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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

I. Background

1. The Presidency proposes to focus the discussions of the Working Party on specific issues stemming from Chapters I-IV which require further consideration. First discussions in the Working Party on 8-10 January 2014 and 21 January 2014 dealt with pseudonymous data, profiling and certain aspects of the relationship between controller and processor. In continuation of that discussion, the Presidency has prepared this paper in order to facilitate a discussion on the new right to data portability.

2. This right which is in the prolongation of the right of access of individual to his or her personal data, aims at reinforcing the control of individuals on their personal data. Whilst discussions have shown that there is support for introducing a right to data portability, some delegations have expressed concerns on issues such as the (perceived) risks for companies' competitive positions, the administrative burden which may be caused by such right or the scope of the concept of "automated processing system". Some delegations have also pointed the relationship of the proposed right to portability with competition and/or intellectual property law.

II. Data portability – Content of the current presidency compromise text

3. In order to better circumscribe the scope of the right the Presidency has introduced the following changes to the Commission's proposal.
- Article 18 restricts the application of the right to data portability to cases where personal data have been provided by the data subject and when the processing is based on consent or on a contract. With regard to the scope Recital 55 further clarifies that the application of this right will not apply in the public sector. It specifies that when personal data is processed by controllers (public authorities/ private entities) which are processing data in the exercise of public duties the data subject cannot exercise the right to data portability.
 - The insertion of the reference to “ an automated processing system provided by an information society service” limits the right to data portability to internet related services. The applicability to cases of offline data processing has been excluded.
 - The reference to "any other information" has been deleted in paragraph 2 and the compromise clarifies that the right to data portability covers only “personal data” as defined in the Regulation.
 - The data subject will only have the right to withdraw personal data in a form which permits transmission. Thus, there is no obligation for the controller to ensure the direct transmission of data to a another entity that may be a competitor.

4. Furthermore, by replacing "an electronic format which is commonly used" by a reference to a form that permits transmission, the Presidency compromise text has introduced more flexibility for controllers as to the practical implementation of the right to data portability, thereby reducing burden and costs for controllers. Furthermore, it could be envisaged -building on the compromise on the right of access- to allow the controller to request from the data subject the payment of a non-excessive fee. The current compromise provides that the right can be exercised free of charge at reasonable intervals.
5. A new paragraph 2a. has been introduced in Article 18 in order to address concerns raised by some delegations regarding possible interference of the right to data portability with intellectual property rights.
6. Recital 55 clarifies that the right to data portability will not interfere with the right of the controller to keep personal data that the data subject has provided for the performance of a contract to the extent and as long as the data are necessary for the performance of that contract.
7. Paragraph 3 of Article 18 has been streamlined in order to match changes made in paragraph 1.

III. Further considerations

8. The right to data portability will allow individuals to exercise control on their personal data by withdrawing their personal data and transmit them to other business applications. The Presidency compromise text gives controllers the freedom to decide the format by which the data subject can withdraw his or her data, provided that the form allows the transmission into a different system. In situations where, for example, a user of a small internet start-up company wants to withdraw the personal data to transmit them to large internet company, the latter might *de facto* impose the form of the transfer; thereby pushing the small start-up to make complex adjustments to be able to process the personal data transmitted by the data subject. This might be addressed by minimum common technical standards, modalities and procedures. However, setting out these standards in the text of Regulation itself would not serve the need for technological neutrality as it would be difficult to reconcile it with future technological developments.

9. As regards the application of the right to data portability in cases of multiple data subjects concerned in a certain set of personal data, the scope of the data subject's right to withdraw personal data may be further clarified in recital 55 by indicating that the data subject does not have the right to withdraw personal data related to someone else and that the right applies to personal data relating to him/her.
10. The notion of automated processing, in order to avoid any misinterpretation, could be clarified in a Recital on the basis of common concepts in particular to the definition of processing as referred to in Article 4.

11. In this context, the Presidency invites delegations to express their views on:

- a. Whether they support the compromise reached on the issue of data portability, in particular as regards the envisaged reduction of scope.*
- b. Whether they consider that, building on this compromise, further clarifications/specifications can be sought by:*
- Clarifying in text or in recital 55 that a data subject has the right to withdraw personal data relating to him/her.*
 - Further clarify in a recital 55 that the notion of automated processing system has to be understood by reference to the general concepts.*
 - Providing for a mechanism by which certain common minimum standards can be defined for the form in which personal data has to be provided to the data subject.*

Proposal for revision of Recital 55

To further strengthen the control over their own data and their right of access, data subjects should have the right, where personal data are processed by electronic means and in a structured and commonly used format, to obtain a copy of the data concerning them also in commonly used electronic format. **Where the processing of personal data is carried out by automated means,** the data subject should also be allowed to **withdraw the personal data concerning him or her, which he or she has provided, from one automated processing system and** transmit those data, ~~which they have provided, from one automated processing system~~ (...) into another one.

This should apply where the data subject provided the **personal** data to the automated processing system, based on ~~their~~ **his or her** consent or in the performance of a contract. **Where, in a certain set of personal data, more than one data subject is concerned, the right to withdraw and** transmit the data into another automated processing system should not imply **the right to withdraw and transmit data related to another individual. It should neither imply** the erasure of personal data **concerning the data subject** which have been provided ~~by the data subject~~ **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. By its very nature this right cannot be exercised against controllers processing data in the exercise of their public duties.