



Council of the European Union
General Secretariat

Brussels, 23 November 2022

WK 16252/2022 INIT

LIMITE

TELECOM

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

MEETING DOCUMENT

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

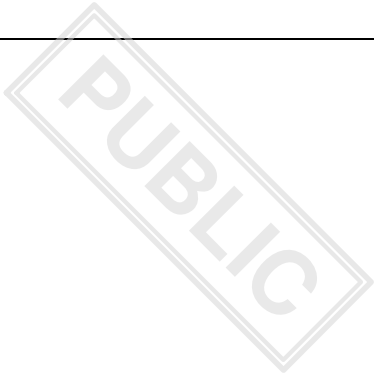
Delegations will find in the annex the EE comments on the 2nd compromise text on Data Act Regulation.

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

The Reference	Third compromise proposal	Drafting suggestion	Comment
			As a general comment – we would like to highlight the scope of Chapter V as the most important unsolved issue for us.
Recital 58			We do not support dividing statistics into official (non-exceptional needs) statistics and exceptional needs statistics as stipulated in recital 58 and Article 15 point c as well as in Article 16 (1). The term “official statistics” should entail both the regular statistics and also exceptional needs statistics. As the revision of the legal framework for European Statistics has already begun, we propose not to regulate the domain of statistics (official or any other kind produced by the ESS) in the Data Act, but rather concentrate on the relevant issues in the Regulation for European Statistics and the national legislation. Thus, we suggest to delete any references to the exceptional needs statistics in the text in recital 58.
Article 4			We are concerned about the security risks which may arise with the release of data, including metadata. Access to all generated data or their sharing can clearly be a security risk. Sharing metadata might also have negative implications on trade secret protection.

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; (c) receive data from a user that the user has obtained pursuant to a request under Article 4(1).	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; (c) receive data from a user that the user has obtained pursuant to a request under Article 4(1).	We are concerned about Article 5 (2) which provides certain restrictions to gatekeepers but seemingly allows others to incite or stimulate the user for commercial purposes (see also Art. 6(2)(d).). It may also constitute an unproportionate interference with the gatekeepers' freedom to conduct business as well as potentially lead to harming the interests of consumers. We suggest deleting Article 5(2)(c). In such case, the gatekeepers would be restricted from receiving the data from the data holder (art 5(1)) or third parties (art 6(2)(d)), which would achieve the goal that the data sharing enabled by the Data Act will not end up entrenching the market position of gatekeepers but would still enable users to actively provide gatekeepers the data. Article 5(1) sections (a) and (b) help to ensure that such possibility couldn't be exploited by the gatekeepers.
-----------	---	---	--

Article 10			Establishing dispute settlement bodies under Article 10 is problematic. It remains unclear how are these decisions enforced. For example, in Estonia, there is currently no mechanism that would enable automatic enforcement of a decision by such private dispute settlement body. Therefore, this solution would interfere with the domestic enforcement procedure law. In light of the principles of subsidiarity and proportionality, it is questionable whether a domain-specific regulation such as Data Act should and could prescribe that a Member State must create new entities administering justice that must have the power to make binding decisions and which require the Member State (as necessary) to amend their enforcement procedure law.
------------	--	--	---

Chapter V	CHAPTER V {MAKING DATA AVAILABLE TO PUBLIC SECTOR BODIES, AND UNION INSTITUTIONS, AGENCIES THE COMMISSION, THE EUROPEAN CENTRAL BANK OR UNION BODIES BASED ON EXCEPTIONAL NEED}		Estonia acknowledges the need to have a framework in place that allows public sector bodies to receive data in order to respond, prevent or assist in the recovery from a public emergency. At the same time, we are still concerned that Chapter V establishes an unreasonably extensive right of access to data. If we are to include Chapter V in the final proposal, it would have to be in a minimized form: a) it should apply only to exceptional circumstances (responding/preventing/assisting recovery from a public emergency); b) free of charge to the public sector body; c) include also small and micro enterprises. Please see our detailed comments and suggestions below.
Article 14 (2)	2. This Chapter shall not apply to small and micro enterprises as defined in Article 2 of the Annex to Recommendation 2003/361/EC.	2. This Chapter shall not apply to small and micro enterprises as defined in Article 2 of the Annex to Recommendation 2003/361/EC	We believe that exempting small and micro enterprises from the scope of Chapter V is not compatible with the objectives of the regulation. In many cases, small enterprises can hold valuable data which might be necessary to respond to an emergency. The agency responsible for resolving the emergency situation should be able to determine the enterprises from whom it is relevant to requests the data. Otherwise, the goal (to solve the emergency) may not be

			achieved if the data or most of the data in this field are in the hands of micro or small companies. Therefore, we suggest to delete the exemption from Article 14 (2) and avoid imposing excessive administrative burden by narrowing down the scope of Article 15 (please see suggestions below).
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: (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	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: (a) where the data requested is necessary to respond to a public emergency or to prevent a public emergency or to assist the recovery from a public emergency; and (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 the public sector body, the Commission, the European Central Bank or Union body is unable to obtain such data by alternative means in a timely and effective manner. (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	We believe that the scope of Article 15 is too broad and it establishes an unreasonably extensive right of access to data. In addition to public emergencies, the concept of exceptional need entails a wide range of potential scenarios where a public sector body would have the right to request data, consequently raising doubts if the situation is always urgent and the request justified. We welcome the amendments done by the Presidency, but, in our view, more must be done in order to ensure proportionality and avoid potential misuse and bad practices. We believe that government access to commercially held data should apply to situations in which there is a clear “exceptional need”, therefore the right to request data should apply only to circumstances where it is necessary to respond to a public emergency, prevent a public emergency or assist the recovery from a public emergency (Article 15 (a) and (b)). Thus, we

	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, 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	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 reduce the administrative burden for data holders or other enterprises.	suggest to delete Article 15 (c) and establish an additional limitation to points (a) and (b), whereby the obligation to make data available applies if it couldn't be obtained in an alternative way. In addition to our above mentioned concerns on Article 15 (c), regulating official statistics in this provision would lead to a conflict with the principle that the production of statistics for exceptional needs should be easier, more flexible and faster compared to the production of non exceptional needs based statistics. Today, the legal framework is moving in the opposite direction. The production of exceptional statistics would become more complex than non-exceptional statistics because Data Act stipulates stricter rules on exceptional needs statistics (e.g establishment of fees for data) compared to non exceptional statistics. This kind of divided legislation of statistics would also create ambiguity of the legal framework for statistics as a whole.
--	---	--	--

	administrative burden for data holders or other enterprises.		
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, <u>not based on an exceptional need.</u>	As the revision of the legal framework for European Statistics has already begun, we propose not to regulate the domain of statistics (official or any other kind produced by the ESS) in the Data Act, but rather concentrate on the relevant issues in the Regulation for European Statistics and the national legislation. Thus, we suggest to delete any references to the exceptional needs statistics in the text in recital 58 and Article 15 point c (please see our suggestion above). Consequently, we also suggest to delete the following phrase in Article 16 (1) - “, not based on an exceptional need” .
Article 19 (1) (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 .	erase destroy the data as soon as they are no longer necessary for the stated purpose and if it is necessary for decision-making, determine the term of data retention. Data processor has to and inform the data holder without undue delay that the data have been erased destroyed .	According to the Article 19 (1) (c) the public sector body should erase the data as soon as they are no longer necessary for the stated purpose. Our concern is related to situations where nationally important decisions are made and the information ends up also in relevant documents (memos, decisions, and protocols).

			In our view, once the data is received, it cannot be stipulated that it must be deleted immediately. In cases described above, the retention period is settled by MS laws. In other words, the signed or confirmed documents can contain this information in different ways and certainly cannot be erased everywhere. It is crucial that data confidentiality is ensured by the government, but the norm cannot force to erase data itself. It is not practically possible. We suggest adding that if it is necessary for decision-making, the term of data retention is determined by the law of the Member State.
Article 20	1. Data made available to respond to a public emergency pursuant to Article 15, point (a), shall be provided free of charge.		The proposal already states that data made available to respond to a public emergency pursuant to Article 15, point (a), shall be provided free of charge. We believe that this should also apply to request made in order to <i>prevent</i> a public emergency or to <i>assist the recovery</i> from a public emergency (currently art 15 point (b) as it is an administrative task that is very exceptional in nature and the aim is to resolve some kind of crisis. Our suggestion above incorporates points a and b.
Article 21	3. Individuals or organisations receiving the data pursuant to		When it comes to the obligation to erase the data (in accordance with Article 19 (1) (c), we suggest to refer to the Statistics

	paragraph 1 shall comply with the provisions of Article 17(3) and Article 19.		Regulation. That means that the regulation of storing and deleting data would derive from the Statistics Regulation, taking into account the basic principles of statistics - the purpose of data collection and its use, the reliability and verifiability of statistics production, reuse and data exchange – all this taking into account the basic principles of the statistical confidentiality requirement.
Article 27			This Article is still a concern for us. We requests editing it in a way that achieves a clear and unambiguous text which would correspond to the purpose of the initiative. The current wording that addresses all international transfers is too general and might therefore be misleading. It also leads to many different interpretations by authorities and stakeholders. Generally, it would be reasonable to limit the regulation only to situations where the decision of a court or administrative authority of a third country requires the provider of data processing services to transfer data or provide access to it. We must avoid introducing disproportionate restrictions on the transfer of non-personalized data to

			third countries that could harm competitiveness.
Article 33 (3)	For infringements of the obligations laid down in Chapter II, III and V of this Regulation, the supervisory authorities referred to in Article 51 of the Regulation (EU) 2016/679 may within their scope of competence impose administrative fines in line with Article 83 of Regulation (EU) 2016/679 and up to the amount referred to in Article 83(5) of that Regulation.	For infringements of the obligations laid down in Chapter II, III and V of this Regulation, the supervisory authorities referred to in Article 51 of the Regulation (EU) 2016/679 may within their scope of competence impose <u>administrative</u> fines in line with Article 83 of Regulation (EU) 2016/679 and up to the amount referred to in Article 83(5) of that Regulation.	Estonia is of the opinion that the draft regulation should not emphasise the administrative nature of the fines to be imposed and that Member States should remain free to choose the type of sanction.
Article 35			We support the concept by which the intellectual property rights related to databases should not become an obstacle to data sharing or excuse for refusal. Our preference is the second option as it covers the current regulation entirely and is not limited to Art 4 and 5.
Article 42	It shall apply from [12 months after the date of entry into force of this Regulation].	12 24 months after the date of entry into force of this Regulation.	The 12-month application period is too short to implement the Data Regulation as a whole, as the technical requirements for companies set out in the Regulation need more time.

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 ~~strike through~~ 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.