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MEETING DOCUMENT

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

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

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

Reference	Fourth compromise proposal	Drafting suggestion	Comment
General Comments			1. It is necessary to clarify the scope of application of the proposed regulation, in order to introduce greater regulatory certainty. As we have already indicated, the current wording of the proposal leaves doubts in this matter, not only due to the way it is structured, but also due to the terminology and definitions used (not always consistent between the recitals and the articles). 2. It is important that adopted definitions are already commonly accepted and included in European legislation (for example, the definition of "connected product"). Also in this regard, the definition of "exceptional need", is still particularly broad, covering two

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			very general and rather vague notions of public emergency and public interest. We reiterate that to ensure uniform application of the provisions of this proposal for a regulation, it will be necessary to analyze in more detail what these notions include, otherwise there may be some discretion in their application in the Member States, with repercussions to the enforcement of the Regulation, especially in cross-border situations. Additionally, the lack of clarity of this concept raises concerns that the regulation can be misused for purposes that deviate from its objectives. 3. It is necessary to determine concepts applied to data sharing operations - such as data

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			interoperability - and to implement concepts such as "durable medium" in conflict resolution and "operators of data spaces" in the essential requirements of interoperability. 4. Regarding the B2G provisions, the definition of "exceptional need" is still particularly broad, covering two very general and rather vague notions of public emergency and public interest. It will be necessary to analyze in more detail what these notions include, otherwise there could be some discretion in their application in the Member States, with repercussions to the enforcement of the Regulation, especially in cross-border situations. The lack of clarity of

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			this concept also raises concerns that the regulation could be misused for purposes that deviate from the intended objectives. 5. The exclusion of devices from the scope of the Data Act should be done on the basis of the type of data generated and not by specific categories of products (reference to Recital 15). This would contribute to the intent of making the Regulation both as future-proof and as technologically neutral as possible. Regarding its implementation, <u>the Regulation should contain greater detail/clarity in identifying the requirements (namely in terms of areas of expertise) to be observed by the MS in the designation, either of the competent national authority(ies)(s), or the coordinating national authority.</u>

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Recital 5	This Regulation should does not be interpreted as recognising or creating any legal basis in accordance with Article 6(1)(c) and 6(3) of Regulation (EU) 2016/679 for the purpose of allowing the data holder to hold,,have access to or process data, or as conferring any new right on the data holder to use data generated by the use of a product or related service.“	This Regulation does not recognise or create any legal basis in accordance with Article 6(1)(c) and 6(3) of Regulation (EU) 2016/679 for the purpose of allowing the data holder to hold, have access to or process data, or as conferring any new right on the data holder to use data generated by the use of a product or related service.	In recital 5) where it is intended to state that the present diploma does not constitute a legal basis to substantiate the lawfulness of the processing of personal data, a probable typo ends up establishing the opposite.
Recital 15	The objective of this Regulation is to enable users of connected products to benefit from aftermarket, ancillary and other services based on data collected by sensors embedded in such products the collection of these data being of potential value in improving the performance of the connected products (...)		This wording seems confusing. What was understood, from the beginning, was that the Data Act regulates who can use and access EU-generated data by introducing rules that promote a fairer digital environment, making the data "market" more competitive.
Recital 67	<u>Data holders should not be able to claim compensation in cases where Member State law prevents national statistical institutes or other national authorities responsible for the production of statistics from compensating data holders for making data available.</u>	<u>Data holders should not be able to claim compensation in cases where Member State law prevents national statistical institutes or other national authorities responsible the specific task in the public interest is for the production of official statistics from compensating data holders for making data available.</u>	Please see comments to article 15 (3).
Article 1, no. 1	1. This Regulation lays down harmonised rules on making data generated by the use of a product or related service available to the user of that product or service, on the makingdata available by data holders		Further clarification of the concept of ‘data generated by the use of a product’ should be considered, especially in order to determine if such concept also includes data collected by the products and related

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	to data recipients, and on the making data available by data holders to public sector bodies, the Commission, the European Central Bank or Union institutions, agencies or bodies, where there is an exceptional need, for the performance of a task carried out in the public interest, on facilitating switching between data processing services, on introducing safeguards against unlawful third party access to non-personal data, and on providing for the development of interoperability standards for data to be accessed, transferred and used.		services. In addition, we suggest that the concepts of "exceptional need" and "public interest" are clarified in the recitals.
Article 2, no. 2	[Definition of “product”]		It could be useful to provide some examples of what is considered in the scope of “products” covered by the Regulation.
Article 2, no. 19	(19) ‘interoperability’ means the ability of two or more data spaces or communication networks, systems, products, applications or components to exchange and use data in order to perform their functions;	(19) ‘ data interoperability’ means the ability of two or more data spaces or communication networks, systems, products, applications or components to exchange and use data in order to perform their functions;	The definition inserted in Article 2(19) refers to data interoperability. Thus, we suggest inserting the word "data".
Article 3	Obligation to make data generated by the use of products or related services accessible		Further clarification of the concept of ‘data generated by the use of a product’ should be considered, especially in order to determine if such concept also includes data collected by the products and related services.
Art. 3, no. 1	1. Products shall be designed and		Further clarification of the concept of

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	manufactured, and related services shall be designed and provided, in such a manner that data generated by their use (...)		‘data generated by the use of a product’ should be considered, especially in order to determine if such concept also includes data collected by the products and related services.
Art. 4	Article 4 The right of users to access and use data generated by the use of products or related services		Further clarification of the concept of ‘data generated by the use of a product’ should be considered, especially in order to determine if such concept also includes data collected by the products and related services.
Art. 4(1)	1. Where data cannot be directly accessed by the user from the product or related service , the data holder shall make available to the user the data generated by its the use of a product or related service (...)		Further clarification of the concept of ‘data generated by the use of a product’ should be considered, especially in order to determine if such concept also includes data collected by the products and related services.
Article 4 (3)	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 can shall agree on necessary additional measures, such as technical and organisational measures, to preserve the confidentiality of the shared data, in	3. Trade secrets shall only be disclosed provided that the data holder and the user take all necessary measures, such as technical and organisational 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 can shall agree on necessary additional measures, such as technical and organisational measures, to preserve the confidentiality of the shared data, in relation to third parties. The data holder shall	With regard to the protection of trade secrets, changes were introduced that could jeopardize the practical application of the diploma. Effectively, the allegation of protection of trade secrets could be used as an unfounded reason for not carrying out the proper sharing of data. A process for requiring additional measures has been added which may not be adequate and only adds a further obstacle to the process

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	particular in relation to third parties. The data holder shall identify the data which are protected as trade secrets, including in the relevant metadata,	identify and bear proof of the data which that are protected as trade secrets, including in the relevant metadata,	as all necessary measures should always be taken to prevent the disclosure of trade secrets, including technical and organizational measures. It should be noted that the most important thing will be to establish the burden of proof of the existence of the trade secret, which must rest with the owner of the data who alleges it in order not to make the proper sharing. The reference to relevant metadata is too broad and it seems that everywhere else the adjective "relevant" has been dropped to refer to metadata. Consider revising the rationale of the use of this designation and to clarify it.
Art. 5, no. 1	1. Upon request by a user, or by a party acting on behalf of a user, the data holder shall make available the data generated by the use		Further clarification of the concept of 'data generated by the use of a product' should be considered, especially in order to determine if such concept also includes data collected by the products and related services.
Art. 5, no. 5	5. The data holder shall not use any non-personal data generated by the use of the product or related service to derive insights about the economic situation, assets and production methods of or use by the third party that could undermine	5. The data holder shall not use any non-personal data generated by the use of the product or related service to derive insights about the economic situation, assets and production methods of or use by the third party that could undermine the commercial position of the third party on the	Further clarification of the concept of 'data generated by the use of a product' should be considered, especially in order to determine if such concept also includes data collected by the products and related services.

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	the commercial position of the third party on the markets in which the third party is active, unless the third party has consented given permission to such use and has the technical possibility to withdraw that.	markets in which the third party is active, unless the third party has consented given permission authorized to such use and has the technical possibility to withdraw that.	
Art. 5, no. 6	Where the user is not a the data subject whose personal data is requested , any personal data generated by the use of a product or related service shall only be made available (...)		Further clarification of the concept of 'data generated by the use of a product' should be considered, especially in order to determine if such concept also includes data collected by the products and related services.
Article 5 (8)	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 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 data holder and the third party shall agree on necessary additional measures. In such a case, the nature of the data as trade secrets and the measures for preserving the confidentiality shall be specified in the agreement between the data holder and the third party. The data holder shall identify the data which that	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 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 data holder and the third party shall agree on necessary additional measures. In such a case, the nature of the data as trade secrets and the measures for preserving the confidentiality shall be specified in the agreement between the data holder and the third party. The data holder shall identify and bear proof of the data which that are protected as trade secrets, including in the relevant metadata and the necessary additional measures that were taken between the data subject and the third party in order	The same reasoning as in art. 4(3) applies. The reference to relevant metadata is too broad and it seems that everywhere else the adjective "relevant" has been dropped to refer to metadata. Consider revising the rationale of the use of this designation and to clarify it.

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	are protected as trade secrets, including in the relevant metadata.	to preserve the confidentiality of the trade secret.	

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Art. 7, no. 1	The obligations of this Chapter shall not apply to data generated by the use of products manufactured or related services provided by enterprises (...)		Further clarification of the concept of ‘data generated by the use of a product’ should be considered, especially in order to determine if such concept also includes data collected by the products and related services.
Article 11 (2)	The data holder may: a) request the data recipient to, without undue delay, destroy 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 infringing goods for those purposes, and destroy any infringing goods. , (c) seek compensation from the data recipient.		Regarding point c) – How will these compensations be regularized? A set of standard procedures or guidelines can be established.
Chap. V	CHAPTER V MAKING DATA AVAILABLE TO PUBLIC SECTOR BODIES AND UNION INSTITUTIONS, AGENCIES OR BODIES BASED ON EXCEPTIONAL NEED		Although we support the intention of keeping the DA as broader and horizontal as possible, we consider that definitions like “public emergency”, “exceptional need” and “public interest” need to be more clearly defined, in order to promote a harmonised enforcement within the EU of the provisions under this chapter.

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Article 15 Exceptional need to use data	(...) ... (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.	(...) ; or 2) obtaining the data in line with the procedure laid down in this Chapter, for the production of official statistics , would substantively reduce the administrative burden for data holders or other enterprises.	Maintaining this provision is relevant for official statistics purposes. PT therefore suggests limiting the scope of this paragraph 2, in line with option 2, point 2.2 “Task in the public interest” of the Presidency Option Paper (WK 263/2023 INIT)
Article 15 Exceptional need to use data	<u>3. The obligation to demonstrate that the public sector body was unable to obtain data by purchasing of the data on the market shall not apply in case the specific task in the public interest is the production of official statistics and where the purchase of data is prohibited by national law.</u>	<u>3. The obligation to demonstrate that the public sector body was unable to obtain data by purchasing of the data on the market shall not apply in case the specific task in the public interest is the production of official statistics.</u> and where the purchase of data is prohibited by national law.	PT reiterates the position expressed in the previous compromise texts in relation to the need to exempt official statistics from paying for the data at market rates. As said before, official statistics are a public good, available to all for free. The access to private data should not be paid for official statistics purposes, as this access is aimed to produce official statistics for the benefit of all the society. The same principle applies as regards to the access of data from respondents and from administrative records. Moreover, making this exemption conditional to the cases where national law prohibits the purchase of data may create inequality conditions for the National Statistical Institutes when it comes to the production of official

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			European statistics requested in exceptional circumstances.
Article 19 (2)	2. Disclosure of trade secrets to a public sector body or to the Commission, the European Central Bank or Union body shall only be required to the extent that it is strictly necessary to achieve the purpose of the request. In such a case, the public sector body or the Commission, the European Central Bank or Union body shall take, prior to the disclosure, appropriate measures, such as technical and organisational measures, to preserve the confidentiality of those trade secrets. The data holder shall identify the data which are protected as trade secrets, including in the relevant metadata.	2. Disclosure of trade secrets to a public sector body or to the Commission, the European Central Bank or Union body shall only be required to the extent that it is strictly necessary to achieve the purpose of the request. In such a case, the public sector body or the Commission, the European Central Bank or Union body shall take, prior to the disclosure, appropriate measures, such as technical and organisational measures, to preserve the confidentiality of those trade secrets. The data holder shall identify and bear proof of the data which that are protected as trade secrets, including in the relevant metadata.	(Same comment as in art. 4(3)) With regard to the protection of trade secrets, changes were introduced that could jeopardize the practical application of the diploma. Effectively, the allegation of protection of trade secrets could be used as an unfounded reason for not carrying out the proper sharing of data. A process for requiring additional measures has been added which may not be adequate and only adds a further obstacle to the process as all necessary measures should always be taken to prevent the disclosure of trade secrets, including technical and organizational measures. It should be noted that the most important thing will be to establish the burden of proof of the existence of the trade secret, which must rest with the owner of the data who alleges it in order not to make the proper sharing.
<i>Article 19 Obligations of public sector bodies</i>	(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	(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	Additional wording proposed, which considers the GDPR exemption from Art. 17.3(d).

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and Union institutions, agencies the Commission, the European Central Bank and Union bodies	data have been erased destroyed unless archiving of the data is required for transparency purposes in accordance with national law.	unless archiving of the data is required for transparency purposes in accordance with national law <u>or for statistical purposes</u>.	

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Article 20 <i>Compensation in cases of exceptional need</i>	<u>2b. Data holders shall not be able to request compensation for making data available in compliance with a request made pursuant to Article 15, points (b) or (c) in case the specific task in the public interest is the production of official statistics and where the purchase of data is prohibited by national law.</u>	<u>2b. Data holders shall not be able to request compensation for making data available in compliance with a request made pursuant to Article 15, points (b) or (c) in case the specific task in the public interest is the production of official statistics and where the purchase of data is prohibited by national law.</u>	See comments to article 15 (3).
Article 22(4)	<u>(...) The competent authority shall act without undue delay.</u>		Suggestion to set a specific time period instead of “ <i>undue delay</i> ”, to introduce more regulatory certainty and clarity.
Art. 26, no. 4	4. Where the <u>no</u> open interoperability specifications or European standards referred to have been identified in the <u>the central Union data processing service standards repository</u> in <u>accordance with</u> paragraph 3 do not exist for the service type concerned, the provider of data processing services shall, at the request of the customer, export all data generated or co-generated, including the relevant data formats and data structures, in a structured, commonly used and machine-readable format.		Further clarification of the concept of ‘data generated by the use of a product’ should be considered, especially in order to determine if such concept also includes data collected by the products and related services.
Article 31 Competent			In order to assist the MS in the implementation process of the DA, we consider that it would be useful to further clarify both the competences of each

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authorities			competent authority and the requirements (e.g areas of expertise, know-how) that need to be observed when appointing a competent authority

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