November 20, 2024

Comments

of the German Direct Marketing Association
(Deutscher Dialogmarketing Verband e. V. - DDV)

on the Draft Guidelines 1/2024 on Processing of Personal Data Based on Article 6 (1)(f) GDPR

Summary:
The German Direct Marketing Association (DDV) supports the draft guidelines on the processing of personal data under Article 6(1)(f) GDPR, emphasizing that direct marketing is crucial for business success and economic growth in the EU. The DDV argues that common marketing practices, which serve both business and consumer interests, should not require explicit consent and can be justified under legitimate interests. They advocate for a balanced approach, ensuring consumer rights are protected while enabling effective marketing. The DDV also criticizes certain interpretations in the guidelines and calls for clearer definitions of legitimate interest, necessity, and proportionality in direct marketing.

The German Direct Marketing Association (Deutscher Dialogmarketing Verband e. V. - DDV) welcomes the opportunity to comment on the draft Guidelines 1/2024 on processing of personal data based on Article 6(1)(f) GDPR published by the European Data Protection Board.

Direct marketing is an important instrument to attract new and retain existing customers. The economic success of the European Union depends on this instrument because other marketing measures, such as newspaper, television adds or bulk mail, do not allow cost effective marketing for most businesses. Therefore, requiring consent for direct marketing would be disproportionate and ineffective.

For a company that aims to survive and strive it is not an option to refrain from marketing or limit marketing to former or existing customers. Direct marketing needs to allow businesses to attract new customers. The European legislator has acknowledged the importance of direct marketing for this purpose by maintaining the opt-out principle in the GDPR and explicitly recognising the legitimate interest to process personal data for direct marketing purposes.

We believe that direct marketing equally serves the interests of businesses and consumers. Businesses want to reach consumers with a potential interest in their products and services. Consumers want to be spared of marketing that is not of interest for them. Direct marketing is designed to reconcile both interests by allowing businesses to select addressees of direct marketing based on objective criteria.

The use of selection criteria for direct marketing under the legitimate interest clause is possible but has limits. Our members do not use special categories of data (Article 9) without the data subject's consent. They do not send electronic direct marketing without consent if the ePrivacy Directive requires it. Furthermore, they commit to a high degree of transparency by informing consumers in every direct marketing communication about their opportunity to object. The direct marketing activities of our members are not surprising for average consumers because they are common practice, and the consumers regularly receive respective notices as part of their marketing communication. The limited number of complaints to data protection authorities underlines this finding, because in Germany less than one addressee out of 100.000 direct marketing communications complains.

We believe that direct marketing has a settled place in our society. It secures fair competition and economic growth in the European Union. The European legislator has recognised the importance of direct marketing but also confirmed its limits if the processing of selection criteria becomes too sensitive. It requires a case-by-case assessment to establish whether the processing of personal data is within or outside these limits. New techniques, such as online behaviour advertising and social media, provide greater opportunities to collect, analyse and use customer data for selection purposes. The level of detail of such profiles can create greater sensitivity. However, most of the common direct marketing techniques are not based on sensitive consumer profiles and do not cross the limits of the legitimate interest test.

Guidelines on the application of the GDPR must be firmly based on the jurisprudence of the CJEU. We appreciate that the EDPB Guidelines make the effort to refer to the relevant court cases. The DDV Guidelines do the same and have been regularly updated over time. However, we disagree with some of the interpretations of the EDPB of the relevant judgements and the application of the requirements of the GDPR. Most of the CJEU decisions have been made in

relation to techniques that require the collection of detailed online profiles. Traditional direct marketing techniques do not require such detailed selection criteria.

With these considerations in mind, we comment on the draft EDPB Guidelines as follows:

1. Comparison with Directive 95/46/EC (paragraph 5)

The legitimate interest clause remained broadly the same compared to the text in the Data Protection Directive 95/46/EC. However, the legislator extended or clarified the scope of the provision in three ways: Firstly, the legislator specifically recognized in Recital 47 the legitimate interest in direct marketing. Secondly, the legislator modified the provision to include the legitimate interest of any third party, not only third parties to whom the data are disclosed. Thirdly, by strengthening the data subject rights the legislator reduced the potential weight of the interests or fundamental rights of the data subjects. All the three factors mean that the scope of application for the legitimate interest clause has been broadened by the GDPR without compromising the legitimate protection of data subjects. There is no indication that the legislator wanted to tighten the application of the legitimate interest clause.

2. Legitimate interest of the controller or a third party (paragraphs 17-18, 114)

As the first step of the test, the legitimate interest needs to be established. The CJEU has made clear that a wide range of interest can be considered. The CJEU stated in C-708/18 in response to a specific question of the referring questing court that the legitimate interests should be present and effective at the time of processing and not hypothetical. C-708/18 does not support the wording “real and present” and not “speculative” in the draft Guidelines. Furthermore, C-26/22 and C-64/22 already parted from the idea. The referring court in these cases questioned whether a credit information bureau could collect data prior to an actual credit reference request. The CJEU could have regarded such a collection as hypothetical, but the court did not apply the test anymore. Instead, the court considered the issue only as part of the necessity requirement. Therefore, it is not part of the first step anymore.

It is also not relevant in the first step whether the legitimate interest is transparent. Transparency might be relevant for the degree of impact on data subject rights in the third step, but not for the existence of a legitimate interest as such. In C-621/22 the CJEU says at the end of the legitimate interest test that one should “recall” the transparency requirements, but the court did not make it a requirement for the existence of a legitimate interest.

We appreciate the value of examples, if they are relevant, clear and correct. The first example sets out an example in which the envisaged marketing initiative is supposed to be unlawful. Whilst the example seems clear, it represents an unusual situation, because very few products or services have marketing restrictions. Later, the draft Guidelines also mention restrictions of the ePrivacy Directive. However, it would be very unusual to limit the purpose of the processing to one specific communication channel. Therefore, the lawfulness of the processing as such is not affected if only one of the communication channels used to send direct marketing is unlawful.

The second example is also unusual and not correct. In practice, the CJEU does not limit the consideration to the legitimate interests stipulated in the data protection notice. All representations regarding the legitimate interest made in the proceedings are considered

whether they were part of the data protection notice or not (for example in C-252 as well as C-26/22 and 64/22). In the second example, the court would allow further explanation by the parties as to the legitimate interests.

The third example refers to the outdated judgement C-708/18 in which the CJEU stated that the legitimate interest must be present and effective as at the date of the data processing and must not be hypothetical at that date. As mentioned above, the CJEU has meanwhile skipped these criteria in C-26/22 and C64/22. Even if one would uphold the criteria, the CJEU confirms in C-26/22 and C64/22 that the collection of data for potential requests from (not yet identified) third parties can constitute a legitimate interest unless it is so hypothetical that its weight is zero. This is almost never the case and certainly not in the third example.

A database for potential future marketing activities would have an economic value because it would enable the publisher to effectively market a new publication. The purpose to create an economic value is a legitimate interest. It is not relevant whether a publication is already scheduled. The publisher has launched publications in the past and it is common for publishers to launch new publications. This is sufficient given that the CJEU accepted that a potential use could create a legitimate interest. Therefore, we would argue that the purpose to build the database is based on a present and effective legitimate interest and not hypothetical.

As in C-26/22 and C64/22 the CJEU would test the question whether the potential use in the future is sufficient as part of the necessity test and potentially within the balancing process. However, in the example the processing would be necessary, because the publisher would not be able to collect the specific addresses at a later point. The potential customers would otherwise be lost as addressees for the marketing initiative for a new publication. This legitimate interest would not be outweighed by data subject interests, because the legitimate interest has substantial commercial weight and the impact to the data subject would be minimal.

Finally, it would be helpful to further elaborate on the findings of C-621/22 which confirm the wide scope of legitimate interest in relation to commercial interests since some data protection authorities took diverging views on this issue in the past.

2. Third-Party Interests (paragraph 25)

Taking the history of the legitimate interest clause into account, any third-party interest can provide weight in the legitimate interest clause. As the CJEU shows in C-26/22 and C64/22, these third parties do not have to be specified. The cases also shows that wider community interests may count. If a company processes address data and selection criteria to allow potential third parties to send out marketing material, the legitimate interests of these potential advertisers provide weight.

3. Necessity (paragraphs 28-30)

The necessity test according to the CJEU requires that the legitimate interest pursued cannot “reasonably” be archived just as effective by other means less restrictive of the fundamental rights and freedoms of data subjects. We agree with the CJEU that the necessity requirement covers also the data minimisation requirement. It also overlaps the storage limitation principle. If and as long the necessity requirement is fulfilled, these principles are not breached.

The necessity test has two limitations. Firstly, the purpose of the processing is not questioned as such. For example, if a controller decides to use direct marketing techniques, the question is not whether this type of marketing is necessary to successfully run the company. The management choses the purpose of the processing. The necessity test accepts the decision and asks whether that purpose can be archived otherwise with less impact on the data subject. Secondly, the necessity test includes a proportionality requirement ("reasonably"). It is not required that the controller uses less impacting alternatives whatever they cost. For example, one could argue that the processing of selection criteria is not necessary because the controller can send the marketing communication to all contacts. However, this would be very expensive and ineffective. Therefore, if would not be reasonable. It would be helpful to highlight the limits of the test and the proportionality requirement, because the necessity requirement is sometimes misunderstood.

4. Balancing (paragraphs 31-60)

We agree that the balancing test is an objective test. The test aims to protect the data subjects. In consumer protection law, the CJEU applies such tests to the "average" consumers (for example in C-611/14). The same should apply for the legitimate interest test, because the purpose of Article 21 (1) GDPR is to consider the "particular situation" of a data subject. Article 21 GDPR would have no role if the legitimate interest test would already take the particular situation into account.

The draft Guidelines mention the data protection impact assessment in the context of the legitimate interest clause. It should be noted, however, that Article 35 rarely applies for data processing justified under the legitimate interest clause. The reason is the following: Article 35 applies only if there is a "hight risk" for the rights and freedoms of natural persons. Such a hight risk would be difficult to outweigh in the balance of interest clause. At least for the area of direct marketing we believe that both provisions are exclusive to each other. If Article 35 applies, the high risk required for the application of this clause would usually outweigh the legitimate interest to conduct direct marketing.

The draft Guidelines explain the application of the criteria of reasonable expectations. It should be noted, however, that this is not a criterion in the legitimate interest clause. The expectations are only mentioned in Recital 47 as one example for aspects that could be considered. Therefore, the lack of reasonable expectations does not automatically mean that the processing is unlawful.

Furthermore, due to the prominent role of direct marketing in the European economy, the average consumer expects the processing of personal data for such purposes. With respect to new techniques the expectation is part of a learning process driven by transparency. As the draft Guidelines point out in a footnote, the CJEU states in C-252/21 that "the user of that network cannot reasonably expect that the operator of the social network will process that user's personal data, without his or her consent, for the purposes of personalised advertising". The expectation to be asked for consent for tracking is reasonable, if it is a requirement by law (in this case under the ePrivacy Directive). The data subject can expect from the controller that the law is respected. However, most direct marketing techniques do not fall under the application of the consent requirements in the ePrivacy Directive. They fall under the opt-out regime under the GDPR. There is not reasonable expectation that such direct marketing will be carried out only with consent.

Finally, the notice provided to the data subject impacts the reasonable expectation. We agree that a notice cannot overwrite the law. However, if the described processing does not fall under a consent requirement by law, the data subject can reasonably expect that the processing described in the notice will take place. The average data subject cannot be surprised if the notice already envisaged the processing. Therefore, we disagree with the interpretation of the requirement of reasonable expectations in the draft Guidelines.

5. Transparency (paragraphs 31-60)

The draft Guidelines describe the transparency requirements. We agree that the controllers should inform about the legitimate interests pursued. Under the Article 13 the obligation to information about the legitimate interest is strict. It is required if "necessary to ensure fair and transparent processing" under Article 14 and not required at all under Article 15. This inconsistency cannot be balanced out by Article 5 (2), because this provision is clearly not a data subject right. The obligation to be able to demonstrate compliance does not create an obligation to provide access to the underlying documentation. There is also no right of the data subjects to receive the records of data processing activities under Article 30 or the documentation of data protection impact assessments under Article 35. The access right of the data subject is exclusively regulated in Article 15.

However, our members inform about their legitimate interests in their data protection notices and such notices are also included in any response to a data access request. This level of transparency exceeds the legal requirements and weighs in favour of the controllers under the legitimate interest test.

6. Children data (paragraph 95)

The draft Guidelines state that processing that negatively affects children's interests should not be undertaken. We agree that they deserve greater protection then average adults. However, the requirement in the legitimate interest clause is not absolute and C-252/21 does not make it an absolute requirement either.

7. Direct marketing (paragraphs 109-122)

We welcome that the draft Guidelines include a section on direct marketing. We agree that the mentioning of direct marketing as a legitimate interest in Recital 47 does not make the balancing exercise redundant.

It is correct that the definition of direct marketing is limited to commercial activities. However, that does not mean that non-commercial marketing (for example by non-profit organisations) cannot be considered as a legitimate interest, because Recital 47 only mentions direct marketing as an example. If a commercial activity constitutes a legitimate interest a non-commercial activity can do the same. Therefore, it might be helpful to explain that non-commercial activity does not fall under the definition of direct marketing but can still be justified under the legitimate interest clause.

With reference to the considerations above, we would also recommend to take the following into account:

- Reasonable expectations are just one aspect to be considered in the balancing act and do not automatically overwrite legitimate interests.
- Article 5 (3) only requires consent for storing and access to information on the terminal equipment. The processing before and after the application of the ePrivacy Directive does not.
- The processing of personal data for direct marketing purposes can be based on the legitimate interest clause even if one of the communication channels used requires consent.
- The necessity test is based on the defined purpose and legitimate interest and includes a proportionality test.
- The common direct marketing techniques are not based on “extensive processing of potentially unlimited data” as the CJEU criticised in relation to online services.

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About the DDV (German Dialogmarketing Association):

The German Dialogmarketing Association (DDV) is the largest national association of dialog marketing companies within the EU and is one of the leading associations in the communications industry in Germany. As the driving force of the Data Driven Economy, the DDV represents companies that generate data or use it for professional, data-driven, and customer-centric dialogue. Together with our members, we aim to create substantial added value through individual relationships between people, brands, and companies in an interconnected world. The focus of the association’s activities includes political advocacy, information exchange, quality assurance, and the promotion of young talent.