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MEETING DOCUMENT

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

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

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

Reference	Fourth compromise proposal	Drafting suggestion	Comment
Art. 9.1	1. Any compensation agreed 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.**	1. Any compensation agreed 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~~.**	The phrase "which may vary for objectively justified reasons" creates additional legal uncertainty and makes the fees less foreseeable for market participants. It is also not clear what is meant by "which may vary", since it is not clear compared to what the variation would occur – does this entail that otherwise, the margin would have to be static? According to Article 9(4)a the Commission will adopt guidelines for the calculation of reasonable fees and these should be used as an objective method of doing such calculations.
Art. 9.4a	**4a. The Commission shall adopt guidelines on the calculation of reasonable compensation, taking into account the opinion of the European Data Innovation Board established under Regulation (EU) 2022/868.**	**4a. The Commission shall adopt guidelines on the calculation of reasonable compensation, taking into account the opinion of the European Data Innovation Board established under Regulation (EU) 2022/868.** This Regulation should not prevent sector-specific regulatory requirements under Union law, or national law compatible with Union law, to define further obligatory provisions on the calculation of reasonable compensation	We accept the notion that compensation for costs incurred should be reasonable, but feel that without binding guidelines, there is a high risk that what is deemed reasonable by data holders may not be seen the same way by data recipients. clear and binding rules should be established by the Commission. This may take the form of general guidelines, as proposed in Article 9(4a) however the possibility of complementing this with more precise and obligatory rules in sector specific legislation should be included.

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Article 15.3	**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.**	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~~ **not allowed** by national law.	PL welcomes including provisions (in Art. 15.3 and Art. 20.2(b)) with exemptions for official statistics from the rules on compensation to data providers. Without those changes these provisions would not be operational for the Polish official statistics. However, we propose a slight change in the wording by substituting the words: "is prohibited" by "is not allowed". The change, even though it seems not significant would reflect appropriately the situation where the provisions stipulate that official statistics has the right to free of charge access to data (as a general principle enshrined in some acts on official statistics) but, at the same time, they are not saying that paying for data is prohibited (different construction of legal provisions where it is said what is the rule and not what is forbidden).
Article 16.1	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~~**	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.~~**	PL maintains our position that the final part of the provision "not based on an exceptional need" should be removed as it seems to refer only to statistics, which is confusing and not relevant

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	producing official statistics, not based on an exceptional need.		
Art. 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.**	(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 and statistical purposes in accordance with national law.**	Since It is not clear what the "archiving (…) for transparency purposes" means, for clarity reasons we propose to complement the provision with reference to statistical purposes in the following way: "(…) **unless archiving of the data is required for transparency and statistical purposes in accordance with national law.**" The exception of that kind is already included in GDPR (art. 17.3(d)). The above draft is simplified in comparison to our previous suggestion.
Article 20.2(b)	**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.**	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~~ **not allowed** by national law.	As in our comment to Article 15.3. PL proposes a slight change in the wording by substituting the words: "is prohibited" by "is not allowed". The change, even though it seems not significant would reflect appropriately the situation where the provisions stipulate that official statistics has the right to free of charge access to data (as a

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			general principle enshrined in some acts on official statistics) but, at the same time, they are not saying that paying for data is prohibited (different construction of legal provisions where it is said what is the rule and not what is forbidden).
Art. 23.1(a)	(a) terminating, after ~~a~~ **the** maximum notice period **and the successful finalisation of the switching process,** ~~of 30 calendar days~~ ~~**specified in the contract**~~ **in accordance with Article 24**, the contractual agreement of the service	(a) terminating, after ~~a~~ **the** maximum notice period **and the successful finalisation of the switching process,** ~~of 30 calendar days~~ ~~**specified in the contract**~~ **in accordance with Article 24**, without prejudice to any commitments, including with respect to duration of the contract and alternative notice periods.	Art. 23.1(a) was adapted in the 4th compromise to provide flexibility for notice periods (i.e. the period between sending a termination letter and the effective termination of a contract), not the duration of a contract. It may impact fixed term contracts usually featuring lower prices and allowing customers to deploy cloud solutions at a lower cost. We also want to lessen to a some extent this article impact on contractual freedom,
Art. 27.1	1. Providers of data processing services shall take all reasonable technical, legal and organisational measures, including contractual arrangements, in order to prevent international ~~transfer or~~ governmental access **and transfer of** ~~to~~ non-personal data held in the Union where such transfer or access would create a conflict with Union law or the national law of the relevant	1. Providers of data processing services, upon instructions of data holders, shall take all reasonable technical, legal and organisational measures, including contractual arrangements, in order to prevent international ~~transfer or~~ governmental access **and transfer of** ~~to~~ non-personal data held in the Union where such transfer or access would create a conflict with Union law or the national law of the relevant Member State, without prejudice to paragraph 2 or 3.	We fear that Art. 27.1 on international data transfers will oblige providers of data processing services to decide if data should be transferred, and what measures should apply to safeguard data. This shifts the control over non-personal data from customers to providers, which is contrary to the Data act's objective. Providers can only make these decisions if they monitor their customers' data all the time, which – again - is the exact opposite of the Data act's intent. Therefore, Art. 27.1 should also let clients decide what happens with their

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	Member State, without prejudice to paragraph 2 or 3.		data, and not leave that decision to cloud providers alone.
Art. 28.4-4a	4. The Commission may, in accordance with Article 10 of Regulation (EU) No 1025/2012, request one or more European standardisation organisations to draft ~~European~~ **harmonised** standards ~~applicable to specific service types of data processing services~~ **that satisfy the essential requirements under paragraphs 1 and 2.** **4a. 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.**	4. The Commission shall~~may~~, in accordance with Article 10 of Regulation (EU) No 1025/2012, request one or more European standardisation organisations to draft ~~European~~ **harmonised** standards ~~applicable to specific service types of data processing services~~ **that satisfy the essential requirements under paragraphs 1 and 2.** The Commission shall submit the first such draft request to the relevant committee by 12 months after entry into force of the Regulation **4a. 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~~.~~** where the following conditions have been fulfilled: (a) no reference to harmonised standards covering any or all of the essential requirements set out in paragraph 1 is published in the Official Journal of the European Union in accordance with Regulation (EU) No 1025/2012; (b) the Commission has requested, pursuant to Article 10(1) of Regulation 1025/2012, one or more European standardisation organisations to draft a	We repeat the amendment we submitted to the 3rd compromise text that align this procedure of standard setting with these from Art. 28 and 30 It increases the involvement of neutral standardization organizations in setting standards for providers and sets conditions for the EC before it gets the right to self-determine the standards. However, we would like to point out that this is only one of possible legislative proposals that can achieve our goals. We are open for alternative wordings.

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		harmonised standard for the essential requirements set out in paragraph 1; and (c) the request referred to in point (b) has not been accepted by any of the European standardisation organisations; or the harmonised standard addressing that request is not delivered within the deadline set in accordance with article 10(1) of Regulation 1025/2012; or the harmonised standard does not comply with the request. 4aa. 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 4a are fulfilled.	
Art. 33	Penalties		We are looking forward to concrete proposals regarding penalties. Since it has been decided that the legal form of the DA is to be a regulation, the amount of financial penalties should be regulated directly in the act – the good example of the correct legislative practice is the GDPR. The Data Act should establish a level playing field throughout the UE. By its very nature, a regulation should unify the rules rather than exacerbate further fragmentation. Otherwise, fundamental question arises about the rationale for

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			choosing a regulation as a correct legal for the DA and not, for example, a directive. We have observed similar tendency to shift the responsibility for regulating essential matters onto the Member States while working on the DGA file. Nevertheless, we think that referring to a past defect does not justify committing the same again. The consequences of not regulating the amount of penalties in the DA directly may negatively impact the uniformity of the European single market as so called "forum shopping" effect will no doubt occur. Against this background Poland strongly supports point 3.9 of EDPB-EDPS Joint Opinion 02/2022 on the DA proposal.
Art. 42	It shall apply from [~~12~~ **18** months after the date of entry into force of this Regulation].	[~~12~~ **18** 24 months after the date of entry into force of this Regulation].	We maintain our amendment which extends the DA application date to 24 months after entering into force. We are seriously concerned that the limited time frame of only 18 months will not be long enough to properly prepare the implementing landscape the DA requires from the European Commission and the European Data Innovation Board in a form of guidelines and numerous implementing acts. We do not see a rationale for limiting the application period in these circumstances.

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