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MEETING DOCUMENT

From:	General Secretariat of the Council
To:	Working Party on Telecommunications and Information Society
Subject:	Data Act : NL comments 4th compromise (doc. 5586/23)

Delegations will find in the Annex the NL comments on 4th compromise (doc. 5586/23).

NL comments of the fourth compromise proposal on Data Act (document 5586/23)

Reference	Fourth compromise proposal	Drafting suggestion	Comment
General comments			The Netherlands would like to thank the presidency for their work in putting together the compromise text. In general, we welcome the amendments made in the compromise text. We believe the proposal now strikes the right balance on many of the issues that have been discussed in the past months. In particular we would like to state that we believe the proposal strikes the right balance concerning the protection of trade secrets and that we support the ambitious measures with regard to switching and in-parallel use of cloud services. We have three priorities which we would still like to address: • The provisions concerning reasonable compensation in article 9 and recital 42a should be amended to ensure data holders cannot freely determine a price for their compliance with the obligations in the Data Act. • The scope of chapter 5 should be further narrowed and it should be further clarified that competent authorities can intervene in case of unlawful requests, especially in cross-border contexts.

Reference	Fourth compromise proposal	Drafting suggestion	Comment
			The SME-exemption for chapter 2 should be limited to micro- and small enterprises. In this document we put forward our amendments to address these priorities. In addition to our priorities we have also included a few smaller points we addressed during the CWP of 31 January and which would like to put to the attention of the Presidency as we believe they are in line with the current compromise text and will improve the clarity, consistency or effectiveness of the proposal.
Recital 42a	Such reasonable compensation may include firstly the costs incurred and investment required for making the data available. These costs can be technical costs, such as the costs necessary for data reproduction, dissemination via electronic means and storage, but not of data collection or production. Such technical costs could include also the costs for processing, necessary to make data available, including costs associated with anonymising or pseudonymising data. Costs related to making the data available may also include the costs of	Such reasonable compensation may include firstly the costs incurred and investment required for making the data available. These costs can be technical costs, such as the costs necessary for data reproduction, dissemination via electronic means and storage, but not of data collection or production. Such technical costs could include also the costs for processing, necessary to make data available, <u>including costs associated with anonymising or pseudonymising</u>	Reasonable compensation is a fundamental element of this proposal, not a technical issue which should only be dealt with using guidelines and non-binding model contractual clauses. We have several issues with the current text: This recital merely contains a non-limitative list of factors to include in reasonable compensation. This

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	organising answers to concrete data sharing requests. They may also vary depending on the arrangements taken for making the data available. Long-term arrangements between data holders and data recipients, for instance via a subscription model or the use of smart contracts, could reduce the costs in regular or repetitive transactions in a business relationship. Costs related to making data available are either specific to a particular request or shared with other requests. In the latter case, a single data recipient should not pay the full costs of making the data available. Reasonable compensation may include secondly a margin. Such margin may vary depending on factors related to the data itself, such as volume, format or nature of the data, or on the supply of and demand for the data. It may consider the costs for collecting the data. The margin may therefore decrease where the data holder has collected the data for its own business without significant investments or may increase where the investments in the data collection for the purposes of the data holder's business are high. The margin may also depend on the follow-on use of the data by the data recipient.	<u>data and formatting of data</u>. Costs related to making the data available may also include the costs of organising answers to concrete data sharing requests. They may also vary depending on the arrangements taken for making the data available. Long-term arrangements between data holders and data recipients, for instance via a subscription model or the use of smart contracts, could reduce the costs in regular or repetitive transactions in a business relationship. Costs related to making data available are either specific to a particular request or shared with other requests. In the latter case, a single data recipient should not pay the full costs of making the data available. Reasonable compensation may include secondly a margin. Such margin may vary depending on factors related to the data itself, such as volume, <u>format or</u> and nature of the data, <u>or on the supply of and demand for the data</u>. For the purposes of calculating the margin, the volume of data relates to the data	seems to imply any other factor may be taken into account as well. - The wording in the compromise text weakens any data sharing obligation as it allows data holders full discretion to set a price as compensation for complying with a data sharing obligation. - Additionally, the proposal risks perpetuating the system in which the data holder is the party that can reap all the economic benefits from the use of data. This is contrary to the goals of the Data Act. - Allowing the data holder to freely monetize the users' right to share data hinders the user in exercising this right or monetizing the data itself.

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	It may be limited or even excluded in situations where the use of the data by the data recipient does not affect the own activities of the data holder. The fact that the data is co-generated by the user could also lower the amount of the compensation in comparison to other situations where the data are generated exclusively by the data holder.	holder's business interests, which may be more greatly affected when the recipient receives the totality of a dataset as opposed to a sub-set thereof. With regards to the nature of the data an important distinction should be made in relation the data's level of processing, and the margin should increase where data is refined and even more where there is given access to secondary inferred or derived data. ¶The margin may consider the costs for collecting the data. The margin may therefore decrease where the data holder has collected the data for its own business without significant investments or may increase where the investments in the data collection for the purposes of the data holder's business are high. The margin may also depend on the follow-on use of the data by the data recipient. It may be limited or even excluded in situations where the use of the data by the data recipient does not affect the own activities of the data holder. The fact that the data is co-	- Moreover, if third parties will have to pay high compensation (based on their follow-on use), they will be disincentivized to provide (innovative) services based on this data. The data holder can simply raise compensation for any valuable follow-on use and thereby profit off any third party's innovativeness. This limits the beneficial effects of the Data Act for the European data economy. - Additionally, a high compensation to be paid by the third party will likely be passed on to the user by the third party, thus limiting the stimulating effect that the Data Act has on the European data economy. - Finally, the lack of specificity of this recital will lead to many and

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		generated by the user could also should lower the amount of the compensation in comparison to other situations where the data are generated exclusively by the data holder.	lengthy disputes on compensation, undermining users' right to share data. We therefore fully support the amendments to recital 42a and article 9 proposed by DK.
Recital 42b		(42b) Where a data holder is obliged to make data available to a third party as data recipient under Article 5, the compensation should consist of the costs and investments related to making the data available. Since data sharing under article 5 always concerns raw or pre-processed data which is co-generated by the user of a product or service and readily available to the data holder, the margin should be excluded or significantly reduced.	In addition to the changes proposed above, it is important to add further clarity on the applicability of Article 9 concerning transactions taking place based on Article 5 of the Data Act. The current text may inadvertently allow data holders to monetize individual users' (personal) data with few limits and the lack of specificity with regards to the way a margin may be established will inevitably lead to many and lengthy disputes on compensation, undermining users' right to share data. We strongly feel the Data Act should increase users' control over the use of their data,

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			instead of protecting vested interests of data holders. It is therefore important to supplement the general provisions on reasonable compensation with a recital that explains how the provisions should be applied to the specific transactions covered in the Data Act in Article 5. Transactions in the Data Act always concern co-generated raw or pre-processed data which are already available to the data holder. According to this logic, this should generally lead to compensation where the margin is either excluded or small..
Article 9	1. Any compensation agreed between a data holder and a data recipient for making data available in business-to-business relations shall be reasonable. <u>Such reasonable compensation may include the costs incurred and investment required for making the</u>	1. Any compensation agreed upon between a data holder and a data recipient for making data available in business-to-business relations shall be reasonable <u>Such reasonable compensation may include the costs incurred and investment required for making the data available as well as a margin, which may vary for objectively</u>	In line with above comments

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	<u>data available as well as a margin, which may vary for objectively justified reasons relating to the data.</u>	justified reasons relating to the data, and as a minimum take into consideration: a) the costs incurred and investments required for making the data available. These costs include the costs necessary for the formatting of data, dissemination via electronic means and storage, but not of data collection or production; b) the volume and nature of the data, as well as investments in data collection and processing; whether or not the data is co-generated.	
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, 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	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, 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 set out in Paragraph 1(a) of this Article. directly related to making the data available to the data recipient	As a consequence of our suggested changes to Paragraph 1, it would make sense to refer to Paragraph 1 and which elements therein apply to micro, small or medium enterprises with a view to provide further legal certainty and to simplify the text.

	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.	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.	
Article 15(1)	(a) where the data requested is necessary to respond to a public emergency and 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 under equivalent conditions; (b) where the data request is limited in time and scope and necessary to prevent mitigate a public emergency or to assist the recovery from a public emergency and 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 under equivalent conditions; or	exceptional need to use data within the meaning of this Chapter shall be limited in time and scope and deemed to exist in situations of public emergency and only in any of the following circumstances: (a) where the data requested is necessary to respond to a public emergency <u>and 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</u>	While a number of improvements have already been made to the scope of this chapter, the scope of exceptional need remains too broad and should be further narrowed. Especially 15(c) establishes an unreasonably extensive right of access to data. We support the amendments to article 15 proposed by DK.

	(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 reduce the administrative burden for data holders or other enterprises.	<u>and effective manner under equivalent conditions;</u> (b) where the data request is limited in time and scope and necessary to prevent <u>mitigate</u> a public emergency or to assist the recovery from a public emergency <u>and 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 under equivalent conditions;</u> 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	
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		<u>(1)</u> 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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		<u>reduce — the — administrative burden for data holders or other enterprises.</u>	
Article 22(4)		(d) reject the request or otherwise exercise its functions in relation to the enforcement and implementation of this regulation	We welcome that recital 61 now indicates that the competent authority can exercise its functions in relation to the enforcement of this regulation. However, reading recital 61 in conjunction with article 22 and article 31 still leaves it unclear whether competent authorities can actually intervene on unlawful requests, especially in cross-border contexts. We believe it is important the proposal clearly allows the competent authority to intervene on all unlawful requests made under chapter 5, also in cross-border contexts, and not only on requests rejected by the concerned data holders.
Article 31(3)	(j) examining the requests for data made pursuant to Article 14(1) in cross-border contexts.	(j) examining the requests for data made pursuant to Article 14(1) in cross-border contexts and rejecting any unlawful requests.	In line with above comments, we believe that this article is insufficiently clear on the competences of the competent authority for chapter 5. We therefore propose to clarify its wording in line with the additions made to recital 61 in REV4. The article states that the competent authority can only examine (not reject) <i>cross-border</i> requests. We believe it is important the proposal clearly allows the competent authority to intervene on <u>all</u> unlawful requests made under chapter 5.

Article 7	1. The obligations of this Chapter shall not apply to data generated by the use of products manufactured or related services provided by enterprises that qualify as micro or small enterprises, as defined in Article 2 of the Annex to Recommendation 2003/361/EC, 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 or small enterprise. The same shall apply to data generated by the use of products manufactured or related services provided by enterprises that qualify as medium-sized enterprises as defined in that same Recommendation, for either medium-sized enterprises that meet the threshold of that category for less than one year or that where it concerns products that a medium-sized enterprise has been placed on the market for less than one year.	1. The obligations of this Chapter shall not apply to data generated by the use of products manufactured or related services provided by enterprises that qualify as micro or small enterprises, as defined in Article 2 of the Annex to Recommendation 2003/361/EC, 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 or small enterprise. The same shall apply to data generated by the use of products manufactured or related services provided by enterprises that qualify as medium-sized enterprises as defined in that same Recommendation, for either medium-sized enterprises that meet the threshold of that category for less than one year or that where it concerns products that a medium-sized enterprise has been placed on the market for less than one year.	We are concerned that a year-long exemption for all products placed into market by medium enterprises will undermine the purpose of the regulation. A large amount of European enterprises classify as medium-sized and new versions of IoT-products are often put into market by these companies. This exemption is a <i>de facto</i> exemption for products placed in the market by medium-sized enterprises and would therefore allow a large number of products which are non-compliant with this chapter to be put into market. This renders the users' rights to access and share data useless for any such products. This exemption undermines the future proof nature of this regulation and renders the Data Act ineffective in various sectors. An example is the agricultural sector, where IoT-products are abundant and often produced by SMEs. We prefer no exemption at all over an exemption for medium-sized enterprises.
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Article 4	1a. Any agreement between the data holder and the user shall not be binding when it narrows the access rights pursuant to paragraph 1.	1a. Any agreement between the data holder and the user shall not be binding when it narrows the access rights pursuant to paragraph 1 other than provided under the Data Act..	Annulment has far-reaching implications. Rights and obligations (such a taking technological measures to protect trade secrets) included in the other provisions of the Data Act should not be perceived as narrowing the access rights as meant in Article 4 paragraph 1.
Article 4	3. Trade secrets shall only be disclosed provided that the data holder and the user take all necessary measures prior to the disclosure to preserve the confidentiality of trade secrets in particular with respect to third parties. Where the data holder can show that such measures do not suffice, the data holder and the user shall agree on necessary additional measures, such as technical and organisational measures, to preserve the confidentiality of the shared data, in particular in relation to third parties. The data holder shall identify the data which are protected as trade secrets, including the relevant metadata.	3. Trade secrets shall only be disclosed provided that the data holder and the user take all necessary measures prior to the disclosure to preserve the confidentiality of trade secrets in particular with respect to third parties. The user shall inform the data holder of the measures taken. Where the data holder can show that such measures do not suffice, the data holder and the user shall agree on necessary additional measures, such as technical and organisational measures, to preserve the confidentiality of the shared data, in particular in relation to third parties. The data holder shall identify the data which are protected as trade secrets, including the relevant metadata.	The burden of proof lies on the data holder as to whether additional measures are necessary, but the data holder has no insight into the measures. Hence the adjustment.
Article 5	8. Trade secrets shall only be disclosed to third parties to the extent that they are strictly necessary to fulfil the	8. Trade secrets shall only be disclosed to third parties to the extent that they are strictly necessary to fulfil the purpose agreed between the user and	See the comment under article 4.3, similar adjustment suggested as the

	purpose agreed between the user and the third party and all specific necessary measures including technical and organisational measures agreed between the data holder and the third party are taken by the third party to preserve the confidentiality of the trade secret. Where the data holder can show that such measures do not suffice, the dataholder and the third party shall agree on necessary additional measures. The data holder shall identify the data which are protected as trade secrets	the third party and all specific necessary measures including technical and organisational measures agreed between the data holder and the third party are taken by the third party to preserve the confidentiality of the trade secret. The third party shall inform the data holder of the measures taken. Where the data holder can show that such measures do not suffice, the dataholder and the third party shall agree on necessary additional measures. The data holder shall identify the data which are protected as trade secrets	concerns the same circumstances, but one other party.
Article 11	2. (a) request the data recipient to, without undue delay, erase the data made available by the data holder and any copies thereof; (b) request the data recipient to, without undue delay, 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	2. (a) request the data recipient to, without undue delay and if explicitly requested with evidence thereof, erase the data made available by the data holder and any copies thereof, (b) request the data recipient to, without undue delay and if explicitly requested with evidence thereof, 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	The data recipient must also, if asked, be obliged to provide evidence. Otherwise the data holder will not be able to check if the data recipient has fulfilled the request(s) made under sub (a) and/or (b) of this Article.

	infringing goods for those purposes, and destroy any infringing goods,	storage of infringing goods for those purposes, and destroy any infringing goods,	
Article 16	1. This Chapter shall not affect obligations laid down in Union or national law for the purposes of reporting, complying with access to 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 producing official statistics, not based on an exceptional need.	1. This Chapter shall not affect obligations laid down in Union or national law for the purposes of reporting, complying with access to information requests or demonstrating or verifying compliance with legal obligations, including in relation to official statistics the obtaining making available of data for the purpose of compiling producing official statistics, not based on an exceptional need.	Our statistical bureau suggests this amendment to further ensure legal clarity with respect to legislation concerning the production of official statistics.
Article 26	2. For data processing services other than those covered by paragraph 1, providers of data processing services shall make open interfaces publicly available to an equal extent to all their customers and the concerned destination service providers and free of charge, including sufficient information about the concerned service to enable the development of software to communicate with the service, for the	2. For data processing services other than those covered by paragraph 1, providers of data processing services shall make open interfaces publicly available to an equal extent to all their customers, and the concerned destination service providers and any data processing service providers requesting access and free of charge, including sufficient information about the concerned service to enable the development of software to communicate with the	For providers which are not a destination service (for example because they are new market entrants and do not yet have a strong market presence) the availability of the interfaces is essential for them to be able to develop interoperable services. Having the interfaces publicly available or on request better allows new market entrants to develop interoperable services.

	purposes of portability and interoperability.	service, for the purposes of portability and interoperability.	
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