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NOTE

from: Presidency
to: Working Group on Information Exchange and Data Protection (DAPIX)
Subject: Proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)
- Data portability

Delegations find attached the revised provision on data portability and the corresponding recitals.

- 51) A natural person should have the right of access to data which has been collected concerning him or her, and to exercise this right easily and at reasonable intervals, in order to be aware of and verify the lawfulness of the processing. This includes the right for individuals to have access to their personal data concerning their health, for example the data in their medical records containing such information as diagnosis, examination results, assessments by treating physicians and any treatment or interventions provided. Every data subject should therefore have the right to know and obtain communication in particular for what purposes the data are processed, where possible for what period, which recipients receive the data, what is the logic involved in any automatic data processing and what might be, at least when based on profiling, the consequences of such processing. This right should not adversely affect the rights and freedoms of others, including trade secrets or intellectual property and in particular the copyright protecting the software. However, the result of these considerations should not be that all information is refused to the data subject. Where the controller processes a large quantity of information concerning the data subject, the controller may request that before the information is delivered the data subject specify to which information or to which processing activities the request relates. **To further strengthen data subject right of access to their own data, the data subject should have the right, where personal data are processed by electronic means and in a structured and commonly used format, to obtain a copy of the data concerning them also in commonly used electronic format.**
- 55) To further strengthen the control over their own data (...), where the processing of personal data is carried out by automated means, the data subject should also be allowed to withdraw the personal data, which he or she has provided, **in a commonly used format** from one automated processing system and transmit those data, (...) into another **automated processing system.**

This **right** should apply where the data subject provided the personal data to the automated processing system, based on his or her consent or in the performance of a contract. **It should not apply where processing is based on another legal ground other than consent or contract. By its very nature this right should not be exercised against controllers processing data in the exercise of their public duties. It should therefore in particular not apply where processing of the personal data is necessary for compliance with a legal obligation to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of a official duty vested in the controller.**

Where, in a certain set of personal data, more than one data subject is concerned, the right to withdraw and transmit the data into another automated processing system should **be without prejudice to the requirements on the lawfulness of the processing of personal data related to another data subject in accordance with this Regulation. This right should also not prejudice the right of the data subject to obtain the erasure of personal data and the limitations of that right as set out in this Regulation and** should **in particular not** imply the erasure of personal data concerning the data subject which have been provided by him or her for the performance of a contract, to the extent and as long as the data are necessary for the performance of that contract. (...)

Article 18

Right to data portability¹

1. (...)
2. Where the data subject has provided personal data and the processing, (...) based on consent or on a contract², is carried on in an automated processing system³[provided by an information society service⁴], the data subject shall have the right to withdraw these data⁵ in a **commonly used format⁶ and** to transmit them into another automated processing system without hindrance from the controller from whom the personal data are withdrawn, **without prejudice to Article 17.**

¹ UK reservation: while it supports the concept of data portability in principle, the UK considers it not within scope of data protection, but in consumer or competition law. Several other delegations (DK, DE, FR, IE, NL, PL and SE) also wondered whether this was not rather a rule of competition law and/or intellectual property law or how it related to these fields of law. Therefore the UK thinks this article should be deleted. DE, DK and UK pointed to the risks for the competitive positions of companies if they were to be obliged to apply this rule unqualifiedly and referred to/raises serious issues about intellectual property and commercial confidentiality for all controllers. DE, SE and UK pointed to the considerable administrative burdens this article would imply. DE and FR referred to services, such as health services where the exercise of the right to data portability might endanger on-going research or the continuity of the service. Reference was also made to an increased risk of fraud as it may be used to fraudulently obtain the data of innocent data subjects (UK). ES, FR and IE were broadly supportive of this right. SK thought that the article was unenforceable and DE referred to the difficulty/impossibility to apply this right in 'multi-data subject' cases where a single 'copy' would contain data from several data subjects, who might not necessarily agree or even be known or could not be contacted.

² BE suggested adding a new subparagraph in order to clarify that the right to data portability would not apply to processing based on Article 6(1)(c) or (f), but it appears that the restriction at the beginning of this paragraph is clear enough.

³ DE, IT and SI scrutiny reservation; there is no definition of an 'automated processing system', which could cover almost anything.

⁴ COM scrutiny reservation. BE suggested referring to 'processing by internet'. FR, PT and IT are not fully convinced of the expediency of limiting this to the internet processors.

⁵ NL and DE indicated that this right should apply more broadly to 'user-generated content' and should therefore not be limited purely to data provided by the data subject. BE, ES and MT proposed to refer to 'obtaining a copy of' rather than withdrawing data.

⁶ PL suggested adding "non-aggregated or non-modified" before "form".

2a. The right referred to in paragraph 2 shall be without prejudice to intellectual property rights **in relation to the processing of the data in the automated processing systems**¹..

[2b. The right referred to in paragraph 2 shall not apply to processing on the basis of points (c), (d), (e) and (f) of Article 6(1).]

[3. The Commission may specify (...) the technical standards, modalities and procedures for the transmission of personal data pursuant to paragraph 2. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2).]²

4. (...) ³

¹ ES thought there should be an exception in case disproportionate efforts would be required.

² FR, HU, SE and UK reservation: this would better set out in the Regulation itself.

³ Deleted in view of the new articles 83a to 83c.