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MEETING DOCUMENT

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

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

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

Belgium's comments on second compromise proposal on DA (document 14019/22)

Belgium wishes to thank the CZ Presidency for its hard work on the Commission's Proposal. We believe most of the modifications, clarifications and additions are useful and increase the quality of the text. We can broadly support the changes made.

However, we would like to submit further questions and comments concerning certain provisions and recitals we are not comfortable with and which still require improvements and/or clarifications in our point of view.

As previously indicated, we consider that this proposal needs further time before the adoption of a general approach in order to carefully assess it, given especially its potential and important impact for the private sectors, and to adopt an ambitious, proportionate and effective horizontal instrument.

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 ~~striethrough~~ 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.

Reference	Second compromise proposal	Drafting suggestion	Comment
Article 1.3	Union law and national law on the protection of personal data, privacy and confidentiality of communications and integrity of terminal equipment shall apply to personal data processed in connection with the rights and obligations laid down in this Regulation. This Regulation is without prejudice to, in particular Regulations (EU) 2016/679 and (EU) 2018/1725 and Directives 2002/58/EC and (EU) 2016/680, including with regard to the powers and competences of supervisory authorities. Insofar as data subjects are concerned, the rights laid down in Chapter II of this Regulation shall complement the right of data portability under Article 20 of Regulation (EU) 2016/679. and shall not adversely affect data protection rights of others.		BE insists on the need to have more clarity and certainty with regard to the interplay between the EU data protection rules and the Data Act. This interplay requires a more in-depth examination. We have, in this regard, identify specific requests for clarification in Chapters II and V (see comments below). We consider however that further discussions on this point are needed to check if this interplay is sufficiently clear or if other clarifications are needed in the text.
Art. 1.4b	This Regulation does not affect Directive 93/13/EEC on Unfair Terms in Consumer Contracts.	This Regulation is without prejudice to Union law aiming to promote the interests of consumers, in particular Directive 2005/29/EC, Directive 2011/83/EU, and Directive 93/13/EEC on Unfair Terms in Consumer Contracts.	We thank the Presidency for including this clarification already mentioned in recital 9 in the provision itself. However, we would like to further specify this paragraph by reiterating, in its entirety, what is already mentioned in recital 9.
Art. 1.4c		This Regulation does not affect the application of the rules of competition, and in particular Articles 101 and 102 of the Treaty. This Regulation shall not affect Regulation xx on Digital Market Act.	Given the important interaction between the EU rules on competition law and this instrument, we suggest to include recital

			88 in the disposal and to add a reference to the Digital Market Act.
Art. 2.(1ae)	'readily available data' means data generated by the use of a product that the data holder obtains or can obtain without disproportionate effort, going beyond a simple operation;		We understand the objective pursued by this notion. However, we consider that this definition, and in particular the notions of 'disproportionate effort' and 'simple operation', is too vague and could lead to legal uncertainty. Therefore, BE insists to further elaborate this notion to ensure legal certainty on the scope of this instrument.
Art. 2.(2)&rec. 15	In contrast, certain products that are primarily designed to display or play content, such as textual or audiovisual, often covered by intellectual property rights, or to record and transmit such content, amongst others for the use by an online service should not be covered by this Regulation. Such products include, for example, smart televisions and speakers, cameras, webcams, sound recording systems and text scanners. Additionally, products primarily designed to process and store data, such as personal computers, servers, tablets and smart phones, should not fall in scope of this Regulation. On the other hand, smart watches have a strong element of collection of data on human body indicators or movements and should thus be considered covered by this Regulation		BE pays a particular attention to any exception of the scope as they may limit the effectiveness of the instrument and could give a competitive advantage to certain actors, contrary to the principle of fair competition between companies. We also underline the need to stay technologically neutral as we cannot predict how the market will develop. In this sense, BE reiterates its concerns with regard to the delineation of the product's scope that remains unclear and leads to inconsistencies and uncertainties on which products will be included in the product scope. The main inconsistency resides in the exclusion of any product primarily designed to process and store data such as smartphones while including smartwatches due to its strong element

	as far as they qualify as “product” in particular due to the ability to communicate data via a publicly available electronic communication service. Given the share of investment in providing data-related functions in relation to other functions of these categories of products, the obligation to allow access or the sharing of data would be disproportionate in the light of the objective of this Regulation.		of collection of certain type of data as well as its ability to communicate data via a publicly available electronic communication service. Indeed, the difference in regime between a smartphone (excluded) and a smartwatch (included) raises questions insofar as the same data can be generated by these two connected products. A difference in treatment may generate competitive differences between devices that fall under the scope and devices that do not. Therefore, BE asks for further analysis of the impact (costs and benefits) of an extension of the scope to products that are primarily designed to process and collect data (e.g. computers, servers, tablets and smartphones).
Art. 2(6)	‘data holder’ means a legal or natural person who - has the right or obligation, in accordance with this Regulation, applicable Union law or national legislation implementing Union law, to make available certain data or - can enable access to the data through control of the technical design or means of access, in the case of non-personal data;		We insist on the legal uncertainty resulting from the use of a same notion but with a different meaning and scope as the one adopted in the Data Governance Act. Indeed, in the DGA, the notion of ‘data holder’ is used to refer to the person with a legal right on the data, and which is not the data subject, while in the Data Act, we refer to the person having the ability to make data available and which can be the data subject. In order to avoid

			any misleading on this notion and to ensure terminological consistency across related acts, we request to use a notion, different to 'data holder', 'data processor' and 'data controller' which will refer to the person, including a data subject, which have the ability or the right to make data available. This is of utmost importance to avoid confusion given the interplay between these two instruments, as referred notably in recital 29 (data intermediation services).
Art. 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 which is determined and officially declared according to the respective procedures under Union or national law;		Following the explanation on the interplay between the Data Act and the Single Market Emergency Instrument, this interplay requires further examination, in particular on the differences between both notions used, namely 'public emergency' and 'crisis' : Is there a real differences and, in such a case, such difference are they justified? In addition, while we support the intention to limit this definition when restricting public emergencies to the ones that are officially declared, we consider that it is necessary to further examine the interaction between this definition and the situations related to the prevention of a public emergency. Indeed, this condition to be officially declared as a

			public emergency would not be fulfilled when a B2G data sharing is requested in order to prevent a public emergency.
Art. 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 such measures do not suffice, the data holder and the user shall agree 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.	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 considers that the measures do not suffice, the data holder and the user shall agree 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.	We support the addition 'where such measures do not suffice' and we suggest to clarify also explicitly who will decide that the measures do not suffice. In addition, we deem particularly essential to do pay a particular attention to provide for an adequate framework of rules for the re-use of data by the user and any third party (including a non-EU state) and to avoid any loophole in this regard. In this respect, it should be clarified whether the existing EU rules on business secrecy applicable to the third party receiving the data via the user are sufficient. If not, it will be necessary to clarify these provisions in order to ensure that there is no legal gap between the rules applicable to the recipient of data transmitted by the holder and third parties.
Art. 6.2(c)	The third party shall not: (...) (c) make the data it receives available to another third party, in raw, aggregated or derived form, unless this is necessary to provide the service requested by the user;		When the third party make the data it receives available to another third party given the necessity to provide the service requested by the user, how it is ensured that this another party respect the conditions related to trade secrets and competing products with regard to the

			data holder? See our related comment in Art. 4.3.
Art. 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.		We do support the addition referred to medium-sized enterprises made by the Presidency in the last sentence. However, as drafted, the exclusion of any products that a medium-sized enterprise has been placed on the market for less than one year results in the exclusion as a whole of the medium-sized enterprise. This exclusion should be either clarified or deleted.
Art. 11	Technical protection measures and provisions on unauthorised use or disclosure of data.		See our comment in Art. 4.3. - we deem particularly essential to do pay a particular attention to provide for an adequate framework of rules for the re-use of data by the user and any third party (including a non-EU state) and to avoid

			any loophole in this regard. In this respect, it should be clarified whether the existing EU rules on business secrecy applicable to the third party receiving the data via the data recipient are sufficient. If not, it will be necessary to clarify these provisions in order to ensure that there is no legal gap between the rules applicable to the recipient of data transmitted by the data holder and third parties.
Art. 9 (and rec. 42a)	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, dissemination via electronic means and storage, but not of data collection or production.		We deem important to set in the text itself the main parameters that should guide the determination of reasonable compensation while including some examples in the recital. The last sentence as proposed by the CZ Presidency is a going in this direction and should be further developed by including the main parameters identified in recital 42a in this Article.
Art. 13.1	A contractual term, concerning the access to and use of data or the liability and remedies for the breach or the	A contractual term, concerning the access to and use of data or the liability and remedies for the breach or the termination of data related	BE underlines the importance to ensure an adequate and ambitious framework to

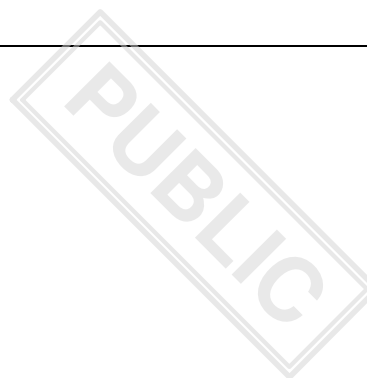
	termination of data related obligations which has been unilaterally imposed by an enterprise on a micro, small or medium-sized enterprise as defined in Article 2 of the Annex to Recommendation 2003/361/EC, provided those enterprises do not have partner enterprises or linked enterprises as defined in Article 3 of the Annex to Recommendation 2003/361/EC which do not qualify as a micro, small or medium enterprise, shall not be binding on the latter enterprise if it is unfair.	obligations which has been unilaterally imposed by an enterprise on a micro, small or medium sized 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, on another enterprise which is significantly disadvantaged shall not be binding on the latter enterprise if it is unfair.	protect any enterprise that is considered as the 'weak party'. We therefore suggest the following several proposal to strengthen the current text.
Art. 13.3 (a)	A contractual term is unfair for the purposes of paragraph 2, in particular if its object or effect is to: (a) exclude or limit the liability of the party that unilaterally imposed the term for intentional acts or gross negligence;	(a) exclude or limit the liability of the party that unilaterally imposed the term for intentional acts or gross negligence or excludes its liability in case of non-performance of its essential obligations;	BE recalls its proposal to add "...or excludes its liability in case of non-performance of its essential obligations",
Art. 13.4	A contractual term is presumed unfair for the purposes of paragraph 2 if its object or effect is to:	A contractual term is presumed unfair for the purposes of paragraph 2, in particular if its object or effect is to:	BE welcomes the new reference in Art. 13.3 to a non-exhaustive list with the wording 'in particular' and suggests to add it also in Art. 13.4.
Art. 13.5	A contractual term shall be considered to be unilaterally imposed within the meaning of this Article if it has been supplied 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 a the contractual term		BE asks for more flexibility in the interpretation of the definition of 'unilaterally imposed'. In this regard, we recommend in the Article or in the recital, as set out in Article 3.2 of Directive 93/13, that <i>"the fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude</i>

	bears the burden of proving that that term has not been unilaterally imposed.		<i>the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract”.</i>
Art. 14.2	This Chapter shall not apply to small and micro enterprises as defined in Article 2 of the Annex to Recommendation 2003/361/EC.		With regard to micro and small enterprises, while BE supports the need to protect them from disproportionate burdens, it is necessary to examine the appropriateness of defining cases of public emergency in which data could be required, with reasonable and proportionate compensation to the latter.
Art. 15(a)	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;		Belgium supports a mandatory legal framework in case of public emergency. As mentioned in Art. 2, the consistency between the definition of public emergency in this instrument and the notion of ‘crisis’ in the SMEI need further examination.
Art. 15 (b)	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: (b) where the data request is necessary to prevent a public emergency or to assist the recovery from a public emergency;		Belgium raises some concerns to this broad reference to the prevention of a public emergency that could lead to a very broad and vague scope for this B2G mandatory data sharing. We therefore suggest to further specify this notion of prevention and to avoid any confusion with the requirement in the definition of ‘public emergency’ to be ‘officially

			declared' in Art. 2.10 (see our comment in Art. 2.10). Moreover, the time limit requirement is not always predictable as it is impossible to predict when a crisis will be over. A solution might be to have to demonstrate that the exceptional measure is still necessary.
Art. 15 (c)	where the lack of available data prevents the public sector 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 the Commission, the European Central Bank or Union body has exhausted all other means at its disposal to obtain such data, including, but not limited to, purchase of the data on the market by offering market rates or relying on existing obligations to make data available, or the adoption of new legislative measures which could guarantee 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.		We raise some doubts about the implementation of such a binding and time-limited system in broader public interest situations, a notion that may be subject to diverging interpretations in different MS.

Art. 17.1 (d) and 17.2 (d) & (da) (and recital 64)	Where requesting data pursuant to Article 14(1), a public sector body or the Commission, the European Central Bank or Union body shall: (d) state the legal provision allocating to the requesting public sector body or to the Commission, the European Central Bank or Union bodies the specific public interest task relevant for requesting the data as well as the specific legal basis for the processing of personal data in Union or Member State law; 2. A request for data made pursuant to paragraph 1 of this Article shall: (d) in case of requests made pursuant to Article 15, points (a) and (b) concern, insofar as possible, non-personal data; in case personal data are requested, the request should justify the need for including personal data and set out the technical and organisational measures that will be taken to protect the data; (da) in case of requests made pursuant to Article, 15 point (c), concern personal data only in case the data processing has a specific basis in Union or Member State law;		We welcome this clarification related to the need to have a specific legal basis for the processing of personal data. However, further clarifications are necessary in this Article as well as in recital 64. As far as we understand recital 64, the requirement of a specific legal basis is only required in cases set out in Art. 15(c)? With regard to cases of ‘public emergency’, this chapter constitutes a legal basis for processing personal data. In those cases, the only requirement specified in Art. 17.2(da) is to justify the need to process personal data. Could COM confirm this interpretation with regard to the interplay between data protection rules and this Chapter V? If so, we suggest to further clarify it in the text and to explain if all conditions required in the data protection rules are met in this new legal basis for processing personal data. We also wonder if Art. 17.2(d) is consistent with the new addition in Art. 17.1 (d).
Art. 22.4	The competent authority shall act without undue delay.		We deem important to further specify the timeline for the competent authority to

			examine the request in case of public emergency.
Chap. VI	Switching between data processing services		Despite the complexity of the system, BE insists on the importance of ambitious provisions allowing free and efficient switching between different cloud services but also interoperability of data between different service providers at the same time. BE pleads for the maintenance of ambitious rules in this respect and support the NL proposal to include ambitious rules to stimulate interoperability, beyond portability, between cloud services.
Chapter X – Art. 35	For the purposes of the exercise of the rights provided for in Articles 4 and 5 of this Regulation, the sui generis right provided for in Article 7 of Directive 96/9/EC shall not apply when data is obtained from or generated by a product or related service.] OR [The sui generis right provided for in Article 7 of Directive 96/9/EC shall not apply when data is obtained from or generated by the use of a product or a related service.]		First of all, BE underlines the need to clarify that this Article creates an exception (and not only a clarification) to the 'sui generis right' which could, in certain cases and without this exception, apply to data generated by connected products or related services. This is explicitly and consistently clarified either in the provision and in the corresponding recital. More specifically, we notice some inconsistency on the aim of this provision between the recital and this Article BE supports the inclusion of such an exception to the 'sui generis right' in order to avoid an abuse of this right which



			would go against the right of the user of a connected product to access this data. At this stage, BE cannot state that the 'sui generis' right would not apply in any case to data generated by connected products or services and does not have clear and sufficient knowledge about the impact of a generic provision as proposed in option 2 for businesses that could, in some cases, rely on such a right. Any extension or general exception to the sui generis right beyond the user's rights need to be carefully examined. In this sense, BE regrets that this inclusion cannot be taken up in a revision of the Database Directive. This would have ensured legal clarity and a uniform application of this right involving a detailed analysis of the consequences and impact of this exception.
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