task of the verification of compliance to entities other than public sector bodies, should also not be affected by this Regulation.		IE Can it be confirmed if Recital (59) relates to current existing arrangements for sharing data; with its purpose being to protect those arrangements so as not to assign costs/charges to them.
Reference	Third compromise proposal	Drafting suggestion	Comment

Recital 59a	This Regulation complements and is without prejudice to the Union and national laws providing for the access to and enabling to use data for statistical purposes, in particular Regulation (EC) No 223/2009 on European statistics and its related legal acts as well as national legal acts related to official statistics.		IE welcomes amendments to the text to take account some of IE concerns and wants to ensure that the Data Act does not limit the potential ambition for amendments to the Statistics Reg (223/09) to allow access to privately held data for the purpose of official statistics
Reference	Third compromise proposal	Drafting suggestion	Comment
Recital 65	Data made available to public sector bodies and to Union institutions, agencies and bodies on the basis of exceptional need should only be used for the purpose for which they were requested, unless the data holder that made the data available has expressly agreed for the data to be used for other purposes. The data should be destroyed-erased once it is no longer necessary for the purpose stated in the request, unless agreed otherwise, and the data holder should be informed thereof.	'The data should be erased entirely and securely after fulfilling the purpose of the request...'	IE This should also reflect change in Article 21 and we suggest the addition of the following 'The data should be erased entirely and securely after fulfilling the purpose of the request...'
Reference	Third compromise proposal	Drafting suggestion	Comment

Recital 66	When reusing data provided by data holders, public sector bodies and Union institutions, agencies or bodies should respect both existing applicable legislation and contractual obligations to which the data holder is subject. Where the disclosure of trade secrets of the data holder to public sector bodies or to Union institutions, agencies or bodies is strictly necessary to fulfil the purpose for which the data has been requested, confidentiality of such disclosure should be ensured to the data holder.		IE Welcomes protection of trade secrets made implicit in the text. ‘...confidentiality of such disclosure should be ensured to the data holder’ – we would suggest the substitution of ‘ensured’ with ‘guaranteed’ to strengthen the clause.
Reference	Third compromise proposal	Drafting suggestion	Comment
Recital 71(a)	The generic concept ‘data processing service’ by definition covers a very large number of services, with a very broad range of different purposes, functionalities and technical set-ups. As commonly understood by providers and users and in line with broadly used standards, data processing services fall into one or more of the following three data processing service delivery models: IaaS (infrastructure-as-a-service), PaaS (platform-as-a-service) and		IE We welcome the additional text under the data processing services definition, however some further clarity is needed as there still remains an ambiguity of scope.



	SaaS (software-as-a-service). These service delivery models indicate the level and type of computing resources (hardware and/or software) offered by the provider of a given service, relative to the computing resources that remain in control of the user of that service. In a much more detailed categorisation, data processing services can be categorised in a non-exhaustive multiplicity of different ‘service types’, meaning sets of data processing services that share the same primary objective and main functionalities. Examples of such service types could be customer relationship management systems, office suites or cloud-based software suites tailored to a specific sector, such as cloud-based banking software. Typically, services falling under the same service type also share the same data processing service model.		
Reference	Third compromise proposal	Drafting suggestion	Comment

Article 1	This Regulation lays down harmonised rules on making data generated by the use of a product or related service available to the user of that product or service, on the making data available by data holders to data recipients, and on the making data available by data holders to public sector bodies or Union institutions, agencies or bodies, where there is an exceptional need, for the performance of a task carried out in the public interest, on facilitating switching between data processing services, on introducing safeguards against unlawful third party access to non-personal data, and on providing for the development of interoperability standards for data to be accessed, transferred and used.		IE In context of Article 6(1) GDPR, does this present “exceptional need” as a separate matter to “public interest”?
Reference	Third compromise proposal	Drafting suggestion	Comment
Article 1(2)(a)	manufacturers of products and suppliers of related services placed on the market in the Union, irrespective of their place of establishment, and the users the use of such products or related services in the Union;	irrespective of their place of establishment, and the users the use of data generated in relation to the use of such products or related services in the Union	IE This amendment will align Article 1.2(a) with Article 2(2) and 2(3).

Reference	Third compromise proposal	Drafting suggestion	Comment
Article 2(1)	‘data’ means any digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audio-visual recording;		IE The definition for “data” in Article 2(1) is too broad and should be more closely aligned with Recitals 14, 14(a) and 17. Data in its different forms should be distinguished. The exclusion of data that has not undergone any form of processing beyond data collection will avoid the impingement of proprietary information, commercially confidential data, trade secrets and intellectual property rights.
Reference	Third compromise proposal	Drafting suggestion	Comment
Article 2(2)	‘product’ means a tangible, movable item, including where incorporated in an immovable item, that obtains, generates or collects, data concerning its use or environment, and that is able to communicate data directly or indirectly via a publicly available electronic communications service and whose primary function is not neither the storing and processing of data nor is it primarily designed to display or play content, or to record and transmit content;		IE asks if we could get some additional clarity on what is in scope of a product. This should be along the lines of indicating the criteria to fall in scope and facilitating a tech-neutral regulatory environment into the future that allows for the use of data. A clearer definition of “product” would allow manufacturers more certainty around what falls within scope.
Reference	Third compromise proposal	Drafting suggestion	Comment

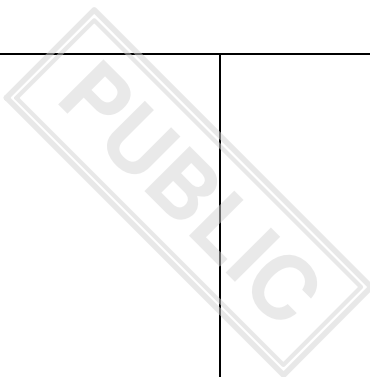
Article 2(3)	‘related service’ means a digital service, including software, which is at the time of the purchase, rent or lease agreement incorporated in or inter-connected with a product in such a way that its absence would prevent the product from performing one of its functions;		IE The current definition of a “related service” may include any service or piece of software that interacts with a connected product. Preferably, it would instead refer to the “intended purpose” of a product. This will align the definition more appropriately with the EU product legislation (such as Regulation 2019/1020 on market surveillance, Directive 2014/53/EU on radio equipment and Regulation 2017/745 on medical devices).
Reference	Third compromise proposal	Drafting suggestion	Comment
Article 2(12a)	‘customer’ means a natural or legal person that has entered into a contractual relationship with a provider of data processing services with the objective of using one or more data processing services.		IE Can we confirm our understanding that this covers all contractual relationships, including those without monetary exchange?
Reference	Third compromise proposal	Drafting suggestion	Comment
Article 2(14)	‘functional equivalence’ means the maintenance of a minimum level of functionality in the environment of a new data processing service after the switching process, to such an extent that, in response to an input action by the user on core elements of the service, the destination service will deliver the same output at the same performance and with the same level of security, operational resilience and		IE More clarity is needed on the scope of the requirements for the originating provider and all requirements must reflect technical feasibility. This provision appears overly burdensome on the originating provider and yet it is not possible for the originating provider to ensure same level of security at the destination provider’s services.

	quality of service as the originating service at the time of termination of the contract;		
Reference	Third compromise proposal	Drafting suggestion	Comment
Article 2(22)		(22) ‘main establishment’ means the place of the data holder’s central administration in the Union.	IE The addition of a definition of a “main establishment” will provide more legal certainty and clarity for enforcement authorities. The multiplication of competent authorities without any formal coordination and consistency mechanisms would otherwise result in legislation under the Data Strategy to cause fragmentation, rather than harmonisation of the EU’s single market.
Reference	Third compromise proposal	Drafting suggestion	Comment
Article 4(1)	Where data cannot be directly accessed by the user from the product or related service , the data holder shall make available to the user the data generated by its the use of a product or related service that are accessible readily available to the data holder, as well as the relevant metadata , without undue delay, free of charge, easily, securely, in a structured, commonly used and machine-readable format and, where applicable, of the same quality as is available to the data holder , continuously and in real-		IE When data cannot be directly accessed, the data holder may need some preparatory work to make the data available. Similarly to how the GDPR recognises technical obstacles to data sharing for access rights, the Data Act should also recognise that it may be technically impossible to share data continuously or in real-time, especially when large volumes of data are concerned.

	time. This shall be done on the basis of a simple request through electronic means where technically feasible.		
Reference	Third compromise proposal	Drafting suggestion	Comment
Article 5(2)	Any undertaking designated as a gatekeeper, pursuant to Article 3 [...] of [Regulation XXX (EU) 2022/1925], shall not be an eligible third party under this Article and therefore shall not: (a) solicit or commercially incentivise a user in any manner, including by providing monetary or any other compensation, to make data available to one of its services that the user has obtained pursuant to a request under Article 4(1); (b) solicit or commercially incentivise a user to request the data holder to make data available to one of its services pursuant to paragraph 1 of this Article;		IE is keen to ensure that there is fairness and proportionality in all markets, including the digital market, that SMEs are supported and that consumers continue to have choice.

	(c) receive data from a user that the user has obtained pursuant to a request under Article 4(1).		
Reference	Third compromise proposal	Drafting suggestion	Comment
Article 6	A third party shall process the data made available to it pursuant to Article 5 only for the purposes and under the conditions agreed with the user, and subject to the rights of the data subject insofar as personal data are concerned, and shall delete the data when they are no longer necessary for the agreed purpose.		IE suggests that guidance would be helpful to indicate instances where the data holder may give data to a user who is not the data subject. IE wishes to ensure that Article 6 does not interfere with the ability of consumers to make independent choices which will help them to achieve their objectives.
Reference	Third compromise proposal	Drafting suggestion	Comment
Article 9	Any compensation agreed between a data holder and a data recipient for making data available in business-to-business relations shall be reasonable.		IE We look forward to receipt of the Commission's study on FRAND compensation and dispute resolution. Our concern is the demand on Competent Authorities in price/dispute resolution.
Reference	Third compromise proposal	Drafting suggestion	Comment
Article 9(2)	Where the data recipient is a micro, small or medium enterprise, as defined in Article 2 of the Annex to Recommendation 2003/361/EC,		IE has concerns that this may raise sector specific impacts for the use of data in relation to the health space. The proposed Data Act enhances portability of certain user-generated data, which can include

	provided those enterprises do not have partner enterprises or linked enterprises as defined in Article 3 of the Annex to Recommendation 2003/361/EC which do not qualify as a micro, small or medium enterprise, any compensation agreed shall not exceed the costs directly related to making the data available to the data recipient and which are attributable to the request. These costs include the costs necessary for data reproduction, dissemination via electronic means and storage, but not of data collection or production. Article 8(3) shall apply accordingly.		health data, but does not provide rules for all health data. The current draft proposal for the EHDS Regulation, Article 3 (8) states that ‘By way of derogation from Article 9 of Regulation [...] [Data Act COM/2022/68 final], the data recipient shall not be required to compensate the data holder for making electronic health data available.’ However, this provision states that where the data recipient is a micro, small or medium enterprise any compensation agreed shall not exceed the costs directly related to making the data available to the data recipient - unless those enterprises do not have partner enterprises or linked enterprises (defined in Article 3 of the Annex to Recommendation 2003/361/EC). This additional provision could affect costs for GPs or smaller healthcare providers linked to larger partners, providing health information for primary use under the EHDS in the long term.
Reference	Third compromise proposal	Drafting suggestion	Comment
Article 11	Where a A data recipient that has, for the purposes of obtaining data, provided inaccurate or incomplete or false information to the data holder, deployed deceptive or coercive		IE What rights do data subjects have in relation to this provision?



	means or abused evident gaps in the technical infrastructure of the data holder designed to protect the data, has used the data made available for unauthorised purposes, including the development of a competing product in the sense of Article 6(2)(e), or has disclosed those data to another party without the data holder's authorisation, the data holder may request the data recipient to, without undue delay: shall without undue delay, unless the data holder or the user instruct otherwise: (a) destroy erase the data made available by the data holder and any copies thereof; (b) end the production, offering, placing on the market or use of goods, derivative data or services produced on the basis of knowledge obtained through such data, or the importation, export or storage of infringing goods for those purposes, and destroy any infringing goods. 2a Where the data recipient has acted in violation of Article 6(2)(a) and 6(2)(b), users shall have	
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	the same rights as data holders under paragraph 2. Paragraph 3 shall apply <i>mutatis mutandis</i>. 3. Paragraph 2, point (b), shall not apply in either of the following cases: (a) use of the data has not caused significant harm to the data holder or the user respectively; or ; (b) it would be disproportionate in light of the interests of the data holder or the user.		
Reference	Third compromise proposal	Drafting suggestion	Comment
Article 11(3)(a)	Paragraph 2, point (b), shall not apply in either of the following cases: (a) use of the data has not caused significant harm to the data holder or the user respectively; or ;		IE asks how will “significant harm” be defined? This is a concept with different meanings in different circumstances so some additional information/clarification would help here.
Reference	Third compromise proposal	Drafting suggestion	Comment
Article 18	<i>Article 18</i> <i>Compliance with requests for data</i>		IE We believe that there should be a reference to GDPR here to provide legal clarity for the data holder.
Reference	Third compromise proposal	Drafting suggestion	Comment

Article 20(3)	Where the data holder claims compensation for making data available in compliance with a request made pursuant to Article 15, points (b) or (c), such compensation shall not exceed the technical and organisational costs incurred to comply with the request including, where necessary, the costs of anonymisation, pseudonymisation and of technical adaptation, plus a reasonable margin. Upon request of the public sector body or the Union institution, agency or Commission, the European Central Bank or Union body requesting the data, the data holder shall provide information on the basis for the calculation of the costs and the reasonable margin.		IE supports an approach that the competent authority overseeing regulation of the level of compensation and dispute resolution will be the competent authority of the member state where the data holder is established as this aligns with the regulatory approach of other digital files.
Reference	Third compromise proposal	Drafting suggestion	Comment
Article 21	According to Article 21, the public sector body, the Commission or Union body can share the data received under Article 14 with national statistical institutes or research organisations (this does not cover the situation of national statistical institutes directly requesting data based on Article 15c). However, a visible discrepancy can be found	1. The data requested (under Article 14) could be shared with research organisations and national statistical institutes (and Eurostat), in accordance with Article 21. The data, after fulfilling the purpose of the request, would then be erased by all entities involved (in accordance with Article 19(1)c)). This option means that the requested data	IE We choose option one as the time limit in option two is too limiting.

	when it comes to the obligation to erase such data. According to Article 19 (c), the requesting body is responsible for erasure of the data after purpose of the request is fulfilled (data are no longer needed, are efficiently used etc). This brings in the question, what happens to the data that are shared with research or national statistical institutes, who is responsible for the erasure of the data, etc. To address such cases, Presidency would like to present two options: 1. The data requested (under Article 14) could be shared with research organisations and national statistical institutes (and Eurostat), in accordance with Article 21. The data, after fulfilling the purpose of the request, would then be erased by all entities involved (in accordance with Article 19(1c)). This option means that the requested data will be available only for the time, when they are used by the requesting public sector body, the Commission or Union body.	will be available only for the time, when they are used by the requesting public sector body, the Commission or Union body.	
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	2. The data requested (under Article 14) could be shared with research organisations and national statistical institutes (and Eurostat) in accordance with Article 21, and they would be allowed to keep them for additional 6 months after the purpose of the request would be fulfilled. The data would be erased afterwards.		
Reference	Third compromise proposal	Drafting suggestion	Comment
Article 29	Open interoperability specifications and European standards for the interoperability of data processing services shall adequately address: (a) the cloud interoperability aspects of transport interoperability, syntactic interoperability, semantic data interoperability, behavioural interoperability and policy interoperability; (b) the cloud data portability aspects of data syntactic portability, data semantic portability and data policy portability;		IE would like to see more clarity around interoperability and how it is expected to work in practice.

	(c) the cloud application aspects of application syntactic portability, application instruction portability, application metadata portability, application behaviour portability and application policy portability.		
Reference	Third compromise proposal	Drafting suggestion	Comment
Article 31	<i>Article 31</i> <i>Competent authorities</i>		IE seeks clarification on whether there is a requirement on data holders to self-declare infringements of the Act?
Reference	Third compromise proposal	Drafting suggestion	Comment
Article 31(1)	Each Member State shall designate one or more competent authorities as responsible for the application and enforcement of this Regulation. Member States may establish one or more new authorities or rely on existing authorities.		IE supports the inclusion of the country-of-origin principle to ensure legal harmonisation across digital files and to avoid legal fragmentation of the internal market. The principle is fundamental in providing businesses with the necessary legal certainty and understanding as to the rules and regulations to which they must adhere. This principle has allowed companies to establish, grow and scale across the EU in an efficient and cost-effective way, especially for micro and small enterprises. This has taken on particular significance in digital sectors because digital business models are typically large in scale but low margin, and country of origin control avoids duplication of regulatory costs which would be inefficient and damaging for such models.

			It is crucial to the continued innovation and growth of these digital services, in particular for smaller service providers in Europe. A decentralised system of enforcement would lead to different practices across the EU.
Reference	Third compromise proposal	Drafting suggestion	Comment
Article 33	Member States shall lay down the rules on penalties applicable to infringements of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive.		IE seeks information on whether there should be a right to an effective judicial remedy for a data subject against data holders? What provision is there for penalties for incorrect processing of non-personal data?
Reference	Third compromise proposal	Drafting suggestion	Comment
Article 35	In order not to hinder the exercise of the right of users to access and use such data in accordance with Article 4 of this Regulation or of the right to share such data with third parties in accordance with Article 5 of this Regulation, [For the purposes of the exercise of the rights provided for in Articles 4 and 5 of this Regulation, the sui generis right provided for in Article 7 of Directive 96/9/EC does shall not apply to databases		IE holds a scrutiny reserve on Article 35.

	containing data when data is obtained from or generated by a product or related service.] OR [The sui generis right provided for in Article 7 of Directive 96/9/EC does shall not apply to databases containing data when data is obtained from or generated by the use of a product or a related service.]		
Reference	Third compromise proposal	Drafting suggestion	Comment
Article 41	By [two years after the date of application of this Regulation], the Commission shall carry out an evaluation of this Regulation and submit a report on its main findings to the European Parliament and to the Council as well as to the European Economic and Social Committee. That evaluation shall assess, in particular: (a) other categories or types of data to be made accessible; (b) the exclusion of certain categories of enterprises as beneficiaries under Article 5;	By [two years after the date of application of this Regulation], the Commission shall carry out an evaluation of this Regulation and submit a report on its main findings to the European Parliament and to the Council as well as to the European Economic and Social Committee. That evaluation shall assess, in particular: (a) other categories or types of data to be made more or less accessible; (b) the exclusion of certain categories of enterprises as beneficiaries under Article 5; (c) other situations to be deemed as exceptional needs for the purpose of	IE We consider that the proposed amendments to the text will make the provision more balanced.

	(c) other situations to be deemed as exceptional needs for the purpose of Article 15; (d) changes in contractual practices of data processing service providers and whether this results in sufficient compliance with Article 24; (e) diminution of charges imposed by data processing service providers for the switching process, in line with the gradual withdrawal of switching charges pursuant to Article 25;. (f) other <u>products or</u> categories of services to which access and use rights or the switching obligations could apply.	Article 15 or for current situations to be removed; (d) changes in contractual practices of data processing service providers and whether this results in sufficient compliance with Article 24; (e) diminution of charges imposed by data processing service providers for the switching process, in line with the gradual withdrawal of switching charges pursuant to Article 25;- (f) other <u>products or</u> categories of services to which access and use rights or the switching obligations could apply. (h) impacts of the proposal on Trade Secrets and other intellectual property rights; (i) th efficacy of the enforcement regime required under Article 31; (j) the price affect of Chapter VI provisions.	
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Reference	Third compromise proposal	Drafting suggestion	Comment
Article 42	This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union. It shall apply from [12 months after the date of entry into force of this Regulation]. The obligation resulting from Article 3(1) shall apply to products and related services placed on the market after [12 months] after the date of application of this Regulation. The provisions of Chapter IV shall apply to contracts concluded after [date of application of this Regulation].	This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union. It shall apply from [18 months after the date of entry into force of this Regulation]. The obligation resulting from Article 3(1) shall apply to products and related services placed on the market after [18 months] after the date of application of this Regulation. The provisions of Chapter IV shall apply to contracts concluded after [date of application of this Regulation].	IE We consider there a need to lengthen the period of time before the proposal comes into effect and that further discussion is necessary. We don't believe that the proposal evolved sufficiently to agree a general approach in lifetime of the current Presidency.

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.

