



PARTICIPATORY APPROACHES TO A NEW ETHICAL AND LEGAL FRAMEWORK FOR ICT



# ISSUES AND GAPS ANALYSIS ON DATA COMMERCIALIZATION

CONTEXT AND WORKFLOW

19th June 2020

# AGENDA

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- INTRODUCTION TO DATA COMMERCIALIZATION
- ISSUES AND GAPS
  1. COUNTER-PERFORMANCE PRACTICES
  2. COLLECTING CONSENT FOR THE PROCESSING BY YET UNIDENTIFIED RECIPIENTS
  3. UNCLARITIES WITH REGARDS TO SHARED CONTROLLERSHIP
  4. DETERMINATION OF THE VALUE OF DATA
  5. MANAGEMENT OF INDIVIDUAL PRIVACY PREFERENCES
- NEXT STEPS

# GENERAL INFORMATION

## Aim of D3.1:

- Identify and elaborate on issues and gaps (I&G) devoted to data commercialisation in ICT R&I.
- Provide European Commission with recommendations.

## Identification of I&G:

- Workshop in June 2019 in Bilbao
- 4 legal + 4 industry experts

## Results

### 1. Issues and Gaps:

1. Issue: Data Commercialisation and Counter-Performance Practices
2. Issue: Collecting Consent for the Processing by yet Unidentified Recipients
3. Issue: Unclearities with regards to shared controllership
4. Gap: Determination of the value of data
5. Gap: Management of individual privacy preferences

### 2. Special Issue in *European Review of Private Law*

- Several papers on commercialisation of data, data ownership and big data
- Relates to D3.2 (M34)

## THE COMMERCIALISATION OF DATA

- Causes diverging reactions among stakeholders in the environment of data protection and ICT research
- Is a reality: The value of the EU data economy is predicted to increase **to EUR 643 billion** by 2020, representing 3.17% of the overall EU GDP”.
- Differentiation between type of data, data amount, data source, data recipient and form of commercialisation necessary.

### Definition:

*“The processing of personal data as regulated under the GRPD, in form of licensing by granting third parties’ access to collected personal data for a monetary profit.*

*While it is assumed that personal data possesses economic value that may be transferred between parties, the specifics of the commercialisation of data however may differ, depending on the licensor, licensee and the purpose of the data.”*

1.

## DATA COMMERCIALISATION AND COUNTER-PERFORMANCE PRACTICES

### Context and Legal Background:



- Many service providers monetise personal information instead of charging a fee for using a their platform.
- Neither Directive on the legal protection of databases (Directive 96/9/EC) nor the GDPR consider this topic.

### Issue:



- It is unclear whether counter-performance practises are banned under the EU legal framework.

### Risk Assessment and Impact on R&I:



- hinders the mergence of markets and commons of personal data.
- Organisation can hardly plan their research strategy if they cannot forssee whether personal data can be processed and/or under which conditions.

### Mitigation Measures:



- Official EU position on counter-performance practices.

## 2.

# COLLECTING CONSENT FOR THE PROCESSING BY YET UNIDENTIFIED RECIPIENTS

### Context and Legal Background:



- Recital 42: data subject has to know the controller at the time of giving consent
- In markets and commons, controllers are yet unknown at the time of data collection

### Issue:



- It is unclear whether the GDPR permits to ask consent for the processing of a yet unknown future recipient of data.

### Risk Assessment and Impact on R&I:



- Subsequent consent requests may lead to consent fatigue and consent withdrawal.
- Potential loss of investments.
- Cancellation of data initiatives.
- Particularly important for sciences that strongly rely on consent (human sciences, health science, open access).

### Mitigation Measures:



- Authoritative interpretation of the GDPR by the EDPB.
- Research on TOM for specific conditions for this consent to be lawful

### 3. UNCLARITIES WITH REGARDS TO SHARED CONTROLLERSHIP

#### Context and Legal Background:



- Art. 4(7) GDPR defines:
  - Data controller: defines the purposes and means of processing
  - Joint controller: two or more controllers jointly defining the purposes and means of processing
  - Data processor: processes personal data on behalf of the controller

#### Issue:



1. It is unclear when exactly a processor becomes a controller.
2. Missing legal consequences of joint controllers failing to fulfil their obligations
3. Can and should data subject become data controllers.

#### Risk Assessment and Impact on R&I:



- Roles relate to rights, responsibilities and risks.
- Commercialisation is risky if legal consequences in a joint controllership are not defined.
- Joint controllership of individuals and researchers through new technologies.

#### Mitigation Measures:



- Currently, agreements for joint controllerships are used. Standard agreements should be introduced.
- Clarification through EDPB.

## 4.

# DETERMINATION OF THE VALUE OF DATA

### Context and Legal Background:



- Personal data protection is a fundamental right.
- Can be used to pay for digital services.
- Citizens are unaware of the value of their personal data.

### Gap:



- Although data is regarded as a valuable asset, there is no established pricing mechanism for data.

### Risk Assessment and Impact on R&I:



- The importance of large amounts of data is likely to increase in the future.
- Resource allocation difficult without pricing of data.
- Unawareness of the value of data is hindering citizen science.

### Mitigation Measures:



- Research on pricing mechanisms for data is needed to develop price indicators for data (balancing data protection concerns and business interests).
- Provide examples and frameworks to determine the value of data.



## 5. MANAGEMENT OF INDIVIDUAL PRIVACY PREFERENCES

### Context and Legal Background:

- ⚖️ ▪ Online services use nudging and other techniques to get consent, against Recital 42 GDPR.
- Privacy preferences differ.
- Individuals demonstrate consent fatigue.
- P3P was not adopted by website providers.

### Gap:

- ⚠️ ▪ Data subjects should be enabled to effectively manage their privacy preferences.

### Risk Assessment and Impact on R&I:

- 🔍 ▪ GDPR is effectively circumvented.
- Management of privacy preferences would help researchers to focus on the critical aspects of their work.
- Data subjects are more willing to participate in research if privacy preferences are considered.

### Mitigation Measures:

- 🔧 ▪ Development of a machine-readable standard for privacy preferences.
- Introduction of an incentive system for organisations to adopt such a standard.

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