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WORKING PAPER

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WORKING DOCUMENT

From:	General Secretariat of the Council
To:	Working Party on Telecommunications and Information Society
Subject:	Data Governance Act : BE comments

Delegations will find in annex BE comments on the Data Governance Act.

WRITTEN COMMENTS ON THE PROPOSED DGA REGULATION

General remarks

1. Which instruments/means can the European Commission use to remedy and penalise negligent Member States when those MS aren't carrying out their tasks as described in the DGA?

2. Lots of Member States have already referred to the issue of compatibility between the DGA and the GDPR. Privacy is a very important right and preserving privacy is a policy objective of the DGA. It would reassure us if the European Commission would request proactively the advice of the EDPB (European Data Protection Board) in the short term. The advice of the EDPB would strengthen hugely the confidence in the DGA at this stage of the law-making and it would clarify the privacy rights of the European citizens.

3. Overall, we wish to stress the importance of bearing in mind the impact of any legislative measure on SMEs, in order to make sure they are not disproportionately affected.

4. There were already questions raised about clarity regarding the attribution of the roles of data processors or data controllers. These GDPR concepts are typically hard to apply in practice as the 'real world' is not so black or white. Adding a new parallel set of rules with new actors and without any guidance on how the GDPR concepts of data processors or data controllers would apply to them seems likely to add difficulties in practice afterwards. We have read the feedback of the COM regarding the roles of processor and controller and indeed should be determined in each individual situation. However, since these GDPR concepts are typically hard to apply in practice, it is not so easy and clear cut to put them in the right box. It would be interesting and helpful to receive a point of view of the COM on which responsibilities and roles should be assigned to a "provider of data sharing services" and/or a "data intermediary", not being the public sector body holding the information and not being the re-user requesting the data, but the technical data exchange platform in the middle?

5. Also, the remarks concerning obtaining a truly GDPR compliant consent in certain situations of imbalance might need some further clarification or guidance.

6. The question has already been raised for an estimation of the financial impact on member states for the DGA. This seems important to know beforehand to be able to free the necessary resources on member state level. The investments for member states to comply with DGA seem quite important. Already, the PSI and Open Data directive lack effectiveness since there are public authorities where this is not seen as a priority and/or there are simply no resources or means to implement.

7. Would it be possible to work with a licensing system as proposed in the PSI and open data directive and/or demand that – in certain cases-- where public sector data is being re-used that the re-user is under the obligation to work in an open-access way and not claim exclusive rights on their creation derived of public sector data?

8. Related to art.7, 8 and 9: to what extent could roles be combined and/or are they incompatible or should the necessary measures be taken to separate functions/roles? The

tasks described in these articles are tasks that may already be carried out in part by one and the same government department. It would be useful to get more clarification on this from the Commission.

CHAPTER I GENERAL PROVISIONS

1. The General Data Protection Regulation (GDPR) tries to limit data sharing to the essential minimum, while the DGA tries to encourage more data sharing. The DGA focuses more on the situations in which data sharing will be possible, more than on the types of data being shared. Great care needs to be taken that the definitions, principles, and procedures used in these two European laws, the GDPR and the DGA, are not contradictory.

CHAPTER II RE-USE OF CERTAIN CATEGORIES OF PROTECTED DATA HELD BY PUBLIC SECTOR BODIES

1. This chapter appears to limit the sharing of data to "protected data held by public sector bodies". How does this apply to data that has been collected as part of a public-private partnership, e.g. in a smart city environment? Is that data to be considered as commercially protected data, and who owns it, the public body or the private partner? Does the public sector body have the right to ask the private partner for the possibility to share that data?

2. The public sector bodies are responsible for providing "a secure processing environment for the access and re-use of data" and for "guaranteeing the integrity of the functioning of the technical systems of this secure processing environment". This seems like a reasonable operating requirement, but it imposes a lot of responsibility on the public sector body, which may not have the necessary data skills or technical infrastructure to fulfil this requirement. Will the Data Innovation Board provide "consistent practice" guidance on how to set up such a secure processing environment?

3. Regarding the feedback on article 5(7), the relevant IP laws on database protection should be verified, but it seems that re-users (for example private entities) would not be able to claim exclusive rights since they themselves did not substantially invest in the data as for them it was 'just a copy-paste' of government data already organized in a database. (art. 7(1) directive 96/9) In any case, it would seem unwanted that private entities could just copy-paste government data and privatise that data claiming exclusive rights on said data.

4. The feedback regarding the re-users responsibility to respect confidentiality seems important to raise as well. It might also be an added value to insert a specific article on a right to compensation and liability for re users (such as art. 82 GDPR).

5. Regarding article 6, would the costs necessary to deliver data in a format that does not exist yet also fall within this fee? And when new services need to be developed for certain requests, will the first person/entity requesting have to pay the full price? Where would the limit lie for the public sector body holding the data as regards efforts that should be made?

6. We support the wording of Article 6(4) which takes into account the specificity of SMEs by inviting public sector bodies to encourage the re-use of data by SMEs. However, no

clarification is given on how this can be done (especially in view of the respect of competition rules) -> This question has already been raised *(Question 55 - Data Governance Act_Early Stage Questions on Chapters I II III IV + Recitals: more technical questions discussed in the WP Telecom of 28/01)*, so we are particularly interested to receive the answer of the Commission. *The question concerned:* Article 6 (4) stipulates that "Where they apply fees, public sector bodies shall take measures to incentivise the re-use of the categories of data referred to in Article 3 (1) for non-commercial purposes and by small and medium-sized enterprises in line with State aid rules". In this context, does the Commission intend to publish specific guidelines on how to incentivize the re-use of data, in order to avoid non-compliance with state-aid rules? In addition, does the Commission intend to publish recommendations on how to ensure compliance with competition law?

7. There should be more clarity regarding what data can be classified as 'highly sensitive non-personal public data'. It could be of added value if more examples would be provided of such highly sensitive non personal data.

CHAPTER III REQUIREMENTS APPLICABLE TO DATA SHARING SERVICES

1. The provision of data sharing services by the service provider can consist of:
    - match-making between companies, leaving the actual data transfer to the companies and not to the service provider
    - facilitating the data transfer between the data holder and the data user
    - offering a virtual workspace within which the data can be used without ever being transferred to the IT system of the data user
    - converting the data into specific formats only to enhance interoperability within and across sectors or if requested by the data user or where mandated by Union law or to ensure harmonisation with international or European data standards

   For each of these services the appropriate fees can be charged. However, article 11 (1) also says that "the provider may not use the data for which it provides services for other purposes than to put them at the disposal of data users". **Does this mean that the data service provider can only ask a fee for the above 4 services, and can have no other means of monetizing (part of) the data transfer (e.g. analysing the different types of data transfer being executed, performing data analysis on the data being transferred and in doing so adding value to the data being transferred, …)?**

2. Data sharing service providers can offer the possibility for individuals to request copies of their personal data to be held in a "personal data space" for use within that data space (only results of that use transmitted to another data processor, limiting transfer of personal data) or to be transmitted to another company that needs the full data. **Can the data sharing service provider himself be a provider of such personal data spaces (e.g. a so-called 'data utility company' providing Solid[1] data stores), or can it only provide access and data transfer services to personal data spaces provided by another functionally independent C2B provider (a public sector body or a private company, e.g. a bank)? Can such a C2B data sharing service provider at the same time also be an intermediary for B2B data sharing?**

[1] https://solidproject.org/about#how-does-solid-work

3. In many data sharing situations, different legal regimes apply (personal and non-personal data, protected data and non-protected data, …) and all will need to be enforced. **The regulation should make better clear when exactly data sharing issues will fall under the competences of data protection authorities (GDPR) or under the competences of competent authorities (DGA).**

4. Art.9: Regarding the feedback given on article 9, which seems an important question, where the question is raised whether data sharing intermediaries are considered subcontractors, we would like to raise additionally the question of whose subcontractors? **Subcontractor of the public sector body holding the data, or of the re-user requesting the data?**

5. Art.10(3): Would it be possible to obtain a cost estimate of the fees that the competent authorities could charge? Is it possible for competent authorities to distinguish between SMEs and large companies in the way fees are calculated, in order to take the specificity of SMEs into account?

6. Art.12(3): we are wondering how this collaboration will function in practice and how conflicting decisions/recommendations/etc. will be prevented?

7. Art.13. Competent authorities: Is it an option to monitor not by the competent authorities, but by the European Commission? This would uniform the monitoring process in each Member State.

CHAPTER IV DATA ALTRUISM

1. Should there not be more stringent conditions? For example, to exclude any (strong) influence from said big data companies on altruistic organizations (board members, conflicts of interests, …)

2. Art.18, (2), (b): Why is it necessary to describe the promotion activities of a data altruism entity to a competent national authority? This seems to be a redundant step. It creates an administrative burden for a DAE.

3. "The entity shall also ensure that the data is not to be used for other purposes than those of general interest for which it permits the processing." **In which ways can a DAE (Data altruism entity) ensure that the data is not used for other purposes than those of general interest for which it permits the processing? Are there legal and/or non-legal actions which a DAE could take? If yes, which kind of actions or instruments?**

CHAPTER V COMPETENT AUTHORITIES AND PROCEDURAL PROVISIONS

1. Article 23 (1) says that "The competent authorities designated pursuant to Article 12 and Article 20 shall be legally distinct from, and functionally independent of any provider of data sharing services or entity included in the register of recognised data altruism organisations." **Does this mean that the public sector is allowed to set up a data sharing service provider (as a public sector body, or as a public-private partnership), as long as this data sharing service provider (what we call a 'data utility company') is sufficiently legally distinct from, and functionally independent of the public sector agency taking up the role of competent**

authority? Or is the public sector completely forbidden to set up a data sharing service provider itself (even as part of a public-private partnership)? We invite the COM to elaborate its response in a more comprehensive way than the one already given. Possible incompatibilities of functions/roles should be clearly established from the beginning.

2. Art.26 (1): "other representatives": Wouldn't it be suitable to let data scientists participate as core members of this Board? Their contribution would add independent expertise and a scientific base for the development of standards. A scientific perspective in the development of new standards (and the methodology for those standards) could be very useful in the long run for the quality of data sharing.

CHAPTER VI EUROPEAN DATA INNOVATION BOARD

1. The establishment of a European Data Innovation Board to follow up on and actively support the implementation of the Data Governance Act is very useful. However, the Board seems to consist of only government entities ("representatives of competent authorities of all the Member States, the European Data Protection Board, the Commission, relevant data spaces and other representatives of competent authorities in specific sectors"). Stakeholders and other relevant third parties may be invited. **How will the Board assure that the needs and requirements of the private sector (especially SMEs) are adequately taken into account in the Board's decisions and advice?**

2. The European Data Innovation Board will assist the Commission in enhancing the interoperability of data as well as data sharing services between different sectors and domains, building on existing European, international or national standards. It is clear that interoperability standards are essential to realise the potential of cross-sectoral data sharing. **The text of the Act is very vague on how this standardization will be achieved by the Board. Should these standardization efforts not be completed, or at least already have started, before the implementation of the Act can begin? Should the legal text not better contain an effort / resource commitment specifying that certain specific efforts will have to be made to achieve the stated standardization results?**