

Executive Summary

Report on access to non-personal data in the private sector

1. Context

On 30 October 2019, the Federal Council tasked the Swiss Federal Institute of Intellectual Property (IPI) with drawing up a report on access to non-personal data in the private sector. This mandate comes in response to a recommendation which features in the final report by the Future of Data Processing and Data Security expert group¹.

2. Non-personal data

Unlike the term ‘personal data’, Swiss legislation does not provide a definition of the term ‘non-personal data’². Personal data is defined as “all information relating to an identified or identifiable person”³. In contrast, non-personal data is defined as “all data that is not personal data”. This distinction between personal and non-personal data is central because the strict provisions of the Federal Act on Data Protection apply to the processing of personal data, but not to the processing of non-personal data.

Meteorological data⁴, topographical data⁵ and machine-generated data (from machine tools on industrial production lines) constitute non-personal data. Information that is mandatory for the labelling of food-stuffs⁶ or an inventory of tourist attractions in a town or region is also considered non-personal data⁷. In theory, anonymised and aggregated personal data equally constitute non-personal data. However, particular caution should be exercised with regard to this data because technological advances and cross-checking with other non-personal data sometimes make it possible for a person to be re-identified.

3. Content of the report

3.1. Economic conclusions – data economy performs well

The data economy in its entirety significantly contributes to the economic performance of Switzerland. Switzerland’s overall performance in this domain is relatively good compared to other European countries. In 2018, around 182,000 people were employed in the data economy domain in Switzerland. In relation to total employment, the number of data specialists corresponds to 4.4%, which is much higher than the EU average. Growth in the number of employees was also more dynamic in Switzerland (10%) than in the EU (8%).

Products and services based on “the analysis and evaluation of raw data” generated approximately 3.6 billion Swiss francs in 2018. Compared to the previous year, the ‘data market’ experienced a growth of around 8%. The data economy contributed approximately 14.1 billion Swiss francs – around 3% of the total value added in 2018. This represented a growth of almost 20% compared to the previous year.

Non-personal raw data markets are also on the verge of developing in this country. One in four companies generates non-personal data and one in five companies commercialises it. The importance of this data will continue to grow in the future.

¹ Available at: www.news.admin.ch/news/message/attachments/55754.pdf (in German).

² EU legislation and the legislation of other European states also do not offer a positive definition.

³ Art. 3 let. a of the Federal Act on Data Protection (FADP, SR 235.1).

⁴ cf. for example, the ‘data warehouse’ concept of the Federal Office of Meteorology and Climatology MeteoSwiss, available at the following address: www.meteosuisse.admin.ch > Measurement & forecasting systems > Data management (status per 1.03.2021).

⁵ cf. for example, the geodata made available for free by the Federal Office of Topography swisstopo at the following address: <https://shop.swisstopo.admin.ch/> > Free Geodata (status per 1.03.2021).

⁶ cf. for example, the work of <https://food.opendata.ch/> or of www.foodrepo.org (status per 1.03.2021).

⁷ cf. for example, the data made available by the Zurich tourist office: <https://zt.zuerich.com/de/open-data> (status per 1.03.2021).

Therefore, there does not appear to be a clear and significant market failure in the B2B sector. The challenges in harnessing the full economic and social potential of non-personal data strongly vary depending on the sector examined. Consequently, there is no single solution adapted to the different characteristics of the non-personal data market.

Recommendation: Continue to observe the evolution of the data economy in Switzerland. Update the ‘Analysis of the Data Market’ study and submit it to the Federal Council by the end of December 2025.

3.2. Legal conclusions – an adequate legal framework

There is no property right for personal or non-personal data in Switzerland. Switzerland also does not recognise any *sui generis* right for databases, as provided for in Directive 96/9/CE on the legal protection of databases. However, the analysis of the legal situation shows that the current law contains a certain number of norms which enable the assignment of non-personal data and give the owner of the non-personal data extensive control over ‘their’ data.

At the forefront is the protection of manufacturing or trade secrecy (Art. 162 of the Swiss Criminal Code [SR 311] and Art. 5 and 6 of the Federal Act on Unfair Competition [UCA, SR 241, not available in English]). Under the current law, the owners of non-personal data have very broad legal protection.

Based on the current outlook and the results of the commissioned analyses, it is not necessary to introduce a property right for non-personal data. On the one hand, the current markets for the production, use and trade of non-personal data are functioning without a property right for data. On the other hand, it does not appear necessary to provide additional incentives for the collection and analysis of non-personal data as these activities have been constantly growing in the past number of years. Finally, it is unlikely that the introduction of a property right for this type of data would reduce the transaction costs and facilitate access to the data. The same applies for the establishment of a *sui generis* right for databases.

Recommendation: Waive the introduction of a property right for non-personal data or a *sui generis* right for databases.

3.3. Obligatory and FRAND licences – horizontal solutions for access to non-personal data?

A general (horizontal) obligatory licence mechanism for the provision of access to non-personal data in the private sector is theoretically feasible. Notably, it could be created in compliance with international law, in particular the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). However, the analysis demonstrates that such a generalised system would not be advisable due to the difficulties relating to its implementation and the risks that it would pose for the interests of the owner of the non-personal data. On the other hand, it may be appropriate for an obligatory licensing system to be occasionally applied in certain sectors (for example, car manufacturing, aviation and energy). Moreover, competition law already allows for the enforcement of an obligatory license in specific cases.

FRAND licences were developed to ensure access for all to a protected (patented) technology which has become a standard recognised by a state authority or standardisation body. This is known as an ‘standard-essential patent’. However, non-personal data can hardly be equated with a technology that has become a recognised standard. The feasibility of a general FRAND licensing mechanism for access to non-personal data is questionable. This is because of the differences between the standard-essential patents for which the FRAND licences were developed and access to non-personal data. In addition, there is no certification authority for non-personal data which could be considered a standard. It therefore does not seem possible to adopt the FRAND model to create general access to non-personal data between companies. As a result, this approach does not appear appropriate in light of the obstacles it faces.

Recommendation: Waive the introduction of a horizontal system of obligatory and FRAND licences for access to non-personal data.

3.4. Open data, shared data and common data spaces

The concepts of open and shared data and common data spaces⁸, in particular, are promising approaches for facilitating access to non-personal data in the private sector. They are based on the principle of voluntary participation and reflect a liberal understanding of the economy, which guarantees the greatest autonomy possible.

Common data spaces are the subject of a study by the OFCOM and the DIL, which is expected to be published by the end of the year. The study will indicate the areas in which government intervention is needed. The report recommends waiting for the conclusions of this study before taking measures in this domain.

Recommendation: Wait for the conclusions of the OFCOM and DIL report on common data spaces before taking measures in this domain.

3.5. Complementary support measures

When preparing this report, the IPI commissioned specialists to draft an initial series of model agreements designed to facilitate access to non-personal data. An agreement on data transfer, a subscription agreement for access to data and a data exchange agreement are available for free on the IPI website⁹. Commented versions and an explanatory report on all of the model agreements are also available in French, German and English.

The IPI recommends that the Federal Council promote complementary support measures to improve the legal certainty and reduce transaction costs. These instruments may take the form of model agreements, summaries of the legal situation surrounding data, checklists and guides for establishing agreements or best practices for each sector, etc. In this regard, the IPI provides Swiss SMEs with access to model contracts which are designed to encourage cooperation within this field and the exchange of non-personal data.

Recommendation: Promote complementary support measures to improve access to non-personal data in the private sector. The IPI is prepared to take on the coordination of such measures.

⁸ Refers to data centres created and managed in Europe and in which public and private actors can retrieve and integrate data. In this way, personal and non-personal data, including sensitive business data, is secured and companies can easily access a practically infinite amount of high-quality industry data.

⁹ See www.ipi.ch > Intellectual property > IP and society > Data processing and data security (status per 1.03.2021).