

## Microsoft's comments to the European Commission's draft Delegated Act on the Sustainability Indicators for data centres

Microsoft supports the EU's efforts to better measure the energy and environmental footprint of the ICT industry and appreciates the opportunity to comment on the draft delegated act on the Sustainability indicators for data centres.

Based on the research the Commission conducted in the last two years, the stakeholders consultation, and our business' expertise in this sector, Microsoft's proposes the following points for consideration when finalizing the Delegated Act.

### 1. One year transition period in the interest of data quality and comparability

The list of proposed indicators in the Draft Delegated Act (DDA) is different and longer than those assessed as part of the Technical Assistance Study; therefore, it seems unreasonable to ask the industry to report at such short notice on metrics it was not fully aware of, for the year preceding the date of entry into force of the DDA. To ensure all operators report against the same indicators already on day one, the Commission should allow for the first reporting year to be conducted in line with Annex VII a) and c) of the EED, in accordance with Standard EN 50600-4, in order to tackle the significant legal uncertainty and operational challenges of applicability.

The Commission could therefore add wording to Article 3(2) of the DDA: *"For the first reporting deadline of May 15, 2024, Member States shall allow that the reporting be limited to those KPIs set out in Annex VII a) and c) of the Directive."*

There are examples of similar flexibility in delegated acts and other Commission implementing regulations in other environmental regulatory areas (e.g., labelling of chemicals).

### 2. Lack of clear stakeholders' consultation for new indicators included in the DDA which do not support the objectives of the EED

Some of the reporting data points included in Annexes I and II of the draft delegated act were not consulted with stakeholders during the technical assistance study in 2023. Although the industry had the opportunity to provide feedback on several additional metrics beyond Annex VII, some items were not part of the consultation – list below. These elements are not relevant to evaluating the energy efficiency of data centres, which is the main objective of the EED mandate. Therefore, they should be removed from the reporting requirements at this stage.

#### Annex II:

- 1(c) - Data centre computer room floor area
- 1(g) - Average battery capacity
- 1(h) – Battery time
- 1(m) - Rated cooling capacity
- 1(n) - Type of refrigerant used
- 1 (o) - Cooling degree days
- 3(a) - Incoming traffic bandwidth
- 3(b) - Outgoing traffic bandwidth
- 3 (c) – Incoming data
- 3 (d) - Outgoing data

### 3. Ensure EU level protection of confidential business information and security risks.

The Delegated Act mandates reporting on each data centre individually, with the expectation that the published data will be aggregated before publication. However, there are serious concerns about the potential release of confidential data stored in the Commission's database in response to access requests from competitors and NGOs including for purposes of responding to requests to access to information under Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents and Directive 2003/4/EC on public access to environmental information. For example, making raw data publicly available, like the kWh and data traffic indicators, will show current and emerging competitors where to focus their capital expenditure. Both are by-products of a market so higher numbers will show hotter market.

As it stands now, the Commission proposal also **exposes security-critical datacentres** to cyberattacks. Revealing the total bandwidth capacity of a data centre can inform attackers about traffic volume needed to overwhelm and disable the facility. Similarly, providing server data on sent/received streams at a granularity finer than monthly could enable attackers to assess the impact of their attempted attacks on our platform, allowing them to optimize their strategies for greater damage. In the same way, releasing data like kWh and data traffic indicators can lead to security risks as bad actors can extrapolate where to focus attacks on strategically important locations. This can be a significant problem also for discrete sites with highly confidential locations that process and hold government data, for example. Although Article 12(1) of the EED refers to confidential business information and 12(2) to data centres used for defence and civil protection aims, it remains unclear who determines if a certain site will fall under this exemption and if this is self-determined by the reporting entity.

The Commission should establish a clear legal framework to protect the confidentiality of this information at EU level rather than leaving it to national laws, especially given the lack of clarity regarding Member State-level confidentiality exemptions. Confidentiality exemptions are left to national laws but it is not clear which metrics this will apply to and especially this reference does not provide protection against the potential reactive disclosures requirements mentioned above. Given that reporting is directed to the European database while subject to national laws, it remains uncertain whether industries can directly claim exemptions within the database. To clarify this point and provide confidentiality protection at EU level, the Commission should clarify these points introducing the following amendments.

European Commission Draft Delegated Act	Proposed Amendment
N/a	New Recital 11 a  <b><i>Pursuant to Article 12(1) of Directive (EU) 2023/1719, the information of data centres subject to Union and national law protecting trade and business secrets and confidentiality must not be made publicly available. Article 12(3) also requires that the European database be publicly available on an aggregated level. Thus, it is necessary to introduce measures to ensure that the key performance indicators and other information reported and the calculated sustainability indicators of data centres are</i></b>
Article 5  European database shall consist of a common user interface ensuring that all reporting data centres are able to input, in the same way, the	Article 5  European database shall consist of a common user interface ensuring that all reporting data centres are able to input, in the same way, the

<p>information and key performance indicators referred to in Annexes I and II.</p> <p>2. The information and key performance indicators shall be made public in an aggregated manner, at Member State and Union level, in accordance with Annex IV.</p> <p>3. Member States shall have access to all information and key performance indicators communicated to the European database in their territory pursuant to Article 3.</p> <p>4. The Commission shall have access to all information and key performance indicators communicated to the European database pursuant to Article 3.</p> <p>5. The aggregated data collected under this Regulation can be reused for European statistics in line with the principles defined in the Regulation (EC) 223/2009.</p>	<p>information and key performance indicators referred to in Annexes I and II.</p> <p>2. The information and key performance indicators shall be made public in an aggregated manner, at Member State and Union level, in accordance with Annex IV.</p> <p>3. Member States shall have access to all information and key performance indicators communicated to the European database in their territory pursuant to Article 3.</p> <p>4. The Commission shall have access to all information and key performance indicators communicated to the European database pursuant to Article 3.</p> <p><b>4a (new). The European database, Commission and Member States concerned shall keep confidential all information and key performance indicators communicated to the database pursuant to Article 3 and the sustainability indicators calculated in accordance with Annex III. Such information shall be considered confidential information affecting the commercial interests of operators and owners of data centres in accordance with Article 4(2) of Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents and Article 4(2)(d) of Directive 2003/4/EC on public access to environmental information.</b></p> <p>5. The aggregated data collected under this Regulation can be reused for European statistics in line with the principles defined in the Regulation (EC) 223/2009.</p> <p><b>6 (new). The European database, Commission and Member States shall erase all information and key performance indicators communicated pursuant to Article 3 once the sustainability indicators of Annex III have been calculated and the aggregated data have been published and in all cases within one year since operators communicated it.</b></p>
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The proposed new paragraph 4a in Article 5 of the DDA would require the Commission, European database and Member States to keep confidential the key performance indicators, other communicated information and the calculated sustainability indicators of data centres, including for purposes of

responding to requests to access information under Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents and Directive 2003/4/EC on public access to environmental information. The proposed new paragraph 6 in Article 5 would require the Commission, European Database and Member States to erase all key performance indicators and other reported information of data centres once the sustainability indicators have been calculated and in all cases within one year from the date they are reported.

#### 4. Provide clarity on how to secure confidential business information protection in the reporting process for co-locators

Microsoft welcomes the separate timeline provided to co-locators for their reporting, particularly given the complexity and the need for contractual clauses that will need addressing between colocation customers and providers, which makes reporting more challenging. It would be crucial to have further clarity in the Delegated Act on the type of data points these operators will have to disclose by 2026 and how to ensure confidentiality of business data is preserved when a co-location operator is also a competitive cloud provider.

To ensure confidentiality of such information, a mechanism should be set in place that requires the operators, upon request of their customers, to ensure that the data is gathered and submitted via a contractually agreed and independent third party that ensures the confidentiality of the information of the customers. This proposed mechanism is in line with previously explored options in the Task A report and in line with current understanding of EU competition law.

Alternatively, the Commission could introduce an interface in the European Database that would allow the operator of the colocation or co-hosting data centre to create a profile for the data centre and submit its own information. Once the profile is created, the operator would give the reference number to its customers, who would be able to provide their own information while not making it available to competitors and colocation operators. The authorities would be able to see all the information, but the colocation and co-hosting data centre operators and customers would only see their own information. EU law offers similar approaches in other environmental areas such as chemical notifications in the Database of Substances of Concerns in articles and products (SCIP).

In support of these suggestions, Microsoft recommends considering the proposed wording below to introduce this solution.

European Commission Draft Delegated Act	Proposed Amendment
n/a	New Recital 10 (a)  <b><i>Colocation and co-hosting data centre operators should be required to submit the information and key performance indicators of their colocation and co-hosting data centre customers. Given the significant burden that this requirement will impose on colocation and co-hosting data centre operators, until 15 May 2026, such operators should be allowed to submit only information and key performance indicators with respect to the equipment that they operate and for which they are responsible. Mechanisms should also be put in place to ensure that when colocation and co-hosting data centre operators gather</i></b>

	<p><b>and submit information covering their co-location and co-hosting customers at the co-location or co-hosting data centres, the confidentiality of the individual customers' competitively sensitive information is protected and no exchange of competitively sensitive information between potential competitors takes place.</b></p>
<p>Article 3</p> <p>1. Member States shall ensure that the information set out in Annex I is communicated to the European database on data centres.</p> <p>2. Member States shall ensure that the key performance indicators set out in Annex II are monitored and communicated to the European database on data centres.</p> <p>3. The information and key performance indicators referred to in paragraphs 1 and 2 shall cover the calendar year immediately preceding the reporting year. Where a reporting data centre has been in operation for less than a year, it shall report only for the time it has been in operation and it shall indicate that fact accordingly.</p> <p>4. Enterprise data centre operators shall monitor and communicate to the European database the information and key performance indicators set out in Annex I and Annex II, respectively, regarding the enterprise data centres they operate.</p> <p>5. By 15 May 2026 colocation and co-hosting data centre operators shall, gather, <i>publish</i>, and communicate to the European database on data centres the information and key performance indicators referred to in paragraphs 1 and 2, covering all their co-location and co-hosting customers at the co-location or co-hosting data centres they manage.</p> <p>Where a colocation and co-hosting data centre operator cannot gather the information and key performance indicators referred to in paragraphs 1 and 2, it shall indicate the percentage of the data centre computer room floor area covered by the information communicated.</p>	<p>Article 3</p> <p>1. Member States shall ensure that the information set out in Annex I is communicated to the European database on data centres.</p> <p>2. Member States shall ensure that the key performance indicators set out in Annex II are monitored and communicated to the European database on data centres.</p> <p>3. The information and key performance indicators referred to in paragraphs 1 and 2 shall cover the calendar year immediately preceding the reporting year. Where a reporting data centre has been in operation for less than a year, it shall report only for the time it has been in operation and it shall indicate that fact accordingly.</p> <p>4. Enterprise data centre operators shall monitor and communicate to the European database the information and key performance indicators set out in Annex I and Annex II, respectively, regarding the enterprise data centres they operate. <b>Until 15 May 2026, colocation and co-hosting data centre operators shall only monitor and communicate to the European database the key performance indicators set out in Annex I and Annex II with respect to the information technology equipment that they operate and for which they are responsible at the co-location and co-hosting data centres they manage.</b></p> <p>5. By 15 May 2026 colocation and co-hosting data centre operators shall, gather, <del>publish</del>, and communicate to the European database on data centres the information and key performance indicators referred to in paragraphs 1 and 2, covering all their co-location and co-hosting customers at the co-location or co-hosting data centres they manage. <b>Upon request of the colocation or co-hosting customers, colocation and co-hosting data centre operators shall</b></p>

	<p><b><i>ensure that the information is gathered and submitted via a contractually agreed, independent, third party that ensures the confidentiality of the competitively sensitive information of the individual colocation and co-hosting customers.</i></b></p> <p>Where a colocation and co-hosting data centre operator cannot gather the information and key performance indicators referred to in paragraphs 1 and 2, it shall indicate the percentage of the data centre computer room floor area covered by the information communicated.</p>
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