Protection of Personal Data in High-Value Datasets (HVDs) – 'Companies, Company Ownership and Insolvencies'

Position paper submitted by the Member State of the Netherlands

Synopsis

In this document, the Member State of the Netherlands proposes a number of ideas which it believes to be relevant in establishing high-value datasets (HVDs) relating to Companies, Company Ownership and Insolvencies.
First of all, it merits attention that the PSI Directive (Open Data Directive) and the Implementing Act it supports pertain to the re-use (i.e. secondary use) of data rather than the primary use of data. This primary use refers to the use of data in accordance with the original purpose within the public-service remit for which this data was produced or collected. It is important to make a clear distinction, as the PSI Guideline grants the authority solely to adopt an Implementing Act for re-use of data, and not for primary use. It is important to clarify this scope so that the Implementing Act cannot impinge on the policy space granted to the Member States to decide how to make data available from the register, including to take the appropriate measures in this regard to protect personal data or -for example- charging a fee, for primary small-scale and large-scale usage.
A second area which merits attention is that the outcome of the impact study conducted by the consortium led by Deloitte which confirm that the high-value

legislative measure that automatically allows the re-use of personal data (i.e. the use of personal data for (a) purpose(s) other than that or those for which it was

on Human Rights and in the General Data Protection Regulation (GDPR). However, this requires that the European legislature make a balanced assessment of the various interests at stake. In any case, the Commission must consider whether there are sufficient grounds for a legislative exception measure which warrants personal data processing in cases where the requirement of purpose limitation cannot be satisfied, as is the case with the re-use of the personal data contained in the high-value datasets. The Netherlands is requesting that the Commission provide detailed reasons for the outcome assessment in its notes to the Implementing Act.

This has prompted the Netherlands to submit two requests to the commission. The first of these is to conduct a privacy impact assessment in addition to the economic impact study currently being conducted as part of the preparation for the

Implementing Act.[1] The second request is to submit the Implementing Act to the EDPS for an opinion before it is adopted, as it did with the PSI Directive.

Introduction

The Directive 2019/1024/EU (Directive on open data and the re-use of public-sector information, also known as the 'Open Data Directive') introduces the concept of high-value datasets. Categorised by topic, this concerns the following datasets listed in the Annex to the Directive: (1) Geospatial, (2) Earth observation and environment, (3) Meteorological, (4) Statistics, (5) Companies and company ownership and (6) Mobility.
In early 2020, the European Commission instructed a consortium led by Deloitte to conduct an impact study into the social and economic value of these datasets. For the 'Companies and company ownership' category, a survey was distributed among the institutions concerned in the various Member States; this survey cites the datasets and data fields listed below.

Companies and company attributes	**Company ownership**	**Insolvency**
• Company name; • Address; • Legal form (business structure); • Registration no.; • Company ID; • Member State where company is registered; • NACE code; • Registration no.; • Date of incorporation; • Liquidation date; • Name(s) of the company's legal representative(s); • Balance sheets/financial statements/annual accounts • Headcount; • Location;	• Company name; • Address; • Legal form (business structure); • Company ID; • Member State where company is registered; • Owner's name; • Month and year of birth; • Nationality; • Percentage of ownership or size of the stake acquired (in investment holdings and/or voting rights); • Owner ID.	• Debtor's name; • Registration no.; • Statutory email address or (if different) postal address; • Type of insolvency process; • Period for submitting applications; • Completion date of main insolvency proceedings; • The district court where the decision for the application for insolvency proceedings must be initiated.

This synopsis reveals an intention to include personal data in the high-value datasets. The fields highlighted in yellow should in any case be classified as personal data. The Netherlands believes this intention calls for a diligent preparation process with a

[1] When making decisions regarding the scope and conditions for the re-use of government documents containing personal data – e.g. in healthcare – assessments of protective effects may need to be conducted in accordance with Article 35 of the

balancing of interests including reasons, as well as a careful assessment of this balancing of interests.

Furthermore, the questions contained in the survey reveal that the consortium tasked with conducting the impact study into the social and economic importance of high-value datasets does not use a clear definition of the term 're-use'. That is to say, the survey gives the impression that the high-value datasets are also intended for primary use. This lack of any clear definition creates uncertainty as to the answer to the question of what conclusion the Commission will draw from the results of the impact study.

These issues are addressed in more detail below.

Scope of the Implementing Act: primary use versus re-use

The management of the registers for Companies and company ownership is entrusted in the Netherlands to the Chamber of Commerce (Kamer van Koophandel), while the Insolvencies Register is managed by the Council for the Judiciary (Raad voor de rechtspraak). In this context, both entities fulfil a public duty by offering legal

up-to-date data, in order to facilitate economic processes. Companies must be able to engage in economic activities based on solid and up-to-date data. The responsible

(individuals) whose data must be included in the registers in accordance with their statutory duties, based on the applicable laws.
Both entities share the data principally for primary use based on their statutory duty. Primary use is divided into small-scale use and large-scale use. Small-scale use is facilitated through public websites, while large-scale use occurs based on application programming interfaces (APIs), web services or download services.
The primary use of data – i.e. use for the public purpose for which the data was collected – must be separated from the re-use of data within the meaning of Directive 2019/1024/EU. In Article 2, paragraph 11 of the Directive states:

> '11. *'re-use' means the use by persons or legal entities of documents held by: a) public-sector bodies, for commercial or non-commercial purposes other than the initial purpose within the public task for which the documents were produced, except for the exchange of documents between public-sector bodies purely in pursuit of their public tasks, (...)'*

'Re-use', within the meaning of the Directive, is thus defined as 'use (...) *for commercial or non-commercial purposes other than the initial purpose within the public task for which the documents were produced.'* Examples of re-use include:

- the re-user combines the data collected or produced within a public-sector duty for a specific purpose with other data, creating a product or service with a predominantly different purpose;

- the re-user creates an app concerning, for example, the composition of companies based on data from the Register of Companies and Company Ownership;
- the re-user is a scientist and is using the data to answer a scientific question.

Large-scale users of registers who create a shadow database of the register and provide services to third parties which are identical to the services provided through the register cannot be classified as re-use. If, in such case, the producer or registrar has not expressly waived their right to exercise sui generis database rights[2], such use is, as a rule, not permitted pursuant to Directive 96/9/EC.

It is important to make a clear distinction between primary use and re-use, because this contributes to a precise definition of the scope of the Implementing Act and creates clarity about the policy scope offered by the European legislature to the Member States for a manner of providing access to primary use in such a way that privacy can be protected. Furthermore, a clear distinction also helps to highlight the precarious nature of the re-use of personal data and of the necessity of a balancing of interests in which the privacy interest is specifically considered. This is explained in further detail below.

Scope and meaning of the impact study

The Netherlands draws attention to the fact that the scope of the impact study as defined in Article 14, paragraph 2 of the PSI Directive must correspond to the scope of the Directive and the Implementing Act.[3] This applies both to the instructions under the PSI Directive to the Member States regarding adequate personal data protection and adequate protection of general-interest objectives, including public safety and security.[4] If this is disregarded, the economic pros and cons considered are irrelevant to the adoption of the Implementing Act.
The Netherlands also draws attention to that fact that the results of the impact study cannot, in themselves, constitute a justification for a legislative measure that

or those for which it was collected or produced. In addition to an analysis showing the social and economic value of the inclusion of personal data in the high-value

[2] This is possible, for example, through the use of the options provided by the system of Creative Commons licenses by means of a CC0 statement.

[3] See recital 20 of the PSI Directive: *'A general framework for the conditions governing re-use of public-sector documents is needed in order to ensure fair, proportionate and non-discriminatory conditions for the re-use of such information. Public-sector bodies collect, produce, reproduce and disseminate documents to fulfil their public tasks.*
Public undertakings collect, produce, reproduce and disseminate documents to provide services in the general interest. Use of such documents for other reasons constitutes a re-use.'

[4] See recital 16 of the PSI Directive: '(...) *In doing so they should ensure a consistent level of protection of public-interest objectives, such as public security, including where sensitive critical infrastructure protection related information are concerned. They should also ensure the protection of personal data, including where information in an individual data set does not present a risk of identifying or singling out a natural person, but when that information is combined with other*

datasets, an analysis is required based on the question of to what extent the social and economic pros of the re-use of personal data outweigh the cons due to the infringement of the privacy of directors and businesses.

Necessary balancing of interests

A balancing of interests is necessary, for example, against the background of Article 8 of the Charter of Fundamental Rights of the European Union. If an Implementing Act is adopted the validity of which is successfully contested because it constitutes a violation of fundamental rights, the economic premises on which the Implementing Act is based will, with hindsight, have to be considered insufficiently strong or solid to uphold the Implementing act. This should be analysed prior to adopting the Implementing Act.
A balancing of interests is also needed against the background of the GDPR, which provides the option of making an legislative exception measure for processing personal data, if this processing – as is the case with re-use – is not compatible with the purpose for which the data was collected. One condition is that such a legislative measure must be necessary and proportional in order to safeguard one or more of the objectives set out in Article 23, paragraph 1 of the GDPR[5]. The upshot of this is

personal data, it must first consider whether these objectives apply and, if so, whether these constitute adequate justification for permitting non-reconcilable

This balancing of interests and the outcomes will need to be assessed by an independent entity. The most qualified organisation is EDPS.

Personal data protection

The Dutch government supports the open data policy and the generous sharing of data at the European level regarding Businesses, Company Ownership and Insolvencies both for primary use and re-use. The Dutch government endorses the social and economic purposes this serves.
The re-use of high-value datasets containing personal data raises the standards for personal data protection; these standards are higher than those applied to primary use. These higher standards for re-use arise from the fact that this involves the processing or use of data for a purpose other than that for which it was collected or

[5] These objectives are: (a) national security; (b) defence; (c) public security; (d) the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security; (e) other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation a matters, public health and social security; (f) the protection of judicial independence and judicial proceedings; (g) the prevention, investigation, detection and prosecution of breaches of ethics for regulated professions; (h) a monitoring, inspection or regulatory function connected, even occasionally, to the exercise of official authority in the cases referred to in points (a) to (e) and (g); (i) the protection of the data subject or the rights and freedoms

produced. Re-use pertains, among other things, to combining data from different sources and making calculations and analyses in order to create new products. If the datasets used for this purpose contain personal data, this could have far-reaching implications for the privacy of the individuals whose data is processed in this manner. Unless the Implementing Act provides for an exception under the law, any re-use of this kind will need to be preceded by a request. If such a request relates to the use of calculations or analysis for a dataset containing personal data, this requires a request – including valid arguments and a clear explanation – submitted to the producer or registrar in charge of carrying out a public duty. That is to say, these agencies cannot be expected to make HVDs containing personal data available for re-use unconditionally as open data for re-use. Since the re-use of this data deviates by definition from the purpose limitation, it seems reasonable that they should, as a rule, anonymise the requested datasets.[6]

If the Implementing Act were to require by law that Member States share HVDs containing personal data unconditionally as open data on a platform in order to be able to combine or enhance this data with other datasets and apply calculations and analyses, this Implementing Act would undermine the assessments made by each of the Member States regarding the availability of data for primary use from the Companies, Company Ownership and Insolvencies registers, and the measures taken

Implementing Act of this kind could conflict with, for example, Directive (EU) 2018/843 (the Fifth Anti-Money Laundering Directive), which provides Member

of data on ultimate beneficiary owners (UBOs). After all, if HVDs were to become automatically available for re-use free of charge, the data will also find its way to the primary users.

Both in case of an Implementing Act of this kind and in case of a less far-reaching Implementing Act which permanently gives the responsibility to producers or registrars to assess and possibly grant requests for the re-use of data from their registers, privacy protection needs to be future-proof and take into account new technologies and their impact. A practical example shows that the re-use of data

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[6] For reference, see recitals 52 and 53 of the PSI Directive: *'This Directive does not affect the protection of individuals with regard to the processing of personal data under Union and 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. ..[…]… Rendering information anonymous is a means of reconciling the interests in making public sector information as re-usable as possible with the obligations under data protection law, but it comes at a cost. It is appropriate to consider that cost to be one of the cost items to be considered to be part of the marginal cost of dissemination as referred to in this Directive.*

This type of provision for re-use would be highly problematic with regard to the 'Ownership of companies' dataset, since the Fifth Anti-Money Laundering Directive was established following a careful assessment against the GDPR and contains several options for Member States to increase privacy protection. The Netherlands currently uses all these Member State options.

from the Companies register may result in for-profit companies using artificial intelligence to make forecasts of the likelihood that certain companies or businesses will commit fraud and will sell these forecasts as commercial products. This example of profiling alerts us to the fact that if technological advances are to be of value to society, they can only be established in a responsible manner if artificial intelligence is transparent and complies with public values, specifically with regard to the transparency and verifiability of algorithms, analyses and data used. It is important that rule-of-law principles are not compromised by advances in technology.

Request

The Netherlands requests that the Commission, in preparation of the Implementing Act, conduct a privacy impact assessment in addition to the economic impact study currently being carried out, and that it make an assessment between the interests of re-use and the interests of privacy. In any case, the Commission must consider whether there are sufficient grounds for a legislative exception measure which warrants personal data processing in cases where the requirement of purpose limitation cannot be satisfied, as is the case with the re-use of the personal data contained in the high-value datasets.

Implementing Act to the EDPS for an opinion prior to its adoption, with the request to assess the evaluation of interests made.