



The General Data Protection Regulation

Cross-industry innovation

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The European Commission has launched an ambitious program to establish a genuine European Digital Single Market (DSM) and to revitalize innovation. One of the key steps toward the creation of an effective DSM was the Commission's consideration to review the existing legislation on data protection. The new General Data Protection Regulation (GDPR) aims not only to modernize the current data protection directive, but also to facilitate business development by simplifying and unifying the rules and thus preparing the groundwork for innovation, while strengthening the fundamental rights of citizens in the digital age. Recent studies show that over 90 percent of all companies are starting to prepare for the upcoming regulation. ➤

The adoption of the GDPR has received mixed reactions. The fear of additional expenses associated with data protection and the perceived costs for compliance already experienced in most industries are the main concerns. Critics also denounce an obsession of the European Union with the protection of privacy and data protection, which could drive the digital economy “two giant steps backward,” as claimed by the Information Technology and Innovation Foundation (ITIF). However, the Commission’s goal is not only to protect the right to data protection, which is one of the fundamental rights, but also to promote innovation.

At first sight, the GDPR could be seen as detrimental to innovation, as it appears to expand the regulatory burden on businesses and industries that were perceived not to be previously covered by the rules on data protection. The definition of personal data now clearly contains features such as online identifiers, location data, and genetic data. In addition, the GDPR states that compliance not only applies to data controllers and processors in the EU, but also to all those who offer goods or services to EU citizens. However, in practice, these new definitions have little direct influence on the scope of the data protection regime. Although online identifiers and location data are now explicitly mentioned in the law, they only reflect the evolving jurisprudence. For example, even though IP addresses were largely believed not to be part of personal data, the European Court of Justice has now ruled twice on the subject and considers them to be personal data on the grounds that they allow an indirect identification of users. While article 4 on the territorial scope of Directive 95/46/EC on data protection was formulated in a much more lenient way than that of the GDPR, it already had an extra-territorial scope. In short, this means that any fear regarding a potential negative impact on businesses and innovation caused by the wider scope of the GDPR is without basis and mainly due to unfamiliarity with the present legal obligations. The increase in awareness that will be produced by the adoption of the GDPR could result in a wider range of actors recognizing

the need to comply with data protection requirements and thus generate a need for innovative cross-industry approaches.

The increase in penalties for infringements of the GDPR could appear to have a similar negative psychological impact on business and innovation. Article 83 of the GDPR states that the national supervisory authorities may now impose fines of up to four percent of the annual turnover of an undertaking or up to €20 million (whichever is higher). On one hand, high fines are problematic because of the new, strict regulatory requirements and a high degree of legal uncertainty, but on the other hand they allow for interesting business cases and provide opportunities to create competitive advantages. It forces companies to actively seek solutions to problems that were potentially ignored in the past by applying principles like “data protection by design” and “by default” and by conducting “data protection impact assessments.” Privacy enhancing technologies (PET) and other new and innovative solutions are starting to

emerge and to gather momentum. Collecting valid consent under the GDPR can also become more complicated. The GDPR states that the person in question must have greater choice to decide to which parts of an agreement he or she consents and the data controller is required to demonstrate that the appropriate consent has been given freely. For medical researchers, this requirement might make it more difficult to gain access to valuable information and thus be innovative. This provision could also very well have an impact on existing business models, such as gaming companies providing free access to games in exchange for personal data likely not to be directly related to the gaming services.

However, dismissing the GDPR as an obstacle to innovation would be a mistake. The GDPR has great potential to meet the Commission's objectives of protecting the rights and freedoms of individuals and simplifying administrative burdens for businesses as well as the promotion of innovation in the DSM.

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Contrary to what one might think at first glance, many of the potential setbacks concerning innovation that could possibly occur are much less or not at all problematic. It would be wrong to assume that the supervisory authorities are waiting for the right time to be able to issue fines. In fact, they have the duty to help, guide, and inform about the upcoming changes and fines will only be a last resort and proportionate. In addition, companies will not simply stop innovating because their activities might be considered non-compliant by the supervisory authorities; instead, they will continue innovating in new business areas, while keeping the new rules in mind.

Following the same logic, obstacles to research are readily mitigated in the GDPR: article 9 allows for the processing of data under certain circumstances without the explicit consent of the data subjects if the data and the processing are considered necessary for “the purposes of preventive or occupational medicine,” “medical

diagnosis,” protecting against “serious cross-border threats to health,” or if only used for “archiving in the public interest, scientific, or historical research.” If one is able to demonstrate that research, such as a medical research project, meets one of the above criteria, the GDPR will not present a regulatory obstacle.

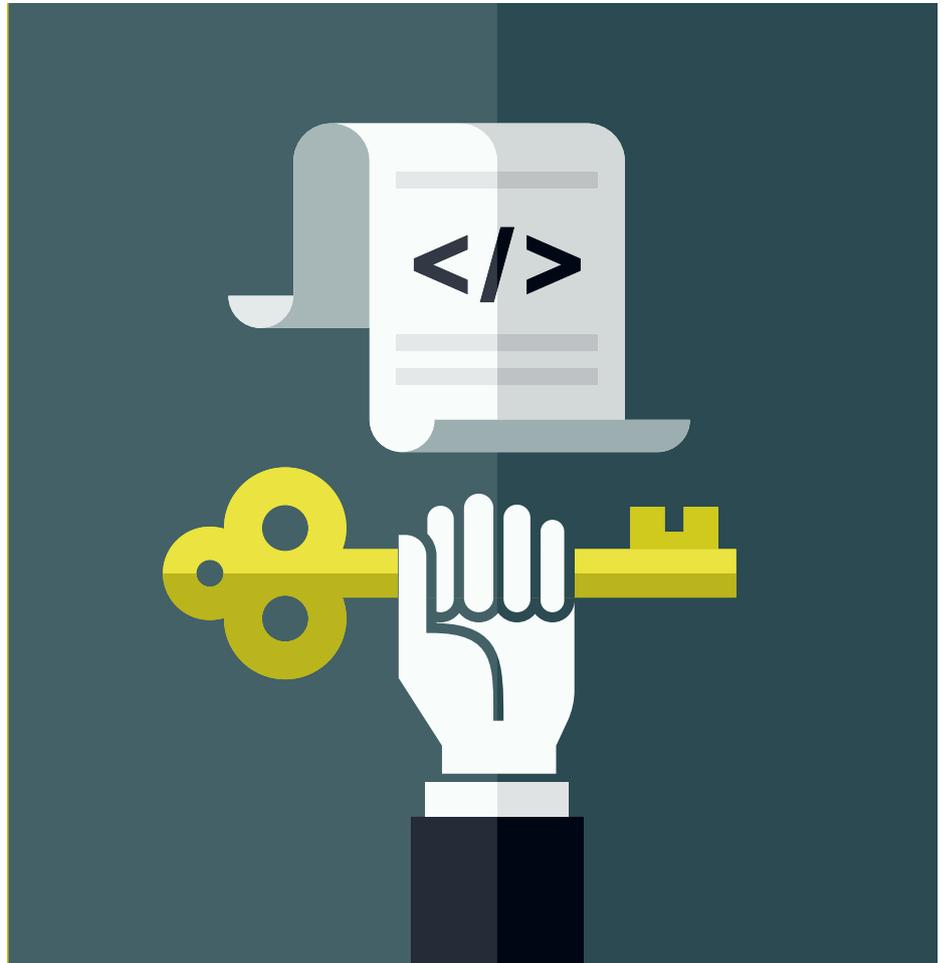
However, it will also depend on the extent to which member states create appropriate exceptions for research purposes, as provided for in article 89. In any case, the GDPR is unlikely to be interpreted narrowly, especially since intensive lobbying focuses the attention of policymakers on the matter. In addition, the objectives of EU politicians would be violated by a restrictive interpretation of these clauses, mainly because recital 159 of the GDPR emphasizes the objective of creating a European research area and points out that “the processing of personal data for scientific research purposes should be interpreted in a broad manner.” ➤

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The improvement of data protection, by placing more emphasis on the protection of personal data, actually has a positive impact on competition and innovation. Data protection and data security have been and still are of interest to an increasing number of consumers and businesses. Effective data protection offers companies a real opportunity to restore and keep consumer confidence. Weak consumer confidence can be as much a source of costs as the attempt to reach a high level of compliance. While many studies show the keen willingness of consumers to share personal data in exchange for free services (like the 2015 Intercede consumer research), this is only part of the story. Multiple reports (like the 2015 Aimia Global Loyalty Lens report) show that consumers are starting to display growing concern and that the existence of a trusted relationship with an organization is valued by customers.

The enormous social and commercial potential of Big Data is dependent on the size and quality of the record. By providing consumers with proof that their right to data protection is taken seriously, companies can also increase the willingness of consumers to share data or to use the services offered. Free and specific consent as required by the GDPR will not be problematic if companies properly communicate the purpose and benefit of sharing data with the person concerned. In a world where people are increasingly aware of the intrusive data collection practices undertaken by social media platforms, these companies could gain a competitive advantage by focusing on new and innovative means to enhance data protection. This development has already begun to materialize as a growing number of customer messaging applications are turning to encryption to secure the privacy of conversations.



In addition, the GDPR is pursuing the harmonization of data protection rules in the EU and although a certain degree of discretion is left to the member states, the GDPR will considerably increase harmonization and facilitate and ensure the compliance of pan-European companies. This is particularly true because, unlike its predecessor, the GDPR is directly applicable to all member states. Contrary to the positive effect of harmonization, the success of the one-stop-shop mechanism is less certain however. While it should facilitate compliance for businesses by allowing firms to have a single contact with a regulator, the mechanism might miss the desired effect by causing conflicts between authorities and thus lead to significant delays when dealing with European businesses active in multiple member states. Despite the uncertainty of the one-stop-shop, greater harmonization should have a positive impact on innovation by reducing compliance costs, as data flows more easily across the European Union and industries can spend resources on innovation instead of devoting attention to complying with different laws in 28 member states.

The restrictive rules of data protection can encourage innovation because they force companies to work with these limitations. This is particularly true where the GDPR promotes the principle of privacy by design and by default; that is, the integration of data protection measures from the very outset. In contrast to the largely inadequate level of data protection under the current scheme, the high fines that will soon be applied for non-compliance will encourage the widespread adoption of the principle of data protection by design. This means that innovation will be needed to offer compliant products and services.

As it becomes more expensive to collect personal data, algorithms are starting to emerge based on machine learning, which will produce data that resembles personal data but which is not linked or linkable to a real physical person. In addition, the newly introduced data portability right, in conjunction with similar regulations like PSD2, will lead to innovations that will facilitate data transfer.

As companies will have to export personal data in a “structured and machine-readable format” and transfer the data to another provider at the request of the subject, they feel the need to introduce harmonized formats enabling them not only to export, but also to import such data.

Likewise, the European Parliament noted the higher cost of compliance for data controllers and processors to store and process data securely, which should prompt innovation to find cost-effective security solutions. The example of the automotive industry has shown that the increasing regulation of vehicle safety does not stifle innovation. Instead, the mandatory use of airbags has not only allowed the development of many patented airbags, but it has also created a new type of competition and innovation in the area of car safety. History will only have to repeat itself for innovation to change the way we look at the use of Big Data. ●

Conclusion

- In this context, the aim of the European Commission is to revitalize the “digital single market” by creating a unified playing field to enable competition
- The GDPR has great potential to promote innovation overall and across all industries
- Harmonization will free resources that can be applied to innovation
- New constraints will create the need for innovative approaches
- The GDPR, combined with other regulations like PSD2, will definitively create the need for enhanced data transfer mechanisms

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