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European Data Protection Board

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EU Payment Services Directive 2015/2366 (PSD-II): Article 94 PSD-II,

EDPB Consultation 06/2020: Guidelines on the interplay of the PSD-II and the GDPR

Dear Ms. Jelinek,

We refer to you on behalf of the German *Interessengemeinschaft Kreditkarten* (Interest Group Credit Card, hereinafter referred to as “IK”). We appreciate the opportunity to comment on the aforementioned consultation 06/2020 with respect to EDPB Guidelines on the interplay of the PSD-II and the GDPR.

The IK is a non-competitive platform without legal capacity for entities, which act in the credit and debit card business in Germany (Issuer, Acquirer, Network Service Providers, Processing Entities, Licensors), registered in the EU-Transparency Register under below-mentioned Ident-no.

With the following remarks, we will give comments on the consulted Draft-Guidelines 06/2020 on the interplay of the Second Payment Services Directive and the GDPR (Version 1.0, 17 July 2020; hereinafter referred to as “Draft-Guidelines”).

I. EDPB Consultation confirms bigger need to re-consider Art. 94 PSD-II

The wording of the present Article 94 PSD-II causes avoidable interpretation issues regarding data protection law:

1. The EDPB-preparation, particularly EDPB’s letter as of 5th July 2018 and the Draft Guidelines confirm that there is a bigger need to re-consider Art. 94 (2) PSD-II. As the EDPB correctly points out, the major reason for the establishment of Art. 94 (2) PSD-II is always linked to the introduction of "payment initiation services providers" (“PISP”) and "account information services providers" (“AISP”), also called third-party providers („TPP“). The required “access” to personal data is the key component of the TPPs’ business model and the introduction of TPP2, by means of the PSD-II, called for an adapted and innovative data protection concept. This discussion, however, overlies the material aspect of Art. 94 PSD-II that standard payment services, such as credit transfer performed by banks or credit or debit card issuing by payment service providers („PSP“) did not itself call for additional data protection requirements beyond the statutory requirements as set out by the GDPR.

The problematic data protection discussion in the context of Art. 94 (2) PSD-II, which again became obvious in aforementioned EDPB letter and the Draft Guidelines, has maybe always been linked to a misunderstanding or misinterpretation of the intended scope of application of this clause. As recital 93 of the PSD-II confirms, the PSD-II legislator intended to ensure an appropriate data protection framework also for the newly regulated TPPs, for their new business models, be it on direct or indirect “access” and always based on “consent” of the payment services user.

This intention in recital 93, which refers to a requirement for “consent” exclusively to TPPs, can still be read in Art. 94 (2) PSD-II from the starting point that PSPs need explicit consent for the **access,** processing and retaining of personal data, which – in the interpretation of the IK – must be read as a consecutive listing of processes of a business model, which starts with the “access to data” and ends with retaining data.

2. This interprestation is also in line with the understanding that Art. 94 (2) PSD-II only makes sense in cases where no payment services framework contract pursuant to Art. 4 no. 21 PSD-II has been concluded, which, again particularly applies for TPPs. As the PSD-II outlines, TPPs are not regularly required to conclude payment services framework contracts with payment services users, which, consequently calls for an **additional** requirement to obtain explicit consent under Art. 94 (2) PSD-II since TPPs need access to personal data of data subjects, held at other PSPs. This may be particularly understood in comparison to the rules applying for PISPs in Art. 66 (3) PSD-II, which do not require a PISP to obtain an

explicit contractual consent of the payment services user and which limits the authority of PISPs to use payment services users‘ data. In addition to these rules for PISPs, it makes sense to further require explicit consent under Art. 94 (2) PSD-II with an explicit limitation of purpose of the processing of data, to which the PISP will obtain access.

Furthermore, since Art. 94 (2) PSD-II shall not be applicable on AISPs‘ services, the intention of the legislator has been made clear, that the general consent of the payment services user to provide access to the AISP with respect to his personal data according to Art. 67 (2) a PSD-II will already be sufficient with respect to data protection requirements. In consequence thereof, Art. 94 (2) should better be understood as a „catch-all“ clause for those cases, where no payment services framework contract exists at all or where no further explicit contractual consent for the execution of payment transactions with the use of personal data exists.

3. This reading of Art. 94 (2) PSD-II, however, makes clear that the main topic of the interplay between the PSD-II and the GDPR should always be a new data protection framework required for TPPs, the business model of which is completely based on the **access** to personal data which are held at the systems of account servicing payment service providers („ASPSP“). The entire discussion and interpretation problem of Art. 94 (2) PSD-II evolves as this explicit consent requirement is – in the interpretation of the IK – erroneously extended to all types of PSPs, also including ASPSPs and card issuing PSPs.

4. From a reading focused on wording only, this is understandable since Art. 94 (2) PSD-II refers to “PSPs”. European Law in the jurisdiction of the ECJ, however, should not be limited to read the wording of applicable law, but, primarily to explore the political context and the purpose of a regulation (see established ECJ jurisdiction starting with the van Gend & Loos decision, RS 26/62, coll 1963, 1, 27).

5. This reading of Art. 94 (2) PSD-II is also confirmed by EPPB’s outline in para. 37 of the Draft Guidelines when the EDPB states:

„…*the object of the explicit consent* under *Art. 94 (2) PSD-II is the permission to obtain* ***access*** *to those personal data to be able to process and store these personal data that are necessary for the purpose of providing the payment service. If explicit content is given by the data subject, the account servicing payment service provider is obliged to* ***give access*** *to the indicated personal data .“*

Furthermore, the IK welcomes the EDPB’s concluding statement in paragraph 43:

“When a payment service provider needs access to personal data for the provision of a payment service, explicit consent in line with Article 94 (2) of the PSD2 of the payment service user is needed.”

6. Opposite to an appropriate interpretation of the scope of application as outlined above, an extended application of Art. 94 (2) to all PSPs, consequently makes it necessary for the

EDPB to reconsider the interpretation of singular terms and features of this clause to get back to practical results.

In the assessment of the IK, consequently, and from a political data protection perspective, it would be more appropriate to reconsider the general scope of application of Art. 94 (2) PSD-II in light of the legislative purpose as readable in recital 93, rather than fix this issue of an extended application with discussions on specific terms and definitions.

7. Card Issuers and Acquirers are in each case exclusively active on the basis of dedicated payment services framework contracts and their processing and storage of data is correctly governed by the GDPR – as set out in Art. 94 (1) PSD-II. The legal grounds for Issuers and Acquirers to process personal data are sufficiently laid down in Art. 6 (1) lit. b, c and f GDPR.

Hence, the IK emphasizes, that the more transparent and clearer political and legal solution for harmonizing supervisory work of European data protection authorities would be to apply Art. 94 (2) PSD-II exclusively to TPPs only and to have issuing or acquiring PSPs be subjected to the rules under the GDPR. That is – in the assessment of the IK – the correct joint reading of recital 93 and Art. 94 (2) PSD-II.

II. The discussion on “explicit consent” in Art. 94 (2) PSD-II

If the EDPB continues to discuss the terms implied in Art. 94 (2) PSD-II as being applicable for all PSPs – opposite to the IK’s assessment, see I. – then the IK certainly will appreciate EDP’s general concept on how to define and apply the „explicit consent“ concept as laid down in this clause.

It is a reasonable interpretation to acknowledge that explicit consent shall be part of a contractual consent, as emphasized by EDPB in para. 36 of the Draft Guidelines. Further details as outlined by EDPB in para. 36 should be discussed however:

1. It is without saying that data subjects are always made fully aware of the specific categories of personal data which are processed by card issuers and if applicable, by card acquirers at the occasion of concluding a payment services framework contract and performing existing disclosure and information duties according to Art. 13, 14 GDPR.

It is problematic, however, as EDPB outlines in para. 36 – to apply a wording in the Draft Guidelines that data subjects “… *have to explicitly agree to these clauses*”. It is practice and in execution of existing statutory law obligations under the GDPR to provide “*information*” to payment services users. Information, however, are not “contractual clauses” as indicated in EPPB’s understanding.

2. If EDPB’s solution concept is consequently pursued, this section of the Draft Guidelines should refer to an explicit agreement with regard to the specific payment services purpose for which the personal data will be processed **with reference** to provided information to data subjects according to Art. 13, 14 GDPR.

3. Furthermore, it is again problematic that "*such clauses*", as EDPB outlined, "… *would need to be explicitly* ***accepted*** *by the data subject*".

As one of the driving political concepts of the PSD-II, PSD-II should foster technical innovation and also electronic payments, but should not pull back the payment services market to contractual, paper-based mechanisms of some decades ago. Hence, it is required for modern payment services products in all respects to enable the offering of payment services by means of general business conditions and to accept a stated consent of a payment service user as element of such business conditions. Here, it is required to clearly point out that the "*contractual consent*", as correctly highlighted by EDPB, should be clear as a consent to the specific payment **service** and the implied **purposes** of data processing required for such payment services. Here, "contractual consent" should be documented in the underlying contractual documents, including, without limitation in general business conditions and terms.

4. Furthermore, the transparency objectives as outlined by EPDB in para. 38 and 39 of the Draft Guidelines are without saying for all PSPs, which are all subject to information and disclosure requirements pursuant to Art. 13, 14 GDPR. Here again, the rule of Art. 94 (1) PSD-II must be emphasized which highlights that payment service providers are called to provide information to data subjects about the processing of personal data in accordance with the **applicable EU Data Protection Directive and Regulations**. Consequently, this means that Art. 94 PSD-II as element of a payment services regulation did not specify any **additional** information requirements, but envisaged to integrate existing information duties under the GDPR into the provision of payment services in general.

III. Processing of Silent Party Data

In terms of the discussion in Chapter 4 of the Draft Guidelines on the processing of Silent Party Data, the IK recognizes again, that this might again be a specific data protection discussion for business models of TPPs, which obtain a series of silent party data, as further outlined in detail by the EDPB.

The IK generally welcomes clarifications by the EDPB, that certainly the processing of Silent Party Data is a key component of the provision of payment services in credit and debit card business, since Issuers might also obtain personal data from data subjects from merchants, if applicable, on the one hand and Card Acquirers in the due course of the processing of the payment services might obtain data of cardholders who used cards for payment transactions.

As EDPB outlined correctly, any reference to a consent-based data protection concept with respect to Silent Party Data is not feasible at all. The IK simply suggests to clarify in the Draft Guidelines of the EDPB and also to facilitate day-to-day work of European data protection authorities, that the processing of Silent Party Data is a self-understanding standard component of payment services, since each PSP usually only contracts with „his/her"

payment services user, but also obtains data of the counterparty of such user within the payment transaction, whether it may be the payer or the payee. Art. 6 (1) f GDPR provides sufficient legitimate grounds for processing of such data. Furthermore, and again as outlined above, new TPP business models and standard banking and card business products may be distinguished from traditional banking and card payment services in this respect:

With new TPP business models, data subjects of „Silent Party Data“ might in fact be surprised that their personal data will also be available for TPPs.

On the other hand, in standard banking and card business, it is self-understanding for payers and payees in credit transfer business or at the execution of card payment transactions, that the processing of payment transactions between the payer and the payee is simply impossible without the existence of „Silent Party Data“. Here, opposite to the new TPP business models, „no surprise“ of payment services users is at risk that another PSP, whether a Card Acquirer or a Card Issuer may, if applicable for this specific processing transaction, also be processing personal data, since this is obviously required for the performance of such payment services. The IK suggests, to better make clear in this chapter, that the processing of Silent Party Data for standard banking and card business is a „*conditio sine qua non*“ or indispensable for the performance of payment services without risk of any surprises for involved payers or payees.

We would appreciate it if you take our suggestions into consideration for further discussions.

In case of questions, please do not hesitate to contact us. We would appreciate any opportunity to outline and discuss the IK’s position.

Yours sincerely,

Dr. Hugo Godschalk / Dr. Markus Escher on behalf of the IK (Interessengemeinschaft Kreditkartengeschäft)