

Warsaw, 21th October 2022
KL/415/202/AM/2022

Adam Bielan, MEP
Member of the Committee on the Internal Market and Consumer Protection
European Parliament

Dear MEP Bielan,

We would like to thank you for the very positive amendments you made in your draft report on the Data Act, as we believe these will very much make cloud switching much more workable.

We very much welcome the amendments you proposed as you're they are daring to make some much necessary amendments to bring needed focus, clarity and practicality, mainly on the Cloud Switching requirements, including:

- removal of functional equivalence;
- switching requirements have been aligned to market practice and technical reality: the incumbent provider has now an obligation of means to assist in the switching, with the destination provider's collaboration (vs a full responsibility to ensure the whole switching process, previously);
- removal of the ban on egress fees in B2B settings;
- data processors are not required to share data anymore (through an amendment of the definition of data holders);
- removal of CSP's sole liability to determine whether non-personal data transfers to third countries are illegal.

On the other hand, we still have open questions as to some of the elements in the report, for instance:

- We're not sure that a cloud provider and their customer would be entitled to agree on fixed term contracts as per amendment 46 (maybe a short tweak would be needed to set forth that parties will be able to after a fixed term period -vs. "notice" period); and
- We're also wondering why you did not amend the obligation for a provider to transfer all metadata & digital assets at the end of a cloud contract. We fear this may lead to a mandate to share trade secrets, IP or competitively sensitive information between competitors, and we also feel that it could lead to maintaining a vast amount of unnecessary data that would need to be stored, secured and transferred - to no obvious benefit.

Therefore, we would be happy to discuss in more detail with you or your team.

Additionally, we would like to highlight the fact that the timeframe of negotiations of the Data Act, especially in the European Parliament, remains a challenge for business.



We want to address two important issues In this respect:

- The Data Act will have an impact not only on the entire data economy, but also on manufacturers of smart objects and service providers across the board. Industries and businesses of all sizes (regardless of the given exemptions) will feel the repercussions of this horizontal legislation. The Data Act must avoid a GDPR scenario, where the majority of businesses only found out they are in scope 5 months before the deadline for application, and after all the possible opportunities for input were closed. Therefore, co-legislators must extend **the timelines of talks, by at least another six months**, and allow for thorough discussions with stakeholders, assessing the benefits and possible effects (both positive and negative) of the Data Act.
- Our position calls for maintaining the protection granted by the Trade Secrets Directive, and to ensure the proper application of the Trade Secrets Directive. The current timeline would not allow for a proper discussion, thus risking an undesirable outcome, e.g., “chilling effect” on investments. Furthermore, the Commission’s study, published in July 2022 (attached), further clarifies in its Point 5.8 Conclusion that a legislative clarification on the relation of trade secrets in the data economy, *“risks intervening too soon, before markets in the data economy have taken shape. Therefore, it is recommended that the EU Commission consider utilising interpretative soft law mechanisms on the applicability of trade secrets protection in the data economy, particularly as regards the criteria for protection as a trade secret.”*

Below you will find the detailed proposal of amendments to the draft ITRE report to the Data Act.

Yours sincerely,



Maciej Witucki
President of the Polish Confederation Lewiatan





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Annex

EU Data Act Proposed Amendments Table

	Data Act Provision	Proposed Amendment	Justification
1	<p>Definitions</p> <p>'service type' means a set of data processing services that share the same primary objective and basic data processing service model;</p>		<p>The concept of a 'same service type' reduces the complexity of cloud services into a number of discreet 'buckets' which do not reflect the reality of cloud services. While services may share a similar objective (e.g. storage or computing), by categorising them as fundamentally the same service (and requiring functional equivalence between services), services will be forced to standardise in a way which is not beneficial to the customer or competition between cloud service providers. Services risk becoming overly homogenised in order to comply with functional equivalence requirements, rather than innovating in order to meet the customer's requirements.</p>
2	<p>Definitions</p> <p>'functional equivalence' means the maintenance of a minimum level of functionality in the environment of a new data processing service after</p>		<p>As above – functional equivalence requires services to be neatly categorised, and reduces the ability of cloud service providers to compete on</p>





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the switching process, to such an extent that, in response to an input action by the user on core elements of the service, the destination service will deliver the same output at the same performance and with the same level of security, operational resilience and quality of service as the originating service at the time of termination of the contract;

the security, resilience or functionality of the services each provides.

3 Article 23; Paragraph 1

Providers of a data processing service shall take the measures provided for in Articles 24, 25 and 26 to ensure that customers of their service can switch to another data processing service, covering the same service type, which is provided by a different service provider. In particular, providers of data processing service shall remove commercial, technical, contractual and organisational obstacles, which inhibit customers from:

- (a) terminating, after a maximum notice period of 30 calendar days, the contractual agreement of the service;
- (b) concluding new contractual agreements with a different provider of data processing services covering the same service type;
- (c) porting its data, applications and other digital assets to another provider of data processing services;
- (d) maintaining functional equivalence of the service in the IT-environment of the different provider or providers of data processing services covering the same service type, in accordance with Article 26.

Article 23; Paragraph 1

Providers of a data processing service shall take the measures provided for in Articles 24, 25 and 26 to assist customers of their service with switching to another data processing service which is provided by a different service provider. In particular, providers of data processing service shall remove commercial, contractual and organisational obstacles, which inhibit customers from:

- (a) terminating, after a maximum notice period of 30 calendar days, the contractual agreement of the service (without prejudice to any financial commitments made by the customer regarding the service);
- (b) concluding new contractual agreements with a different provider of data processing services covering similar data processing services;
- (c) porting its data, applications and other digital assets to another provider of data processing services.

Given the above difficulties in guaranteeing functional equivalence, the focus should be on removing contractual and artificial barriers to switching, rather than placing limitations on the services themselves. Additionally, while an absolute right to terminate on 30 days' notice is not problematic, the exercise of such a right should be without prejudice to any financial commitments, e.g. fixed term contracts against discounted rates, that customers have made with cloud service providers, as such a limitation would limit both the customer's and the provider's freedom to negotiate an appropriate commercial deal.



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Article 24; Paragraph 1

The rights of the customer and the obligations of the provider of a data processing service in relation to switching between providers of such services shall be clearly set out in a written contract. Without prejudice to Directive (EU) 2019/770, that contract shall include at least the following:

(a) clauses allowing the customer, upon request, to switch to a data processing service offered by another provider of data processing service or to port all data, applications and digital assets generated directly or indirectly by the customer to an on-premise system, in particular the establishment of a mandatory maximum transition period of 30 calendar days, during which the data processing service provider shall:

- (1) assist and, where technically feasible, complete the switching process;
- (2) ensure full continuity in the provision of the respective functions or services.

(b) an exhaustive specification of all data and application categories exportable during the switching process, including, at minimum, all data imported by the customer at the inception of the service agreement and all data and metadata created by the customer and by the use of the service during the period the service was provided, including, but not limited to, configuration parameters, security settings, access rights and access logs to the service;

Article 24; Paragraph 1

The rights of the customer and the obligations of the provider of a data processing service in relation to switching between providers of such services shall be clearly set out and made available to the customer in advance of that customer entering into a written contract with the provider. Without prejudice to Directive (EU) 2019/770, the information to be provided to the customer shall include at least the following:

(a) the customer's rights, on the conclusion of its contractual agreement with the provider, to switch to a data processing service offered by another provider of data processing service or to port all data, applications and digital assets generated directly by the customer to an on-premise system, in particular the data processing service provider shall provide clear information concerning:

- (1) the estimated duration of the process for the customer to transition from the data processing service, including any operational, technical or organisational steps that the customer must undertake in order to complete the switching process;
- (2) assistance with the switching process that the provider can supply including, where technically feasible, completion of the switching process from the provider's side; and
- (3) any risks to continuity in the provision of the respective functions or services from the provider's side during the switching process.

(b) a detailed specification of all data and application categories exportable during the switching process, including, at minimum, all data imported by the customer at the inception of the service

The time and cost involved when a customer switches from one CSP to another are highly variable and dependent on numerous factors and choices made by the customer that a CSP does not control or have visibility into, including the complexity of a customer's solution, the practical changes required and the necessity of technical assistance. CSPs are not in a position to complete the switching process end-to-end for customers due to these factors. Instead, CSPs can simply make tools and services available to assist in data transfers. In fact, CSPs compete on making these tools and services available and should not be required to provide these services at no cost.

The commitments regarding switching do not need to be contractual between the cloud service provider and the customer, but instead would operate effectively as a legislative obligation placed on the provider to provide transparent information about the costs, dependencies, data and assistance related to the switching process.





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	<p>(c) a minimum period for data retrieval of at least 30 calendar days, starting after the termination of the transition period that was agreed between the customer and the service provider, in accordance with paragraph 1, point (a) and paragraph 2</p>	<p>agreement and all data created by the customer’s use of the service for customer’s own use or benefit during the period the service was provided;</p> <p>(c) the minimum period for data retrieval starting after the termination of the transition period that was agreed between the customer and the service provider, in accordance with paragraph 1, point (a) and paragraph 2.</p>	<p>By ensuring transparency over timings, customers can make informed choices regarding the switching cloud providers. Ensuring cloud service providers justify the length in time it will take customers to transfer data should offer comfort to the Commission that cloud service providers will not unduly delay the process. This approach recognises the technical and practical realities of cloud switching in that there are varying degrees of complexities which should be handled on a case-by-case basis. Additionally, the data types that suppliers are required to transfer should only include those generated by the customer or which uniquely relate to that customers own usage of the service – cloud service providers will generate their own proprietary information concerning usage, efficiency etc., which they should not be obliged to release to potential competitors, particularly given that this will not assist the customer with the actual switch of their service.</p>
5	Article 24; Paragraph 2	Article 24; Paragraph 2	As per section 5 above.





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	<p>Where the mandatory transition period as defined in paragraph 1, points (a) and (c) of this Article is technically unfeasible, the provider of data processing services shall notify the customer within 7 working days after the switching request has been made, duly motivating the technical unfeasibility with a detailed report and indicating an alternative transition period, which may not exceed 6 months. In accordance with paragraph 1 of this Article, full service continuity shall be ensured throughout the alternative transition period against reduced charges, referred to in Article 25(2).</p>	<p>Where the provider of the data processing service becomes aware that the estimated transition period as defined in paragraph 1, points (a) and (c) of this Article is technically unfeasible for the provider, the provider of data processing services shall notify the customer within 14 working days after the switching request has been made, duly motivating the technical unfeasibility with a detailed report justifying and indicating an alternative transition period. In accordance with paragraph 1 of this Article, full service continuity shall, where technically feasible, continue throughout the alternative transition period.</p>	
<p>6</p>	<p>Article 25 <i>Gradual withdrawal of switching charges;</i></p> <ol style="list-style-type: none"> From [date X+3yrs] onwards, providers of data processing services shall not impose any charges on the customer for the switching process. From [date X, the date of entry into force of the Data Act] until [date X+3yrs], providers of data processing services may impose reduced charges on the customer for the switching process. The charges referred to in paragraph 2 shall not exceed the costs incurred by the provider of data processing services that are directly linked to the switching process concerned. The Commission is empowered to adopt delegated acts in accordance with Article 38 to supplement this Regulation in order to introduce a monitoring mechanism for the Commission to monitor switching charges imposed by data processing service providers on the market to ensure that the withdrawal 	<p>Article 25 <i>Transparency on switching charges;</i></p> <ol style="list-style-type: none"> From [date X] onwards, providers of data processing services shall, before entering into a contract with a customer, provide clear information about the costing parameters for mandatory operations that the provider of data processing services must perform in relation to porting and switching. The charges associated with mandatory operations that the provider of data processing services must perform as part of the switching process shall not be determined outside the costing parameters as referred to in paragraph 1 by the provider of data processing services and, where the costing parameters are exceeded or additional costs are charged to the customer, the provider of data processing services shall, upon the customer's request, provide the customer with a report justifying the charge. 	<p>Any data transfer is not free of charge for cloud service providers. In fact, cloud service providers are usually not even aware of the purpose of a particular customer's data transfer, whether to switch to another provider or otherwise. Additionally, many elements are within the control of the customer (e.g. whether to seek professional services support regarding the transfer or whether it can be managed internally) or the destination provider (e.g. accepted data formats, service start date), and not the originating provider.</p> <p>The originating provider should be responsible for providing clear information about data transfer costs,</p>





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	<p>of switching charges as described in paragraph 1 of this Article will be attained in accordance with the deadline provided in the same paragraph.</p>	<p>3. The Commission is empowered to adopt delegated acts in accordance with Article 38 to supplement this Regulation in order to introduce a monitoring mechanism for the Commission to monitor the costing parameters and switching charges imposed by data processing service providers on the market to ensure that the transparency of data processing services with regards to switching charges as described in paragraph 1 of this Article will be attained in accordance with the deadline provided in the same paragraph.</p>	<p>but should not be obliged to bear costs outside of its control, which are determined by the customer or destination provider. By providing transparency to customers on the scale of costs at the outset of the contract, customers can make informed decisions pre-contract, and plan their data transfers accordingly. The Commission should take comfort in that they can monitor these costing parameters to ensure cloud service providers are being fully transparent and justified in their approach to costs, and therefore fair with their customers.</p>
<p>7</p>	<p>Article 26 <i>Technical aspects of switching;</i></p> <p>1. Providers of data processing services that concern scalable and elastic computing resources limited to infrastructural elements such as servers, networks and the virtual resources necessary for operating the infrastructure, but that do not provide access to the operating services, software and applications that are stored, otherwise processed, or deployed on those infrastructural elements, shall ensure that the customer, after switching to a service covering the same service type offered by a different provider of data processing services, enjoys functional equivalence in the use of the new service.</p>	<p>Article 26 <i>Technical aspects of switching;</i></p> <p>Providers of data processing services that concern scalable and elastic computing resources limited to infrastructural elements such as servers, networks and the virtual resources necessary for operating the infrastructure, but that do not provide access to the operating services, software and applications that are stored, otherwise processed, or deployed on those infrastructural elements shall provide capabilities, adequate information, documentation, technical support and, where appropriate, tools, to perform porting and switching..</p> <p>4. Where the open interoperability specifications or European standards referred to in paragraph 3 do not exist for the service type concerned, the provider of data processing services shall, at</p>	<p>See comments above regarding the complexities in guaranteeing functional equivalence. The obligation to ensure customers are informed of the standard of service they are switching to should be on the destination provider. It is onerous to expect that the outgoing cloud service provider should understand and analyse the destination cloud provider's offerings and determine if it is equivalent to its own services.</p>





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	<ol style="list-style-type: none"> 2. For data processing services other than those covered by paragraph 1, providers of data processing services shall make open interfaces publicly available and free of charge. 3. For data processing services other than those covered by paragraph 1, providers of data processing services shall ensure compatibility with open interoperability specifications or European standards for interoperability that are identified in accordance with Article 29(5) of this Regulation. 4. Where the open interoperability specifications or European standards referred to in paragraph 3 do not exist for the service type concerned, the provider of data processing services shall, at the request of the customer, export all data generated or co-generated, including the relevant data formats and data structures, in a structured, commonly used and machine-readable format. 	<p>the request of the customer and where technically feasible, export all data described in Article 24(1)(b), including the relevant data formats and data structures, in a structured, commonly used and machine-readable format for the relevant service type.</p>	
<p>9</p>	<p>Article 29</p> <ol style="list-style-type: none"> 1. Open interoperability specifications and European standards for the interoperability of data processing services shall: <ol style="list-style-type: none"> (a) be performance oriented towards achieving interoperability between different data processing services that cover the same service type; (b) enhance portability of digital assets between different data processing services that cover the same service type; 	<p>Article 29</p> <ol style="list-style-type: none"> 1. Open interoperability specifications shall comply with paragraph 3 and 4 of Annex II of Regulation (EU) No 1025/2012. 2. Following consultation with industry and taking into account relevant international standards, the Commission may, in accordance with Article 10 of Regulation (EU) No 1025/2012, 	<p>See above for comments concerning the difficulty in establishing ‘same service types.’ Interoperability specifications and standards are useful in helping customers transition services, but should not be mandatory on cloud service providers as this will limit their ability to innovate and create services that serve their customer’s needs. Instead, transparency regarding the compliance of a service with</p>





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(c) guarantee, where technically feasible, functional equivalence between different data processing services that cover the same service type.

2. Open interoperability specifications and European standards for the interoperability of data processing services shall address:

(a) the cloud interoperability aspects of transport interoperability, syntactic interoperability, semantic data interoperability, behavioural interoperability and policy interoperability;

(b) the cloud data portability aspects of data syntactic portability, data semantic portability and data policy portability;

(c) the cloud application aspects of application syntactic portability, application instruction portability, application metadata portability, application behaviour portability and application policy portability.

3. Open interoperability specifications shall comply with paragraph 3 and 4 of Annex II of Regulation (EU) No 1025/2012.

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 standards applicable to specific service types of data processing services.

5. For the purposes of Article 26(3) of this Regulation, the Commission shall be empowered to adopt delegated acts, in accordance with Article 38, to publish the reference of open interoperability specifications and European standards for the

request one or more European standardisation organisations to draft European standards applicable to specific service types of data processing services.

standards and interoperability requirements pre-contract should allow customers to make sufficiently informed decisions before entering into a contract for the provision of cloud services. Where the Commission chooses to implement European standards, these should take into account both any relevant international standards (given the global nature of cloud services and the fact that many customers rely on them), as well as seeking impact from relevant parties within the industry that will be affected by the new standards.



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	interoperability of data processing services in central Union standards repository for the interoperability of data processing services, where these satisfy the criteria specified in paragraph 1 and 2 of this Article.		
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