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THE DATA ACT PROPOSAL

Literature Review and Critical Analysis

Moritz Hennemann / Benedikt Karsten / Marie Wienroeder / Gregor Lienemann / Gordian Ebner (Eds.)

by

Marie Wienroeder

Part II (Art. 14-22)

Chapter V: Making Data Available to Public-Sector Bodies (...) based on Exceptional Need

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Abstract

This three-part publication critically evaluates the Commission's Proposal for a Data Act. It provides an in-depth analysis of the Proposal. The concept of the Act is critically examined and the instruments proposed are thoroughly evaluated and put into context. The existing literature

on the Act is mapped and mirrored. Proposals for amendments to the Act are considered. This publication aims to contribute to the on-going debate about and the legislative process of the Act.

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Data Act, Data Governance, EU, Data Strategy, Access Rights, Unfair Terms, SMEs, Cloud Services, Data Transfers, Interoperability, Data Portability, Transparency

Foreword by the Editors

Dear Fellow Reader,

Since February 2022, the wider public and the Data Law community in particular has had the chance to have a look at the Commission's Proposal for a Data Act. From then on, manifold discussions have begun – including within the European Parliament. Up to this date, we have seen three proposals by the Council's presidency to amend the Commission's proposal – and at least one more is said to come. To assist this process, we have – as a first step – published a Data Act – Article-by-Article Synopsis (systemizing provisions, recitals, and definitions) in March 2022.

This Literature Review and Critical Analysis of the Data Act Proposal – as a second step – provides an (more) in-depth analysis of the Proposal. It is presented in three parts / documents (all accessible here) and also builds upon first contributions to the debate by Hennemann, M. / Steinrötter, B., Data Act – Fundament des neuen EU-Datenwirtschaftsrecht?, *Neue Juristische Wochenschrift (NJW)* 2022 (21), 1481-1486 and Ebner, G., Information Overload 2.0? – Die Informationspflichten gemäß Art. 3 Abs. 2 Data Act-Entwurf, *Zeitschrift für Datenschutz (ZD)* 2022 (7), 364-369; Karsten, B. / Wienroeder, M., Der Entwurf des Data Act – Auswirkungen auf die Automobilindustrie, *Recht Automobil Wirtschaft (RAW)* 2022, 99-105; Hennemann, M., Datenrealpolitik – Datenökosysteme, Datenrecht, Datendiplomatie (2022) *University of Passau IRDG Research Paper Series No. 22-18*).

The concept of the Data Act is critically examined and the instruments proposed are evaluated and put into context. Especially, the study also considers the on-going legislative debate within the European Parliament and with regard to the amendment proposals of the Council Presidency. In addition, reference is not only given to the growing literature on the Data Act proposal (there is very much…), but the current state of discussions is mapped and mirrored – and, where appropriate – this Literature Review and Critical Analysis takes a stand on existing proposals for amendments to the Act and / or proposes further amendments to be considered.

We have especially looked at those parts of the Act (especially Chapter VI on "Switching between Data Processing Services") which have not got the same attention than the omnipresent access rules of Art. 4 et seq. Part I includes an Executive Summary.

This Literature Review and Critical Analysis will be amended in due course – it is *work-in-progress* and just an Open Access-Version 1.0 – and is meant to be published in a revised version after the finalisation of the Data Act (whenever that might be…).

We are more than happy to hear your thoughts about this Literature Review and Critical Analysis in general and about what we have missed – and warmly welcome recommendations in order to close gaps and to correct us! Please drop us an e-mail to moritz.hennemann@uni-passau.de.

We like to thank the entire team at the chair of European and International Information and Data Law and at the Research Centre for Law and Digitalisation (FREDI) for their extremely valuable support in the drafting process and for taking the burden of formatting the documents.

Sincerely yours,
Moritz Hennemann, Benedikt Karsten, Marie Wienroeder,
Gregor Lienemann & Gordian Ebner

Version 1.0

Contents

VII. Making Data Available to Public-Sector Bodies based on Exceptional Need (Art. 14-22)

Chapter V ('Making Data Available to Public Sector Bodies and Union Institutions, Agencies or Bodies Based on Exceptional Need', Art. 14-22) creates a framework under which public-sector bodies may request certain data in specific scenarios, especially in the case of public emergencies, such as public health emergencies or major natural or human-induced disasters.[1]

These provisions seem especially relevant and timely after the global pandemic in general and the flood disaster in Germany last year in particular.[2]

However, the LIBE Draft Opinion proposed to delete the Art. 14-22 altogether, thus discarding B2G data sharing from the Data Act.[3]

1. Obligation to Make Data Available to Public-Sector Bodies (Art. 14)

Art. 14(1) obliges data holders, upon request, to make data available to public sector bodies in cases of exceptional need to use the data. Regarding the material scope, the provisions establish the right for the public sector bodies to both access and use the data requested.[4] However, regarding the access to and use of personal data it is still debated whether Art. 14 and the following provisions fulfil the requirements for a legal basis according to Art. 6(1)(c) and (e) GDPR. According to Rec. 56 Art. 14 includes research-performing organisations and research-funding organisations organised as public sector bodies or as bodies governed by public law. The ITRE Draft Report proposes to change "upon request" to "upon a duly justified and time limited request", to clarify that the obligation to make data available exists only then.[5]

In contrast to the user's right to data access in Art. 4, which is limited to data generated by the use of a product or related service, this obligation to make data available concerns all types of data.[6] Due to its broad definition in Art. 2(6) data holder can also be understood as including public sector bodies.[7] To avoid the overlapping of B2G and G2G data sharing, it should be clarified in the definition in Art. 2(6), whether data holder should include public sector bodies. The Council Presidency addresses this issue in its proposal to add to Rec. 56 that the notion of data holder generally does not include public sector bodies but might include public undertakings.[8]

To ensure that individuals do not fall within the scope of Chapter V, the ITRE Draft Report proposes that only a data holder "that is a legal person" is obliged to make data available.[9]

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[1] Commission, COM(2022) 68 final Explanatory Memorandum, p. 15.

[2] Schaller, T. / Zurawski, P., *ZD-Aktuell* 2022, 01169.

[3] LIBE PE737.389, pp. 49-8.

[4] Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, p. 109.

[5] ITRE PE732.704, p. 46.

[6] Gerpott, T., *CR* 2022, 271, 272.

[7] Ducuing, C. / Margoni, T. / Schirru, L. (Ed.), *CiTiP Working Paper* 2022, 48.

[8] Council Presidency 2022/0047(COD) – 13342/22, p. 23.

[9] ITRE PE732.704, p. 46.

Rec. 56 further states public emergencies as primary examples for such an exceptional need. The Council Presidency proposes to add that exceptional needs are circumstances which are unforeseeable and limited in time, in contrast to other circumstances which might be planned, scheduled, periodic or frequent. The prerequisites for such an obligation are further defined in the following Articles 15-22.

Rec. 57 justifies this obligation based on the assessment that in such cases of public emergency the public interest "will outweigh the interests of the data holders to dispose freely of the data they hold".

If data holders do not comply with this obligation, they may face sanctions according to Art. 33.[10]

The IMCO Draft Opinion proposes to add in Rec. 56 that in order to ensure coherent practices between Member States and a predictable environment, the Member States and the Commission should identify the bodies that can request access to data.[11]

Art. 14(2) exempts small and micro enterprises defined in Art. 2 of the Annex to Recommendation 2003/361/EC from the obligation of Art. 14(1) to limit the burden on them, as Rec. 56 explains. While this exemption is in line with the regulatory concept of the Data Act of excluding small and micro enterprises widely from obligations to make data available, it is questionable, whether it should apply in cases of exceptional need, which require broadest possible access to data including data held by small and micro-sized enterprises.[12] If the public interest outweighs the interests of the data holders to dispose freely of the data they hold in such cases of public emergency (Rec. 57), it would also outweigh the expected burden on small and micro enterprises. Thus, the public interest could prevail in cases of public emergencies.[13] The burden on small and micro enterprises could be reduced by compensating them adequately.[14] Accordingly, the Draft Opinion for the Committee on Legal Affairs (JURI) proposes to delete Art. 14(2) altogether, as well as the respective sentence in Rec. 56.[15] In its latest compromise text, the Council Presidency proposes that SMEs should be obligated to make data available to respond to public emergencies according to Art. 15(a).[16] They should then be able to ask for compensation, unlike other data holders, Art. 15(a), 20(1).[17]

Considering the importance of access to relevant data, it is questionable, whether access in cases of public emergencies is sufficient to further the fulfilment of tasks in the public interest.[18] Especially concerning non-personal data, lesser requirements for access rights of public sector

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[10] Klink-Straub, J./Straub, T., *ZD-Aktuell* 2022, 01076.

[11] IMCO PE736.701, p. 10.

[12] Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, p. 109.

[13] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 49 n. 133.

[14] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 49 n. 133.

[15] JURI PE736.696, pp. 12, 40.

[16] https://www.euractiv.com/section/data-privacy/news/swedish-presidency-tries-to-close-in-on-the-data-act/.

[17] https://www.euractiv.com/section/data-privacy/news/swedish-presidency-tries-to-close-in-on-the-data-act/.

[18] Specht-Riemenschneider, L., *MMR* 2022, 809 (826).

bodies are conceivable and should be considered. So far, the proposal does not differentiate between personal and non-personal data.

The Council Presidency proposes to add that the data which should be made available could include relevant metadata.[19] According to its proposal, "Union institution, agency or body" which can request the making available of data should be limited to "the Commission, the European Central Bank or Union bodies". Consistently, they propose this change also for the Art. 15-22. Additionally, they propose to add a definition for Union bodies in Art. 2 as Art. 2 (21).[20]

The Council Presidency also proposes to add "in order to carry out their statutory duties in the public interest" after "demonstrating an exceptional need to use the data requested".[21]

In order to keep the public or Union bodies that can engage with companies to request access of privately hold data "under control", the IMCO Draft Opinion proposes in his Draft Opinion to add an Art. 14(1a).[22] With the aim to keep public sector bodies that can request access to privately owned data under control, it proposes that the competent authorities according to Art. 31 should establish a procedure to identify a list of dependent public sector bodies available to the public, while considering what is strictly necessary to achieve the objectives of this Regulation.[23] It is not explicitly stated in the proposal, although probably meant, that only the listed public sector bodies should have the right to request access to data according to Art. 14. However, establishing a procedure to then identify a list does not fit most scenarios of exceptional need, as they require a timely response, and would thus contradict the purpose of Art. 14.

Proposed Amendments:

- Adopt the Council Presidency's proposal to clarify that the notion of data holder generally does not include public sector bodies but still might include public undertakings.
- Further access rights especially concerning non-personal data should be considered.

Art. 14(2)

- The exclusion of micro and small enterprises should be eliminated. A special compensation might be considered.

2. Definition of Exceptional Need (Art. 15)

The reference point for the obligation to make data available are the circumstances under which public sector bodies may request data from private data holders.[24] Art. 15 defines alternative scenarios which may constitute an exceptional need.

[19] Council Presidency 2022/0047(COD) – 13342/22, p. 50.

[20] Council Presidency 2022/0047(COD) – 13342/22, p. 39.

[21] Council Presidency 2022/0047(COD) – 13342/22, p. 50.

[22] IMCO PE736.701, p. 29.

[23] IMCO PE736.701, p. 29.

[24] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 49 n. 134.

According to the Council Presidency, the restriction in Art. 15(b) "limited in time and scope" should be moved to the first sentence of Art. 15, thus applying to all three scenarios, Art. 15(a), (b) and (c). Also "in any of the following circumstances" should be changed to "only in the following circumstances".[25]

Response to a Public Emergency

According to Art. 15(a), an exceptional need is given where the data requested is necessary to respond to a public emergency.

Art. 2(10) defines a "public emergency" as an exceptional situation negatively affecting the population of the Union, a Member State or part of it, with a risk of serious and lasting repercussions on living conditions or economic stability, or the substantial degradation of economic assets in the Union or the relevant Member State(s).

Rec. 57 further provides "public health emergencies, emergencies resulting from environmental degradation and major natural disasters including those aggravated by climate change, as well as human-induced major disasters, such as major cybersecurity incidents" as examples for public emergencies. The ITRE Draft Report proposes to include this directly in Art. 15(a) by adding "including public health emergencies or major natural disasters" at the end of the paragraph.[26] It is unclear how including this in the article itself instead of only giving the examples in the Recital would improve the application of this Article.

The JURI Draft Opinion proposes to specify the data requested as "including real-time data".[27]

Whether such a public emergency exists shall be determined "according to the respective procedures in the Member States or of relevant international organisations" (Rec. 57). This may lead to various different procedures to determine a public emergency in the individual member states. Therefore, a standard European procedure would lead to more legal certainty regarding the obligation to make data available in cases of exceptional need.

Prevention of or Assistance in Recovering from a Public Emergency

Furthermore, an exceptional need is given according to Art. 15(b) where the data request is limited in time and scope and necessary to prevent a public emergency or to assist the recovery from a public emergency. The Council Presidency proposes to add "or" to the end of Art 15(b), linking it to Art. 15(c).[28]

Rec. 58 clarifies that this applies only in "circumstances that are reasonably proximate to the public emergency in question". To ensure this, the ITRE Draft Report proposes, to change "prevent a public emergency" to "prevent an imminent public emergency".[29]

It is doubtful whether this would allow for data requests to enable early preventive measures to avoid a public emergency.[30] This scenario though could fall in the category of Art. 15(c).

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[25] Council Presidency 2022/0047(COD) – 13342/22, p. 50.

[26] ITRE PE732.704, p. 46.

[27] JURI PE736.696, p.40.

[28] Council Presidency 2022/0047(COD) – 13342/22, p. 50.

[29] ITRE PE732.704, p. 47.

[30] Bomhard, D./Merkle, M., *RDi* 2022, 168 (171).

Fulfilling a Specific Task in the Public Interest

Lastly an exceptional need may exist according to Art. 15(c) where the lack of available data prevents the public sector body or Union institution, agency or body from fulfilling a specific task in the public interest that has been explicitly provided by law and – in addition – one of the following scenarios are given:

> "the public sector body or Union institution, agency or body has been unable to obtain such data by alternative means, including by purchasing the data on the market at market rates or by relying on existing obligations to make data available, and the adoption of new legislative measures cannot ensure the timely availability of the data" or
>
> "obtaining the data in line with the procedure laid down in Chapter V would substantively reduce the administrative burden for data holders or other enterprises; compared to existing procedures to make data available".

Rec. 58 on the other hand speaks even of "preventing it from effectively fulfilling a specific task" and thereby gives room for an even wider interpretation.[31] Rec. 58 also adds that such an exceptional need may also arise "in relation to the timely compilation of official statistics when data is not otherwise available or when the burden on statistical respondents will be considerably reduced". Thus, the Council Presidency proposes to add "such as official statistics" to "fulfilling a specific task in the public interest".[32] It also proposes to add in Rec. 58 that the specific task should be within the competence of the public sector body and explicitly laid down in their mandate.[33] It further proposes to give examples for such tasks, which could be related to local transport or city planning, improving infrastructural services (as energy, waste, or water management), or producing reliable and up to date statistics.[34]

In line with its proposal for Art. 14, it also proposes to replace "Union institution, agency or body" with "the Commission, the European Central Bank or Union bodies".[35]

Assessment of the Definitions

Regarding the necessary differentiation between Art. 15(a) and (b) in some scenarios of public emergency, for example the ongoing pandemic, it might be difficult to effectively distinguish between response, prevention, and recovery.[36] However, under the current proposal, this differentiation remains necessary, due to different requirements in paras. (a) and (b) and its link to the possibility to claim compensation, Art. 20.

Respective difficulties in the application of Art. 15 should be further considered. This is addressed by the proposal of the JURI Draft Opinion to delete Art. 15(b) and combine both

[31] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 50 n. 135.

[32] Council Presidency 2022/0047(COD) – 13342/22, p. 50.

[33] Council Presidency 2022/0047(COD) – 13342/22, p. 23.

[34] Council Presidency 2022/0047(COD) – 13342/22, p. 23.

[35] Council Presidency 2022/0047(COD) – 13342/22, p. 50.

[36] Ducuing, C. / Margoni, T. / Schirru, L. (Ed.), *CiTiP Working Paper* 2022, 48.

scenarios in Art. 15(a) as "… is necessary to prevent, to respond or to assist the recovery from a public emergency".[37]

While the definition in Art. 2(10) and the scenario of Art. 15(a) seem to give a narrow and strict understanding of an exceptional need, this understanding is expanded in Art. 15(b) and (c) regarding time as well as intensity.[38] Although this is reflected in the increasing requirements for the data request, it still seems necessary to further concretise the conditions for an exceptional need.[39] According to the BDI, the definitions of "public emergency" and also "fulfilling a specific task in the public interest that has been explicitly provided by law" are too broad and lack legal certainty for the data holders, when the obligation to make data available exists.[40] To point out the difference to Art. 15(a) and (b), the ITRE Draft Report proposes to begin the introductory part of Art. 15(c) with "in non-emergency situations,…"[41]. In contrast, the IMCO Draft Opinion proposes to add "as a measure of last resort" at the beginning, to narrow its scope.[42]

Concerning Art. 15(c)(1) it seems especially uncertain for the data holder, when the condition "has been unable to obtain such data by alternative means" will be met[43] and what efforts the public sector body has to make.[44] This condition may even allow for the possibility of its misuse.[45] Still, taking also the Impact Assessment Report into account, the threshold seems high, as it states "difficulties must be justified by objective reasons that make it impossible or very difficult to buy data on the market".[46] The Council Presidency proposes for clarification to replace "has been unable [….] by alternative means" with "has exhausted all other means at its disposal".[47]

It remains open, whether "purchasing the data on the market" refers only to data already offered on the market or if the public sector body is also required to individually negotiate with potential data providers, if the needed data has not been offered.[48] Furthermore it should be clarified, how to determinate the "market rate", as single-source data would be prone to monopoly pricing.[49] Here, the Council Presidency proposes to changing this requirement to "including, but not limited to, purchasing of the data on the market by offering market rates".[50]

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[37] JURI PE736.696, p.40.

[38] Cf. also Schaller/Zurawski, *ZD-Aktuell* 2022, 01169.

[39] Cf. also Schaller/Zurawski, *ZD-Aktuell* 2022, 01169; Hilgendorf, E./Vogel, P., *JZ* 2022, 380 (388).

[40] BDI Stellungnahme zum Legislativvorschlag des EU-Data Act, 2022, p. 18.

[41] ITRE PE732.704, p. 47.

[42] IMCO PE736.701, p. 30.

[43] BDI Stellungnahme zum Legislativvorschlag des EU-Data Act, 2022, pp. 18 et seq.; Hilgendorf, E./Vogel, P., *JZ* 2022, 380 (388).

[44] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 50 n. 136.

[45] Hilgendorf, E./Vogel, P., *JZ* 2022, 380, 388.

[46] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 50 n. 136.

[47] Council Presidency 2022/0047(COD) – 13342/22, p. 50.

[48] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 50, 51 n. 137.

[49] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 51 n. 137.

[50] Council Presidency 2022/0047(COD) – 13342/22, p. 50.

The Council Presidency also proposes to change "and" to "or" before "the adoption of new legislative measures" and replace "cannot ensure" with "which could guarantee".[51] The JURI Draft Opinion proposes to specify existing obligations as "legal" obligations.[52]

The alternative requirement to Art. 15(c)(1) in Art. 15(c)(2) "obtaining the data in line with the procedure laid down in Chapter V would substantively reduce the administrative burden for data holders" is highly questionable as it would allow the request for data access, even if the public sector body could obtain the data by other means.[53] It seems to contradict Art. 15(c) Sentence 1, which requires that a lack of data prevents the public sector body from fulfilling its public task.[54] It also does not really seem to fit the understanding of an "exceptional need". Thus Art. 15(c)(2) should be deleted. This is also proposed by the JURI Draft Opinion.[55]

In contrast, *Leistner* and *Antoine* argue that the conditions under which public bodies may request data access and use from a data holder as defined in Art. 15 are defined and specified adequately.[56]

Proposed Amendments:

Art. 15(a)

– There should be a standard (European) procedure for determining a public emergency.

Art. 15(b)

– Consider integrating lit. b in lit. a.

Art. 15(c)

– The threshold for Art. 15(c) should be clarified.

– The criteria for "market price" should be clarified.

– It should be considered to delete Art. 15(c)(2).

3. Relationship with Other Obligations to Make Data Available (Art. 16)

Existing Obligations to Make Data Available

According to Art. 16(1) the provisions of Chapter V should not affect existing obligations in Union or national law of reporting and complying with information requests. Rec. 59 explains further that "obligations placed on data holders to provide data that are motivated by needs of a non-exceptional nature, notably where the range of data and of data holders is known and

[51] Council Presidency 2022/0047(COD) – 13342/22, p. 50.

[52] JURI PE736.696, p. 41.

[53] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 51 n. 140.

[54] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 51 n. 140.

[55] JURI PE736.696, p. 42.

[56] Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, p. 109.

where data use can take place on a regular basis, as in the case of reporting obligations and internal market obligations, should not be affected".

The same applies to existing obligations to demonstrate or verify compliance with legal obligations. According to Rec. 59 this includes "cases where public sector bodies assign the task of the verification of compliance to entities other than public sector bodies".

These provisions show that Chapter V only regulates "ad hoc" data access and thus should only pre-empt legislation national legislation concerning ad hoc data access.[57] This should be stated explicitly in Art. 16(1).

In addition to Art. 16(1), Rec. 59 clarifies that this regulation neither applies nor pre-empts "voluntary arrangements for exchange of data between private and public entities". The Council Presidency proposes that a respective sentence shall be included in Art. 1(4) Sentence 1.[58]

The Council Presidency proposes to change "in relation to official statistics" with "including the obtaining of data for the purpose of compiling official statistics, not based on an exceptional need".[59]

It also proposes a new Rec. 59a that this Regulation complements and is without prejudice to the Union and national laws providing for the access to and enabling to use data for statistical purposes, in particular Regulation (EC) No 223/2009 on European statistics and its related legal acts as well as national legal acts related to official statistics.[60]

The Prevention, Investigation and Prosecution of Criminal and Administrative Offences

Art. 16(2) excludes the prevention, investigation, detection or prosecution of criminal or administrative offences, or the execution of criminal penalties, as well as customs or taxation administration as possible scenarios in which an exceptional need may occur. Therefore, concerning these areas "public sector bodies should rely on their powers under sectoral legislation" (Rec. 60).

The Council Presidency proposes to specify at the beginning of Art. 16(2) the rights from this chapter as "including the right to access, share and use of data".[61]

Correspondingly, the Union and national law applicable in these areas is not affected by Chapter V, as is also stated by Art. 1(4) for the entire Data Act. Art. 16(2) however adds, that applicable law on the prosecution of administrative offences and execution of administrative penalties should not be affected.

The Council Presidency proposes to add in Rec. 60 that this Regulation should not apply to situations concerning national security or defence.[62] This is however already stated by Art. 1(4).

[57] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 53 n. 145.

[58] Council Presidency 2022/0047(COD) – 13342/22, p. 36.

[59] Council Presidency 2022/0047(COD) – 13342/22, p. 51.

[60] Council Presidency 2022/0047(COD) – 13342/22, p. 24.

[61] Council Presidency 2022/0047(COD) – 13342/22, p. 51.

[62] Council Presidency 2022/0047(COD) – 13342/22, p. 24.

Art. 16(2) and Art. 19(1) together ensure the data made available is only used for the intended purposes.[63]

Proposed Amendment:

Art. 16(1)

– Clarify whether Chapter V only regulates "ad hoc" data access and thus should only pre-empt legislation national legislation concerning "ad hoc" data access.

4. Requirements for the Request to Make Data Available (Art. 17 paras. 1 and 2)

Rec. 61 states the necessity for a "proportionate, limited and predictable framework at Union level […] to ensure legal certainty and to minimise the administrative burdens placed on businesses". Hence, Art. 17 lays down requirements for requests for data to be made available in cases of exceptional need. Such a request pursuant to Art. 14(1) shall include specific substantial information according to Art. 17(1):

— specify what data are required (lit. a)

— demonstrate the exceptional need for which the data are requested (lit. b)

— explain the purpose of the request, the intended use of the data requested, and the duration of that use (lit. c)

— state the legal basis for requesting the data (lit. d)

— specify the deadline by which the data are to be made available or within which the data holder may request the public sector body, Union institution, agency or body to modify or withdraw the request (lit. e)

These provisions ensure that the public sector body has to prove in its request the exceptional need and the conditions of the obligation to make data available.[64] It gives the data holder precise information about the request and thus reduces the burden on the data holder.[65] However, the public sector body may face difficulties specifying the data required, as it may often not know which data private entities hold.[66] As the data holder can decline a request due to unavailability of the data, information imbalances could hamper the effectiveness of the proposed data access right.[67] The legislature should consider ways to ensure requests are not declined too easily on the basis of an asserted data unavailability.

[63] Klink-Straub, J. / Straub, T., *ZD-Aktuell* 2022, 01076.

[64] Schaller / Zurawski, *ZD-Aktuell* 2022, 01169.

[65] Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, p. 110.

[66] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 53 n. 145.

[67] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 53 n. 145.

The IMCO Draft Opinion proposes to add a new Art. 17(1)(aa) "request data within its remit" to prevent data requests outside of competence of the requesting public body.[68]

The Council Presidency proposes to add to Art. 17(1)(a) "including metadata".[69] It also proposes to further specify Art. 17(1)(b) and change "demonstrate the exceptional need" to "demonstrate that the conditions necessary for the existence of the …. are met".[70] For Art. 17(1)(c) it proposes to add "including when applicable by a third party in accordance with paragraph 4" after "the data requested".[71]

The Council Presidency further proposes in Art. 17(1)(d) to change "legal basis" to "legal provision allocating to the requesting public sector body or to the Commission, the European Central Bank or Union bodies the specific public interest task relevant".

Regarding Art. 17(1)(c) the ITRE Draft Report proposes to change "the deadline" to "appropriate deadline that allows the protection of informational self-determination and data security on the part of the data holder".[72] The JURI Draft Opinion proposes that a separate deadline, within which the data holder may request the modification or withdrawal of the request, should be given.[73] It also proposes to add that such deadlines may be extended for SMEs, as consequence of the proposal to delete Art. 14(2).[74] The Council Presidency proposes to specify the deadline as "referred to in Article 18".[75] It also proposes, as does the JURI Draft Opinion, to change "or within which" to "and [the deadline] within which", indication to separate deadlines.[76]

The ITRE Draft Report additionally proposes to add a new Art. 17(1)(ea) that the public sector body should inform the data holder within three months of receiving the requested data on how the data has been processed, in order to ensure transparency.[77]

According to Art. 17(2)(a), the request must be expressed in clear, concise, and plain language understandable to the data holder.

According to Art. 17(2)(b), the request must be proportionate to the exceptional need, in terms of the granularity and volume of the data requested and frequency of access of the data requested.

According to Art. 17(2)(c), the request must respect the legitimate aims of the data holder, considering the protection of trade secrets and the cost and effort required to make the data available. As this requirement demands subsequently for strong technical and legal safeguards to ensure the effective protection of trade secrets, the Centre for IT & IP Law (CiTiP) of the

[68] IMCO PE736.701, p. 30.

[69] Council Presidency 2022/0047(COD) – 13342/22, p. 51.

[70] Council Presidency 2022/0047(COD) – 13342/22, p. 51.

[71] Council Presidency 2022/0047(COD) – 13342/22, p. 51.

[72] ITRE PE732.704, p. 48.

[73] JURI PE736.696, p. 42.

[74] JURI PE736.696, p. 42.

[75] Council Presidency 2022/0047(COD) – 13342/22, p. 51.

[76] Council Presidency 2022/0047(COD) – 15035/22, p. 55; JURI PE736.696, p. 42.

[77] ITRE PE732.704, p. 48.

KU Leuven recommends that the Data Act should require for public sector bodies to be equipped with the necessary legal, technical, and human resources to comply with these obligations.[78]

The JURI Draft Opinion proposes to add to Art. 17(2)(c), that where the disclosure of trade secrets of the data holder is strictly necessary to fulfil the purpose for which the data was requested, confidentiality of such disclosure should be ensured, including through the use of model contractual terms and technical standards.[79]

The IMCO Draft Opinion proposes to add a new Art. 17(2)(ca) "take into account required information security measures".[80]

Rec. 61 adds that the burden on data holders should be minimised by obliging requesting entities to respect the once-only principle, which prevents the same data from being requested more than once by more than one public sector body where those data are needed to respond to a public emergency.

According to *Leistner and Antoine*, Art. 17(2)(b) and (c) ensure that the legitimate interests of the data holder are observed and – consequentially – achieve balanced and proportionate results.[81]

According to Art. 17(2)(d), the request must concern, insofar as possible, non-personal data and should only include personal data where it is strictly necessary (Rec. 64). The Council Presidency proposes to add "in case personal data are requested, the request should justify the need for including personal data and set out the technical and organisational measures that will be taken to protect the data.[82] However, the ITRE Draft Report proposes to change Art.17(2)(d) so that the request may not extent to personal data or data covered by professional secrecy, as such data is highly sensitive and should not be subject to B2G data sharing.[83]

The JURI Draft Opinion proposes to add a new Art. 17(2)(da) that obliges the public sector body to indicate, insofar as possible, user friendly data-sharing mechanisms that respect ethical guidelines on transparency, security and privacy.[84]

According to Art. 17(2)(c), the request must inform the data holder of the penalties that shall be imposed pursuant to Art. 33 by a competent authority referred to in Art. 31 in the event of non-compliance with the request. This deadline must also consider the legitimate aims of the data holder (Art. 17(2)(c)) and especially the time and effort needed to protect affected personal

[78] Ducuing, C. / Margoni, T. / Schirru, L. (Ed.), *CiTiP Working Paper* 2022, 49.

[79] JURI PE736.696, p. 43.

[80] IMCO PE736.701, p. 30.

[81] Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, p. 110.

[82] Council Presidency 2022/0047(COD) – 13342/22, p. 52.

[83] ITRE PE732.704, p. 49.

[84] JURI PE736.696, p. 43.

data as well as the time needed for its anonymisation and pseudonymisation, as required by Art.18(5).[85]

According to Art. 17(2)(f) and to ensure transparency (Rec. 61), the request should be made publicly available online without undue delay. The JURI Draft Opinion proposes the change that the request should be made by the Data Coordinator referred to in Art. 31 (competent authority in the original Data Act proposal) who should make the request publicly available.[86] Similarly, the Council Presidency proposes that the public body should inform the competent authority, Art. 31.[87] However, it also proposes an exception of the obligation to publish the request, if it would create a risk for public security.[88]

The ITRE Draft Report further proposes to add new paras. 2a, 2b, and 2c. According to the proposed Art. 17(2a), Member States should coordinate any requests of databases pursuant to Art. 14(1) to avoid multiple requests by different public sector bodies within their territory to the same data holder.[89] According to the proposed Art. 17(2b), Member States should inform the Commission about any request without undue delay and in any event within 24 hours after the request has been made.[90] According to the proposed Art. 17(2c), where a public sector body or a Union institution, agency or body requires data from more than one Member State, it shall submit its request to the Commission for handling.[91]

5. Reuse of the Data Made Available (Art. 17 paras. 3 and 4)

As the data obtained may be commercially sensitive, it should not be made available for reuse within the meaning of Directive (EU) 2019/1024 (Open Data Directive)[92]. Correspondingly, the Open Data Directive shall not apply to the data held by public sector bodies obtained pursuant to Chapter V, Art. 17(3). As not all obtained data will be commercially sensitive, it is questionable why the prohibition should apply to all data, especially since commercially sensitive data would be excluded from the scope of application of the Open Data Directive (but rules are set by Art. 3 et seq. Data Governance Act, see below).[93] According to Rec. 65, the data holder can expressly agree for the data to be used for other than the requested purposes. A similar approach, with the application of the Open Data Directive as the default and the possibility of the data holder to object the re-use or to explicitly designate purposes beyond the requested purpose, is to be favoured instead of prohibiting the making available for reuse altogether.[94]

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[85] BDI Stellungnahme zum Legislativvorschlag des EU-Data Act, 2022, p. 19.

[86] JURI PE736.696, p. 43.

[87] Council Presidency 2022/0047(COD) – 13342/22, p. 52.

[88] Council Presidency 2022/0047(COD) – 13342/22, p. 52.

[89] ITRE PE732.704, p. 49.

[90] ITRE PE732.704, p. 49.

[91] ITRE PE732.704, p. 49.

[92] Directive (EU) 2019/1024 of the European Parliament and of the Council on open data and the re-use of public sector information.

[93] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 56 n. 153.

[94] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 56 n. 153.

Nevertheless, as stated in Rec. 62, the Open Data Directive is still applicable to the reuse of "official statistics for the production of which data obtained pursuant to this Regulation was used, provided the reuse does not include the underlying data."

Furthermore, it must be noted that Rec. 62 points to the option for public bodies to "[share] the data for conducting research or for the compilation of official statistics, provided the conditions laid down in this Regulation are met". This is further regulated in Art. 21.

As the Open Data Directive only regulates the re-use of data, but does not provide access to data, access to data is still governed by national rules or sectoral EU or national legislation.[95] Thus, the proposal does not exclude access of third parties to data obtained under Chapter V under existing legislation.[96]

The re-use of the obtained data under Art. 3 to 8 Data Governance Act would also be possible. However, these provisions only apply to data protected on the grounds of secrecy, confidentiality intellectual property, or data protection, which are only a fraction of the data covered by Chapter V of the Data Act.[97]

The Council Presidency proposes to add that the obtained data should also not be made available within the meaning of the Data Governance Act and that the Data Governance Act should not apply to data obtained pursuant to Chapter V.[98]

However, according to Art. 17(4), (3) does not preclude the public sector body to exchange the data obtained pursuant to Chapter V with other public sector bodies, where it is necessary to respond to the exceptional needs, for which the data has been requested. It may also make the data available to a third party in cases where it has outsourced, by means of a publicly available agreement, technical inspections or other functions to this third party. It is required to observe Art. 19. To even further clarify this, the ITRE Draft Report [99] and the Council Presidency[100] propose to add "[applies] also to those third parties" at the end.

The possibility to exchange data between public sector bodies given in Art. 17(4), which the once-only principle according to Rec. 61 makes necessary, may lead to a circumvention of the requirements for a request according to Art. 17(1) and may dilute the consideration of the purpose for which the data were requested.[101]

Where a public sector body or a Union institution, agency, or body transmits or makes data available under Art. 17(4), it shall notify the data holder from whom the data was received. The ITRE Draft Report [102] and the Council Presidency[103] propose to add that the data holder should be notified without undue delay. The IMCO Draft Opinion proposes that the data holder should

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[95] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 57 n. 154.

[96] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 57 n. 154.

[97] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 57 n. 155.

[98] Council Presidency /0047(COD) – 13342/22, p. 52.

[99] ITRE PE732.704, p. 50.

[100] Council Presidency 2022/0047(COD) – 13342/22, p. 52.

[101] Schaller / Zurawski, *ZD-Aktuell* 2022, 01169.

[102] ITRE PE732.704, p. 51.

[103] Council Presidency 2022/0047(COD) – 13342/22, p. 52.

already be notified about the intend to transmit or make data available.[104] It also proposes to add that the data holder should have the right to submit a reasonable objection to the intention to transmit or make the data available.[105] The data holder could object within 5 days of the notification – and if the objection is rejected by the public sector body, the data holder could bring the objection to the competent authority referred to in Art. 31.[106]

The ITRE Draft Report proposes to add a new Art. 17(4) subparagraph 2a[107] and the JURI Draft Opinion a new Art. 17(4a)[108], both with the content that the third party should not use the data it receives from a public sector body to develop a product or service that competes with the product or service from which the data originated nor share the data with another third party for that purpose.

The ITRE Draft Report also proposes to add a new Art. 17(4a) that the data request cannot extent to data already available within the public sector domain.[109]

The JURI Draft Opinion proposes additionally a new Art. 17(4b) that the Data Coordinator (competent authority) referred to in Art. 31 may inform the public sector body if the data holder already provided the requested data for the same purpose to another public sector body.[110]

Proposed Amendments:

Art. 17(1)

– Consider how to ensure requests are not declined too easily on the basis of an asserted data unavailability.

Art. 17(2)

– Clarify the legal basis for the processing of personal data.

Art. 17(3) and (4)

– Consider adapting Art. 17(3) and (4) so that the Open Data Directive (Directive (EU) 2019/1024) should as a general rule apply to the data obtained pursuant to Chapter V and the data holder could object to the reuse in cases of commercially sensitive data.

6. Compliance with Requests for Data (Art. 18)

The data holder should comply with the request without undue delay (Art. 18(1)). The data holder may however decline the request or seek its modification under specific circumstances – either the data is unavailable (Art. 18(2)(a)) or the request does not meet the conditions laid down in Art. 17(1) and (2) (Art. 18(2)(b)). The Council Presidency proposes to change

[104] IMCO PE736.701, p. 31.

[105] IMCO PE736.701, p. 31.

[106] IMCO PE736.701, p. 31.

[107] ITRE PE732.704, p. 51.

[108] JURI PE736.696, p. 44.

[109] ITRE PE732.704, pp. 51 et seq.

[110] JURI PE736.696, p. 44.

Art. 18(2)(a) "the data is unavailable" to "the data holder does not have control over the data requested".[111] The IMCO Draft Opinion proposes to add another reason to decline the request in a new Art. 18(2)(ba), "provided security measures concerning transfer, storing and maintaining data confidentiality are insufficient".[112]

Decline or Seek for Modification

According to Art. 18(2) the decline or the seeking of modification must be made in a period of 5 working days in the case of a request for the data necessary to respond to a public emergency (Art. 15(1)(a)). The Council Presidency proposes that the data holder should decline or seek modification without undue delay and not later than within 5 working days.[113] In other cases of exceptional need the data holder should decline or seek modification within 15 working days, Art. 18(2). The Council Presidency also proposes the change "without undue delay and not later than [within 15]".[114]

This provision is reiterated in Rec. 63. The JURI Draft Opinion proposes to change Rec. 63 in a way that the data holder should seek modification or cancellation in a period of 1 to 20 days and depending not only on the nature of the exceptional need, but also on the size of the company, the nature and granularity of the data, and, as appropriate the technical and organisational adaptions necessary to comply with the request.[115] However, it does not propose the same change for Art. 18(2).[116] Notably, such a change would have to be made in the Articles and only subsequently in the Recitals. And while it might increase proportionality to take more criteria into account, a more variable period depending on various criteria would decrease legal certainty both for the data holder as well as the public sector body.

According to Art. 18(3), the data holder may also decline or seek modification of the request if the data holder already provided the requested data in response to previously submitted request for the same purpose by another public sector body or Union institution agency or body (*once-only-principle*) and the data holder has not been notified of the destruction of the data pursuant to Art. 19(1)(c).While this principle is useful to minimise the burden on data holders and may incentivise a better cross-border coordination between public sector bodies, it may come into conflict with the public interest to respond to a public emergencies effectively.[117] There may be cases, where the public sector body which originally requested the data is no longer in the possession of the data or where it cannot provide the data in a timely manner to the public sector body in an exceptional need.[118] In these cases, if there is a public emergency according to Art. 15(a) the public interest should prevail over the interest to minimise the burden for data holders.[119] Thus it should be considered to not apply the once-only-principle to cases of

[111] Council Presidency 2022/0047(COD) – 13342/22, p. 53.

[112] IMCO PE736.701, pp. 31 et seq.

[113] Council Presidency 2022/0047(COD) – 13342/22, p. 52.

[114] Council Presidency /0047(COD) – 13342/22, pp. 52 et seq.

[115] JURI PE736.696, p. 16.

[116] See JURI PE736.696, p. 44.

[117] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 55 n. 149.

[118] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 55 n. 149.

[119] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 55 n. 149.

Art. 15(a) or to provide a "backdoor provision" that the data holder is still obliged to make the data available, if the requesting public sector body despite making reasonable efforts cannot obtain the data from the previous public sector body.[120]

According to Art. 18(4), a data holder – in the case of Art. 18(3) – shall indicate the identity of the public sector body or Union institution agency or body that previously submitted a request for the same purpose. The JURI Draft Opinion proposes, that the data holder should also remit the request to the Data Coordinator (competent authority) referred to in Art. 31.[121] This is in line with the JURI proposal for a new Art. 17(4b) (see above).

Furthermore, Rec. 63 states that the "data holder (…) should communicate the underlying justification for refusing the request to the public sector body or to the Union institution, agency or body requesting the data." This requirement seems to only stem from the Recitals.

Potential conflicts with *sui generis* database rights under the Directive 96/6/EC are not directly addressed in the provisions, e.g. in Art. 18 or Art. 35. Also Art. 35 only concerns the relationship of Art. 4 and 5 with the *sui generis* database rights. Only Rec. 63 states that where the *sui generis* database rights apply in relation to the requested datasets, data holders should exercise their rights in a way that does not prevent the public sector body from obtaining the data, or from sharing it, in accordance with this Regulation. The phrasing of the recital corresponds to the provisions regarding the *sui generis* database rights in the Open Data Directive and the Data Governance Act.[122] It would improve the legal certainty of the interplay between Chapter V and the *sui generis* database rights, if it was regulated not only in a Recital but also explicitly in provisions of the Data Act [123], preferably in Art. 35.

Art. 18(6) also states the possibility for the public sector body to challenge the data holder's refusal and for the data holder to challenge the request. The competent authority is referred to in Art. 31. The procedure should be further specified in the Art. 31-34, especially with regard to the urgency of the situation when the data holder refuses a request in cases of public emergencies.[124] The Council Presidency proposes to add "and the matter cannot be solved by an appropriate modification of the request" before "the matter shall be brought to the competent authority".[125]

Anonymisation and Pseudonymisation of Personal Data

Concerning the disclosure of personal data, where it is strictly necessary to comply with the request, Art. 18(5) obliges the data holder to take reasonable efforts to pseudonymise the data, insofar as the request can be fulfilled with pseudonymised data. According to Rec. 64 this applies where anonymisation of the data proves impossible. The provision itself only refers to

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[120] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 55 n. 149.

[121] JURI PE736.696, p. 45.

[122] Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, p. 110; Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 59 n. 161.

[123] Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, p. 110; Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 59 n. 161.

[124] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 55 n. 150.

[125] Council Presidency 2022/0047(COD) – 13342/22, p. 53.

pseudonymisation, taking into account that due to the huge amount of available data and the advanced analytical methods it has become technically nearly impossible to anonymise data.[126] Still, if, as Rec. 64 implies, the data should first be anonymised where possible, this should also be explicitly mentioned in Art. 18(5).[127] Also, Art. 20(2) mentions compensation for the costs of anonymisation, this supports the understanding that Art. 18(5) should also oblige the data holder to anonymise data where possible. Thus, the JURI Draft Opinion proposes to add "anonymise or" to pseudonymise.[128] The Council Presidency proposes a similar, but further change. It proposes that where the requested data set includes personal data, the data holder should properly anonymise the data, unless the compliance with the request requires the disclosure or personal data.[129] In that case the data should be pseudonymised.[130]

Rec. 64 continues that the making available of the data and their subsequent use should be accompanied by safeguards for the rights and interests of individuals concerned by those data. The body requesting the data should demonstrate the strict necessity and the specific and limited purposes for processing.

This provision should be specified by guidelines on the adequate anonymisation and pseudonymisation.[131]

Proposed Amendments:

– The interplay of Chapter V with *sui generis* data base rights should be regulated explicitly in Art. 35, so that it does not prevent the public sector body from obtaining the data, or from sharing it, in accordance with this Regulation.

Art. 18(3)

– The once-only-principle should be reconsidered in cases of Art. 15(a).

Art. 18(5)

– Anonymisation is to be expressly included.

7. Obligations of Public Sector Bodies Receiving Data (Art. 19)

Art. 19(1) obliges the public sector body receiving data pursuant to Chapter V to:

— (a) not use the data in a manner incompatible with the purpose for which they were requested;

[126] Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, p. 111.

[127] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 58 n. 160.

[128] JURI PE736.696, p. 45.

[129] Council Presidency 2022/0047(COD) – 13342/22, p. 53.

[130] Council Presidency 2022/0047(COD) – 13342/22, p. 53.

[131] BDI Stellungnahme zum Legislativvorschlag des EU-Data Act, 2022, p. 19.

— (b) implement, insofar as the processing of personal data is necessary, technical and organisational measures that safeguard the rights and freedoms of data subjects;

— (c) destroy the data as soon as they are no longer necessary for the stated purpose and inform the data holder that the data have been destroyed.

The Council Presidency proposes to add to Art. 19(1)(b) "[measures that] preserve the confidentiality and integrity of the requested data, in particular personal data, as well as [safeguard]".[132] The JURI Draft Opinion proposes to add "in accordance with Regulation (EU) 2016/ 679 and Directive 2002/58/EC" at the end.[133]

The ITRE Draft Report proposes to add an Art. 19(1)(ba), obliging public sector bodies to "have in place the appropriate and proportional technical and organisational measures to manage cyber risk to that data.[134]

Correspondingly to the obligation to inform the data holder that the data have been destroyed, the data holder should also have the right to request information on whether the data is still stored.[135]

Still Rec. 65 allows the use of the data for other purposes if the data holder that made the data available has expressly agreed for the data to be used for other purposes.

It must be ensured that the data is actually destroyed as soon as they are no longer necessary for the stated purpose.[136] Both the Council Presidency[137] and the ITRE Draft Report [138] propose to change "destroy" to "erase" and to add "without undue delay". The Council Presidency also proposes to add "unless archiving of the data is required for transparency purposes in accordance with national law".[139]

Additionally, Rec. 66 obliges the public sector body receiving data to "respect both existing applicable legislation and contractual obligations to which the data holder is subject". This implies that contractual obligations of the data holder therefore might prevent data access on the basis of Chapter V.[140] Such a consequence should be regulated directly in the provisions and not merely in a Recital, although this approach also seems questionable.[141] If contractual obligations always trump the obligation to make data available, it could pose an incentive for data holders and third parties to circumvent the obligation under Art.14.[142] To foster B2G data

[132] Council Presidency 2022/0047(COD) – 13342/22, p. 53.

[133] JURI PE736.696, p. 45.

[134] ITRE PE732.704, p. 52.

[135] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 57 n. 157.

[136] BDI Stellungnahme zum Legislativvorschlag des EU-Data Act, 2022, p. 18.

[137] Council Presidency 2022/0047(COD) – 13342/22, p. 54.

[138] ITRE PE732.704, p. 52.

[139] Council Presidency 2022/0047(COD) – 15035/22, p. 57.

[140] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 59 n. 162.

[141] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 59 n. 162.

[142] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 59 n. 162.

sharing, it would be more appropriate to render mere derogation clauses void and instead include a balancing test for cases in which contractual restrictions would prevent data access.[143]

According to Art. 19(2) and Rec. 66 the disclosure of trade secrets of the data holder to public sector bodies should only be required where it is strictly necessary to fulfil the purpose for which the data has been requested and confidentiality of such disclosure should be ensured to the data holder. Both the Council Presidency and the JURI Draft Opinion propose that those measures should be taken in advance.[144] The Council Presidency, JURI Draft Opinion, and ITRE Draft Report propose to specify the appropriate measures as (including) technical and organisational measures, with the ITRE Draft Report adding legal measures.[145] The JURI Draft Opinion further proposes to add "including, as appropriate through the use of model contractual terms, technical standards and the application of codes of conduct".[146]

The IMCO Draft Opinion proposes to add an Art. 19(2a), that notwithstanding Art. 21(1) a public sector body should be responsible for the security of the data they it receives.[147]

The ITRE Draft Report also proposes to add an Art. 19(2a) that the public sector body should notify the data holders without undue delay of any cybersecurity incident with the data they have been trusted. If they did not have the measures in place pursuant to the proposed Art. 19(1)(ba) it should be liable by damages due to a cybersecurity breach.[148]

Proposed Amendments:

Art. 19(1)

– Art. 19(1)(c) should also include the right of the data holder to request information whether the data is still stored

Rec. 66

– Clarify that contractual obligations of the data holder cannot prevent data access on the basis of Chapter V.

8. Compensation in Cases of Exceptional Need (Art. 20)

Whether the data holder may claim compensation depends on the kind of exceptional need which motivates the request.

Where the data is made available to respond to a public emergency pursuant to Art. 15(a), according to Art. 20(1) the data holder should provide the data free of charge, as the safeguarding of a significant good is at stake in such cases, Rec. 67. Rec. 67 gives further reason: "Public emergencies are rare events and not all such emergencies require the use of data

[143] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 59 n. 162.

[144] Council Presidency 2022/0047(COD) – 13342/22, p. 54; JURI PE736.696, p. 46.

[145] Council Presidency 2022/0047(COD) – 13342/22, p. 54; JURI PE736.696, p. 46; ITRE PE732.704, p. 53.

[146] JURI PE736.696, p. 46.

[147] IMCO PE736.701, p. 32.

[148] ITRE PE732.704, p. 53.

held by enterprises. The business activities of the data holders are therefore not likely to be negatively affected as a consequence of the public sector bodies having recourse to this Regulation."

In other cases of exceptional need, pursuant to Art. 15(b) and (c), the data holder may claim a reasonable compensation as these cases might be more frequent, Rec. 68.

However, the JURI Draft Opinion proposes to delete Art. 20(1) and adapt Art. 20(2), so that data holders can claim compensation for all requests pursuant to Art. 15.[149] It also proposes a respective change in Rec. 67.[150] The ITRE Draft Report proposes that "where the data holder claims compensation" should be changed to "the data holder is entitled to fair remuneration"[151]

According to Art. 20(2) such compensation shall not exceed the technical and organisational costs incurred to comply with the request including, where necessary, the costs of anonymisation and of technical adaptation, plus a reasonable margin. The data holder should provide information on the basis for the calculation of the costs and the reasonable margin upon request of the public sector body. To foster legal certainty it should be clarified how the "reasonable margin" should be calculated.[152] The legislature could borrow from the Open Data Directive, which already specifies how the "reasonable return on investment" it allows, should be understood.[153]

The JURI Draft Opinion proposes to change "not exceed the" to "cover the proven [… costs]"[154] and the ITRE Draft Report proposes to change it to "cover at least"[155].

Art. 20(2) mentions that efforts to anonymise data should be compensated, but does not mentions pseudonymisation. As pseudonymization is required by Art. 18(5) it should also be compensated.[156] This should be added in Art. 20(2). This is also proposed by the Council Presidency.[157]

Rec. 68 clarifies that the compensation should not be understood as constituting payment for the data itself and as being compulsory.

It has been stressed by various actors that an adequate compensation mechanism should be implemented for all scenarios of an exceptional need that require the making available of data.[158]

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[149] JURI PE736.696, p. 47.

[150] JURI PE736.696, p. 19.

[151] ITRE PE732.704, p. 53.

[152] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 58 n. 159.

[153] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 58 n. 159.

[154] JURI PE736.696, p. 47.

[155] ITRE PE732.704, p. 53.

[156] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 58 n. 160.

[157] Council Presidency 2022/0047(COD) – 13342/22, p. 54.

[158] Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, p. 111; Perarnaud, C. / Fanni, R., The EU Data Act – Towards a new European data revolution?, 2022, p. 4.

The Council Presidency proposes an additional Art. 20(3) that where the public sector body wishes to challenge the level of compensation requested, the matter should be brought to the competent authority referred to in Art. 31.[159] It also proposes a respective addition to Rec. 67.[160]

Proposed Amendments:

Art. 20(1)

– An adequate compensation mechanism should be implemented for all scenarios that require the making available of data not excluding cases of Art. 15(a)

Art. 20(2)

– Clarify how the "reasonable margin" should be calculated.

9. Contribution of Research Organisations or Statistical Bodies (Art. 21)

Art. 21(1) entitles the public sector body to share data received under Chapter V with individuals or organisations in view of carrying out scientific research or analytics compatible with the purpose for which the data was requested. It may also share the data with national statistical institutes and Eurostat for the compilation of official statistics, if compatible with the purpose for which the data was requested. Regarding the meaning of "compatible with the purpose" of the request, it remains open how strict it should be interpreted, e. g. may the research relate to addressing the concrete emergency or may it be used for more general research on emergency prevention.[161]

In such cases it should notify the data holder from whom the data was received, Art. 21(4). The IMCO Draft Opinion proposes, the data holder should even be notified about the intention to transmit the data.[162] The Council Presidency proposes to add that this notification should be made without undue delay and should include the identity of the receiving organisation or individual as well as the technical and organisational measures taken.[163]

The IMCO Draft Opinion proposes to add a new Art. 21(4) subparagraph 1a, giving the data holder the right to submit reasonable objection to the intention to transmit data. If the public sector body rejects the objection, the matter may be brought to the competent authority referred to in Art. 31.[164]

The individuals or organisations receiving the data pursuant to Art. 21(1) should act either on a not-for-profit basis or in the context of a public-interest mission recognised in Union or member state law, Art. 21(2). This resembles Art. 18(c) DGA, which requires data altruism organisations to operate on a not-for-profit basis. Rec. 68 explains that organisations upon which commercial undertakings have a decisive influence allowing such undertakings to

[159] Council Presidency 2022/0047(COD) – 13342/22, p. 54.

[160] Council Presidency 2022/0047(COD) – 13342/22, p. 26.

[161] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 57 n. 156.

[162] IMCO PE736.701, p. 33.

[163] Council Presidency 2022/0047(COD) – 13342/22, p. 55.

[164] IMCO PE736.701, p. 33.

exercise control because of structural situations, which could result in preferential access to the results of the research, should not be considered research organisations for the purposes of this Regulation. The IMCO Draft Opinion proposes to delete in Art. 21(2) "a decisive" before influence, so that any influence of commercial undertakings would prevent data sharing.[165]

The Council Presidency proposes to change "act on" to "use the data exclusively [on a not-for-profit basis]".[166]

The individuals or organisations receiving the data must also comply with the provisions of Art. 17(3) and Art. 19. The JURI Draft Opinion proposes to add the compliance with Art. 20.[167] If this proposal is followed, the data holder could claim compensation twice, which would contradict Rec. 68 stating that the compensation is not to be understood as payment.

The Council Presidency proposes to add a new para. 3a stressing that notwithstanding Art. 19(1)(c) the individuals and organisations receiving the data may keep the data received for up to 6 months following the erasure of the data by the public sector bodies.[168]

Still needed is precision regarding the protection of trade secrets according to Art. 17(2)(c) when data is shared under Art. 21 as well as precision regarding an understanding, which organisations may have access to the data made available.[169]

The proposed data sharing for research purposes allows for data sharing with individuals and organisations working on a non-profit basis. This ignores that also profit based research is valuable and often essential in cases of public emergencies, as proven during the pandemic.[170] The provisions on data sharing for scientific purposes are therefore not fully sufficient to enable effective research.[171] To enable scientific research further, a right to access for individuals and organisations carrying out research should be added to the provisions of the Data Act.[172]

However, according to Rec. 56 research-performing organisations and research-funding organisations organised as public sector bodies or as bodies governed by public law already have access rights under Art. 14 and 15. Consequently, for research organisations governed by public law Art. 14, 15 might have more significance than Art. 21.

Thus, it can be questioned, whether Art. 21 in its current scope, only allowing for data-sharing instead of own access rights while research organisations governed by public law already have own access rights under Art. 14, 15, is necessary and adds value in cases of exceptional need. Some even argue to delete Art. 21 altogether.[173]

Proposed Amendments:

[165] IMCO PE736.701, p. 32.

[166] Council Presidency 2022/0047(COD) – 13342/22, p. 54; similar proposal in ITRE PE738.549, p. 51.

[167] JURI PE736.696, p. 48.

[168] Council Presidency 2022/0047(COD) – 15035/22, p. 58.

[169] BDI Stellungnahme zum Legislativvorschlag des EU-Data Act, 2022, p. 18.

[170] Specht-Riemenschneider, L., *MMR* 2022, 809 (826).

[171] Specht-Riemenschneider, L., Act, *MMR* 2022, 809 (826).

[172] Specht-Riemenschneider, L., *MMR* 2022, 809 (826).

[173] ITRE PE738.549, pp. 46 et seq.

– Consider own access rights for researching individuals and organisations that are not organised as public sector bodies or governed by public law.

Art. 21(1)

– Clarify whether Art. 21(1) is the legal basis for the sharing of personal data.

Art. 21(2)

– Reconsider whether research organisations acting on a for-profit basis should be included.

10. Mutual Assistance and Cross-Border Cooperation (Art. 22)

Art. 22(1) obliges the public sector bodies and Union institutions, agencies, and bodies to cooperate and assist one another in order to implement Chapter V in a consistent manner. The JURI Draft Opinion proposes that this should be ensured by the Data Coordinator (competent authority) as referred to in Art. 31.[174]

The following paragraphs 2 to 4 clarify the preconditions of this assistance.

The exchanged data may not be used in a manner incompatible with the purpose for which they were requested, Art. 22(2).

Union institutions, agencies, and bodies as well as public sector bodies intending to request data from a data holder established in another Member State should first notify the competent authority of that Member State as referred to in Art. 31, Art. 22(3). The Council Presidency proposes that the public sector body should with the notification also transmit the request for examination.[175] It also proposes a Rec. 68a regarding requests to data holders in different Member States.[176]

To reduce the administrative burden on the data holder, the relevant competent authority should – after a notification according to Art. 22(3) – advise the requesting public sector body of the need, if any, to cooperate with public sector bodies of the Member State in which the data holder is established, Art. 22(4) Sentence 1. The requesting public sector body shall take the advice of the relevant competent authority into account, Art. 22(4) Sentence 2.

The Council Presidency proposes that paras. 3 and 4 should also apply to requests made by the Commission, the European Central Bank, and Union bodies.[177]

The Council Presidency proposes consequently that "after having been notified" should be replaced with "after having examined the request in light of the requirements under Art. 17".[178] It also proposes additional measures to be taken by the competent authority and a new structure of Art. 22(4)(a)-(d). According to this proposal, the relevant competent authority shall, "(a)

[174] JURI PE736.696, p. 48.

[175] Council Presidency 2022/0047(COD) – 13342/22, p. 55.

[176] Council Presidency 2022/0047(COD) – 13342/22, p. 27

[177] Council Presidency 2022/0047(COD) – 15035/22, p. 59.

[178] Council Presidency 2022/0047(COD) – 13342/22, p. 55.

transmit the request to the data holder".[179] The proposed Art. 22(4)(b) is the current Art. 22(4) from "advise the requesting public sector body" onward. The Council Presidency further proposes (c) that the competent authority should return the request with duly justified reservations to the public sector body and notify it of the need to consult the competent authority of its Member State to ensure compliance with the requirements of Art. 17 and that the requesting public sector body should take the advice into account before resubmitting the request.[180] It proposes (d) that it should return the request with duly justified reservations to the Commission, the European Central Bank, or the requesting Union body, which should take the reservations into account before resubmitting the request.[181] It also proposes to add an additional sentence that the competent authority should act without undue delay.[182]

This structure parallels the approach followed by the GDPR. Therefore, the challenges and difficulties of establishing the cooperation structure according to Art. 60-62 GDPR might also be paralleled in the cooperation mechanism of the Data Act.[183] Thus relying on already existing structures might be preferable to building additional structures, especially in the beginning.[184]

Proposed Amendment:

– Consider how the existing cooperation structure under the GDPR can be used for the cooperation under the Data Act.

11. Interplay with Art. 6 GDPR

While the request should as far as it is possible be limited to non-personal data, Art. 17(2), and only include personal data where strictly necessary, Rec. 64, cases of exceptional need might often necessitate a request concerning also personal data.

Relationship between Art. 15 and Art. 6 GDPR

As far as personal data is concerned, the making available of data according to Art. 14 and 15 would require a legal basis according to Art. 6 GDPR – as the Data Act is without prejudice to the GDPR.

The Council Presidency proposes to add at the beginning of Rec. 61 "In accordance with Article 6(1) and 6(3) of Regulation (EU) 2016/679 … when providing for the legal basis."[185] This change would clarify, that Chapter V is a legal basis in Union law for the processing of personal data according to Art.6(1)(e), (c) and Art. 6(3) GDPR.

[179] Council Presidency 2022/0047(COD) – 13342/22, p. 55.

[180] Council Presidency 2022/0047(COD) – 13342/22, p. 55.

[181] Council Presidency 2022/0047(COD) – 13342/22, p. 55.

[182] Council Presidency 2022/0047(COD) – 13342/22, p. 55.

[183] Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, p. 111.

[184] Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, p. 111.

[185] Council Presidency 2022/0047(COD) – 15035/22, p. 25.

Leistner and *Antoine* argue that the GDPR itself provides the respective legal basis in Art. 6(1)(d) and (e) as situations of exceptional need as defined in Art. 15 will often also justify a need for personal data.[186] However, the threshold of Art. 6(1)(d) is high and cannot be assumed for any case of exceptional need but would have to be proven for each request. Especially requests according to Art. 15(c) will seldomly be necessary in order to protect vital interests of a natural person, Art. 6(1)(d) GDPR. Art. 6(1)(e) GDPR could justify that the public sector body receives and uses personal data, but needs a legal basis outside of the GDPR, Art. 6(3) GDPR. This legal basis could be the provisions of Chapter V, if they meet the requirements of Art. 6(3) GDPR.

As a legal basis according to Art. 6(1)(e) GDPR it must either state the the purpose of the data processing or the purpose should be necessary for the performance of a task carried out in the public interest, Art. 6(3) GDPR. Art. 14, 15(a) and (b) state the aim of the data processing as combatting or preventing a public emergency. Art. 15(c) does not give an aim other than fulfilling a specific task in the public interest but only allows for aims, which are necessary for the performance of a task carried out in the public interest, thus fulfilling the requirement of Art. 6(3) GDPR.

The data holder who makes personal data available based on a request under Art. 14 could be justified according to Art. 6(1)(c) GDPR, as it is necessary for compliance with a legal obligation.[187] The provisions of Chapter V would have to meet the requirements according to Art. 6(1)(c), (3) GDPR. Thus, it would need to determine the aim of the data processing it requires, Art. 6(3) GDPR. This is only the case for Art. 14, 15(a) and (b). Art.15(c) comprehensively requires data processing for a number of future purposes as long as they are necessary to fulfil a public task. While these tasks must be explicitly provided by law, Art. 15(c) itself does not determine the purpose of the processing.

However, it could also be argued that a separate justification for the data holder making the data available is not needed, as it could be seen as a specification under Art. 6(3) from whom the public sector body can request the data.

Art. 6(3) GDPR also requires that the legal basis meets an objective of public interest and be proportionate to the legitimate aim pursued. Art.15(a)-(c) meet an objective of public interest. The processing of personal data is proportionate to combat and prevent public emergencies, Art. 15(a), (b), especially since it should be anonymised or pseudonymised were possible, Art. 18(5).

Under Art. 15(c) data processing is allowed for various undetermined purposes. It also does not specify the kind of data that can be requested. The aim could be seen as preventing cases in which a public sector body is unable to fulfil its task in the public interest provided by law. However, the significance of these tasks varies and not each task in the public interest will justify the processing of any kind of personal data, as also the extent of protection needed for different kind of personal data will vary. Even if Art. 15(c) is understood as regulating data requests as a last resort, the specific task for which the data is requested will not always justify the processing of personal data.

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[186] Leistner, M. / Antoine, L., IPR and the use of open data and data sharing initiatives by public and private actors, 2022, p. 111.

[187] See also Ducuing, C. / Margoni, T. / Schirru, L. (Ed.), *CiTiP Working Paper* 2022, pp. 57 et seq.

The Council Presidency also proposes a new Art. 17(2)(da) according to which requests made pursuant to Art. 15(c) may only concern personal data in case there is a specific legal basis in Union or Member State law for the processing of data.[188] Though as the proposal seeks to offer a solution in scenarios, were new legislation cannot ensure the timely availability of the data, a legal basis outside of the Data Act might not fit the purpose of this legislation. Rather should Art. 15(c) be amended in a way that specifies the tasks in the public interests for which personal data can be requested. For other tasks in the public interest non-personal data could still be requested.

In the following articles, especially in Art. 18-21, the Data Act contains specific provisions to adapt the application of rules of the GDPR, as allowed in Art. 6(3) GDPR.

Relationship between Art. 18(5) and Art. 6 GDPR

It is also debated whether Art. 18(5) stipulates a legal ground for data processing according to Art. 6(1)(c) GDPR, as anonymisation and pseudonymisation constitute data processing under Art. 4(2) GDPR.[189]

In the context of chapter V, Art. 18(5) has to be seen as a specific provision within the legal basis according to Art. 6(1)(c), (e), (3) GDPR adapting the application of rules of the GDPR on "processing operations and processing procedures" (see above). Thus, no further legal ground for the anonymisation and pseudonymisation of the requested data is needed.

Relationship between Art. 21 and Art. 6 GDPR

Regarding Art. 21 it has to be analysed whether it needs its own justification under Art. 6(1) or also falls under the specification according to Art. 6(3) GDPR, more specifically as a specification on "the entities to, and the purposes for which, the personal data may be disclosed".

As the aim of data sharing for research purposes under Art. 21 is not only the disclosure of data but also further data processing by the research organisation, it is questionable whether this should be encompassed as a specification according to Art. 6(3) GDPR. Still, the purpose of data disclosure to other entities will usually be data processing in some form. So, Art. 6(3) could also be interpreted as allowing for provisions on data sharing such as Art. 21.

Proposed Amendment:

Art. 15(c)

– It should be specified which tasks in the public interest allow for data requests concerning personal data.

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[188] Council Presidency 2022/0047(COD) – 15035/22, p. 52.

[189] Max Planck Institute for Innovation and Competition, Position Statement, 2022, p. 58 n. 160.

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