

**To the attention of:**

Article 29 Working Party

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The Presidency:

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To Whom It May Concern

Rakuten welcomes and truly appreciates the continuous effort of the Article 29 Working Party (hereinafter: WP 29) for the common interpretation of the European Data Protection Rules. The views of the WP 29 are an essential element for the application of Data Protection Rules safeguarding the fundamental rights and freedoms in the European Union and beyond. Especially, where the General Data Protection Regulation (hereinafter: The Regulation) introduces new concepts of data protection, the interpretations of the WP 29 are a *sine qua non* for Rakuten to identify the appropriate measures.

As encouraged by the WP 29, Rakuten is honoured to provide additional comments to the adopted guidelines. Due to the nature of Rakuten group structure and priorities, Rakuten is only concerned with the guidelines about Data Portability and the Data Protection Officer.

## A. Data Portability

### **Introduction**

We are deeply concerned that certain aspects of the right to data portability will not be beneficial for the right to data protection as envisaged in the Charter of Fundamental Rights of the European Union because conflicting interests might be at stake ultimately undermining the original purpose of enhancing data subjects' control over their data.

Rakuten understands the core of data protection as empowering data subjects to decide freely at any moment in time about the use of their data. This informational self-determination is the foundation of all data protection principles and further developed in the principles such as consent, right to object and erasure of data. The right to data portability aims to "empower the data subject and give him/her control over the personal data concerning him or her". However, Rakuten is concerned that

the new right **misses the aim of empowering the data subject**. The data subject has control over her/his data as she/he may object the transparent processing any time and can request erasure of all data concerning her or him. Additionally, the data subject shall have the right to data portability in accordance with the Regulation. In this situation the data subject might decide to request her/his data to be transmitted to another data controller. In principal, the data subject does not object to the processing nor does she/he contest the use of the data for the specific purpose. She/He simply wishes to choose a different controller. This consideration may have various reasons and is valid but not relevant for the right to data protection. This is related to the consumer rights of individuals. Therefore, it should be developed in consumer law or competition law but does not enhance the right of individuals to data protection. This confusion between competition, consumer and data protection law is reflected in the guidelines. Ultimately creating undesirable outcomes for data protection, as for example, regarding the rights of third parties involved.

### I. Third Party Rights<sup>1</sup>

Rakuten welcomes the Working Party 29 affirmation that **“data controllers answering data portability requests are not responsible for the processing handled by the data subject or by another company receiving personal data”**. This includes that the controller subject to the request under article 20 cannot be held responsible for any unlawful processing after it transmitted or provided the data requested to the data subject or a new controller. A further clarification would be highly appreciated on how the second controller can lawfully process the received data. The guidelines state that “legitimate interest” may be a valid ground in particular in cases of “household activity”. However, most cases will not concern “household activity”. We urge the Working Party 29 to clarify if this includes further cases and if answered affirmative which ones. The new controller might receive data before it has the chance to request for consent or a contract with a third party resulting in a lacuna for the protection of the individual in question.

The Working Party 29 further clarifies that “data of third party can only be used if it does not adversely affect the rights and freedoms of others”. Rakuten acknowledges that it will be very difficult to decide on a case by case basis of large amounts of data sets which data is capable of infringing the rights of others. Therefore, Rakuten suggest to further clarify that a **new controller will be presumed to comply with this addition if it sends its data use policy containing the relevant information about the processing to the third party where possible**.

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<sup>1</sup> See P. 9 of the WP 29 Guidelines on the right to Data Portability

## II. Transmission to another controller<sup>2</sup>

Rakuten notes that the new controller is not allowed to use the data of a third party for any other purpose than the one for which it was originally collected. In this context Rakuten points out the contradiction to the definition of a controller in the Regulation being described as the responsible defining the purpose of processing. In that regard, the new controller cannot legally be seen as a controller for the processing in question, if it is not allowed to determine the purpose of processing.

## III. Identification of Data Subject<sup>3</sup>

Rakuten acknowledges that the data requested may concern very sensitive data about the life and relationships of data subjects. Therefore, it is fundamental to transmit the data to the actual data subject requesting it only, and not to anybody else. However, article 11(2) of the Regulation precludes the controller to request additional information from the data subject. We wish to stress our deep concerns about these provisions as in nowadays information age it is extremely simple to fake identification documents if they are solely provided by digital means. Rakuten would highly appreciate a more detailed guidance of the WP 29 under which conditions a controller will be seen as having taken all necessary steps to ensure identification.

## IV. Time limit for transmission of data<sup>4</sup>

While Rakuten believes a reply within a period of 3 months will be feasible in general, we respectfully remind the WP 29 that no specific time limit is foreseen in the Regulation. We regret the misinterpretation of the Regulation in the guidelines defining a time limit. The guidelines state that the **personal data** must be **provided** to the data subject “**without undue delay**” and “within one month of receipt of the request” in accordance with article 12(3) of the Regulation. The respective article however, states solely “the controller shall provide information on action taken on a request [...] to the data subject without undue delay”. This does not imply that the actual data has to be transmitted without “undue delay”. This interpretation is further confirmed by article 17 (1) naming a time limit for the right to erasure. Rakuten stresses its willingness to comply with the request within three months, however preserves the right for a longer period if the requests are complex and large amount of data sets are concerned.

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<sup>2</sup> See P. 10 of the WP 29 Guidelines on the right to Data Portability

<sup>3</sup> See P. 11 of the WP 29 Guidelines on the right to Data Portability

<sup>4</sup> See P. 12 of the WP 29 Guidelines on the right to Data Portability

## V. Security of Transmission<sup>5</sup>

Rakuten welcomes that the WP 29 is aware of a possible security risk emerging from the transmission of data to the data subject. Especially since the general awareness on security risk in the society is relatively low. Rakuten considers it utterly important to stress that we can in no way ensure any security measures taken by the data subject. The data subject requesting the data shall be responsible for identifying the right measures. It is the sole responsibility of the society, regulators and politicians to educate data subjects about possible security risks and appropriate measures and cannot be attributed to the controller. Especially, because the controller does not have the background information to assess the security risk of every single data subject.

### B. Data Protection Officer

Rakuten expresses its gratitude on further clarification on the concept of Data Protection Officers (hereinafter: DPO) by the WP 29 guidelines. In order to fully comply with the concept, we would appreciate a few further clarifications.

#### I. Dismissal of DPO<sup>6</sup>

Rakuten is aware and welcomes the importance of an independent DPO and acknowledges that to guarantee the independence it is incumbent to shield this position from being dismissed because of exercising its tasks. Rakuten welcomes the clarification made by the WP 29 that a DPO can nevertheless, be dismissed in cases of theft and harassment but also urges for a clarification on dismissal in case the DPO repeatedly fails to perform his tasks appropriately. This is an important safeguard for the fundamental rights of the data subject as a company with a DPO not performing a tasks will not achieve the same level of compliance as necessary for a sufficient functioning of the rights in question.

#### II. Conflicts of interest<sup>7</sup>

The WP 29 provides a few examples of what may constitute a conflict of interest. However, the overall definition of a conflict does not go beyond a rephrasing of the issue at stake. Rakuten would highly appreciate a further elaboration on what exactly constitutes a conflict of interest. Especially, with a view on the structure of our teams there will be a need for various people working together in fulfilling the tasks of the DPO. However, it is not clearly addressed in the guidelines whether this would endanger the independence of a DPO.

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<sup>5</sup> See P. 15 of the WP 29 Guidelines on the right to Data Portability

<sup>6</sup> See P. 15 of the WP 29 Guidelines on the Data Protection Officer

<sup>7</sup> See P. 15 of the WP 29 Guidelines on the Data Protection Officer

## C. Conclusion

In conclusion, Rakuten stresses the importance of the guidelines and trusts the WP 29 to sufficiently address the named issues. In particular, to clarify on the right to data portability the position of third parties, the necessary steps for identification of a data subject and the dismissal of a DPO. This will be the key elements to be addressed for Rakuten.