

**BUILDING THE EUROPEAN DATA ECONOMY**

**POSITION PAPER**

**ON THE PROPOSAL FOR A NEW RIGHT**

**IN NON-PERSONAL DATA**

April 2017

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## Executive Summary

We welcome the opportunity provided by the European Commission (Commission) to submit an accompanying position paper to our consultation response, in particular to justify and explain our responses. We also hope to give our vision on what a possible future European Union (EU) framework should look like to support a thriving, diverse and innovative European data economy.

In this context, this present position paper examines the Commission's proposal for a new right in non-personal, machine-generated data. The perspective taken considers this new type of right in comparison with the future legislative landscape related to data privacy/protection under the two impending data laws coming into force in the EU in this area to providing a complete legal framework for privacy and data protection under the Digital Single Market Strategy. These are the General Data Protection Regulation 2016/679 (GDPR); and, the draft E-Privacy Regulation *COM(2017) 10 final* (EPR). In this context, this position paper discusses the compatibility of certain facets of such legislation with features of the proposal for a new (exclusive) right to non-personal data, the specificity of said facets/features, together with possible reflections.

**This paper concludes that the Commission should carefully assess the remit of the GDPR and the EPR before supporting the creation of a new right in non-personal, machine-generated data.**

We are happy for this paper to be published. It should be noted that this paper reflects the views only of the authors, not those of the University of Southampton (of which we are all employees).

## Introduction

The Commission is consulting stakeholders on a possible future EU framework for facilitating the free flow of non-personal data in the EU and inviting comments on possible ways to help achieve certain objectives in this respect. One of these is to improve data access and transfer.

One of the example types of the proposals put forward by the Commission for discussion and refinement through stakeholder dialogue (following discussion in academic debates) **is a proposal for a right in non-personal, machine-generated data**. The purpose of this briefing paper is to feed into shaping the future policy agenda with respect to the development of such a right and, in particular, **to help identify legal and regulatory challenges raised by the right as proposed in its current form and ways to tackle those challenges**.

## Proposals for a new right in non-personal data

The Commission hopes to examine the issues raised by, and therefore understand more about, business practices regarding access, trade, and re-use of non-personal “raw” data, specifically licensing practices around such data. This will help it determine whether and to what extent such data can and should be shared and exchanged. In particular, the **Commission states that its objective is to improve access to anonymous machine-generated and machine-to-machine (M2M) data, and facilitate and incentivise the sharing of such data, in ways that tackle restrictions on the free movement of data for reasons other than the protection of personal data**.

Three possible new rights are then proposed that could apply as part of a new licensing regime for anonymised machine-generated data. These proposals – which may be considered as alternatives to each other, as well as to another proposal to leave the issue of licensing decisions solely to the parties involved as a matter of contractual negotiations - are:

- **A possible manufacturer’s right** – *“More data would become available for re-use if the companies active in the production and market commercialisation of sensor-equipped machines, tools or devices were awarded an exclusive right to license the use of the data collected by the sensors embedded in such machines, tools and/or devices (a sort of sui generis intellectual property right)”*<sup>1</sup> and,

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<sup>1</sup> Section 2.3.3 of the Commission’s Consultation.

- **A possible data producer’s right** – *“More data would become available for re-use if the persons or entities that operate sensor-equipped machines, tools or devices at their own economic risk (“data producer”) were awarded an exclusive right to license the use of the data collected by these machines, tools or devices (a sort of sui generis intellectual property right), as a result of the data producer’s operation, to any party it wishes (subject to legitimate data usage exceptions for e.g. manufacturers of the machines, tools or devices)”*.<sup>2</sup>
- **A possible shared right** – *“More data collected by sensors embedded in machines, tools and/or devices would become available for re-use if both the owner or user of the machine, tool or device and the manufacturer share the right to license the use of such data”*.<sup>3</sup>

The Commission also asks for views about a possible new obligation to license the re-use of such data under fair, reasonable and non-discriminatory (‘FRAND’) terms, to facilitate more access to such data with remuneration after anonymisation.<sup>4</sup>

## The legal reform backdrop against which such a right should be appraised

The Commission has stated that its proposals are aimed at clarifying the legal situation. However, possible criticism of the proposal to introduce a new right in non-personal, machine-generated/M2M data include the fact that **it could in fact result in huge legal uncertainty for anyone creating and re-using data**. The importance of avoiding such uncertainty is underlined by the fact that – as rightly pointed out by the Commission - ever-increasing amounts of data are generated by machines, sensors or processes based on emerging technologies, such as the Internet of Things (IoT), industrial processes and autonomous, connected systems. Therefore, anything which could hinder that data generation – including significant legal uncertainty – should be avoided.

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<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> The Commission also refers to other options that could be taken forward include potentially developing new guidelines to incentivise businesses to share the non-personal data they have and granting public bodies special rights of access to data where this is in the “*general interest*”. New default contracts rules are also proposed that could be set to facilitate access to data in accordance with benchmarks that account for the different bargaining positions that businesses in the market have. The Commission caveats these suggestions with the statement that “*relevant legitimate interests, as well as the need to protect trade secrets, would need to be taken into account*”.

## The Commission's Assessment of Existing EU legislation

First, it is useful to consider the existing EU legislative framework for dealing with new ways of generating, collecting, acquiring, and otherwise processing non-personal data in this context. The Commission has called such legislation as currently ill-equipped. This is because, according to the Commission, under the law of different Member States legal claims would be only applied to data when that data meets specific conditions to qualify, for instance, as a trade secret<sup>5</sup> or as an intellectual property right, notably the database right.

In respect of the latter, the Commission holds that such data is not protected by existing intellectual property rights and the sui generis right of the Database Directive (96/9/EC) may provide protection only under the condition that the creation of such a database involves substantial investment in the obtaining, verification or presentation of its contents. In this respect it should be however noted that the definition of 'database' is a broad one. This so because the Database Directive protects databases 'in any form' (Article 1(1)), the only requirement being the existence of a collection of 'independent materials', that is to say, materials which are separable from one another without their informative, literary, artistic, musical or other value being affected (Article 1(2)).<sup>6</sup> The Court of Justice of the European Union (CJEU) has *consistently* granted databases broad protection. In this sense, in its recent judgment in *Freistaat Bayern v Verlag Esterbauer*<sup>7</sup> (a case concerning database protection of topographic maps) the Court held that the unauthorised extraction from a collection of any information that may be used to produce and market another collection retains, following its extraction, sufficient informative value to be classified as 'independent materials' of a 'database' within the meaning of Article 1 of the Database Directive. On the other hand, the CJEU made it clear that if the investment at stake is for the creation of the data constituting the database it cannot be protected through the means of a sui generis database right.<sup>8</sup>

The Commission says that it wants to find out "*what role existing legislation plays in today's data markets, and whether there is a need to revise or introduce legislation to support the European data economy. To which extent does current legislation ... address problems related to access to data?*"<sup>9</sup>

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<sup>5</sup> The Commission points out that the recently adopted Trade Secrets Protection Directive (2016/943/EU), to be transposed into national law by June 2018, "*will grant protection to trade secrets against their unlawful acquisition, use and disclosure. For data to qualify as a "trade secret", however, measures have to be taken to protect the secrecy of information, which represents the 'intellectual capital of the company'.*"

<sup>6</sup> *Fixtures Marketing Ltd v Organismos prognostikon agonon podosfairou AE (OPAP)*, C-444/02, EU:C:2004:697, paragraph 29.

<sup>7</sup> *Freistaat Bayern v Verlag Esterbauer*, C-490/14, EU:C:2015:735.

<sup>8</sup> *British Horseracing Board v William Hill*, C-203/02, EU:C:2004:695, paragraph 31.

<sup>9</sup> Section 2.1 of the Commission's Consultation.

We agree with the Commission that acting as a significant barrier to expansion in the uptake of data analysis in the EU is - as described by Bird & Bird in its recent White Paper for the Commission on data ownership - *“the cumulative implementation of the current maze of different possibly applicable legislations”*.<sup>10</sup>

However, for the reasons set out below, we do not believe that introducing a new exclusive right to license the use of non-personal, machine-generated data (a sort of sui generis intellectual property right) is the right approach. Notably, little reference is made to the potential overlap between the application of a new right to non-personal data and the GDPR, as well as the right and the new EPR currently in draft form. Yet we believe that, in the relevant context (particularly looking forward to the IoT), there could be overlaps and, therefore, more clarification is required regarding the scope of each piece of legal regimes and possible interplays between them.

As a reminder:

- Under the draft EPR, it is proposed that rules for the protection of privacy and personal data in the electronic communications sector (currently set out in the E-Privacy Directive (2002/58/EC) will be updated. A key feature of this proposal is to strengthen privacy protection for both content and non-content (metadata) derived from electronic communications, which will need to be anonymised or deleted if users have not given their consent, unless the data is required for legitimate purposes. These are an expression of the right to respect for private life, as enshrined in Article 7 of the EU Charter of Fundamental Rights (the Charter), so as to restrict interferences to the private life to the minimum.
- Under the forthcoming GDPR, which comes into effect in May 2018, several new concepts and approaches are to be introduced. These are primarily an expression of the fundamental right to the protection of personal data as enshrined in Article 8 of the Charter.

The Commission has acknowledged that *“[a]ny policy measure must take account of this economic reality and of the legal framework on the protection of personal data, while respecting the fundamental rights of individuals”*.<sup>11</sup>

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<sup>10</sup> Bird & Bird, White Paper – ‘Data ownership in the context of the European data economy: proposal for a new right’, 1 January 2017, pp. 5 and 112.

<sup>11</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Building a European Data Economy" {SWD(2017) 2 final}, COM (2017) 9 final, p.9.

**However, as we describe below, we believe that there is potentially a very close line between non-personal (anonymised) data and machine-generated data which is either personal data - and/or information in which an individual may have a reasonable expectation of privacy – that might raise concerns for closer examination precisely because of the way that the proposed right is formulated.**

In particular, while an exclusive right to licence the use of personal data does not exist under EU law, individuals do have rights in data that can become personal data even though it has been subject to anonymisation techniques; and these cannot be precluded where an exclusive right to licence the use of de-identified data (which may easily transition from non-personal data to personal data) is posited.

Furthermore, the EPR concept of a ‘communication’ – which encompasses a conceptual distinction between data and ‘metadata’ (rather than a distinction between personal and non-personal data) is closely related to the concept of a M2M data generation.

These concerns are described in more detail below.

### *The GDPR vis-à-vis the scope of data covered by the proposed right*

Regarding the scope of the right, as well as the data to be covered by such a right, the Commission states that that the new right could be created as a right in rem, which could be assigned as a right to licence the data usage. This right would cover the syntactical (data, code) level, with metadata as “*part of the scope as they contain the information necessary to use the data subject to such a potential new right*”.<sup>12</sup> In relation to this possible right, the Commission stresses two points that touch on the relationship between such a right and the GDPR:

- The Commission says that “*such right would not be conceivable with regard to personal data as the protection of the latter is a fundamental right in itself under which natural persons should have control of their own personal data (cf. recital 7 of the GDPR). Such control is ensured by legislation on the protection of personal data which confers enhanced rights on natural persons, reinforces obligations on data controllers and is backed by strong enforcement*”.<sup>13</sup>

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<sup>12</sup> Alternatively, the Commission proposes that a data producer’s right could be conceived as a “*set of purely defensive rights*”, “*i.e. the capacity for the de facto data holder to sue third parties in case of illicit misappropriation of data...In this respect, a number of civil law remedies could be introduced such as: the right to seek injunctions preventing further use of data by third parties who have no right to use the data, the right to have products built on the basis of misappropriated data excluded from market commercialisation and the possibility to claim damages for unauthorised use of data*”. However, the Commission also notes that the mere dissemination of (non-personal) data without illegal use could remain lawful.

<sup>13</sup> European Commission, Staff Working Document on the free flow of data and emerging issues of the European data economy - accompanying the document Communication Building a European data economy - SWD(2017) 2 final, p.33.

- The Commission also mentions that *“the GDPR continues to apply to any personal data (whether machine generated or otherwise) until that data has been anonymised. Where personal data are concerned, the individual will retain his right to withdraw his consent at any time after authorising the use. Personal data would need to be rendered anonymous in such a manner that the individual is not or no longer identifiable, before its further use may be authorised by the other party”*.<sup>14</sup>

It is undeniable that the GDPR fully regulates the processing of personal data within the EU, including machine-generated or industrial data that identifies or makes identifiable a natural person. For example, the Commission has recently stated:

*“[M]achine-generated data can be personal and non-personal. Where machine-generated data allows the identification of a natural person, it qualifies as personal data with the consequence that all the rules on personal data apply until such data has been fully anonymised (e.g. location data of a satellite navigation system).”*<sup>15</sup>

Yet, while the statement that the scope of any new right is limited to non-personal data seems clear cut, in practice it is very hard to make a clear cut distinction between those cases involving data relating to persons from which an individual is not identifiable (taking into account *“all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly”*, per Recital 26 of the GDPR) and those cases involving the processing of data whereby an individual is identifiable. This is as true of data created by (legal or natural) persons as it is for data generated by machines or sensors (often as by-products). This includes metadata.<sup>16</sup>

Moreover, to add to the confusion, as the Commission has confirmed, *“One common theme linking the free flow of data with the emerging issues of access and transmission of data is that enterprises*

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<sup>14</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Building a European Data Economy" {SWD(2017) 2 final}, COM (2017) 9 final, p.13.

<sup>15</sup> European Commission, Fact Sheet, 'Building the European Data Economy' – Questions and Answers, MEMO/17/6, 10 January 2017, p.1.

<sup>16</sup> See, for example, the statement by the Article 29 Working Party in its Opinion 4/2007 on the concept of personal data that *"in cases where prima facie the extent of the identifiers available does not allow anyone to single out a particular person, that person might still be 'identifiable' because that information combined with other pieces of information (whether the latter is retained by the data controller or not) will allow the individual to be distinguished from others"*.



*and actors in the data economy will be dealing with both personal and non-personal data, and that data flows and datasets will regularly contain both types”.*<sup>17</sup>

Furthermore, just as personal data can be transformed into non-personal data through the process of anonymisation, so can non-personal data be at some future-point transformed into personal data meaning that all of the rules of data protection recommence applying to its processing which, as we explain in our recent paper, suggests adopting a dynamic approach to anonymisation.<sup>18</sup> Relevant to the likelihood of non-personal data transformation back into personal data is the fact that there are incentives for third party organisations to re-identify individuals about whom data relates. For example, as the Commission acknowledges, “[t]hanks to the use of sensors, the sector generates and analyse large amounts of data, mainly on production processes” whereas “the increasing connectivity of machines can provide valuable business insights along the entire value chain, allowing for collaborative decision-making and potentially enabling almost real-time feedback of data on consumers’ preferences into production processes”.<sup>19</sup>

This ‘grey area’ of on-going legal uncertainty for data controllers adds confusion to the decision-making process in deciding which legal regime would apply. It also highlights the possibility for tension between the scopes of a possible new right in anonymised data and, for example, the new right of data portability (Article 20, GDPR) conceived to support the free flow of personal data in the EU and foster competition between data controllers.

### *The draft EPR vis-à-vis the scope of data covered by the proposed right*

Earlier this year, the Commission published the draft EPR as part of a process to replace the current e-Privacy Directive, aiming to simplify current legislation and reinforce privacy/confidentiality rules in the delivery of electronic communications services. Notably, the scope of the draft EPR extends beyond that of the E-Privacy Directive in that it would apply to any company processing personal data in the context of delivering electronic communications and files, including so-called ‘over-the-top’ providers. It also provides for various enhanced privacy measures, including in relation to

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<sup>17</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Building a European Data Economy” {SWD(2017) 2 final}, COM (2017) 9 final, p.9.

<sup>18</sup> Stalla-Bourdillon, Sophie, and Alison Knight. “Anonymous data v. Personal data—A false debate: An EU perspective on anonymisation, pseudonymisation and personal data.” *Wis. Int’l LJ* (2016).

<sup>19</sup> European Commission, Staff Working Document on the free flow of data and emerging issues of the European data economy - accompanying the document Communication Building a European data economy - SWD(2017) 2 final, p.27.

confidentiality of electronic communications and user consent, while aiming (amongst other things) to bring electronic communications services rules in line with the GDPR.<sup>20</sup>

The following key points should be noted as far as they might intertwine with the proposal to introduce a new right in non-personal data.

Articles 1 and 2 provides the draft EDR's scope. Under Article 2(1), it would apply to the *"processing of electronic communications data carried out in connection with the provision and the use of electronic communications services and to information related to the terminal equipment of end-users"*.<sup>21</sup> This would appear to encompass M2M communications. Recital 12 specifies that the principle of confidentiality shall apply to *"the transmission of machine-to-machine communications"*.

In particular, the draft ECR distinguishes two types of electronic communications data (ECD) under Article 4(3):

- Electronic content communication (ECC) - *"electronic communications content' means the content exchanged by means of electronic communications services, such as text, voice, videos, images, and sound"*; and,
- Electronic communications metadata (ECM) - *"data processed in an electronic communications network for the purposes of transmitting, distributing or exchanging electronic communications content; including data used to trace and identify the source and destination of a communication, data on the location of the device generated in the context of providing electronic communications services, and the date, time, duration and the type of communication"*.

Thus, the concept of metadata appears close to getting official legal recognition (replacing the term currently used under the E-Privacy Directive, *"traffic data"*).<sup>22</sup> This is in line with the recent

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<sup>20</sup> According to Article 1(3) of the draft EPR, it *"particularizes and complements"* the GDPR. Therefore, the GDPR applies as the general rule, by default, and the EPR will be *lex specialis*, according to the explanatory memorandum accompanying the proposal (See Section 1.2. of the Explanatory Memorandum, p. 2).

<sup>21</sup> According to Article 1(1) of the Commission Directive 2008/63/EC of 20 June 2008 on competition in the markets in telecommunications terminal equipment, terminal equipment is equipment *"directly or indirectly connected to the interface of a public telecommunications network to send, process or receive information; in either case (direct or indirect), the connection may be made by wire, optical fibre or electromagnetically..."* Article 3 also sets out an extended territorial scope for non-EU service providers that provide electronic **communications** services to end-users in the EU, whether the services are paid for or not.

<sup>22</sup> See also Recital 2 of the draft EPR: *"These metadata includes the numbers called, the websites visited, geographical location, the time, date and duration when an individual made a call etc..."* as well as Recital 14: *"Electronic communications metadata may include information that is part of the subscription to the service when such information is processed for the purposes of transmitting, distributing or exchanging electronic communications content."*

acknowledgement by the CJEU (in its judgment in *C-203/15 Tele2 Sverige AB v Post-och telestyrelsen* and *C-698/15 SSHD v Tom Watson & Others*) that metadata derived from electronic communications may reveal very sensitive and personal information, although the Commission still seems to suggest that content and metadata are on a hierarchical par.

**Therefore, due to its wide material scope and absence of any reference to personal data (and non-personal data), the draft ECR – if is adopted in law – could be deemed to cover many different types of data generated by connected devices in the IoT and this is true even if the definition of ECM refers to “the purposes of transmitting, distributing or exchanging electronic communications content.”<sup>23</sup>**

This could result in significant legal confusion if the legal regimes of a new right in non-personal data and the ECR were deemed to apply at the same time.

Indeed, this would result in three potentially applicable legal regimes that the new right holder will need to discern between as Recital 4 of the draft EPR explains that “*electronic communications data may include personal data as defined in [the GDPR]*” as well as by implication non-personal data. This represents an important change compared to the current regime of the e-Privacy Directive, which is centred on processing personal data (Article 3(1)).

## Conclusion

The Commission wants to understand the nature and magnitude of any barriers to the wider access and re-usability of data and ways of tackling those barriers. We hope to have shown that there is scope for confusion by companies regarding which legal regime might apply in the future, in addition to determining how the new rules under the EPR (when it becomes law) and the GDPR apply - with all that entails - from next year. As the Commission itself points out, there is a need for a coordinated and pan-European approach to make the most of data opportunities in the future. With respect, we believe that such coordination should encompass exploring the possibilities for legal uncertainty over potential overlap areas (if not in reality as a matter of theory, as a matter of perception in practice) with the GDPR and the negotiation of the EPR.

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<sup>23</sup> EPR, Art. 4(3).