

EXPLANATORY MEMORANDUM FOR EUROPEAN UNION LEGISLATION

2017/0228 (COD)
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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

Submitted by the Department for Digital, Culture, Media and Sport on 12 October 2017.

SUBJECT MATTER

1. The European Commission's Free Flow of Data initiative forms part of the Digital Single Market agenda and seeks to remove barriers to the free flow of data in the Single Market. The proposed regulation aims to achieve the following three objectives:
 - To improve cross-border flows of non-personal data within the Single Market by prohibiting public bodies from imposing unjustified "data localisation" requirements;
 - To ensure cross-border access to data within the Single Market for "competent authorities" (i.e. public bodies) for regulatory control purposes; and
 - To facilitate data portability, in a business-to-business context with a view to, in turn, making it easier for data service users to switch data service provider.

Our interpretation of the key provisions is as follows:

Prohibition on Unjustified Data Localisation

2. Data localisation is, for the purposes of the draft regulation, the practice whereby a public authority mandates, or encourages by way of guidance, that data must be stored on servers physically located on the territory of a given state. Localisation often derives from the widespread misperception that its practice renders data more secure. Article 4 of the Commission's proposal includes a prohibition of data localisation requirements, unless justified on grounds of "public security." National security lies outside EU legal competence so is not in scope of the proposed regulation.
3. The proposal provides that Member States should notify the Commission of any draft act that introduces a new data localisation requirement or makes changes to an existing requirement. Member States are also required, within 12 months of the start of the regulation, to repeal any data localising requirement which is not exempt or outside scope of the regulation. Should a Member State consider that an existing localising requirement is exempted on grounds of public security, it must notify the Commission, together with a justification.

4. The Commission will require Member States to provide online details of localisation requirements applicable in that Member State.

Access to Data

5. Article 5 states that access to data by competent authorities, for the performance of official duties in accordance with EU or national law, cannot be refused on the basis that the data is stored or processed in another Member State. It also sets out that a competent authority in one Member State should provide assistance to a competent authority in another Member State where the latter has exhausted all means of obtaining access to such data and there is no other pre-existing co-operation mechanism.

Portability

6. Article 6 encourages providers of data storage or other processing services to develop self-regulatory codes of conduct to facilitate the porting of data to allow switching of service providers by users. This should include the processes, technical requirements, timeframes and charges that would apply when porting data to another provider. The Commission is looking for this code to be in use within one year after the start of application of this Regulation and will review its implementation by no later than two years after the start of application of the Regulation.

Single points of contact and Free Flow of Data Committee

7. Article 7 states that Member States will designate a single point of contact to deal with issues concerning the application of the regulation.
8. Article 8 states that the Commission will be assisted by a Free Flow of Data “comitology” Committee as set out in Article 5 of EU Regulation 182/2011.

SCRUTINY HISTORY

9. The Commission issued a Communication in January 2017¹, which identified potential barriers to the free movement of non-personal data in the Single Market. The House of Lords European Union Committee provided clearance on 30 March 2017; the document has not been cleared by the House of Commons European Scrutiny Committee.

MINISTERIAL RESPONSIBILITY

10. The Minister of State for Digital, has overall policy responsibility for cross-border flows of non-personal data. Ministers in other government departments will have an interest in proposals in the draft regulation that impact directly on the public sector.

¹ COM(2017) 9: “Building a European data economy”

INTEREST OF THE DEVOLVED ADMINISTRATIONS

11. The UK Government will lead on negotiations in respect of this regulation, and will liaise with the devolved administrations to ensure their interests are taken into account and to ensure they are aware of their responsibilities in respect of compliance with this regulation. We do not expect any implementation will be necessary. However, if any implementation is needed, we will consider with the devolved administrations any legislation required on a case by case basis.

LEGAL AND PROCEDURAL ISSUES

i. Legal basis

12. The legal basis for the proposal is Article 114 of the Treaty on the Functioning of the European Union (TFEU): the proposal aims to achieve a more competitive and integrated internal market for data storage and other processing services by ensuring the free movement of data within the Union.
13. This proposal falls within the area of shared competence in accordance with Article 4(2)(a) TFEU (which relates to the internal market).

ii. European Parliament Procedure

14. Ordinary legislative procedure.

iii. Voting procedure

15. Qualified Majority.

iv. Impact on United Kingdom Law

16. The regulation will be directly applicable to Member States. The regulation makes no provision for derogations (save that restrictions on free flow are permitted where it is necessary for public security), nor does it require any measures to be transposed into, or implemented in, domestic law.

v. Application to Gibraltar

17. The Regulation will apply to Gibraltar. In view of this, the government is engaging with the Government of Gibraltar.

vi. Fundamental rights analysis

18. In its explanatory memorandum, the Commission sets out that the proposal respects those fundamental rights and principles which are recognised by the Charter of Fundamental Rights (CFR). Further, the Commission holds that, in accordance with CFR Article 16, the proposal should have a positive impact on the freedom to conduct a business; this is due to the proposal's intention of contributing to the removal and prevention of unjustified or disproportionate barriers to the use and provision of data services.

APPLICATION TO THE EUROPEAN ECONOMIC AREA

19. Although the regulation makes reference only to the European Union, the Commission's explanatory memorandum makes explicit that the Single Market is intended to be in scope; as such, we believe the proposal to be an EEA-relevant EU legal act which is intended to apply to the EEA.

SUBSIDIARITY

20. The Commission states that the proposal is in compliance with the principle of subsidiarity, as per Article 5 of the Treaty on European Union (TEU). The Commission highlights, in its explanatory memorandum, that the objective of the proposal is to ensure the smooth functioning of the internal market; the Commission further states that the free movement of non-personal data within the EU is essentially a problem of cross-border data mobility and, as such, cannot be achieved by Member States at national level.
21. The Commission recognises that Member States could address domestic data localisation practices, but this would lead to a divergence of approach, resulting in varying regulatory requirements. This would result in additional costs for businesses, especially small and medium-sized enterprises.

POLICY IMPLICATIONS

22. On 23 June 2016, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. The government respected the result and triggered Article 50 of the Treaty on European Union on 29 March 2017 to begin the process of exit. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the government will continue to negotiate, implement and apply EU legislation.
23. The government welcomes the Commission's proposal. It has consistently encouraged the Commission to legislate to address the practice of unjustified data localisation, recognising the need for limited exemptions. The government has argued that data localisation can be anti-competitive, operating as *de facto* trade barriers which limit growth and stifle innovation. This position was set out in government's response to the Commission's public consultation on the data economy in April 2017.
24. There are several aspects of the draft regulation where the government will be seeking clarification from the Commission in order to better understand its potential impact, in particular:
 - In Article 4 (Free movement of data within the Union):
 - The treatment of datasets that contain personal and non-personal data, and exempted and non-exempted data, including where these are difficult to separate out.
 - The mechanism for assessing notified exemptions: the criteria, including any proportionality test, and the process in the event of a Member State challenging a negative decision.
 - How the proposed notification system would capture localisation that occurs as a result of practices, guidance and procurement.
 - How the proposed transparency model will work in relation to sensitive data that is exempted.
 - In Article 5 (Data availability for competent authorities):
 - The scope of this Article, including examples of the information that would apply, and the degree to which it would support public authorities seeking to access data held in non-public organisations.
25. The government will also raise with the Commission, regarding Article 6 (Porting of Data): the evidence in the impact assessment to support action in this area; how the proposed code of conduct will have the desired impact on

facilitating switching and increased market competition; and what appears to be an ambitious 12 month deadline.

26. The government will also underline the importance of aligning any code of conduct for the porting of non-personal data with the data portability requirements for personal data as set out in the General Data Protection Regulation, and will seek clarification from the Commission on the potential impact on businesses, including SMEs.

CONSULTATION

27. The European Commission ran a public consultation earlier this year to help shape its work on the European data economy. The government responded to the consultation and this was shared with the European Scrutiny Committees. The government has undertaken a targeted consultation with stakeholders on the draft regulation which will further inform the government's approach.

IMPACT ASSESSMENT

28. The Commission accompanied its proposal with an impact assessment which considered the following four scenarios concerning data localisation:
- a. Baseline i.e. no intervention
 - b. 1st policy option: guidelines and/or self-regulation to address identified problems, allied to strengthened enforcement in relation to unjustified or disproportionate data localisation.
 - c. 2nd policy option: legal principles in relation to identified problems, allied to the designation of a single point of contact by each Member State and the establishment of an expert group, with a view to discussing common approaches, in addition to providing guidance on the aforementioned principles. A sub-option thereof (Option 2a) contemplated a combination of, on the one hand, a legislative approach to establishing the free flow of data, the designation of single points of contact, and establishment of an expert group and, on the other hand, self-regulatory measures in relation to data portability.
 - d. 3rd policy option: detailed legislative intervention to establish, amongst other things, harmonised assessments of what constitutes justified and proportionate data localisation, in addition to a data porting right.
29. The Commission believes that its preferred option (2a) will ensure the removal of existing - and prevention of future - unjustified data localisation measures, in addition to providing legal certainty and increasing trust in the market.
30. The Commission's Regulatory Scrutiny Board twice issued a negative opinion on the impact assessment; on the second occasion noting a lack of evidence to support a new right to cloud services portability. The Commission stresses that the proposed measures in relation to data porting are, in acknowledgment of the Board's second opinion, less burdensome - specifically, self-regulatory measures have substituted the previously envisaged new right of data porting.
31. In acknowledgment of the Board's opinion, the proposal was amended to ensure no overlap with, or duplication of, the review of the mandate of the European Union Agency for Network and Information Security and the creation of a European ICT cybersecurity framework.

FINANCIAL IMPLICATIONS

32. The Commission estimates that the annual burden on the public authorities of each Member State will be approximately EUR 33,000, to take into account the cost of sustaining a single point of contact, in addition to an estimated EUR 385 -1925 for the preparation of notifications.

TIMETABLE

33. Consideration of the proposal in Council is expected to start in November 2017. We do not yet have an indication of timings for consideration by the European Parliament.

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