

# Public Consultation on Data Portability and Data Innovation Provisions

May-Jul 2019

The document issued for public consultation is as follows:

[Public Consultation on Proposed Data Portability and Data Innovation Provisions](#)

Interested parties are invited to submit their views to [corporate@pdpc.gov.sg](mailto:corporate@pdpc.gov.sg) (deadline 17 July 2019, 5pm.)

Dear Sirs,

please note that, in order to facilitate the reading of my comments, I considered it was appropriate to bring them at the bottom of each reference paragraph of the proposed text, as follows:

TEXT:

*2.10 PDPC recognises the need to consider the interests of the individuals as well as organisations - such as the first movers in innovation, fast followers, and new entrants. PDPC is mindful that a Data Portability Obligation which covers an overly broad spectrum of data would not only impose compliance costs, it could also have a dampening effect on innovation. Organisations must innovate in order to entice customers to use their products or services. However, first movers may not be incentivised to innovate if a fast follower can emulate its business model and easily acquire its customers' data through the Data Portability Obligation. It is therefore important to create the right competitive landscape in order to strike a balance and reap the most benefits for consumers and the economy.*

## Commentary:

In order that a too wide data portability obligation does not involve compliance costs, but above all will not imply a restraining effect on innovation, one could precisely calibrate the dialectic between the obligations of the organizations - as differentiated by their expressed capacity and level of innovation - and equally articulated rights starting from a basic minimum. Thus the first movers would feel protected from the danger that a fast follower could emulate their business model and easily acquire their customers' data through the Data Portability Obligation. It is therefore important to create a set of information to be transferred where the component of innovation is so to speak "minimized", i.e. minimally disclosed.

TEXT:

*2.14 PDPC is considering the introduction of a Data Portability Obligation under the PDPA. Under the proposed obligation, an organisation must, at the request of the individual, provide the individual's data that is in the organisation's possession or under its control, to be transmitted to another organisation in a commonly used machine-readable format.*

## Commentary:

It seems that the individual's data to be transmitted to another organisation should be in a commonly used machine-readable format. That's to say that interoperability would not be required hereto.

TEXT:

*2.18 Organisations will only be required to transmit data to other organisations (“receiving organisations”) that have a presence in Singapore. Organisations will not be required, as a matter of compliance with the proposed obligation, to transmit data to overseas receiving organisations. However, this is not intended to prevent voluntary arrangements by organisations to transmit data to overseas organisations with consent of the individual.*

Commentary:

A provision that organizations will not be obliged to transmit data to foreign receiving organizations abroad but only to receiving organizations that have a presence in Singapore may be restrictive in an international view. Possible voluntary agreements on the part of organizations to transmit data to foreign organizations with the consent of the individual would probably not be enough to exclude compatibility with the clauses about Cross-border data transfers envisaged e.g. by the California Consumer Privacy Act and even more by the GDPR.

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TEXT:

*2.22 In line with this objective, the PDPC is proposing for the proposed Data Portability Obligation to apply only to data in the possession or control of organisations that is held in electronic form. This is regardless of whether it was originally collected in electronic or non-electronic form. Data held in non-electronic form will not be subject to the proposed Data Portability Obligation. This takes into consideration that imposing the Data Portability Obligation for non-electronic records would entail significant compliance costs for organisations, especially for SMEs that hold data in non-electronic form. Limiting the Data Portability Obligation to data held in electronic form also helps address organisations’ concerns regarding compliance costs while ensuring data portability delivers the relevant impact and economic value for Singapore.*

Commentary:

Allowing that Data held in non-electronic form will not be subject to the proposed Data Portability Obligation surely avoids significant compliance costs for organisations, especially for SMEs.

But, although I do not know the reality of your specific context, I would suggest a deeper evaluation whether to exclude the requirement for paper data or not, when considering that

- in general, the smallest companies do not invest high figures in software for the computerized management of information;
- in some sectors, eg banks, insurance companies, electric or telephone service companies, there may be large volumes of "dated" contracts, stipulated many years ago i.e. on prolix paper forms.

Therefore in both cases the interested customers would be subject to discrimination in terms of rights. And moreover for reasons that are certainly not attributable to them. Essentially, they could receive double damage.

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TEXT:

*2.23 PDPC recognises the need to distinguish between the different types of data that would be subject to the proposed Data Portability Obligation. This should take into consideration the potential impact to companies’ competitive positions and business innovation. Specifically, recognition should be given to the generation of data by virtue of an organisation’s innovative product or service offering, and the proprietary input of businesses in deriving new insights.*

AND

*2.27 To promote business innovation, PDPC is proposing to provide for a similar exception to the Access Obligation for data which, if disclosed, would reveal confidential commercial information that could harm the*

competitive position of the organisation. This is not intended to affect general competition in the market, but to protect first movers who bring to market an innovative product or service from unfair competition by fast followers. The proposed Data Portability Obligation is not intended to remove the commercial incentives for constant innovation. However, an innovative product or service will become a standard feature with the passage of time. The proposed exception to port data that is associated with an innovative product or service should not exempt a first mover for an unnecessarily prolonged period. PDPC would like to seek feedback on the relevant considerations in striking the right balance.

#### Commentary:

In my comment to the previous point 2.10 I was ventilating the possibility of studying different possible combinations of obligations / rights just to protect someone's greater innovative capacity and the related investments, as well as various possible combinations regarding the data themselves. Perhaps, when contemplating in addition to basic standards even higher levels - provided, however, to adequately protect the rights of intellectual property's holders - this will allow an even technologically better portability, finding a good compromise between concepts such as "interoperability", "minimization" and "empowerment".

Finally, it must be borne in mind that e.g. one of the general principles of the ARTICLE 29 DATA PROTECTION WORKING PARTY Guidelines provides that "the right to data portability shall not adversely affect the rights and freedoms of others".

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#### TEXT:

*2.29 While the Data Protection Provisions of the PDPA do not apply to business contact information (BCI), it is proposed for such information to be covered under the proposed Data Portability Obligation as BCI is provided by the individual to facilitate business activities, allowing individuals to port his or her data supports this objective of promoting business activities. For instance, where an individual has provided his or her business contact information (e.g. business email address or business telephone number) to an organisation, that information may be included as part of the data to be ported by the organisation at the individual's request.*

#### Commentary:

Certainly the intention to facilitate the circulation of company contact information can be positive, but I think we need to consider carefully also

1) if going ahead in that direction cannot lead to violations of the person's privacy as an individual (by showing what work he does, where he works, etc.);

2) the boundary between contact information and advertising in every possible form, even indirectly.

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#### TEXT:

*2.30 The data is not limited to the personal data of the individual, but may include personal data of third parties, so long as it was provided by the requesting individual, or generated by the individual's activities. Examples include personal data of the individual's travelling companions provided for a flight booking, and contact lists and photographs which contain personal data of third parties uploaded by the individual to his social media account.*

#### Commentary:

In my opinion, it could not be done even with the consent of the applicant. Or at least with his only consent, but it would be absolutely necessary to obtain evidence of consent legitimately and expressly given by other individuals. Even more in the case of social media.

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TEXT:

*2.37 (e) Format for porting data – Given the wide range of types of data that could be processed by organisations, PDPC will not prescribe the data formats that an organisation should adopt for transmitting data. To facilitate interoperability, the formats used should be easily accessible and affordable to any organisation receiving the data. Where possible, open data formats should be used. Formats that are subject to costly licensing agreements, for instance, would not be considered to be acceptable formats.*

Commentary:

Open data formats fit surely very good, but I would suggest prior checkings about the consequences both in terms of

- 1) interoperability;
  - 2) compatibility with the observations made above with the aim of protecting intellectual property.
- .....

TEXT:

*3.13 Derived personal data enriches the information that an organisation has about an individual. Where personal data is used for the creation of derived personal data for business innovation purposes (i.e. for operational efficiency and service improvements; product and service development; or knowing customers better), organisations will not be required to notify the individual and obtain consent to do so. Consent is also not required to use the derived personal data for business innovation purposes.*

Commentary:

From a very general point of view, I draw attention to the dangers of activities that could actually hide profiling treatments without being given not only the consent - which I would instead consider absolutely mandatory - but even not an adequate information.

Much more specifically, I noted the differences in your proposed approach compared with the ARTICLE 29 DATA PROTECTION WORKING PARTY Guidelines on the right to data portability: They say that the term “provided by the data subject” must be interpreted broadly, and only to exclude “inferred data” and “derived data”, which include personal data that are generated by a service provider (for example, algorithmic results).“A data controller can exclude those inferred data but should include all other personal data provided by the data subject through technical means provided by the controller. Thus, the terms “provided by” includes personal data that relate to the data subject activity or result from the observation of an individual’s behaviour but not subsequent analysis of that behaviour. By contrast, any personal data which have been generated by the data controller as part of the data processing, e.g. by a personalisation or recommendation process, by user categorisation or profiling are data which are derived or inferred from the personal data provided by the data subject, and are not covered by the right to data portability”.

To me other relevant remarks are those made in EUROPEAN BANKING FEDERATION'S COMMENTS TO THE WORKING PARTY 29 GUIDELINES ON THE RIGHT TO DATA PORTABILITY . As they wrote, “some companies, notably banks, tend to enhance the quality of the raw data they receive from customers and other sources” also because they are often “legally required to guarantee a higher quality of data (e.g. for Anti-Money Laundering, credit facilitation etc.). These processes create an additional layer of value on top of the raw data. We believe it is important to recognize that there is an added value in the data managed by those companies.

When the customer applies for data portability, we believe that this should only include the raw data that he has provided - but not the data of enhanced quality that is the result of further verifications and analysis run by the data controller to fulfill his legal obligations”...

“In line with the distinction made above between ‘raw data’ and ‘managed/derived data’, it would appear contradictory to allow the portability of such data.”

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Thank you so much, it was a great honor for me to participate in this public consultation.

Yours faithfully,

Dr Sergio Guida

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