ECIS European Committee for Interoperable Systems

ECIS ivzw-aisbl
Louizalaan 65 avenue Louise Box 2
B-1050 Brussels, Belgium

T/F +32 (0)2 706 24 15
info@ecis.eu
www.ecis.eu

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FEEDBACK ON THE EUROPEAN COMMISSION'S PROPOSAL FOR THE DATA ACT

1. BACKGROUND ON ECIS

The European Committee for Interoperable Systems ("**ECIS**") is an international, non-profit association of information technology companies founded in 1989 which endeavours to promote a favourable environment for interoperable ICT solutions. For three decades ECIS has actively represented its members on issues relating to interoperability and competition before European, international, and national fora, including the EU institutions and WIPO. ECIS' members include both large and small information and communications technology hardware and software providers, including IBM, McAfee, Opera, Oracle, and Red Hat. For further information, please see ECIS' website at www.ecis.eu.

2. FEEDBACK ON THE PROPOSAL FOR THE DATA ACT

ECIS welcomes the European Commission's ("**Commission**") proposal for the Data Act and supports the Commission's strategy for data, aiming to ensure a fairer, more open, and transparent approach towards data flows. Throughout its 30-year history ECIS has been striving for better system interoperability, both in terms of software and data, hence our feedback is mainly focused on these elements of the proposed regulation.

As a general comment, we believe the proposed Data Act will contribute to the Commission's goal of maximising the value of data in the economy by ensuring fair and correct data flows. It is an ambitious, but necessary, regulation that will help ensure contestable data markets in the future. As is the case for any piece of legislation, the true power of the Data Act will depend on its legal clarity and subsequent enforcement and application in practice. The effectiveness of this legislation will also depend on how well it complements other legislative instruments such as the

General Data Protection Regulation and the Data Governance Act. ECIS is looking forward to engaging with the co-legislators in discussions on how to ensure the Data Act delivers on its promise.

ECIS understands that the Data Act goes beyond data to include underlying assets and underpinning technologies such as containers which drive both greater fairness and faster transformation across the European market. Given the overarching role of this Act it would be useful to establish some core related principles and definitions in article 2 such as the key determinants ensuring high-hygiene open standards and open source. ECIS is of the opinion that establishing such core principles would be important to realise the core objectives of value co-creating, fair and seamless, to the extent functionally possible, switching and porting enabled by hybrid multi cloud environments.

B2G data sharing (Chapter V)

ECIS welcomes the Commission's intention to provide certainty and clarity in relation to situations in which data can, and should be, shared with the public sector. ECIS supports the Commission's aim to have a robust and secure data-sharing framework and is of the opinion that the proposed provisions have the potential to contribute to this goal. However, data sharing with the public sector, even if only limited to situations of "*exceptional need*" (Article 14(1) Data Act), can bring about certain risks. Appropriate oversight on how public bodies make use of this right will be important, especially with regard to the obligation on public bodies to be specific and clearly explain the necessity of the data sharing (Article 17 Data Act). Therefore, ECIS believes continuous dialogue between the Commission and relevant stakeholders will remain important in the implementation of this framework.

Switching between data processing services (Chapter VI)

The continued dependency on a small number of big cloud services players has raised concerns regarding cloud vendor lock-in. In 2019, ECIS published a paper on the importance of openness and interoperability in cybersecurity and cloud services[1] as well as, previously, in 2017 a special report on cloud computing portability and interoperability.[2] Whilst the cloud market has developed considerably in the last 5 years, ECIS is of the opinion that the arguments set out in these papers are still valid. ECIS fully agrees with the Commission's views that in order to address this growing vendor lock-in by ensuring an open and competitive cloud market, it is necessary that business users can easily switch their data, and to an extent possible, applications, between different cloud computing service providers, or port their data back to on-premise IT systems without encountering contractual or economic barriers, and minimising technical incompatibilities.

[1] http://www.ecis.eu/wp-content/uploads/2019/10/White-paper-on-The-importance-of-openness-and-interoperability-in-cybersecurity-and-cloud-services.pdf) http://www.ecis.eu/wp-content/uploads/2010/10/ECIS-Special-Paper-on-Cloud-Computing-Portability-and-Interoperability-16-06-27.pdf

[2] http://www.ecis.eu/wp-content/uploads/2010/10/ECIS-Special-Paper-on-Cloud-Computing-Portability-and-Interoperability-16-06-27.pdf

To this end, ECIS welcomes the Commission's efforts to provide more favourable conditions for the switching of cloud services whereby providers of data processing services must remove "*commercial, technical, contractual and organisational obstacles*" which prevent customers from switching (Article 23(1) Data Act)).

Article 23(1)(d) Data Act sets out that data processing service providers must maintain "*functional equivalence of the service in the IT-environment of the different provider or providers of data processing services covering the same service type."* This "*functional equivalence*" is defined in Article 2(14) Data Act as "*the maintenance of a minimum level of functionality in the environment of a new data processing service after 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*." ECIS welcomes the Commission's efforts in trying to make the switching process effective, however, "*functional equivalence*", as it is set out and defined under the proposal, is unclear and leaves room for interpretation on what functional equivalence means *in practice*. ECIS specifically questions whether a provider should be able to intervene in the environment of the new provider? Given that a provider must ensure the same level of security, performance, and quality of service after the switching process. ECIS believes this requirement may go further than interoperability, as it arguably obliges cloud vendors to allow their competitors access to their environments, which could create security breaches. Therefore, the effectiveness of the regulatory proposal would be enhanced if the concept of "functional equivalence" would be detailed and clarified. Moreover, functional equivalence poses problems in tailor made software solutions where it is not possible to simply extract the data and insert it into a similar solution. ECIS also believes that if functional equivalence were defined to a degree that the service elements were identified, it would prove detrimental to further innovation and differentiation since it could commoditise services.

Attention should rather be focussed on making "cloud switching" more straightforward. In this regard, while some of our members welcome the Data Act's de facto support of open source software, ECIS would suggest a broader open-technologies approach embracing open, transparent, well documented, and thus predictable, interfaces, as well as the pervasive use of high hygiene open standards and open formats as well as Open Source Initiative ("OSI") recognised licensed open source software.

The provisions about contractual terms concerning switching between providers of data processing services and the gradual withdrawal of switching charges, set out in Articles 24 and 25 Data Act, will provide safeguards in order to ensure fair and contestable markets. ECIS further welcomes the Commission's efforts in ensuring switching of data processing services is made technically feasible (Article 26 Data Act). In practice, ECIS believes efficient switching of data processing services can be effectively supported through the further use and development of open international standards as building blocks for cloud services. As set out above, establishing such international standards should remain a high priority in the development of the Commission's digital strategy in order to combat the power of a few largescale data processing service providers.

Moreover, only organisations that satisfy the criteria laid out in Regulation 2012/1025 should be allowed to assess and/or develop such standards. ECIS therefore is concerned that the Commission's occasional reference to GaiaX as a possible vanguard, risks a free-for-all marketplace for standards without the requisite governance, expertise or credibility required to develop high-hygiene open standards.

Interoperability (Chapter VIII)

ECIS welcomes the Commission's continued efforts in striving for interoperability between data processing service providers. Chapter VIII provides essential requirements regarding interoperability (Article 28 Data Act) and specific provisions regarding interoperability for data processing services (Article 29 Data Act). Interoperability is important to ensure data processing service markets according to key European values such as fairness, equality, and transparency.

Article 28 Data Act refers to "*Operators of data spaces*" in setting out the obligations to facilitate interoperability of data, data sharing and data sharing mechanisms and services. Based on the Commission's wording, the usage of "*Operators of data spaces*" seems to refer to a category of operators that differs from data processing service providers. ECIS is of the opinion that the Commission's proposal would benefit from further clarification regarding who is caught under that definition. If too many entities were to fall under the definition of "*Operator of a data space*" the Regulation runs the risk of being overexpansive and burdensome. The Regulation would also risk not being clear enough for a varied group of "*Operators of data spaces.*" ECIS considers it would be more beneficial to have a targeted provision focussed on the well-defined Common European data spaces, rather than all platforms that serve to exchange data. Today, some platforms used to exchange data work very well and it is unclear why these should be subject to the requirements on Article 28.1 Data Act, requiring for instance to be Blockchain enabled, as set out in Article 28.1(d) Data Act.

ECIS recognises the Commission's commitment to open and harmonised standards. Under Article 29(4) Data Act, the Commission has a mandate to "*request one or more European standardisation organisations to draft European standards applicable to specific service types of data processing services.*" In addition, under Article 29(5) Data Act the Commission has the power to adopt delegated acts regarding open interoperability specifications and European standards for interoperability. This power to adopt delegated acts could be used to accompany harmonised standards and make their use mandatory, if necessary. ECIS welcomes these additional powers of the Commission and believes they will aid in the (speed of) development of interoperability through open, common, and harmonised standards. Nevertheless, ECIS strongly recommends that the Commission will consult and engage with stakeholders and industry players regarding the use of its powers in practice. In addition, ECIS hopes that the Commission will adopt common specifications after a standardisation request results in an insufficient standard that does not address the concerns expressed in Article 30.1(a) to(d) Data Act. Standardisation and interoperability have the potential to truly unlock data processing service markets. However, correct, fitting and efficient standardisation efforts will be important moving forward in order to prevent potential trade-offs in innovation.