

Article 29 Working Party
JUST-ARTICLE29WP-SEC@ec.europa.eu
presidenceg29@cnil.fr

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**Opinion on Article 29 Working Party Guidelines
on the right to data portability (WP 242)**

Estonian Association of Information Technology and Telecommunication (hereinafter: ITL) analysed the draft Guidelines on the right to data portability (hereinafter: the Guidelines), published by Article 29 Working Party on 13th December 2016 and we hereby submit our feedback.

The Guidelines are in principle necessary and helpful to all stakeholders as the article 20 about data portability in the General Data Protection Regulation (EU) 2016/679 (GDPR) is quite vague. The Guidelines ensure that the regulation is implemented similarly by all concerned parties. The aim of the Guidelines should therefore be to achieve legal certainty.

ITL's position is that the Guidelines should not extend or amend the GDPR. Moreover, the Guidelines should not extend the scope of portable data as that increases risks to the rights of the data subjects.

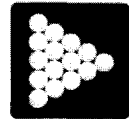
Part III of the Guidelines lists the conditions when the data portability applies. According to the article 20 of the GDPR the right of data portability includes only personal data concerning him or her and which he or she has provided to the controller.

However, the Guidelines extend the scope by stating that data portability includes also observed data that are provided by the data subject by virtue of the use of the service or the device. At the same time, the Guidelines do not address clearly which problems such a wide interpretation will solve.

In ITL's view the right of data portability should only apply to personal data that is actively and knowingly provided by the data subject to the controller. We are concerned about the proposed extension because of the following reasons:

1) The extension contradicts with the aim of the GDPR. The primary aim of data portability is to facilitate switching from one service provider to another. It should also facilitate effective competition. However, the observed data does not create similar lock-in risks that would limit competition. The data subject may only lose control over data that was actively and knowingly provided by the data subject.

2) The observed data of different service providers may not be comparable and this means that the data cannot be re-used in whole.



3) We also point out that for example the telecommunication sector is already subject to requirements, which support competition and avoidance of service lock-in, for example, through number portability requirements that are actively used by customers. Therefore, there is no need to extend data portability to traffic (including location) data as this creates disproportionate obligations to telecommunication operators.

4) **We believe that one of the key issue of data portability is the principle that the right to data portability shall not adversely affect the rights and freedoms of other persons.** It seems to us that the Guidelines do not consider such risk in full extent while extending the scope of data portability to observed data.

a. For example in telecommunication sector the observed data may be highly confidential as it includes also traffic and location data. Due to the sensitive nature of data related to personal communication, there is a high risk to data subjects when such data is transmitted from one service provider to another service provider. Such data may include personal data of several persons and this means that there are several affected data subjects (for example there may be one subscription which are used by all members of family). It is important to bear in mind that the subscriber is often not the only user of services. This means that the other data subjects have no control over their personal data being transmitted.

b. Although the Guidelines suggest to ask the consent of every affected data subject, it may not be possible, because the service provider does not know the contact data of all the users under one subscription.

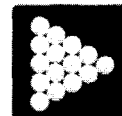
c. We also see a risk that the requesting data subject may rely on data portability to purposely obtain confidential data about another user. As a consequence, data portability may weaken the principle of confidentiality of communications and this should be avoided.

5) Relying only on the good faith of requesting data subject or the receiving data controller is not enough to guarantee that the rights of each and every data subject are taken into account. The transmitting data controller should be obliged and entitled to exclude any data (especially sensitive data) that relates to other persons from the data set, unless it has the consent of the data subject.

Accordingly, the scope of data portability that only includes data provided by the data subject would decrease privacy risks for data subjects. The most effective would be to restrict the right to data portability to data that does not include other subjects' data.

In addition, we would like to emphasise that expanding the scope of data portability so it would include observed data **creates additional costs and efforts for the industry.** The Guidelines do not take the imposed burden too seriously, but as the data portability is complex, needs detailed technical work and not exercised in practice yet, it cannot be concluded that this does not impose excessive burden or bring along significant costs.

In conclusion, we hope that Article 29 Working Party establishes reasonable balance between data subjects request and the data controller's obligations in the Guidelines and does not extend the regulation of the GDPR. All requests must be clear, reasonable and proportionate to the objectives pursued by the exercise of the right.



ITL is thankful for the opportunity to comment on the Article 29 Working Party's Guidelines. We hope that Article 29 Working Party considers our feedback by reviewing the Guidelines in order to provide guidelines that are strictly in accordance with the GDPR regulation and do not extend the obligations of the service providers.

Estonian Association of Information Technology and Telecommunications (officially abbreviated as ITL) is a voluntary non-profit organisation, whose primary objective is to unite the Estonian information technology and telecommunications companies, to promote their co-operation in Estonia's development towards information society, to represent and protect the interests of its member companies and to express their common positions.
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Yours sincerely,

A handwritten signature in black ink, followed by a thick black horizontal redaction mark.

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