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**BENEFITS AND CHALLENGES OF PRIVATELY HELD DATA IN THE  
STATISTICAL AGENDA: LEGAL CONCERNS ABOUT INFORMATIONAL  
PRIVACY AND THE ROLE OF THE PUBLIC INTEREST**

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***Abstract***

*Access to privately held data and innovative methods of data processing and statistical production can clearly be a game changer for statistical authorities and the compilation of official statistics. However, these methods raise concerns on the balance between the need of information in society versus the respect of fundamental rights, thus making it necessary to explore the nature and limits of public interest as a basis for privacy limitations. Considering also that use of data for the public good is one of the main principles mentioned in data ethics discussions, we aim to address the service of public interest in the contemporary and future production of Official Statistics, mostly from a legal perspective.*

*Our aim is to explore whether and how public interest can be a legal tool to justify limitations of privacy and other fundamental rights i.e. commercial freedom for the production of official statistics, thus building trust and ensuring public acceptability of statistical work.*

**I. INTRODUCTION**

1. Access to privately held data has the potential, either on its own, or in combination with data from other sources, to revolutionise statistical practice by proliferating the data input and providing timely information when needed. Many statistical experts enthusiastically present the potential of telecom data, utilities data, internet data, payment data for better official statistics. Several national statistical authorities have already implemented projects based on privately held data, either for regular statistical production or on a pilot basis. Actually, the numbers of these projects have increased in the aftermath of the pandemic which created new needs for more and speedier information.<sup>2</sup>

2. In a Position Paper, presented by the European Statistical System (“ESS) in 2017, it was admitted that *‘persisting obstacles and the lack of clarity concerning the conditions on access to*

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<sup>2</sup> European Statistical System (ESS), Position Paper on the future Data Act proposal (June 2021)

*privately-held data which are of public interest are hindering the capacity to fully exploit the potential of the Digital Single Market*<sup>3</sup>.’ Uncertainty was detected in terms of issues such as data ownership, privacy and data protection, practical modalities of access, costs issues and it still remains unresolved. Actually, in June 2021, the ESS reiterated that *‘ensured, sustainable access to privately held data is the main challenge to unlock the power of data for better official statistics’*.<sup>4</sup>

3. Our aim is to shed some clarity to privacy concerns relating to privately held data from a legal perspective, with references to the Greek legal regime, in combination with EU and international law which has immediate effect. Although the use of privately held data entails significant challenges from a methodological perspective<sup>5</sup>, it is not our aim to delve into the methodological concerns in terms of design and implementation of the projects.

4. Among ESS Member States questioned about the status of access to privately held data, only 6 out of 24 EU countries stated that their laws had no provision for general access to privately held data. However, the majority indicated that the conditions for this access need to be set in more clear terms. Moreover, even in states where their legal toolbox includes a specific provision for general access to privately held data, this provision is not an effective mechanism on its own. Either more partnership efforts help with the implementation, or the relevant provision is not systematically used, like in Greece<sup>6</sup>. Several data providers express privacy concerns as justification. The relevant provision of the Greek Statistical Law was enacted in 2010. At the time, Greece had not experienced the Big Data’s revolutionary impact yet and it can be assumed that the legislator had simply visioned the transmission of specific tables including microdata to statistical agencies upon specific request. Therefore, understandably the legislator did not deal with the privacy concerns which emerged as a result of the massive digitalization of every aspect of our life.

5. Certainly, since then, the national and international legal landscape, adapting to the technological changes has changed and has been enriched with new legal texts, case law and new guidance. However, well-established legal principles and fundamental human rights texts continue to govern the innovative data tech initiatives. From a legal perspective, the systematic integration of privately held data into the statistical processes gives rise to noteworthy issues that prompt a legal professional to elaborate upon and find workable solutions which will safeguard the credibility of a national statistical authority. In our paper we will examine whether the provisions about the right to privacy can achieve appropriate balances between the individuals’ concerns with their privacy and the role of the statistical systems to serve *‘the Government, the economy and the*

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<sup>3</sup> European Statistical System (ESS), *Position Paper on Access to Privately Held Data which are of public interest: Opening up new data sources for a new generation of official statistics in light of the growing European Digital Single Market and the revision of the Public Sector Information Directive* (November 2017)

<sup>4</sup> European Statistical System (ESS), *Position Paper on the future Data Act proposal* (June 2021)

<sup>5</sup> See more in SOGETI Luxembourg-Alma Rutkauskiene, *Ethical Review of using Big Data sources for official Statistics*(Eurostat, 2017) 9

<sup>6</sup> Article 2, paragraph 3 of the Greek Statistical Law (No 3832/2010) foresees that *‘the legal entities under private law, the associations of individuals and natural persons are obliged to grant EL.S.S. agencies access to all the sources, records, or files kept in printed, electronic or other form and provide, in an accurate and timely manner, any data or primary information requested by these agencies for the performance of their duties. The data and information mentioned in this paragraph are used by EL.STAT. and the other EL.S.S. agencies for the production of official statistics, as it is specifically set out in the Regulation on Statistical Obligations.’*

*public with data about the economic, demographic, social and environmental situation*'.<sup>7</sup> (sections IV and V) To provide the answer, we attempted to illustrate the conceptual content of the crucial notions: the right to privacy (section II) and the public interest (section III).

## II. PRIVATELY HELD DATA AND THE RIGHT TO INFORMATIONAL PRIVACY

6. In the first place, privately held data is data concerning individuals, which had been collected for purposes other than statistical production by third private parties. Gaining access to this data and using them for a new purpose give rise to privacy considerations. In this section we will explore the conceptual meaning of privacy to grasp 'its essence' and its 'core elements' and provide ourselves with a compass for our assessment.

7. The protection of informational privacy can fall either within the provision stipulating the right to private life<sup>8</sup> or privacy<sup>9</sup> or the right to data protection<sup>10,11</sup>. In the context of the Council of Europe, where the initial Convention<sup>12</sup> (ECHR) does not explicitly provide for a specific right to data protection<sup>13</sup> Member States set forth a new Convention with a view to '*extending the safeguards for everyone's rights and fundamental freedoms, and in particular the right to the respect for privacy*'.<sup>14</sup> This shows us that law follows and adapts to technological development throughout the years.

8. The right to private life encompasses '*the right to a form of informational self-determination, allowing individuals to rely on their right to privacy as regards data which, albeit neutral, is collected, processed and disseminated collectively*'.<sup>15</sup> In addition, the underlying aim of Article 8 is to secure '*to individuals a sphere within which they can freely pursue the development and fulfilment of their personality*'.<sup>16</sup> It is worth our attention that the right to privacy is very often linked to the values of human dignity and well-being<sup>17</sup>, personality development<sup>18</sup>, physical and psychological integrity (Söderman v. Sweden, [GC], § 80). Under this rationale, scholars consider privacy as a prerequisite for a free self-development and a free and democratic participation in the

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<sup>7</sup> UN Fundamental Principles for Statistics, Principle 1

<sup>8</sup> The right to private life as enshrined in Article 8 of the ECHR encompasses: (i) a person's physical, psychological or moral integrity, (ii) his privacy and (iii) his identity and autonomy. See more: Council of Europe, *Guide on Article 8 of the European Convention on Human Rights* (December 2020)

<sup>9</sup> Universal Declaration of Human Rights (UDHR) Art. 12, International Covenant on Civil and Political Rights Art. 17, European Convention of Human Rights Art.8, Charter of Fundamental Rights of the European Union Art. 7, Greek Constitution Art. 9

<sup>10</sup> Charter of Fundamental Rights of the European Union Art 8, Greek Constitution Art 9A

<sup>11</sup> On this issue, see Juliane Kokott and Christoph Sobotta, 'The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR' (2013) 4 (3) *International Data Privacy Law*, Volume 3, Issue 4, November 2013, Pages 222–228, <https://doi.org/10.1093/idpl/ipt0171>

<sup>12</sup> European Convention of Human Rights (ECHR)

<sup>13</sup> However, in line with the Court's interpretation 'the protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8' See European Court of Human Rights, *Guide on Article 8* (December 2020) and ECtHR, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], §§ 133-134

<sup>14</sup> See CoE, *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*

<sup>15</sup> European Court of Human Rights (ECtHR), *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], §§ 133-134

<sup>16</sup> ECtHR, *Guide on Article 8* (December 2020) § 220, ECtHR, *A.-M.V. v. Finland*, § 76; *Brüggemann and Scheuten v. Germany*, Commission decision; *National Federation of Sportspersons' Associations and Unions (FNASS) and Others v. France*, § 153

<sup>17</sup> ECtHR, *Beizaras and Levickas v. Lithuania*, § 117

<sup>18</sup> ECtHR, *Von Hannover v. Germany*, (no. 2) [GC], § 95

society.<sup>19</sup> Privacy is perceived as an instrument to achieve a higher purpose and more specifically *'as an instrument for fostering the specific yet changing autonomic capabilities of individuals'*.<sup>20</sup> Such an approach actually underlines the utmost importance of protecting privacy for an individual's well-being and a society's democratic progress. Indeed, it is not difficult to imagine how one's continuous preoccupation with the possibility of being monitored without knowing or uneasiness for not controlling information about himself can affect his behavior and freedom of expression. This is a potential risk in case of non-transparent access to privately held data. But even if transparent, such access can easily shape one's behavior.

9. In view of the ECtHR, *'private life considerations arise where there has been compilation of data on a particular individual, processing or use of personal data or publication of the material concerned in a manner or degree beyond that normally foreseeable.'*<sup>21</sup> Similarly, the German 'Bundesverfassungsgericht' (German Federal Constitutional Court) in its first judgement on data protection in light of the German Constitution held that the right to informational self-determination is substantially jeopardised in case of secret interventions and data linkage.<sup>22</sup> Accordingly, the secondary collection<sup>23</sup> of the privately held data for statistical purposes entails considerable risks for the individuals' privacy.

10. Interestingly, the German Court's landmark judgment on the link between data protection and the informational-self-determination concerned the population census which was initiated by the Federal Government in 1982<sup>24</sup>. The new right to informational self-determination derived from the right to personality which, in German legal history, had been recognized as being founded on a combination of the protection of human dignity and the protection of general personal liberty. The Court accepted the purpose of the census but called for further procedural and organisational safeguards to protect citizens' fundamental rights: intervention to the right of self-determination could only be permitted in order *'to further a general legal interest (Rechtsgut) of constitutional status'*.<sup>25</sup> In addition, any act interfering with the citizen's right to informational self-determination should be based on a specific act, characterized by clarity and certainty. According to the judgment, if the intervention is necessary, citizens must be able to assess the risks for their personality

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<sup>19</sup> Gerrit Hornung, Christoph Schnabel, 'Data protection in Germany I: The population census decision and the right to informational self-determination' (2009) 25 (1) Computer Law & Security Review 84

<sup>20</sup> Antoinette Rouvroy and Yves Poulet, 'The Right to Informational Self-Determination and the Value of Self-Development: Reassessing the Importance of Privacy for Democracy' in S., Gutwirth et al. (eds), *Reinventing Data Protection?* (Springer, 2009)

<sup>21</sup> European Court of Human Rights (ECtHR), *Satakunnan Markkinapörssi Oy* §§ 136-138

<sup>22</sup> Bundesverfassungsgericht, decisions volume 65, p. 1 ff. In view of the Court, the way in which additional information is collected in these two cases poses substantial risks for the individual. Firstly, the intimidating effect of secret data processing activities is much higher and, besides, undermines the democratic communication. Secondly, through the combination of apparently harmless information, new and sensitive data referring to the person can be generated. In this case, the collecting entity may be able to gather information about the individual which he/she never disclosed. Thus, a person cannot decide for him/herself which personal information will be revealed in his/her social environment.

<sup>23</sup> Council of Europe, Explanatory Memorandum Recommendation of the Committee of Ministers No.R (97) 18 to Member States concerning the protection of personal data collected and processed for statistical purposes (adopted on 30 September 1997) par. 15,22, 69. 'Secondary collection' from public or private agencies which hold information concerning individuals refers to the processing for statistical purposes of personal data originally collected for non-statistical purposes.

<sup>24</sup> For more information on 'Bundesverfassungsgericht' judgment see Gerrit Hornung and Christoph Schnabel, 'Data protection in Germany I: The population census decision and the right to informational self-determination' (2009) 25 (1) Computer Law & Security Review 84

<sup>25</sup> Gerrit Hornung, Christoph Schnabel, 'Data protection in Germany I: The population census decision and the right to informational self-determination' (2009) 25 (1) Computer Law & Security Review 84

emerging from processing of their personal data. Thus, they must be informed about the scope, intensity, and purpose(s) of the data processing.

11. Despite the rapid advancements of digital technologies, the aforementioned considerations are still relevant today, and underlie the most recently adopted legal texts in the field of data protection. The Convention 108+, which was adopted in May 2018, in alignment with the provisions of the General Data Protection Regulation, aims to empower individuals to exercise the right to personal autonomy and the right to control one's personal data, which stems in particular from the right to privacy and establishes a link between data protection and the dignity of individuals. Its Explanatory Report proclaims that *'human dignity requires that safeguards be put in place when processing personal data, in order for individuals not to be treated as mere objects'*.<sup>26</sup>

12. The Preamble of this Convention points out that *'the right to protection of personal data is to be considered in respect of its role in society and it has to be reconciled with other human rights and fundamental freedoms.'*<sup>27</sup> Similar are the provisions in other EU and international Conventions with regard either to the right of privacy<sup>28</sup> or the right to data protection. These provisions indicate that despite its great importance for the individual and the democracy, the right to privacy is not absolute. Instead, it may be subject to restrictions under specific circumstances.

13. All statistical collections of individuals' data entail a degree of privacy invasion. However, at least until recently, this rarely led to infringement of the right.<sup>29</sup> CoE<sup>30</sup> suggested that since the data are used only to produce statistical results and the results themselves are aggregated and impersonal, there is no threat of infringement of privacy. However, technological developments may pose 'hidden' risks to privacy. In 1997, CoE identified higher risks to privacy when individual data that appear to be anonymous (without any link to identification data) may nevertheless in

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<sup>26</sup> Council of Europe Explanatory report Convention 108 +, par. 10

<sup>27</sup> Council of Europe, Convention 108+, Preamble

<sup>28</sup> The conditions for legitimate limitations may be either foreseen specifically in relation to the right to privacy or may be stipulated as a general limitation clause. For instance:

**ICCPR, Art 17 par.1:** *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.* See also § 3, 7, 8, UN Human Rights Committee, 'General Comment No. 16 Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (adopted on 8 April 1988) <<https://www.refworld.org/docid/453883f922.html>> accessed 1 September 2021,

**ICCPR, Art 5 par. 1:**

*Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant. 2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.*

**European Convention of Human Rights Art 8 par.2**

*There shall be no interference by a public authority with the exercise of this right [right to private life] except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

**EU Charter of Fundamental Rights, Article 52 par. 1**

*Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.*

<sup>29</sup> Ivan P. Fellegi, 'Characteristics of an Effective Statistical System' (1996) 64 (2) International Statistical Review 165-187

<sup>30</sup> Council of Europe, Explanatory Memorandum Recommendation No.R (97) 18 of the Committee of Ministers to Member States concerning the protection of personal data collected and processed for statistical purposes (adopted on 30 September 1997) § 27

some cases be indirectly identifiable. They pointed out that informative data (such as age, sex, occupation, residence, family status, etc.) may render possible to trace the identity of the person concerned. A higher risk could be also hidden where statistical results refer to a small number of individuals and they may also occasionally be used, by means of analyses and cross-checks, so that the identity of the individuals may be revealed (e.g. very small geographical units or when a small group of persons occupies a dominant position in a given population). In these cases, dissemination of aggregates should be performed very carefully.<sup>31</sup>

14. Big data<sup>32</sup> and methods of big data analytics facilitate and accelerate linkage of vast amounts of data, which even if they are de-identified, may result in revealing the identity of people.<sup>33</sup> The greater the amount and the variety of data, if of good quality, the greater the potential benefit to individuals' health, housing conditions, public transport, climate and environment. However, data accumulation intensifies the 'mosaic effect'<sup>34</sup>, the identification of a person by combining distinct pieces of data, which do not pose a privacy risk when they are used independently. For this reason, statistical authorities need to apply the data protection and confidentiality framework to data acquired by third parties (secondary data sources), because these datasets contain individuals' data directly or indirectly identifiable.<sup>35</sup>

### III. PRIVATELY HELD DATA, THE PUBLIC INTEREST AND THE PUBLIC GOOD

15. In most cases, interference with privacy in the context of public statistical activities is justified on the basis of 'public or general interest'. Admittedly, the conceptual definition of public 'interest' is a difficult undertaking<sup>36</sup> and is influenced by ideological, political and sociological approaches articulated since ancient times. The term is very often used interchangeably with 'public good'. Both terms are dynamic concepts which are defined on the basis of the context (location, time, people). Therefore, there is not one single definition.

16. Historically, the meanings of the two terms had subtle differences<sup>37</sup>. 'Public good' had some moral connotations, describing the 'intellectually, spiritually and morally' good.<sup>38</sup> It referred to the mutual well-being of the community. The term also implied that the good was shared among the members of the community and was linked with the society's priorities. On the other hand, public interest was linked to the satisfaction of the majority's preferences.<sup>39</sup> As a result of individualist ideals, well-being could not be determined on a social scale; it was an individual matter. Public interest may refer to the interests of many, which may collide with the interests of

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<sup>31</sup> *ibid*

<sup>32</sup> Big data refers to extremely large data sets that may be analysed computationally to reveal patterns, trends, and associations, especially relating to human behaviour and interactions in A. McAfee and E. Brynjolfsson, 'Big Data: the management revolution' (2012) 90 *Harvard Business Review* 60

<sup>33</sup> See more in SOGETI Luxembourg - Alma Rutkauskienė, *Ethical Review of using Big Data sources for official Statistics* (Eurostat, 2017) 9

<sup>34</sup> The mosaic effect is based on the fact that each individual is a unique mosaic of publicly visible characteristics and private information.

<sup>35</sup> SOGETI Luxembourg - Alma Rutkauskienė, *Ethical Review of using Big Data sources for official Statistics* (Eurostat, 2017) 17

<sup>36</sup> Edwin Rekosh, 'Who defines the public interest?', (2004) 2 *SUR* <<https://sur.conectas.org/en/defines-public-interest>> accessed August 23, 2021

<sup>37</sup> B. Douglass, 'The Common Good and the Public Interest' (1980) 8 (1) *Political Theory* 103

<sup>38</sup> *ibid*

<sup>39</sup> *ibid*

the few. It may identify the interests of a group concerned, in contrast to a private interest. It may even describe the greatest wellbeing of the largest possible number of people<sup>40</sup> or the interest of the society as a whole<sup>41</sup>. Arguably, the public good seems to reinforce the positive connotations of the public interest in favor of the community as whole. There is an abundant body of philosophical and political science literature on the topic.

17. In legal terms, the indeterminate nature of ‘public interest’ results in some legal uncertainty but it offers flexibility which allows for consideration of the surrounding circumstances. Thus, its conceptual content changes throughout the years and differs from country to country, depending on each country’s social and economic priorities. By being flexible, it also leaves room for reference to the instrument that prescribes the public interest as a criterion for making a determination’.<sup>42</sup> This means that the public interest pursued by a specific activity is defined by the decision-making body. Relevance of public interest to our discussion is based on its two main functions in the democratic society. Firstly, it legitimises the authorisation of power to the public bodies, which perform (or should perform) their activities to serve the public interest considering also that these activities are also funded by the public finance. Secondly, it usually provides a basis for justification of interference with human rights, for instance the right to privacy.

18. When public authority is awarded to an entity, its legally defined objectives literally correspond to the public interest this authority serves. In addition, the public interest ensures the legitimacy<sup>43</sup> for the exercise of the official authority. With regard to official statistics, the public interest usually refers to evidence-based policy making and also to greater availability of information for individuals and businesses, so that they can take better-informed decisions and participate in the public dialogue. Hence, the latter are well-informed to hold the government accountable, thus contributing to better democracy. Availability of meaningful information for the citizens reduces information asymmetries and improves the quality of democracy.<sup>44</sup> It is pertinent to note that the benefit for the general public from statistics was not self-evident at the beginning of statistical institutions which mainly provided their information to the government<sup>45</sup>. Later, statistical information was opened to everyone, at the same time, in equal terms, as a result of the progress in IT and Communications technologies.

19. The Greek Statistical law alludes to the public interest served by the agencies of the ELSS: *‘The Hellenic Statistical System is the set of rules, activities and agencies responsible for the conduct of statistical operations aiming at the development, production and dissemination of the country’s official statistics, which are used for the decision and policy making at local, national,*

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<sup>40</sup> *ibid*

<sup>41</sup> Aryness Joy Wickens, ‘Statistics and the Public Interest’, (1953) 48 *Journal of the American Statistical Association*, 1-14

<sup>42</sup> Full Court of the Federal Court of Australia in *McKinnon v Secretary, Department of Treasury* [2005] FCA FC 142 per Tamberlin J (at 245)

<sup>43</sup> For the legitimacy of official statistics meaning “*a social judgment that the activity of the statistical system is in the interest of the country, that it indeed serves an essential purpose*”, see Ivan P. Fellegi, ‘Characteristics of an Effective Statistical System’ (1996) 64 (2) *International Statistical Review* 165-187

<sup>44</sup> ESS concisely describes the envisaged role of Official statistics. They ‘*represent a distinct public interest purpose. They are necessary for the performance of the activities of the Union. They enable policy makers, economic and other social actors, and citizens to take evidence-based decisions and build informed opinions. As official statistics are delivered to everybody, at the same time and for free, they effectively represent an essential public good that benefits all.*’ See *European Statistical System (ESS)*, Position Paper on the future Data Act proposal (June 2021)

<sup>45</sup> Aryness Joy Wickens, ‘Statistics and the Public Interest’, (1953) 48 *Journal of the American Statistical Association*, 1-14

***European and international level.***<sup>46</sup> Ethical principles can also guide the interpretation of the public interest served by the national statistical authorities. UN Fundamental Principles for Statistics enshrine that “*official statistics provide an indispensable element in the information system of a democratic society, serving the Government, the economy and the public with data about the economic, demographic, social and environmental situation.*”<sup>47</sup>

20. The public interest, which is pursued by statistical authorities, has changed in comparison to the previous decades. The mass digitization has opened up new possibilities for official statistics. It is expected that harnessing the wealth of data currently held by private stakeholders will enable governors, entrepreneurs and citizens to better inform their decisions. ESS persistently supports access to privately held data arguing that: *‘this will not only help statistical offices to fulfil their public interest missions but, where data or insights can be made widely available, providing a rich digital information base for others to re-use, will also benefit to the emerging data economy as a whole.’*<sup>48</sup> The benefits of the use of big data in official statistics which were described by Eurostat in the VIP BIGDATA Business Case 2015<sup>49</sup> reflect the public interest which the ESS will be entrusted to fulfill: *‘a better response to user needs, the acquisition of new competences to enlarge a portfolio of official statistics, increased efficiency, wider product range, increased quality of statistical products, a reduction of burden on respondents, faster adaptability’*. The EU Commission also encourages the use of privately held data for the public good: *‘Public authorities could be granted access to data where this would be in the “general interest” and would considerably improve the functioning of the public sector, for example, access for statistical offices to business data (...).’*<sup>50</sup>

21. For the benefit of legal clarity, it would be more effective if statistical authorities set specific criteria/guidance to assess whether a statistical activity serves the public interest. In addition, when defining the public interest, it is important that views of the public are considered. In academic literature<sup>51</sup> it is suggested that acting in the public interest has two separate components: i) objectives and outcomes of the decision-making process and ii) the process adopted, and procedures followed by decision makers in exercising their discretionary powers.

22. Given that the statistical system has been designed to meet the needs of multiple users and support the decision-making process in democratic societies,<sup>52</sup> appropriate procedures should be in place to consult and engage with them. Greek statistical system has integrated a user engagement procedure by establishing (by law) an Advisory Committee of the Hellenic Statistical System (SY.EP.EL.S.S.). SY.EP.EL.S.S representatives express their needs and try to ‘have their voice heard’ in terms of priorities of the national statistical information policy. Thus, a democratic participation of those affected by the statistical production is safeguarded in a policy level. Its members provide their opinion with respect to: (i) the areas in which it may be necessary to have

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<sup>46</sup> Greek Law No 3832/2010, Article par. 1

<sup>47</sup> UN Fundamental Principles for Official Statistics, Principle 1

<sup>48</sup> ESS Position Paper on Data Access for Official Statistics A contribution to the reflection on the establishment of an EU framework on access to and re-use of privately held data (June 2017)

<sup>49</sup> Business Case, VIP BIGDATA, Eurostat, 2015

<sup>50</sup> European Commission, ‘The Communication on “Building a European Data Economy” (adopted on 10 January 2017)

<sup>51</sup> Chris Wheeler, ‘The Public Interest: We Know It’s Important, But Do We Know What It Means’ (2006) 48 AIAL Forum 12

<sup>52</sup> European Commission’s Proposal for a Regulation of the European Parliament and of the Council on statistics on agricultural input and output and repealing Regulations (EC) No 1165/2008, (EC) No 543/2009, (EC) No 1185/2009 and Council Directive 96/16/EC (issued on 02.02.2021)



new statistics developed by EL.S.S, (ii) potential changes in the priorities of the EL.S.S, (iii) the ways in which the relevance of EL.S.S. statistics can increase for users, (iv) whether the scope, the level of analysis and the cost of statistics correspond to the needs of users. In addition, users of statistical data or microdata for research purposes can complete a feedback form, in which their views are noted and then considered by the competent Department. The role of the Committee in practice but also as illustrated in the Greek law demonstrates users' involvement in the determination of which types of statistical data will be produced for the public interest and how this shifts according to the social and financial conditions.

23. The interpretation of 'public interest' is also influenced by the general social and economic environment. More precisely, in the contemporary social environment, there is an urgent need to tackle the challenges of misinformation, post-truth world and fake news<sup>53</sup>. Official statistics are expected to strengthen the democratic values which are jeopardized by the uncontrolled spread of fake news to the general public. Access to and use of more accurate, trustworthy and comparable information is key to meeting the aforementioned challenges. Undoubtedly, equal access to broad information is a prerequisite for democracy. However, it is of utmost importance that this information is understandable from the public. To serve the public interest, to inform the public, statistical authorities are expected to provide information of a certain quality and according to a specific quality process covering all the stages of statistical production from the design to the dissemination.

24. Additionally, official statistics need to strengthen their position in the data economy worldwide. Digital platforms have dominated the data market. These private data holders can also process data and produce useful information and spread insights. However, private data holders' incentives and objectives for conducting data analysis and delivering insights are different: commercial profit from selling, good reputation, increase of their market share, Corporate Social Responsibility objectives and sustainability considerations.<sup>54</sup> At the same time, as a result of the data revolution, data on individuals and businesses have become a commodity with an increasing market value, while official statistics (at least the standard output) have remained a public good expected to be of the highest quality and offered to all users free of charge. ESS representatives verify that in many domains, '*statistical production based on traditional data sources is reaching its limits with respect to timeliness, relevance and compliance with the requirement to reduce the burden on respondents.*'<sup>55</sup>

25. What distinguishes national statistical authorities from the private data producers is that official statistics have been designed for the benefit of people. The role of official statistical authorities within the democracy is to provide free information for all in a sustainable manner within the limits of the public authority vested on them. Statistics are designed, produced and disseminated according to specific rules agreed by people who are accountable to the national or EU Parliament. Statistical authorities have been awarded a certain position in democracy and are subject to rule of law, to a certain extent, like any other public authority. A safeguard for this position which reinforces its credibility among the public is the protection of its independence and impartiality. In these circumstances, official statistics need - more than ever – to serve the public

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<sup>53</sup> Hans Viggo Sæbø et al. 'Official Statistics as a Safeguard Against Fake News' (2020) 36 Statistical Journal of the IAOS 435 – 442

<sup>54</sup> David Salgado & Bogdan Oancea *On new data sources for the production of official statistics* [2020]

<sup>55</sup> ESS Position Paper on ESS Priorities beyond 2020 (adopted in 2017)

interest for free public information and guarantee the respect for the institutional principles governing the whole system of official statistics, such as the independence from other (special) interests, either the government's or economic players and impartiality. In the past, producing statistics was a very expensive activity, the costs for which would not be borne by private stakeholders. Now, if there is no strong case for official statistics, the ugly scenario of their replacement might be realized. Powerful private actors will take the lead.<sup>56</sup> However, any relevant legal framework to put some requirements will ensue restrictions of their commercial activity.

26. Until this point, we have illustrated the core conceptual elements of privacy and the public interest but also their fluidity and their capacity to adapt to the changing technological, social and economic conditions. Exactly thanks to this flexibility, the well-established provisions protecting core human values and democracy remain relevant.

#### IV. THE BALANCING EXERCISE

27. We can now approach the question whether the private data holders' obligation to provide sustainable access to the data they hold for the statistical authorities, including data concerning individuals at an EU level is likely to infringe the individuals' right to privacy. If yes, how such an infringement could be avoided?

28. It is reminded that the right to protection of personal data is to be considered in respect of its role in society and that it has to be reconciled with other human rights and fundamental freedoms.

29. To determine whether there is a justified limitation, we need to examine:

- If there is any interference with privacy,
- Whether this interference/limitation is foreseen in law,
- Whether the law aims to achieve a legitimate general interest or one of the interests of Article 8 par.2 and more specifically: the economic well-being of the country, or to protect the rights and freedoms of others,
- Whether the interference is necessary in a democratic society<sup>57</sup> or respects the essence of the right and is in accordance with the principle of proportionality.

30. In principle, in the case of privately held data, interference with privacy can only be excluded in case the person has provided his or her consent or the data accessed has been completely and permanently anonymised without any possibility of re-identification with reasonable means. Nevertheless, neither of these conditions is met. The statistical authorities aim to gain direct access to the third party's data without the data subjects' intervention and not in a completely anonymised format. However, if a statistical project can be performed in a methodologically optimal way by accessing data on the basis of the individuals' consent e.g. for a pilot project, this option should be chosen as the least intrusive option (data altruism?). In addition, even if the statistical authority

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<sup>56</sup> Emanuele Baldacci and Felicia Pelagalli, 'Communication of statistics in post-truth society: the good, the bad and the ugly' (Eurostat, 2017)

<sup>57</sup> The requirement for interference to be "in accordance with the law" was so closely linked to the "necessary in a democratic society" criterion that the two conditions had to be discussed together (S. and Marper v. the United Kingdom [GC], 2008, § 99; Kvasnica v. Slovakia, 2009, § 84; Kennedy v. the United Kingdom, 2010, § 155).

does not collect direct identifiers, the mosaic effect cannot exclude the possibility of re-identification.

31. Any other access to privately held data might entail some interference with privacy. Furthermore, a general provision for mandatory access to privately held data might not satisfy the threshold for clarity and foreseeability of the law which has been set by the Courts as a criterion to be considered when assessing compliance with the right to privacy. A specific law with specific safeguards is needed. Article 6 (1) (e) of the GDPR, provides a legal basis for data processing in the public interest in combination with the provisions which grant the public authority to the statistical authorities. However, in view of the large-scale processing, the public interest needs to be further specified in a more specific provision either in law or an administrative act. It is generally acknowledged that production of granular, more relevant, and timelier official statistics, is a purpose of general interest, serves the public interest of the whole society and benefits the economic well-being of the citizens. It is felt that appropriate documentation would be an important safeguard.

32. When assessing the proportionality of a statistical activity or the necessity in a democratic necessity, either the balancing or the cost/benefit approach is examined on a case by case basis. The ECtHR examines, in the light of the case as a whole, whether the reasons adduced to justify the interference were relevant and sufficient and whether the measure was proportionate to the legitimate aim pursued.<sup>58</sup> According to the CoE's Recommendations, using personal data for a statistical purpose does not undermine individuals' privacy. Data processing for statistical purposes poses no recognisable risk of infringement to the rights and fundamental freedoms of data subjects. What is at issue is the risk arising from the holding of identifiable data. There is no infringement but there is a risk which must be prevented or minimized.<sup>59</sup>

33. With regard to statistical authorities' access to privately held data, the public interest, as explained, for better statistics, which support well-informed decision-making for all, including businesses, individuals and the government is significant, considering also the global issues humanity needs to tackle: the climate change, poverty, public health crisis, migration, globalisation.

34. The risk for privacy given that the individual loses control of his data is considerably high. The fact that the data will not have any individual effects and that the focus of statistical authorities is on aggregate collective data, leads us to the conclusion there is no violation of the essence of the right. However, unexpected security incidents and lack of individuals' control impinge on the right. It is true that harnessing the potential of privately held data is necessary for satisfying the government's, the financial stakeholders' and the general public's informational needs, considering also the high competition with the Big Tech platforms and other businesses and the risk for the free-of-charge public information.

35. On the basis of all the above considerations, we suggest that robust safeguards are needed. According to ECtHR, procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained

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<sup>58</sup> ECtHR, *Z v. Finland*, § 94

<sup>59</sup> Council of Europe, Explanatory Memorandum Recommendation No.R (97) 18 of the Committee of Ministers to Member States concerning the protection of personal data collected and processed for statistical purposes (adopted on 30 September 1997)

within its margin of appreciation.<sup>60</sup> Therefore, transparent information either on behalf of the private data holder or on behalf of the statistical authorities must be provided. This information does not have to be targeted directly at the data subjects; it can be disseminated in the relevant media. Appropriate guarantees to prevent the data being used as a basis for decisions or measures affecting the data subject need to be in place.

36. David Salgado & Bogdan Oancea,<sup>61</sup> have presented very clearly for a person from a non-technical background the different options for a statistical authority to access the privately-held data:

- The in-situ access, which prevents the risk that data is taken out of data holders' information systems. This possibility alleviates the privacy and confidentiality issues, but the operational aspect must then be tackled, since the statistical office will have to somehow access the private information systems.
- Transmission of data from the data holders' premises to the statistical offices' information systems, in which scenario no access to the private information systems is needed but there are risks to privacy from unintentional breaches. Both legal and confidentiality issues must be resolved in advance, both from the legal and the technical points of view.
- Via a trusted third party who will receive the data from the data holders and then, possibly after some preprocessing, will transmit them to the statistical office. The confidentiality and privacy issue needs to be agreed beforehand and part of the statistical process is delegated to a third party.

37. Given that the risk is higher if the data is transmitted to the statistical authority in a directly or indirectly identifiable format stronger safeguards such as security measures should be in place. In general, the riskier the access option, the more robust the security measures need to be. In addition, feasibility assessments aiming to test whether statistical purposes can be fulfilled by processing data which do not permit or no longer permit the identification of data subjects, provided that appropriate safeguards exist (such as, for instance, pseudonymisation of the data)<sup>62</sup>.

38. Another organisational safeguard could be the submission of the statistical projects to the assessment of necessity for the achievement of public interest to a specific independent body of various stakeholders' representatives. Somebody may argue that relevance and necessity can only be assessed by statistical experts. However, a Committee consisting of experts and users but also independent representatives of the general public could be a viable and fair solution. The statistical authorities also should establish specific procedures for data subjects to exercise their rights<sup>63</sup>. Finally, it is pertinent to recall that the proportionality principle, while remaining a general reference criterion in the design of statistical methodology, must be applied in such a way as not to interfere with the statistician's scientific freedom.

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<sup>60</sup> ECtHR, A.-M.V. v. Finland, §§ 82-84

<sup>61</sup> David Salgado & Bogdan Oancea, 'On new data sources for the production of official statistics [2020]

<sup>62</sup> GDPR, Recital 156

<sup>63</sup> GDPR, Recital 156

## V. FINAL THOUGHTS

### **Access to privately held data: implications to professional and contractual freedom, professional confidentiality, intellectual and industrial property**

39. Having regard to all the above, one can also not dismiss deeper issues and considerations arising from the notion of access to privately held data, as described above. These are concerns we can see formulating in the discussions regarding the new ePrivacy regulation proposal<sup>64</sup> and other data related European legislative initiatives, such as the Data Act.

40. To be able to legally articulate the need for access to private information from third sources, which is one of the prerequisites for the establishment of legality as described above, there needs to be a clearly structured description on the type of data statistical authorities need, the reason why they need them (the expected benefits from their use and the lack of other equivalent sources, in connection to the growing statistical information needs), as well as the form in which they need them (anonymised or pseudonymised data or even directly identifiable data).

41. This is essential in order to obtain a legal basis for the processing of private data in general, as the mandatory use of private information is a restriction of personal freedom and privacy in itself. However, when seeking to get primary information from a party different from the actual statistical unit, then other issues arise as well. This has also been an issue before, when trying to ensure access to administrative data. Privately held data is an even more complex issue.

42. Providers of electronic communications and other big data holders (such as telecommunication companies, microsoft, google etc) do not hold information that belongs to them. They provide services according to the specific contractual clauses of their terms of service, in which they take on the obligation to provide systems, functionality, storage space etc to their clients, but they themselves have no ownership, or even access, to the information these clients store and process. These clients may also be using the providers' services to create services of their own for their own clients, and also have no contractual access to these clients' stored information. Their powers over the data they hold are determined by their terms of service. Their clients on the other hand could use these services for whatever purpose, with the provider of the service not being liable for illegal use. They could for example be storing information on business turnover and personnel, undeclared revenue or workers, or other illegal (business or personal) activities, personal or family life, children, health, sexual preferences, legality of residence in a country etc.

43. Access to this primary (and therefore accurate) information would clearly be a game changer for statistical authorities and the compilation of official statistics, but could that be brought forth as a legal obligation in the European legal system? The implications would be phenomenal to a vast number of fundamental rights, such as contractual freedom and the free negotiation of contractual obligations, free competition, intellectual and industrial property rights, trade secrets, the expectation of a certain space of privacy and the freedom of personal development etc.

44. This is not only the case when we refer to the actual content (data) of such services (e.g. what we wrote in an e-mail), but it is also a concern in the case of metadata (e.g. when we sent it,

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<sup>64</sup> <https://digital-strategy.ec.europa.eu/en/policies/eprivacy-regulation>, 03/09/2021

to whom, the location of our device etc). Metadata of electronic communications, as defined in ePrivacy for example, could lead to the extraction of very detailed characteristics of people in relation to their preferences and personality, making the risk to privacy just as high. How would we react, for example, to the idea that official statistical agencies could have permanent access to metadata on our use of the internet or our e-mails? Would that idea restrict the freedom to personal development and alter our use of the internet?

45. This is a matter that reflects the general debate on the balance of state involvement and penetration in private action and it is one that should be met with serious concern and the involvement of all stakeholders in the utmost transparency.

46. In this scope, a clear and methodologically measurable description of the necessity of access of statistical agencies to information about individuals (people and business entities) is what ultimately determines the legality of their use. This principle of necessity is one of the governing mechanisms in the determination of legality in personal data processing in Europe under GDPR, but it is also applicable to business and company information we seek to gain access to through third parties.

47. Only on the basis of such a clear and specific presentation of both necessity and social benefit could the statistical community be able to reflect on ways to ensure legal access to privately held data. This access can therefore be neither free, nor generic, but it must be built upon clear and strict rules and it must determine specific variables for specific uses, for needs that cannot be met in other ways. As portrayed in the extended discussions on the new ePrivacy regulation proposal, there is actual legal and pragmatic difficulty to introduce an open mandate for access of statistical authorities to privately held data (even more in the case of data in the area of correspondence, which is a core element of the individual existence and is protected by secrecy rules). This is not just about conflicting financial interests, it is just as much about conflicting fundamental human rights.

48. A question in statistical work in general is whether statistical authorities will be based on the obligation of law or on their own persuasion and respectability to collect the data they need on a voluntary basis. This has to do with how one sees the role of statistics in society, but is also about the legal status of statistical authorities.

49. The more statistical authorities rely on the obligation of law to gather data, the more necessary it becomes to safeguard legally and in reality the absolute nature of professional independence and statistical confidentiality, as well as society's perception of official statistics. If, for example, it is mandatory for a network provider to hand over data to statistical authorities - data they do not own, but are legally bound by contract to process in certain ways -, it must then be set in stone, both in the legal documents and ethics, but also to the heart of society, that under no circumstances will this data be obtained by other authorities for other reasons of public interest (e.g. prosecuting authorities under criminal proceedings).

50. Any attempt to convince society that statisticians must have access to their lives, must be described in detail, presented in clarity and governed by absolute transparency.