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WORKING PAPER

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MEETING DOCUMENT

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

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

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

Reference	Fourth compromise proposal	Drafting suggestion	Comment
General comments			EE welcomes the latest compromise text and, in general, we agree that the text is moving in a good direction. Before moving to the next phase, we consider it important to ensure the proportionality of Chapter V by further narrowing of Article 15. We also consider it important to ensure complete alignment with the Machinery Regulation concerning provisions on harmonized standards and common specifications in Articles 28, 29 and 30. EE supports DK proposals on this matter.
Article 2 (10)	‘public emergency’ means an exceptional situation such as public health emergencies, emergencies resulting from natural disasters, as well as human-induced major disasters, such as major cybersecurity incidents , negatively affecting the population of the Union, a Member State or part of it, with a risk of serious and lasting repercussions on living conditions or economic stability, or the substantial degradation of economic assets in the Union or the relevant Member State(s) and <u>the existence or likely occurrence of which is determined and officially declared</u>	‘public emergency’ means an exceptional situation such as public health emergencies, emergencies resulting from natural disasters, as well as human-induced major disasters, such as major cybersecurity incidents , negatively affecting the population of the Union, a Member State or part of it, with a risk of serious and lasting repercussions on living conditions or economic stability, or the substantial degradation of economic assets in the Union or the relevant Member State(s) and <u>the existence or likely occurrence of which is determined <u>and</u> or officially declared according to the respective procedures under Union or national law;</u>	To align Article 2 (10) with Recital 57.

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	according to the respective procedures under Union or national law;		
Article 10 (2)	If no dispute settlement body is certified in a Member State by [date of application of the Regulation], that Member State shall establish and certify a dispute settlement body that fulfils the conditions set out in points (a) to (d) of this paragraph.	2. [...] If no dispute settlement body is certified in a Member State by [date of application of the Regulation], that Member States may shall establish and certify a dispute settlement body that fulfils the conditions set out in points (a) to (d) of this paragraph. for the purposes of paragraph 1.	As we have indicated previously and as suggested by several other Member States, setting up dispute settlement bodies should not be mandatory. In practice, there may not be significant number of disputes in smaller Member States such as Estonia to justify a separate domain-specific dispute settlement body. Such obligation would create unjustified financial burden to Member states.
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 data available as well as a margin, which may vary for objectively justified reasons relating to the data.</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. 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 justified reasons relating to the data., and, as a minimum, take into consideration:	We support complementing the main text on reasonable compensation, as proposed by DK, in order to increase legal clarity and certainty.

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		a) <u>the costs incurred and investments required for making the data available.</u> <u>These costs include the costs necessary for the formatting of data, dissemination via electronic means and storage, but not of data collection or production;</u> b) <u>the volume and nature of the data, as well as investments in data collection and processing;</u> c) <u>whether or not the data is co-generated.</u>	
Article 9 (2)	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 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,	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. <u>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.</u> Article 8(3) shall apply accordingly.	

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	dissemination via electronic means and storage, but not of data collection or production. Article 8(3) shall apply accordingly.		
Article 15 (1)	1. 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:	1. _____ 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:	We welcome the amendments done by the Presidency in Chapter V, especially the deletion of article 15(1) (c) (2). In order to ensure the proportionality Chapter V, we support DK proposal that article 15(1) (c) should only be applicable in situations of public emergency. Our arguments from previous rounds of written comments are still valid.
Article 15	2. <u>Letters (b) and (c) of paragraph 1 shall not apply to small and micro enterprises as defined in article 2 of the Annex to Recommendation 2003/351/EC.</u>	2. <u>Letters (b) and (c) of paragraph 1 shall not apply to small and micro enterprises as defined in article 2 of the Annex to Recommendation 2003/351/EC.</u>	We welcome the amendments done by the Presidency that allow to request data also from micro and small enterprises if it is necessary to respond to a public emergency. However, we believe that this should also apply to situations where data is needed to mitigate a public emergency or assist a recovery from a public emergency (Article 15 point b). Otherwise the goal (to solve an 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. We should also take into account that small enterprises play a key role in many Member States. Excluding them may lead to a risk that this provision becomes meaningless.

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			Our aim is to ensure that the overall framework in Chapter V is proportionate and does not create excessive administrative burden to companies, regardless of their size (please also see our comment above on Article 15 (c)). In terms of statistics, our concerns still remain. Our view is that regulating statistics and its access to data and its management needs to be regulated in Regulation 223/2009, which is being redrafted. The access to data for statistical purposes needs to be addressed in a measured, coherent and logical way. We believe that in the case of exceptional needs statistics, obtaining data must be easier, faster and at lower costs compared to official statistics. If the current wording of the Data Act remains, the opportunity to consider these issues under 223 will essentially be taken away. Instead of finding legal solutions to questions concerning statistics within the framework of the Data Act, the 223 must formulate a new regulation of statistics that would be fit for the future based on the fundamental principles of statistics. Furthermore, the changes made regarding statistics, micro and small enterprises and compensation have a negative effect on

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			the ability to collect data needed for exceptional needs statistics as most of the enterprises in Estonia that our statistics authority would need to get data from are micro and small enterprises.
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 unless archiving of the data is required for transparency purposes in accordance with national law.		We welcome these previous clarifications in Article 19 (1) (c) but we suggest replacing “archiving” with the possibility to determine data retention period on national level. Our concern is related to situations where nationally important decisions based on this information are made. In these situations, it is normal that the information also ends up in some documents (memos, decisions, protocols). In other words, the signed or confirmed documents can contain this information in different ways. Retention of such kind of data depends on the document retention periods. In this light, we suggest adding that if it is necessary for decision-making, the term of data retention is determined by the national law. Archiving is one processing method, and in the end it still means setting a retention period (we have the decisions stored and in the system, not archived and handed over to the National Archive), so it is

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			correct to say that it will not be deleted as long as it is necessary to keep it according to MS law (the document in which the requested data is in).
Article 29 (4)	<u>The Commission may, by way of implementing acts, adopt common specifications on the basis of open interoperability specifications covering all of the essential requirements set out in paragraphs 1 and 2 and 3.</u>	The Commission may, by way of implementing acts, adopt common specifications <u>on the basis of open interoperability specifications</u> covering all of the essential requirements set out in paragraphs 1 and 2 and 3, <u>where the following conditions have been fulfilled:</u> a) <u>the Commission has requested, pursuant to article 10 (1) of Regulation 1025/2012, one or more European standardisation organisations to draft a harmonised standard for the essential requirements set out in paragraph 1 of this article and the request has not been accepted or the European standardisation deliverables addressing that request is not delivered within the deadline set in accordance with Article 10 (1) of Regulation 1025/2012 or European standardisation deliverables does not comply with the request, and</u> b) <u>no reference to harmonised standards covering the relevant essential requirements set out in paragraph 1 of this article is published in the Official Journal</u>	We ask for alignment of Articles 28, 29 and 30. EE supports DK comments on this matter. We consider it important to follow the traditional standardization processes also in Article 29 that deals with interoperability for data processing services.

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		<u>of the European Union in accordance with Regulation (EU) no 1025/2012 and no such reference is expected to be published within a reasonable period.</u>	
Article 29 (new 4b)		<u>Before preparing a draft implementing act in accordance with paragraph 4a, the Commission shall inform the committee referred to in Article 22 of Regulation EU (No) 1025/2012 that it considers that the conditions in paragraph 5 are fulfilled.</u>	We ask for alignment with Articles 28 and 29.
Article 29 (new 4c)		<u>Open interoperability specifications that meet the common specifications established by one or more implementing acts referred to in paragraph 5 or parts thereof shall be presumed to be in conformity with the essential requirements set out in paragraph 1 and 2 covered by those common specifications or parts thereof.</u>	We ask for alignment with Articles 28 and 29.
Article 29 (new 4d)		<u>When references of a harmonised standard are published in the Official Journal of the</u>	We ask for alignment with Articles 28 and 29.

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		European Union, implementing acts referred to in paragraph 4a, or parts thereof which cover the same essential requirements set out paragraph 1 and 2, shall be repealed by the Commission.	
Article 33	1. Member States shall lay down the rules on penalties applicable to infringements of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive. <u>Member States shall take into account the recommendations of the European Data Innovation Board. Member States shall, by [date of application of the Regulation], notify the Commission of those rules and of those measures and shall notify it, without delay, of any subsequent amendment affecting them.</u>	1. Member States shall lay down the rules on penalties applicable to infringements of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive. <u>Member States shall take into account the recommendations of the European Data Innovation Board. Member States shall, by [date of application of the Regulation], notify the Commission of those rules and of those measures and shall notify it, without delay, of any subsequent amendment affecting them.</u>	The requirement to take “all measures necessary” to implement the penalties is redundant in the article text – penalties having to be effective, proportionate and dissuasive already ensures that there must be necessary measures taken to implement the penalties. Additionally, EE does not support the proposal that the recommendations of the European Data Innovation Board must be taken into account in laying down the rules on penalties. In accordance with the Estonian laws, the penalties under Article 33 will, in many cases, be considered as criminal sanctions. The proposed solution would exceed the competences of EU as it would constitute indirect harmonization of criminal sanctions. The determination of criminal sanctions in the national legal order must remain under the exclusive competence of the Member State and cannot be subject to recommendations by an EU expert group.

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Article 42	It shall apply from [12 18 months after the date of entry into force of this Regulation].	It shall apply from [12 18 24 months after the date of entry into force of this Regulation].	We welcome the extended time period but we suggest extending it to 24 months.

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 ~~strikethrough~~ 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.