

Computer & Communications Industry Association
(CCIA Europe)
Rue de la Loi 227
1040 Brussels

Ms Anu Talus
Chair
European Data Protection Board
Rue Wiertz 60
B-1047 Brussels

15 June 2023, Brussels

Subject: Reconciling conflicting provisions on data portability in GDPR and the Data Act

Dear Ms Talus,
Dear Chair,

On behalf of the Computer & Communications Industry Association (CCIA Europe), I would first like to congratulate you on your recent election as Chair of the European Data Protection Board. Within the next five years, new digital rules will come into force, and some of them are expected to overlap, and sometimes conflict with the General Data Protection Regulation (GDPR). One such case is the inherent tension between the GDPR and the upcoming Data Act on individuals' right to data portability. If unresolved, this potential conflict has the potential to significantly undermine individuals' right to data portability established in the GDPR, and unfairly expose companies' liability.

Although the trilogue negotiations on the Data Act proposal are still underway, we understand that Article 5(2) of this proposal will remain largely untouched. We wanted to raise this issue directly with you, too, as we are concerned that the interplay between the Data Act and the GDPR has not been appropriately addressed in the context of the Data Act negotiations.

While both the GDPR and the Data Act aim to empower users with data portability rights, Article 5(2) of the Data Act prohibits companies designated as gatekeepers under the Digital Markets Act (DMA) from receiving user data, including personal data. As a result, without further guidance, and given the overlapping scope of the GDPR and the Data Act,¹ a company receiving a portability request under the GDPR may interpret the Data Act as requiring it to decline individuals' requests to export their personal data to services operated by a gatekeeper. In doing so, the exporting company would risk non-compliance with Article 20 of the GDPR.

¹ The relevant portability provisions in both the GDPR and the Data Act apply to data generated by any natural person when using a product or service which falls within their scope (see page 9 of the EDPB Guidelines on the right to data portability under Regulation 2016/679, WP242 rev.01, Article 2(5) Data Act).

Further, this would effectively deprive individuals from controlling their personal data however they see fit, and may result in user lock-in, limited competition, and reduced contestability among gatekeeper companies. Such an outcome contradicts both the purpose and the specific provisions of the GDPR as well as the DMA.

Individual users should have the freedom to choose which services they want to export their personal data to, regardless of whether such services are operated by a gatekeeper company under the DMA. Companies that receive a user request should not be put in a situation of legal uncertainty as to how to comply with the GDPR without at the same time infringing the Data Act.

In light of the above, CCIA Europe urges you to encourage the Council of the EU and the European Parliament to avoid any conflict with the GDPR and to remove the gatekeepers' ineligibility to receive user data under Article 5(2) of the Data Act.

Alternatively, and absent further modifications to the Data Act, CCIA Europe invites you to consider revising the existing guidelines on data portability detailing how to effectively comply with the two regulations at the same time. In particular, we ask that you clarify that data holders and data recipients cannot be held liable under the Data Act for exporting to, or receiving as, a gatekeeper the personal data of a user, as Article 20 of the GDPR takes precedence over the Data Act.

Thank you in advance for your consideration, and I remain at your disposal for any further information.

Sincerely yours,

Alexandre Roure
Director, Public Policy
Computer & Communication Industry Association (CCIA Europe)
EU Transparency Register: 15987896534-82

Cc:

- Mr Olivier Micol, Head of Unit, Data Protection Unit, DG JUST
- Ms Karolina Mojzesowicz, Deputy Head of Unit, Data Protection Unit, DG JUST
- Mr Yvo Volman, Director, Data Directorate, DG CONNECT
- Mr Bjoern Juretzki, Head of Unit for Data Policy & Innovation, Data Directorate, DG CONNECT