The position of the State Archives of Belgium on the Digital Omnibus Proposal

Why centring the archives is crucial when regulating data

Louise de Béthune, CiTiP – State Archives of Belgium

Laura Drechsler, CiTiP – Open Universiteit – State Archives of Belgium

Introduction

This paper is a response to the public consultation regarding the Digital Omnibus Proposal (DOP) by the European Commission. The DOP introduces amongst others two important changes that directly impact archiving by a state archive. First, the DOP merges the Open Data Directive (ODD), the Data Act (DA) and the Data Governance Act (DGA) into one data law. Second, the DOP introduces changes to the General Data Protection Regulation (GDPR), NIS2 Directive, CER Directive, the Regulation on the single digital gateway, EU Data Protection Regulation and the ePrivacy Directive, and annuls the Regulations 2018/1807 and 2019/1150. This position focuses on these two changes and proposes concrete improvements to better align the planned legislative reform with the essential state activity of public archiving. Without such amendments, we see a risk that the role public archiving plays for democratic accountability is (further) undermined.

A. From public interest to economic benefit

Archives are recognised as authoritative sources of information underpinning accountable and transparent administrative actions.[1] Thereby they fulfil an important role for democracy.[2] Freedom of information is a fundamental right, enshrined in the Charter of Fundamental Rights of the European Union (Charter).[3] Built upon this right, access to data has been granted on multiple occasions where the public interest overrides individual rights to data.[4]

The first problem of the DOP relates to the merger of the Open Data Directive (ODD), the Data Governance Act (DGA) into the Data Act (DA). While the former two pieces of legislation aim at balancing the interest of the public (including the private sector) into public information with various rights protecting said information (such as data protection rules and IP rights), the latter aims at data sharing between the private sector in the concrete context of connected products. As such the different laws have very different objective and a different relation to public interest. Both the ODD and

[1] Universal Declaration on Archives.
[2] Idem.
[3] Art. 11 EU Charter of Fundamental Rights.
[4] Recital 16 Open Data Directive.

the DGA are shaped by the public interest in the information in question, with the intention to enhance the democratic narrative of access to data (information). This is not the case with the DA. By merging these different pieces of regulations, the DOP undermines the public interest component previously present when it comes to accessing public sector data as it assimilates commercial re-use with open data.

It is unclear whether the collective public interest is still a consideration of relevance for the DOP. The proposal addresses in one breath both commercial and non-commercial re-use of public sector data,[5] as if a distinction never mattered. In reality access to and re-use of certain data, including sensitive data, may be permitted under the right circumstances for purposes in the public interest, including research, while excluding commercial re-use.[6]

Only with regard to the possibility to charge fees, a vague exception is introduced for non-commercial re-use.[7] Thus non-commercial re-use is also monetised. With three out of four points focussing on business and economic benefits, the proposed extension of high value datasets is indicative of the Proposal's approach in assimilating value with economic gains.[8] As it stands, the public interest is no longer addressed by the proposed Act.[9]

It is important to note that in this case diminishing the public interest will not improve market interests since they are not inherently opposed to each other. This aligns with the findings that regulation does not inherently hamper innovation.[10] Except for trade secrets, data shared for the public interest does not diminish its value for commercial re-use.[11]

Fundamental rights and shared moral values were considered to shape the EU digital single market and even inspired legislation in other countries via the so-called 'Brussels effect.' Turning away from that paradigm,[12] the Omnibus Proposal risks letting market values shape fundamental rights. Trading the democratically oriented open access for access and reuse for business profit, turns the archives into a mine for looting and data mining. At the same time, however, archives all over Europe are overlooked and underfunded.

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[5] See for example Art. 1(2) (e)(52) Digital Omnibus Proposal.
[6] Recital 7 DGA; art. 5(3) DGA.
[7] Art. 32y (2) Digital Omnibus Proposal.
[8] Art. 32v (2) Digital Omnibus Proposal.
[9] J. Ouyang, 'The Omnibus Comeback of the Neoliberal EU', *Verfassungsblog*, 2025, https://verfassungsblog.de/the-omnibus-neoliberal-eu/.
[10] A. Bochon, *Position Paper on the initiative for a European Innovation Act (EIA)*, 2025.
[11] N. Purtova, G. Van Maanen, 'Data as an economic good, data as a commons, and data governance', *Law Innov Technol*. 2023, 51.
[12] F. Bieker, K. Nolan, 'European AI FOMO, The European Commission Sacrifices the Digital Acquis at the Altar of AI Hype', *Verfassungsblog*, 2026, https://verfassungsblog.de/eu-digital-law-ai-fomo-omnibus/.

Specific recommendation:

Given the above, we caution the European Commission against merging three pieces of legislation driven by such fundamentally different objectives and values. If a merger is deemed essential, then it should be the ODD and the DGA that are merged (at least the part of the DGA concerning the sharing of public sector data). This could then be taken as an opportunity to be more precise about the different uses of public sector data. Commercial re-use of data can no longer be considered on the same level as access to public institution data by society for purposes of research (including family research) and democratic accountability. Public archives should not be made into harvesting grounds for non-EU AI companies, as this would go against the intentions behind the efforts of archival preservation. Rather changes to the ODD and the DGA should enhance the role of archives for democratic accountability and take into account the variety of reasons why society seeks access to public data, with a preference to those reasons that are covered by other fundamental rights and values.

B. A distinction that is none: documents and data

The DOP reappropriates the notion of documents from the ODD. However, the definition of document is altered as the ODD allowed for a broad interpretation.[13] Under the DOP, a document is defined as 'non-digital content',[14] which introduces a seeming distinction between documents and data. Yet, both concepts are also generally collated throughout the DOP as if to indicate their equivalence.

At the same time, the original definition of data from the Data Act is preserved, meaning any digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audio-visual recording.[15] Thereby, encompassing digital and digitised documents.

Enforcing the distinction between physical documents and digital data, the DOP would exempt archival institutions from all obligations and rights related solely to data, when it comes to the paper archives they hold. Nevertheless, in the archival contexts many records exist in twofold, as it were in two dimensions, in their original analogue format and subsequently as a digitised record. Applied in the archival context the proposed rules would apply differently to the same content, and this merely depending on the format.

Moreover, the concept of personal data entailing 'any information relating to an identified or identifiable natural person'[16] is widely understood as covering both

[13] Art. 2(6) Open Data Directive.

[14] Art. 2(e) (48) Digital Omnibus Proposal.

[15] Art. 2(1) Data Act.

[16] Art. 4(1) GDPR.

Ruisbroekstraat 2, 1000 Brussel | Tel: +32 (0)2 513 76 80 | Fax: +32 (0)2 513 76 81
E-mail: algemeen.rijksarchief@arch.be | http://arch.arch.be

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digital and analogue formats.[17] Unsurprisingly, introducing a different understanding of 'data' as only including digital records in the DOP leads to confusion. This is particularly impactful in the archival context, where both documents and data are processed, including personal and non-personal data.

Archives, held by both private and public sector bodies, are a major source of documents, with some holding kilometres of analogue records. Even though a distinction between digital and non-digital material can be valuable, it is important that both its scope and the rules applicable to non-digital documents are aligned with the archival reality. As it stands the distinction between 'documents' and 'data' is insufficiently clarified to ensure legal certainty. While 'data' is mentioned 1770 times, the word 'documents' only occurs 149 times in the text of the Proposal. Moreover, reference to documents is only made in the context of the public sector. Contradictorily enough, documents do not feature in the title of the section on re-use of open government data.[18] Either forgetting the analogue counterpart or indicating that digitisation of all public sector documents is the ultimate goal.

If only documents held by public sector bodies are understood under the notion of 'documents', this begs the question what rules are applicable to documents held by private entities. Preserving this distinction between 'documents' and 'data' while incorporating the ODD into the DOP seems to exempt physical files held by private entities from its scope. As such, public archives have to consider the proposed DOP for both the analogue and digital records they hold, while private archives only have to take it into account when it comes to their digital records as well as their analogue records to the extent that they contain personal data. A void appears as to the fate of privately held documents.

The differentiation between data and documents is certainly relevant when it comes to their access and reuse, the elevated costs associated with the sharing of analogue records being one of them. However, in order to protect the rights and access to the data, differentiation on the basis of formats creates problematic distinctions. If anything, such an approach implies the obsolescence of documents. If only data hold economic value, documents would merely be the paper burden of public sector bureaucracy, to be digitised as soon as possible. It is important to recognise that such a digital transition will not happen in the blink of an eye, but will a lot of take time considering the large collections of analogue records held by archives.

As indicated above the distinction between documents and data is currently either superfluous or lacking in the DOP. Moreover, it remains unclear how the distinction

[17] Recital 15, art. 2(1) GDPR; art. 1(1) Decision of the EDPS of 25 November 2025 on records and archives management (2025/2608).
[18] Chapter VIIc, Section 2 Digital Omnibus Proposal.

Ruisbroekstraat 2, 1000 Brussel | Tel: +32 (0)2 513 76 80 | Fax: +32 (0)2 513 76 81
E-mail: algemeen.rijksarchief@arch.be | http://arch.arch.be

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between data and documents is made, corroborating the arbitrary origins of this distinction.

Specific recommendation:

To address the legal confusion stated above, there are according to us two ways to facilitate the task of the archives while strengthening the DOP. We suggest introducing distinct rules for documents, aligned with the archival reality, considering their primary impact on archives. Otherwise, in the absence of legal reasonings, including documents into the definition of 'data' would strengthen the legal protection while aligning with the definition of personal data. Furthermore, exceptions and distinctions should be introduced in light of the complexities of handling analogue files, acknowledging the specificity and cost related to these formats where necessary.

C. The archives are not the public archives[19]

A final complication of applying the current EU data legislation to archives is the lack of an EU wide definition for archival entities, despite them being mentioned on different occasions.[20] The DOP would have been an opportunity to clarify the EU law understanding of archives, but it has not been taken up. If the archives are forgotten, it is the long term perspective which is really being ignored.

The notion of archives is a debated one. The meaning of archives can range from a collection of records to repositories, including public or private entities, to philosophical concepts of knowledge.[21] In its Decision of 2025 the European Data Protection Supervisor (EDPS) defined the concept of 'archives' as 'records to be permanently preserved for their administrative, fiscal, legal, historical or informational value'.[22] In doing so, the EDPS clearly and understandably focusses on the records held by the archival entities rather than on the entities themselves. It remains unclear how archival entities are understood in EU law.

While it is clear that the archives envisioned by the DOP are the archival repositories, for the sake of clarity, we advise to adopt a clear definition of 'archives' as 'entities preserving data and documents, responsible for their accessibility' based on the understanding of the International Council of Archives.[23]

[19] M. Casswell, 'The Archive' is Not an Archives: Acknowledging the Intellectual Contributions of Archival Studies', in A. Prescott, and A. Wiggins (eds), *Archives: Power, Truth, and Fiction*, Oxford Academic, 2023, https://doi.org/10.1093/oxfordhb/9780198829324.013.0002.

[20] See for example recital 65 Open Data Directive; art. 1(2) (j) and 3 (2) Open data directive; recital 12 DGA.

[21] Idem.

[22] Art. 2 (a) Decision of the EDPS of 25 November 2025 on records and archives management (2025/2608).

[23] ICA Universal declaration on Archives.

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E-mail: algemeen.rijksarchief@arch.be | http://arch.arch.be

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Moreover, there is currently no indication whether the exceptions for ‘libraries, museums, and archives’[24] always address the same entities and include both public and private archives. This leads to unnecessary legal uncertainty as to the applicability of these articles of the DOP. Therefore, clarification as to the public or private nature of the entities envisioned by these exceptions is needed.

Specific recommendation:

To improve legal certainty when it comes to the obligations of archives, we are in favour of the implementation of an EU wide definition of archives, as ‘entities preserving data and documents, responsible for their accessibility.’

In light of the distinctions between public and private sector data upheld by the DOP, we recommend adding an explanation of the distinction between the public and private nature of archives to the text to clarify the scope of applicability of these archival exceptions.

Conclusion

Based on the above, we propose the following six changes to the DOP in order to better enable the crucial functioning of archival institutions:

A. Reconsider the merging of the ODD, the DGA and the DA:

1) Instead conduct an impact assessment for merging the ODD and the relevant section of the DGA.
2) A merger of the ODD and the DGA should strengthen the differentiation of open data and commercial re-use when it comes to public sector data access.

B. Clarifying the legal regime for documents:

3) The different rights and obligations for documents should either be rewritten or the distinction between documents and data should be eliminated.
4) Complementing the Digital Omnibus Proposal as to fit the needs and reality of entities - in particular taking into account the archives - handling these analogue documents by inserting, where needed, exceptions and specifications for analogue documents.

C. Defining and recentring the archives:

5) A definition of archives should be included based on the concept of archival repositories by the International Council on Archives, taking into account archival practices. As such archives can be defined as: ‘entities preserving data and documents, responsible for their accessibility’.
6) To enhance clarity, the public or private nature of the archives in scope should be clarified, depending on the article.

[24] See for example Art. 32i (3) (b) (i) Digital Omnibus Proposal.

Ruisbroekstraat 2, 1000 Brussel | Tel: +32 (0)2 513 76 80 | Fax: +32 (0)2 513 76 81
E-mail: algemeen.rijksarchief@arch.be | http://arch.arch.be

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