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ALLIANCE FOR INTERNET OF THINGS INNOVATION

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)¹, 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 2017², 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.

A. Key elements of the Regulation

1. Obligations on national governments not to restrict movements of non-personal data

This Regulation enshrines the principle of the free movement of non-personal data into EU law, with clear obligations on national governments not to restrict the location, storage or processing of non-personal data in any specific territory, unless justified on grounds of public security.

2. Repeal of existing unjustified data localisation rules

EU Member States must repeal all data localisation requirements³ which are not justified by public security reasons within a year from the adoption of this Regulation.

3. Notification and transparency procedure

Any new data localisation requirement justified on public security grounds must be notified to the European Commission. Details of all approved data localisation rules must be made publicly available.

4. Access to data for purposes of regulatory control

Public authorities should be able to access data stored in a different Member State for regulatory purposes.

5. Porting of data to another provider or back to professional user's own non-cloud IT systems.

The transparency requirements are strengthened. Industry and other stakeholders are encouraged to draft self-regulatory codes of conduct providing guidelines to facilitate switching of providers and to ensure that professional users are provided with "sufficiently detailed, clear and transparent information, before a contract for data storage and processing is concluded".

The abovementioned codes of conduct will be subject for review by the Commission two (2) years after the start of the application of the proposed Regulation; the Regulation shall apply six (6) months after its publication.

¹ The AIOTI initiative was built upon the Momentum Declaration adopted at the High Level Meeting on 04th of February 2015. See, also, <https://aioti.eu/learn-more-about-aioti/>

² 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, 13.9.2017 COM(2017) 495 final, available at: https://ec.europa.eu/info/law/better-regulation/initiatives/com-2017-495_en

³ For example, national laws may dictate the local storage of certain corporate information including records of shareholders.



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B. Shared acknowledgment

Being well aware of the impact of the existing data localization restrictions on the EU market and, in particular, on their excessive impact on the IoT uptake, AIOTI endorses Commission's decision to propose a Regulation allowing the free-flow of non-personal data within EU. AIOTI has witnessed the impact of the absence of such a regulatory framework and, thus, welcomes the regulator's decision to take action.

Should Member States engage in a concrete manner to the objectives aspired by the proposed Regulation by lifting any existing unnecessary legislative barriers, then this would actually demonstrate trust towards other Member States and, more broadly, towards the EU. Trust is an element of foundational importance for the IoT uptake in general and is, therefore, linked not only to the mission of AIOTI as a whole, but also to the role each individual member of AIOTI can play.

Currently, the discussion below reflects on the status of the proposed Regulation and presents suggestions for the way forward.

C. Detailed provisions and positions

The discussion below reflects the views expressed by members of AIOTI linked to the main elements of the proposal briefly described earlier in this paper.

Article 2 - Scope

"The Regulation shall apply to the storage or other processing of electronic data other than personal data in the Union".

- Under the current regime (including the Data Protection Directive and the forthcoming GDPR)⁴ the free flow of personal data is only allowed if certain requirements are met⁵. Considering the exceptions included in the GDPR the Member States could adopt more specific rules, for example, in the context of employment, which could lead to obstacles even to the generally allowed free movement of personal data.
- Also, the fact that the proposed Regulation only applies to non-personal data would raise questions around datasets which combine personal and non-personal data, as it is often difficult or too costly to unbundle such data.

Article 3 - Definitions

'draft act' means a text formulated with the aim of having it enacted as a law, regulation or administrative provision of a general nature, the text being at the stage of preparation at which substantive amendments can still be made by the notifying Member State;

'data localisation requirement' means any obligation, prohibition, condition, limit or other requirement provided for in the laws, regulations or administrative provisions of the Member States, which imposes the location of data storage or other processing in the territory of a specific Member State or hinders storage or other processing of data in any other Member State;

AIOTI position:

- The definitions of "draft acts" and "data localisation requirement" cover the relevant regulatory texts both in terms of maturity level of the text as well as in relation to the scope and the type of instrument. The definitions, thus, allow for a broad range of Member State instruments to fall under the scope of the proposed Regulation, including, for instance, rules on public procurement or other

⁴ The Data Protection Directive will remain applicable until the 24 May 2018, while the GDPR has entered into force and will become applicable as of 25 May 2018.

⁵ Article 88 of the GDPR allows Member States to provide specific rules regarding data processed in the employment context.



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regulations adopted. Public procurement rules are not explicitly mentioned and it is not clear whether public procurement rules are understood as “administrative provisions”.

- Also, the definition of “data localisation requirement” covers laws and administrative provisions of the Member States, but it is not clear whether laws and other rules adopted by regional or local authorities are also covered.
- AIOTI recommends that “public procurement rules” should also be covered by this Regulation and therefore request clarification (e.g. add “public procurement” in the definition of “draft act”). In addition, request clarification that regional and local public procurement rules are also covered.

Article 5 - Data availability for regulatory control by competent authorities

- AIOTI’s understanding is that this article should make sure that in cases where: a) there is no other cooperation mechanism in place and b) where other means of access to data have been exhausted, the cooperation mechanism provided under the proposed framework on the free flow of data could serve as a basis to ensure availability of data for national competent authorities.

AIOTI position:

- Support this article, which is essential to achieve the objectives of the proposal on the of free flow of in the EU. However, the scope of this provision should not be broadened, in practice, beyond access for regulatory control, and include unreasonable measures on government access to data for example. The issue of availability for regulatory control by competent authorities can be of critical importance, also, because an authority considered as “competent” within the jurisdiction of one Member State may not be considered as “competent” within the jurisdiction of another Member State. Competence needs, therefore, to be carefully defined and assessed under a framework providing for the free flow of data across the EU countries.

Article 6 - Porting of data

“The Commission shall encourage and facilitate the development of self-regulatory codes of conduct at Union level, in order to define guidelines on best practices in facilitating the switching of providers and to ensure that they provide professional users with sufficiently detailed, clear and transparent information before a contract for data storage and processing is concluded.”

(...)

“The Commission shall review the development and effective implementation of such codes of conduct and the effective provision of information by providers no later than two years after the start of application of this Regulation.”

Portability of data is of key importance for organizations of all sizes, as it ensures continuity for all stakeholders in often critical applications, therefore, providing the appropriate circumstances for competition growth and stimulation of innovation, which is a key aim aspired by AIOTI.

This helps build trust in the Digital Single Market and the overall digitization of the market and society aspired.



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AIOTI position:

- Support the view that portability would be best ensured via stakeholders-led initiatives and discussions and not via mandatory rules, thus codes of conduct are a more suitable approach. In this respect, the timeframes set under the proposed Regulation linked to the implementation of codes of conduct and their review by the Commission are considered to be pragmatic, taking into account: a) the overall time needed for the negotiation process within the EU Institutions and b) the starting date of the application of the proposed Regulation (6 months after its publication in the Official Journal of the EU). Moreover, existing soft law instruments do provide for porting of data⁶, while EC has already taken action on the matter in the context of the activities performed within the Cloud Stakeholders' Platform initiative⁷.
- Soft rules of data porting - as currently provided under Article 6 of the proposed Regulation - is deemed to be the preferred policy option within AIOTI.
- If, however, the review of the implementation of the codes of conduct by the EC reveals that a soft rules approach does not suffice to meet the objectives of the proposed Regulation, then other options need to be explored (e.g. the introduction of statutory right to data portability under certain requirements) at a later stage.

D. Conclusion⁸

Due to technological change, globalisation, worldwide competition and demographical challenges in most regions in the world, operating in a durable hyper-connected economy and society and boosting innovation and productivity are no longer option but part of the roadmap for society. These are a necessity to have, in order to stay competitive as an economy and functional as a society providing for all its citizens, helping avoid social disruption.

On the Free flow of data, it can be established that restrictions on the free movement of data within the European Union and unjustified restrictions on the location of data for storage or processing purposes are generally not addressed in generic IoT products and services. This is understood as most restrictions are only applicable to certain industries, markets or use. It is however a major challenge since hyper-connected ecosystems are borderless and the data therein should be able to flow freely and unrestricted, at least within the European Union.

In order to make IoT and related hyper-connected ecosystems work, create space to innovate, modernise society, build global connectivity, nurture internet openness, create trust, jobs and skills in the digital economy and society, and continue working on and safeguarding an acceptable level of social prosperity that is durable, the two now colliding worlds of digital technology on the one hand and regulations and compliance on the other will need to be aligned. The proposed regulation on Free Flow of non-personal data is an essential addition which will aid business and government data best practice across the EU.

⁶ See, for example, the Cloud Service Level Agreement Standardisation Guidelines endorsed by the European Commission, available at: <https://ec.europa.eu/digital-single-market/en/news/cloud-service-level-agreement-standardisation-guidelines>

⁷ The last Digital Single Market (DSM) Cloud Stakeholder meeting organised by the European Commission took place on the 12 December 2017, in Brussels. All publicly available materials can be found at: <https://ec.europa.eu/digital-single-market/en/news/dsm-cloud-stakeholder-meeting-0>

⁸ Digitising the Industry - Internet of Things Connecting the Physical, Digital and Virtual Worlds -IERC Cluster Book 2016