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Statement Volkswagen AG „EDPB Guidelines 1/2020"

1. Strict separation of GDPR and Art 5(3) ePrivacy Directive in their application

The General Data Protection Regulation and Art 5(3) of the ePrivacy Directive have clearly different protection objectives and areas of application. The aim of the ePrivacy Directive 2002/58/EC is to particularise and to complement Directive 95/46/EC (now GDPR) basically for publicly available electronic communications services in public communications networks (Art 1(2); Art 3 ePrivacy Directive). A European law regulation and a European law directive with different scopes of applications should not be mixed together :

- The **General Data Protection Regulation (EU) 2016/679** lays down rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data (Art 1(1) GDPR).
- The **ePrivacy Directive 2002/58/EC** (as amended by Directive 2009/136/EC) pursues clearly different protection goals and purposes:
    - Art 4 of the ePrivacy Directive focuses on the security of processing in the case of publicly available electronic communications services.
    - Art 5, Art 6 and Art 9 of the ePrivacy Directive aim to ensure the confidentiality of electronic communications in the case of publicly available electronic communications services in public communications networks (secrecy of telecommunications and handling of traffic and location data).
    - **Art 5(3) of the ePrivacy Directive (as amended by Directive 2009/136/EC) aims to protect information stored in terminal equipment.**
    - Art 7 of the ePrivacy Directive regulates the modalities for itemised billing.
    - Art 8 f ePrivacy Directive the questions concerning the display and/or suppression of a number of a caller.
    - Art 11 of the ePrivacy Directive regulates issues relating to call forwarding.
    - Art 12 of the ePrivacy Directive regulates directories of subscribers ("telephone directories").

- Art 13 of the ePrivacy Directive regulates the issue of advertising communication (unsolicited communication).
- Art 14 of the ePrivacy Directive regulates technical characteristics and standardization issues.

As you can see, the ePrivacy Directive, with the aim to particularise and to complement Directive 95/46/EC (now GDPR) for publicly available electronic communications services, pursues different goals than GDPR, so both topics should not be mixed up in one. We consider it problematic to apply a mixture between Article 5(3) ePrivacy Directive (protection of terminal equipment information) and GDPR (protection of personal data and ensuring free movement of data within the Union) in a blanket way to the connected vehicle. Consequently, the two European legal acts, their applicability and their effects should be considered completely separately, which is what our opinion is trying to show you.

Furthermore, it seems not persuasive that Art. 5(3) of the ePrivacy Directive shall have priority over Art 6 GDPR (marginal 14). It seems that the Guidelines relies on that argument – with the assumption of Art 5(3) ePrivacy Directive as general provision like GDPR – to override the various legal bases of Art 6 GDPR (see marginal 16). However, these legal bases are prescribed in primary European law and are not a question of issue. As the ECJ judgment of 20 May 2003 expressly emphasized, the provisions of data protection law, according to which the processing of personal data is permitted with consent or in accordance with a balancing of interests, comply with the fundamental rights and principles of the EC Treaty (ECJ, cases C - 465/00, C 138/01 and C 139/01 - ORF). Accordingly, the paper does not refer to the ePrivacy Directive in the following, but also applies the legal basis of the GDPR.

2. Application of the GDPR to the connected vehicle

There are already two European supervisory authorities that have been finalized and published guidelines for the connected vehicle at the national level in France and Germany:

- Joint statement of the conference of the independent data protection authorities of the Federal and State Governments of Germany and the German Association of the Automotive Industry (VDA) ;
- French CNIL Compliance Package for connected Vehicles.

Both, the German and the French publication, consider car manufacturers to be within the scope of data protection law only if the data does not remain in the vehicle.

The German VDA paper is based on the "collection" from the vehicle by the car manufacturer, the French Compliance Package is based on the fact that the person concerned has full control over the data in the "offline" vehicle ("users having full control over their data"; CNIL, Compliance Package, p. 20.).

In this respect, the German supervisory authorities and the French CNIL follow a very similar understanding of the applicability of the GDPR to car manufacturers. In our view, the EDPB Guidelines 1/2020 should therefore follow these established German and French concepts (GDPR applicability to car manufacturers only from the time of collection from the vehicle).

Other issues which, in our view, should be clarified in such a guideline in relation to the GDPR in order to ensure coherent application of the GDPR in the Union:

- All GDPR-permits are applied equally and completely independently of the ePrivacy Directive. This is a basic rule of Art 6 para 1 sentence 1 GDPR (see below).
- Art 6(4) GDPR applies without restriction in the exclusive scope of application of the GDPR. A link with Art 5(3) of the ePrivacy Directive (protection of terminal equipment) - as made in the Guidelines (marginals 50 ff.) - cannot be justified objectively. Art 5(3) of the ePrivacy Directive protects terminal equipment information; the GDPR protects personal data. The aim of the ePrivacy Directive is to ensure the protection of information on the terminal equipment. If the subscriber or user gives his or her informed consent that the information may be retrieved from the terminal equipment, the protection provided by Art 5(3) of the ePrivacy Directive ends and the terminal equipment information which is now retrieved in accordance with the ePrivacy law, is subject only to the GDPR in the case of personal data and no further regulations whatsoever with regard to non-personal data. Art 5(1) lit b GDPR in conjunction with Art 6(4) GDPR are therefore applicable without any restriction by Art 5(3) of the ePrivacy Directive.

- It should be specified in a practice-oriented manner, when in the connected vehicle criminally relevant data in the sense of Art 10 GDPR are processed. In the opinion of Volkswagen, the question of personal data as defined in Art 10 GDPR should follow the concept of the GDPR on biometric data. According to recital 51 sentence 3 about biometric data, personal data relating to criminal offences as defined in Art 10 GDPR, should only be seen as data under Art 10 GDPR, if these data are processed for purposes like criminal prosecutions, preservation of evidence of criminal offences, compliance investigations, etc. This is generally not the case for personal data are being processed for the provisions of mobile online services

and, therefore, if such data are processed for other purposes, the general GDPR-provisions of Art 6 should only apply.

- The EDPB should, if necessary, encourage the EU Commission to adopt standardized pictorial symbols in accordance with Art 12(8) GDPR.
- In the line with its political intention to regulate the use of social networks, the right to data portability should not be extended to pure vehicle data by an excessive interpretation.
- Concrete statements on how to deal with Art 11 GDPR in the vehicle, would be desirable to ensure largely anonymous driving, which would eliminate the requirement for car manufacturers, out of legal caution, to have to identify affected persons, because they can then refer to Art 11 GDPR in a legally secure manner.

3. No exclusive nature of consent pursuant to GDPR

The paper does not only focus on the ePrivacy Directive, but also on the GDPR (e.g. marginals 66, 73). This results in a level of regulation that clearly exceeds both sets of rules and has no basis in either the Directive or the GDPR. At the same time, the paper makes the obvious assumption that the processing of personal data in the automotive sector can also be covered by a balancing of interests in accordance with the implementation of a contract within the meaning of Article 6(1) GDPR (see marginals 113, 121, 123, 131, 132). In this respect, the paper surprisingly assumes the exclusive nature of consent.

In addition the paper does not focus on the practical consequences of consent as legal basis. Especially, it might be unfavorable obtaining consent in certain cases as several services would require core data processing operations which cannot be carried out once the consent has been withdrawn, whereas the service provider would still be obliged to carry out the services from a contractual perspective.

4. Application of the ePrivacy Directive to the connected vehicle

The guidelines are based on the ePrivacy Directive of 2002 (marginals 9 ff.). However, this Directive is outdated and, has become obsolete with the entry into force of the General Data Protection Regulation ("GDPR"). It is no longer possible to adopt the regulatory structure and regulatory instruments of the ePrivacy Directive in the light of the GDPR. This prohibits in particular Art 95 of the GDPR, on which marginal 173 expressly states that the GDPR should apply if the respective processing of data is not

subject to the obligations laid down in the ePrivacy Directive, which pursue the same objective (for the circumstances see also Steinrötter, in: Specht (Hg), Handbuch europäisches und deutsches Datenschutzrecht. Munich 2019, § 5 marginal note 2 f.).

Marginal 173 also explicitly mentions the need for a fundamental review of the Directive after the entry into force of the GDPR, which is still lacking today. For this reason, the Directive falls well behind the Regulation, as can be seen from the lack of a consent requirement. The Directive lags behind the regulation, which is also and to a large extent due to the old age of the regulations. It is not without good reason that all European institutions and the European digital economy are pushing for the adoption of a separate ePrivacy Regulation, which the Croatian Presidency of the Council has just launched again in 2020. To stop in the midst of this important changeover to an outdated directive is critical.

The Conference of the Independent Data Protection Supervisory Authorities of the Federal Government and of the Länder (Federal States) therefore clearly pointed out the prevalence of application of the GDPR in its guidance for telemedia providers of March 2019. They also pointed out that directives under Art. 288 TFEU, in contrast to regulations, require implementation by the Member States and that Art. 95 cannot therefore speak of a primacy of the ePrivacy Directive (page 3).

In any case: In the opinion of Volkswagen, the applicability of Art 5(3) ePrivacy Directive to the connected vehicle must be examined completely independently and thus completely separately in the consideration. In our view, for example, the linking of Art 6(4) GDPR with Art 5(3) of the ePrivacy Directive (changes of purpose only on the basis of consent due to the ePrivacy Directive), which is made in marginals 50 ff. of the Guidelines, cannot be found in the law text
The first unanswered question is, that Art 3 ePrivacy Directive (“Services concerned”) clearly says, that the whole ePrivacy Directive is only applicable to “publicly available electronic communications services in public communications networks in the Community, including public communications networks supporting data collection and identification devices.” Out of the legal text of Art 3 ePrivacy Directive it is not visible, why car manufacturers should fall under the ePrivacy scope? Although we know, that Art 29 Working Party and now EDPB interpret Art 5(3) ePrivacy Directive as a general provision, but contra the wording of Art 3 ePrivacy Directive.

In the interpretation of the Art 29 Working Party and now EDPB, Art. 5(3) ePrivacy

Directive does not focus its applicability on specific European telecommunications law actors (e.g. "publicly available electronic communications services", "information society services"), but simply on whether someone wants to store or retrieve information on a "subscriber's" or "user's" terminal equipment. The scope is the integrity and confidentiality of an information technology system to be commercially accessed by private sector actors via publicly available electronic communications networks.

The term "terminal equipment" was first defined in Art 1 Directive 88/301/EEC and was incorporated into Art 5(3) of the ePrivacy Directive in 2002. Directive 2008/63/EC replaced the Directive 88/301/EEC in 2008 and in the German and French version the term "terminal equipment" (GER: “Endgerät”; FR: « appareil terminal ») was redefined by “Endeinrichtung” (GER) and «équipement terminal» (FR). In the English version the term “terminal equipment” did not change since 1988. The drafts of the ePrivacy Regulation from 2017 therefore also speak of "terminal equipment" in the English version, and use the new German (“Endeinrichtung”) and French («équipement terminal») definitions in Art 8 ePrivacy Regulation-Draft and no longer the terms of the 1988 Directive 88/301/EEC (GER: “Endgerät”) as Art 5(3) ePrivacy Directive still does in the German version. In terms of content, the definition of "terminal equipment" - also in the German version - has remained largely identical.

According to Art 1(1) of Directive 2008/63/EC "terminal equipment" (ex Art 1 of Directive 88/301/EEC) is

a) equipment directly or indirectly connected to the interface of a public telecommunications network for the transmission, processing or reception of messages; in the case of both direct and indirect connections, the connection may be made by wire, optical fibre or electromagnetically; in the case of an indirect connection, a device is connected between the terminal equipment and the interface of the public network
b) Satellite earth station equipment with its facilities;

A "terminal equipment" in the sense of European Telecommunications Law must therefore **fulfill** at least **two requirements** in order to fall under the definition of Art 1(1) of Directive 2008/63/EC and thus come within the scope of Art 5(3) of the ePrivacy Directive: 1. It must be connected directly or indirectly to the interface of a public telecommunications network (Art 2 lit d Framework Directive 2002/21/EC). 2. It must

be a device for sending, processing or receiving "messages". The term "message" is legally defined in Art 2 lit d ePrivacy Directive 2002/58/EG as "*any information exchanged or transmitted between a finite number of parties by means of a publicly available electronic communications service. This does not include information which is transmitted to the public as part of a broadcasting service over an electronic communications network, provided that the information cannot be associated with the identifiable subscriber or user receiving it*;".

Consequently, in the case of a connected vehicle, only those components can be considered as 'terminal equipment', which are connected to an interface of a public telecommunications network (Art 2 lit d Framework Directive 2002/21/EC) and which contain 'messages' (Art 2 lit d ePrivacy Directive). So it must therefore be checked, whether these two conditions are met, before a technical device can even be designated as a "terminal equipment" in the sense of Art 1 para 1 of Directive 2008/63/EC in conjunction with Art 5 para 3 of ePrivacy Directive 2002/58/EC.

Protection is provided by Art 5 para. 3 ePrivacy Directive 2002/58/EC as amended in the Citizens' Rights Directive 2009/136/EC to:

- "subscriber" (Art. 2 lit. k of the Framework Directive 2002/21/EC): "*any natural person or legal entity who or which is party to a contract with the provider of publicly available electronic communications services for the supply of such services;*".
- "user" (Art. 2 lit a ePrivacy Directive 2002/58/EC): "*any natural person using a publicly available electronic communications service, for private or business purposes, without necessarily having subscribed to this service;*".

As can be seen, these two terms are completely different with regard to the data protection law term "data subject" (Art 4 No. 1 GDPR). A blanket mixing of GDPR and Art 5(3) ePrivacy Directive in the consideration of the connected car thus becomes in our view because of this considerations problematic.

The "subscriber" within the meaning of European telecommunications law is someone who has concluded a contract with a provider of publicly available electronic communications services. In this respect, a "subscriber" in the sense of the ePrivacy Directive could also be the automobile manufacturer itself with regard as a contractual partner of a provider of publicly available electronic communications service(a possible legal interpretation). Furthermore, a "subscriber" can be the vehicle owner if he or she books free Internet access via the SIM card installed in the vehicle.

In addition, the ePrivacy Directive protects the "users". ”Users” are all persons utilizing the “terminal equipment” (Art 1 (1) of Directive 2008/63/EC). The term “using” means interacting with the terminal equipment (internet surfing, watching online videos, playing computer games, etc.).

But - there is only one consent necessary, because the law text of Art 5(3) ePrivacy Directive says clearly consent of “subscriber **or** user”.

Persons who do not use the "terminal equipment" (e.g. who do not utilize the "terminal equipment" as defined in Art. 1 Directive 2008/63/EC) do not fall within the scope of protection of Art. 5 para. 3 of the ePrivacy Directive, but are covered by the GDPR as "data subjects".

Result:
The application of Art 5(3) of the ePrivacy Directive to the connected vehicle appears to be far too little legally and technically investigated by the EDPB at this stage, also against the background of the practical effects and technical conditions in the connected vehicle.

- A detailed analysis of the definition of a 'terminal equipment' shows that the blanket approach of the EDPB that a Connected Vehicle is in any event a 'terminal equipment ' is not tenable.
- A concrete assignment of the roles protected by Art 5(3) ePrivacy Directive ("subscriber" and "user") is not made, but it appears that these roles are not objectively related to affected persons as defined in Art 5(3) ePrivacy Directive although legal persons can also be " subscribers " (Art. 2 lit. k of the Framework Directive 2002/21/EC). Under the protection of Art 5(3) ePrivacy Directive fall legal persons, who have a contract with a publicly available electronic communications services for the supply of such services , too - whereas the GDPR only protects natural persons as “data subjects”.
- Due to the complex role definitions of European Telecommunications Law in our view, it could be seen as possible for an automobile manufacturer, for example, which is a contractual partner of a publicly available electronic communications service with regard to the SIM cards installed in the vehicles, to be a "subscriber" for the "terminal equipment" concerned, protected by Art. 5(3) ePrivacy Directive (Art. 2 lit. k Framework Directive 2002/21/EC). In this respect, a detailed consideration of the roles of European telecommunications law is necessary,

because purely according to the legal text of Art 5(3) ePrivacy Directive, the consent of the "subscriber" ("subscriber or user") is sufficient. According to Recital 12 of the ePrivacy Directive 2002/58/EC in conjunction with Art. 2 lit k of the Framework Directive 2002/21/EC, "subscribers" can also be legal entities that have concluded a contract with a provider of publicly available electronic communications ser vices. Many car manufacturer have contracts with publicly available electronic communications services for their mobile online services (but often not including open internet access for the car owner; but this seems not relevant for the “subscriber”-definition in Art 2 lit k Framework Directive 2002/21/EC).

- Volkswagen does not per se exclude the application of Art 5(3) of the ePrivacy Directive, but it does expect a precise and clean examination of the terms “terminal equipment” and the different roles of the ePrivacy directive and GDPR ("subscriber", "users", “data subjects”) in such a guideline.
- In addition, Volkswagen draws attention to the complete diversity in the national implementation of Art 5(3) of the ePrivacy Directive (version 2009) in the EU, which means that consistency in the application of the provision appears to be relatively impossible.

5. Storing of data in cloud environment

The paper assumes the necessity and usefulness of storing data in the car itself (marginal 70). For the networked car, it is highly required to operate with a large network of individual telecommunications players and cloudbased operations. To dispense with cloud processing (marginal 72) misses the point and contradicts the European data strategy (of the European Commission, publ. 19.02.2020). The paper overlooks the possibility that sufficient data privacy and data security mechanics can be implemented and control and security of data can be guaranteed even when using cloud systems.

6. No mention of automated cars

The guidelines begin with an exaggerated description of data processing in the car. Automobiles have become "massive data hubs". They are complex ecosystems which are also at the centre of the activities of the new players in the digital economy (marginal 2). All these descriptions exaggerate the extent and intensity of data processing. There are still many new cars on the road in Germany and Europe that are far away from such massive data processing. At most in the case of automated vehicle systems, such massive data collection tends to be envisaged in order to improve road safety in these special vehicles. Remarkably, the paper does not refer to automated

driving in particular. There are no statements about automated passenger cars.

7. Suggestion to the EDPB

Volkswagen AG suggests that the "EDPB Guidelines 1/2020" should initially be limited to the applicability of the GDPR, in line with the CNIL and the German supervisory authorities. Maybe - if necessary - a separate ePrivacy Guideline should deal with this topic and should contain the following content:

- a more precise legal and technical examination of the applicability of Art 5(3) of the ePrivacy Directive to the connected vehicle, including a precise analysis of the definition of "terminal equipment" as defined in the Directive. Art 1(1) of Directive 2008/63/EC;
- to take into account the different national implementations in the EU Member States in the context of a more indepth investigation, with the aim of achieving Europewide coherence in the application of the ePrivacy Directive, against the background that Art 5(3) ePrivacy Directive as amended. Directive 2009/136/EC has partly not been transposed into the national law of the Member States.
- If the ePrivacy Regulation is adopted this year, this analysis could be based on the final text of Art 8 of the ePrivacy Regulation.

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