Privacy Next
Shaping the Next Generation of Privacy

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Clarifying the Definition of Personal Data

Privacy Next recommends that Council discussions on the Digital Omnibus revisit the Article 4 GDPR proposal because it is the more constructive way forward. It ensures legal certainty, aligns with legal precedents, and uses existing personal data boundaries, whereas the new Article 29a adds unnecessary and untested complexity.

Key Points

- The Commission's proposals to amend Article 4 GDPR in the Digital Omnibus are driven by a commitment to increase legal certainty with this key issue and simplify how organisations can process personal data.
- The current compromise text proposes a new Article 29a as an alternative. While compromise is always necessary in pursuing legal reform, Privacy Next believes the most legally certain way to achieve simplification is to clarify the definition of personal data itself through amendments to Article 4.
- Creating a new article for an already complex piece of legislation will not facilitate matters for controllers nor bring legal certainty.
- Privacy Next recommends that discussions on the Digital Omnibus revisit the Article 4 reform proposals with a view to clarifying the definition of personal data and better meeting EU objectives.

Why Clarifying Article 4 GDPR is the Right Approach

The Commission proposal does not reinvent the concept of personal data. It takes an existing legal concept from Recital 26 GDPR and makes it clearer and more accessible in the GDPR's operative provisions. There are four key considerations:

- The proposal does not make the definition of personal data subjective, as critics claim. The *SRB* judgment emphasises that identifiability is based on means "reasonably likely to be used". Reasonableness is a well-established objective legal standard. The question is not simply whether a particular controller believes that identification will or will not occur. It is whether, taking the relevant circumstances into account, any available means of identification are *reasonably likely to be used*.

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- The Commission proposal is firmly rooted in the existing GDPR. The Commission does not import a new judicial test into the legislation; it takes the core of an existing test, informed by the Court's interpretation, and seeks to clarify the boundaries of personal data. The Commission proposal is a relatively modest legislative change, but a critical one for legal certainty.
- Article 4 clarification does not remove any processing from regulatory supervision. The GDPR already addresses pseudonymised data in Recital 26. The applicability of the GDPR to the data in question already depends upon the boundaries created by that Recital. Reinforcing the test used to determine on which side of the boundary particular data falls does not create a new limitation on the competence of supervisory authorities. It simply makes the existing boundary easier for controllers, regulators and courts to apply consistently.
- Fundamental rights and necessary safeguards remain in place. Supervisory authorities would continue to scrutinise whether controllers have applied the reasonableness test correctly; the clarification does not allow controllers to remove themselves from regulatory oversight. A supervisory authority would remain able to examine the circumstances of an individual case and determine whether the controller's assessment was correct.

Taken together, these points demonstrate why the Article 4 approach is more legally coherent and will facilitate compliance without reducing the Charter right to data protection.

Why Article 29a Makes the Position Less Clear

- The alternative approach through a new Article 29a that seeks to specifically define pseudonymisation risks replacing a relatively simple clarification of the definition of personal data with a considerably more complicated one.
- Article 29a does not bring certainty or simplicity, as it creates an open-ended list of elements for controllers to consider, and there will be continual debate about the meaning, relevance, and weighting of each new element.
- As technology and identification techniques evolve, the Commission's original Article 41(a) approach, allowing for implementing acts to determine any necessary criteria, offers a stronger basis for certainty.
- Implementing acts are based on a proven legislative mechanism overseen by the Council and Member States, which can closely review any proposals. Other mechanisms for providing regulatory guidance do not have such democratic and accountability checks.

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Conclusion

Data controllers need clarity on the most basic GDPR question - does this processing involve personal data? Introducing a new Article 29a does not answer this question as it adds unnecessary complexity without supporting compliance or protecting fundamental rights. Discussions on the Article 4 proposals must be reopened to ensure the EU can effectively achieve its agreed data governance objective in an increasingly globalised digital landscape. Privacy Next believes this approach is not just preferable - it is imperative.

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