Comments on the draft Guidelines 2/2021 of the European Data Protection Board

This paper exclusively reflects the views of its author.

On 12 March 2021, the European Data Protection Board published its draft Guidelines 2/2021[1] *"on Virtual Voice Assistants"* (hereinafter referred to as Draft Guidelines or Draft).

Although prolix, the Draft Guidelines do not provide any useful guidance on important topics (e.g. the way of implementation of data subject rights), and the Draft is also controversial in other topics (detailed below).

1. Who are the addressees of the Draft Guidelines?

Concerning the actors involved in data processing activities, the GDPR regulates the rights and obligations of controllers [Article 4(7) of the GDPR], processors [Article 4(8) of the GDPR], data subjects [Article 4(1) of the GDPR] and *"person[s] acting under the authority of the controller or of the processor, who has access to personal data"* (e.g. Article 29 of GDPR). Only these persons are obliged to comply with the GDPR (or can exercise any rights granted in the GDPR).

Although, in its Guidelines 04/2019, the EDPB at least acknowledged that "*technology providers … are not directly addressed"* by the GDPR[2] (since they are not under the personal scope of the GDPR), the Draft—with noble simplicity—considers "VVA designers/providers" as addressees of the obligation in the GDPR (i.e. as controller), and just sporadically uses the precise term "data controllers providing VVAs".

2. Are VVAs "terminal equipment" in the sense of the e-Privacy Directive?

Paragraph 25 says that *"VVAs should be considered as 'terminal equipment' and the provisions of Article 5(3) e-Privacy Directive apply"* and also cites the definition of "terminal equipment". "Unfortunately", however, considering VVAs as "terminal equipment' is a total misunderstanding (or misinterpretation?) of both the Directive 2008/63/EC[3] and the e-Privacy Directive: the "terminal equipment" is, simply, hardware, while VVAs are software.[4] Therefore, anything that is based on the (mis)interpretation given by the EDPB in the Draft should be reconsidered (especially the legal ground based on Article 5(3) of the e-Privacy Directive).

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[1] See at the following link https://edpb.europa.eu/sites/edpb/files/consultation/edpb_guidelines_022021_virtual_voice_assistants_adopted-public-consultation_en.pdf

[2] See paragraph 1 of EDPB Guidelines 4/2019

[3] Commission Directive 2008/63/EC of 20 June 2008 on competition in the markets in telecommunications terminal equipment

[4] See also the definition of „equipment" in – for example – the Oxfrod Handy Dictionnary (Oxford University Press, 1987): *„(esp.) outfit, tools, apparatus, for expedition, job, etc."*

3. Use of VVAs or time to acknowledge the "contractual consent" in this case as well

The Executive Summary of the Draft says that *"all VVAs require at least one user to register in the service"*. Not just from this, but also by taking into account the nature of the relationship of the "data controllers providing VVAs"/"VVA designers/providers", it should be clear that the nature of the relationship is a *contractual relationship* (honestly, between two, legally independent actors there cannot be any other kind of relationship), and this is irrespective of the fact whether the user is registered for this service or not. Accepting the terms and conditions of the VVAs (*any* terms or conditions) is—similarly to the "explicit consent" to payment services in PSD2[5]—a contractual statement, therefore any "consent" is contractual consent and falls under Article 6(1)(b) of the GDPR.[6]

Although, the Draft tugs to promote the (erroneous) concept of "objective necessity"; by doing so, however, it contradicts civil law: in paragraphs 79-80, for example, the Draft fails to realise that providing a service in good quality or in quality expected by the obligee is/can be a legal requirement on the obligor.[7] To make steps in order to meet this requirement is/can be an obligation under the contract; and, therefore, it cannot be relied on consent of the data subject. Simply, it should be accepted that the nature of the relationship of two civil law entities (like the VVA provider/designer or data controller providing VVAs and a user) cannot be else but only contractual. Any potential imbalance between the parties' power is subject to customer protection law but not to data protection legislation (i.e. this issue is out of the mandate of the EDPB).

4. Is "personal data" the voice of another person?

The Draft considers any person's voice that is recorded by the VVAs personal data. But the Draft should realise that in many cases the conditions that qualify data as "personal data" are missing, namely in the vast majority of cases the "owner" of the voice is not identifiable by the data controllers providing VVAs [taking into account the definition in Article 4(1) and the explanation given in Recital (26)]: it is very unlikely that a data controller providing VVAs has sufficient resources in its possession to identify the "owner" of such voice out of a couple millions of potential people, or just intention for that. So, the theory of "absolute approach" of personal data should be rethought in this case as well.

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[5] See EDPB's letter (https://edpb.europa.eu/sites/edpb/files/files/file1/psd2_letter_en.pdf)

[6] See also the Vienna Superior Court (Oberlandesgericht Wien) theoretically right decision: https://noyb.eu/sites/default/files/2020-12/BVI-209_geschw%C3%A4rzt.pdf

[7] See, for example, Hungarian Civil Code Section 6:123(5): *"If the parties have not stipulated the quality of the object defined by type and quantity, performance shall be made in conformity with commercially available goods of standard good quality."* or Code Civil (Frace), Article 1166: *"Lorsque la qualité de la prestation n'est pas déterminée ou déterminable en vertu du contrat, le débiteur doit offrir une prestation de qualité conforme aux attentes légitimes des parties en considération de sa nature, des usages et du montant de la contrepartie."*