Council of the European Union
General Secretariat

Interinstitutional files:
2020/0340(COD)

Brussels, 03 February 2021

WK 1608/2021 INIT

LIMITE

TELECOM

WORKING PAPER

This is a paper intended for a specific community of recipients. Handling and further distribution are under the sole responsibility of community members.

WORKING DOCUMENT

From:	General Secretariat of the Council
To:	Working Party on Telecommunications and Information Society
Subject:	Data Governance Act - questions and clarifications on Chapters V-VIII : Presidency non-paper

Delegations will find in annex a Presidency non-paper on Data Governace Act - questions and clarifications on Chapters V-VIII.

Presidency non-paper
Data Governance Act - questions and clarifications on Chapters V - VIII

CHAPTER V - COMPETENT AUTHORITIES AND PROCEDURAL PROVISIONS

Article 23 Requirements relating to competent authorities

1) How will competent bodies interact among each other in case of a complaint requiring administrative actions carried out by different competent bodies?
   Answer: Such problem of coordination existed before the DGA and should take the forms of cooperation established at national level.
2) We would like to highlight the need for flexibility to ensure that the DGA is compatible with existing administrative structures and measures to facilitate access to data. Therefore, it is important that Member States can designate different competent authorities for different sectors, to ensure that the designated authority have the necessary, and sector-specific knowledge to carry out the tasks assigned to them.
   Answer: Yes, but bearing in mind that data sharing intermediaries under Chapter III and data altruism organisations could be active in many sectors. Regulating data sharing intermediaries will require knowledge of competition policy at minimum.
3) Art. 23 (5) states that Member States shall have at their disposal "adequate financial and human resources to carry out the tasks as-signed to them […]". What is meant by "adequate financial resources" and how Member States could live up to this requirement?
   Answer: The adequacy of resourcing will depend on workload, which is hard to predict and will vary from country to country.
4) How is art. 23 (6) to be understood in practical terms? What kind of information could be considered "necessary" for the Commission or other Member States' competent authorities and how is confidentiality regarding this information to be ensured?
   Answer: Such information is necessary for a monitoring of the proper enforcement of the Regulation and for preparation of potential future amendments. The level of detail required shall be discussed in the EDIB. The Board should be the main channel of informing the Commission and other MS on how the regime functions in practice. The Commission has experience in receiving confidential information and will ensure it.
5) Given that the Act calls for the establishment of competent authorities for three different purposes, we would be interested in knowing whether one authority may be designated to carry out the tasks set out in the following: Article 7 – support public bodies in access to re-use of data; Article 12 - carry out tasks relevant to notification framework; and Article 20 – responsible for register of data altruism organisations. Article 23 suggests a number of competent authorities are possible.
   Answer: The choice is for each country. Article 7 bodies will need to have specific expertise present on how public sector can allow more types of data analyses on the basis of public sector data which may require a data analytics expertise. Article 12 and 20 bodies need to have expertise in monitoring market participants and respect of conditions for their operation.

Article 24 Right to lodge a complaint

6) What is the relation of the complaints referred to in Art. 24 par. 1 of the DGA to complaints submitted under the provisions of Regulation 2016/679, also in the context of Art. 20 par. 3 of the project (regarding the cooperation of competent authorities with data protection authorities)? Should it not be clear from the provisions of the DGA whether the authority competent to deal with these complaints is either a data protection authority or a competent authority (or other body)?

Of what infringements can an appeal be made in Article 24? Of breaching Arts 11, 18 and 19? What is the scope of the right to complain? Does it only pertain to issues related to this regulation? It is currently not limited to complaints that are only based on this regulation
Answer: Article 24 applies to complaints alleging a violation of the DGA. It does not pertain to violations of other legal regimes.

7) .Art. 24 (1) - Since the complaint can be lodged with the competent authority, does this mean that a complaint can only be lodged against notified providers of data sharing services and registered data altruism organisations? How could the data subject defend themselves against breaches of other actors?
Answer: Indeed, the complaint can only be brought on the grounds of the DGA. A data breach under GDPR has to be remedied by the regime provided for by the GDPR.

CHAPTER VI - EUROPEAN DATA INNOVATION BOARD

Article 26 European Data Innovation Board

8) How are the representatives of competent authorities in specific sectors chosen? What are the specific sectors in this context?
Art. 26 states that "relevant data spaces" will be represented in the Board. What would be a "relevant" data space in this context? Also, how would the data spaces be represented, e.g. if the data space is a consortium consisting of several different actors from various member-states? We would like to understand the role of the Board in relation to the Data Spaces Support Centre.
Answer: The DGA seeks to ensure that the EDIB communicates with other relevant bodies. This concerns in particular the standardisation tasks (Art 27(c) and (d)) and in that context, the necessary link with sector specific initiatives. Insofar as there are common European data spaces in place that can legitimately speak on behalf of a sector, representatives of such data spaces should be invited. Where this is not the case or where other relevant committees are set up, they should be invited. The eHealth network is one example. The ITS Advisory Group is another in the context of intelligent transport systems.
The Support Centre will be a service contract procured by the Commission under the Digital Europe Programme. It will both be a service to the consortia setting up sector specific data spaces, offering interoperability solutions, and a support to the EC in preparation of the meetings of the European Data Innovation Board.

9) Board´s competences (or lack of it) and perceived functioning are not sufficiently specified in the Regulation. Will the Board adopt any resolutions, make decisions or prepare guidance? If so, how will be these procedures regulated? in other words, how will be the advisory function of the Board carried out (incl. its decisions/advisory competences)?
Answer: As a Commission expert group, the Board can only provide non-binding advice to the Commission. That being said, its deliberations and documents can be made public and thus inform industry stakeholders and the wider public, e.g. on standardisation questions.

10) Please, clarify the platform/channel through which the cooperation of competent authorities (also as per 13(6) and 21(6)) is supposed to take place. What is the process and periods for responding? Will the cooperation be happening via EDIB as suggested by art. 27(b)?
Answer: There is no specific platform or channel to be created nor a procedural regime. The principle of sincere cooperation of Article 4(3) TEU applies. The EDIB will be the forum to discuss structural questions on the application of the DGA, but not allow for the collaboration in individual cases. If there is a sufficient number of cross-border cases that challenges this manner of collaboration, either the EDIB shall be the forum to agree on more detailed rules (to be then issued in the form of Commission guidance) or a future revision of the regime shall take this into account.

Article 27 Tasks of the Board

1) How will the work of the Board be driven forward, ensuring that it makes a real impact on the data economy? How can the Board contribute to timely and relevant input to standardization work and implementation of the regulation? Based on art. 27(a), how shall the Board advise and assist the Commission in "developing a consistent practice of public sector bodies and competent bodies" within Member States?
   Regarding standardisation, members of the Board (Member State experts, data space and industry representatives) would identify the main areas where standardisation is necessary with the lead of governmental authority, in order to avoid the abundance of exclusionary proprietary standards. Interoperability standards are essential to realise the potential of cross-sectoral data sharing. As far as the consistent practice of public sector bodies is concerned, it will be developed through the participation and feedback of the Member States.
2) Art. 27 (1) - What kind of cooperation the Board should have with sectoral bodies, networks or expert groups, or other cross-sectoral organizations dealing with re-use of data (concrete example)? What is meant by 'consistent practice' that the Commission develops in relation to processing request for the re-use?
   Sectoral bodies, networks and expert groups would have the opportunity to express their interest in participating as members in the work of the Board through a call for interest that will be launched ahead of the formal establishment of the Board through a Commission decision. "Consistent practice" could take up the form of guidelines for Member States, based on their feedback and best practices through the application of the Regulation.
   See also the reply to a related question above.
3) Will there be further guidelines etc. published on the basis of the advice received from the board?
   The input from the work of the Board should on one hand provide a basis for standardisation requests towards the European standardisation organisations, on the other hand give assistance for developing consistent practice in the areas covered by the Regulation, which may indeed lead to the issuing of guidelines.

CHAPTER VII - COMMITTEE AND DELEGATION

Article 28 Exercise of the delegation

4) What is the purpose and background for Article 28 and the related Art. 5 (11)? What would be in scope?
   Article 5(11) provides a basis for future legislation to determine the categories of "highly sensitive non-personal data" where necessary, and for delegated acts to set out specific conditions on third country transfers for such data. Article 28 contains the compulsory provisions on the process of the exercise of delegation. The scope would be determined by the EU legislation defining the categories of "highly sensitive" data (e.g. the future European Heath Data Space legislation might provide for such categories of highly sensitive non-personal health data).
5) Is the intention of the delegated acts that the Commission will set out more specific conditions for different sectors or data categories separately, or that it will set out general conditions for all data defined as "highly sensitive" in sector-specific regulation?
   The delegated acts on the conditions for the third country transfers of "highly sensitive non-personal data" would determine the conditions specifically for that category of data that is defined by the sectoral legislation. In different sectors, different data could qualify as "highly sensitive" and they would need specific conditions regarding transfers, which might differ from the conditions that would be appropriate for other sectoral "highly sensitive" data.

6) What is the expected timeline for adopting delegated acts?
As the delegated acts foreseen in Article 5(11) would be dependent on other sectoral EU legislation (that determine the definition of "highly sensitive non-personal data" in the relevant context/sector), the timeline for the adoption of these delegated acts would be determined by the outcome and adoption of the mandating sectoral legislation.

Article 29 Committee procedure

7) In Recital 15 "appropriate safeguards should be considered to exist when in that third-country there are equivalent measures in place which ensure that non-personal data benefits from a level of protection similar to that applicable by means of Union or national law in particular as regards the protection of trade secrets and the protection of intellectual property rights. To that end, the Commission may adopt implementing acts that declare that a third country provides a level of protection that is essentially equivalent to those provided by Union or national law." What level of requirements would be assessed against the level of protection in a third country, i.e. is it possible to maintain a higher level of protection requirement in Member State? It is necessary to examine, in particular with regard to the Art., how the Commission could compare the national systems of different Member States when making equivalence decisions, unless the Commission intends to lay down minimum criteria at EU level, in which case the basic level of all countries would be the same.
The level of requirements are set by the level of protection harmonised on the EU level. Both trade secrets protection and intellectual property rights (copyright and related rights being of most relevance in this context) are highly harmonised within the Union, through a significantly developed acquis, which provides that the level of protection in the Member States are to be regarded as "essentially equivalent" to each other. This level of protection however is often higher than that ensured by the minimum rules laid down in international agreements (e.g. TRIPS, Berne Convention) that third countries are parties of (e.g. in terms of term of protection, exceptions, exclusive rights, etc.)

CHAPTER VIII - FINAL PROVISIONS

Article 30 International access

8) The international access provisions describe a procedure for non-personal data. We assume that as far as personal data is concerned, GDPR will be applicable (see Recital 3 of DGA) and the international transfer of personal data will take place according to Chapter V of GDPR. In this regard, what will be the applicable procedure in case of mixed data (in fact, for most of the cases of data transfers)?
Answer: Indeed, the GDPR applies to all datasets containing personal data. If a dataset that is shared through a data sharing service provider or a data altruism organisation also contains non-personal data, this does not change the nature of the dataset as containing personal data. "Mixed datasets" are thus not a third category.
9) Is the chapter for final provisions the right place for Art. 30? Should there be an individual chapter concerning third country questions (delegated regulations in Art. 5, Art. 30)?
Answer: We consider that the questions on international transfer of public sector data should be dealt with in Chapter II. Article 30 covers the cross-cutting issue of public sector bodies, re-users, data sharing service providers and data altruism organisations.
10) Is it correct that art. 30(2) and (3) only refer to cases in which a data transfer to a third country leads to a conflict with EU and member states' law? So if there is no conflict, then data flows are not restricted by this regulation?
Answer: This is correct.

11) Would 30(3)c mean that if data is transferred to a third country by a party in Member State A, but the data originates from Member State B, the authorities in Member State A have to check whether the data transfer is in conflict with the law of Member State B?
Answer: Article 30(3)(c) would mean that an access request from a third country should only be executed if the third country's legal system empowers its authorities and courts to adjust such requests in order to take into account in general the law of the jurisdiction from which the data are sought. In the case of the example, it would depend on what "originate" means in terms of fundamental interests on not disclosing the data to a governmental authority to be linked to the nature of the data (e.g. trade secrets of a company established in country B) or to the company in the country that is agreeing to transfer the data and the obligations such company is under, also with the originator of the data.

12) The comparison was made with the international regime of the GDPR, but in this article there seems to be no obligation for the Commission to judge whether a foreign legal system adequately protects EU rights, as is the case with adequacy decisions for the GDPR. Is this correct? If so, does this mean that the Member States have to judge the legal systems of third countries individually?
Answer: Yes, the design of Article 30 is different from Article 5(9). Article 30(3) is inspired by the approach taken in COM(2018)225 (E-evidence proposal) on the conditions under which EU law enforcement authorities would issue orders to request preservation and production of digital assets held in third countries, the judicial safeguards and the respect for fundamental rights and fundamental interests of a third country.

Article 31 - Penalties

13) Since the competent authorities serve to monitor compliance of providers of data sharing services and data altruism organisations, is it correct to assume that they should be also the ones who apply the penalties?
Indeed, competent authorities could be empowered to apply the penalties.

Article 35 - Entry into force and application

14) The 12-month DGA application period seems too short, what was the decisive factor in choosing the present date?
12 months would be appropriate given the pace of the development of the data market and the relevant technologies, the emergence of national schemes for data, and the urgency to act in these domains.