

## Developing the European data economy

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**IP & IT analysis:** The European Commission's proposals on how to develop the European data economy are considered by Giles Pratt, a partner in the IP/IT group at Freshfields Bruckhaus Deringer, and Sam Kirsop, an associate in the group.

### Original news

EU Commission consultation on Building the European Data Economy

*The Commission's [public consultation on Building the European Data Economy](#) follows the adoption of the [Communication on Building a European Data Economy](#) (the Communication) and its accompanying [Staff Working Document](#). Results will feed into the Commission's possible future initiative on the European Data Economy in 2017.*

### What is the background to the consultation?

Data is now a key value driver in EU and global economies.

Over the past few years, the Commission's data-related agenda has focussed on personal data. The [General Data Protection Regulation \(EU\) 2016/679 \(GDPR\)](#), which will apply from 25 May 2018, establishes a common set of data protection rules among Member States. An express objective of the GDPR is to ensure the free movement of personal data within the EU.

The Commission is now turning to non-personal data, such as data generated by machines. This data is driving new technologies, including those built on the internet of things and autonomous systems. Developing a single market for data is one of the objectives of the Commission's Digital Single Market strategy. According to Commission estimates, the EU data economy could grow from €272bn in 2015 (1.9% of EU GDP) to €643bn in 2020 (3.17%) (see: Communication, page 2 and footnote 2), but only if the right legal and technical frameworks are in place. On the flip side, if data cannot move freely around Europe, and if businesses do not share their data with one another, this could hamper innovation.

### What are the key issues?

The consultation will focus on a number of key issues, including:

#### Removing data localisation restrictions

Data location restrictions require the storage or processing of data to be limited to a particular geographical area or jurisdiction. So far, the Commission has identified 50 such legal restrictions (see: Staff Working Document, footnote 3) (most commonly relating to accounting and tax data). It has also found evidence of non-legal practices that effectively create digital borders, such as public procurement processes that look favourably on suppliers using local data storage.

#### Access to and re-use of non-personal data

Research carried out for the Commission found that 78% of surveyed companies generate and analyse their data in-house or using a subcontractor, and there is no exchange of this data with third parties (see: Staff Working Document, page 15). The Commission sees this as a problem and singles out large, high-tech banking and telecoms providers, and car and machinery manufacturers, as being the worst offenders (see: Staff Working Document, footnote 56). In addition, the Commission believes that there is a risk that unfair data terms are being imposed on smaller companies (see: Communication, page 12 and Staff Working Document, page 31) and that manufacturers and service providers are frequently becoming de facto owners of data because of legal uncertainties around ownership.

#### Portability of non-personal data, interoperability and standards

The Commission believes that individuals and businesses currently find it difficult to move around their non-personal data. For example, businesses can find that they are unable to move their company data from one cloud service provider to another because those providers use different technical formats.

### **Product liability**

The consultation will also look at product liability issues, including how liability should be allocated in interconnected systems involving many actors and whether manufacturers should be required to contribute to an insurance scheme to compensate consumers when things go wrong.

### **How does the Commission plan to remove digital borders from the EU?**

The Commission will first hold discussions with Member States and other stakeholders. It will review whether current data localisation rules are justified and proportionate. For example, Member States might not be able to rely on national security grounds to require all their energy data to be stored in-country—they will need to look at exactly which datasets are sensitive.

If any rules or policies are not justified or proportionate, the Commission says that it will, where needed, launch infringement proceedings. The Commission has heard from small businesses that have been prevented from expanding into other Member States because they would need to store their data in different countries, incurring high data storage costs.

The Commission also wants to dispel what it sees as a myth that data is more secure or accessible if stored locally (see: Communication, page 8 and Staff Working Document, page 7).

### **What steps has the Commission proposed to facilitate data access and transfer?**

According to the [Communication](#), during the stakeholder dialogues, the Commission intends to discuss a number of possibilities for addressing the issue of access to machine-generated data, including:

- o publishing guidance on how to deal with data in contracts, which would be based on existing laws (including those relating to copyright, trade secrets and consumer protection)
- o drafting model or default contract terms
- o fostering the development of technical solutions to make it easier for businesses to share their data and improve trust in data transactions
- o introducing a new data producers' right, which would effectively be an intellectual property right in machine-generated data
- o a framework for data holders to provide access to the data they hold, which could be based on certain key principles, such as fair, reasonable and non-discriminatory (FRAND) terms

In addition to facilitating data access, the Commission is further considering imposing an obligation on businesses to share some types of data, for example for public interest or scientific purposes.

### **What steps has the Commission proposed regarding portability, interoperability and standards?**

Possible ways forward mentioned in the Communication include:

- o a new data portability right for non-personal data, which could be similar to that introduced by the GDPR for personal data
- o developing recommended contract terms to facilitate switching of service providers
- o working with standard setting bodies, industry and other stakeholders to develop common standards for system interoperability

### **What steps has the Commission proposed regarding product liability?**

Possible approaches which the [Communication](#) states could be explored include:

- o strict liability for those causing loss
- o risk-generating or risk-management approaches, which would assign liability to the market players generating a major risk for others or to those market players which are best placed to minimise or avoid that risk
- o voluntary or mandatory insurance schemes

### What might a data producers' right look like?

This is perhaps the most radical of the Commission's proposals and it is likely to be one of the hot topics of the consultation. The right would grant the data producer, ie the owner or user of a device that generates data, the right to use or license that data. However, there are challenges with this approach.

First, it is likely to be difficult to identify who the data producer is. Should machine-generated data be owned by the manufacturer of that machine (who has invested in its development), by the machine operator, or both?

Secondly, the right would need to work alongside existing intellectual property rights in data. In particular, the Commission will need to work through potential overlaps with copyright, which can protect the selection or arrangement of the contents of a database, and with the database right, which can arise if there has been a substantial investment in obtaining, verifying or presenting the contents of a database. There could also be a conflict if the data generated by a machine is derived in any way from another dataset in which another person already has a claim to a data producers' right, copyright or a database right.

Thirdly, the right would need to be considered alongside data protection rules. Machine-generated data could still include personal data, which under EU law should remain under the control of the data controller and data subject and not owned by a data producer.

If a data producers' right were to be introduced, it could be limited by obligations to share the data—both for public interest purposes and also to other private companies with a genuine interest in using that data for improving their products or ensuring product safety.

### What happens next?

The public consultation is open until 26 April 2017 and will feed into the Commission's possible future initiative on the European Data Economy later in 2017.

The Commission may also take inspiration from developments in other sectors, such as the Second Payment Services Directive (EU) 2015/2366, which requires banks to share data to encourage fintech innovation.

*Interviewed by Robert Matthews.*

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