CREATIVE COMMONS POSITION PAPER:
EU DATA ACT REGULATION

April 2023

EXECUTIVE SUMMARY

Creative Commons (CC) is an international nonprofit organisation dedicated to helping build and sustain a thriving commons of shared knowledge and culture. Together with an extensive member network and multiple partners, we build capacity, we develop practical solutions, and we advocate for better open sharing of knowledge and culture that serves the public interest. CC's long focus on open sharing has evolved into a focus on better sharing: We must pursue a commons of knowledge and culture that is inclusive, just, and which inspires reciprocity — a commons that serves the public interest.

Given the dramatic amount of data that our modern digital society generates, policymakers and legislators have a duty to develop robust frameworks to ensure citizens' data is protected, stored and shared as intended, while also encouraging and facilitating research, creativity and innovation enabled by data generation. We therefore welcome the EU's draft Regulation and its focus on giving citizens control of their data and how it can be used and shared.

We believe it is important that the EU works closely with other jurisdictions and international standard setters to ensure that the Data Act is not developed in isolation, in order to ensure global legal coherence and certainty. Data is not bound by national boundaries, and diverging regional or jurisdictional approaches risk creating barriers to the flow of and access to data, hindering better sharing and creative potential.

The Data Act is an important step in addressing the challenges and opportunities of data in an increasingly digital world. Creative Commons supports the EU in setting explicit goals of promoting the sharing of data to drive research and innovation while, at the same time, offering access and protection to the people who generate these data.
1. A key principle of the Data Act is that of **value creation** across economic sectors: the Act determines who can create value from data and under what conditions. CC believes that the Data Act can create value by empowering creativity, promoting innovation to unlock the potential of a fair and innovative data economy, and ensuring **more responsible sharing of data** to support the public interest — what we call better sharing at CC. Accordingly, CC supports all efforts in the Data Act to **strengthen user access to data**, to **empower users with control over the data** they generate, and to **promote better sharing of data**. At its core, the Data Act seeks to balance the interest of users and holders of data in a way that will encourage innovation while protecting data subjects. One way it does this is by providing consumers control over and access to the data that companies may collect about them. Additionally, the Data Act levels the playing field between large enterprises and small and medium sized enterprises (SMEs). We approve of these goals of the Data Act to more broadly unlock data sharing among business and public sector bodies.

2. **Interoperability is essential for value creation of citizens’ data**: Interoperability is a pillar of the data economy (especially cloud services and data spaces) and is key to better data sharing and deriving value from data. Without a firm commitment to technological interoperability, based on specific, agreed-upon standards, a legal requirement to share data would be ineffective. Moreover, data holders may act to impede re-use of the data, in order to continue to maximise their ability to control and profit from its use. As such, interoperability is critical to remove barriers to data sharing. Moreover, requiring interoperability helps to empower citizens by ensuring they can have access to and control over the data they generate in all relevant data spaces by preventing technological barriers to sharing, having access to, and deriving value from the data. Furthermore, interoperability promotes competition and prevents users from being locked in to individual products or services. Altogether, interoperability is essential to the success of the Data Act, and CC supports these provisions.

3. **Sui generis database right is not applicable**: **Sui generis** database rights should not be a barrier to data sharing under the Data Act. CC supports Article 35 of the Data Act, that clarifies that the **sui generis** database right (EU Database Directive 96/9/EC) does not apply to databases containing machine-generated data from internet of things (IoT) devices, data generated by connected products, or other types of machine-generated data. Without Article 35, sharing and access to such data could be blocked by database protection rights. While CC believes that **sui generis** database protection does not apply to these databases, by exempting them from **sui generis** protection, Article 35 ensures that the data they contain can be accessed and shared as intended by the Data Act. Additionally, **sui generis** database rights should not prevent data sharing with public sector bodies following a proper request under the Data Act, as addressed by Recital 63.
SUGGESTED AMENDMENTS

Article 2: definitions

‘user’ means a natural or legal person that owns, rents, or leases a product or receives a product or services;

Justification: As currently drafted, the definition of ‘user’ does not clearly include a person who receives a product as a gift or who does not otherwise purchase a product themselves — that is, someone who does not own, rent, or lease a product. Excluding users who do not own, rent, or lease products conflicts with the purpose of the Data Act to empower users with some control over their data.

Add new definition “data space”:
“data space means data infrastructures with tailored governance mechanisms that collect or store user data”

Justification: Article 29 on interoperability uses holds “Operators of data spaces shall comply with [the interoperability provisions of the article.]” However, the Act does not appear to define the term “data spaces” in Article 2. Without a clear definition for who is an “operator of a data space,” it is ambiguous to whom Article 29 provisions apply. This definition adds clarity and aligns with a similar one used by the European Commission in its Digital Europe Work Programme.

Article 35

In order not to hinder the exercise of the right of users to access and use such data in accordance with this Act or the right to share such data with third parties in accordance with Article 5 of this Regulation, the sui generis right provided for in Article 7 of Directive 96/9/EC shall not apply to databases containing data obtained from or generated by the use of a product or a related service.

Justification: This section appears to limit the scope of Article 35 to include only data covered by Articles 4 and 5. In doing so, this conflicts with the purpose of the Data Act to empower users with control over their data and to promote better sharing of data. Additionally, it adds unwanted ambiguity over the scope of the Article. Recital 84 does not mention this limitation, and if we read Article 35 and Recital 84 in tandem, the intended scope of Article 35 is unclear.

Recital 18

The user of a product should be understood as a natural or legal person that owns, rents, or leases a product or receives a product or services. Depending on the legal title under which he uses it a product or service, such a user bears the risks and enjoys the benefits of using the connected product and should enjoy also the access to the data it generates, whether or not the
user is also the purchaser, owner, or lessor of the product or service. The user should therefore be entitled to derive benefit from data generated by that product and any related service.

Justification: This amendment to Recital 18 clarifies that the Act should apply to users of products or services who do not purchase, own, or lease those products or services, including people who receive products or services as gifts, or otherwise receive products or services.

Recital 63

Data holders should have the possibility to either ask for a modification of the request made by a public sector body or Union institution, agency and body or its cancellation in a period of 5 or 15 working days depending on the nature of the exceptional need invoked in the request. In case of requests motivated by a public emergency, justified reason not to make the data available should exist if it can be shown that the request is similar or identical to a previously submitted request for the same purpose by another public sector body or by another Union institution, agency or body. A data holder rejecting the request or seeking its modification 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. In case the sui generis database rights under Directive 96/6/EC of the European Parliament and of the Council apply in relation to the requested datasets, data holders should exercise their rights in a way that does not prevent the public sector body and Union institutions, agencies or bodies from obtaining the data, or from sharing it, in accordance with this Regulation. Rightsholders shall not invoke these rights to prevent or restrict access to the data.

Justification: This amendment ensures that sui generis database rights will not be used to block access to data when properly requested by public sector bodies to address public emergencies.

Recital 84

In order to eliminate the risk that holders of data in databases obtained or generated by means of physical components, such as sensors, of a connected product and a related service claim the sui generis right under Article 7 of Directive 96/9/EC where such databases do not qualify for the sui generis right, and in so doing hinder the effective exercise of the right of users to access and use data and the right to share data with third parties under this Regulation, this Regulation should clarify that the sui generis right does not apply to such databases as the requirements for protection would not be fulfilled.

Justification: Deletion of the final clause of Recital 84, after the word “databases” as this section is not reflected in Article 35 and creates ambiguity over the scope of Article 35. Including this section may suggest that Article 35 only applies to databases that do not already qualify for sui generis protection, which is not the intention. Deletion further improves the clarity of the legal drafting.
ADDENDUM:
Commentary on relevant Parliament and Council positions

The final positions of the Parliament and Council relate to the topics above, and we highlight here our recommended, preferred approach of the two positions.

For the definition of “user”: We recommend the Council’s definition, namely:

(1ad) ‘data subject’ means data subject as referred to in Article 4, point (1), of Regulation (EU) 2016/679;

(5) ‘user’ means a natural or legal person, including a data subject, that owns, rents or leases a product or receives a related services;

For the limitations on the sui generis right’s application to data under the Act, we recommend incorporating the Council’s Recital 84 while Parliament’s Article 35, namely:

Council - Recital 84: In order to eliminate the risk that holders of data in databases obtained or generated by means of physical components, such as sensors, of a connected product and a related service claim the sui generis right under Article 7 of Directive 96/9/EC where such databases do not comply with the sui generis right, and in so doing hinder the effective exercise of the right of users to access and use data and the right to share data with third parties under this Regulation, it should be clarified that the sui generis right does not apply in the situations covered by this Regulation to such databases as the requirements for protection would not be fulfilled:

Parliament - Article 35: The sui generis right provided for in Article 7 of Directive 96/9/EC does not apply to databases containing data obtained from or generated by the use of a product or a related service falling within the scope of this Regulation.