LEWIATAN

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Pan
Janusz Cieszyński
Sekretarz Stanu
Minister ds. cyfryzacji
Pełnomocnik rządu do spraw cyberbezpieczeństwa

Szanowny Panie Ministrze,

W związku z zaproszeniem wystosowanym przez Kancelarię Prezesa Rady Ministrów do konsultacji projektu Aktu w sprawie danych (*draft Data Act)*, Konfederacja Lewiatan, w załączeniu, przesyła materiał do wykorzystania w toku wypracowywania stanowiska rządu do projektu.

Z poważaniem,

Maciej Witucki
Prezydent Konfederacji Lewiatan

Do wiadomości:
Pani **Anna Gos -** Dyrektor Departamentu Zarządzania Danymi, KPRM

Załącznik: Wkład Konfederacji Lewiatan do stanowiska rządu do projektu Aktu w sprawie danych (*draft Data Act)*

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Wkład Konfederacji Lewiatan do stanowiska rządu do projektu Aktu w sprawie danych (*draft Data Act)*

The following document sets out high-level points on issues of concern arising from the draft of the European Commission's proposal for a Data Act ("**proposal**").

1. **Scope:** The scope as defined in the articles of the proposal remains unclear and arbitrary. The definition of 'related services' is also unclear as it fails to address the delineation of responsibilities between the stakeholders of the supply chain that are best positioned to give access to data.
2. **Trade secret protection:** The proposal provides for disclosure of trade secrets to users, third parties and public bodies under conditions to preserve the confidentiality of the trade secret. However, it does not indicate how the legitimate interests of data holders would be protected in the event of unlawful use by third parties.
3. **Obligations of data receiving third parties:** Data receiving entities may not use the data to develop competing services but it is unclear how this would be enforced and how they would even be aware of competing services of the data holder, as no definition is given. Overall, once data is shared with a third party, it is not clear how the data holder would be able to control how the data is used, or what parties may access it further.
4. **International access and transfer:** The proposal mandates technical, legal and organizational measures to prevent international access or transfer of non-personal data held in the EU where such transfer or access would contradict EU laws or national law of the relevant Member State. Third- country requests for access or data transfer will only be considered valid if based on an international agreement between the requesting country and the EU or EU Member State. The proposed procedural requirements would lead to *de facto* data localization requirements and discriminate cloud service providers legally established in Europe that may be subject to laws in another jurisdiction that could conflict with EU law, but without legal review. This could affect numerous major data flows without even a prior judicial assessment and restrict the choice of technology and
   the EU's capacity for innovation while limiting the ability for EU businesses, beyond digital platforms, to grow and compete internationally.
5. **Making data available to public bodies:** While the proposal enables public bodies to acquire data where there is an "exceptional need", it does not include any safeguards for data holders that avail data to public bodies that then either use the data to harm the data holder.
6. **Cloud switching:** While the proposal has the legitimate ambition to remove blockers for cloud customers to port their workloads, the attempt of the Data Act to compare cloud switching to a relatively straightforward migration of stored data or to free-of-charge portability operations under GDPR does not reflect the variety of cloud services, the volume and complexity of data, the shared responsibilities between cloud providers and customers and the need for specialist technical assistance and project management. This rigid approach would have unintended consequences on competition and innovation in Europe. Also, while more specific, such switching obligations appear to overlap with the portability obligations under DMA, urging to put on hold

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the implementation of the DMA until obligations applicable to cloud computing providers are clarified under the Data Act.

7. **Interoperability:** The proposal empowers the Commission to adopt standards for which compliance with the Data Act provisions on interoperability is presumed. This is significant because the Commission's new Standardization Strategy appears and its review of EU Regulation 1025/2012 aim at reducing the cooperation of EU standardization bodies with international standardization bodies, thus decreasing the influence of non-EU companies in EU standard setting processes. This is worrisome as is unclear how the EU could avoid circumstances where standards are designed to disadvantage non-EU companies, both generally and with respect to compliance with the Data Act.
8. **Enforcement**: It is unclear why the enforcement of the Data Act, including levying of fines for non- compliance is split between different regulators and left to individual Member States. A decentralized system that affords Member States the discretion to enforce the rules would lead to different practices across the EU. It is not clear how that comports with the objective of creating a harmonized legal framework using Article 114 of the TFEU.
9. **Dispute settlement**: Data holders and recipient are entitled to use dispute settlement mechanism established in the proposal. However, this does not affect the right of the parties to seek an effective remedy before a national court or a tribunal. It is unclear how this would work in practice as it exposes companies to the risk of having one dispute before multiple fora.

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