



Comments of the EDPS on a Proposal for a Regulation of the European Parliament and of the Council on a framework for the free-flow of non-personal data in the European Union.

1. Introduction

On 13 September 2017, the European Commission tabled a proposal for a Regulation of the European Parliament and of the Council on a framework for the free flow of non-personal data in the European Union (“the Proposal”).

This Proposal is one of the sixteen intended actions listed in the Digital Single Market strategy of May 2015 and referenced by the European Commission in its Communication on "Building a European Data Economy" of 10 January 2017 and its Communication on "Digital Single Market mid-term review" of 10 May 2017.

The aim of the Proposal is to remove barriers to the free-flow of non-personal data in the internal market and to facilitate switching between cloud service providers and the porting of data for professional users. It builds upon the existing applicable legal framework that regulates the internal market for data services (E-commerce Directive, Services Directive, Transparency Directive), and pursues a high level of cybersecurity in the EU (NIS Directive).

The Proposal is also meant to complement the Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation or “GDPR”).

On 15 February 2018, the European Economic and Social Committee adopted an Opinion on the Proposal, asking a number of changes and improvements.

On 04 June 2018, the Committee on Internal Market and Consumer Protection adopted its report. On the same occasion, it was agreed that the IMCO committee should request comments from the EDPS regarding the interaction between the GDPR and Proposal, in particular in respect of the compromise adopted text of Article 2. We were provided with the following text as the outcome from the vote in IMCO Committee that took place on the 4th of June:

Article 2

1. This Regulation shall apply to the storage or other processing of electronic data other than personal data in the Union, which is
 - (a) provided as a service to users residing or having an establishment in the Union, regardless of whether the provider is established or not in the Union or
 - (b) carried out by a natural or legal person residing or having an establishment in the Union for its own needs.

In the case of mixed data sets, this Regulation shall apply to the non-personal data part of the set. Where personal and non-personal data

in a mixed data set are inextricably linked, this Regulation shall apply without prejudice to Regulation (EU) 2016/679.

2. This Regulation shall not apply to an activity which falls outside the scope of Union law.

The report voted in the IMCO Committee also includes the following two recitals (emphasis original):

(9) The legal framework on the protection of natural persons with regard to the processing of personal data, *and on respect for private life and the protection of personal data in electronic communications*, in particular Regulation (EU) 2016/679, Directive (EU) 2016/680 and Directive 2002/58/EC, are not affected by this Regulation.

(10) Under Regulation (EU) 2016/679, Member States may neither restrict nor prohibit the free movement of personal data within the Union for reasons connected with the protection of natural persons with regard to the processing of personal data. This Regulation establishes the same principle of free movement within the Union for non-personal data except when a restriction or a prohibition would be justified for *public* security reasons. *Regulation (EU) 2016/679 and this Regulation provide a coherent set of rules that cater for the free movement of different types of data. Where data sets contain both personal and non-personal data, Regulation (EU) 2016/679 should apply to the personal data part of the set, and this Regulation should apply to the non-personal data part of the set. Where non-personal and personal data in a mixed data set are inextricably linked, this Regulation should apply without prejudice to Regulation (EU) 2016/679. If technological advancements, such as artificial intelligence, machine learning, internet of things, and big data analysis, make it possible to turn anonymised data into personal data, such data are treated as personal data and Regulation (EU) 2016/679 applies accordingly. Furthermore, this Regulation does not impose an obligation to store the different types of data separately or an obligation to unbundle mixed data sets.*

We welcome this consultation by the IMCO Committee on the most relevant elements of its report.

Unless otherwise specified, Articles mentioned in the EDPS formal comments refer to Articles of the Proposal.

2. Definition of (non-personal) “data”

Regarding the intended scope of application of the Proposal, we do not question the objective of eliminating unjustified barriers within the Single Digital Market.

However, the EDPS would like to underline that the EU data protection framework (previously the Directive 95/46/EC, and currently the Regulation (EU) 2016/679 GDPR and Regulation (EU) 45/2001) has always allowed, as a principle, for the free flow of personal data within the EU territory. Furthermore, the principles of the GDPR do not preclude the free flow of data in the European Union, but on the contrary, they aim to enable it (see for example recital 10 GDPR).

For the purposes of the Proposal, “data” that would fall within its scope is defined as “*data other than personal data as referred to in Article 4(1) of Regulation (EU) 2016/679*” (see

Article 3(1) of the Proposal). Such non-personal data are meant to include machine-generated data or commercial data which are non-personal in nature or anonymised¹.

Furthermore, we draw attention to the fact that such negative definition may prove very difficult to apply in practice, thus undermining legal certainty. This is because the definition of “personal data” is contextual in nature as well as intentionally broadly drafted by the European legislator.

Article 4(1) of the GDPR defines personal data as “**any information relating to an identified or identifiable natural person**” and further specifies that “an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person”.

As recalled by the Article 29 Working Party in its Opinion WP 136 of 20 June 2007 on the concept of personal data, the definition of personal data is very broad and dynamic whereas the determination of what constitutes a personal data might be done on the basis of a case by case assessment. This Opinion remains fully applicable to the concept of “personal data” in the GDPR which remained essentially unchanged compared to Directive 95/46.

Indeed, the Court of Justice held that the scope of the personal data covered by that Directive is varied (judgment of 7 May 2009, *Rijkeboer*, C-553/07, paragraph 59 and the case-law cited).

The Court has confirmed on several occasions this broad interpretation of the notion of personal data, notably in establishing that for information to be treated as “personal data”, there is no requirement that all the information enabling the identification of the data subject must be in the hands of one person (judgment of 19 October 2016, *Breyer*, C-582/14, paragraph 43 in relation to a dynamic IP address of a website user).

Furthermore, the Court stated that: “*the use of the expression ‘any information’ in the definition of the concept of ‘personal data’, within Article 2(a) of Directive 95/46, reflects the aim of the EU legislature to assign a wide scope to that concept, which is not restricted to information that is sensitive or private, but potentially encompasses all kinds of information, not only objective but also subjective, in the form of opinions and assessments, provided that it ‘relates’ to the data subject. As regards the latter condition, it is satisfied where the information, by reason of its content, purpose or effect, is linked to a particular person*” (judgment of 20 December 2017, *Peter Nowak v Data protection commissioner* C-434/16, para. 34-35).

In the context of a rapidly growing data-intensive society, users or the machines they own produce more and more data every day and where the possibility to single out a person on the basis of very few data points is becoming easier (for example with the use of Big Data analytics).

Consequently, unless the concept of “data” is further clarified, the Proposal carries significant risks of overlap or conflict with the GDPR, thus undermining legal certainty and causing difficulties of practical application.

We note that similar concerns have been raised by stakeholders (including the European Economic and Social Committee², the French³ and Czech⁴ Senates, the German Bundesrat⁵ as

¹ European Parliament Research Service Briefing on Free flow of non-personal data in the European Union http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/614628/EPRS_BRI%282017%29614628_EN.pdf

well as academics⁶) which highlighted the need to clarify the concept of non-personal data in the meaning of the Proposal.

3. “Mixed datasets”

Even though the full text of the report is not yet available, we can assume that a ‘mixed data set’ is defined as a “data set composed of both personal and non-personal data”⁷.

The explanatory memorandum clarifies that in many situations, personal data might be found in non-personal datasets. For example a dataset may contain a large majority of non-personal data, but also contain personal details (such as name or email address) included for administrative purposes only.

While this might be true in certain cases, this definition appears to be far too imprecise to be operational. It may also be a result of a certain misunderstanding of the actual scope and reach of the concept of personal data as explained above: it cannot be excluded that many elements of large databases (e.g. machine-generated data) will in reality comprise much more information relating to identifiable individuals, i.e. personal data, than anticipated by the drafters of the amendments. This is, however, impossible to ascertain without greater clarity as to what precise examples were used as models for those amendments.

We note in this context that the recital 10 of the IMCO Committee Report adopted on 4th June, as well as the press release published the same day⁸ emphasize that artificial intelligence, machine learning, internet of things, cloud computing and big data analysis would benefit from the Proposal allowing for the free-flow of non-personal data. It is important to underline that it is precisely in these new technological areas that most mixed datasets are likely to be produced and used.

We would therefore strongly suggest to clarify the concept of “*mixed dataset*”, as a minimum by providing concrete examples, so as to render the concept applicable in practice.

4. Relationship between the Proposal and the GDPR

As referred to above, the IMCO report proposes to amend Article 2 of the Proposal so as to read as follows: “[i]n the case of mixed data sets, this Regulation shall apply to the non-personal data part of the set. Where personal and non-personal data in a mixed data set are

² EESC Opinion TEN/645-EESC-2017 of 15 February 2015

<https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/free-flow-non-personal-data-eu>

³ Reasoned opinion of the French Senate of 5 December 2017

[http://www.europarl.europa.eu/RegData/docs_autres_institutions/parlements_nationaux/com/2017/0495/FR_SENATE_AVIS-COM\(2017\)0495_EN.docx](http://www.europarl.europa.eu/RegData/docs_autres_institutions/parlements_nationaux/com/2017/0495/FR_SENATE_AVIS-COM(2017)0495_EN.docx)

⁴ Resolution of the Czech Senate delivered on the 11th session held on 6th December 2017

[http://www.europarl.europa.eu/RegData/docs_autres_institutions/parlements_nationaux/com/2017/0495/CZ_SENATE_CONT1-COM\(2017\)0495_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/parlements_nationaux/com/2017/0495/CZ_SENATE_CONT1-COM(2017)0495_EN.pdf)

⁵ Beschluss des Bundesrates 27 April 2018

[http://www.europarl.europa.eu/RegData/docs_autres_institutions/parlements_nationaux/com/2017/0495/DE_BUNDESRAAT_CONT1-COM\(2017\)0495_DE.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/parlements_nationaux/com/2017/0495/DE_BUNDESRAAT_CONT1-COM(2017)0495_DE.pdf)

⁶ Feedback from Tilburg University on the European Commission's Proposal

https://ec.europa.eu/info/law/better-regulation/initiatives/com-2017-495/feedback/F8922_en

⁷ Article 3(1) point 1a (new) in <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-619.038+01+DOC+PDF+V0//EN&language=EN>

⁸ <http://www.europarl.europa.eu/news/en/press-room/20180604IPR04926/no-barriers-to-free-flow-of-non-personal-data-in-the-eu>

inextricably linked, this Regulation shall apply without prejudice to Regulation (EU) 2016/679”.

As a preliminary remark, we recall that in any case, EU data protection framework rules fully applies to any information that falls within the definition of personal data as set out above. It is important to stress that this EU legislative framework for data protection not only includes the GDPR, but also Regulation (EC) 45/2001 (soon to be replaced by a new regulation that is currently in the final stages of the legislative process), the Directive (EU) 2016/680 on data protection in the police and justice sectors, as well as the e-Privacy Directive (EC) 2002/58 (currently under revision). For this reason, the reference to the GDPR in the amended cited above appears incomplete. It is worth noting that the related recital 8 include references to two other instruments from this list.

We note from the IMCO Committee rapporteur’s position as explained in the IMCO Committee draft report that “(...) *Where mixed data sets can easily be unbundled, this Regulation should apply to the non-personal data part of the set. In a mixed data set where non-personal and personal data is **inextricably linked**, this Regulation should apply to the whole data set without prejudice to the GDPR. (...)*”

We also note from recital 10 of the IMCO Committee Report that “(...) *Where non-personal and personal data in a mixed data set are **inextricably linked**, this Regulation should apply without prejudice to Regulation (EU) 2016/679 (...)*”.

The use of the words “*without prejudice*” is problematic, as it is an ambiguous expression that may easily be misinterpreted, in particular as it is used in conjunction with several similarly unclear terms such as “*mixed datasets*” (see above) and “*inextricably linked*” (which are not defined in the IMCO report). This wording could give the impression that the Proposal should be considered the primary instrument applicable to a personal data included in a certain subset of mixed datasets, and not the GDPR. Such an outcome would not be acceptable from the personal data protection point of view.

A recent example shows the perils of resorting to unclear language: the proposal of the European Commission for a Directive on certain aspects concerning contracts for the supply of digital content also stated that “*This Directive is **without prejudice** to the protection of individuals with regard to the processing of personal data*”⁹. As set out in our Opinion 4/2017 of 14 March 2017, the phrase “without prejudice to” would not have prevented the new proposal from having an impact the data protection framework¹⁰.

At best, such an approach could be accepted in cases where there is no risk of future potential conflicts between the provisions of the Proposal on the one hand, and the GDPR on the other hand. Unfortunately, this does not apply in the present case. For example, Article 6 of the Proposal appears to create a new right to business-to-business (B2B) data portability, similar to the right to data portability offered to personal data subjects by Article 20 of the GDPR. Given the lack of precision about what exactly this new right would entail and how precisely it would interact with the relevant provisions of the GDPR, there is a risk for natural persons to see some of the rights they benefit granted under GDPR undermined.

⁹ See Article 3 (8) of COM(2015) 634 final of 9 December 2015 of the Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content. [https://www.eumonitor.eu/9353000/1/j4nvke1fm2yd1u0_j9vvik7m1c3gyxp/vkcweel6t2zl/v=s7z/f=/com\(2015\)634_en.pdf](https://www.eumonitor.eu/9353000/1/j4nvke1fm2yd1u0_j9vvik7m1c3gyxp/vkcweel6t2zl/v=s7z/f=/com(2015)634_en.pdf)

¹⁰ https://edps.europa.eu/sites/edp/files/publication/17-03-14_opinion_digital_content_en.pdf

In many cases, business datasets held by professional users might also contain personal data (for example, identifying information about employees). In such cases, it should be ensured that the porting of data exercised by a professional user will not adversely affect the rights to data protection of any data subject involved. Consequently, any future self-regulatory codes of conduct on porting of data facilitate the switching of providers for professional users must be designed and drafted in such a way that the right to personal data portability provided by Article 20 of the GDPR is not undermined, having regard to the interests of data subjects. In any case, the Proposal must not lower the level of protection enjoyed by natural persons under Regulation (EU) 2016/679.

We understand that it is not the intention of the European Parliament to undermine the GDPR in any way. It is therefore necessary to clarify the provisions of the Proposal so as to ensure that the fundamental rights of natural persons to the protection of their personal data is fully guaranteed and that legal uncertainty is not undermined.

Indeed, the right to personal data protection is a fundamental right under the EU Charter of fundamental rights and, as such, cannot be subject to a restrictive interpretation. Consequently, GDPR applies fully to personal data contained in a mixed dataset, also where non-personal and personal are “*inextricably linked*” and even when personal data represent only a small part a dataset.

In this regard, we take note of recital 9 of the Proposal, according to which “*[t]he legal framework on the protection of natural persons with regard to the processing of personal data, in particular Regulation (EU) 2016/679, Directive (EU) 2016/680 and Directive 2002/58/EC should not be affected by this Regulation.*”

This intention of the legislator should also be clear in the drafting of the substantive provision, i.e. Article 2, which should be redrafted so as to clearly state that **the EU regulatory framework for data protection, including the GDPR, fully applies** to personal data, also those included in mixed data sets (irrespective of whether the “*inextricably linked*” criterion is met or not).

5. On data availability for competent authorities

The aim of Article 5 of the Proposal is to ensure that the powers of competent authorities to request and receive access to data for regulatory control purposes, such as for inspection and audit, remain unaffected.

However, we observe that in almost all cases, datasets which are necessary for regulatory supervision purposes will in fact contain personal data. This might explain why almost all examples provided in the Annex 8 of the Impact Assessment to illustrate mechanisms for cooperation between public authorities in relation to access to data actually concern situations where personal data are very likely to be processed (such as in the context of European Investigation Order Directive, the fourth Anti-Money Laundering Directive, VAT monitoring, or the European Judicial Network, just to name a few)¹¹.

¹¹ Commission staff working document impact assessment SWD(2017) 304 final PART 2/2 ANNEX 8: Existing mechanisms for cooperation between public authorities in relation to access to data
<https://ec.europa.eu/transparency/regdoc/rep/10102/2017/EN/SWD-2017-304-F1-EN-MAIN-PART-2.PDF>

We also draw attention to the fact that this provision of the Proposal might also overlap with the e-evidence package published by the European Commission on 17 April 2018¹².

6. Conclusion

We underline that relying only on a negative definition of non-personal data may prove very difficult to apply in practice. Consequently, in order to prevent significant risks of overlap or conflict with the GDPR undermining legal certainty, we recommend to further clarify the concept of “data”.

As regards the concept of “*mixed datasets*”, we recommend to clarify as a minimum by providing concrete examples, so as to render the concept applicable in practice.

Moreover, the use of the words “*without prejudice*” is problematic, as it is an ambiguous expression that may easily be misinterpreted, in particular as it is used in conjunction with several similarly unclear terms such as “*mixed datasets*” and “*inextricably linked*” (which is not defined).

This intention of the legislator should also be clear in the drafting of the substantive provision, i.e. Article 2, which should be redrafted so as to clearly state that the EU regulatory framework for data protection, including the GDPR, fully applies to personal data, also those included in mixed data sets (irrespective of whether the “*inextricably linked*” criterion is met or not).

We also draw attention to the fact that Article 5 of the Proposal on Data availability for competent authorities might also overlap with the e-evidence package published by the European Commission on 17 April 2018.

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¹² Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters.

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:225:FIN>

Proposal for a Directive of the European Parliament and of the Council laying down harmonized rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings.

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:226:FIN>