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MEETING DOCUMENT

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

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

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

Reference	Third compromise proposal	Drafting suggestion	Comment
Article 1(4.c) - NEW		4c. This Regulation is without prejudice to Union and national legal acts providing for the protection of intellectual property, including 2001/29/EC, 2004/48/EC, 2009/24/EC and (EU) 2019/790 of the European Parliament and of the Council.	Recital 13 should be included in the Article itself as well. The proposed wording has an addition (to the wording of Recital 13): Directive 2009/24/EC (on the legal protection of computer programs) is also listed.
Article 6	(f) prevent the user, including through contractual commitments, from making the data it receives available to other parties.	prevent the user, in any way that is incompatible with the purpose of this regulation , including through contractual commitments, from making the data it receives available to other parties.	Such action of a third party would be contrary to the underlying purpose of this proposal, which is to ensure that the users of a product or a related service in the Union can access the data generated by the use of that product or related service and that those users can use the data, including by sharing them with third parties of their choice (rec. 5 and 6). It should be clarified if the provision is aiming to prohibit the third party from passively or actively, in the broadest sense, preventing the user, including through contractual commitments, from making the data it receives available to

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			other parties. In this regard, if the provision is to be understood in a broad sense, we suggest an additional clarification of the text. We also suggest the inclusion of a legal consequence that would stand to additionally protect the user in cases where the third party aims to prevent the user from making the data it receives available to other parties through contractual commitments, such as the annulment of a contractual provision, if the annulled provision is not essential for the existence and validity of the contract. (This proposition is not indicated in the drafting suggestion.)
Article 14	1. Upon request, a data holder shall make data, which could include relevant metadata, available to a public sector body or to a Union institution, agency or body the Commission, the European Central Bank or Union bodies demonstrating an exceptional need to use the data requested in order to carry out their legal competencies statutory duties in the public interest.		<i>We suggest an additional reference to article 15, which lays down the rules for the determination of exceptional need. Such an addition would further clarify that Article 14 and Article 15 do not provide separate legal grounds for the obligation to make data available but are inextricably linked.</i> <i>This could also be done by an addition to Article 15.</i>

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	2. This Chapter shall not apply to small and micro enterprises as defined in Article 2 of the Annex to Recommendation 2003/361/EC.		
Article 15	n 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: (a) where the data requested is necessary to respond to a public emergency; (b) where the data request is limited in time and scope and necessary to prevent a public emergency or to assist the recovery from a public emergency; or (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) the public sector body or Union institution, agency or body the Commission, the European Central Bank or Union body has exhausted all other means at its disposal has been unable to obtain such data by alternative means, including, but not limited to, by		

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	purchaseing 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 (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.		
Article 15(c)(1)	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: ... (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) the public sector body or Union institution, agency or body the Commission, the European Central	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: ... (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 Option 1: (1) the public sector body or Union institution, agency or body the Commission, the European Central Bank or Union body <u>has exhausted all other means at its disposal</u> has been unable to	We suggest the following 2 options of the text modification (marked in yellow). It will make an exemption for all the situations in which there is legal impossibility to pay for data required for the purpose of official statistics (as it is the current situation in Slovenia).

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	Bank or Union body has exhausted all other means at its 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 (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.	obtain such data by alternative means, including, if relevant 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 Option 2: ... (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) the public sector body or Union institution, agency or body the Commission, the European Central Bank or Union body has exhausted all other means at its 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 (2) obtaining the data in line with the procedure laid down in this Chapter would substantively	

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		reduce the administrative burden for data holders or other enterprises. (3) obtaining data is necessary for official statistics purposes.	
Article 16.1	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, including in relation to official statistics the obtaining of data for the purpose of compiling official statistics, not based on an exceptional need.	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, including in relation to official statistics the obtaining of data for the purpose of compiling official statistics, not based on an exceptional need.	We would prefer the previous compromise version (indicated in a 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)	... (c) erase destroy the data as soon as they are no longer necessary for the stated purpose and inform the data holder without undue delay that the data have been erased destroyed.	... (c) erase destroy the data as soon as they are no longer necessary for the stated purpose and inform the data holder without undue delay that the data have been erased destroyed. Official statistics authorities are exempted from the latter obligation	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 erasure of data, as provided for by this obligation, may be difficult to implement or even impossible by official statistics. The exception of that kind is already included in GDPR (Art. 17.3(d)). With regard to data collected by official statistics, which always uses them for statistical purposes, it should be also

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			clarified whether the re-use of the data can be considered as a purpose compatible with the one for which the data were collected.
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. ...	Option 1 : 1. Data made available to respond to a public emergency pursuant to Article 15, point (a) and for the official statistics needs, shall be provided free of charge. ... Option 2 – relevant to option 2 for Art. 15: 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. (...)	We believe it is necessary to include an exemption for official statistics, as a public sector body fulfilling a specific task in the public interest. 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).
Chapter V			The subject matter of Chapter V of the Draft Regulation represents an additional limitation of the rights of makers of databases, because holders of rights in these databases will not be able to exercise their rights in the cases specified in this Chapter V (that is, in these cases rightholders will not be able to prohibit the use of their database). Contrary to the Draft Regulation now they can prohibit such use (as defined in Chapter V).

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			Since the related right of the maker of databases will be further limited, any such limitation must be defined in law and must be defined narrowly and only to the extent that absolutely necessary (in accordance with the three-step test set forth in the international treaties and Directive 2001/29/EC, the so-called InfoSoc directive). Since Chapter V of the Draft Regulation restricts the rights of the holders of related right of the maker of databases (sui generis right), Article 9 of Directive 96/9/EC is amended, which should be stated in this Draft Regulation. Therefore, we would like an explanation of the relationship between Chapter V of the Draft Regulation in relation to Article 9 of Directive 96/9/EC on the legal protection of databases.
Art 35			General comment: The provision of Article 35 of the Draft Regulation represents a limitation of the scope of Directive 96/9/EC and thus also limits the rights of makers of database, as certain databases will be exempt from protection. Therefore, this Article 35 itself amends Directive 96/9/EC.

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Art 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 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.	We support the first of the two options, because it limits the right of the maker of databases to a lesser extent (only in cases of Articles 4 and 5 of this Data Act).

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