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MEETING DOCUMENT

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

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

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

Reference	Third Second compromise proposal	Drafting suggestion	Comment
Recital 15	In contrast, certain products that are primarily designed to display or play content, such as textual or audiovisual, often covered by intellectual property rights, or to record and transmit such content, amongst others for the use by an online service should not be covered by this Regulation. Such products include, for example, personal computers, servers, tablets and smart phones, smart televisions and speakers, cameras, webcams, sound recording systems and text scanners. Additionally, products primarily designed to process and store data, such as personal computers, servers, tablets and smart phones, should not fall in scope of this Regulation. They require human input to produce various forms of content, such as text documents, sound files, video files, games, digital maps. On the other hand, smart watches have a strong element of collection of data on human body indicators or movements and should thus be considered covered by this Regulation as far as they qualify as the definition of “product” in particular due to the ability to communicate data via a publicly available electronic communication service. Given the share of investment in providing data-related functions in relation to other functions of these categories of products, the obligation to allow access or the sharing of data would be disproportionate in the light of the objective of this Regulation.	In contrast, certain products that are primarily designed to display or play content, such as textual or audiovisual, often covered by intellectual property rights, or to record and transmit such content, amongst others for the use by an online service should not be covered by this Regulation. Such products include, for example, personal computers, industrial PCs and programmable logical controllers, servers, tablets and smart phones, smart televisions and speakers, cameras, webcams, sound recording systems and text scanners, printers, IP phones, videoconferencing endpoints, headsets, smartwatches, video game consoles, video surveillance cameras, ATMs, point-of-sale terminals, bank cards and digital wallets. Additionally, products primarily designed to process and store data, such as personal computers, servers, tablets and smart phones, should not fall in scope of this Regulation. They require human input to produce various forms of content, such as text documents, sound files, video files, games, digital maps. On the other hand, smart watches have a strong element of collection of data on human body indicators or movements and should thus be considered covered by this Regulation as far as they qualify as the definition of “product” in particular due to the ability to communicate data via a publicly available electronic communication service. Given the share of investment in providing data-related functions in relation to other functions of these categories of products, the obligation to allow access or the sharing of data would be disproportionate in the light of the objective of this Regulation.	SK welcomes the clarifications made so far in the Recital 15 & Article 2 (2). However, SK would welcome a future proof approach, since devices might change rapidly in the following years in their characteristics/functions/requirements for human input and an exhaustive list based on a “functional” definition of a product as proposed now could become outdated by that time. As our proposed additions show, there are still devices requiring human input not covered by the 2nd compromise. SK would therefore propose to explore a different way of defining products, for example through “data processing” as mentioned by the EC at the WP to remedy these issues.

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Recital 23	Before concluding a contract for the purchase, rent, or lease of a product or the provision of a related service, the data holder should provide clear and sufficient information should be provided to the user on how the data generated may be accessed. This obligation provides transparency over the data generated and enhances the easy access for the user...		SK suggests a clear specification, that the manufacturer is primary responsible for providing the information. In case, the manufacturer is not a direct seller, or in case of renting or leasing the product, the manufacturer can authorise distributor, renter or lessor to do it.
Recital 79	Standardisation and semantic interoperability should play a key role to provide technical solutions to ensure interoperability. within the common European data spaces, which are purpose- or sector-specific or cross-sectoral interoperable frameworks of common standards and practices to share or jointly process data for, inter alia, development of new products and services, scientific research or civil society initiatives. This Regulation lays down certain essential requirements for interoperability. Operators within the data spaces, which are entities facilitating or engaging in data sharing within the common European data spaces, including data holders, should comply with these requirements in as far as elements under their control are concerned. Compliance with these rules can occur by adhering to the requirements laid down, or by adapting to already existing standards via a presumption of conformity...	Standardisation and semantic interoperability should play a key role to provide technical solutions to ensure interoperability preferably and given priority to within the common European data spaces, which are purpose- or sector-specific or cross-sectoral interoperable frameworks of common standards and practices to share or jointly process data for, inter alia, development of new products and services, scientific research or civil society initiatives, however standardisation and semantic interoperability should be supported and taken into account in regards to all relevant data outside the European data spaces. This Regulation lays down certain essential requirements for interoperability. Operators within the data spaces, which are entities facilitating or engaging in data sharing not only within the common European data spaces, including data holders, should comply with these requirements <u>in as far as elements under their control are concerned</u> . Compliance with these rules can occur by adhering to the requirements laid down, or by adapting to already existing standards via a presumption of conformity...	In order to ensure (1) faster interoperability (2) lower switching costs (3) supporting use of other EU regulations (i.e. High value datasets as defined in Open data and PSI Directive or Single digital gateway) we consider it necessary not to limit the scope only to data present in the European data spaces. Based on experience with the implementation of the above mentioned regulations, the result of smooth data transition/exchange relies on transparent and understandable communication – and the lack of it brings a lot of work to be done (for example SDG's working subgroups on Data mapping and interoperability: Evidence mapping subgroup and Standardisation of data models subgroup).
Article 1 (2)	This Regulation applies to:		It is not yet clear from the Regulation to what extent it will have an impact on the regulation of the legal relationships concerning law enforcement authorities and the protection of

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			personal data, which are regulated by the Directive of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA. In relation to definitions, it needs to be clarified whether law enforcement authorities are also considered public sector bodies. If so, it will then be necessary to specify the possible relationship of the new instrument with the legislative package on electronic evidence.
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;		SK would welcome an alternative definition of a “product” based on the data processing capabilities/characteristics as indicated by the European Commission during the productive joint workshop ahead of the WP on 15th November.
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	‘related service’ means a digital service other than an electronic communications 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	During the consultations, stakeholders recommended that the Data Act should clearly declare that a related service is not a publicly available electronic communication service (ECS) through which collected data is transmitted from a device, and that the

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	prevent the product from performing one of its functions;	product from performing one of its core functions as guaranteed under the sales, rent or lease agreement;	regulation does not apply to data, including any operational data, that is generated or stored on or from a device within or for the purpose of transmitting a message (device-generated data) and connecting through an ECS. This way, the proposed directive shall not provide an opportunity to circumvent pre-existing rules and statutory safeguards.
Article 17 (2)	A request for data made pursuant to paragraph 1 of this Article shall: ... (e) inform the data holder of the penalties that shall be imposed pursuant to Article 33 by a competent authority referred to in Article 31 in the event of non-compliance with the request; ...	A request for data made pursuant to paragraph 1 of this Article shall: ... (e) inform the data holder of the penalties that shall be imposed pursuant to Article 33 by a competent authority referred to in Article 31 in the event of non-compliance with the request; (ea) reviewed by the independent authority without undue delay after submitting the request; ...	Slovakia emphasizes that several access of data regimes already exists under the EU law (including Article 15 of ePrivacy directive). However, access to data and metadata by public authorities is strictly limited in the context of decisions of the Court of Justice of the EU (see e.g. ECLI:EU:C:2014:238 Digital Rights Ireland; ECLI:EU:C:2020:790 Privacy International or ECLI:EU:C:2020:791 La Quadrature de Net). Although the decisions in question relate to telecommunication operators and access of telecommunication data by public authorities (including law enforcement and security bodies), we are convinced that these standards shall be upheld in relation to the Data Act. This is mainly due to the fact, that the judicial decisions deal with the processing of data including metadata, that are explicitly acknowledge as being in the scope of the Chapter V. Therefore, the Data Act shall at least contain following safeguards against misuse of data accessed by public authorities: clear purpose; subsidiarity; independent oversight

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			(ECLI:EU:C:2014:238 Digital Rights Ireland, paras 61-63.). We are of the opinion, that at least independent oversight over data request is not ensured in the current text of the proposal thus Slovakia proposes review of requests by independent body in timely manner.
Article 28 (1)	Operators of within data spaces shall comply with...		Data Act should foresee the further development of EU data environment and support it by not limiting the support only to European data spaces, but having the connection to the existing data legislation in mind (i.e. High value datasets as defined in Open data and PSI Directive or Single digital gateway).
Article 31 (3)	3. Member States shall ensure that the respective tasks and powers of the competent authorities designated pursuant to paragraph 1 of this Article are clearly defined and include: ... (g) ensuring the online public availability of requests for access to data made by public sector bodies in the case of public emergencies under Chapter V and promoting voluntary data sharing agreements between public sector bodies and data holders; ...	3. Member States shall ensure that the respective tasks and powers of the competent authorities designated pursuant to paragraph 1 of this Article are clearly defined and include: ... (g) ensuring the online public availability of requests for access to data made by public sector bodies in the case of public emergencies under Chapter V and promoting voluntary data sharing agreements between public sector bodies and data holders; (ga) conduct investigations on the use of data accessed by public sector bodies in the case of public emergencies under Chapter V; ...	Slovakia believes that such sensitive issue as business to government data sharing requests may benefit from additional safeguards against misuse. We are proposing ex-ante auditing (investigatory) powers of competent authority specifically aimed to foster accountability and oversight for requests for access to data made by public sector bodies in the case of public emergencies under Chapter V. Specifics of such mechanisms may be discussed and specified in further negotiations.
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		SK would like to thank EC & CZ PRES for the chosen approach where for the purposes of exercising the rights set out in Articles 4

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	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.]		and 5 of this Directive (the right to access and use the data and the right of the user to share the data with 3rd parties), the sui generis right provided for in Article 7 of Directive 96/9/EC shall not apply where the data are obtained or generated from a product or related service. Both proposed alternatives contain a "non-application" of the sui generis right, which is key for us (and for the future development of compromise proposals); there is no fundamental problem with either alternative from our point of view. However, the substantive scope of the two alternatives is significantly different. The first alternative concerns only situations for the exercise of user rights under Articles 4 and 5 of the Regulation (and of course this scope may still change after the changes to Articles 4 and 5). The second alternative may be unnecessarily wide-ranging as there is no narrowly defined purpose. The extent to which this right is interfered with (or not applied) is therefore very different. The scope also depends very much on the final wording of the definition of 'product and related service'. For this reason, the first alternative seems to us for the time being to be clearer in scope and not unduly far-reaching. However, we do not entirely reject the second alternative either, if its actual scope is clarified (and possibly justifying the greater impact of 'non-application'). We also make the above point in light of the absence of changes in the

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			related recitals that would clarify the scope issue.

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