Comments on the Article 29 Working Party's guidelines on the right to data portability

Public comment on guidelines is welcome by the industry

The undersigned associations[1] welcome the opportunity for public comment on the Article 29 Working Party's (WP29) draft guidelines on the implementation of the General Data Protection Regulation (GDPR). As expressed in a letter sent to the WP29 by the undersigned associations on 2 November 2016, we believe that international-, European-, and national-level industry associations, as well as individual companies, can offer the WP29 expertise from different business sectors and geographies to provide important feedback on the practical implementation of the GDPR at the necessary depth to tackle complex topics appropriately. The undersigned associations would also like to reiterate its support for ensuring the effective and meaningful implementation of the GPDR.

In this paper, the associations would like to share with the WP29 comments on its draft guidelines on the right to data portability.

General debate on data portability

The undersigned associations understand that there is a greater debate about data portability underway in the European Union and its member states, as well as globally. A right to retrieval of data/digital content, including non-personal data, is currently under discussion in the context of the Directive for certain contract rules for the supply of digital content (Digital Content Directive). In addition, the communication for the "Building of the European data economy" also provides for discussion on a right to portability, including for non-personal data.

Notwithstanding these broader debates, the undersigned associations believe that the portability right in the GDPR should not be interpreted to accommodate political positions on portability expressed in the ongoing debate. Moreover, the undersigned associations consider that the discussions on broader and conflicting rights to data portability could risk undermining the coherence and solidity of the compromises reached in the GDPR.

Scope of the right of data portability

The undersigned associations are particularly concerned about the WP29's interpretation of the scope of the right to data portability. The undersigned associations believe that the co-legislators envisaged the right to data portability as a consumer-oriented prerogative, and so does the Working Party in parts of its guidelines. However, the Working Party's broad interpretation of the scope of this right does not reflect this approach.

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[1] Application Developers Alliance, AmCham EU, BSA, CCIA, cocir, DIGITALEUROPE, EACA, eCommerce Europe, EDiMA, EMOTA, EPC, EuroISPA, FEDMA, IAB Europe, TABC, WFA.

First, the legislator intended to limit its scope to personal data *provided* by the data subject and processed under the consent or contract legal ground. The WP 29 has taken a very broad interpretation of "provided by".

Second, we question whether the suggested approach concerning other data subjects' data is balanced and offers adequate protection for other data subjects. The Working Party should clarify the criteria for the exercise of the right when other data subjects' data are included, such as proportionality, the purpose, feasibility or usability.

Third, the right to portability needs to be clarified and restricted for employees' personal data. Applying data portability for data collected in an employee relationship would in many instances violate current employer's confidentiality interests.

Overall, the undersigned associations invite the Working Party to further refine the balance between the consumer interest of the data subject, other obligations (including those pertaining to data minimization) and the burden borne on the controller, and third party rights involved in the possible exercise of this right.

Commonly used and machine readable formats

The requirement of providing portable data in a structured, commonly used, machine readable, and "interoperable format" should be clarified. In particular, the undersigned associations is worried about defining the terms "interoperability" and "machine readability" on the basis of EU secondary law and implementing acts aimed at the public sector. Moreover, the guidance should differentiate between "interoperable data formats" and "interoperable systems". While the former is rooted in the GDPR, the latter is not a requirement nor a goal. Indeed, according to Recital 68 there is no obligation for the controllers to adopt or maintain technically compatible processing systems.

The GDPR must remain technologically neutral. Organisations should remain free to grant the data subject's right to data portability with the technological solution they consider the most suitable and to use any format which does not inhibit the data subject from using the data should be allowed, including most popular and common standards for structured documents and web data.

Authentication, risk of adverse effects on the rights and freedoms of others

The guidelines should clarify further what sort of authentication processes would be required by controllers exporting or importing personal data in the context of the data portability right and ensuring that these do not disproportionately affect businesses, considering the costs and time required to authenticate a data subject. The WP29 should also provide guidance on when a controller may reasonably refuse to act on a request for data portability because it is unable to reasonably authenticate the data subject, as may be the case in services that do not operate on a log-in basis. Requiring the provision of data portability where a data subject is not identified or authenticated, may carry with it a risk of a data breach that may adversely affect the rights and freedoms of others. The draft guidance should clarify that the right to data portability must not adversely affect the rights and freedoms of others, whereas

"others" should not be interpreted as only meaning other data subjects as is the case in the current draft guidelines.

The undersigned associations are: