EUROPEAN COMMISSION

Brussels, 3.8.2018
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Dear President,

The Commission would like to thank the Bundesrat 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 in the Digital Single Market strategy of the Commission, which is a broader package of 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. Together with the General Data Protection Regulation, the proposed Regulation will allow personal and non-personal data to flow freely across the Union.

The proposal on the free flow of non-personal data should 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 data. More specifically, the proposal should 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 would like to note that while the formal adoption of the proposal has not yet taken place, after a swift negotiation process, a provisional political agreement was reached on 19 June 2018.

In the context of the negotiations the Commission has taken into consideration the Bundesrat's position and its remarks. It welcomes this opportunity to provide a number of clarifications regarding its proposal, the reached political agreement and trusts that these will allay the Bundesrat's concerns.

Mr Michael MÜLLER
President of the Bundesrat
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In first instance, the Bundesrat has presented its view that the scope of the Regulation should not be extended to mixed data sets which consist of inextricable sets of both, non-personal data and personal data, because this would result in the prohibition of most localisation requirements in view of the practical difficulty of separating non-personal data from personal data. Furthermore, the Bundesrat has voiced concerns about such an extension of the scope of the regulation and its potential impact on the processing of sensitive information held by public sector, in particular the independence as well as security of the of the Information Technology infrastructure related to the administration of the justice. Therefore, the Bundesrat has highlighted the need to keep the public security exception during the upcoming negotiations in order to uphold, in particular, the possibility for the judicial administration to organise its Information Technology infrastructure without limitations. Lastly, the Bundesrat emphasised the necessity for authorities processing data in the context of the administration of justice to uphold localisation requirements when entering into procurement contracts and in their execution of administrative practices in order to guarantee the safe processing of personal data. Therefore, in the Bundesrat's view, the intention to extend the definition of localisation requirements is in conflict with information security considerations of the administration of justice and an independent judiciary.

The Commission welcomes the views expressed by the Bundesrat. Whilst the Commission does not necessarily share all conclusions drawn in the Opinion, the detailed work that the Bundesrat has undertaken constituted an important contribution to the debate. A detailed response of the Commission to the specific remarks and requests for clarification made by the Bundesrat is presented in the attached Annex.

The Commission attaches great importance to the Opinion of the Bundesrat and places it into perspective of the important role Germany plays in the construction of a Digital Single Market for Europe.

The Opinion of the Bundesrat had been made available to the Commission's representatives before the conclusion of negotiations with the co-legislators, the European Parliament and the Council, and has therefore informed these discussions.

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

Yours faithfully,

Elżbieta Bieńkowska
Member of the Commission

Annex

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

Regarding mixed data sets, the proposed Regulation will be without prejudice to the General Data Protection Regulation. For a mixed dataset this means that data protection obligations of the General Data Protection Regulation remain applicable to all personal data at all times, also when personal data is stored alongside non-personal data. Also under the General Data Protection Regulation, even though data moves freely within the Union, the protection of personal data and its safe processing must be ensured at all times, independently of the location of such processing.

The political agreement foresees that, before the start of application of the Regulation, the Commission will publish informative guidance on the joint applicability of the General Data Protection Regulation and this regulation with regards to data sets composed of both personal and non-personal data.

Regarding public sector data, the Commission would like to highlight that such data should be explicitly covered by the free flow of data principle. Otherwise real barriers to the cost-efficient procurement of data storage and processing services for public sector bodies would remain in place, limiting flexibility regarding the type of data processing and computing services used. This would undermine efforts on public administration modernisation and on cross-border online public services.

However, as clarified in the compromise text prepared by the Council of the European Union, the Commission's free flow of non-personal data proposal should not oblige public administrations to externalise their data storage and processing. By forbidding the imposition of rules on the location of storage and processing, the proposal seeks to provide freedom of choice for data storage and processing, to the benefit of businesses as well as public administrations.

Furthermore, the Bundesrat outlined the necessity for authorities processing data in the context of the administration of justice to uphold localisation requirements when entering into procurement contracts and in their execution of administrative practices in order to guarantee the safe processing of personal data. In that respect, the Commission would like to stress that the General Data Protection Regulation lays down harmonised data protection rules within the Union and, therefore, ensures a safe processing of personal data across the Union, which makes localisation requirements motivated by such safe processing obsolete. Article 1(3) of the General Data Protection Regulation provides specifically that "The free movement of personal data within the Union shall be neither restricted nor prohibited for reasons connected with the protection of natural persons with regard to the processing of personal data".

Moreover, it should be recalled that Directive 2014/24 (the Public Procurement Directive)[1] has established a general non-discrimination principle, according to which "contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner". The proposed Regulation on a framework for the free flow of non-personal data complements that principle as far as procurement of data processing services is concerned.

The political agreement reflects these considerations and therefore foresees that public sector data 'insourcing' is out of scope while public procurement of cloud services is in scope.

Regarding the term 'public security', the Commission would like to recall recital 12 of the proposed Regulation on a framework for the free flow of non-personal data, where it is clarified that it is a concept defined by Union law, in particular Article 52 of the Treaty on the Functioning of the European Union. The compromise text prepared by the Council of the European Union clarified that, in accordance with Article 4 of the Treaty on European Union, national security remains the sole responsibility of each Member State. 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"[2]. The Court has also confirmed 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 Bundesrat's understanding that this proposed exception covers also data related to the administration of justice of a Member State, the Commission would like to underline that the applicability of the 'public security' exception would have to be assessed in the light of the circumstances in each individual case, in accordance with the provisions of Article 4 of the proposed Regulation.

According to the political agreement public security remains the only permissible exception to the key provision prohibiting of data localisation requirement.

[1] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance; OJ L 94, 28.3.2014, p. 65–242.

[2] Judgment of the Court of 29 October 1998 Case C-114/97, Commission v Spain, para. 46; EU:C:1998:519.

[3] Judgment of the Court of 23 November 2010 Case C-145/09, Tsakouridis, para 43; EU:C:2010:708.