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DATA DRIVEN MARKETING ASSOCIATION FINLAND COMMENTS ON THE DRAFT GUIDANCE ON DATA PORTABILITY

WP29 has published a draft guidance on the new right to data portability and has invited stakeholders to comment on this guidance. Data Driven Marketing Association Finland (ASML/DDMA Finland) likes to comment on following issues of the guidance.

In general

Article 20 of the GDPR provides the data subject with a new right to data portability and a new obligation on companies and public authorities to build tools that allow users to download their data or transfer it directly to a competitor. Compliance will require organizations to make costly operational changes to their systems and databases. For business it is of utmost importance that this new right is interpreted in a way that does not generate unnecessary obstacles and costs. All relevant issues and consequences should therefore be taken into consideration.

On the data that is covered

Under Article 20 of the GDPR, a data subject has the right to receive personal data concerning him or her, which he or she **"has provided"** to a controller for processing based on consent or contract. The GDPR does not clarify the scope of data covered by this right.

According to ASML's view WP29 adopts an unnecessarily and dangerously broad interpretation of the right to data portability. In addition to the data provided actively by the data subject (e.g. name in the user profile), data generated by or collected from the activities of the data subject (e.g. search history, location data, data about her/his use of a website, service or device or raw data such as heartbeat collected by wearable devices) falls within the scope of the right. Also pseudonymous data that can be clearly linked to a data subject falls into the scope according to the WP29.

ASML states that there is no indication in GDPR of such an interpretation, not in articles or in recitals. In contrary, literal reading of the regulation would be that data is "provided" by individuals only when, for instance, they complete a form, or upload their address book. This is also what the literal meaning of the term "provided" would suggest, the term does not mean *"generated, collected and observed"* but simply *"to give or supply"*. ASML states that WP29 guidance has no such authority that would allow it to overstep what is stated in the Regulation and its recitals. As such a broad interpretation is unnecessary and extremely harmful for businesses – before issuing a guidance that has such a drastic consequences to European businesses, at least an impact assessment of sorts should be made. Additionally WP29 should consult the Legal Service of Commission on the issue of jurisdiction.

A few examples of issues that should have been thought of:

Incoming calls are not and should not be seen as kind of essential set of data that needs to be ported to competing operator. Records of incoming calls are not essential to competition

among telephone service providers and this data is also regarded as confidential communications data according to the ePrivacy directive. Enabling this data to be ported would cause unproportionate costs to the operators compared to the benefits it might add to competition.

To include identification data to the scope is not serving anyone's interest. Telecommunication operators hold massive amounts of raw data – not just call data, but everything from signal data when a cellphone moves from one access point to another to email update streamdata. The amount of data is such that one needs specific technical readiness to be able to use it, the data includes also data that has to be screened out because of its nature.

In some industries, systems are not equipped for data portability. For example in telecom industry, to be able to port the data, raw data has to be copied to a new system to where access can be granted. Access cannot be granted to the production system due to privacy issues.

Portability of a “data observed “ is problematic because it is not “provided” by a customer, but instead it is only based on the behavior of a customer. The collection of such data is only possible through processes developed by the business and it should not be allowed to be used by a party that hasn't invested on the process. Issue of observation enters clearly in the area of business and trade secrets. Broad interpretation and allowing third parties to use such data would distort severely competitiveness of European companies.

This broad interpretation does not affect the implementation of other data subject rights, such as the right of access, which might cause confusion and difficulties in implementing the GDPR. According to ASML's view, it would be extremely important that terms used in the legislation are interpreted the same way in every article.

On identification

The part in the guidance covering the necessary identification of the data subject requesting for data portability should be clearer in order to help implementation. When delivering the data, strong identification is not necessarily required, but instead a user name and password to an online service will suffice. However, the controller should be able to ensure that the data portability request comes from the data subject, and adapt the required identification to the types of data and processing in question, as well as to the identification used when collecting the data.

In ASML's view the identification of the right data subject is of utmost importance in order to ensure that the right is not misused or to avoid possible data breaches. This is even more important in cases where portable data might contain personal data of a third person, trade secrets or intellectual property. Especially for companies that do not operate in this environment, this means additional costs since they have to use outside service providers. Also, it should be clarified that there is no right to ask for data only based on cookie/IP – address.

On personal data of a third person

As stated above, portable data might in some cases contain personal data of a third person (such as communication services data or financial transaction data). WP29 states that this

potential business risks do not constitute a right to refuse to transfer data. Hereby WP29 actually states that portability is a right to transfer third persons' data, which is unacceptable.

Draft guidelines are not in line with accountability rules of GDPR in general. Instead the accountability is set on the receiving company that has to ensure that it has the right to process the data in question and that the data is relevant with regard to the receiving controller's processing activities. It is recommended that the receiving controller provide the data subject with information on which personal data is relevant, so that the data subject may then provide only such relevant data to the receiving controller. The receiving controller should also note that the data may include personal data of other data subjects and that it may not use such data.

According to the WP29, both companies should create tools to enable data subjects to select relevant data and exclude other subject's data. This obligation is not stated in GDPR and it is unclear what is the legal basis, if there is any, for creating new obligations in this way.

ASML views that it would be less risky and more clear to all parties that this kind of data would be excluded from the scope. The guidance states that receiving company cannot use for example (bank) account information for marketing purposes. This is good, but in general this issue is very difficult to carry out and oversee, not to mention the risks it poses to privacy of third person.

How to provide the data?

According to WP29, controllers should provide the data subjects with a direct download opportunity and allow them to transmit the data to another controller directly. Technical measures for providing the information include allowing data subjects to download their personal data directly from the controller's website or directly transmit the data to another data controller, for example, by making an API available. The data must be structured and machine-readable (i.e. not in pdf-format) and include as much metadata as possible. The format must support re-use and ensure the data will be interpretable. The guidelines also anticipate that a trusted third party could be used as a store for personal data to which the data subject then grants access. Controllers are not obliged to adopt compatible systems in order to meet this requirement, but the aim is to produce interoperable systems.

To avoid problems with interoperability-compatibility, the forms that fulfill the requirements, should be stated clearer.

It should be stated that portability is not as simple as the guidance sets it out to be. For example in insurance field it is extremely difficult to gather and combine data that has been collected based on a contract. Also in cases where the data has been collected years before this new legislation and the data is scattered to multiple different systems, some that don't have any possibilities to be connected to the internet, the business has to create a whole new system from the scratch. This is highly costly and even so, collection of the data is still partly manual and therefore API is no answer.

ASML states also that neither direct download opportunity nor API availability are not required by the GDPR. They might be functional ways, but it should be stated that they are only among different options, not obligations.

Conclusion

The broad interpretation of the portability right that goes way beyond GDPR articles, creates huge costs and detrimental burden for European controllers. Therefore, before setting these guidelines as one of the tools to interpret the GDPR in practice, at least following things should be considered:

- Legal Service of Commission should be consulted on the issue of WP29's jurisdiction.
- An impact assessment should be done if these normative guidelines create new obligations that are not found and based in GDPR.
- The concept of "observed data" broadens drastically the obligations set in GDPR – the relationship to the new trade secret directive should be investigated.
- Third person data must be protected, which in itself requires changes to the guidelines.
- The nature and status of guidelines should be stated more clearly e.g. if and when guidelines are just the view of WP29 among other interpretations guiding controllers when implementing data portability.

Also it should be of paramount interest to observe this issue through customer's point of view. Now the interpretation is so broad that it obliges to transfer all kinds of useless data in massive amounts, not taking into consideration of what is important to the customer. The guidance should view the issue on not of "as much as possible" but on what is important and interesting to the customer and follows in the sense of jurisdiction the obligation of GDPR.

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DDMA Finland (ASML) represents the data driven business and marketing of Finland. Member companies are the most advanced and biggest players from sectors of retail, finance & insurance, telecom, media, e-commerce, energy, travel, fundraising etc and of various service provider sectors supporting the growth of data driven business. "Data In, Delight Out"