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DATA ACT: HOW TO FINALISE THE NEGOTIATIONS?

28 March 2023

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WELCOME

by Giuseppe Colangelo
University of Basilicata

AGENDA

14:00	**Welcome words**
14:05	**Keynote speech**
14:20	**Panel 1: Business to Business/Business to Consumer Data Sharing**
15:00	**Coffee Break**
15:20	**Panel 2: Business to Government Data Sharing**
16:00	**Panel 3: Cloud Switching**
16:55	**Closing words**

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OPENING KEYNOTE SPEECH

Pilar del Castillo
Member of the European Parliament

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PANEL 1: BUSINESS TO BUSINESS / BUSINESS TO CONSUMER DATA SHARING

Johannes Nitschke, Siemens

Sabine Seggelke, Zurich Insurance

Veronika Chvála Vinklárková, Permanent Representation of the Czech Republic to the EU

Maya Bacache, Arcep

Jan Krämer, CERRE Academic Co-Director

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OVERVIEW:

THE DATA ACT IS TOO COMPLEX AND INVOLVES TOO HIGH TRANSACTION COSTS TO FULFILL ITS GOALS

- Good starting point: Enhanced data portability right
- But numerous exceptions and restrictions raise transaction and compliance costs
- A more effective DA needs to be simpler in order to truly free data from its silos

KEY RECOMMENDATION 1:

REMOVE THE NO-COMPETITION CLAUSE
Articles 4(4) and 6(2)(e)

- Data access is already limited to raw data
- Significant investments and innovation still needed to develop competing product
- Stifles entry and innovation also in secondary markets
- Raises compliance costs for emerging data markets
- Competition is a driver of innovation

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KEY RECOMMENDATION 2:

REBUTTABLE PRESUMPTION FOR ZERO ACCESS PRICE FOR THIRD PARTIES

- Inconsistency in the DA: Users can get data for free, but third-parties authorized by users cannot.
- Marginal costs of data access usually close to zero, if data access is restricted to raw data readily available to data holder.

KEY RECOMMENDATION 2:

REBUTTABLE PRESUMPTION FOR ZERO ACCESS PRICE FOR THIRD PARTIES

- Sets yardstick for FRAND access: Lowers transaction costs for accessing data significantly
- Avoids double marginalization and facilitates emergence of data markets/brokers
- Yet, useful to keep liability obligations for third parties

KEY RECOMMENDATION 3:

DO NOT RESTRICT POSSIBLE DATA RECIPIENTS, INCLUDING GATEKEEPERS

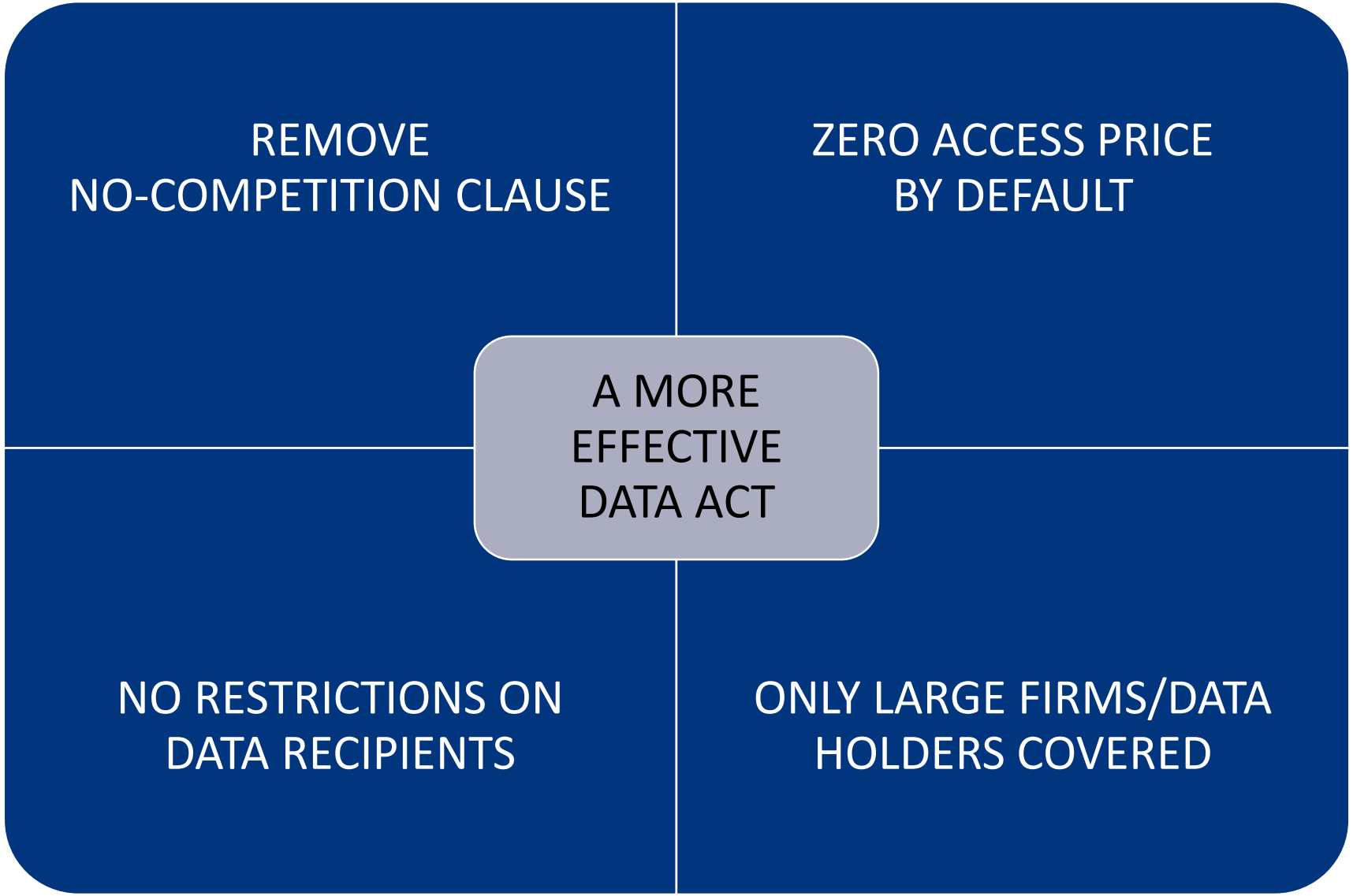
- Gatekeepers under the DMA have proven to be superior innovators in data-driven markets
- DMA already contains provisions on data siloing and data fusion (Articles 5(2) and 6(2) DMA)
- Raises compliance costs for data brokers
- DA does not prevent data holders to contract directly with gatekeepers

KEY RECOMMENDATION 4:

EXEMPT ALSO MEDIUM-SIZED ENTREPRISES FROM COMPLIANCE WITH DA

- Medium-sized enterprise:
  - <250 employees
  - < 50 mio € turnover
- Avoid undue compliance costs and stifling of entry and innovation by new players

SUMMARY OF KEY RECOMMENDATIONS



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COFFEE/TEA BREAK

Next session starts at **15.20 CEST**

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PANEL 2: BUSINESS TO GOVERNMENT DATA SHARING

François Chirié, IGN-France

Matthew Allison, Vodafone

Mario Guglielmetti, EDPS

Anna Aurora Wennakoski, Ministry of Transport and Communications of Finland

Heiko Richter, Max Plank Institute

OVERVIEW

I. **Chapter V: Four regulatory components**

II. **Assessment of the components and recommendations**

III. **Closing remarks**

CHAPTER V:

FOUR REGULATORY COMPONENTS

- Empowerment of national and EU PSBs to request data from private data holders (businesses) in certain cases (Arts. 15/16)
- Harmonization of request procedure and obligations to safeguard affected interests (Arts. 17–19)
- Compensation (Art. 20)
- (Re-)Use of the acquired data (Arts. 17(3), 21)

ASSESSMENT AND RECOMMENDATIONS

EMPOWERMENT TO REQUEST DATA FROM PRIVATE DATA HOLDERS IN CERTAIN CASES
Articles 15 and 16

Analysis

- Scope ill-defined, especially Art. 15(c)
- Problem of pre-emption and subsidiarity
- Unclear relationship with voluntary data sharing agreements

ASSESSMENT AND RECOMMENDATIONS

EMPOWERMENT TO REQUEST DATA FROM PRIVATE DATA HOLDERS IN CERTAIN CASES Articles 15 and 16

Recommendations

- Delete Art. 15(c)(2)
- Clear limitation of Art. 15(c)(1) to ad hoc access and clear (rather restrictive) definition in Art. 2 of the meaning of ad hoc access
- Full derogation of national rules regarding ad hoc access
- Delete exclusion of micro and small enterprises (Art. 14(2)) regarding response to public emergencies under Art. 15(a)
- Clarify relationship between mandatory and voluntary data sharing

ASSESSMENT AND RECOMMENDATIONS

HARMONISATION OF REQUEST PROCEDURE AND OBLIGATIONS TO SAFEGUARD INTERESTS Articles 17 – 19

Analysis and Recommendations

- Require best efforts of the data holder to identify available data
- Increase transparency by publishing all requests (Art. 31(3)(g))
- Introduce more specific procedure on challenging requests

ASSESSMENT AND RECOMMENDATIONS

COMPENSATION
Article 20

Analysis

- Not clear what “reasonable margin” means (fixed costs? average costs? ROI? Profit margin?)
- No economic justification for “reasonable margin”, if the scope is strictly limited to ad hoc access
- Marginal costs of request should be compensated

ASSESSMENT AND RECOMMENDATIONS

COMPENSATION
Article 20

Recommendations

- Limit Art. 20(2) to marginal costs and provide clear definition
- “Protective” cost compensation for micro and small enterprises if included

ASSESSMENT AND RECOMMENDATIONS

(RE-)USE OF THE ACQUIRED DATA
Articles 17(3) and 21

Analysis and Recommendations

- Strict derogation of re-use not justified → consent-based solution (businesses must decide); modification of duty to destroy the data (Art. 19(1)(c))
- Privileged access for research debatable but unsatisfying and vague → thorough conceptualization or (more likely) abstain from initiative in the frame of this legislative act

CLOSING REMARKS

- **Further aspect: Interface with private rights (data protection, IP)**
- **Bottom line:**
  - Dilemma: Effectuating data for the common good while preserving/fostering incentives to collect and market data
  - Generally: Horizontal rules in Chapter V are welcomed

CLOSING REMARKS

- **Bottom line:**
  - But: Scope should be limited and clarified
    - Increase effectiveness and legal certainty of rules
    - Strengthen justification for pre-emptive effect and compensation mechanism
    - Can be broadened at later stage if it proves being effective
  - Other recommendations for improvement → see report and discussion

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PANEL 3: CLOUD SWITCHING

Pierre Chastanet, European Commission

Enzo Ribagnac, Huawei

Solange Viegas dos Reis, OVHCloud

Jeremy Rollison, Microsoft

Francisco Mingorace, CISPE.cloud

Sophie Batas, Dassault Systèmes

Daniel Schnurr, CERRE Research Fellow

OVERVIEW:

THE MAIN FOCUS OF THE DATA ACT SHOULD BE ON FACILITATING SWITCHING BY STRENTHENING DATA PORTABILITY

Main rationale behind recommendations:

- DA as a symmetric regulatory framework of basic rules
- Weigh benefits of regulation against potential adverse side effects and regulatory burden in a technically complex and dynamic sector
- Prioritize clarity and enforceability of rules

OVERVIEW:

THE MAIN FOCUS OF THE DATA ACT SHOULD BE ON FACILITATING SWITCHING BY STRENTHENING DATA PORTABILITY

Main rationale behind recommendations:

- Promote and facilitate one-off switching between data processing services
- Interoperability regulation and mandatory standards as additional provisions subject to further justification
- Competition law and sector-specific regulation as complementary tools

KEY RECOMMENDATION 1:

ON CONTRACTUAL OBLIGATIONS

Ensure effective right to data portability (Art. 24, Art. 25), but retain general freedom to conduct a business (remove Art. 23 (1) (a))

- Contractual obligations should be targeted to the switching process
- Provisions should safeguard against inflated financial barriers to switching, but allow for recoupment of “regular costs”
- Account for responsibilities of all involved parties in the switching process

KEY RECOMMENDATION 2:

ON DATA PORTABILITY

Make Art. 24 (1)(b) on minimum scope of data and Art 26 (4) on data format the default portability requirement for all data processing services

- Data and metadata should be exportable in a structured, commonly used and machine-readable format
- In addition, data should be available in a *non-proprietary, open* format

KEY RECOMMENDATION 3:

ON FUNCTIONAL EQUIVALENCE

Replace the functional equivalence criterion with a (hypothetical) “service replication test” that refers to the original service provider

- Key idea: Is the portable data sufficient to recreate the same service at the original provider?
- Minimizes the need to classify services of the “same service type”

KEY RECOMMENDATION 4:

ON INTEROPERABILITY REGULATION

Mandatory interoperability standardisation should be tied to

i) **ineffectiveness of data portability in specific markets** or

ii) **identification of market failures**

KEY RECOMMENDATION 4:

ON INTEROPERABILITY REGULATION

- Technical complexity, broad diversity of services and dynamic technological progress should be considered
- Mandatory interoperability standards can promote competition, but may also have detrimental effects on smaller providers
- Business users make strategic adoption decisions, which can facilitate market-driven alliances of interoperable providers

Contractual safeguards
(Maximum transition period,
no switching-specific charges)

+

Enhanced Data Portability

Minimum scope of data and metadata (Art. 24 (1)(b))	**+**	**Structured, commonly used, non-proprietary and machine-readable format (Art. 26 (4))**	**+**	**"Service replication test" at the original service provider**

+

Mandatory interoperability standardisation
tied to i) ineffectiveness of data portability
or ii) identification of market failures

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