

- Bundesverband E-Commerce und Versandhandel Deutschland e.V. (bevh) -

Position Paper on the Guidelines 2/2023 on Technical Scope of Art. 5(3) of ePrivacy Directive

Berlin, 18.01.2024

Contact: Eva Behling, eva.behling@bevh.org

Bundesverband E-Commerce und Versandhandel Deutschland e.V. (bevh) represents the interests of online and mail order retailers active in Germany of all sizes and trade channels (online, multichannel, catalogue, TV shopping, platform dealers and operators). The members of bevh represent more than 75% of the entire industry turnover. In addition, more than 130 service providers from the e-commerce sector are affiliated with our association.

We thank you for the opportunity to comment on the Guidelines 2/2023 on Technical Scope of Art. 5(3) of the ePrivacy Directive. First of all, we are very surprised by the guidelines, as to our knowledge there have been no recent discussions nor complaints on the points mentioned in the guidelines. The technologies mentioned in the guidelines are neither new nor have serious infringements been reported in the past. Not least for this reason, we consider some of the views in the guidelines to be far too broad:

1. Notion of gaining access, margin no. 31

We find it very surprising that the European Data Protection Board does not base its legal opinion on the wording of the ePrivacy Directive, but instead interprets the provisions on the scope of the regulation very broadly, for which, in our opinion, there is no legal basis whatsoever. The wording of Art. 5 (3) expressly only concerns cases in which information is stored or accessed in end devices. The fact that Art. 5 (3) should now also apply "whenever the accessing entity wishes to gain access to information stored in the terminal equipment and actively takes steps towards that end" is incomprehensible. As it is known, the protection objective of the ePrivacy Directive is to ensure privacy and confidentiality with regard to the processing of personal data in the electronic communications sector. The edpb gives the impression that the wording is based on the subjective wishes of an entity. This opinion leads to legal uncertainty, as it is no longer possible to predict when the scope of application will actually be opened up.

We therefore suggest deleting or rephrasing this paragraph.

2. Tracking within the scope of Art. 5 (3), margin no. 48

We disagree with the edpb's view that the use of tracking links also falls within the scope of Art. 5 (3).

When tracking links are used, at no time is information in an end user's terminal equipment actively accessed, as required by the wording of Art. 5 (3).

At the time the end user clicks on the link, only the IP address of the end user is transmitted to the website. But the IP address is always transmitted completely automatically when websites are accessed and is fundamental to the functionality of the internet. The German Data Protection Conference also states in its "Guidance of the supervisory authorities for telemedia providers"¹ in margin no. 21 that information, such as browser or header information, which is transmitted inevitably or due to (browser) settings of the end device when a telemedia service is called up - such as IP addresses - is not to be understood as access within the meaning of the e-Privacy Directive.

What makes link tracking special, is the creation of an own URL for a respective event. It is used to track clicks in order to measure the effectiveness of different marketing campaigns. This URL is a unique and customized web address that is created specifically for a particular marketing campaign. Additional information is added to the original URL, such as the name of the campaign, the source and the medium. The purpose of this is, that when advertising is placed on other websites, the effectiveness of this advertising campaign can be measured and remunerated accordingly. Tracking is therefore an essential component of many business models. Particularly in the case of influencers who publish their tracking links via a third party (such as social platforms), it is questionable how they should correctly implement the requirements of this guideline. According to the edpb's view, end users would have to be comprehensively informed and give their consent before clicking on such a link. As influencers use the technical infrastructure of social media, they are dependent on the implementation by telemedia providers. It is difficult to imagine how this should be implemented on social media or YouTube, for example. Retailers and companies are making every effort to comply with data protection regulations. However, this view of the edpb makes the above-mentioned business models unattractive and significantly restricts them.

From our point of view, the edpb's assessment is neither practicable nor does it correspond to the interests of the parties involved. There is already talk of the phenomenon of "clique fatigue" in relation to cookie banners. If additional consent now has to be obtained for tracking links, even

¹ Orientierungshilfe der Aufsichtsbehörden für Anbieter:innen von Telemedien ab dem 1. Dezember 2021 (OH Telemedien 2021), Version 1.1 https://www.datenschutzkonferenz-online.de/media/oh/20221205_oh_Telemedien_2021_Version_1_1_Vorlage_104_DSK_final.pdf

though end devices are not actively accessed, this will also lead to displeasure and incomprehension among end users.

3. Conclusion

We are very much in favor of the edpb reconsidering and revising the views in its guidelines. This is because the current guidelines would mean that the internet - as we know and use it now - could significantly be impaired. If in the EU any use of link-tracking in business models should only be possible with explicit consent, it will paralyze the economy and create a lack of understanding among European citizens.