

Committed to Europe

Orange's views on The Data Act proposal

Executive Summary

Orange supports the overall objective of fostering data sharing and data re-use across sectors and between public and private entities. With the Data Act (DA) proposal the European Commission (EC) defines horizontal principles aiming fair data access and use. It also gives European individuals and businesses new tools to access and control the data they cogenerate using IoT devices. Orange welcomes this approach because data control is key especially for AI, However, the DA should also limit burdens and protect investment in the data business.

Orange recommends the following improvements:

- exclude Electronic Communication Services and their metadata from the scope of the DA;
- clarify and better frame the key definitions of “product and related services”, “emergency or exceptional needs”, “functional equivalence”;
- strictly restrain public authorities’ purposes for requesting privately held data and ensuring fair compensation;
- always compensate access to cogenerated data used for commercial purposes;
- establish workable switching obligation for data processing services and allow longer contracts for customized cloud projects.

Detailed position

B2B Data Sharing

Orange is one of the main European connectivity providers and an enabler of IoT ecosystems for people and businesses, from smart devices to industry 4.0. We support actions that facilitate data access by users of connected products, and that increase transparency and fairness in data marketplaces. However, data exchanges should continue to be primarily based on voluntary agreements that address the specific needs of contractual parties, subject to general contract law and regulations including competition law.

Data access in B2B

The DA proposal establishes a new data access and re-use right for “users”, which is a new category that includes both individuals and companies. Users will have the right to access cogenerated data real time, continuously and free of charge.

Orange welcomes the DA's objective to facilitate data sharing for IoT devices and IoT-related services. However, **the DA should distinguish between the users' own data that they have contributed to generate, and additional proprietary data insights that the data holder may have invested in generating and therefore, be entitled to a fair and reasonable remuneration for such data.** Moreover,

it should remain possible to refuse access to data when the risk of fraud or cybersecurity attacks for users is high – for example providing real-time, continuous access to surveillance devices for industrial and/or residential security systems could expose users to security breaches.

Definitions need more precision

The terms ‘product’, ‘related services’, ‘virtual assistants’ in the DA proposal need to be more precisely defined. **To increase legal certainty, legislators need to better clarify which devices would fall under the scope of a ‘product’ in Art. 2 (2)** and how they are to be distinguished from the list of IT devices that are not covered according to R15.

Connectivity should be excluded

Certain IoT devices and related services such as smart watches come with ‘related services’ (dedicated apps) as part of the product experience and are therefore covered by the DA. However, in the case of connected smart watches, **such ‘related services’ need to be clearly distinguished from electronic communication services (ECS) that enable connectivity and that are not related to the specific functionality of the product. ECS and their metadata should therefore be explicitly excluded from the scope.**

B2G Data Sharing

The DA proposal introduces a new obligation for industry to give access to their data based on exceptional needs, for “tasks carried out in the public interest”.

Orange understands that authorities may need to require access to data that is strictly necessary to respond to exceptional needs with the necessary safeguards and controls based on fair compensation. But with the DA proposal, any public sector body may request access to whatever privately held data at a cost-oriented price for the fulfillment of “tasks carried out in the public interest” which could include for example improving city transport, with the result of eluding the usual commercial tariffs and therefore hinder Orange B2G commercial offers.

Orange considers that it is necessary to set the right incentives for a sustainable private-public cooperation, through a fair and reasonable compensation. Companies’ costs for providing data should always be compensated, including the costs of anonymisation and pseudonymisation processes.

Privacy in B2G

In the current DA proposal, **there is a lack of institutional control over public authorities’ requests with the result that any public body may obtain citizens’ personal data without prior opinion or decision from a supervisory authority.** This should be updated in line with EDPB and EDPS opinion 2/2022 that the “lack of data preventing public sector’s fulfillment of a public interest task” cannot constitute justification for interfering with citizens’ fundamental rights. Moreover, the data holder is made the solely responsible for controlling the proportionality of the volume and granularity of the requests, a choice that puts at risk citizens’ fundamental rights and creates burdens for the industry.

Definitions should be more precise

The current definition of “public emergency”, the term “public interest” and “exceptional needs” should be limited to the strict necessary. Orange supports the EDPB and EPDS opinion 2/2022

according to which the DA raises fundamental rights interference. We share their suggestion to amend the definitions and more clearly delineate the types of situations that would constitute a public emergency.

Waive liabilities on mandatory shared data

Orange considers that once data are shared to fulfill B2G obligations, the initial owner should not be considered liable anymore for individual data protection rights, trade secrets and intellectual property because further data processes are not in the control of initial data holders anymore.

One single public authority

With the DA proposal, industry faces multiple requests for the same emergency situation because the number of public authorities' that may request access to data is not defined. Orange recommends defining a single public body to be the interface for each emergency situation.

Encourage diversification of data providers.

A wide-ranging cooperation should be encouraged to increase B2G data sharing instead of focusing on a few players and technologies. For example, mobility data for pandemics should also be requested to GPS-based players and not only to network based geo-localisation.

Switching obligations for data processing services

The DA proposal aims at facilitating customers of cloud and edge services to switch between cloud providers covering the same types of service. This is done by requiring cloud providers to remove commercial, technical, contractual, and organisational "obstacles" that inhibit users from switching to another provider of the same type of service. By enhancing the 'switchability' of cloud services, the DA would contribute to increasing flexibility and choice for customers while reducing dependencies resulting from vendor lock-in.

However, it is also important to consider that the cloud market is evolving and in parallel to providing standardised off-the-shelf solutions it is also addressing more specialised needs as it is the case of Multi-access Edge Computing (MEC) for ultra-low latency and high bandwidth radio telecommunications network.

MEC and cloud-based mobile infrastructure are key investment challenges for the future of the telecom sector. The dependency on very few cloud giants that dominate the global cloud market has raised concerns about vendor-lock-in, bargaining power, privacy, and transparency. The DA's propositions regarding switching and interoperability create opportunities for a more competitive cloud and edge market in Europe, where more cloud services are offered in line with EU values.

While welcoming the general objectives on cloud switching, **Orange considers that the implementation of provisions of the data processing services chapter of the DA proposal should be technically and economically feasible and should not hinder innovation and business opportunities in the cloud and edge cloud sectors**, which are strategic sectors for the digitalisation of the economy and society. Moreover, we recommend improving the following specific topics:

Functional equivalence

The DA proposal requires that data processing service providers should guarantee the functional equivalence of a customer's service when switching to a new data processing service provider. **That new notion of "functional equivalence" should be better defined to become operational and guarantee legal certainty.**

Workable provisions

The DA proposal includes a right for customers to terminate a contract on 30 days' notice, extensible to 6 months if the provider of data processing services demonstrates technical difficulties. Processes for obtaining the extension of delay are a crucial point. Orange recommends harmonisation, transparency for such processes and taking into account the reality of complex offers for specific customers. In the case of even more complex cases, as for customised cloud projects, that need significant investments, the possibility to mutually agree on long term contractual commitments should be envisaged.

Obligation for resellers

The DA does not take into account the different business models for the provision of data processing services (i.e., managed services vs pure resale or cloud broker), in order to correctly allocate the responsibilities along the value chain, considering that the party which has the contractual relationship with the customer is not always the data holder.

Specifically, the DA does not establish who is legally obliged to implement the switching obligations for data processing services in situations where the contracting party is not the same as the original technology provider.

Resellers offer complete products whose essential features are determined by the technology provider, and an important part of the switching process relates to the specific technical adaptation to customers' data applications and digital assets. This makes it difficult for a reseller to fulfill the DA new legal obligations.

To make these provisions workable in case of resellers, **the DA should establish that it is the technology providers in charge of the switching.**

Promotion of interoperability

The DA proposal requires compliance with open standards and interfaces, where these exist, and contains provisions that would empower the Commission to adopt common specifications where it considers that existing harmonised standards are insufficient in relation to certain interoperability requirements.

Orange recommends a careful approach to interoperability. Costs and complexity of the DA proposed obligation need a careful assessment.

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