POSITION PAPER

ESBG response to the European Commission's call for feedback on the Data Act

ESBG (European Savings and Retail Banking Group)

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INTRODUCTION

The European Savings and Retail Banking Group (ESBG) welcomes the European Commission's data strategy and its commitment to create a single market for data that will constitute a potential source of growth and innovation. A European approach to data is essential to ensure competitiveness, avoid fragmentation of national regulations, and benefit from an effect of scale.

The horizontal regulatory approach is crucial to establish the key rules and principles for all sectors as in our view, an open data economy should be multilateral and cross-sectoral.

If we share the ambitions of this second building block of the Commission's data strategy, particularly the wish to assure fairness in the digital environment and to stimulate a competitive data market, it is important that the Data Act and the Data Governance Act are complementary and consistent with each other.

We welcome the introduction in the Data Act of the compensation for the costs of granting access and the prevention of any negative impact on its business opportunities. We believe these principles will be key to maintain a proper functioning of a data economy and to incentivize data holders to continue investing in high quality data. It will be important at sectorial level that any new EU legislation or review of existing EU legislation takes those principles into consideration (especially in the revision of PSD2, in which currently these requirements are missing). The possibility to exclude compensation for making data available or providing it for lower compensation should only be allowed in exceptional circumstances and would have to be duly justified.

We support the distinction made between data observed and provided on the one hand and inferred and derived on the other hand, as well as the exclusion of the latter from the regulation (recital 14). This exclusion is also justified by the intellectual property rights on data resulting from a process carried out by companies.

CHAPTER I: GENERAL PROVISIONS

The connected products in the scope should be clearly defined. Security dongles, credit cards, and similar devices should not fall under the scope of the product definition. Credit cards and debit cards should not fall under the scope of the product definition for security reasons since the information related to them is particularly sensitive. Also, the sort of data generated by bank cards is already shared via API under PSD2 requirements. It is important that the Data Act clarify the exclusion of this type of product. The regulation should not apply to products that generate data as a result of intentional human input to display, record, or transmit content (recital 15).

CHAPTERS II (AND III): BUSINESS TO CONSUMER AND BUSINESS TO BUSINESS DATA SHARING (AND OBLIGATIONS FOR DATA HOLDERS LEGALLY OBLIGED TO MAKE DATA AVAILABLE)

• We welcome the goal to increase legal certainty for consumers and businesses to access data generated by the products or related services they own, rent, or lease.

• As for the proper functioning of a data economy, it will be crucial beyond access to data to maintain incentives for data holders to continue investing in high-quality data. We particularly welcome the introduction in the Data Act of two key principles for the data holder: the compensation for the costs of granting access (art 9) and the prevention of any negative impact on its business opportunities (art 6).

• Exempting micro and small enterprise from the scope (art 7) would constitute an unlevel playing field that could limit innovation. More proportionality in the application could be achieved by limiting this exemption to microenterprises.

• Limiting the compensation due by SMEs to the "costs directly related to making the data available to the data recipient and which are attributable to the request" (art 9) would constitute an unlevel playing field. More proportionality in the application could be achieved by limiting this exemption to microenterprises.

• The possibility that the Commission leaves, via sectorial Union law or national legislation implementing Union law (art. 9), to exclude compensation for making data available or providing for lower compensation, would go against the level playing field and may lead to market asymmetries and incoherence. It is important that any new EU legislation or the review of existing EU legislation takes those principles into consideration. Legislators should not be able to exclude contractual compensation rules in sectorial legislation with the goal to preserve the freedoms of market participants.

Chapter IV: UNFAIR TERMS RELATED TO DATA ACCESS AND USE BETWEEN ENTERPRISES

• Fairness in contracts is a goal that we share.

• We are pleased to see that the Commission is taking consumer law as a reference, to draw up a list of abusive or illegal clauses.

• This chapter should protect all the actors from unfair contractual terms, regardless of the size of the company (big actors could have the same difficulties that micro, small or medium-sized enterprises face in the contractual negotiation, with bigger companies).

Chapter V: MAKING DATA AVAILABLE TO PUBLIC SECTOR BODIES AND UNION INSTITUTIONS, AGENCIES OR BODIES BASED ON EXCEPTIONAL NEED

• We fully support the need to enhance the capacity of public authorities to take action for the common good, even though some points could be further discussed.

• We question the exemption of microenterprises and small enterprises from the scope (art. 14) as the size of a company does not matter when it comes to public interest. A proportionality in the application could be achieved by limiting this exemption to microenterprises.

• More precision could be given about the distinction between "respond to a public emergency" and "assist the recovery from a public emergency" (art. 15).

• The data made available to respond to a public emergency shall be provided free of charge (art. 20). But there could also be other ways of compensation for the companies, such as tax incentives.

• More precision could also be given about the notion of "reasonable margin" (art. 20). Who would be in a position to define it, considering that it could be very different from a public or business point of view?

• Finally, the interaction between the provision of this chapter and the duty of banking secrecy and the relationship to personal data under GDPR should be clarified. An option could be to only deliver aggregated data to protect the integrity of the customer in accordance with GDPR principle of data minimization.

Chapter VI: SWITCHING BETWEEN DATA PROCESSING SERVICES

• Considering the limited effect of the SWIPO Codes of Conduct on cloud switching, we welcome the introduction by the EC of minimum regulatory requirements of contractual, commercial, and technical nature, imposed on providers of cloud, edge, and other data processing services, to enable switching between such services.

• It is not completely clear whether all cloud services are in the scope of the Data Act, which is of great importance.

• We are concerned that the exception left to providers under the heading "technically unfeasible" (art 24) will function as a way to escape the requirements. We noticed that the burden of proof is on the service provider, but we think this notion should be further specified in order to avoid any future abuse.

Chapter VII: INTERNATIONAL CONTEXTS NON-PERSONAL DATA SAFEGUARDS

• We welcome the Commission's ambition to offer specific safeguards, by way of providers having to take all reasonable technical, legal, and organizational measures to prevent such access that conflicts with competing obligations to protect such data under Union law. The effectiveness of the established process has to be assessed.

• Moreover, this chapter is relating only to non-personal data. Regarding personal data, the realization of the European Union and U.S. new agreement "in principle" on a new framework for cross-border data transfer could represent more legal certainty for all the European actors.

Chapter VIII: INTEROPERABILITY

• Interoperability issues linked to data spaces, data processing service providers, or smart contracts need to be tackled and we agree on the suggested approach, hoping that this future requirement will be discussed and elaborated via a fair and balanced representation of all the involved stakeholders.

• We would recommend a clarification on the interaction between the provisions on interoperability under the Data Governance Act and the Data Act. In the former, under Art. 27(d), the European Data Innovation Board (EDIB) would assist the Commission in tackling fragmentation by addressing cross-border and cross-sectoral interoperability of data, and, under Art. 27(da)(ii) proposing guidelines for common European data spaces on, among other points, requirements for ensuring interoperability. At the same time, under Art. 28 of the Data Act sets out essential requirements regarding interoperability for operators of data spaces.

About ESBG (European Savings and Retail Banking Group)

ESBG is an association that represents the locally focused European banking sector, helping savings and retail banks in 17 European countries strengthen their unique approach that focuses on providing service to local communities and boosting SMEs. An advocate for a proportionate approach to banking rules, ESBG unites at EU level some 885 banks, which together employ 656,000 people driven to innovate at 48,900 outlets. ESBG members have total assets of €5.3 trillion, provide €1 trillion billion in corporate loans, including SMEs, and serve 163 million Europeans seeking retail banking services. ESBG members commit to further unleash the promise of sustainable, responsible 21st century banking. Learn more at www.wsbi-esbg.org.

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