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Lord Boswell of Aynho
Chairman of the European Union Committee
House of Lords
London SW1A 0PW

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Dear Lord Boswell,

Free flow of non-personal data in the European Union: 12244/17

I am writing to you to provide an update on the progress of the proposed Regulation for the Free Flow of non-personal Data in the European Union (FFoD), and to seek scrutiny clearance for this file.

In response to my letter of 24 March, you asked three questions about the proposal which are addressed at Annex A.

Since I last updated you, the timeline for adoption of this Regulation has become clearer. The second informal trilogue occurred on 19 June and has concluded with an informal political agreement on the text. The draft final text (attached) was presented to by COREPER on 29th June, where Member States indicated there was sufficient support in principle for the Regulation to proceed to formal adoption. The text will now proceed for translation and a lawyer linguist check, with final adoption through a vote at a European Parliament Plenary sitting, before a Ministerial vote at Council. The vote at Council is expected to take place in October or November of this year.

As you know, the UK is a strong supporter of action in this area and has lobbied heavily - with a group of like-minded member states - for a regulatory intervention to prevent unjustified data localisation. During the debates the UK has successfully argued for limited exemptions to the prohibition on data localisation in Article 4 of the Regulation which has been a point of contention, but is crucial to ensuring the free flow of non-personal data.

The Parliament's position was close to the Council's text and therefore the UK supported the Presidency's decision to maintain the informal negotiating mandate that was granted under the Estonian Presidency in December. We considered this the best course of action. By sticking firmly to the original Council mandate the Presidency was ultimately able to resist the most concerning elements of Parliament's text as part of the final deal. This included a proposal to ensure that data localisation restrictions could only be imposed on "imperative grounds" of public security, which my officials advised would have introduced considerable risks. The Presidency was also able to resist proposed



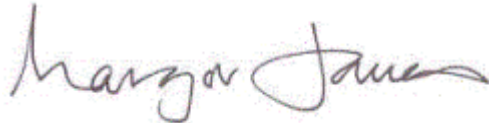
measures under Article 4 to enable the Commission to take decisions requiring Member States to amend or withdraw localisation measures. In the final text the Commission can only issue non-binding opinions on draft measures proposed by Member States, in line with existing procedures under the Transparency Directive (2015/1535). The key points from the final FFoD text are detailed at Annex B.

Based on the text provisionally agreed at trilogue, we expect that the UK would vote to support the final Regulation as it meets our policy objectives of removing barriers to the free flow of non-personal data. During the course of the negotiations the key ambiguities in the Commission's proposal – in particular about the treatment of mixed datasets, and the relationship between the procedures for cross-border access to data, have also been resolved. I am therefore seeking clearance to do so.

I hope your Committee finds this update helpful in its deliberations, and my officials are happy to provide further clarifications to the Clerk of the Committee where needed.

I am copying this letter to Sir William Cash, Les Saunders at DEXEU and Agim Zekaj, DCMS scrutiny coordinator.

Yours ever

A handwritten signature in black ink, appearing to read 'Margot James', written in a cursive style.

MARGOT JAMES MP
Minister for Digital and the Creative Industries

Annex A: EUC Questions on FfOD Regulation

How might Member States challenge negative decisions on data localisation notifications and how will the Commission enforce such decisions?

Under the final text of this regulation, the Commission do not have powers to issue a binding decision on whether a localisation notification is justified. Under Article 4.3 the Commission may only issue a recommendation based on an assessment of the proportionality of the justification for localising data as, detailed in the Member State notification. However this does not prejudice the Commission's ability to action its infringement powers under Article 258 TFEU. Should the Member State wish to challenge the Commission's recommendation through the procedure laid out in the FfOD regulation, a dialogue between the Commission and the Member State would occur where the recommendation could be challenged. This would occur before the more formal procedure under Article 258 TFEU was actioned.

Can a competent authority decline a request for data access on the basis of commercial sensitivity?

Yes. Under this regulation a competent authority can decline a request for data access on any basis except its location, but must provide a response outlining the refusal of the request to the member state seeking assistance. It should also be noted that Article 5 refers to different types of access to data, including data held by another competent authority, and data held by a private commercial entity that is not complying with a request from a However Article 5.3 makes it clear that any request for assistance, and the assistance rendered, must be in accordance with Union Law or national procedural law.

If it can, how will this file would interact with the proposed ePrivacy Regulation?

Any *non-personal* data in scope of the ePrivacy Regulation would also fall under the FfOD regulation but the regulations do not focus on the same objectives. For example, FfOD specifically seeks to address data localisation, whereas the proposed ePrivacy Regulation would focus on governing: the processing of electronic communication of personal and non-personal data; cookies tracking online activities; cookies extracting informations from terminal equipments. Unlike the FfOD regulation, the ePrivacy Regulation is extraterritorial which means that after Brexit it will still apply.

Annex B: Key points from the Article text

Article	Key points of change
<p>Article 2: Scope and Recital 11</p>	<p>Art 2.2b - the EP pushed for changes to Council’s provision in Article 2.2b, which carves out measures governing internal storage of government data. The final text inserts “without contractual remuneration of private parties” at the end of the paragraph. This removes the large carve out of public sector data whilst ensuring that internal government data storage is unaffected, maintaining balance for parties like Germany who have developed a public sector G-Cloud.</p> <p>Recital 11: Removal of recital on Mixed data sets. Inclusion of clarifying statement in Art 2.2 that states mixed data sets do not require separation.</p>
<p>Article 3: Definitions</p>	<p>Art 3.5 – Definition of data localisation practices now has “including in the field of public procurement” inserted to Council’s definition. This preserves the existing non-discrimination requirements under the public procurement Directive.</p>
<p>Article 4: Free movement of data within the Union</p>	<p>Article 4.1 – exemptions to the free flow of data – This will be as it was in the Council text, with public security being the only public policy exemption to the prohibition on data localisation measures. The EP draft text had suggested an amendment which introduced the wording ‘imperative grounds of public security’ which would have disproportionately heightened the level of justification required for exemptions.</p> <p>Article 4.3 - The text now includes a 24 month period for Member States to notify existing data localisation measures to the Commission from the date of publication. While the EP was pushing to give the Commission more binding powers, the final text states that the Commission is able to issue a non-binding opinion on those notification measures without prejudice to its powers under Article 258 TFEU. The procedure for notification will be the same process as detailed in the Transparency Directive, which importantly</p>

	<p>includes the option of seeking confidential handling by the Commission of sensitive information contained in a notification.</p>
<p>Article 6: Porting of Data</p>	<p>The final text removes the prescriptive minimum information requirements that were proposed for the industry Code of Conduct on portability. It has additional paragraphs under Art 6.1.a which now includes text on open standard format to facilitate switching.</p> <p><i>Timing:</i></p> <p>Under Art 6.2 the Code should be developed by 12 months after the date of publication.</p> <p>Under Art 9.1 the Code will be reviewed in 48 months from the date of publication.</p>