



ARTICLE 29 DATA PROTECTION WORKING PARTY – DRAFT GUIDELINES ON THE RIGHT TO DATA PORTABILITY AND THE DATA PROTECTION OFFICER – SNCD INPUT

Sncd 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.

Created in 1933, Sncd, National Union of Direct Communication, ranging from data to logistics is the French leading professional association for businesses using and supporting direct communication and customer relationship techniques. Sncd stands for 200 company members who have undertaken to provide their clients with the best services following the professional codes of ethics, and goods practices in the fields of databases, list rental, IT services, personalization, postal & electronic direct communication and targeted advertising. As a union, it is devoted to defending and promoting multichannel direct marketing businesses.

The data-driven marketing industry uses personal information and data to effectively match customers' needs with relevant brand offers. The industry aims to create and maintain an individual and interactive relationship between organizations, institutions and their customers (both prospective and existing). The industry allows organizations to target customers with a personalized message, to generate sales both online and in store in a cost-effective way to build long-lasting relationships with customers and raise brand awareness. It is an essential driving force of the EU economy and the EU Digital Single Market.

As a preliminary comment, Sncd 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.

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

Right to data portability

- **Interpretation and objectives of the provision**

Sncd considers that the interpretation of this data portability right is already being influenced by current national and European proposals, investigations and technological evolution. It is however important to sustain the right balance between the interests of consumers and organizations by respecting GDPR principles such as the risk based approach, proportionality and remaining technologically neutral.

Data portability aims at granting the data subject more control over his/her personal data. The right to data portability in the GDPR must be interpreted in the context of the GDPR. Such an interpretation should not change in the light of future national and European proposals, investigations and

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technological evolutions. The interpretation of the right to data portability in other related areas, such as competition law, needs to be aligned as much as possible with its interpretation under the GDPR, taking account of the GDPR principles (risk-based approach, proportionality, minimization, technology neutrality).

- Personal data provided

The data referenced in article 20 of the GDPR is the personal data concerning the data subject (personal data, pseudonymous data that can be clearly linked to the data subject, but not anonymous data). If the data does not fall within the GDPR definition of personal data, there is no right to data portability.

Regarding pseudonymous data, this should only apply to personal data actively or consciously provided by the data subject. The right to data portability does not apply to personal data, which is not provided by the data subject.

Sncd 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.).

- Observed personal data

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.

SNCD considers that right to data portability does not apply to personal data which is not provided by the data subjects. Therefore, the right to data portability should not apply to all observed data.

- Data subject rights and technology

SNCD 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.

There should not be confusion between the data subject's right to data portability and the various technologies which foster free flow of data such as personal data stores, trusted third parties, Application Programming Interface. The GDPR must remain technologically neutral. Organizations should remain free to grant the data subject's right to data portability with the technological solution they consider the most suitable. PDF and Excel formats should be allowed as still largely used by organizations and data subjects.

Eventually, 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, SNCD considers that the controller must not be expected to help the data subject in this matter: it is not the role of the controller; the controller does not in any case have the appropriate expertise and in addition it could engage its liability.

- Third party and other rights

Sncd urges for the respect of the intellectual property rights and trade secrets of organizations under the right 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.

Moreover, Sncd calls for more caution regarding when personal data of third parties are included in the dataset. We are concerned with the fact that the organization receiving the third-party data in a dataset, should be able to decide which data it can process and on which legal basis. Indeed, the guidance provides that the receiving controller can process the data on the basis of legitimate interest, in particular for the purpose of providing a service to the data subject that allows the latter to process personal data for a purely personal or household activity. The data must be kept under the control of the requesting user. The data cannot be used for the receiving's controller own purpose (e.g. marketing). Yet, the third party must be informed and must benefit from his/her data protection rights. Sncd is not convinced of the compatibility of these suggestions with third party rights under article 20 (4). Sncd recommends a case by case approach based more on the principle of proportionality.

Sncd considers that it is important to respect the principle of proportionality. An organization should be able to assess on a case by case basis whether the right to data portability request violates the right to data protection of third parties or not.

Data Protection Officer

Sncd welcomes the concept of Data Protection Officers as part of the accountability principle of the GDPR and its risk based approach.

We would like to highlight an important aspect, which Sncd feels should be strengthened in the guidance of the article 29 Working Party.

While it is likely that many of the personal data processing carried out by the data driven marketing industry may fall within the criteria of the GDPR for a Data Protection Officer, a case by case analysis should always be the necessary prerequisite to identify whether a Data Protection Officer is legally required or not. As an example, section 2.1.4 of the guidelines refers to “loyalty programs”. While the personal data processing made in the context of loyalty programs may correspond to the definition of “regular and systematic monitoring”, it might not always be the case. In particular if such loyalty programs take place in the offline world, carried out by small organizations. The legal requirement for a Data Protection Officer should not be defined by a general industry practice but must be the result of a specific and justified analysis of a particular case.

Conclusion

Sncd calls on the article 29 working paper to review this guidance in light of the GDPR principles such as the risk based approach, proportionality and remaining technologically neutral. National or parallel European discussions on competition and consumer protection should not jeopardize the delicate compromises reached in the GDPR.

About Sncd

Created in 1933, the **Sncd, National Union of Direct Communication, ranging from data to logistics** is the leading professional association for businesses using and supporting direct communication and customer relationship techniques. It can be compared to the US and UK DMA-Direct Marketing Association. The Sncd stands for 200 company members who have undertaken to provide their clients with the best services following the professional codes of ethics, and goods practices in the fields of databases, list rental, IT services, personalization, postal & electronic direct communication and targeted advertising. As a union, it is devoted to defending and promoting multichannel direct marketing businesses.

It represents all BtoB and BtoC digital and multichannel direct communication businesses with a large knowledge and highly proven technologies: datamining, research and analytics, data processing and quality, targeting and personalization, CRM and e-CRM, offline and online mail businesses, full lettershop services for direct mail and publications, distribution, logistics and printing, acquisition and loyalty techniques, emailing, social media, mobile media... www.sncd.org

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