May 2019

ETNO Comments on EDPB draft Guidelines on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects

Introduction

On 9th April, the European Data Protection Board (EDPB) released its draft Guidelines on the processing of personal data under the contractual necessity legal basis (Article 6(1)(b) GDPR) in the context of the provision of online services to data subjects. EDPB has invited interested stakeholders to comment on the draft Guidelines until 24th May 2019. ETNO welcomes the opportunity to submit comments to the EDPB on this important topic, but regrets the static interpretation given by EDPB on the "contractual necessity" legal ground.

- EDPB aims to provide guidance on Article 6(1)(b) as a legal basis for processing personal data when such processing is necessary for the performance of a contract and its application to online services.
- The Guidelines focus on what constitutes "contractual necessity" and emphasises the narrow scope of the contractual necessity legal basis and how it applies to pre-contractual steps and termination of contract.
- For applicability of Article 6(1)(b) GDPR, it is necessary that the processing is *objectively necessary* for a purpose that is integral to the delivery of that contractual service to the data subject. If the controller cannot demonstrate such necessity, it must consider another legal basis for processing the personal data.

EDPB's static approach

While the Guidelines provide useful clarifications, they also contain some suggestions that are particularly problematic as they build on a very static approach to any contractual relationship between the data controller and the data subject.

The Guidelines further address the applicability of Article 6(1)(b) GDPR to specific situations like service improvement (Par. 45), fraud prevention (Par. 47), online behavioural advertising (Par. 48), personalisation of content (Par. 54), always with the intention to exclude performance of contract as appropriate legal ground.

- Service improvement: "(…) EDPB does not consider that Article 6(1)(b) would generally be an appropriate lawful basis for processing for the purposes of improving a service or developing new functions within an existing service (…) While the possibility of improvements and modifications to a service may routinely be included in contractual terms, such processing usually cannot be regarded as being objectively necessary for the performance of the contract with the user". Service improvement could however be based on alternative legal grounds such as consent or legitimate interest.

- Fraud prevention: "(…) In the view of the EDPB, such processing is likely to go beyond what is objectively necessary for the performance of a contract with a data subject. Such processing could however still be lawful under another basis in Article 6, such as legal obligation or legitimate interests".
- Online behavioural advertising: "(…) behavioural advertising does not constitute a necessary element of online services (…)" and Article 6(1)(b) cannot provide a lawful basis of online behavioural advertising even in case of free services where such advertising indirectly funds the provision of the service.
- Personalisation of content: EDPB acknowledges that personalisation of content may (*but does not always*) constitute an essential or expected element of certain online services, and therefore may be regarded as necessary for the performance of the contract in some cases. This will be the case when such processing can be regarded as an intrinsic aspect of an online service. However, when personalisation of content is not objectively necessary for the purpose of the underlying contract, data controllers should consider an alternative legal ground.
- Bundling of services: Where the contract consists of several separate services or elements of a service that can in fact reasonably be performed independently of one another, the applicability of Article 6(1)(b) should be assessed in the context of each of those services separately, looking at what is objectively necessary to perform each of the individual services.

Some points of the Guidelines imply that the EDPB may be exceeding its functions and limit the right to business freedom. EDPB is questioning multiple business models that function differently on the Internet. Both contracting parties should remain free to decide what is benefitting the contract and its performance based on the legitimate expectations of the customer who signs the contract.

Ultimately, whether you "pay" for the use of an app with location data or not is an autonomous decision. Data protection law should not interfere with the autonomy of the contracting parties and shall not prevent that certain "data against service models" are offered. The limits that exist with regard to contractual freedom are found in civil law and not in data protection law. If, at the time of the conclusion of the contract, the parties are given transparent information of the object of the contract, the price and the "means of payment", then a free decision by the individual is possible based on a sufficient factual basis.

It is important to note that, especially in a fast moving environment as the digital one, customers' expectations as regard the steps taken by the service provider to ensure the service is constantly updated to the latest available standards and its quality improved, are high and consequently may justify the processing of their data to reach this objective. When assessing if the processing can be considered necessary for the performance of the contract, a case-by-case approach must be adopted, taking into due account the reasonable expectations of the customer and the relation between the purpose of the processing and the contracted service (e.g. a telco provider processing data to enhance the quality of the subscribed service is different from an hotel selling its customers' data for advertisement purposes).

At least in some cases, service improvement could be considered as being necessary to fulfill the contractual obligation of service provider towards the customer, particularly when the user would not be continuing using the services properly without such improvement. In addition, this could concern the development of existing functions of the service being provided to make it more

efficient to use. Already today, customers expect to receive the best available service. Looking to the future, most services might be "smart" (i.e. automatically self-optimising services) and the static interpretation of the performance of contract might restrict the possibility to innovate in this respect. At least in some cases Art. 6 (1) b could be considered as an appropriate legal basis for service improvement-related processing as long as data controller ensures full transparency towards data subjects and other accountability obligations under GDPR are fulfilled.

GPDR and ePrivacy

All these concrete cases build on a narrow interpretation of what a contractual relationship is. Customers increasingly expect personalised services that match their expectations. Once customers have agreed to enter a contractual relationship, they expect that the service provider will constantly improve its service and will prevent fraud to happen. Relying mainly on consent is not the adequate way forward.

EDPB also refers to legitimate interest as an alternative legal ground. The proposed ePrivacy Regulation does not include neither "performance of contract" nor "legitimate interest" as legal grounds for processing. E-communication service providers will not be able to process personal data for service improvement, network optimisation, fraud prevention, etc. Such interpretation is unhelpful for e-communications service providers and does not allow them to compete on equal footing with other players in providing the best service to their customers.

With its interpretation, EDPB is limiting the offering of services, such as those related to AI and machine learning, whose value proposition implies to constantly process data in order to anticipate the needs of customers and constantly develop the service according to those needs.

Necessity to take steps prior to entering into a contract

EDPB points out that preliminary processing of personal data *may be necessary before entering into a contract in order to facilitate the actual entering into that contract*.

One of the examples provided by EDPB points to situation when financial institutions have a duty to identify their customers pursuant to national laws. EDPB clarifies that in this case, the identification is necessary for a legal obligation on behalf of the bank rather than to take steps at the data subject's request. Therefore, the appropriate legal basis in this particular situation is not Article 6(1)(b), but Article 6(1)(c).

The above-mentiond example might lead to a narrow interpretation that customer identification is valid only if there is an explicit legal obligation to identify a data subject. That may be considered by the data controller as an objectively necessary step for entering into a contract and therefore Article 6(1)(b) should be considered as an appropriate legal ground for such processing.

Validity of contracts for online services

EDPB highlights that a controller can rely on Article 6(1)(b) to process personal data only when it can establish that the processing takes place in the context of a valid contract with a data subject. Although EDPB considers validity of the contract to be outside of its competences, at the same time it notes that another legal ground should be considered if the controller cannot demonstrate that a contract exists or that such contract is valid pursuant to applicable national contract law.

The utmost importance of fairness of terms and conditions and of validity of contracts is undeniable. However, EDPB's strict, static and limited approach does not really reflect practical situations, e.g. unintentional cases. Data controller may process data under the assumption that a specific contract is valid, and that terms and conditions are fair to the data subjects at hand. In case such contract were found invalid or its terms unfair, it should be stressed that the related data processing should be considered unfair or unlawful only from that moment forward rather than from the start of the contractual relation. This would otherwise imply an obligation to immediately stop any further processing and to delete all customer data, taking into consideration the time and effort this may objectively require.

Concluding remarks

The right to the protection of personal data is not an absolute right and must be balanced against other fundamental rights. As far as transparent information is provided, GDPR principles are met and contract and consumer law are respected. There is no reason to limit data subjects' freedom to agree on their personal data to be processed. This will by no means imply that their fundamental right to privacy and data protection is undermined.

Optimisation of a service can inherently be part of the contract, thinking for instance of regular updates that ensure the service can be provided continuously. Separating the legal bases between performance of contract and, for instance, legitimate interest or consent will not provide additional protection to the data subject; on the contrary, this will bring more confusion without value.

ETNO is grateful for the opportunity to comment on these draft Guidelines and hopes these remarks will help better understand the dynamic environment of the provision of online services.

ETNO (European Telecommunications Network Operators' Association) represents Europe's telecommunications network operators and is the principal policy group for European e-communications network operators. ETNO's primary purpose is to promote a positive policy environment allowing the EU telecommunications sector to deliver best quality services to consumers and businesses.

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