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**Data Protection in the
Internal Market
Information System
(IMI)**

NOTE



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT A: SCIENTIFIC AND ECONOMIC POLICY

Data Protection in the Internal Market Information System (IMI)

BRIEFING NOTE

Abstract

This briefing note deals with some data protection aspects of Proposal of the European Commission for a Regulation on administrative cooperation through the Internal Market Information System ("the IMI Regulation). In particular Article 13 of the Proposal extends the data retention period from 6 months, as it is now, to 5 years.

The briefing note investigates whether there are any grounds which justify the extension and assesses the compliance of the Proposal with the existing legal framework.

This document was requested by the European Parliament's Committee on the Internal Market and Consumer Protection.

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EXECUTIVE SUMMARY

The extension of the retention period may only be partly justified for allowing data subjects to exercise their rights effectively (for example by obtaining evidence that an exchange of data via IMI took place in order to appeal against a decision based on the exchanged data). If the sole purpose of the longer retention period were to allow data subjects to better exercise their rights, the Proposal would have to be amended in such a way that the data may only be used for this purpose.

1. SCOPE OF THE PAPER

This briefing note deals with Art. 13 of the Proposal of the European Commission for a Regulation on administrative cooperation through the Internal Market Information System (hereafter: "the IMI Proposal").¹ Article 13 of the IMI Proposal introduces a blocking procedure after a data retention period of eighteen months commencing from the closure of an administrative cooperation procedure for personal data processed in IMI and thus substantially extends the data retention period from 6 months, as it is provided for in Commission decision 2008/49/EC concerning the implementation of the Internal Market Information System (IMI) as regards the protection of personal data, to five years.²

This briefing note investigates whether there are any grounds which justify the extension of the already existing period of six months to up to five years, whether it would be needed by an expansion of the scope of IMI, and whether the proposal complies with the existing legal framework.

2. THE PURPOSE-DEPENDENT NATURE OF DATA RETENTION PERIODS

The appropriate length of any data retention period depends on the purposes for which data is being processed. For assessing the planned extension of the IMI retention period up to five years, the purposes of the IMI need to be taken into account.

Until now, the IMI has not been a tool for file administration in general. Its scope and function are limited to being a tool for the exchange of information between competent authorities in the EU, cf. Art. 3 of the IMI Proposal. The competent authorities may collect and process data relating to their activities, usually including data exchanged via the IMI. Any storage of data in the IMI system could, therefore, simply duplicate data which may be stored in the files of the competent authorities using the IMI anyway.

¹ Proposal of the European Commission for a Regulation on administrative cooperation through the Internal Market Information System, COM (2011) 522 final.

² Commission Decision 2008/49/EC "concerning the implementation of the Internal Market Information System (IMI) as regards the protection of personal data"

Moreover, the IMI is neutral as to its purpose. It creates an infrastructure for the exchange of data in certain fields of the internal market which are regulated by specific EU legislation. At present, the main areas where the IMI is in use are the Services Directive³ and the Professional Qualifications Directive⁴. In future, use of the IMI is envisaged for further purposes regulated in other EU instruments.

Any assessment of the standard of data protection depends on the kind of data and the purposes for which it is being processed. Since the IMI is designed as a multi-purpose tool with room for development by adding further purposes, precisely what kind of data, and for which purposes the latter will be exchanged in the future cannot be foreseen. Any future use may produce its own kind of sensitive data which requires specific tailor-made data protection requirements.

3. DIFFERENTIATION OF DATA RETENTION PERIODS

The IMI Proposal regulates two basic types of rather different functions. Firstly, and mainly, the IMI is designed as a pure data exchange tool. This is in line with the current state of the IMI already in operation. Secondly, the Commission's proposal and some preliminary materials⁵ seem to envisage that the IMI could be developed towards a database which would make certain data that are relevant for the internal market permanently available to IMI actors.

With regard to appropriate retention periods for data processing within the frame of the IMI, these two different main functions may require very different approaches. Whereas for pure data exchange, only a very short storage of data seems necessary (if at all), databases naturally require much longer retention periods. Already this very first observation indicates that a "one size fits all" system of data retention periods will not be feasible in order to balance the effectiveness of the two different basic purposes of the IMI (file exchange v. database).

4. EVALUATION OF ARTICLE 13 OF THE PROPOSAL

There are three main issues related to Article 13 of the IMI Proposal:

1. Whether there are any grounds which justify the extension up to five years of the already existing period of 6 months on the basis of the current IMI system;
2. Whether the potential expansion of the scope of the IMI would necessitate an increase in the retention period;
3. Whether the proposal complies with the existing legal framework, in particular Fundamental Rights and the EU Data Protection Legislation.

³ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

⁴ Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications.

⁵ Commission Staff Working Paper SEC (2011)206 final on Background information related to the strategy for expanding and developing the Internal Market Information System ('IMI') ; Commission Communication COM (2011) 75 final on Better governance of the Single Market through greater administrative cooperation. A strategy for expanding and developing the Internal Market Information System ('IMI').

4.1. Lack of grounds of justification for the extension on the basis of current use of IMI

The current IMI, which has been introduced on the basis of Commission decision of 12 December 2007,⁶ is applicable for the exchange of personal data for the purposes defined in certain EU legislative acts. These legislative acts are the Professional Qualifications Directive⁷, the Services Directive⁸ and, recently, the Posting of Workers Directive⁹. The main activity is the exchange of information between two competent authorities and, in the area of services, the distribution of alerts by one competent authority to many others.

The kind of data exchanged under the IMI follows from these purposes. In particular, the Professional Qualifications Directive requires the storage of much personal data, including very sensitive data such as information about entries into criminal records or other black lists. Furthermore, the alerts issued and distributed via the IMI under the Service Directive¹⁰ may contain very sensitive data on individual service providers.

The Commission has not argued that the six month retention period under the current IMI would be too short for the purposes the system is currently used for. It is even doubtful whether there is a need to keep the data in the IMI after case closure at all. Thus, when the requesting competent authority has received a response through the IMI and closed the case, it is hardly imaginable that there could be a need to retrieve the same data exchanged through the IMI again. Such an example could only be the loss of the data due to fire, a computer crash or faulty organisation. Since such events happen, a reasonably short period of retention following case closure may perhaps be justified. The current six months period seems rather generous for such improbable cases – all the more so as the competent authority can make a new request through the IMI in order to get the lost data back.

4.2. Possible expansion of the scope of IMI and its potential consequences

In its Communication,¹¹ the Commission outlined perspectives for expansion of the scope of the IMI system. Some of these projects are rather technical and probably do not imply the collection of very sensitive data. However, the Communication refers to a list of possible policy areas which could benefit from the use of the IMI as an information exchange tool. Many of these possible uses would require sensitive data to be exchanged via the IMI. Examples are Patients' Rights, Medicinal Products, Civil Status Documents, Gambling, Business Registers and many others. The Communication does not explain why longer data retention periods would be needed.

⁶ Commission Decision 2008/49/EC of 12 December 2007 concerning the implementation of the Internal Market Information System (IMI) as regards the protection of personal data.

⁷ Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications.

⁸ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

⁹ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

¹⁰ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

¹¹ Commission Communication COM (2011) 75 final on better governance of the Single Market through greater administrative cooperation: A strategy for expanding and developing the Internal Market Information System ('IMI').

The Proposal itself contains in its Annex II a much shorter list of potential areas in which provisions on administrative cooperation may be implemented by means of IMI. This includes:

- Internal market and free movement of goods
 - Chapters I and II of the Commission Recommendation of 7 December 2001 on principles for using 'SOLVIT' the Internal Market Problem Solving Network
- Freedom of establishment and to provide services
 - Articles 15(7) and 39(5) of the Services Directive¹²
 - Article 426 of the Posting of Workers Directive¹³
 - Article 327 of the Directive on electronic commerce¹⁴
 - [Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directives 89/666/EEC, 2005/56/EC and 2009/101/EC as regards the interconnection of central, commercial and companies¹⁵]
- Free movement of persons
 - Article 6 of the Patient rights Directive¹⁶
- Freedom of capital and payments
 - [Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the professional cross border transport of euro cash by road between euroarea Member States¹⁷]

These examples follow the traditional approach of the IMI as a tool for data exchange. There is no indication or explanation in the IMI Proposal why these purposes would require longer data retention periods.

It should be noted, however, that a Commission Staff Working Paper (SEC (2001) 206)) issued along with COM (2011) 75 envisaged the IMI to be developed towards an "Information Repository" offering structured storage capacity for data exchanged or uploaded within the IMI (p.6). If such a fundamental shift of the purpose of the IMI from a tool for exchange of information towards a tool for file administration were intended, longer retention periods would be necessary. The Proposal indeed contains a rather vague and general provision which points towards this direction (cf. Art. 13 (2)).

¹² Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market

¹³ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services

¹⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market

¹⁵ COD/2011/0038

¹⁶ Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare

¹⁷ COD/2010/0204

4.3. Compliance of the IMI proposal with the existing legal framework

The current EU data protection legislation is under review. Until then, the (old) Data Protection Directive¹⁸ and Regulation¹⁹ provide the benchmark. Article 4 (1)(e) of the Regulation states that personal data must be kept no longer than is necessary for the purposes of which the data were collected or are further processed.

In the Explanatory Memorandum of the Proposal, the Commission has argued that the proposed retention period of 18 months until blocking and of 5 years until deletion would be in line with the decision of the Court of Justice in the *Rijkeboer* case.²⁰ In that decision, the ECJ took a stance on the right of data subjects under Art. 12 of Directive 95/46/EC to obtain information on data being disclosed. The ECJ held that rules limiting the storage of information on the recipients of personal data and on the content of the data disclosed to a period of one year and correspondingly limiting access to that information, while basic data is stored for a much longer period, do not constitute a fair balance of the interest and obligation at issue.

From this case, one could therefore indeed conclude that information on the recipients of personal data and on the content of the data disclosed should be stored long enough to allow data subjects to effectively exercise their rights (for example by obtaining evidence that an exchange of data via IMI took place in order to appeal against a decision based on the exchanged data).

In the *Rijkeboer* case, the ECJ identified a number of parameters which may be taken into account for fixing the data retention period, including in particular applicable provisions of national law on time-limits for bringing an action by the data subject (cf. para 63 of the judgement). It is, thus, for the EU legislators to fix a time-limit for storage of information on the exchange through the IMI and on the content of the data exchanged, and to provide for access of the data subject to that information which takes into account the interest of the data subject in protecting his or her privacy, in particular by way of his or her right to bring legal proceedings. Since prescription or limitation periods in the Member States may vary, a period of five years may be appropriate – as long it is guaranteed that the data is blocked and can only be retrieved with the data subject's consent.

If the sole purpose of the much longer retention periods in Art. 13 (1), (4) of the IMI Proposal is to allow data subjects to better exercise their rights, Art. 13 (1), (3) of the Proposal would have to be amended in such a way that the data may only be used for this purpose after the short 6 month period of the current IMI has expired.

Article 13 of the Proposal as presently drafted is therefore not fit for its current purpose.

¹⁸ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

¹⁹ Regulation (EC) 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

²⁰ Case C-553/07 *Rijkeboer* [2009] OJ C153, paragraph 63.

Example:

One competent authority requests information on a professional against whom a complaint has been made in the competent authority's Member State from a competent authority in another Member State in which the professional has obtained his or her professional qualification. The purpose of the request is to confirm that the professional in question is qualified to practice. That is, the purpose of the request is exchange, not retention. Retention is only needed of an exchange having taken place. This would be the case where incorrect information about the professional was exchanged which led to his or her dismissal in the Member State of the requesting competent authority. So that the professional may claim damages resulting from the exchange of incorrect information, it is important that a record is kept of the request. It is clear that in the ordinary case keeping the information 'active' or unblocked for longer than six months is disproportional. The retention of information in its blocked form should correspond to the prescription period for claims against the competent authorities.

5. PROPOSED AMENDMENT OF ARTICLE 13: RETENTION OF PERSONAL DATA

Art. 15 of the Data Protection Directive²¹ contains a model which could be used for redrafting the Proposal in the light of the observations made in this paper. Under this article the data subject has the right to obtain information about a previous processing of data relating to him or her and, if so, certain particulars relating to the processing. A tentative reformulation of Art. 13 of the IMI Proposal could read as follows:

1. Personal data processed in IMI shall be blocked at the latest six months after the formal closure of an administrative cooperation procedure.
2. ...
3. Personal data blocked pursuant to this Article shall, with the exception of their storage, only be processed with the data subject's consent.
4. The blocked data shall be automatically deleted after five years have elapsed from the closure of the administrative cooperation procedure.
5. The Commission shall ensure by technical means the blocking and deletion of personal data and their retrieval in accordance with paragraph 3.

²¹ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data

6. CONCLUSION

Article 13 of the IMI Proposal substantially extends the current data retention period for data exchanged through the IMI. An ideal data retention period cannot be constructed in the abstract from the IMI system itself. This is because the IMI is a tool which can be put to several uses. Therefore an appropriate and proportional data period depends upon how it is intended to be used. If the IMI is used as a database then longer retention periods are necessary. If, however, the IMI is used to transmit data instantaneously, then there is no need for a data retention period other than to record the fact of an exchange having taken place on a particular data subject and the type of data exchanged. It is the instantaneous use to which the IMI is being presently put and it is clear that under the IMI Proposal this would continue to be its predominant purpose. Article 13 as it currently stands is therefore not fit for purpose and does not conform to the current data protection regime. However, this could be easily remedied by making blocked data held for the extended five year period only accessible with the data subject's consent. Also, in the same vein, blocking personal data processed shortly after the formal closure of an administrative cooperation procedure should be considered. The six months period of the current IMI seems long enough for the purposes of instantaneous use, even perhaps rather generous. If the IMI is used exceptionally to store data, then the purposes of data exchange defined in the numerous EU legislative acts which constitute the current framework must be amended accordingly on a case by case basis to accommodate the much longer data retention period.

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