

Embracing technology
Embracing ambition

31/01/2017

.AGORIA

AGORIA Telecom Industries is a leading European association of telecommunications operators and service providers, representing the interests of its members and the wider industry.

AGORIA Telecom Industries is a leading European association of telecommunications operators and service providers, representing the interests of its members and the wider industry.

Position paper of Agoria Telecom Industries
on the Guidelines on the right to data portability
as approved by the WP art 29 in the December 2016 plenary session

Summary:

Agoria Telecom Industries welcomes the WP Art 29 guidelines on the application of the Data portability right, but is at the same time calling upon the WP Art 29 to stick to the text, the spirit and the objectives of the article 20 of the General Data Protection Regulation (GDPR) in its guidelines. Agoria Telecom Industries want to highlight, especially taking into account the specific context of the telecom sector :

- the lack of clarity about the ability to really reach with this instrument, applied azimuth to such a large scope of data, the objectives underlying article 20 (ensuring customer empowerment and avoid lock-in)
- the extension of the scope beyond the text of the article 20 GDPR
- the responsibility of data controllers
- the technical issue of interoperability

Agoria Telecom Industries would be happy to engage in a dialogue based on concrete use cases focused on the telecom sector in order to apply the right of data portability in a way it would really bring an added value to the data subject..

The GDPR adds to the list of data subjects rights the right to data portability.

Agoria Telecom Industries was looking forward to the guidelines of the WP Art 29, in order to get more clarifications on how this new data portability right should be interpreted and finally implemented. Nevertheless we now conclude from the presented guidelines that the aim of providing guidance has rather turned into **creating more confusion** regarding how to implement this new right in practice. We fear that data subjects will have expectations that will finally not be met. This will lead to frustrations of both data

80 Bd A. Reyers Ln
1030 Brussels

AGORIA Telecom Industries

.AGORIA

subjects and receiving data controllers due to the technical incompatibilities and other difficulties to implement the data portability right as described in the guidelines.

A point that Agoria Telecom Industries wants to bring to the attention concerns the **objectives** of the data portability right and how the interpretation in the guidelines is going much further than these objectives.

Recital 68 states : *"To further strengthen the control over his or her own data, where the processing of personal data is carried out by automated means, the data subject should also be allowed to receive personal data concerning him or her which he or she has provided to a controller in a structured, commonly used, machine-readable and interoperable format, and to transmit it to another controller. (...)"*

The data portability right is thus clearly customer oriented right. The guidelines also specify *"The purpose of this new right is to empower the data subject and give him/her more control over the personal data concerning him or her. (...) It will facilitate switching between different service providers, ..."*. Furthermore the guidelines precise in the introduction also *"This right, which applies subject to certain conditions, supports user choice, user control and consumer empowerment."*

Without doubt user empowerment is to be welcomed, and the right of access responds already in great extent to the need for more control by the data subject of his/her personal data. In order to avoid confusion for the data subject it will be important to specify what is the real difference between the right of access as described in article 15 of the GDPR and this new data portability right.

For Agoria Telecom Industries it is especially the second objective of facilitating switching and avoiding a lock-in that needs to be analysed as this seems to be the real novelty aimed at with the article 20.

During the negotiations around the GDPR, Agoria and a lot of other stakeholders understood the data portability right with clear potential use cases in mind. Indeed, a data subject could today be confronted with a lock-in if the data cannot be easily transferred. Data submitted by the data subject to a social network or into the cloud are clearly cases where the data subject provides personal data and where the execution of a contract is the legal basis. As far as the data is necessary to continue the provision of the service by another service provider or to continue the use of the service by the data subject when having switched to another service provider, the personal data are indeed key elements in the service provided, and therefor Agoria Telecom Industries understands these data should be transferrable to another controller with the same service offering in order to prevent the lock-in of the data subject. But, with the current guidelines and especially the examples from the telecom sector like the traffic and location data, Agoria Telecom Industries feels very uncomfortable because the data from these examples are not at all needed for offering the service to the data subject after a switch of service provider. For instance in the context of fixed or mobile phone calls, the transfer of a list containing the phone numbers of contacts seems a reasonable example of a useful data portability case, but the lists of all calls made in the past, is not necessary for the data subject to make use of a phone service with a new service provider. If compared to another example from outside the telecom sector, one could say that the playlist introduced by the data subject in a music streaming service, would be subject to a useful data portability right, but the data about at what moment in

time and how many times the data subject listened to the playlist, would be out of scope of the data portability right because these data are not necessary for offering the service to the data subject after having switched to another music streaming provider.

Moreover in the telecom sector already a lot of anti-lock-in measures exist. The Belgian legal framework introduced over the last years several measures to avoid customer lock-in and to help people with the choice of their telecom provider (easy-switch, number portability, email forwarding, ...) or with different tariff options proposed (tariff simulator, ...). These measures are already effective and therefore with Agoria *Telecom Industries* we really do not see how the portability of e.g. traffic and location data would help to realise the objective of preventing lock-in.

The question raises if this data portability right (in this large interpretation as foreseen by the guidelines) is the correct answer to problems observed and causing lock-in, especially taking into account the already implemented measures due to European and Belgian legal obligations.

The draft guidelines seem to be written with some concrete services/applications in mind but have too many uncertain impacts on already much regulated sectors, like the telecoms. It is of utmost importance, before extending the interpretation of article 20 of the GDPR, to have measured the impacts in order to avoid disproportionate burden on a sector that has already other mechanisms in place to remedy lock-in of users.

It is recommended to start from concrete use cases in those domains where data portability could have a clear added value for the data subject rather than extending for all sectors/applications/services the interpretation of the data portability right.

We are very happy to discuss more concretely how the objectives can be realised starting from concrete use cases.

It is also of the utmost importance to analyse more in detail what will be the status of the data once it has been "ported out" and how this data will provide value for the data subject to have that "ported in/ transferred towards /imported in" another data controller. Before obliging a transfer of data, it is necessary to have clear views on how that data will be useful for the data subject. How will recipient data controllers be able to handle / read that data to extract value for the data subject. If the analysis is not done beforehand, data subjects risk to have too large expectations and this would only create confusion for all parties involved.

This last point also leads to the need to reconsider the **scope** of the data portability right, as otherwise interpreted by the guidelines. Article 20 of the GDPR clearly refers to data provided by the data subject. The evident use cases all concern data provided by the data subject. Article 20 of the GDPR will for those use cases clearly be a new right with clear objectives and thus bring concrete added value for the data subject.

The data portability right surely has not been created to be a copy of the right of access. It is clear that the

data portability right serves other objectives than the right of access and therefore also has another scope.

With the statement in the guidelines that the data portability right should also concern the personal data that are generated by and collected from the activities of users, the WP art 29 seem to widen up the data portability right. A new array of use cases are imagined with this personal data in the guidelines referred to as personal data "provided" by the data subject. Several examples of raw data (smart meter use, search history, traffic data and location data, heartbeat rates etc.) are provided by the Guidelines. Those examples are good to analyse more in detail the real added value for the data subject and the "transferability" of this data to another data controller. That data "provided" by the data subject will not always be similar or comparable from one provider to another, and would potentially create confusion for data subjects.

Another point that may not be neglected, from a practical point of view, is the unclear status of the data for the receiving operator in terms of responsibility, retention period, structure and security measures. As the responsibility of the receiving operator can be engaged, it could be risky for him to import data sets on the request of a data subject. It is furthermore not clear what is always the legal ground on which a data subject will be entitled to oblige a service provider to import his data.

Also taking into account that data from other data subjects could be impacted by the data portability right of one particular data subject, the responsibility of the receiving operator could still be more engaged.

Agoria Telecom Industries is also concerned about the possible impact of the data portability right on the privacy of other persons than the data subject who is exercising its right of data portability. The following example aims to clarify this from a very concrete point of view: if the data portability right would include in its scope the list of the incoming calls, the right to privacy of the calling party risks to be impacted. The calling party has the right to not show his phone number to the called party (the so called "CLIR", calling line identification restriction, versus the "CLIP", calling line identification presentation). However telecom service providers might not have the means to distinguish in the list of incoming calls to be provided in the context of data portability between CLIR-numbers and CLIP-numbers and therefore risk to reveal the calling number of a person while this person wishes to keep his phone number secret.

A last point of concern is about the expected data format. *Agoria Telecom Industries* concurs with the WP art 29 guidelines where they state that a wide range of data types and formats exist and that the GDPR does only encourage but does not impose to set up compatible systems for the sole purpose of data portability. From there *Agoria Telecom Industries* is of the opinion that in case of lack of interoperable format, data controllers have no further obligation than providing the data in the format that is available to them. It would be very useful, as well for data controllers, data subjects and receiving parties, to include this principle into the guidelines.

Agoria Telecom Industries observed **a lot of reluctance towards the proposed guidelines by Art 29 WP**. It will be important to distinguish during the coming months on those data sets that are really aimed at in the GDPR and that will bring added value to the data subject, rather than extending the scope without real considerations of the impact for the data controllers (exporting and importing) and added outcome for the data subject.