



Access Now's submission to the Consultation on the European Strategy for Data

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I. INTRODUCTION

Access Now defends and extends the digital rights of users at risk around the world. By combining direct technical support, comprehensive policy engagement, global advocacy, grassroots grantmaking, and convenings such as RightsCon, we fight for human rights in the digital age.

We defend privacy and data protection globally. Access Now was involved in the EU Data Protection Reform process since the tabling of the General Data Protection Regulation (GDPR) by the European Commission in January 2012. Following its adoption in 2016, we became a member of the European Commission multi-stakeholder group of the application of the GDPR and support its implementation across the EU states and promote its standards globally.

We welcome the opportunity to provide input to the Consultation on the European Strategy for Data. We however regret that our capacity to meaningfully contribute to the European Commission's approach was hindered by the highly biased nature of the questionnaire. In fact, a large number of the questions presented in this consultation are leading and seek to reinforce what appears to be the Commission's pre-ordained vision, rather than genuinely allowing for input. This approach is at odds with the standard of "evidence-based policy making" that the European Commission promotes and should uphold.

In this document, we provide comments to address some of these shortcomings and present the questions that the European Commission should be addressing as a priority to build a European Strategy for Data. Our comments follow the themes presented in the consultation survey in the same order.

II. GENERAL QUESTIONS ON THE DATA STRATEGY

The consultation survey starts with a question on whether the EU needs an overarching data strategy. In doing so, it ignores that the EU has been already implementing a data strategy anchored in the protection of personal data. This acknowledgement should be a starting point to clearly define the scope of this additional strategy. In the absence of a clear definition for the scope, it is unclear which statement and question in the consultation, and the strategy's vision, covers and refers to personal data, non-personal data, or both. This distinction is crucial to provide adequate answers to the survey. The EU already has a very defined strategy for processing of personal data, this new strategy should not modify the data protection acquis. Yet, a number of questions presented in this survey would be understood as encompassing the use or re-use of personal data.

The question regarding the availability of data for the common good, is similarly phrased in a manner which makes it impossible to answer. Making more sensitive data broadly available can also undermine the common good. Such a general statement provides no facts, evidence, or information as to 1) what data would be used; 2) how; and 3) by whom. We need measures in place to ensure that

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the collection and use of data cannot undermine the common good and can actually contribute to it: this is what data protection frameworks, such as the General Data Protection Regulation, provide. Serving the common good is a highly contextual value proposition. Particularly in the context of the processing of personal data, the European Commission is well placed to understand that even if social benefits or the common good is demonstrated for some, the same measure might hurt others.

A following question in this section, regarding whether it is necessary to make it easier for individuals to give access to existing data held about them to the new service providers, rests upon a flawed assumption: namely, that individuals currently have the ability to adequately protect and control their data from being shared with service providers. Data subjects are constantly forced into giving up their data, knowingly or unknowingly, by the misleading data collection and data sharing practices of companies. If individuals were first empowered to restrict what data is collected about them, then we could meaningfully speak about allowing individuals to share data with service providers of their choosing. To do this, the EU must prioritise the application and enforcement of the GDPR which is a robust framework for the protection of users' rights. Earlier this month, we released a [report](#) raising the alarm on the fact that the enforcement of the GDPR has been failing and providing recommendations to EU institutions and authorities on how to address these challenges.

The next main question in section one rests upon a misunderstanding of the point of increasing data literacy. The point of data literacy is not to make people share more data and become “more active in the data economy.” By and large, the people with high data literacy are horrified at the data economy's intrusive harvesting practices and want no part in it. Data literacy should be increased, but the data economy needs to be brought in line with the principles of data protection by design and by default so that it is something that the data literate would want to be part of.

The investment-related question in this section is phrased in a manner such that it is impossible to give an answer to it. The question has two entirely separate parts: firstly, it asks whether the EU should “*make major investments in technologies and infrastructures that enhance data access and use;*” secondly, it states that this should be done while “*giving individuals as well as public and private organisations full control over the data they generate.*” These are two separate points, and it is counterproductive and misleading to lump them together in one statement. Regarding the first point, we support major investments from the EU in technologies and infrastructures that enhance data protection and privacy as a priority. Regarding the second part of the question, we point out that the data generated by private organisations is often data about citizens, and can constitute sensitive personal data (e.g. a telecom company may be able to deduce behavioural insights about customers, such as predictions of their sexual orientation or health status). Private organisations processing this information must do so in accordance with the EU data protection acquis.

Finally, regarding the last question, it is difficult to answer the question without knowing more about the concept of common European data spaces. Supporting this idea very much depends on what these data spaces would look like, what data they will include, especially regarding public sector data.

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Any such data space should comply with EU data protection rules and protect the data it allows access to so that it prevents indiscriminate re-use.

III. SPECIFIC QUESTIONS ON FUTURE ACTIONS: DATA GOVERNANCE

This section of the consultation survey seeks feedback on the possibility of “*establishing mechanisms for data governance at European level which may support data-driven innovation*”. This negates the fact that the European Union already developed rules for such mechanisms, at least for the protection and the free flow of personal data. The requirements for data protection by design and by default enshrined in Article 25 of the GDPR are established to enable models of sustainable data practices across the EU and foster the development of privacy and data protection friendly innovation. The European Commission should dedicate more resources to making this data governance model a reality.

The proposals presented regarding “*data altruism*” in the consultation survey are highly problematic. They suggest that data, including personal data, can be treated as a good for transactions, standing at odds with the fact that the use of personal data is protected not only under the GDPR but also under the EU Charter of Fundamental Rights. The survey consultation suggests that people should be able to “donate” data and seek information on mechanisms to do so. If people wish to share their information, they can consent to their use pursuant the rules established under the GDPR. The concept of “data donation” creates risks of reduced protection for people. What happens if I no longer agree to the use of the data I donated because I find out it is being re-used for a purpose that I do not support? What information will I receive on the way my data is used after “my donation”? Instead of brainstorming new ways for companies to harvest our data by bypassing our control, the European Commission shall instead focus its energy in enforcing the GDPR and ensure that we can adequately give consent to the use of their data. This could entail further research into data governance models to complement individual enforcement of data subject rights but this should not be conflated with the described concept of “*data altruism*”.

Similarly, the section on “*data intermediaries*” presents “*data brokers*” as innovative services that can help businesses grow. This is a gross miss-representation of [how data brokers operate](#), which is largely in the dark. Over the past years, data brokers have been linked to countless data protection and privacy abuses, human rights violations including [against migrants and children](#), and even to the [murder of journalists](#). Some of them were also [involved in schemes to disrupt democratic processes](#) such as elections or referendums. Given the significant negative impact these companies have on human rights, it would be unacceptable for the European Commission to rely on them to develop a data strategy for the “common good”. We stress that data brokers would not be an acceptable entity as data intermediaries in an alternative data governance model mentioned above.

IV. SPECIFIC QUESTIONS ON FUTURE ACTIONS: IDENTIFICATION OF HIGH-VALUE DATASETS AND SPECIFIC QUESTIONS ON FUTURE ACTIONS: THE SELF/CO REGULATORY CONTEXT OF CLOUD COMPUTING

We do not have particular comments on this section of the consultation as Access Now was not involved in the negotiations of the Open Data Directive. We do however note that the consultation survey disproportionately focuses on “re-use” of datasets as a criteria for success of the data strategy. It is unclear why and how this would be measured.

We do not have further comments to make on the section focusing on cloud computing beyond our answers to the survey. Past EU experiences on self- and co- regulation have rarely proven successful. We reiterate our call that the EU should instead focus on enforcing its existing laws and promoting the principles of security, privacy, and data protection by design and by default.

V. WHAT DOES THE EU WANT TO ACHIEVE WITH THE DATA STRATEGY?

Based on this consultation and the presented European Data Strategy, it is unclear what is the goal that the EU wants to achieve.

The Strategy published earlier this year heavily relies on the data protection acquis while this consultation seems to ignore it altogether. Worse still, the consultation suggests future ideas that would directly contradict the efforts of the European Commission to develop a sustainable environment for the use of personal data based on robust safeguards, data subjects rights, and clear requirements for data processors.

When announcing this Strategy, Commissioner Breton said that “the EU lost the battle for personal data”. We respectfully disagree. The European Union, in adopting the GDPR, led the way for the development of a data economy that put people at the center and protected their rights. The priority of any data strategy should build on this success which has inspired many countries around the world to reform or develop data protection laws. The EU data strategy should focus on investment in privacy and data protection friendly solutions.

Beyond this, there is a lack of clarity regarding the goal of the EU's data strategy on the processing of non-personal data. The overall consultation seems to focus on re-use of “data” without clarifying which data and often confusing it with personal data. Further work is needed in defining the scope

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and goal of this strategy and how it interacts with the data protection acquis and the Open Data Directive.

VI. CONCLUSION

Access Now welcomes the opportunity to submit a response to the public consultation on European Strategy for Data.

The regulatory and investment space on any data strategy should be built on existing values enshrined in the Treaties and the EU Charter of Fundamental Rights. The European Union should promote its existing rights-based data strategy, as exemplified by the GDPR, and clarify how its new data strategy will build on this framework to develop privacy-driven innovation.

We stand ready to contribute to these efforts and continue to promote the EU's approach to technology: namely, a human rights approach.

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