Ref. Ares(2021)1483859 - 25/02/2021

9.11.2020

REPUBLIC OF ESTONIA
MINISTRY OF ECONOMIC AFFAIRS AND COMMUNICATIONS

Federal Ministry
Digital and
Economic Affairs

Ministry of Economic Affairs and Climate Policy of the Netherlands

MINISTRY OF THE ECONOMY AND INNOVATION

ADMINISTRATIVE MODERNIZATION AGENCY

REPUBLIKA HRVATSKA | REPUBLIC OF CROATIA
Središnji državni ured za razvoj digitalnog društva
Central State Office for the Development of Digital Society

Joint Non-Paper by Austria, Croatia, Estonia, Lithuania, Netherlands and Portugal
Towards Open Data – Availability of Public Datasets

I. General remarks

We support the initiative for an implementing act to enhance the availability of public datasets. High value datasets (HVD) are key drivers to establishing an internal market for data and for making the EU a leader in a data-driven economy and society. Therefore it is imperative to carefully define the common foundations on essential datasets to be made available free of charge and in a standardized manner within the EU.

The EU should strive to improve the availability of high-quality public-sector data by expanding the categories of re-usable data, for instance, to language corpora. In order to progress in this regard, the European Commission should develop financial support measures for the Member States. It is important to enable cross-border access to data. The exchange of EU public sector data should be based on common standards, for instance, Data Catalogue vocabulary application profile, which is used for describing public sector datasets. DCAT-AP enables and improves cross-data portal search. Similarly important are EU core vocabularies, which standardise the metadata.

It is important to find ways to achieve even higher availability of public sector data sets made available by the public authorities of the Member States. For example, improving the availability of data requires costly IT developments, while ensuring data quality and sufficient amounts of metadata requires skilled specialists currently lacking in the workforce across Europe. Thus, both financial measures and retraining is required. Appropriate support for the Member States through EU programmes for this digital transition should be safeguarded. When changing the legal framework for open data, it must be emphasized that data sharing does not restrict the competitiveness of companies, including state-owned companies. It is also important that public sector data is actually available to all interested parties and such parties have actual access to the said data. This would allow the private sector to build new services using public sector data.

Although one of the aims of the European Data Strategy is to address the shortcomings in the exchange of data between the public sector institutions and to achieve the implementation of the one-stop-shop principle for public services, there is a need for clarifications. Applying one-stopshop principle is hampered by the lack of semantic interoperability, differences in data formats, insufficient metadata (data is only described at dataset level, while for the use of data, element level description is crucial) and the inability to bring people and data together. With regard to the "one-stop-shop" principle, there is also a need for an increased dialogue between the Member States and the Commission to ensure a common understanding of its content. The lack of crossborder interoperability of public sector data is an obstacle to the creation of a single EU digital gateway. The cross-border use of data also requires a significant development of language technologies so that large text corpora (eg in the National Library, the National Archives and the National Broadcasting) can be used in the development of services.

The COVID-19 crisis has highlighted the need for high quality statistical health data. We therefore encourage urgent joint action for improving the quality and standards on health data, for example through a reinforced coordinating role of the European Centre for Disease Prevention and Control (ECDC) and by prioritizing the establishment of a European data space on health.

Another issue with publicly available datasets and the re-use of such datasets is related to the problems of processing personal data. We provide our initial assessment and concerns in relation to this implementing act and its potential effects on processing of personal data in the following paragraphs.

II. High Value Datasets – issues with personal data and compliance with Regulation (EU) 2016/679

The European strategy for data states that the EU can become a leading role model for a society empowered by data to make better decisions – in business and the public sector.[1] For reasons of transparency, increasing trust and enhanced business interaction within the internal market, the data category "companies and company ownership" has been added as a very relevant category of high value datasets to the Open Data Directive. Furthermore, open data is contributing to create adequate transparency of ownership information to combat money laundering and terrorist financing. For the time being, this information is not fully available to the wider public.

Regarding the list of High Value Datasets (hereinafter **HVD**), and in particular related to the company and company ownership category, we would like to point out that proposed list contains numerous personal data. This brings about the concern how making the data in the list re-usable is compatible with the Regulation (EU) 2016/679 on data protection (hereinafter **GDPR**).

Over the last years the WP 29 Group, the European Data Protection Board (EDPB), the European Data Protection Supervisor (EDPS) and the European Court of Justice (ECJ) continuously broadened he erm "personal da a." A very comprehensive view is taken by the WP 29 Group in its opinion 4/2007[2] on the concept of personal data. This highlights that challenges might arise upon trying to differentiate personal from non-personal data. Therefore, we ask the Commission to provide clarity (ex ante) on the allowed reuse of high value data containing personal data.

Our concerns are mainly related to following issues which have partially been addressed in the recitals of the Directive (EU) 2019/1024 on open data and the re-use of public sector information. We would like to get the perspective of the Commission on these issues as well as an opinion from the European Data Protection Supervisor to make sure that any future steps taken do not damage fundamental rights of the individuals and go against GDPR principles.

III. EU level data protection impact assessment

Apart from all other data categories, the high value datasets category "companies and company ownership" deserves particular attention, since company data obviously contains personal data. Due to the fact that transparency criteria and the conditions for re-use vary across Europe, it is essential that for this data category in particular - and in fact for all data categories - data protection and privacy issues are clarified at EU level before the adoption of certain high value datasets by the EU legislator and by the responsible bodies for implementing the GDPR.

According to the GDPR, the nature, scope, context and purposes of processing have to be defined ex ante before making available public sector information containing personal data. Pursuant to opinion 06/2013 of the Article 29 Data Protection Working Party a thorough data protection impact assessment (DPIA) should be carried out before any public sector information containing personal

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[1] COM(2020) 66. A European strategy for data. https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1593073685620&uri=CELEX%3A52020DC0066

[2] https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2007/wp136_en.pdf

data may be made available for reuse. [3] Furthermore, the EDPS recommends that the Commission should provide for data protection impact assessments, for specific sectors dealing with sensitive data, such as the health sector, on which the licensor should base its decision and consequently take into account the conditions for re-use. Appropriate data protection safeguards for reuse (according to a 'do no harm' principle) should also be defined.[4]

Recital 53 of Directive (EU) 2019/1024 states: *"When taking decisions on the scope and conditions for the re-use of public sector documents containing personal data, for example in the health sector, data protection impact assessments may have to be performed in accordance with Article 35 of Regulation (EU) 2016/679."*

For establishing uniform conditions stipulated by the implementing regulation and in order to avoid diverging interpretations in the Member States due to different privacy cultures, it is thus essential to safeguard necessary standard procedures according to the GDPR by making sure that a DPIA on company data of HVD is performed at EU level, and actually for all other data categories. Otherwise the risk is that conditions for certain HVD will not be met by all MS, which might lead to a fragmented situation. This is essential for establishing legal certainty as a precondition for an unconstrained re-use of high value datasets across the internal market.

IV. Permissible re-use of personal data in case of re-use of publicly available data

By definition, the Directive (EU) 2019/1024 on open data and the re-use of public sector information (hereinafter **Open Data Directive**) does not affect the protection of individuals with regard to the processing of personal data. In recital 52 of, among others, the following has been stated:

"*This Directive does not affect the protection of individuals with regard to the processing of personal data under Union and national law, particularly Regulation (EU) 2016/679 and Directive 2002/58/EC of the European Parliament and of the Council (18) and including any supplementing provisions of national law. This means, inter alia, that the re-use of personal data is permissible only if the principle of purpose limitation as set out in point (b) of Article 5(1) and Article 6 of Regulation (EU) 2016/679 is met.*"

According to the overarching Regulation (EU) 2016/679 (GDPR), the re-use of personal data is permissible for reasons of transparency in accordance with Union or Member State law. Art. 86 of the GDPR states:

„Personal data in official documents held by a public authority or a public body or a private body for the performance of a task carried out in the public interest may be disclosed by the authority or body in accordance with Union or Member State law to which the public authority or body is subject in order to reconcile public access to official documents with the right to the protection of personal data pursuant to this Regulation."

This allows the EU legislator to provide the necessary legal basis for the disclosure of personal data for the public interest. This requires that privacy concerns have been considered by the EU legislator, e.g. through an ex ante data protection impact assessment in order to avoid unnecessary fragmentation within the European data space.

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[3] Article 29 Data Protection Working Party. Opinion 06/2013 on open data and public sector information (PSI) reuse. https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2013/wp207_en.pdf

[4] Opinion 5/2018. EDPS Opinion on the proposal for a recast of the Public Sector Information(PSI)re-use Directive. https://edps.europa.eu/sites/edp/files/publication/18-07-11_psi_directive_opinion_en.pdf

Furthermore, Directive 2018/843 makes the disclosure of certain data of beneficial interest mandatory in all member states (cf. Art 30(2)). In general, this directive provides a fair balance between the general public interest in the prevention of money laundering and terrorist financing and the data subjects' fundamental rights.

Situation in Estonia:
The mentioned recital emphasises the importance of respecting purpose limitation set out in point (b) of Article 5(1) of Regulation (EU) 2016/679. For example, the legal basis for Estonian business register is established in the Commercial Code (hereinafter **CC**). § 22 of CC stipulates that purpose of maintaining such database is to collect, store and disclose information on the enterprises of sole proprietorships, companies and branches of foreign companies located in Estonia. The data, including personal data, is held in business register until such purpose exists after which the data will be deleted under § 59 of CC.

However, if this data has been shared in machine readable format and has been multiplied by different service providers, the data subject cannot be certain that this not up to date data does not still exist in other privately held databases. This would violate not only the purpose limitation principle, but would breach the principles of lawful processing and prohibition to keep personal data in a form which permits identification of data subjects for longer than necessary for the purposes for which the personal data are processed GDPR Article 5(1) points (a) and (e). This also applies to the changes made in the business register and how to ensure that the information about the relation of a natural persons to a specific company is up to date in different private databases or services based on business register data. Of course, data subject always has the right to turn to a private body processing his/her data and to ask data to be deleted or amended, however it would bring about considerable burden for natural persons to handle separately all the privately held databases or services. This possibly weakens the level of protection provided to natural persons vis á vis processing their personal data.

Furthermore, if we include accounting documents, such as company annual reports, then in the case of micro enterprises (one-man companies which Estonia has more than 120,000) information about the income of a natural person and possibly economic situation can be deducted from the data in such reports. We understand (from GDPR recital 71) that this is normally seen as data that needs to be processed with more care and precautionary measures than some other categories of personal data.

V. Profiling of natural persons based on public sector data of public registries

We would also like to enquire if the Commission and European Data Protection Supervisor see a possibility that personal data contained in public registries (for example the business registry) could be used, in combination with other publicly available data, as part of profiling natural persons. There are already vast amounts of personal data available online and these amounts are expected to only grow in the future. This could possibly hinder natural persons from enforcing their fundamental rights effectively, especially in the situations where private databases containing personal data from different public sources have been created. The solution that will be foreseen needs to be future proof vis á vis protecting personal data and fundamental rights.

In case of the business registry, for example in relation to one-person companies, if some sets of data are processed together, such as company ownership information in the case of micro enterprises combined with the annual reports, can give an adequate overview of a person and his financial situation, which in turn can, in some specific cases, lead to decisions where profiling has been used.

The problem of mass requests of certain registers in comparison to single searches could also be considered problematic. Uniform guidance at EU level should thus clarify adequate technological conditions for the reuse of data ("privacy by design"). We ask the Commission in close coordination with the EDPS to issue guidelines whether specific licenses may need to be developed for this kind of data instead of standard open licenses.

VI. Rights of data subjects

There are several rights guaranteed to the data subject with the GDPR (e.g art 12, 14 and 15). It is not clear how these rights are affected by charge free mass downloading of person´s data. Yet it is of crucial importance both to person´s who´s data is re-used and to re-users of data to understand what rights and obligations respectively does the re-use of personal data entail.

In conclusion, enabling a wider use and re-use of public datasets is encouraged, however, first the aforementioned issues in relation to GDPR need to be addressed to avoid a situation where the implementing act does not comply with the rules of an EU Regulation.