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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 : FI comments 4th compromise (doc. 5586/23)

Delegations will find in the Annex the FI 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
			Scrutiny reservation to the entire text.
Article 10(2)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.	~~If no dispute settlement body is certified in a Member State by [date of application of the Regulation], that~~ Member State***s*** ~~shall~~ ***may*** establish and certify ~~a~~ dispute settlement ***bodies*** that fulfil~~s~~ the conditions set out in points (a) to (d) of this paragraph.	We accept the basic idea of Article 10 that parties may use a certified dispute settlement body to settle a dispute and the certification procedure is at the responsibility of the Member States. However, we oppose including in the Article an obligation for a Member State to establish an out-of-court dispute settlement body in case no dispute settlement body is certified in a Member State by date of application of the Regulation. The provisions in the Regulation on out-of-court settlement of disputes should be in line with Article 21 paragraph 6 of the Digital Services Act (Regulation (EU) 2022/2065, DSA). The Member States are responsible for guaranteeing access to justice and the right to a fair trial in court. The need to have out-of-court dispute settlement bodies established by the Member States, in addition to courts, should be looked at as a whole. A piecemeal approach where single legislative acts contain obligations for the

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			Member States to establish dispute settlement bodies for very specific purposes leads to excessive costs and administrative burden on the Member States. This is especially the case when there are differences in the way out-of-court settlement of disputes is regulated in those acts. The issue for us is that, at least when it comes to ADR-directive, there has been a lack of accreditation applications, and we have appointed the tasks for ADR-bodies that are authorities. We see great difficulties in having to establish such bodies for quite isolated new purposes, different from one another. Because of the very narrow competence of a dispute settlement body under Article 10, in a smaller Member State such as Finland, there may be a very limited number of cases the dispute settlement body is competent to handle. In that case, the cost and administrative burden of the establishment of the dispute settlement body would be disproportionate to the benefits thereof. We find paragraph 2 subparagraph 2 problematic in other respects as well. According to the wording of the provision, the obligation of a Member State to establish a dispute settlement body does not apply in a situation where such a body is

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			certified in a Member State by date of application of the Regulation but the certification later expires or is revoked. Therefore, the provision does not ensure that there is such a body in every Member State. However, in recital 48a it is stated that the parties should be free to address a dispute settlement body of their choice, be it within or outside of the Member States they are established in. Therefore, access to a dispute settlement body is ensured in the Regulation even without imposing an obligation to establish such a body on the Member States.
Recital 50	Parties to dispute settlement proceedings should not be prevented from exercising their fundamental rights to an effective remedy and to a fair trial. Therefore, the decision to submit a dispute to a dispute settlement body should not deprive those parties of their right to seek redress before a court or a tribunal of a Member State.	Parties to dispute settlement proceedings should not be prevented from exercising their fundamental rights to an effective remedy and to a fair trial. Therefore, the decision to submit a dispute to a dispute settlement body should not deprive those parties of their right to seek redress before a court or a tribunal of a Member State. The provisions in this Regulation on out-of-court dispute settlement should not require Member States to establish such out-of-court settlement bodies.	In line with recital 59 of the Digital Services Act, it should be clarified in the recitals that Member States are not required to establish out-of-court dispute settlement bodies.

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recital 55	**In order to ensure legal certainty, this Regulation establishes a list with clauses that are always considered unfair and a list with clauses that are presumed unfair. In the latter case, the enterprise that imposed the contract term can rebut the presumption by demonstrating that the contractual term listed is not unfair in the specific case at hand.** If a contractual term is not included in the list of terms that are always considered unfair or that are presumed to be unfair, the general unfairness provision applies. In this regard, the terms listed as unfair terms should serve as a yardstick to interpret the general unfairness provision. Finally, model contractual terms for business-to-business data sharing contracts to be developed and recommended by the Commission may also be helpful to commercial parties when negotiating contracts. **If a clause is declared as being unfair, the contract should continue to apply without that clause, unless the unfair clause is not severable from the other terms of the contract.**	~~**In order to ensure legal certainty, this Regulation establishes a list with clauses that are always considered unfair and a list with clauses that are presumed unfair. In the latter case, the enterprise that imposed the contract term can rebut the presumption by demonstrating that the contractual term listed is not unfair in the specific case at hand.**~~ The regulation establishes an indicative and non-exhaustive list of the terms which may be regarded as unfair for the purposes of the unfairness clause. If a contractual term is not included in the list of terms that are ~~always~~ considered unfair ~~or that are presumed to be unfair~~, the ~~general~~ unfairness provision applies. ~~In this regard, the terms listed as unfair terms should serve as a yardstick to interpret the general unfairness provision.~~ Finally, model contractual terms for business-to-business data sharing contracts to be developed and recommended by the Commission may also be helpful to commercial parties when negotiating contracts. ~~**If a clause is declared as being unfair, the contract should continue to apply without that clause, unless the unfair clause is not severable from the other terms of the contract.**~~	See comments in Art 13. The recital 55 is proposed to be changed accordingly.
Article 1		4c. This Regulation should not affect national general contract law aspects such as the formation, validity, nullity or effects of contracts.	We suggest adding a new para to article 1. see comment in article 13 para 6

Reference	Fourth compromise proposal	Drafting suggestion	Comment
Article 13(2)	A contractual term is unfair if it is of such a nature that its use grossly deviates from good commercial practice in data access and use, contrary to good faith and fair dealing.	2. A contractual term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment to the party upon whom the contractual term has been unilaterally imposed. ~~if it is of such a nature that its use grossly deviates from good commercial practice in data access and use, contrary to good faith and fair dealing.~~	we support here the proposal made by Germany and using the wording in Directive 93/13/EEC. "Good commercial practice in data access and use" raises too many questions.
Article 13(3)	**In particular** contractual term is unfair for the purposes of ~~this Article~~ **paragraph 2, ~~in particular~~** if its object or effect is to:	3. ~~In particular, a~~ A contractual term may be regarded as ~~is~~ unfair for the purposes of ~~this Article~~ paragraph 2, in particular if its object or effect is to:	We suggest not to include two separate lists (black nor grey) but instead an indicative and non-exhaustive list of the terms, which may be regarded as unfair, allowing sufficient leeway for evaluation in light of all the circumstances. A similar structure is used in 93/13/EEC.
Article 13(4)	4. A contractual term is presumed unfair for the purposes of ~~this Article~~ **paragraph 2** if its object or effect is to:	~~4. A contractual term is presumed unfair for the purposes of this Article paragraph 2 if its object or effect is to:~~	There should only be one list.
Article 13(5)	A contractual term shall be considered to be unilaterally imposed within the meaning of this Article if it has been supplied ~~**drafted in advance**~~ by one contracting party and the other contracting party has not been able to influence its content despite an attempt to negotiate it. The contracting party that supplied ~~**drafted in advance a**~~ **the**	A contractual term shall be considered to be unilaterally imposed within the meaning of this Article if it has been ~~supplied~~ **drafted in advance** by one contracting party and the other contracting party has not been able to influence its content ~~despite an attempt to negotiate it~~. The contracting party that ~~supplied~~ **drafted in advance** ~~a~~ **the** contractual term bears the burden of proving that that term has not been unilaterally imposed.	We support here the proposal by DE on deleting "despite an attempt to negotiate it" and using the "drafted in advance" instead of "supplied".

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	contractual term bears the burden of proving that that term has not been unilaterally imposed.		
Article 13(6)	6. Where the unfair contractual term is severable from the remaining terms of the contract, those remaining terms shall remain binding.	Where the unfair contractual term is severable from the remaining terms of the contract, those remaining terms shall remain binding provided that it would not be unfair to enforce the rest of the contract, ~~. T~~taking into account all the circumstances and all the other terms of the contract.	The wording should not lead to a situation where the remaining parts of the contract, to which the article is applicable, could in no circumstances be adjusted or set aside. The remaining legal situation should be determined by the relevant applicable law. This is one of the reasons an addition is proposed to art 1: "This Regulation should not affect national general contract law aspects such as the formation, validity, nullity or effects of contracts."

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.