

# COMMENTS

Comments on the EDPB Guidelines 1/2020 on the processing of personal data related to connected vehicles and mobility-related applications

Berlin, April 2020

Ansprechpartner zum Thema

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## 1. Introduction

The Association of the German Automotive Industry (VDA) represents more than 600 member companies from the automotive manufacturers, suppliers, trailer and body manufacturers. The development of connected and automated vehicles is one of the central strategic tasks of the industry and will determine its international competitiveness.

The automotive industry fundamentally welcomes the EDPB's approach of creating common foundations for the uniform application of the GDPR. This will provide legal certainty for businesses in the European Single Market. However, the specificities of the automotive industry and connected vehicles need to be taken into account. Thus, we want to share the several challenges that would occur, if the e-Privacy-Directive from 2002 were applied to connected vehicles.

We have the impression that the technical implications of connected vehicle could be broader reflected in the Guidelines. As an example, we would recommend to always see a vehicle as a "whole" and not to differentiate between individual Electronic Control Units (ECUs). Each manufacturer is free to design the technology in the vehicle under competitive conditions.

For us most important is that data that is created locally in the vehicle and remains there is not considered as "connected" data. As mentioned in the Guidelines draft, in 2016, the German Data Protection Authorities issued a joint statement<sup>1</sup> together with the VDA. One of the main conclusions was that no collection of data takes place unless those data leave the vehicle. Thus, in this scenario Data Protection laws are not applicable except requirements for the manufacturer on "privacy-by-design" and "privacy-by-default". The French CNIL compliance package<sup>2</sup> on the connected vehicle revisits the idea in the "in-in scenario".

Regarding the question of the data subject we feel, this is not sufficiently clarified in the Guidelines. In the vehicle context we see several groups of affected persons: Owner, holder, driver, passenger, service user. Not every data processing is assigned to each group. In this respect, the data subject should be clearly identified for the various processing operations, so that the rights concerned, such as the information obligations of the controller, must only apply to the respective data subject. Here, we would welcome if the Guidelines would also present solutions, e.g. how a vehicle owner has to inform the drivers of his vehicle when he purchased a connected services.

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<sup>1</sup> 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); [https://www.lida.bayern.de/media/dsk\\_joint\\_statement\\_vda.pdf](https://www.lida.bayern.de/media/dsk_joint_statement_vda.pdf)

<sup>2</sup> Connected vehicles: a compliance package for a responsible use of data; <https://www.cnil.fr/en/connected-vehicles-compliance-package-responsible-use-data>

## 2. Application of the GDPR to the connected vehicle

The application of the Data Protection legislation for connected vehicles has been examined by the CNIL with its “Compliance Package” and by the German supervisory authorities. According to this, the scope of the GDPR only applies if the data leaves the vehicle.

According to the German Authorities the crucial factor for the application of Data Protection laws is, that data are collected and leave the vehicle. The CNIL requires that the data subject has full control over the data in the “offline” vehicle. This full control should be given if personal data are not transmitted to the service provider and the storage and deletion of the data are functionally provided for. If the full control thus defined is given, the application of the GDPR to an automobile manufacturer with regard to the data processed in the vehicle is not considered. We would welcome if the EDPB Guidelines 01/2020 would revisit this approach to achieve a harmonized understanding.

Processing of personal data is usually necessary for e.g. the provision of services, which the manufacturer provides to customers. For this, in many cases Article 6 (1) b) GDPR is the legal basis. At the same time we see no room for the application of Article 5 (3) e-Privacy-Directive.

There is also a number of single aspects that we consider to be challenging. With regard to the applicability of Article 10 GDPR on the basis of criminally relevant information from connected vehicles, a more differentiated consideration would have been required than in the present case in the Guidelines. We understand that the interpretation does not completely reflect the requirements of Article 10.

Finally, it is suggested that definitions from the EU GDPR on anonymisation (recital 26) and pseudonymisation (Article 4 (5)) should be directly adopted.

## 3. Application of the e-Privacy-Directive to the connected vehicle

The GDPR and the e-Privacy-Directive have different scopes and objectives and should therefore be treated separately. Article 6 GDPR is designed to ensure the protection of personal data and the free movement of data in the EU. Article 5 (3) of the 2002 e-Privacy-Directive, on the other hand, deals with the terminal equipment and aims to protect the rights of “users” and “subscribers”.

Thus, it is not clear how the EDPB wants to understand the concept of the “terminal equipment” in the sense of the e-Privacy Directive. On the one hand, it refers to the car itself as a “connected vehicle” (Rn. 13) and thus as a terminal equipment, on the other hand, it focuses on the communication systems within the car (Rn. 105). “terminal equipment” may refer to the vehicle or to individual data processing components. Depending on the view, this entails completely different legal requirements.

Furthermore, the EDPB equates the term “data subject” from the GDPR with the terms of the “user” or “subscriber” from the e-Privacy Directive. Against this background, the interplay between e-Privacy-Directive and GDPR is further complicated. It is already leading to issues, that e-Privacy Directive and GDPR use different terms with “user” or “subscriber” which are not fully compatible with the GDPR term “data subject”. We would recommend to exclusively use the terms of the GDPR.

In the opinion of the EDPB, the legal basis for all data processing operations where information is stored within a car or access to information already stored in the car should be required to give consent in accordance with Article 5(3) e-Privacy Directive.

We find it unfortunate that the Guidelines do not explain how such consent be obtained from the (correct) data subject and how he or she can be sufficiently informed. In our opinion it is important that Article 11 GDPR is reflected in the Guidelines such that no data is collected to identify the driver or passenger. The manufacturer usually does not know the driver or passenger.

We understand that the EDPB aims on harmonizing regulations and interpretations that have been published in the past. Yet, the Guidelines needs to be adjusted, as it is conflicting with the “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)” of 2016, which e.g. differentiates between “online cars” and “offline cars”. Thus, a legal basis for processing of personal data is only necessary when data leave the car. In addition, the priority of the e-Privacy-Directive over the GDPR, as depicted in the Guidelines, is in our view highly controversial in legal terms and may hinder innovations. The legal bases for data processing in cars should therefore largely follow from the GDPR.

The EDPB requires that consent within the meaning of Article 5 sec. 3 e-Privacy-Directive requires comprehensive information of the data subjects by the respective responsible body within the meaning of Articles 13, 14 GDPR.

Pursuant to the “Joint Statement” one place for the information to be provided by the manufacturer in the context of the vehicle can be the owners’ manual. We would welcome further discussions and proposals for further places and ways.

The EDPB bases the absolute theory of personal reference as regards the question of when personal data are available. In view of this theory, virtually every date is personal. In this way, the EDPB also wants to be able to collect purely technical data. Both the ECJ and the vast majority of German supervisory authorities follow the modified relative theory that the specific possibilities of the person responsible for identifying the person concerned are always taken into account.

#### **4. Summary / Consideration of the preparatory work of national supervisory authorities**

From the point of view of the VDA, the Guidelines should ideally be limited to the applicability of the GDPR, as the French CNIL and the German Supervisory Authorities already demonstrated in their published guidelines.

We welcome the comprehensive opinion already published by ACEA, which covers additional aspects on the Guidelines.

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Stand              April 2020