



EUROPEAN COMMISSION

*Brussels, 23.3.2018
C(2018) 1551 final*

Dear President,

The Commission would like to thank the Senát for its Opinion on the proposal for a Regulation of the European Parliament and of the Council on a Framework for the free movement of non-personal data in the European Union {COM(2017) 495 final}.

This proposal represents one of the sixteen policy actions announced by the Digital Single Market strategy of the Commission, which is a broader package of ambitious measures designed to unleash the potential of the Union's internal market for digital goods and services. Stimulating the European data economy is an important element of this strategy, and enhancing the free movement of data in the European Union is an important precondition in this regard.

The proposal on the free flow of non-personal data will lead to economic growth and job creation for European Union citizens, by providing legal certainty that the Union's internal market freedoms also apply to the storage and processing of non-personal data. More specifically, the proposal will make it easier to do business in multiple locations in the Union by avoiding the need to duplicate Information Technology infrastructure for businesses that operate in more than one Member State. This allows for economies of scale through centralisation of Information Technology infrastructures and will make it easier for small and medium-sized enterprises and start-ups to scale up and enter new markets across borders.

The Commission welcomes the Senát's broad support for the aims of the proposal and notes its requests for clarification relating to some of the definitions used, as well as its political remarks. The Commission is pleased to have this opportunity to provide a number of clarifications regarding its proposal and trusts that these will allay the Senát's concerns.

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President of the Senát
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The Senát has presented its view that a number of definitions in the proposal on the free flow of non-personal data would need to be better specified, particularly the definitions of 'non-personal data', 'professional user' and 'public security'. Furthermore, the Senát has voiced concerns about possible effects of the proposal on free flow of non-personal data on, respectively, the protection of trade secrets and the principle of contractual freedom for service providers in the European Union. Lastly, the Senát has inquired how the Commission expects to react in case of discontent with the self-regulatory process in the area of switching service providers and porting data.

The Commission welcomes these inquiries and expressions of concern of the Senát. Whilst the Commission does not necessarily share all conclusions drawn in the Opinion, the detailed work that the Senát has undertaken constitutes an important contribution to the debate that is now underway. A detailed response of the Commission to the remarks and requests for clarification made by the Senát is presented in the annex attached to this letter.

The Commission accords high value to the Opinion of the Senát and places it in the perspective of the considerable progress made by the Czech Republic in the digital realm. One example of this is the digitisation of health care in the Czech Republic, in the framework of which the introduction of mandatory electronic prescriptions has happened on 1 January 2018.

The Opinion of the Senát has been made available to the Commission's representatives in the ongoing negotiations with the co-legislators, the European Parliament and the Council, and will inform these discussions. The Commission is hopeful that an agreement will be reached in the near future.

The Commission hopes that the clarifications provided in this letter and the annex address the issues raised by the Senát and looks forward to continuing the political dialogue in the future.

Yours faithfully,

*Frans Timmermans
First Vice-President*

*Mariya Gabriel
Member of the Commission*

Annex

The Commission has carefully considered the issues raised by the Sénat in its Opinion and would like to offer the following observations.

Regarding the term 'non-personal data', the Commission has chosen to use an 'ad contrario' definition, stating that non-personal data is all data which is not personal data as defined by the General Data Protection Regulation (GDPR)¹. The rationale behind this choice was to avoid any possible overlap between the legal scope of the proposal on the free flow of non-personal data and the General Data Protection Regulation. In the view of the Commission, the only way to guarantee this is to use the 'ad contrario' definition of non-personal data in the free flow of data proposal. With respect to non-personal data, the Sénat has recommended to the Commission the inclusion of examples of what can be considered such data. In relation to this, the Commission indicates that such examples were proposed in the general approach agreed on by the Council of the European Union.

Regarding the term 'professional user', the Commission kindly refers the Sénat to Article 3.8 of the proposal for a Regulation on a framework for the free flow of non-personal data, in which the definition of the term is set out. The decision to use this term stems from the wish to avoid overlap with earlier legislative proposals of the Commission, in particular the proposed Directive on certain aspects concerning contracts for the supply of digital content², article 13.2(c) of which provides for easier switching and porting data for consumers.

Regarding the term 'public security', the Commission would like to recall Recital 12 of the proposal for a Regulation on a framework for the free flow of non-personal data, where it is clarified that the justification of grounds of public security relies on the meaning of public security in Union law, in particular on Article 52 of the Treaty on the Functioning of the European Union (TFEU). Additionally, the Court of Justice of the European Union has established that recourse to public security as a ground of justification for derogation from a fundamental freedom presupposes "the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society". The Court has also affirmed that the concept of 'public security' "covers both the internal security of a Member State and its external security."³ The term 'public security' as used in the proposal on the free flow of non-personal data is to be seen in this light. In response to the Sénat's request to clarify that this proposed exception covers also data necessary for ensuring the defence and security of the Member State, the Commission would like to inform the Sénat that such a clarification was inserted in the general approach prepared by the Council of the European Union, alongside another

¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance); OJ L 119, 4.5.2016, p. 1–88.

² Proposal for a Directive (EU) 2015/634 of the European Parliament and of the Council of 9 December 2015 on certain aspects concerning contracts for the supply of digital content, article 13.2.

³ Judgment of the Court of 23 November 2010 in the Case C 145/09, Tsakouridis, para. 43.

clarification that, in accordance with Article 4 TFEU, national security is the sole responsibility of each Member State.

In its Opinion, the Senát has emphasised that the proposal on the free flow of non-personal data must not put in question the protection of trade secrets and other sensitive data related to know-how. In response, the Commission would like to reassure the Senát that this proposal is completely without prejudice to the protection of trade secrets, specifically since, on the one hand, the proposal focuses on improving the choice of data processing services and solutions for the 'owner' of those data and, on the other hand, the proposal does not envisage new powers for competent authorities to obtain access to data.

Moreover, in its Opinion, the Senát has presented its view that the proposal on the free flow of non-personal data should not undermine the contractual freedom of service providers in the European Union. The Commission agrees with the Senát that this freedom is essential for respect of principles of free movement of goods and services in the European Union and is pleased to inform the Senát that its proposal on the free flow of non-personal data will in no way unduly affect the principle of contractual freedom. The proposal does contain a provision encouraging a self-regulatory process for industry to develop, for instance, model contract clauses, but there is no obligation in this respect.

Lastly, the Senát has requested clarification on the intentions of the Commission in case of discontent with the development of self-regulation in the area of switching service providers and porting data. In the proposal for a Regulation on the free flow of non-personal data, the Commission has listed a number of key elements that such self-regulation should address, for instance different aspects concerning processes, technical requirements, timeframes and charges that may apply in case of switching of providers. Should the Commission deem the progress in self-regulation insufficient, it may propose additional measures. However, such potential additional measures would necessarily take account of the proposals made in the context of self-regulation and other developments observed on the market and would be subject to an impact assessment. Therefore, the Commission is unable at this point in time to give an indication of what form potential additional measures could eventually take.