



OPINION OF THE FRENCH DIGITAL COUNCIL ON THE FREE FLOW OF DATA

To encourage the Free Flow of data, the European commission has announced it was exploring various legislative and non-legislative options, including the creation of a right of ownership over non-personal data. However, value creation actually occurs when data is contextualized and combined with data from other datasets in order to produce new insights. Thus, the issue is not to establish an hypothetical right of data ownership; rather, it is about thinking and designing incentive regimes of data access and exchange between data controllers so as to encourage value creation. Indeed, contrary to a widely-held belief, data ownership does not necessarily facilitate data exchanges — it could actually limit them. Above all, the free flow of data should be envisioned between online platforms and not only between Member States. These new forms of sharing are essential to the development of a European data economy.

As part of its strategy for the Digital Single Market, the European Commission has announced in January 2017 the preparation of several initiatives to develop a data-driven European economy. The General Data Protection Regulation¹ has established the framework for the processing of personal data, while the directive on the re-use of public sector information addressed that of public sector data². Now, the Commission wants to regulate the free flow of non-personal data. In doing so, it intends to pursue several objectives: the harmonization and the reduction of data localisation restrictions within EU Member States, the clarification of the legal framework of data to protect investment and reduce legal uncertainty; as well as the promotion of data sharing among data controllers³.

The French Digital Council wished to react to the public consultation launched by the Commission on this matter. Current reflexions on the creation of a fifth freedom of movement in Europe - namely, free flow of data - are still in their infancy. The introduction, at this stage, of a principle of free movement of data could lead to unforeseen consequences considering the extreme variety of realities covered by the term 'data', and the diversity of uses and markets that could emerge. Therefore, it seems essential to begin by reflecting on the concrete actions that could enable Europe to benefit from the economic and social spin-offs of the data revolution, rather than to establish a new principle.

In addition, the Council considers that the barriers to the free flow data are caused by the lock-in strategies developed by prominent economic actors rather than by national legislations. Thus, the Commission should also investigate the means to remove “cross-platforms” barriers, and not only “cross-borders” ones.

Finally, the recognition of a principle of free flow of data within the EU could be used as an argument for enshrining it in future free trade agreements. This would facilitate the unregulated transfer of data outside the EU, which raises major concerns in terms of competitiveness, consumer protection and respect for fundamental rights. On the one hand, the important asymmetries that currently characterize data flows across the world justify an approach that focuses on the interests of European companies. On the other hand, the recognition of such principle could constitute a threat to the sovereignty of EU Member States in terms of taxation, national security and public policy.

DATA & OWNERSHIP

One of the options currently being explored by the Commission is the recognition of a **right of ownership over non-personal data**. It should first be noted that this proposal - if implemented - would reverse the traditional paradigm that governs data protection. A general principle of data ownership would notably conflict with the approach established by the European directive 96/9 of March 11, 1996 relating to legal protection of databases, which grants to its rightholders a double protection; by copyright and by a *sui generis* right. **However, the latter protection, which exists to recognise the substantial investment that is made in compiling a database, is not intended to apply to data itself**, as the European Court of Justice has pointed out. By extending the right of ownership to personal data, we may cause a general shift toward ownership over all raw data.

Thereupon, it would be difficult to determine the ownership regimes and their beneficiaries: who could claim ownership over data? The owner of the data sensor? The owner of the building in which the sensor is located? The data subject? **Contrary to the original intention of clarifying the legal framework, such a proposal would increase the likelihood of litigation over the contracts governing those exchanges. Legal uncertainty could thus be considerably increased.**

Furthermore, the boundary between personal and non-personal data is very thin when one considers the real risks of re-identification. Indeed, the limits of anonymization and pseudonymization have been firmly established; to date, there is no technical guarantees that personal data would not be affected by this right of ownership. Consequently, this paradigm shift is likely to spark a domino effect and ultimately being applied to all data, personal and non personal. **Yet, the introduction of a right of ownership over personal data is a dangerous proposal in several respects.** It would call into question the very nature of this protection for individuals and communities in democratic societies, because the commodification of data goes against the essence of the right to data protection, grounded in human dignity.

The option of a right of ownership is mentioned by the Commission as a means to facilitate the sharing of data between actors and, ultimately, of the value being created by this data. At the very least, it would be necessary to further study this proposal in order to demonstrate that the establishment of a right of ownership over non-personal data would bring real benefits. Currently, the sharing of data is organised by contractual means, which can lead to imbalances of power to industrialists' disadvantage vis-à-vis service providers. Yet, there is no evidence that the recognition of a right of data ownership would address this asymmetry. Far from restoring the balance of power between these two parties, **the right of data ownership could instead lead to the inclusion of clauses of compulsory divestiture within contractual terms between operators, and thus, increasing the risk of dispossession.**



RULES FOR ACCESS AND DATA SHARING

The value created by data use mostly derives from the cross-referencing of datasets. The issue that arises is therefore not so much that of the protection of investment for the constitution of large databases; rather, it is that of the incentives to cross-referencing of datasets between various actors. In many instances, data collection and categorization is done as a by-product activity of an industrial process: data is a *mean*, not an *end* in itself. On the other hand, the cross-referencing of datasets serves a new purpose: it is this essential phase, which covers the true potential of Big Data and the emergence of new services, which should, according to the Council, be promoted by new incentives. Moreover, in the age of Artificial Intelligence, the matter of data access becomes even more crucial. Indeed, AI algorithms are usually programmed under open source licenses; thus, all the players in the sector can have access to it. This means that the only comparative advantage lies in the access to the data used to train the algorithms. Therefore, it is all the more necessary to think about the modalities of data sharing between actors in order to ensure that the development of this key technology does not benefit only a few companies able to collect and process a critical mass of data.

Rather, what matters is to envision the situations in which value creation and the development of new uses are dependent on data sharing. These models are yet to be invented. In this regard, two types of reflection must be undertaken: first, we need to consider the modalities of data access by third parties and second, the means to share data between them.

RULES OF DATA ACCESS

- *The creation of a right to the portability of non-personal data in order to allow any individual and company to recover the data generated by its use of a service and to easily transfer these data to another provider. Similarly to the portability of personal data enshrined in the GDPR, the portability of non-personal data would facilitate the development of the various concerned markets, by encouraging competition between service providers and solutions' providers. This right could be inspired by article 48 of the law for a digital Republic, which enshrines an expanded right to portability of all data.*
- *The identification of situations where data can be considered as infrastructures, where the development of economic products and models is conditional on access to such data, and where it is not possible to reproduce them by reasonable means. The viability of industrial projects for semi-autonomous vehicles or intelligent building applications thus depends on the sharing of data between the players in the automotive sector or in the construction sector. Non-discriminatory licensing requirements could thus be established at sectoral level, as provided for in Regulation 715/2007 of 20 June 2007 on the approval of motor vehicles with regards to private vehicles' emissions and light commercial vehicles, and information on vehicle repair and maintenance.*

- **The revision of Directive 96/9 on databases in favour of a more favorable balance for the circulation of data and for the access to data of certain audiences.** It seems urgent, for example, to provide for an exception for searches of texts and data in order to enable European researchers to make digital copies or reproductions of a database from a licit source in a scientific non-commercial purposes. Europe and its Member States will have to work towards the diffusion of these techniques in the academic world, bringing great potential for scientific discovery and the development of new knowledge. Rather than creating new forms of ownership that could limit access to scientific data, the aim is to enable the research community to benefit from the progress made possible by megadata analysis. This exception would allow researchers to carry out automated searches in the vast amount of scientific literature available, particularly in interdisciplinary research that requires cross-referencing databases of a different nature.

RULES OF DATA SHARING

- **Incentivization of the voluntary pooling of data, which may be essential for the realization of major European projects and the development of competitiveness of European companies.** Member States could encourage different players to share their data on a voluntary basis in order to contribute to a research program, an industrial project or a public policy, either occasionally or on a long-term basis. The pooled data could be collected by a public body and be aggregated before being reused or redistributed, similar to what the US Bureau of Transportation has put in practice by opening US airline data on air navigation. Therefore, experiments in key sectors (health, sustainable development, housing, transport, etc.) could be launched at different scales to assess the positive externalities derived from opening the data, both for the companies involved and for society as a whole.

[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)

[2] DIRECTIVE 2013/37/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information. <http://eur-lex.europa.eu/legal-content/FR/ALL/?uri=CELEX%3A32013L0037>

[3] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Towards a thriving data-driven economy. <http://eur-lex.europa.eu/legal-content/FR/TXT/?uri=COM%3A2017%3A9%3AFIN>

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