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To: JUST-ARTICLE29WP-SEC@ec.europa.eu and presidenceg29@cnil.fr

From: [redacted]

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Guidelines and FAQs on the Right to Data Portability

I offer the following comments on the guidance material released in relation to the new EU Right to Data Portability from the perspective of an interested person outside the EU.

My interest and perspective

I write from three interrelated capacities:

- As a lawyer who has studied Article 20 GDPR and who anticipated the guidance answering the interpretative issues raised by the new right that I had already identified.
- As part of a national data protection regulator in a non-EU country that both has experience in relation to an earlier generation of data portability law and that favours broadly similar portability rights being incorporated into updated domestic privacy law.
- As the convener of an APEC ECSG Data Privacy Study Group in relation to Data Portability, which has as an initial twin focus the potential benefits of the right to consumers and the issues for policy interoperability between the EU right and arrangements in other economies.

[redacted]

I have made meeting/conference presentations and published on the topic of the right to data [redacted]

Need for clear guidance

I commend A29 for prioritising the preparation of guidance on the Right to Data Portability and for producing documentation within calendar year 2016. In my view the novelty and significance of the right justifies that prioritisation.

The need for clear guidance goes beyond the interests of data controllers and regulators within the EU. The guidance will also be needed by businesses whose operations go beyond EU borders. This is both because of the globalised nature of many EU businesses but also because of the purported extra-territorial effect of the GDPR on no-EU businesses. In addition, there is much interest in this right from outside the EU by people interested in 'next generation' privacy law.

My first comment is to note that while parts of the documentation are clearly expressed (especially the FAQs), and the overall effect is highly informative, the main guidance is not as clear as it could be and would benefit from further editing even if the substance is left intact. My general suggestions for improvement of clarity and usability include:

- *Structuring*: To more clearly differentiate interpretation of the law from other matters (especially in Part II where several sub items that could appear elsewhere detract from a logical legal discussion of the main elements of data portability; the ordering seems illogical in places jumping around and missing parts of the statutory right).
- *Numbering the headings or paragraphs*: To assist in citation, dissemination and analysis of the guidance.
- *Plain expression*: The FAQs do a better job of simple description than the guidance and the may be scope to replace some complicated wording in the guidance itself.
- *Better examples*: Users of the guidance are likely to benefit from practical examples – the guidance could be improved through addition of non-trivial examples that are clearly within scope of the right.
- *Text of the applicable law*: It is apparent from the guidance that parts of the recital and Articles 12, 13 and 14 need be considered in addition to Article 20. It might be convenient for users to have these extracted and annexed.

What is missing from the interpretative guidance?

Lawyers and professional advisers seeking interpretative guidance on Article 20 will be particularly interested in Part II of the guidance. This begins promisingly enough by appearing to set out the definition of the right and going on to explain the elements. However, on closer examination it appears that this approach – quite usual in interpretative legal guidance – begins but then trails off and is not systematically completed.

For instance, only the opening part of the definition is given. The legal right cannot be understood by only considering the opening phrases asserting the right. The description of the right is only complete when one adds in a characterisation of its explicit limits (both the extent of the right and exceptions to it).

The guidance gets side-tracked into slightly peripheral commentary ('data portability tools' and 'controllership') that interrupts a clear account of the right and the A29 view of the interpretation of its elements. In my view what should be expected is threefold:

- Brief description of the element.
- A29 interpretative view of that element.
- Reasoning or authority underpinning A29 view.

In my view, a logical approach to outline and provide interpretative guidance on the 'main elements' of the right outlined in Article 20 would cover the following (using the order of the text of the article). I indicate where, in my opinion, the expected elements of description, interpretation or reasoning/authority appear to be missing (based on my reading and, in some cases, a word search).

Element	**Summary**	**A29 interpretation**	**Reasoning/ authority**
the right to receive	✓ p5	×	×
personal data concerning him or her	✓ p7	✓	✓
he or she has provided to a controller	✓ p8	✓	×
in structured, commonly used and machine-readable format	✓ p13	✓	✓

right to transmit to another controller	✓ p5	×	×
without hindrance from the controller	×	×	×
consent or contract	✓ p7	✓	✓ (rudimentary)
carried out by automated means	✓ p7	✓	✓ (rudimentary)
[right to transmit to another controller] where technically feasible	×	×	×
prejudice to Article 17	×	×	×
performance of a task carried out in the public interest or in the exercise of official authority	✓ f/n9 p7	✓	×
rights and freedoms of others	✓ p6, p9	✓	✓/× (reasoning for some aspects only)

Noteworthy complete omissions therefore include interpretation of 'hindrance' by a controller, technical infeasibility, and the inter-relationship with the right to be forgotten. (As an aside, [redacted] has a 1993 law applying to our health sector that could be termed a data portability law and it includes the phrase ""neither the fact that any payment is due ... nor prejudice to the commercial position of the holder ... shall constitute a lawful excuse for not disclosing information" which may offer a hint of some kinds of hindrance that might reasonably be anticipated.)

In many cases the guidance did little more than paraphrase the element. In some cases examples were given but no reasoning was offered. In one case important content was found only in a footnote.

In some cases the guidance helpfully gave clear views of A29 but unfortunately did not accompany this with cogent reasoning or authority. The clearest example of this was in relation to the limitation of the application of the right to personal data that the subject "has provided to a controller". The guidance expresses the firm and emphatic view that this data includes "observed data" generated by a device. This view is potentially insightful and will help ensure that the right is meaningful for consumers. However, it is not one that is necessarily intuitive and might be likely, in the absence of supporting authority, to be disputed by controllers that prefer a narrower interpretation. It would be helpful if fuller reasoning, or support drawn from existing data protection jurisprudence, were given in support.

Brief page by page comments

I offer a few comments on the content. In the absence of paragraph numbering I do this by reference to page numbers.

Page 4

Under heading 'right to receive personal data' the phrase is used "and to store it for personal use on a private device". As far as I can see this phrase is a gloss on the right that does not exist in the GDPR. From my experience one needs take care casually or needlessly introducing extraneous

concepts onto paraphrases in official guidance documents as users mistakenly think they are part of the law itself.

The music streaming service example relies upon the A29 view that 'observed' data can be considered to have been 'provided' by the individual concerned. The guidance may benefit from inclusion of additional clear cut examples that do not rely upon interpretations that might be open to challenge.

Page 5

The examples continuing from page 4 onto page 5 verge upon the trivial and the guidance will be stronger if including non-trivial examples (e.g. transfer of health records?).

Footnote 2, referencing household processing, seems irrelevant to understanding data portability and could be dropped to reduce clutter. If it is important, its relevance should be made plainer.

Under 'a right to transmit' there is passing reference to 'without hindrance' but the significance of that concept is never explained.

Material on 'data portability tools' seems misplaced in this part of the guidance. (Passing brief reference might look less misplaced if the subheading was omitted or if the material was consigned to a footnote.) It is not clear what 'on a technical level' means here, as it sounds more like a business or customer process. It says businesses 'should offer' but doesn't explain why they should.

Material on 'data controllership' also seems misplaced in this part of the guidance and might be better introduced later. The material under this heading that continues on page 7 seems to be quite remote from data portability and could be shortened or omitted to reduce clutter.

Page 6

Under 'when an individual exercises ...' there is an interesting (although occasionally unclear) discussion of whether exercise of the right triggers deletion of data after transmission. In my view this is a topic worthy of more exploration of the issues and possibly A29 guidance. My view is that in some contexts it is expected or even essential that the controller deletes the information and in other cases this may be an undesired or problematic outcome. The important thing is that the expectations of the controller and the individual be aligned: it may be desirable that deletion practices in such cases be explicit and not based on inferences that may result in misunderstandings.

Page 7

The bald statement 'The GDPR does not establish a general right to data portability for cases where the processing of personal data is not based on consent or contract' is not accompanied by any discussion. Surely there is useful guidance to offer?

The statement is linked to footnote 9. However, that footnote makes another point which is of such significance it ought to appear in the body of the guidance.

There is a statement 'pseudonymous data that can be clearly linked to a data subject (e.g. by him or her providing the respective identifier, cf. Article 11 (2)) is well within the scope'. This seems like a

somewhat obscure example for guidance of this kind but since it is given I would note the additional qualifier that the data must be provided by the subject (a qualification discussed on the next page), which might be in doubt for at least some pseudonymous data, so perhaps the firmness of the 'is well within' expression should be lowered to something like 'may well be within'.

Page 8

The material under 'second condition' is fascinating and A29 is certainly forthright in expressing a viewpoint on a key issue (handily set out in bold), which is certainly to be appreciated. However, the material seems largely to assert a conclusion rather than provide support for that viewpoint.

Page 9

The 'third condition' concerns Article 20(4) which provides that 'The right referred to in paragraph 1 shall not adversely affect the rights and freedoms of others.' In the very extensive discussion on p9 continuing onto p 10 this appears to be taken to refer to rights of 'other data subjects' and the further processing of information that might be transmitted. There may be other interpretations that are either (or simultaneously both):

- narrower – focused solely on the right, not the possible downstream processing; or
- broader – not limited to the rights of data subjects (i.e. principally the rights of the controller or perhaps even the public generally).

Another issue that you might wish to consider is whether the right is able to be exercised by agents or representatives of the subject (e.g. a parent in relation to a child). Perhaps the 'other' in such cases might even be the individuals themselves (e.g. parents obtaining a child's health record). If not considered under this limb of the right you may nonetheless explore it is terms of guidance on managing the risks in operating the right.

Page 10

Some of this material seems a little speculative and remote from portability (e.g. 2nd paragraph).

The statement "The right to data portability is not a right for an individual to misuse the information in a way that could be qualified as an unfair practice or that would constitute a violation of intellectual property rights" is not explained. Is 'unfair practice' used as a term of art from some IP law? If so it should be referenced. If there is no law behind the statement it is difficult immediately to see the basis upon which individuals are expected to restrict the use of information that they themselves have 'supplied' and then retrieved.

The statement "data controllers can transfer the personal data provided by data subjects in a form that does not release information covered by ... intellectual property rights." Is this intended to be a positive statement by A29 that IP rights prevail over this GDPR right? A casual statement of that type, without clear delimitation and analysis may be taken further by some business interests than perhaps might be intended. [redacted] health sector portability law, by contrast, states positively that "neither the fact that any payment is due ... nor prejudice to the commercial position of the holder ... shall constitute a lawful excuse for not disclosing information".) Perhaps this is an

area where A29 might benefit from seeking specialist IP legal advice to identify precise areas of potential intersection of relevant rights.

Page 11

I thought that the first half page was a useful discussion of relevant issues and useful guidance. Perhaps you might also like to ponder the right in the context of a controller going out of business or the sale or disposition of a business.

In the second half of the page readers are introduced for the first time to other relevant GDPR articles (which continues helpfully on the following pages). It might be helpful to give an overview of the relevant parts of the GDPR somewhere and perhaps extract and attach the text.

Page 12

There is a speculative statement that multiple requests are unlikely but no basis for that statement is given. In general I have found that it is better in guidance documents to reassure business of the availability of 'safety valves' against vexatious and repeat requesters than imply an attitude from the regulator of unwillingness to see those mechanisms used. These provisions are rarely used but it is the regulatory attitude that is being revealed in the guidance document.

Page 13

The material presented in relation to 'structured, commonly used and machine-readable format' is very useful having all the qualities of being clear, expressing a viewpoint and useful guidance and being backed up by authority.

Page 14

The statement 'processing additional meta-data on the only assumption that they might be needed or wanted to answer a data portability request poses no legitimate ground for such processing' caught my eye. While not necessarily disagreeing on a technical basis, might this statement discourage a controller from doing a proactive favour to consumers in some circumstances?

[redacted] 21 December 2016