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THE EUROPEAN UNION**

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NOTE

From: Presidency

To: Working Group on Information Exchange and Data Protection (DAPIX)

Subject: Proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)

- Data Portability (Revision of Article 18)

Delegations find attached the revised provision on data portability and the corresponding recital.

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

This right should apply where the data subject provided the personal data based on his or her consent or in the performance of a contract. It should not apply where processing is based on another legal ground other than consent or contract. By its very nature this right should not be exercised against controllers processing data in the exercise of their public duties. It should therefore in particular not apply where processing of the personal data is necessary for compliance with a legal obligation to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of a official duty vested in the controller.

Where, in a certain set of personal data, more than one data subject is concerned, the right to transmit the data should be without prejudice to the requirements on the lawfulness of the processing of personal data related to another data subject in accordance with this Regulation. This right should also not prejudice the right of the data subject to obtain the erasure of personal data and the limitations of that right as set out in this Regulation and should in particular not imply the erasure of personal data concerning the data subject which have been provided by him or her for the performance of a contract, to the extent and as long as the data are necessary for the performance of that contract. (...)

Article 18

Right to data portability¹

1. (...)
2. The data subject shall have the right to **transmit the personal data concerning him or her which he or she has provided to a controller to another controller** in a commonly used **and machine-readable** format without hindrance from the controller **to which the data have been provided to**, where
 - (a) **the processing is based on** consent or on a contract **pursuant to points (a) and (b) of Article 6 (2) or point (a) of Article 9 (2); and**
 - (b) **the processing is carried out by automated means.**
- 2a. **The exercise of this right shall be** without prejudice to Article 17.

¹ UK reservation: while it supports the concept of data portability in principle, the UK considers it not within scope of data protection, but in consumer or competition law. Several other delegations (DK, DE, FR, IE, NL, PL and SE) also wondered whether this was not rather a rule of competition law and/or intellectual property law or how it related to these fields of law. Therefore the UK thinks this article should be deleted. DE, DK and UK pointed to the risks for the competitive positions of companies if they were to be obliged to apply this rule unqualifiedly and referred to/raises serious issues about intellectual property and commercial confidentiality for all controllers. DE, SE and UK pointed to the considerable administrative burdens this article would imply. DE and FR referred to services, such as health services where the exercise of the right to data portability might endanger on-going research or the continuity of the service. Reference was also made to an increased risk of fraud as it may be used to fraudulently obtain the data of innocent data subjects (UK). ES, FR and IE were broadly supportive of this right. SK thought that the article was unenforceable and DE referred to the difficulty/impossibility to apply this right in 'multi-data subject' cases where a single 'copy' would contain data from several data subjects, who might not necessarily agree or even be known or could not be contacted.

2aa. The right referred to in paragraph 2 shall be without prejudice to intellectual property rights in relation to the processing of the **those personal data**².

[3. The Commission may specify (...) the technical standards, modalities and procedures for the transmission of personal data pursuant to paragraph 2. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 87(2).]³

4. (...) ⁴.

² ES thought there should be an exception in case disproportionate efforts would be required.

³ FR, HU, SE and UK reservation: this would better set out in the Regulation itself.

⁴ Deleted in view of the new articles 83a to 83c.