

**Telefónica Comments on the Article 29 Working Party
'Guidelines on the right to data portability'**

27th January 2017

Telefónica welcomes the opportunity to make comments to the Guidelines on Data Portability as adopted on 13 December 2016 (*"the Guidelines"*) and to the Art29 Working Party's intention to *"provide guidance on the way to interpret and implement the right to data portability as introduced by the GDPR"*. We do believe that this is an important exercise as the new right to data portability is a key element to provide the proper balance between the fundamental rights to data protection and privacy of the European Citizens and innovation across the digital value chain.

Our evolving data strategy intends to change the traditional approach to user data and the value this data can generate. Telefonica's aims to *"unlock the value of peoples' data for them and for society"* by providing users with transparent tools to easily manage their data. In this context we are working on innovative ways to allow our customers to share their data with partners. We do see data portability as part of this wider data sharing.

1. Guidelines should adhere to the GDPR

Telefónica believes that EU General Data Protection Regulation 2016/679 (hereafter the *"GDPR"*) already strikes the right balance between the need for ex ante regulation and the need to ensure sufficient freedom/flexibility for market players to innovate in a highly dynamic and competitive Internet-based environment.

The Guidelines should therefore adhere to that balance, and avoid prescriptive and broader interpretations in those areas that the GDPR purposely left open to an ex-post, case-by-case assessment that would be highly dependent on technological and market developments. We note in this respect that the Working Party's mandate is not a blanket mandate to develop secondary legislation by adopting an extensive re-interpretation of the GDPR.

2. Provided to a controller does not mean generated by a user

This is specifically the case of the Working Party's interpretation of the term "provided to a controller" in Article 20 (1) of the GDPR¹.

The Working Party first recognises that the words "provided by" narrows the scope of the Data Portability obligations of the controllers. Nevertheless, it then continues to state that "the data controller must also include the personal data that are generated by and collected from the activities of users in response to a data portability request".

The Working Party does not add any justification to this overly broad extensive interpretation of the wording of Article 20 (1) of the GDPR. Nor it could have since there is no legal or business rationale underpinning this interpretation.

The right to data portability was primarily conceived in the context of social networking sites and cloud storage providers in order to allow individuals to easily move their data to similar service providers. That's why data portability is limited to "data provided by" the data subject (a customer's documents in the cloud or the pictures he/she has uploaded, etc). In other words, data portability was conceived as a tool to improve competition between service providers by allowing customer to port all those data that he has provided to a competitor without unnecessary friction.

3. WP29 interpretation would deliver less user control and less security

Against this background, Telefonica believes that the WP29 interpretation of data portability works against the objective to allow customers to easily use their data with a third party to generate value for themselves.

Allowing customers to share their data with third parties goes well beyond raw downloads: we want our customer to share data in a way that protects their privacy (for instance, tokenised responses); we want to guarantee secure connections with our partners (through which customers personal data will flow); and finally we want to ensure that the service will provide value back to our customers.

The downloading and having access to indigestible amount of raw data (like all the records related to how many times their phone was connected to a mobile antenna) does not contribute to the creation of a safe and secure data sharing environment for our customers for various reasons.

¹ "The data subject shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the data have been provided"

First, the user may want to have access to data that may be valuable to him/her (such as for instance the Points of Interest where the user has been during the last week) rather than to unintelligible GBs of data.

Second, uncontrolled download of GBs of data from our services could be potentially detrimental to our users' security and privacy. While our users would not in most cases be able to apply sophisticated algorithms to the raw data they have downloaded they could fraudulently be convinced to transfer those data to third parties that would have this knowledge. What for most users would be an unintelligible set of data, for a malicious third party could be a gold mine of personal information.

Third, we also believe that a too broad portability obligation coupled with interoperability of all the diverse data sets created by each of our services (not all of which will even be available in every data controller) could have a very detrimental impact on innovation. The imposition of a specific format would oblige innovative companies to make the data available in a format that suits the rest of the industry, rather than what works best their services. When new types of data are created by innovative services data controllers would have to devote significant efforts (and risk exposure of commercial secrets) to negotiate how this potentially unique data should be received, and used by other data controllers, including potential competitors.

4. Conclusion

We believe that data connections are an essential differentiating factor in the market, and that companies will find a way to allow customers to download the data that is most relevant to them, in the format that makes more sense in light of the technological development. To oblige all data controllers to make available every data that its users may have generated has no legal basis, is counterproductive from a user-control experience and could potentially result in significant privacy and security risks. Therefore, we kindly request Art 29 Working Party to reconsider its interpretation on the scope of data portability in its Guidelines to take into account Telefonica's considerations as stated above.
