Comment

of the German Insurance Association (GDV)
ID-number 6437280268-55

on the
Draft Guidelines 02/2021 on Virtual Voice Assistants

Executive summary

The draft guidelines 02/2021 provide a great opportunity to create more clarity regarding the use of virtual voice assistants in accordance with data protection regulation. The German Insurance Association has identified certain aspects that would benefit from slight adjustments in order to reduce the remaining legal uncertainty:

- legal bases for machine learning
- clarifications on the roles as (joint) controllers and processors
- transparency obligations
- requirement of pseudonymized data for human reviewers

1. Introduction

The German insurance industry believes that the draft guidelines provide a good basis for bringing more clarity to the application of the GDPR in the context of virtual voice assistants (VVAs). As the topic is a delicate matter, we are aware that no guidance can ever resolve all pending questions. However, we would still like to highlight certain points, which could benefit from additional clarification:

2. Legal Basis for machine learning

The guidelines state in para. 101 und 103 that if users do not consent or withdraw their consent, the data collected from the user can not or no longer be used to train machine learning models to improve the VVAs voice recognition capacity. We agree with this assessment, but suggest adding further explanations that this is due to the special circumstances pertaining to the use of VVAs. Otherwise, it could be misunderstood that training machine learning models always requires consent, which should not be the case. It is the nature of many VVAs that there is no further (contractual) relationship between the user and the VVA provider/developer beyond the original purchase of the VVA. As such, it does not correspond to user's reasonable expectations if his data is processed for the purpose of training the machine learning system. In contrast, depending on the specifics of the individual case, processing of personal data through use of self-learning AI could also be performed on the grounds of other legal bases like the legitimate interests or further compatible processing.

The EDPB rightly says that performance of a contract can also be a legal basis for processing personal data using machine learning when it is necessary for the provision of the service (para. 76). However, with regard to machine learning for the purpose of service improvement we would ask the EDPB to further differentiate its deliberations and not to rule out Art. 6 (1) (b) GDPR as a possible legal basis. Efficient and effective customer service can be an explicit and continuous contractual obligation. Therefore, machine learning for service improvement can be necessary for the provision of a service.

3. Clarification on the roles as (joint) controllers and processors

Due to the many stakeholders involved in the context of VVAs, correct identification of their respective roles as either (joint) data controllers or processors is of utmost importance. We understand that the applicable qualifications have to be established on a case-by-case basis. The EDPB has further provided general guidance in its draft guidelines 07/2020.

Nevertheless, we would still ask the EDPB to complement its deliberations in para. 40 – 46 with further explanations on the relationship between the VVA provider and the provider of a third-party application/service/product that can be accessed and interacted with through the VVA. Legal uncertainty persists as to whether they are to be considered joint controllers, separate controllers or controller and processor. We believe the guidelines could benefit from further elaborations akin to the CNIL White Paper "ON THE RECORD – Exploring the ethical, technical and legal issues of voice assistants, 2020".

4. Transparency obligations

The draft guidelines correctly determine in para. 49 that digital systems are not yet fit for voice-only interactions. This is proven by the systemic use of companion screens. In spite of that the EDPB considers it necessary to be able to inform the user through the vocal interface. This statement should be amended. The fulfillment of the transparency obligations through vocal conveyance will always prove far less useful to the data subject compared to the provision of the information through visual means like the aforementioned companion screens. It is also less effective in achieving the goals pursued by the Artt. 13-15 GDPR, while requiring a disproportionate amount of effort by the controller.

5. Requirement of pseudonymized data for human reviewers

Finally, we ask the EDPB to more strongly differentiate with respect to its recommendation in para. 123 that "human reviewers should always receive the strictly necessary pseudonymized data". While it corresponds to the principle of data minimization to only process pseudonymized data if processing of the raw data is not necessary, there are cases in which pseudonymizing the data before human reviewers can access them would restrict the usability of the data without increasing the data subject's protection (e.g. because the persons tasked with executing the processing are subject to confidentiality obligations).

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