



# **Bitkom on the Commissions draft guidelines for reasonable compensation**

in the sense of Article 9 of the Data Act

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## I. General remarks

Bitkom welcomes the objective pursued by the European Commission to strengthen the European data economy while preserving incentives for investments in research and development and in data technologies. In this respect, Bitkom generally considers the draft Guidelines to be a constructive starting point, as they acknowledge the investments and legitimate interests of data holders and aim to provide practical guidance on the calculation of reasonable compensation under Article 9 of the Data Act.

At the same time, it must be recognised that the Data Act is a relatively new, horizontal regulation applicable across multiple industrial sectors and still exhibits significant practical and conceptual ambiguities. Many stakeholders are currently forced to "work with what is available", while essential questions regarding implementation, valuation methodologies and operational feasibility remain unresolved.

It affects a highly heterogeneous universe of data holders and data recipients, with fundamentally different business models, organisational setups and cost structures. This includes not only companies for which data is an ancillary input, but also undertakings whose core business model is based on the provision and commercialisation of high-value data as a primary product.

Against this background, Bitkom strongly encourages the Commission to adopt a broader and more flexible approach when defining regulatory requirements and methodological expectations. The Guidelines must be sufficiently open and adaptable to accommodate the full spectrum of data-driven business models and must avoid significantly interfering with legitimate commercial practices or failing to recognise the achievements and investments of those who generate and provide valuable data.

From Bitkom's perspective, the current draft risks overshooting its objective in several respects by establishing a level of granularity, documentation and verification obligations that is difficult to reconcile with the stated goal of reducing administrative burden and facilitating data sharing. In particular, the strong emphasis on case-by-case assessments and individual price calculations appears difficult to reconcile with the Data Act's objective of simplification and legal certainty, especially for smaller market participants.

## II. Lack of guidance on onward dissemination of data by data recipients

Bitkom notes that the Guidelines do not contain any provision or recommendation addressing the onward dissemination of data by data recipients. Such clarification would be essential not only for the protection of data holders, but also for the determination of reasonable compensation, in particular under a non-discriminatory framework.

Where data recipients contribute to compensation and bear part of the costs pursuant to Article 9(2)(a) of the Data Act, it is unclear why third parties that receive the same data without being subject to the obligations of the Data Act should potentially be placed in a more favourable position. In the absence of safeguards or restrictions, data

recipients could freely share the received data without complying with the regulatory framework of the Data Act, creating significant risks for data holders and resulting in an unlevel playing field.

### **III. Cost elements**

#### **1. Reformatting costs (Point 23)**

Bitkom rejects the proposal to categorically exclude reformatting costs from the calculation of reasonable compensation. This approach is based on the implicit assumption that data holders deliberately rely on incompatible or proprietary formats, which in practice is rarely the case. Data formats are often the result of historic, technically justified and economically rational business decisions made long before the entry into application of the Data Act.

Given that the Data Act introduces numerous new obligations, at least a transitional period should allow for the allocation of reformatting costs. Otherwise, this would lead to an unfair distribution of burdens to the detriment of data holders.

#### **2. Additional cost categories**

Beyond the cost elements explicitly mentioned in the Guidelines, operational costs as well as costs related to the production or generation of data should be recognised as eligible cost items, where they are causally linked to the obligation to make data available and are not already covered under investments pursuant to Article 9(2)(b) of the Data Act.

This includes, in particular, infrastructure costs, ongoing operating costs and support-related expenses (e.g. technical support), which are indispensable in practice but insufficiently addressed in the current draft. The lack of clarity as to which concrete cost categories may be taken into account creates legal uncertainty and increases the risk of disputes.

#### **3. Protection of trade secrets (Points 26 – 28)**

The provisions set out in Points 26 – 28 raise serious concerns and may potentially infringe upon the rights and legitimate interests of data holders, particularly with regard to the protection of trade secrets. Trade secrets should not be subject to dissemination per se, and the requirements formulated in the Guidelines create a material risk of unlawful disclosure and significant compliance exposure.

For data holders whose core business model is built around the commercialisation of data, these obligations would have severe and disproportionate negative effects. Imposing such requirements would directly undermine the economic foundation of data-driven businesses and jeopardise legitimate competitive interests.

## **4. Other cost-related provisions (Points 29 – 31)**

Bitkom welcomes the clarifications provided in Points 29 and 30, as well as Point 31, which offer useful and balanced guidance regarding dissemination and storage costs.

## **IV. Disproportionate requirements regarding overhead and one-off costs**

Several provisions of the Guidelines, in particular Points 34 and 36, raise significant concerns for entities whose business models rely on the relevant data. As drafted, these provisions would:

- categorically exclude overhead costs,
- require speculative allocation of one-off costs to future data recipients, and
- mandate ex post adjustments of compensation.

This approach interferes with legitimate commercial practices and may undermine the economic viability of data-driven business models. In addition, the methodology proposed in Point 36 appears impracticable in operational terms, as it presupposes clearly defined durations and reliable forecasts that are often unavailable in dynamic markets. From a practical perspective, requirements such as attaching detailed price tables or retroactively recalculating compensation levels are difficult to operationalise and run counter to the objective of administrative simplification.

For these reasons, Bitkom recommends deleting Point 36 in its current form.

## **V. Investments, margin and conceptual clarity**

### **1. Recognition of investments (Points 37 – 39)**

Bitkom welcomes that investments, in addition to access-related costs, are explicitly taken into account for the purpose of recoupment. In order to further strengthen the data economy, there should be no strict limits on the types of investments nor on the margin itself. As technology and data generation methods continuously evolve, the Guidelines must be designed with corresponding flexibility.

### **2. Separation of costs, investments and margin (Points 41 – 43)**

Investments within the meaning of Article 9(2)(b) of the Data Act must not be conflated with the margin referred to in Article 9(1). According to the clear wording of Article 9, reasonable compensation may consist of three distinct components:

1. costs pursuant to Article 9(2)(a),

2. investments pursuant to Article 9(2)(b), and
3. a margin pursuant to Article 9(1), which is optional.

Recital 47 contains linguistic ambiguities and incorrectly blends the concepts of investments and margin. From an accounting and economic perspective, a margin is calculated on top of costs and investments and does not form part of either. Points 41 – 43 should therefore be redrafted in line with the wording of Article 9 of the Data Act rather than relying on recitals.

In particular, Point 43(c) lacks clarity as to what constitutes "operating costs" and which specific items are covered. In its current form, this reference is potentially misleading and should be reconsidered.

Furthermore, Bitkom strongly recommends deleting the reference to Recital 47 in Point 45, as the wording of Article 9 provides clearer and more legally robust guidance.

## **VI. Payment models and contractual autonomy**

With regard to payment models, Bitkom emphasises that such determinations fall within the contractual autonomy of businesses. Given that the Data Act remains silent on this issue, Section 5.2 should be interpreted exclusively as non-binding guidance of a conceptual nature. In practice, volume-based, usage-based models or subscription based models (e.g. per request, per dataset or per API call) are often significantly more suitable and scalable than rigid, case-by-case pricing approaches and should be explicitly recognised as compatible with the Data Act.

## **VII. Transparency, Article 9(7) and clean-team models**

Bitkom shares the objective of preventing abusive pricing practices. However, the first sentence of Point 53 should be deleted, as the legislative intent is already clearly articulated in Article 3 of the Data Act and Article 9(7) sufficiently regulates cost-related disclosure obligations upon request. Additional explanatory language risks creating interpretative inconsistencies.

Moreover, the recommendation to require clean-team structures (Point 56) appears disproportionate and impracticable. Data holders must retain the ability to assess the accuracy and appropriateness of requests, which necessarily requires access by qualified staff. Many SMEs and start-ups do not have the personnel capacity to establish dedicated clean teams. Imposing such a requirement would therefore create unnecessary operational burdens and risk excluding precisely those market participants the Data Act seeks to empower.

## VIII. Overall assessment

Overall, there is a risk that the Guidelines establish a quasi-regulatory accounting regime that:

- entails high administrative costs,
- increases legal uncertainty, and
- makes data sharing less attractive.

These effects would be felt particularly strongly by SMEs, for whom the combination of documentation requirements, valuation uncertainty and case-by-case pricing could constitute a de facto barrier to participation in data sharing arrangements.

Bitkom therefore advocates a simplified, model-based approach, for example through:

- alignment with general margin of the company
- list of non-exhaustive cost items, and
- simplified qualification of data recipients.

We encourage the European Commission to continue its transparent and collaborative engagement with stakeholders. In the coming years, this could include additional webinars, roundtables, Q&A's, and a dedicated Data Act webpage featuring a list of external experts on data-pricing. Such measures would be particularly helpful for SMEs and companies for whom data is not a core business area.

Only such an approach can ensure balance between legal certainty, protection of investments and practical implementability, in line with the objectives of the Data Act.

Bitkom represents more than 2,300 companies from the digital economy. They generate an annual turnover of 200 billion euros in Germany and employ more than 2 million people. Among the members are 1,000 small and medium-sized businesses, over 700 start-ups and almost all global players. These companies provide services in software, IT, telecommunications or the internet, produce hardware and consumer electronics, work in digital media, create content, operate platforms or are in other ways affiliated with the digital economy. 82 percent of the members' headquarters are in Germany, 8 percent in the rest of the EU and 7 percent in the US. 3 percent are from other regions of the world. Bitkom promotes and drives the digital transformation of the German economy and advocates for citizens to participate in and benefit from digitalisation. At the heart of Bitkom's concerns are ensuring a strong European digital policy and a fully integrated digital single market, as well as making Germany a key driver of digital change in Europe and the world.

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