**VĚRA JOUROVÁ**
***Member of the European Commission***

Brussels,
Ares(2017)

Dear Ms Falque-Pierrotin,

I am writing to you as a follow-up to our conversation regarding the data portability guidelines prepared by the Article 29 Working Party.

First of all, I very much welcome the decision to have conducted a consultation on the text of the first three guidelines (data portability, data protection officer ad lead supervisory authority). Indeed, as demonstrated by the number of comments received, including by large umbrella organisations representing a wide array of stakeholders, such a consultation is essential for preparing documents of such importance and will contribute to the take-up by stakeholders of the principles they set. It is important that such a practice is extended to the future guidelines.

However, as a Member of the Working Party and as a negotiator of the GDPR, I would like to share with you some nuances regarding the scope of data portability defined by the Working Party in its guidelines.

I believe that the approach chosen by the Working Party on the scope of data portability could go beyond the position that the co-legislators have agreed upon during the negotiations and which is reflected in the final text of the GDPR.

The interpretation of the notion of "*personal data [...] which he or she has provided to a controller*" is key to define the scope of the right to portability. The guidelines state that "*the term 'provided by the data subject' must be interpreted broadly*" and that the right to data portability covers both *"data provided knowingly and actively by the data subject"* and *"personal data generated by his or her activity"*.

In this context, it is worth recalling that during the GDPR negotiations the notion of "*data provided by*" was not very contentious, in particular no clear distinction between "*data provided by*" and "*data observed*" was made, and the thrust of the negotiations focused on whether the data should be "*directly transmitted*" from one controller to another.

Ms Isabelle FALQUE-PIERROTIN
Chairman of the Art. 29 Working Party

The objective was essentially to allow data subject to move data around in the field of social network and cloud storage. There was an understanding that the reach of the Article 20 is limited compared to that of Article 15 (right of access). In line with the original intent and the legislative negotiations, the scope of portability was meant to also allow for the protection of rights and freedoms of others, including businesses (questions of intellectual property, business secrets)[1].

On this basis, there is no doubt that the data qualified in the guidelines as "*knowingly and actively provided*" fall within the scope of the portability right. Such data include for example: the information provided by the data subject in an online form, the photos and videos uploaded on a social network, or phone books and directories provided by the data subject.

We also share the view that a part of the data qualified in the guidelines as "*observed from the activities of users by virtue of the use of the service or the device*" are also "*provided by*" the data subject and therefore fall in the scope of the data portability right. This is the case for instance for raw data processed by a smart meter or data processed by a tracking device (e.g. heartbeat data) that the data subject intentionally shares as part of a desired service. Indeed, these are (raw) data which the data subject has control over and are to a large extent independent from the technology or protocols put in place by the data controller.

However, doubts exist as to whether some other categories of "*observed data*" also fall within the category of data "*provided by*" the data subject, and therefore within the scope of the right to portability. This is for instance the case with:

- data generated automatically by the service during its use and which are by-products of the use of the service (as distinguished for instance, in the field of telecommunications, from the number called and time of communication which are data provided by the user);

- data which are not raw data either because they are intrinsically linked to the algorithm developed by the data controller for data analytics; or immediately undergo a processing developed by the data controller – such as quality checks or sorting before storage - and turning them into enriched data.

It is important for the credibility of the new system that we are putting in place that we find a solution that corresponds to the objective of the co-legislators and at the same time is workable for all actors involved, including SMEs. The new system should also foster competition between controllers and not stifle innovation.

I believe therefore that further reflection is needed as regards the categories of data to which the above doubts apply, also from a technical point of view. This reflection should in my view involve to the extent possible the sectoral regulators who have an experience as regards portability, for instance in the area of financial services and telecommunications. They could provide an assessment independent from business interest and input as to the interaction with

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[1] See Art 20 (3) GDPR.

other sectoral legislation, such as the Payment Account Directive or the Payment Service Directive 2 in the field of financial services.

I would be pleased to hear your views on the concerns mentioned above.

Yours sincerely,

Věra Jourová