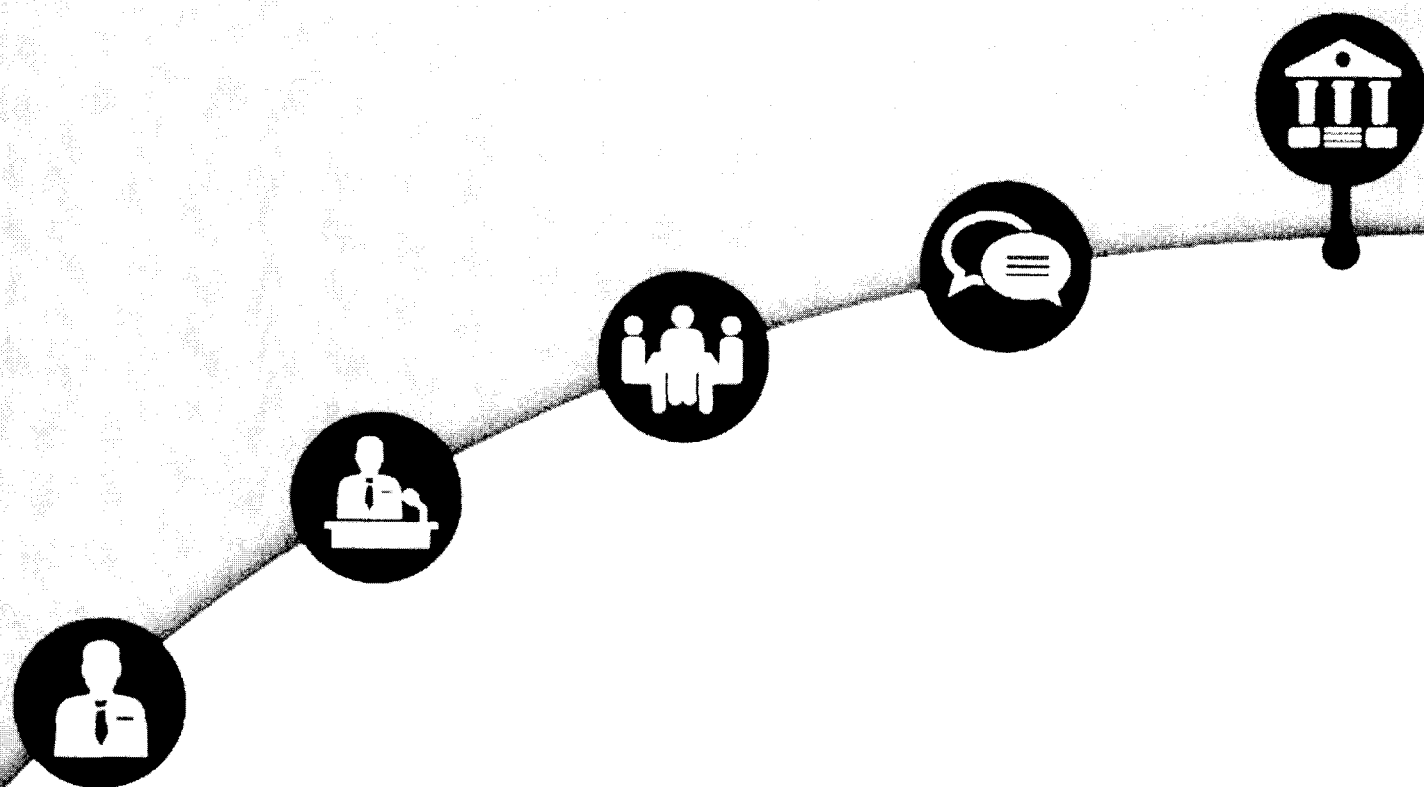


63.



## MEDEF Comments

MEDEF welcomes the G29 consultation process on the draft guidelines. It is indeed, essential to collect stakeholders' comments in order to ensure that the adoption of guidelines takes account of the practical reality.

As a preliminary comment, MEDEF recalls that the G29's guidelines must help companies to apply the regulation's provisions. The guidelines must respect the wording of the provisions concerned and the intent of the legislator.

MEDEF asks the G29 to take into consideration the following comments and revise the draft guidelines accordingly.

## **1. The right to data portability**

MEDEF's comments on the draft guidelines

MEDEF recalls that the regulation introduces a right to data portability in order to further strengthen the control of the data subject over his or her own data (see recital 68) and not as part of a consumer policy approach (ref. in France the right to data portability created especially for consumers and in Europe the ongoing discussions on the proposed regulation on ensuring the cross-border portability of online content services in the internal market). Consistency is necessary between the several rights to data portability and also a strict application of each provision. It is also important when interpreting the right to data portability to keep in mind whether proposed guidelines serve the purpose of strengthening / ensuring the control of the data subject over receiving or transmitting his or her own data.

Comments on Article 20-1 of the regulation

Article 20-1 of the regulation establishes that the portability is related to the personal data provided by a data subject to a controller. Therefore, the application of the right to "observed data" in general, as proposed in the draft guidelines, is too broad and in contradiction with the wording and the objectives of the provision. The draft guidelines must be modified accordingly and exclude « observed data » from the scope of the right to data portability.

MEDEF considers that the draft guidelines must indicate clearly that the data provided by the data subject are communicated in their existing state to the data subject or to another controller. No verification nor update may be solicited from the controller who communicates the data provided by the data subject. Consequently, the controller who transmits the data of the data subject cannot be held liable by those controllers who receive the data (for instance in case of inaccurate data provided by the data subject or a change in circumstances being processed, etc.).

Furthermore, the draft guidelines specify that data concerning third parties could be transmitted to the data subject or a new data controller. This statement is worrying in terms of protection of natural persons and seriously questionable given that the new controller has the obligation to determine what data he can keep or/and use. It raises the issue of liability of the controllers who transmitted the data of third parties and of the new controllers.

Comments on Article 20 and Recital 68 of the regulation

MEDEF recalls that Article 20 and Recital 68 provide respectively that "the data subject shall have the right to have the personal data transmitted directly from one controller to another, where technically feasible" and "the data subject's right to transmit or receive personal data concerning him or her should not create an

obligation for the controllers to adopt or maintain processing systems which are technically compatible". The draft guidelines give examples of technical means for controllers to provide data to the data subject : Application Programming Interface. It is necessary to insist on the fact that the implementation of the right to portability must not imply additional technical obligations for controllers and consequently additional costs. This also applies to the security and authentication requirements made by the draft guidelines.

However, the draft guidelines provide that "the data controller could also, as a best practice, recommend appropriate format(s) and encryption measures to help the data subject [in securing the storage of their personal data in their own systems]". Even if it is presented as a best practice, MEDEF considers that the controller must not be expected to help the data subject in this matter : It is not the role of the controller, he does not in any case have the appropriate expertise and in addition It could engage his liability.

### Right to access and to data portability

Recital 63 of the regulation concerning the right to access provides that "that right should not adversely affect the rights or freedoms of others, including trade secrets or intellectual property and in particular the copyright protecting the software. However, the result of those considerations should not be a refusal to provide all information to the data subject". The draft guidelines take this last sentence and apply it to the right to data portability. This is inappropriate because the Recital 63 concerns the access right and not the right to data portability, which permits a transmission from one controller to another and thus risks competitively sensitive information. Consequently, and in accordance with Article 20, it must be possible for the rights of the controller (trade secrets, confidentiality, intellectual property, etc.) to be asserted in opposition to the right to data portability.

## **2. Data Protection Officer (DPO)**

### External Data Protection Officer

The draft guidelines state that in case of an external DPO "individual skills and strengths can be combined so that several individuals, working in a team, may more efficiently serve their clients. For the sake of legal clarity and good organisation it is recommended to have a clear allocation of tasks within the DPO team [...]".

This statement must be applicable also to an internal DPO. For instance, in case of a group of undertakings, there is no single individual that can meet all the skill requirements. The draft guidelines must be modified accordingly.

