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## **FEDMA input on Article 29 Data Protection Working Party on the guidance for data portability**

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**FEDMA supports the objective of the Digital Single Market to give better access to goods and services across Europe. FEDMA is fully supportive of the ambitious goals set out by President Juncker for the 2015 Commission.** In line with President Juncker's statement "By creating a connected Digital Single Market, we can generate up to € 250 billion of additional growth in Europe in the course of the mandate of the next Commission, thereby creating hundreds of thousands of new jobs, notably for younger job-seekers, and a vibrant knowledge-based society", we believe that the European Union can strongly benefit from the development of the digital economy.

FEDMA stands for 22 national Direct Marketing Associations, directly representing more than 5 000 organisations, it also has more than 50 organisations as members, representing all parts of the value chain in the data-driven marketing industry. Through its many activities, FEDMA is dedicated to building the business of cross-border data-driven marketing, both through its vast network of contacts and businesses within and beyond Europe and by representation within the institutions of the European Union.

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 organisations, institutions and their customers (both prospective and existing). The industry allows organisations to target customers with a personalised 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.

**FEDMA thanks the Article 29 Data Protection Working Party for the guidance for data portability and the possibility for the industry to make comments. Overall, FEDMA 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 organisations by respecting GDPR principles such as the risk based approach, proportionality and remaining technologically neutral.**

## **Right to data portability**

Data portability aims at granting the data subject more control over his/her personal data. The fact that this right may also improve the free flow of data and therefore, competition, innovation and new business models is a side advantage. The fact that this right may equally facilitate the supply of goods and services with the exchange of data and security are also side advantages. Therefore, 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 technological evolutions. The interpretation of the right to data portability in other related areas, such as competition law, needs to be as 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 actively or consciously personal data provided by the data subject. The right to data portability does not apply to personal data, which is not provided by the data subject.

A right to retrieval of data/digital content, including non-personal data, is currently under discussion in the context of the Directive for the certain contract rules for the supply of digital content (Digital Content Directive). The Communication for the “Building of the European data economy” also provides for discussion on right to portability, including for non-personal data. These discussions jeopardize in our view the coherent interpretation of the GDPR. Although we applaud the efforts that the European Union is making to stay up-to-date with relations between B2C and B2B, we consider that the Institutions could very easily harm the coherence and solidity of the compromises reached in the GDPR. FEDMA is working on these dossiers to ensure that these forward looking legislative proposals in the context of consumer protection and competition do not contradict the GDPR but rather complete it and stay in alignment with GDPR principles.

FEDMA agrees and supports the fact that the controller can refuse a request of a data subject if it is processing personal data for a purpose that does not require the identification of a data subject and it can demonstrate that it is not able to identify the data subject. This is extremely important in the context of the Digital Content Directive where the right to retrieval initially applied to all data, including non-personal data. This principle of data minimization must be respected in the context of the Digital Content Directive.

## **Observed personal data**

The guidance provides that this does include all data observed about the data subject during the activities for the purpose of which the data are collected, such as a transaction history or access log. Data collected through the tracking and recording of the data subject (such as an app recording heartbeat or technology used to track browsing behaviour) should also be considered as “provided by” him or her even if the data are not actively or consciously transmitted. The terms “provided by” includes personal data that relate to the data subject activity or result from the observation of an individual’s behaviour.



FEDMA does not consider that data “related to an identified or identifiable” consumer is personal data simply because it can be “related to” an individual who uploaded it. It’s not because a photography or excel table is uploaded in the cloud by a consumer that this data or digital content becomes automatically personal data.

According to the Guidance, “Data portability does not impose an obligation on the data controller to retain personal data for longer than is necessary or beyond any specified retention period”. This data retention period must be taken into account when assessing the portability data. If observed data were to be portable, it would very likely contravene the principle of data retention and minimisation. Browsing history for example may not be retained for long enough to enough portability.

FEDMA 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. Observed data should not be retrievable either in the context of the supply of digital content for the same reasons.

### **Automated data**

Non automated data is data processed with human intervention. However, not all data processed with human intervention is paper processed data. The guidance considers that non automated data and paper processed data are the same. However, this is not accurate as not all non-automated data is paper processed data. .

### **Data subject rights and technology**

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. FEDMA supports the free flow of data and supported the discussions around the various forms of sharing data. However, the GDPR must remain technologically neutral. Organisations 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 organisations and data subjects.

The discussion of the free flow of data does not mean that, under the GDPR, all personal data provided by the data subject should be stored. FEDMA considers that there is confusion here between the essence of right to portability under the GDPR (retrieval of data) and solutions to increase the free flow of data.

### **Third party and other rights**

FEDMA urges for the respect of the intellectual property rights and trade secrets of organisations under the right to data portability.

Moreover, FEDMA calls for more caution regarding the 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. FEDMA is not convinced of the compatibility of these suggestions with third party rights under article 20 (4). FEDMA recommends a case by case approach based more on the principle of proportionality.

FEDMA 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.

### Rejection or charging a fee

FEDMA considers that the analysis is too simple on the cases in which a data portability request in the online world may be rejected. The technical requirements are clearly understated. Portability is much more complex than let to be understood in this description. FEDMA calls for a broader interpretation of the cases where the request may be rejected or a fee charged.

### Conclusion

FEDMA 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.**