Independent Retail Europe

OMNIBUS PROPOSAL TO SIMPLIFY THE DATA ACQUIS - POSITION OF INDEPENDENT RETAIL EUROPE -

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Rue Archimède 5 boîte 3
B – 1000 Brussels

T + 32 2 732 46 60
@ info@independentretaileurope.eu

www.independentretaileurope.eu
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COMMENTS OF INDEPENDENT RETAIL EUROPE ON THE OMNIBUS PROPOSAL TO SIMPLIFY THE DATA ACQUIS (2025/0360(COD)

Data and Artificial Intelligence are rapidly transforming Europe's independent retail sector, changing how retailers serve consumers, offering new potential to optimize their supply chain, logistics and stores. In a context of high competition, persistent low-margins and consumers' high focus on affordability, it is essential that the EU digital rulebook be fit for purpose, minimize administrative burdens and give the necessary space for businesses to innovate and use the full potential offered by digitalization, data and the use of AI. We therefore strongly welcome the Digital Omnibus package which contains important simplifications for businesses, but also warn that some proposals contained in the package, notably in relation to the 'cookie fatigue' may disproportionately hurt businesses with more limited access to data, often SMEs and SMCs. We therefore invite EU policy makers to support a genuine simplification agenda for businesses, and to avoid disproportionate interferences to business practices. This position paper provides detailed opinions on key aspects of the Omnibus proposal to simplify the data acquis (2025/0360(COD).

Digital Omnibus Regulation Proposal to simplify the Data Aquis

1. Amendments to the General Data Protection Regulation

a) Clarification of the notion of 'personal data' (Article 3(1) of the Commission proposal amending Article 4 of the GDPR)

We fully support the proposal to clarify the notion of 'personal data' in Article 4 of the GDPR) to ensure that Data is not 'personal' if the controller does not have the means to identify the person to whom the information relates. This clarification has important positive effects for the retail sector:

- it will facilitate the use of pseudonymised and aggregated datasets for analytics, operational optimisation, trend exploitation and AI training
- It will also facilitate business relationship in groups and cooperatives of independent retailers, notably between independent store operators and the central organisation of the group/cooperative.

However, it is important to stress that:

- the real value of this simplification will only emerge after the subsequent implementing acts by the Commission (foreseen in new Article 41a GDPR) will be adopted. In particular, these implementing acts need to clarify the threshold of 'sufficient probability' for identifiability and the distinction between effective pseudonymisation and weak technical measures (e.g. unsalted hashing).
- additional clarifications are required in the GDPR itself to make this simplification truly operational. In particular, the text must make clear that where there is no personal data from the recipient's perspective, there is no reason to conclude a Data Processing Agreement (DPA) if the recipient cannot establish a personal reference. Similarly, when personal data remains only with the processor, while the controller cannot re-establish the personal reference, there is no need for such DPA neither.

a) New exemptions to the prohibition to process special categories of data (Article 3(3) of the Commission proposal amending Article 9 of the GDPR)

We see positively the proposals to introduce new exemptions to the prohibition to process special categories of data for biometric data necessary to confirm identity of the data subject in some cases and for the development of AI.

Two additional clarifications are needed:

- Article 9(2)(k) should be clarified to ensure it also covers 'processors' (and not just controllers), when the processor acts on behalf of and in the interest of the controller. This will ensure that the lawfulness extends along the supply chain which is necessary in complex supply chains such as for external AI service providers, infrastructure providers or model developers;
- The term 'disproportionate' should be defined through clear criteria to provide legal certainty and support innovation (i.e. the technical limits of deletion and unlearning in AI systems should be acknowledged)

b) Abuse of the access rights (Article 3(4) of the Commission proposal amending Article 12 of the GDPR)

We support this simplification. Retailers often and increasingly face repeated and manifestly unfounded access requests that create significant burdens without improving data subject protection.

c) Removal of the obligation to inform data subjects when personal data are processed in specific cases (Article 3(5) of the Commission proposal amending Article 13 of the GDPR)

We strongly support this proposal which will create major simplifications for data-driven models and the use of AI-based decision-making systems in retail (e.g. delivery/availability of forecasts and personalized product recommendations requested by the customer). However, a clarification of (related) recital 38 is necessary to ensure that the mere possibility of human involvement does not exclude the existence of purely automated decision-making.

d) Relaxation of notification obligations to the supervisory authorities of a data breach in case of low risks: Article 3(8) of the Commission proposal (amending Article 33 of the GDPR)

The critical aspect of this proposal is what constitutes a "high risk'. Without a clear definition, companies will prefer to stay on safe grounds and keep notifying in case of doubts about the type of risks. Without providing legal certainty on the qualification as "high risk", this proposal will not lead to operational simplification.

We support extension of the deadline for notification to 96 hours as proposed by the Commission, as it provides greater flexibility. However, this deadline diverges from the reporting deadlines for security incidents under the NIS2 Directive (which are shorter). It is rather common that a GDPR incident is triggered by an IT incident requiring notification under NIS 2, while in the future notification will need to take place within the same system (single entry point). This creates confusion for companies and unnecessary burdens. We therefore recommend to align the deadlines under NIS 2 with the new deadline proposed under the GPDR.

e) A harmonised list of data processing activities requiring and not requiring a data protection impact assessment (article 3(9) of the Commission proposal amending Article 35 of the GDPR)

The new Article 35 of the GDPR would task the European Data Protection Board (EDPB) to prepare a harmonised list for both types of processing activities, and to develop a harmonised template and methodology to conduct a data protection impact assessment.

We welcome this step towards greater harmonization, which will allow to simplify the work of retail companies operating in different Member States and reduce fragmentation. Such harmonization should however be organized in a way to ensure it does not impact legal certainty nor create burdens for companies using existing national standards.

Therefore, the new article 35 should foresee the following:

- a 12-month transition period from the applicability of the (future) EDPB list of processing operations that become subject to a data protection impact assessment according to the harmonized list;
- A grandfather clause to allow existing data protection assessments to continue to apply until the new review, or for a maximum of 24 months (provided that they are covered in the list);
- A mapping support from the EDPB to translate national categorisation into equivalent EU categorisation (to ensure a legally compliant transition).

f) Reform of the legal regime for the processing of personal data in the terminal equipment of natural persons (Article 3(15) introducing a new Article 88a for the GDPR and Article 5repealing Article 4 of the e-Privacy Directive)

We support the proposed Article 88a(1) and (2) which consolidate rules for the storing or accessing of personal data on the terminal equipment of natural persons and its further processing into a single set of rules under the GDPR. This will lead to substantial simplification through the elimination of two parallel and slightly diverging regimes for essentially the same activity. We also welcome the new exemption for low-risk processing such as audience measurement and similar activities.

Concerning Article 88a(4), we would like to flag that the proposed rule (one-click refusal of consent with validity of the decision for 6 months) will have a major negative impact on retailers' access to first party data, especially for smaller companies, who risk to see their dependence on third parties increase to access data necessary to be competitive on the retail market. This proposal should also be seen in conjunction with article 88b, with a combined impact, which could be very high, on retailers' ability to benefit from the data economy.

We therefore invite EU policy makers to adopt a more balanced approach to tackle the cookie fatigue, as there is otherwise a high risk that many of the benefits of the other simplification elements will be undone.

We recommend EU policy makers to still allow companies to propose to users a contextual consent request at their first visit of the website (to allow retailers to explain the value offered), and to limit the validity of consent refusal to a shorter period of time (e.g. 3 months).

g) Automated and machine-readable indications of data subjects' choices (new Article 88b of the GDPR)

We have strong concerns about the proposed new Article 88b and invite policy makers to delete Article 88b completely. We consider that Article 88a(4) will already provide a solution to the cookie fatigue through a single click refusal of consent. Article 88b is therefore not necessary to tackle the cookie fatigue and will create multiple issues for companies operating websites. It will also lead to a major decrease in access to fist-party data by retail companies, especially smaller retailers, who will become extremely dependent on third-party data to optimize their products and services.

Some web browsers already offer the possibility to decline automatically consent through add-ons without the need to adjust the existing web infrastructure. The proposed Article 88b, besides leading to major loss of opportunities for smaller companies, also requires a costly adjustment of all web interfaces.

Moreover, a generic and automated browser-level signal cannot satisfy the GDPR's strict requirements for valid consent under Article 4(11) of the GDPR, which requires such consent to be "specific," "informed," and "unambiguous". Such automated signals are by nature 'blind' and apply to all future websites, without any distinction and without allowing users to understand who is proposing to collect their data and for which purpose. Lastly, it is extremely complex (if not technically impossible in some cases) to implement such an automated signal consistently when a given user makes use of different terminals with the same account.

2. Amendments to the Data Act

a) Integration of rules on Data Intermediation services (former Data Governance Act)

We support the Commission proposal to merge the rules of the Data Governance Act into a simplified and optional regime within the Data Act. The proposed new Article 32a to 32f of the Data Act would represent a major simplification and burden reduction for data intermediation services, as such services:

- would not be obliged to notify their activities anymore, unless they opt voluntarily to benefit from the status of recognised entity.
- would no longer be subject to the burdensome requirements of the current Data Governance Act (which represents a major obstacle to the development of such services).

This lighter optional regime (instead of the current Data Governance Act) must be supported.

However, the proposed revised definition of Data Intermediation Services creates legal uncertainty as to whether some data services explicitly excluded from the definition of data intermediation services under the Data Governance Act may suddenly be covered by the new definition (Article 1(2(d) introducing a new Article 2(38a) in the Data Act.

This is the case with services provided by the central office of a cooperative group of independent retailers on behalf of its members. In such settings, the central office of a cooperative group is a separate legal entity intermediating between data holders (the member retailers) and data users (e.g. industry suppliers, or possibly some of their member retailers), even though the central office is in

reality not independent from the data holders (i.e. the member retailers of the cooperative) and was actually tasked by them to perform the data collection/sharing activities it performs. This type of services was explicitly excluded from the definition of data intermediation services through the reference to 'closed groups' and the examples provided in the recitals. We therefore invite the co-legislator to keep the part of the definition used in the Data Governance Act under Article 2(11)(c) and recital 28.

b) Data Act provisions on Business-to-Government (G2G) data sharing obligations (Article 1(5) to 1(14) of the Commission proposal amending Chapter V of the Data Act)

We support the Commission proposal to narrow the scope of Chapter V of the Data Act on B2G data sharing, while maintaining the key safeguards to protect data holders from disproportionate interferences in their rights and legitimate interests. This proposal will increase legal certainty for data holders, while ensuring that public authorities can nonetheless obtain data necessary to solve major crises.

c) Cybersecurity reporting under NIS 2 – single entry point (Article 6 of the Commission proposal)

We welcome the Commission proposal to introduce a single entry point through which entities can simultaneously fulfil their incident reporting obligations under multiple legislation (e.g. NIS 2 Directive, GDPR, eIDAS Regulation and the Digital Operational Resilience Act).

However, we stress that this simplification should only represent a first step, as the introduction of a digital business wallet represents an important opportunity to further simplify and streamline such reporting for businesses. The single entry point proposed should therefore constitute a temporary solution until the digital business wallet is effectively introduced, while ensuring that this digital business wallet allow for a single and central entry point for such mandatory notifications.

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Independent Retail Europe represents 23 groups and their over 479.000 independent retailers, who manage more than 708.000 sales outlets, with a combined retail turnover of more than 1.446 billion euros and generating a combined wholesale turnover of 657 billion euros. This represents a total employment of more than 6.306.000 persons.

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