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FENCA

To the Members of the Article 29 Working Party

FENCA would like to thank the Members of the Article 29 Working Party (29WP) for adopting the "Guidelines on the right to data portability" on 13 December 2016.

We would also like to take this opportunity to provide the following comments for your consideration and the request for clarification regarding the right to data portability in the context of the debt collection sector.

Comment

Pursuant to Article 20 of the European General Data Protection Regulation (EU-GDPR), the data subject shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format. Furthermore, the data subject shall have the right to transmit those data from one data controller to another data controller. This right shall also apply if the processing of personal data is based on a contract pursuant to Article 6(1)(b).

The primary aim of data portability rightly is to facilitate the data subject's ability to switch more easily from one service provider to another, in particular from one IT services provider, e.g. social network, e-mail and other cloud service providers, to another.

In the context of debt collection, debt collection agencies (DCAs) are service providers who collect receivables from debtors on behalf of their clients, the creditors. The vast majority of outstanding receivables to be recovered arise from contractual relationships between the creditor and the debtor.

The legal basis for the processing of personal data relating to the services of a DCA is Article 6(1)(b).

For the collection of statutory claims, e.g. claims for damages arising from a legal judgement, Article 6(1)(f) will constitute the legal basis.

In any case, pursuant to Article (4)(7) DCAs will act as controllers, since they continue to decide in an independent manner on the purposes and means of the processing of personal data.

Even though in general a DCA as a service provider receives the personal data of a debtor (i.e. the data subject) from his or her creditor – and thus not directly from the data subject – there are instances where a DCA receives personal data directly from the data subject/debtor. For example, when the data subject/debtor, during the course of the collection process, provides information, e.g. change of address, to the DCA during a phone conversation.

Based on the fact that the 29WP guidelines on the right to data portability emphasise that Article 20 is mainly addressed to IT service providers (e.g. social media, cloud services), FENCA assumes that DCAs are not part of the actual group of addressees of Article 20, since the main purpose of the processing of personal data is to assert, exercise or defend legal claims.

Since the wording of Article 20 is not clear on that point, FENCA would therefore like to ask the WP29 for added clarification in the guideline that the direct provision of personal data by a debtor to a DCA does not fall under the scope of Article 20.

Explanation

In principle, FENCA very much agrees with and welcomes the fact that the data subject is empowered to give him or her more control over the personal data concerning him or her. In the context of DCAs, however, we do not see any added value or increased control for the data subject as intended by Article 20; instead we see the risk of a considerable and incalculable expenditure for the debt collection sector.

The transmission of partial and rather fragmented amounts of personal data to the data subject – i.e. those few additional pieces of personal data that the data subject/debtor would potentially provide in direct contact with the DCA beyond the personal data of that data subject that the DCA has received from the creditor (and thus not directly from the data subject) – does not seem to make any sense, either for the data subject/debtor or for the DCA as a service provider. Since Article 20 relates to data that the data subject has directly provided, in the case of a DCA the data subject/debtor would only receive the very partial and fragmented data from the DCA which he or she has provided directly, rather than all personal data that the DCA is processing.

If the data subject/debtor would like to have a complete overview of the entirety of his or her personal data that is processed by the DCA, it is much more useful for the data subject to use his or her right of access, pursuant to Article 15, with which the entire debt collection sector in Europe will of course fully comply.

Using his or her right of access in Article 15 is thus much more useful for the data subject than receiving only a short excerpt of his or her personal data on the basis of Article 20, i.e. an excerpt of personal data which he or she has provided in the first place.

Beyond that FENCA is concerned, that there is a chance that Article 20 could be excessively used – and thus potentially abused – by some debtors as an instrument for hindering or delaying the collection process of receivables through the DCA. Since the DCA is working on behalf of the creditor this could result in undue delay of the payment of outstanding debt to the creditor, and would thus infringe on the purpose of the processing of personal data to assert, exercise or defend legal claims.

We would like to emphasise that in our view the requested clarification that the data directly provided by a data subject/debtor to a DCA does not fall under the scope of Article 20, does not in any way reduce the protection of the data subject and his or her personal data.