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DATA ACT – CISPE'S RECOMMENDED 'LANDING ZONES' FOR THE TRILOGUES

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Ahead of the upcoming Trilogue meeting on the Data Act on the 23rd of May, **CISPE welcomes the Swedish Presidency's ambition to conclude the file in the coming months.** However, we wish to emphasise the importance of finding a **balanced and future-proof text** that will ensure the viability and health of the European cloud ecosystem for many years to come.

In order to facilitate finding a reasonable compromise on the text, we are **suggesting to the co-legislators a set of 'landing zones'** which we feel would represent the best possible compromise between the positions of the European Commission, the European Parliament and the Council of the EU.

1. Termination deadlines

We support setting a fixed notice period for termination of cloud contracts, which may facilitate switching and ensure a more dynamic cloud market in Europe for customers.

The exercise of such a right **should not affect other contractual commitments negotiated between customers and their cloud service providers**, such as when the customer has negotiated a fixed term agreement against a discounted rate. Not allowing for such agreements would undermine providers' ability to plan for mid-to-long term and therefore raise prices, undermining the EU's Digital Decade targets.

Suggested landing zone

We suggest that the Council adopts the European Parliament's position in Article 23(1)(a):

> 'terminating, after a maximum notice period of ***60*** calendar days, the contractual agreement of the service***, unless an alternative notice period is mutually and explicitly agreed between the customer and the provider where both parties are able equally to influence the content of the contractual agreement***;

In order to ensure that such contracts do not hinder customers' ability to switch to another provider, a maximum contractual period could be added where such agreements are limited in time (e.g. to 5 years). We trust this decision to the co-legislators

2. Definition of 'exportable data'

We support the obligation on originating providers to allow for the transfer of metadata that is necessary for the successful switching and to allow for 'functional equivalence' in relevant cases (see below).

The types of data that suppliers are required to transfer should **only include those generated by the customer or which uniquely relate to the customers own usage of the service** – cloud service providers will generate their own proprietary information concerning usage, efficiency and so on, which they should not be obliged to release to potential competitors, particularly given that this will not assist the customer with the actual switch of their service.

Suggested landing zone

We suggest that the Council adopts the European Parliament's position in Article 22a(6) and Recital (71b):

> ***Art 22(a)(6): 'exportable data' means the input and output data, including metadata, directly or indirectly generated, or cogenerated, by the customer's use of the data processing service, excluding any data processing service provider's or third party's assets or data protected by intellectual property rights or constituting a trade secret or confidential information;***
>
> ***(71b) […] The exportable data should exclude any data processing service, or third party's assets or data protected by intellectual property rights or constituting a trade secret or confidential information, such as data related to the integrity and security of the service provided by the data processing service, and should also exclude data used by the provider to operate, maintain and improve the service.***

We are also supportive of the Council's transparency-focused amendment in Article 24(1)(ba):

[the data processing service provider need to clearly set out in the contract]:

> ***Art 24(1)(ba): […] an exhaustive specification of categories of metadata specific to the internal functioning of provider's service that will be exempted from the exportable data under point (b), where a risk of breach of trade secrets of the provider exists. These exemptions shall however never impede or delay the porting process as foreseen in Article 23;***

3. Costs of switching

CISPE supports proposals to phase out and abolish any switching fees for data transfers, also known as egress fees, **that are untransparent, unpredictable, arbitrary or excessive.** CISPE also supports obliging the originating provider to provide clear, unambiguous and detailed information about data transfer costs during the pre-contractual phase.

CISPs should never be obliged to bear costs outside of their control – for example costs which are determined by the customer or destination provider. By providing transparency to customers on the scale of costs at the outset of the contract, customers can make informed decisions pre-contract, and plan their data transfers accordingly. In any case, as proposed in Article 25(4), the Commission will be able to monitor these costing parameters to ensure cloud service providers are being fully transparent and justified in their approach to costs, and therefore fair with their customers.

Suggested landing zone

We suggest that the Council adopts the European Parliament's position in Article 25(3a) and 25(3b):

> ***3a. Standard subscription or service fees and charges for professional transition services work undertaken by the provider of data processing services at the customer's request for support in the switching process, including any cost incurred for use of the providers network for the switching process at the customers request, shall not be considered switching charges for the purposes of this Article.***
>
> ***3b. Before entering into a contractual agreement with a customer, the provider of data processing services shall provide the customer with clear information describing the charges imposed on the customer for the switching process in accordance with paragraph 2, as well as the fees and charges referred to in paragraph 3a, and, where relevant, shall provide information on services that involve highly complex or costly switching or for which it is impossible to switch without significant interference in the data, application or service architecture. Where applicable, the provider of data processing services shall make this information publicly available to customers via a dedicated section of their website or in any other easily accessible way.***

For additional clarity, we suggest including a clarification (***in blue*** above) that the switching costs also do not exclude any cost that was incurred by the originating provider due to the consumer requesting the use of the providers network for the purpose of completing the switching process. Although this is implied in the text, full clarity would provide additional legal clarity.

4. Functional equivalence

CISPE is ready to support any initiative that pursues the legitimate goal of avoiding contractual and technical switching barriers. We are pleased to see that – compared to the original Commission proposal – both the Parliament and the Council has recognised the importance of clarifying the concept of 'functional equivalence' and 'service types' in order to ensure that it does not adversely affect the take up and innovation of cloud services.

Although the clarifications by the co-legislators are welcome, we want to nevertheless reiterate the imporance of including these clarifications in the final text of the Data Act.

Suggested landing zone

We support the wording of both the *Council* and the *Parliament* in Articles 26&29, and Recitals 72&74:

Art 26(1). Providers of data processing services […] shall ***take all measures in their power, including in cooperation with the data processing service provider of the destination service, to facilitate*** that the customer, after switching to a service covering the same service type offered by a different provider of data processing services, ***achieves*** functional equivalence in the use of the new service***, provided that the functional equivalence is established by the destination provider of data processing services. The source provider of data processing services shall facilitate the process through providing capabilities, adequate information, documentation, technical support and, where appropriate, the necessary tools***.

Art 29(1)(c): Open interoperability specifications and European standards for the interoperability of data processing services shall: […]

(c) ***facilitate***, where technically feasible, functional equivalence between different data processing services ***referred to in paragraph 1 of Article 26 that cover equivalent services;***
(ca) shall not adversely impact the security and integrity of services and data;
(cb) be designed in a way to allow for technical advances and inclusion of new functions and innovation in data processing services.

Recital (72): Functional equivalence means the ***possibility to re-establish, on the basis of the customer's data,*** a minimum level of functionality of a service ***in the environment of a new data processing service*** after switching, ***where the destination service delivers a comparable outcome in response to the same input for shared functionality supplied to the customer under the contractual agreement. Different*** services ***may only achieve functional equivalence for the shared core functionalities, where both the source and destination service providers independently offer*** the same ***core functionalities. Services can only be expected to facilitate functional equivalence for the functionalities that both the originating and destination services offer. This Regulation does not instate an obligation of facilitating functional equivalence for data processing services of the PaaS and/or SaaS service delivery model.***

Recital (74): […] ***A source provider of data processing services has no access and insights into the environment of the destination provider of data processing services and should not be obliged to rebuilt customer's service, according to functional equivalence requirements, within the destination provider's infrastructure.***

5. Multi-cloud and 'in-parallel' services

We at CISPE agree with the Commission's assessment that a 'seamless multi-vendor cloud environment is a key requirement for open innovation in the European data economy'. Indeed, CISPE's Handbook for Public Sector Cloud Procurement emphasises the importance of hybrid and multi-cloud solutions as a way to prevent lock-in and maintain flexibility for cloud customers.

The Council's proposed Article 28a(2) would forbid cloud infrastructure providers from charging for data transferred for in the context of a multi-cloud arrangement. This is problematic for two reasons. First of all, most CISPs do not have the necessary means (legal, technical or both) to establish the purpose of data transfers by customers. In other words, since they cannot establish whether traffic goes to the end-user or another provider, CISPs would not be able to charge for any kind of data transfer, since they couldn't be sure not to violate the Data Act by charging for transfers in a multi-cloud context. Secondly, such a provision would lead to a monumental shift in how data transfers are currently covered – CISPs would need to recuperate the lost revenues and cover the costs of data transfers from different sources. We believe that such a provision would first require a proper impact assessment, lest it lead to far-reaching negative consequences for the European digital ecosystem. Transferring data to other cloud providers is costly. The networks that facilitate these transfers are expensive to build and maintain, and cloud providers charge fees to recoup the costs of these significant investments. As efficient as CISPs can make these transfers, there is still a cost to recoup, which is the reason why cloud providers charge for transfer within their networks as well as out of it. Prohibiting transfer fees for multi-cloud will reduce cloud providers' incentives to invest in their networks since they cannot charge for use of them, which will stifle growth of the highly available, low latency connections that EU customers need to serve their IT needs. Any investment will naturally focus on creating efficient network connections between what are currently the most prominent cloud providers, in the areas of highest customer demand. This could see emerging cloud players disadvantaged, as well as moving investment away from developing areas.

Suggested landing zone

We suggest deleting the Council's proposed Art. 28(2) since it would require substantial discussions and an assessment of its full impact, for which there is not room at the current advanced stage of the negotiations.

If deemed justified, the Commission's empowerment to monitor the developments and trends regarding switching costs and egress fees could be expanded instead, to take into account also data transfer fees for the purpose of using 'in-parallel' use of cloud services. **See our proposed wording *in blue* below, *alongside the changes proposed by the EP and the Council.***

> **Article 25(4):** The Commission is empowered to adopt delegated acts in accordance with Article 38 to supplement this Regulation in order to introduce a monitoring mechanism for the Commission to monitor ***data egress charges and*** switching charges imposed by data processing service providers on the market, including to ensure that the withdrawal ***and reduction*** of ***these*** charges as described in ***paragraphs 1 and 2*** of this Article will be attained in accordance with the deadline provided in the ***those paragraphs***. ***Such a monitoring mechanism could also ensure that data egress charges imposed to facilitate interoperability for the purposes of in-parallel use of data processing services are justified, related to the actual costs of the data processing service provider and do not restrict the free flow of data or have the potential to limit competition and cause lock-in effects, as provided for in Article 28a.***