

The General Data Protection Regulation

The new right to data portability



19th October 2017

Esch-sur-Alzette (Belval)

Mathilde Stenersen

Legal department

Outline

1. Definition
2. How to determine if data portability applies
3. When can a request for data portability be rejected?
4. What is the expected format?
5. After the data portability request

Definition

The data subject shall have the **right to receive** the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the **right to transmit** those data to another controller **without hindrance from the controller** to which the personal data have been provided.

Right to data portability

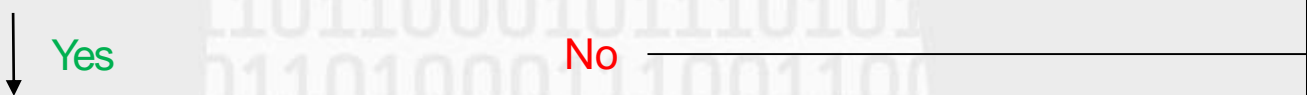
Is it personal data concerning the data subject?



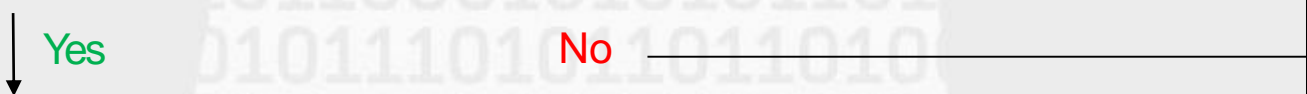
Is the processing carried out by automated means?



Is the legal basis for data collection consent or contract?



Is it data provided by the data subject?



Could the portability adversely affect the rights and freedoms of others?



Data portability

Assessment of the rights of all parties

Data portability



Personal data

- **Only** the personal data concerning the data subject
 - ✗ No anonymous data
 - ✗ No data exclusively concerning third parties

Right to data portability

Is it personal data concerning the data subject?



Yes

No

Is the processing carried out by automated means?



Yes

No

Is the legal basis for data collection consent or contract?



Yes

No

Is it data provided by the data subject?



Yes

No

Could the portability adversely affect the rights and freedoms of others?



No

Yes

Data portability

Assessment of the rights of all parties

Data portability



Carried out by automated means

- **Only** where the data are processed with automated means
 - Does not cover most paper files

Right to data portability

Is it personal data concerning the data subject?

Yes
↓

No

Is the processing carried out by automated means?

Yes
↓

No

Is the legal basis for data collection consent or contract?

Yes
↓

No

Is it data provided by the data subject?

Yes
↓

No

Could the portability adversely affect the rights and freedoms of others?

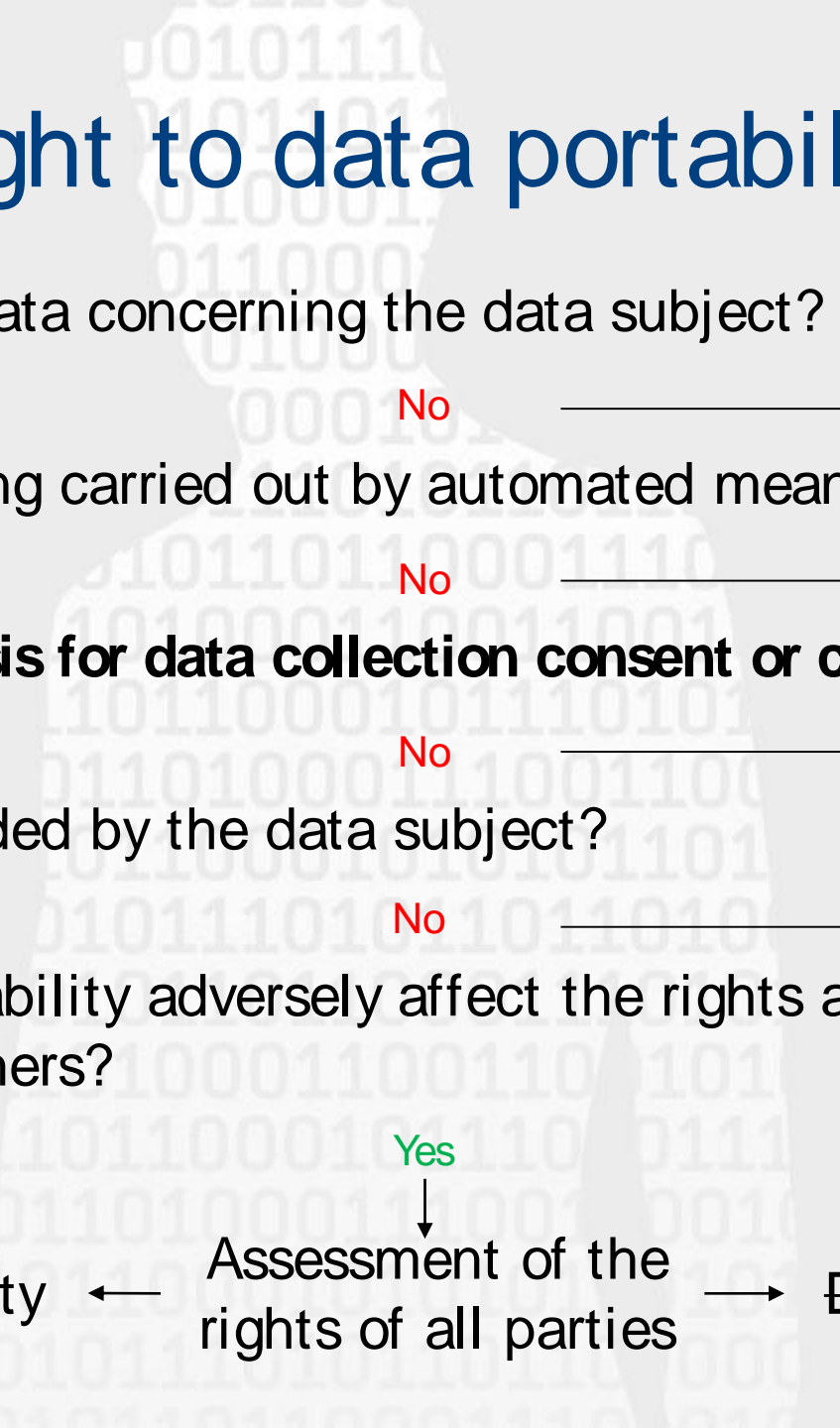
No
↓

Yes
↓

Data portability

Assessment of the rights of all parties

Data portability



Based on consent or a contract

- Processing operations must be based on:
 - the data subject's **consent** (explicit consent, if special categories of personal data are involved), or
 - a **contract** to which the data subject is a party

- **Online services:** titles of books purchased from an online bookstore - the songs listened to via a music streaming service

Based on consent or a contract

- **No general right** to data portability
 - ✗ Processing necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller
 - ✗ The right shall not adversely affect the rights and freedoms of others

Right to data portability

Is it personal data concerning the data subject?

Yes
↓

No

Is the processing carried out by automated means?

Yes
↓

No

Is the legal basis for data collection consent or contract?

Yes
↓

No

Is it data provided by the data subject?

Yes
↓

No

Could the portability adversely affect the rights and freedoms of others?

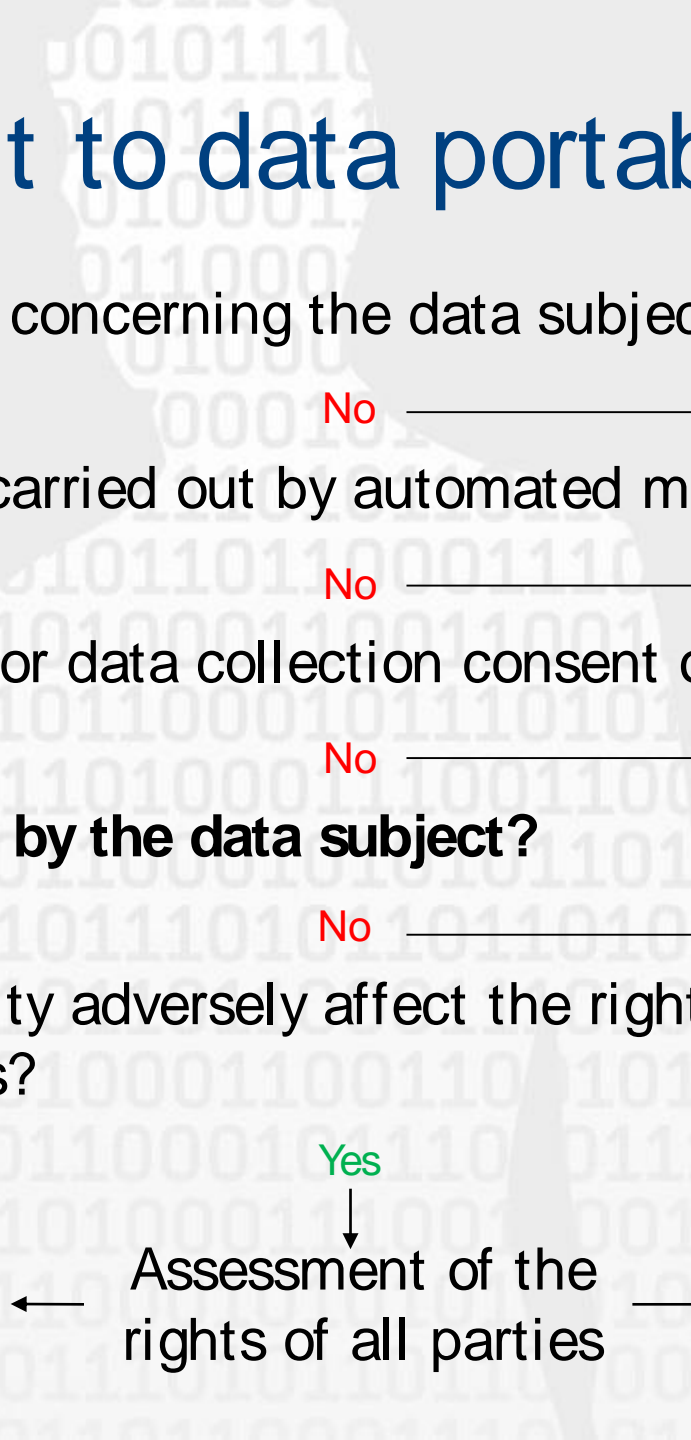
No
↓

Yes
↓

Data portability

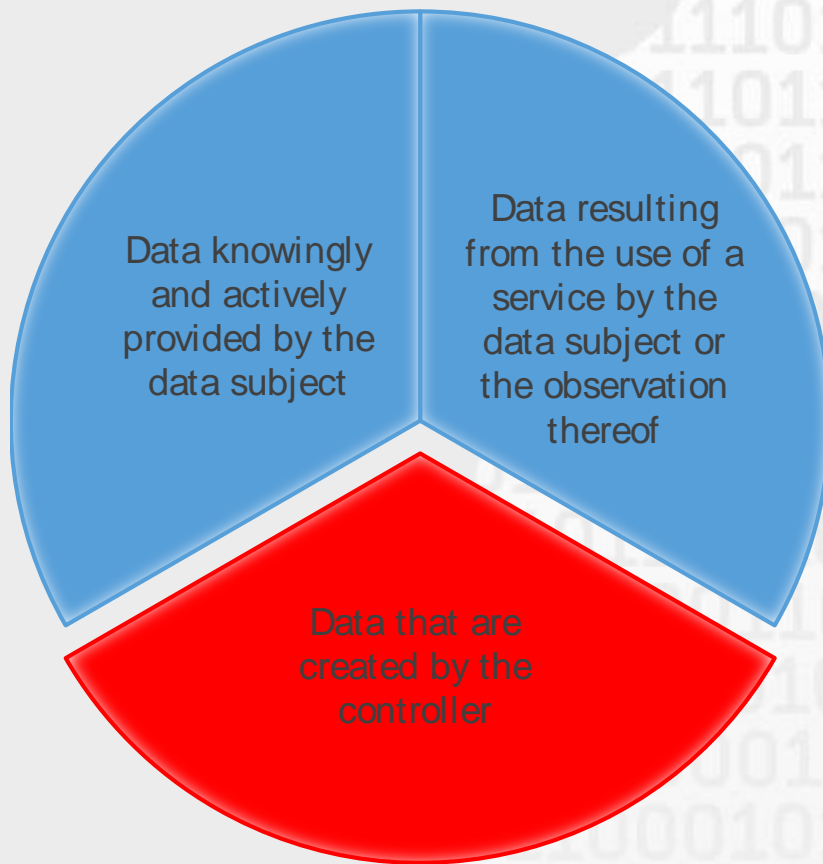
Assessment of the rights of all parties

Data portability



Data provided by the data subject

“Data must be provided by the data subject”



- ✓ **Includes** data resulting from the use of a service by the data subject or the observation thereof
 - ✓ Data directly provided
 - ✓ Raw data (i.e. heartbeat with a wearable device)
 - ✓ Search history, traffic data, location data
- ✗ **Excludes** data created by the controller
 - ✗ Analysis of the behaviour or the data provided (i.e. user profile created by the controller)

Right to data portability

Is it personal data concerning the data subject?

↓ Yes

No

Is the processing carried out by automated means?

↓ Yes

No

Is the legal basis for data collection consent or contract?

↓ Yes

No

Is it data provided by the data subject?

↓ Yes

No

Could the portability adversely affect the rights and freedoms of others?

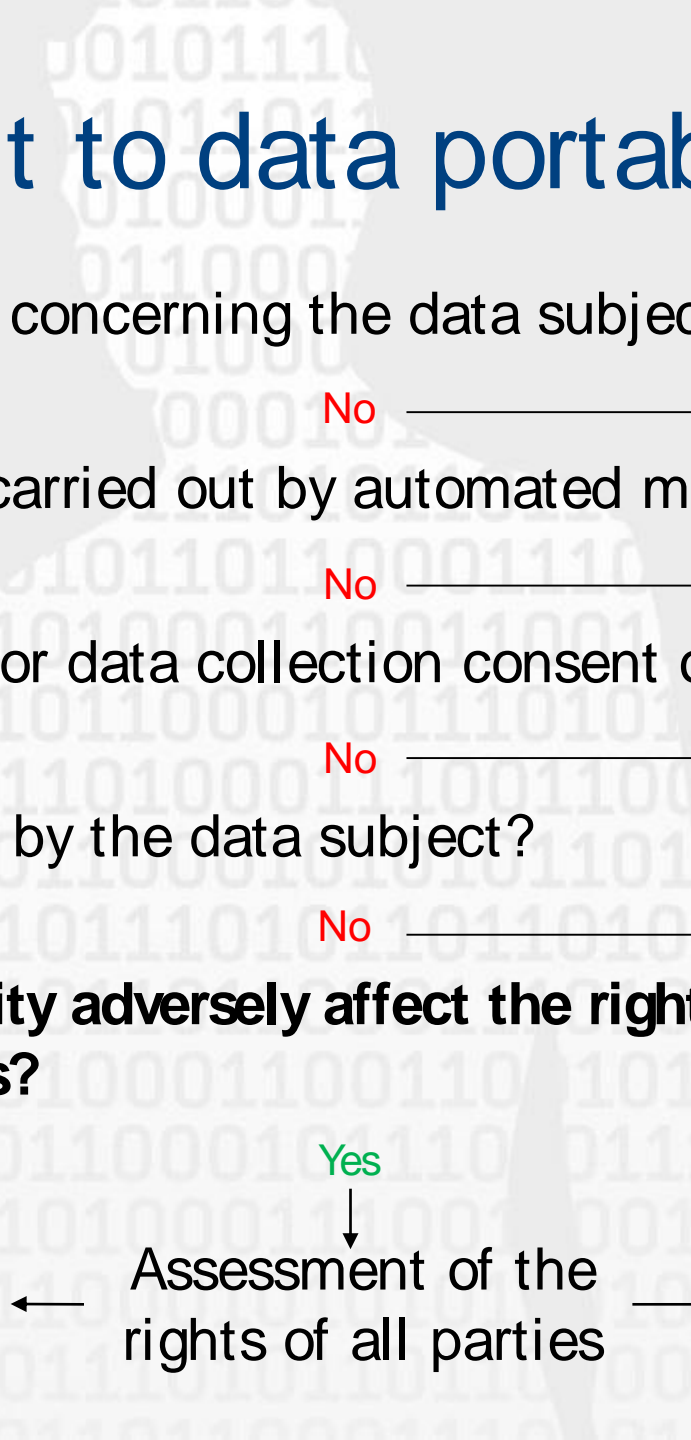
↓ No

Yes

Data portability

Assessment of the
rights of all parties

Data portability



The rights and freedoms of others

- “*The right shall not adversely affect the rights and freedoms of others*”
 - Data subject wants to transfer personal data (including data relating to other data subjects) to another controller
 - A webmail directory of data subject’s contacts (friends, family)
 - Bank account information, including transactions with third parties

! Processing in the context of personal and household activities that could have an impact on third parties are the responsibility of the data subject !

The rights and freedoms of others

- The processing by the new controller must be based on
 - The **consent** of the data subject who requested the portability, or
 - A **contract** between the data subject who requested the portability and the controller

! The controller cannot use third party data for own purposes !

When can a request be rejected?

Is it personal data concerning the data subject?

↓ Yes

No

Is the processing carried out by automated means?

↓ Yes

No

Is the legal basis for data collection consent or contract?

↓ Yes

No

Is it data provided by the data subject?

↓ Yes

No

Could the portability adversely affect the rights and freedoms of others?

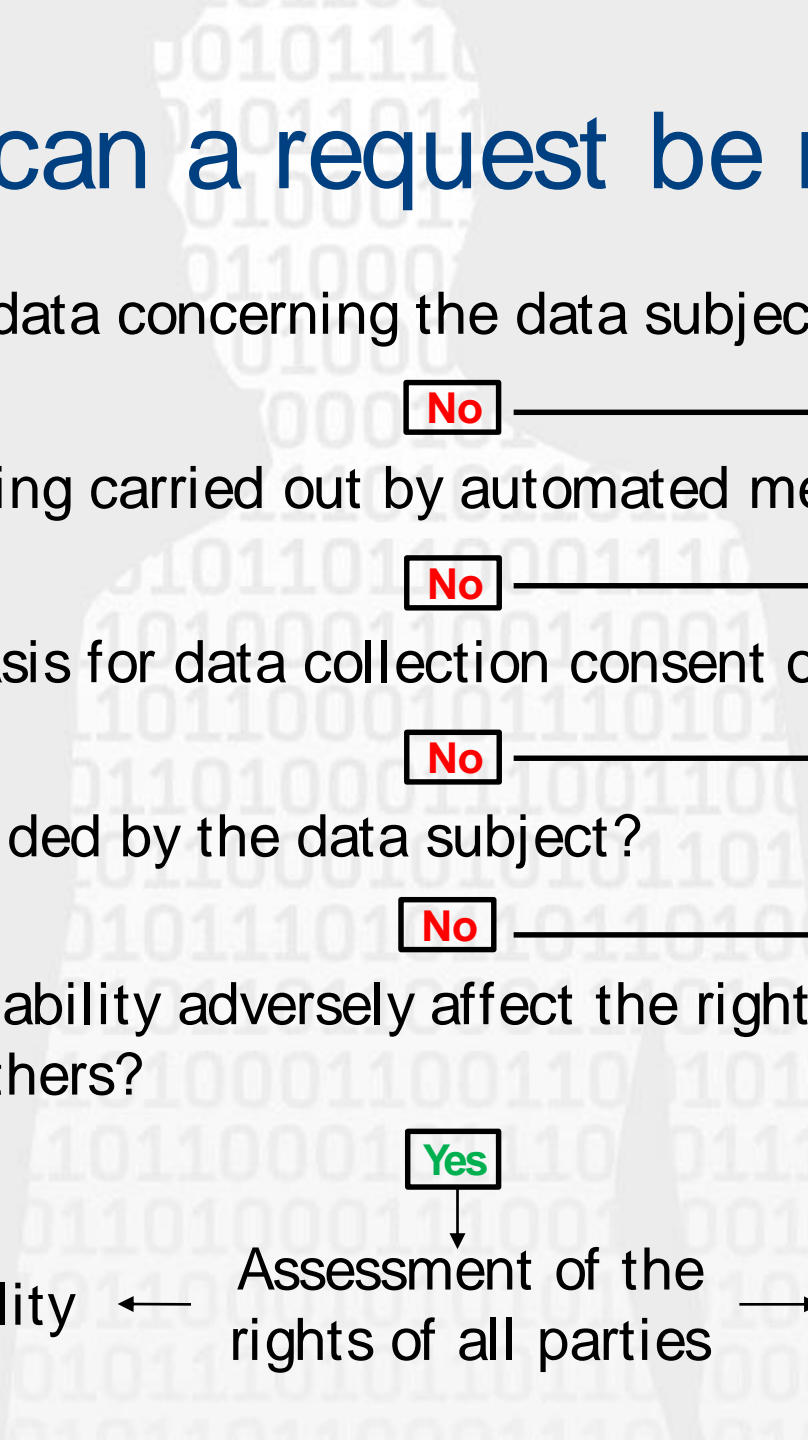
↓ No

Yes

Data portability

Assessment of the
rights of all parties

Data portability



When can a request be rejected?

- If the requests are **manifestly unfounded or excessive** (esp. due to their repetitive nature)
 - Manifestly unfounded or excessive does not cover
 - The overall cost of the controller's processes to enable portability requests
 - The total number of requests received by the controller
 - Burden of proof on the controller
 - The request can be rejected or a reasonable fee can be charged

When can a request be rejected?

- If the controller **cannot identify** the data subject
 - The **controller** must do the utmost to identify the data subject and, if applicable, must request further information from the data subject, or
 - The **data subject** may provide further information to enable the controller to identify him or her.

What is the expected format?

- “*in a structured, commonly used and machine readable format*”
- **No specific recommendations** on the format of the personal data to be provided are imposed
 - Formats that require costly licensing \neq an adequate approach
- **Interoperability** is the desired outcome
- No formats are in common use for the industry or context \rightarrow **commonly used open formats** (e.g. XML, JSON, CSV, ...)

After the exercise of the right

- “**Transmitting**” controller
 - Not responsible for the subsequent processing by the data subject or by another controller
 - Data subject can continue to use the controller’s service
 - Data portability \neq automatic erasure of the data
- “**Receiving**” controller
 - Becomes the new controller for these data
 - The received data must be relevant and not excessive
 - If the data are not relevant with regard to the purpose of the new processing, they should not be processed