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New EU regulation on the free flow of non-personal data

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1 General overview of the EU's legislative procedure

The European Commission presented a [framework for the free flow of non-personal data](#) in September 2017 as part of President **Jean-Claude Juncker's** State of the Union address to unlock the full potential of the [European Data Economy](#). It was announced as one of the key actions in the [mid-term review of the Digital Single Market strategy](#).

A [provisional political agreement](#) was approved by the European Parliament's Internal Market and Consumer Protection (IMCO) committee on 12 July 2018. Later on, the plenary endorsed the agreement at first reading and The Council also gave a green light on November 2018. The Regulation was formally signed by the Parliament and the Council on 14 November 2018 and **will enter into force in May 2019**.

It is interesting to highlight that during the EU Council vote on 9 November 2018, the agreement reached with the Parliament was approved by unanimity by all the EU 28 EU Member States.

The **final text** can be accessed [here](#).

2 Main changes introduced by the new Regulation

The new free flow of non-personal data rules, as approved, will:

- **Ensure the free flow of data across borders:** the new rules set a framework for data storing and processing across the EU, **prohibiting data localisation restrictions**. Member States will have to inform the Commission of any remaining or planned data localisation restrictions in limited specific situations of public sector data processing. The Regulation on free flow of non-personal data has no impact on the application of the [General Data Protection Regulation \(GDPR\)](#), as it **does not cover personal data**. However, the two Regulations will function together to enable the free flow of any data – personal and non-personal – thus creating a single European space for data. **In the case of a mixed dataset, the GDPR provision guaranteeing free flow of personal data will apply to the personal data part of the set, and the free flow of non-personal data principle will apply to the non-personal part;**
- **Ensure data availability for regulatory control:** public authorities will be able to access data for scrutiny and supervisory control wherever it is stored or processed in the EU.

Member States may sanction users that do not provide access to data stored in another Member State;

- **Encourage creation of codes of conduct for cloud services** to facilitate switching between cloud service providers under clear deadlines. This is expected to make the market for cloud services more flexible and the data services in the EU more affordable;
- The agreed measures are also in line with existing rules for the **free movement and portability of personal data** in the EU;
- **Review:** no later than **3 years and 6 months** after the date of publication of the Regulation, the Commission shall submit a report evaluating the implementation of the Regulation, in particular as regards: (i) the application of the Regulation to mixed data sets; (ii) the implementation by Member States of the public security exception; (iii) the development and effective implementation of codes of conduct;
- **Mixed data sets:** in the case of a mixed data set, namely a data set composed of both personal and non-personal data, the Regulation shall apply to the non-personal data of the data set. Where non-personal and personal data are inextricably linked, this Regulation should apply without prejudice to [Regulation \(EU\) 2016/679](#);
- **Access to data for public authorities:** the Commission's proposal provides that where a competent authority has exhausted all possible means of accessing data, it could request the assistance of an authority in another Member State if no specific cooperation mechanism exists. Members believe that such assistance could be requested **where a competent authority does not obtain access to the data** after contacting the user of the data processing service and where there is no specific cooperation mechanism under EU law or international agreements for the exchange of data between competent authorities of different Member States;
- **Codes of conduct:** self-regulatory codes of conduct at EU level shall contribute to a competitive data economy, which are based on the principle of transparency and which establish guidelines on, *inter alia*, the following issues:
 - **best practices** for facilitating the switching of providers and porting data in a structured, commonly used, interoperable and machine-readable format;

- **minimum information requirements** to ensure that professional users are provided with sufficiently detailed, clear and transparent information before a contract for data storage and processing is concluded.

Further and detailed information on the changes brought by this Regulation and its expected impact is accessible [here](#) (updated Q&A by the European Commission).

3 Stakeholder reactions to the adoption of the new EU regulation

3.1 European Commission – Free flow of data in the EU: a pathway into the cloud

By Roberto Viola, Director General at DG CNECT (Communications Networks, Content and Technology)

New proposals on the free flow of non-personal data will give greater certainty to businesses and consumers alike and create an EU data sector that is fit-for-purpose for the 21st century.

On 9 November, EU ministers adopted the Regulation on the free flow of non-personal data, following the adoption of the Regulation by the European Parliament in October. It is the latest step in an ongoing process that is bringing us closer to the completion of the EU Digital Single Market. If a single market is not possible without the free flow of persons, goods, services and capital, it follows that a *digital* single market cannot exist without the [free flow of data](#). Whether you are sending an email to a colleague, buying a sandwich with a bank card or managing a business relationship with a key customer, data will always be involved and is becoming a key asset for every business.

Our Digital Single Market strategy will ensure that European citizens and businesses can embrace the digital future as confidently as possible. This future will be built on data and is increasingly becoming the foundation of our economy. The European data economy, which the [Regulation on the free flow of non-personal data](#) is helping to build, can bring us benefits in terms of the development of new technologies and the emergence of ecosystems around data. Let me explain how this will happen.

Firstly, thanks to the new [General Data Protection Regulation](#) (GDPR), rules on the free movement of personal data in the European Union have been clarified and citizens' data is now guaranteed to

be protected. Until recently, however, there was no legislation dealing with the free flow of non-personal data in European legislation. At the same time, several Member States introduced legislation requiring certain data to be stored or processed within their national borders. These 'data localisation requirements' were hindering the development of the EU data economy by stopping the emergence of data innovation ecosystems across European borders. They were also creating inefficiencies by requiring companies active in multiple Member States to duplicate IT infrastructure. Thanks to the new rules now in place, cloud computing in our societies will continue to grow in the near future. The cloud, which knows no geographic boundaries, offers companies virtually unlimited data storage and processing capacities at a lower cost than when data processing is kept in-house. It is impressive to see the reduction in costs that the cloud can bring: on average, European companies can make savings of at least 20%-50% in IT expenditure. At the same time, the flexibility and scalability of the cloud means less investment, fewer risks for businesses and better prospects for efficient digital transformation.

New forms of cloud computing are already being developed, and Europe is clearly taking the lead in this respect. An example is so-called 'edge computing', which is based on the idea of bringing the computing capacities as close as possible to the end-user. Another example is 'fog computing', which is based on federating the computation over a large number of machines connected to a network. These paradigm-breaking technologies mean a shift of data processing capacities from data centres to the 'edge' of a network. This can bring many advantages, especially with regard to the growing Internet of Things. The combination of these developments will probably culminate in a 'cloud continuum', meaning that virtually all digital activities will be based on the cloud.

Nevertheless, we are not there yet. Let us rewind to 2018. In order for Europeans to grasp the full opportunities of cloud technology, we need to work towards making the cloud even better. We must ensure that the European cloud market can function on the basis of free and open competition. Cloud customers will not be locked-in by their providers and there will be clear security requirements in place. The Regulation on the free flow of non-personal data helps to tackle these issues. Let me take you through its most important provisions.

3.1.1 The free flow of non-personal data principle

Article 4 of the Regulation prohibits EU Member States from putting in place data localisation requirements. In practice, this means that they may not introduce any new rule that requires data to be located on their own territory. The only exception to this, and only when this is justified, is on the basis of public security. Data localisation requirements in existing national rules will have to be repealed. Member States have a two year timeframe to finalise this. Should they consider that any

of their data localisation requirements are justified on the basis of public security, they will have to notify the Commission.

An important aspect of this article is that it covers not only laws or regulation, but also administrative provisions and practices, like public procurement. Public procurement can introduce data localisation requirements that are often criticised by businesses as negatively impacting their capacity to offer cloud services across borders.

In addition, an issue which was much debated during the negotiation process is the fact that the Regulation covers data held by the public sector. This is good news because it will help the public sector across the European Union to benefit from data innovation, leading to more efficient and cheaper public services for European citizens.

For citizens and companies, it is now very clear that they can store and process data wherever they want on the territory of the European Union.

3.1.2 **The data availability principle**

A well-functioning market also means having in place a well-functioning system of monitoring and oversight. For that reason, Article 5 of the Regulation makes it clear that when data is stored or processed in a second Member State, this does not change the right of original competent authorities to have access to the data for regulatory control purposes. For example, a tax authority in one Member State will still have the right to access bookkeeping records when these are stored on a cloud server located in another Member State. If businesses abuse their right to data processing anywhere in the Union by not granting access to regulatory authorities, the authorities may sanction them.

The importance of this article lies in the fact that it will significantly raise trust in the public sector, regarding the use of cloud services. When a business processes its data in the cloud, it often does not know where the data will be located in the EU. This article solves the regulatory concerns that may have emerged around this fact, which is inherent to the cloud technology.

3.1.3 **Self-regulation on switching and porting**

Article 6 of the Regulation contains a self-regulatory provision to facilitate the development of self-regulatory codes of conduct making the switching of cloud service providers easier. It ensures that providers give sufficiently detailed, clear and transparent information to professional users on the terms and conditions applicable before a contract for cloud data storage and processing is concluded.

These codes of conduct have the main goal of countering vendor lock-in to cloud service providers. This way, we will make sure that cloud service providers who have assisted customers porting their data into their services, will also help them to port the data outwards (to another cloud service provider or back to their on-premise systems).

As there are increasing amounts of data in our society, there needs to be clear and fair agreements between cloud customers and cloud service providers. We need clarity regarding which processes, costs and timeframes will apply when cloud customers wish to switch providers. Moving all your personal information from one PC to another is not easy – but imagine how complicated it must be for a business to carry over terabytes of data. Depending on the amount of data stored, this can cost many millions of euros. That is why the codes of conduct must be quite detailed and at least address different aspects, such as various technical and process information like the location of any data back-up, the available data formats and supports, the required IT configuration and minimum network bandwidth.

In order to develop these codes of conduct, the Commission has already facilitated the set-up of a working group called 'SWIPO' (for Switching and Porting). This working group will initially agree on two different codes which will cater for the needs of different available cloud services. One code will be developed for the cloud services that offer only storage space (Infrastructure-as-a-Service). The second code will be developed for cloud services that offer cloud solutions in the form of ready-to-use applications (Software-as-a-Service). A third code for so called Platform-as-a-Service cloud services will follow later.

By 2022, the application of these codes of conduct will be evaluated by the Commission. It will assess whether sufficient progress has been made to counter vendor lock-in and creating a more fluid market. If this goal is not attained, the Commission may come up with additional rules.

3.1.4 **EU cloud security certification**

Trust and security are key requirements for cloud adoption. The Working Group on Cloud Service Provider Certification (CSPCERT), which is another self-regulatory work stream facilitated by the Commission, will develop the requirements for a possible future European cloud security certification scheme. The main goal of this work is to improve clarity for cloud customers on the security level of the service provided. Currently, there are so many certification schemes available on the market, that their functionality in providing trust and legal certainty is seriously undermined.

When it goes ahead, this new EU cloud security certification scheme would be specifically developed in the framework of the Commission's proposal for a Cybersecurity Act, which is currently being negotiated by the EU Council of Ministers and the European Parliament. The Cybersecurity Act indeed proposes a European ICT certification framework in which the cyber agency [ENISA](#) will play a key role. It will make it possible to have different European cybersecurity certification schemes addressing different technologies including cloud services. CSPCERT's work should be seen as preparing input to a future ICT certification scheme for cloud, which will be put forward by the Commission to ENISA. In this way, ENISA will have high quality and balanced input from industry for its work already early on in its processes.

3.1.5 A sustainable green cloud

As nearly all our digital activities will be based on the cloud in the future, it is essential that cloud computing becomes as sustainable as possible. That is why cloud service providers should take their responsibility and continue work on improving production processes, for example by making their cooling systems for data centres more efficient.

While planning the transition from cloud computing to 'green' cloud computing, we should also keep in mind the recent developments of edge and fog computing, which no longer rely on data centres. In order to make the future of computing more energy-efficient, it will be important that the very core of the cloud, the chips and processors on which it is based, become more sustainable.

This is where the work that the Commission is doing on developing a low power processor for the purpose of High Performance Computing (HPC) is crucial. The [European Processor Initiative](#) brings together 23 partners from 10 different countries with the aim of developing a low power microprocessor. This processor will significantly cut energy consumption of chips. In order to make the shift to a green cloud, deploying this chip not only in HPC but also in any cloud infrastructure will be key.

With the combination of cloud activities and energy efficiency, low consuming processing technologies combined, we are opening the future for a better, safer, greener, cheaper and fairer European cloud, that will help build our European data economy further.

URL: <https://ec.europa.eu/digital-single-market/en/blogposts/free-flow-data-eu-pathway-cloud>

3.2 **EPP Group – Free flow of data: new era for digital economy in Europe**

The Regulation on the free flow of data will de facto create the fifth freedom on the internal market, next to the freedom of movement of people, goods, services and capital. According to the new rules, any other data that is not related to an identifiable person can be stored and processed anywhere in the EU. The only exception is in the case of a public security threat, where restrictions to data localisation may still be allowed.

"This new law, making it possible to freely move non-personal data within the EU, will bring about €8 billion per year in estimated GDP growth, equal to the trade agreement with Canada and South Korea. This will be an enormous boost for our businesses and public authorities. It will pave the way for artificial intelligence, cloud computing and big data analysis", said Anna Maria Corazza Bildt, Member of the European Parliament (MEP), who led the negotiations on behalf of the European Parliament.

The new law will not affect citizens' privacy, as the General Data Protection Regulation (GDPR) will remain untouched. In the case that personal and non-personal data are linked together, the GDPR will apply to the personal data part of the set, and the free flow of non-personal data principle will apply to the non-personal part.

The Regulation facilitates portability by tasking the market players to produce and implement Codes of Conduct to ensure that business users can easily switch their data between cloud service providers. It also establishes a single point of contact per Member State that gives easy access to the competent authorities in cases where data is stored in another Member State.

"It's time to put an end to the data protectionism that is threatening our digital economy", Corazza Bildt underlined. "We want an open, free and safe internet for all."

URL: <https://www.eppgroup.eu/newsroom/news/free-flow-of-data-new-era-for-digital-economy-in-europe>

3.3 **S&D Group – Free flow of non-personal data in the EU needs to be transparent and net neutral**

The Socialists and Democrats voted today in favour of removing obstacles to the free movement of non-personal data for businesses and public authorities within the EU. The new rules will encourage flexibility in the market of cloud services and enable businesses to choose IT resources, switch between service providers and make full use of cloud services. The Regulation would bring an 18-

fold growth of the European data economy, which by 2020 would represent 4% of EU GDP. S&D MEPs underlined that this growth must not 'sacrifice' citizens' personal data.

S&D Group negotiator on free flow of data, Christel Schaldemose MEP, said:

"Today we voted in favour of removing geographical restrictions on data storage in the internal market. This is a major step forward towards tapping into the potential of the European data economy. It will benefit significantly both European consumers and businesses in the coming years, enabling them to compete globally on an equal level playing field.

"However, these benefits must not come at the expense of the European citizens' personal data. For us Socialists and Democrats, ensuring the protection of personal data and transparency is paramount. To this end, we fought to ensure that the private life and the personal data in electronic communications will be protected. We want consumers and businesses to benefit from a more integrated internal market data where rules are clear, future-proof and net neutral."

S&D Group spokesperson for the internal market and consumer protection, Nicola Danti, added:

"The Regulation on the free flow of data is a milestone in the Digital Single Market Strategy. It will offer increased competition for cloud services and more choices for consumers who will be able to switch cloud-service-providers more easily"

"In addition to the protection of personal data in line with the General Data Protection Regulation (GDPR), we managed to secure that public authorities will not require the localisation of data processing in their territory. We also achieved that SMEs and start-ups will be involved in the development of the codes of conduct. They will also receive guidance from the European Commission."

URL: <https://www.socialistsanddemocrats.eu/newsroom/free-flow-non-personal-data-eu-needs-be-transparent-and-net-neutral-say-sds>

3.4 **BusinessEurope – Making the free flow of data a reality**

09/11/2018 | Today, Council voted in support of the EU regulation on the free flow of non-personal data in the EU. This is the last step in making this regulation a law which will enter into force by the end of next year. We congratulate all institutions on remaining ambitious. It was crucial to end unjustified national measures that force data to be geographically located when processed or stored. BusinessEurope President Pierre Gattaz said:

"Data knows no boundaries and its free flow across the Single Market will give a major boost to the European data economy. The new regulation will end the fragmentation of the Digital Single Market caused by unjustified national data localisation measures. This is crucial for the proper functioning of modern technologies and unrestricted trade in goods and services within the EU. It is also good for consumers whose apps, streaming, storage and online shops rely on the free data movement. The free flow of data will support cybersecurity technologies ensuring we have a better protected market and aiding our bid in the global Artificial Intelligence race to become a world leader in innovative technologies. Now that the EU has got its own backyard in check, we look towards the institutions to support greater international data flows."

URL: <https://www.businesseurope.eu/publications/making-free-flow-data-reality>

3.5 **DIGITALEUROPE – DIGITALEUROPE views on the Regulation on the Framework for the Free Flow of Non-Personal Data**

DIGITALEUROPE, as the voice of Europe's digital technology industry, welcomes the general principle of free flow of data and reinforces the importance of banning national data localisation rules. This principle will provide legal certainty for companies, boost the European economy and herald new innovative technologies.

Recent studies show that data localisation reduces competition and increases storage costs with up to 120% for companies and consumers. If existing data localising measures are removed, GDP gains are estimated to up to 8 billion euros per year (up to 0.06% of GDP), which is on par with the gains of recent free trade agreements (FTAs) concluded by the EU.[1] This Regulation represent an opportunity not to be missed.

However, to maximise the benefits of cross border dataflows, the scope should not be narrowed. In our opinion, Member States should be able to localise non-personal data in only exceptional cases. Any limiting the scope and widening the exemptions will risk defeating the purpose of the Regulation. **DIGITALEUROPE believes any future actions by policy makers should [take into consideration the following](#).**

[1] ECIFE study: <http://ecipe.org/app/uploads/2016/12/Unleashing-Internal-Data-Flows-in-the-EU.pdf>

URL: https://ec.europa.eu/info/law/better-regulation/feedback/8285/attachment/090166e5b7448a64_en

3.6 **CISPE – CISPE commits to creating the first ever Cloud Infrastructure Data Portability Code of Conduct after EU Regulation on free flow of data agreed**

09/11/2018 – CISPE, the alliance of Cloud Infrastructure Services Providers in Europe, fully supports the adoption of the European Union's new free flow of non-personal data Regulation and has also committed to deliver the first Cloud Infrastructure Data Portability Code of Conduct under the Regulation. This code will probably be in place when the Regulation comes into force, six months after its adoption and publication in the Official Journal of the EU.

The new Regulation makes it easier for customers to switch cloud-service providers and transfer data back to their own IT systems (data portability) and so avoid being locked-in to proprietary services, through the use of industry Code of Conduct.

"The Regulation is a milestone for cloud service providers in Europe and, more importantly, for the many millions of customers they serve," says Alban Schmutz, CISPE President, and Vice President Strategic Development Public Affairs, OVH. "Data portability is essential for a healthy and competitive data economy, and a key requisite for a Digital Single Market. CISPE is therefore pleased to endorse the Regulation and is committed to helping deliver its promised benefits to users across Europe."

Since April 2018, CISPE member companies have worked with EuroCIO (the European non-profit organisation representing large IT users), cloud customers, other industry stakeholders and the European Commission - in the framework of the EC Switching and Porting (SWIPO) Working Group - to develop an Infrastructure as a Service (IaaS) Code of Conduct to ensure data portability. This code is designed to support customers in switching their cloud infrastructure providers without losing data.

URL: <https://euagenda.eu/upload/publications/cispe-press-release-on-the-adoption-of-the-eu-free-flow-of-data-regulation.pdf>

3.7 **ECIPE (European Centre for International Political Economy) – The Free Flow of Non-Personal Data**

Earlier this month MEPs voted to support the final text on the free flow of non-personal data across the European Union (EU). A vast majority of the European Parliament voted in favour of this new regulation.

This is good news. The regulation removes obstacles to the free movement of non-personal data. It reduces the number and range of data localization restrictions, and improves the conditions under which regulators, consumers and service providers use data. Non-personal data is often used in production of goods and when thinking of the 4th Industrial Revolution, it will be an essential factor for many industries.

The biggest winner of this regulation is the EU's economy. Digital flows play a more and more important role in Europe's economy. Besides the goods and services EU members trade with each other, the free flow of data will further contribute to a more competitive European economy, as a so-called "Fifth" freedom.

That is because digital trade generally, and the free flow of data particularly, has become an essential factor in many other industries and sectors to run operations smoothly. The use of digital and other data services such as cloud computing, data processing services and computer and ICT services by many other industries and sectors makes the EU economy much more *productive*.

The crucial point, therefore, is that policy makers should facilitate the provision of these ICT services as much as possible. Reducing burdensome barriers such as the regulation the European Parliament approved will do that job. But much more is needed, as there are still many other digital barriers remaining.

URL: <https://ecipe.org/blog/the-free-flow-of-non-personal-data/>

3.8 **AIOTI – EU Free Flow of Non-Personal Data: AIOTI Discussion Paper – March 2018**

Taking into account the mission and principles of the Alliance for the Internet of Things Innovation (AIOTI), this paper provides input to the discussions on the proposed Regulation for the free flow of non-personal data, which is currently being discussed within the EU Institutions.

The European Commission's proposal for a Regulation on a framework for the free flow of non-personal data in the EU, published in September 2017, aims, primarily, to ensure the free movement of non-personal data and to prohibit national governments from creating unjustified data localization requirements. Moreover, the proposal aims to ensure the availability of data to competent authorities of another Member State and the development of codes of conduct to facilitate data portability.

Overall, AIOTI considers that the proposed framework constitutes a significant step forward towards the actual implementation of a Digital Single Market. There are, however, certain aspects of the

proposal that can be improved to ensure the creation of a regulatory instrument that would effectively address not only the challenges and opportunities of the connected world associated to cloud computing, but also the challenges and opportunities in the hyper-connected world of the Internet of Things.

Please click [here](#) to access the full discussion paper.

URL: <https://aioti.eu/wp-content/uploads/2018/03/AIOTI-Discussion-Paper-on-EU-Free-Flow-of-Data.pdf>