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Memorandum

The first Draft of the European Data Protection Board (EDPB) of the "Guidelines 1/2020 on processing personal data in the context of connected vehicles and mobility related applications"

12 March 2020

I. Facts

On 28 January 2020, the European Data Protection Board (EDPB) published the first draft of the "Guidelines 1/2020 on processing personal data in the context of connected vehicles and mobility related applications" (the ***Draft***) and submitted it for public consultation.

Section 3.5 (pp. 30-31) of the Draft proposes various provisions addressed to companies in the car rental industry. The Draft, *inter alia*, provides that:

> "*Rental companies shall define clear internal procedures to erase personal data stored on the car's dashboard before the vehicle can be rented again*." **(**the ***Provision***)

The Provision captures the following pieces of information which are typically entered into the dashboard system by the user of a rental car:

- GPS navigation history;
- music playlist;
- list of favorite radio stations;
- the identification name of the smartphone (when connected to the car);
- web browsing history,

(together, the ***Data***).

Dashboard systems do not download address lists from smartphones or store dialed or incoming phone numbers.

The SIXT rental companies (***SIXT***) have no remote access to the Data stored in the rental cars and make no use of the Data (e.g. for analytical purposes). The vast majority of, if not all, rental cars do not provide for a technical possibility to automatically erase the Data at the end of the rental period. Also, such technical possibility cannot be implemented with reasonable efforts (e.g. by changing the rental cars' configuration).

The rental cars are equipped with deletion functions which restore the dashboard system "back to factory settings". These functions enable anybody (including the customers) to delete the Data from the dashboard. The deletion of the Data by the car rental companies would require substantial additional time to prepare the cars prior to their use by a successive user. The additional time required is estimated to be approximately up to ten (10) minutes per car per rental. The financial impact for SIXT is estimated to amount to thirty (30) million Euros per annum in the EU.

SIXT has asked us to provide a legal analysis on whether the Provision is compliant with EU laws, in particular with the Regulation (EU) 2016/679 (***GDPR***).

II. Executive Summary

The Provision would not be in accordance with the GDPR. SIXT does not qualify as a data controller with respect to the Data (cf. III.1). Even if SIXT were considered a data controller, it would already comply with the related deletion requirements set out in Art. 17 GDPR by giving customers full control over their own Data, including the possibility to delete such Data at any time (cf. III.2). Furthermore, imposing any additional obligation to *"define clear internal procedures to erase personal data stored on the car's dashboard"* would be disproportionate as it would require SIXT to undertake significant efforts not justified in light of the insignificant privacy impact on data subjects (cf. III.3). By addressing rental companies only, the Provision would also violate the EU law principle of equal treatment (cf. III.4).

III. Legal analysis

1. Rental companies are not controllers of dashboard data

The assumption set out in the Draft, that car rental companies always qualify as data controllers for the Data stored in the cars' dashboards, is too broad as it goes beyond the definition of a controller provided for in Art. 4 (7) GDPR.

According to the Draft:

> "*Since rental companies have effective control over the processing, they should be regarded as the data controller of the information, which resides on the car's dashboard they rent.*"

However, according to Art. 4 (7) GDPR, an entity only qualifies as a controller if it,

> "*alone or jointly with others, determines the purposes and means of the processing of personal data*."

SIXT, as the lessor of rental cars, neither determines the purposes nor the means of processing that occurs in its rental cars.

Whether or not an entity determines purposes and means of processing mainly depends on such entity's "*factual influence*" on such purposes or means, ultimately answering the question "*Why is this processing taking place*? *Who initiated it*?"[1]

The Data residing in the dashboards of the cars is processed for the **purpose** of providing drivers and passengers with certain features, like route guidance or entertainment. Such purposes are not determined by SIXT but rather by the car manufacturers who implemented such features in their cars. SIXT basically leases to its customers the cars "as they are", i.e. with the features provided by the manufacturers.

[1] Art. 29 WP Opinion 1/2010 on the concepts of "controller" and "processor", p. 8.

SIXT also does not determine the **means** of the processing of the Data. Means of processing primarily include the technical way of processing[2], i.e. the technical set-up of the dashboard including software and storage solutions. Such means are, again, solely determined by the car manufacturers. In addition, means of processing entail the "*how*" of the processing, which includes questions like "*which data shall be processed*", "*which third parties shall have access to this data*", "*when shall data be deleted*", etc. [3] SIXT also does not exercise any influence regarding these aspects of the processing of Data.

While it appears clear that SIXT does not qualify as the sole controller of data processing, the question whether SIXT might qualify as a **joint controller** requires a closer analysis, given the recent jurisprudence of the Court of Justice of the European Union (***CJEU***), in particular in its Facebook fan pages decision of 2018. However, the relevance that SIXT as a lessor of rental cars has for the processing of Data falls far short of the influence that a Facebook fan page operator has on the processing of the relevant personal data.

The CJEU explicitly stated that:

> "*... the mere fact of making use of a social network such as Facebook does not make a Facebook user a controller jointly responsible for the processing of personal data by that network...*"[4]

The CJEU rather emphasized that an operator of a fan page only qualifies as a data controller because it has influence on the processing of data and benefits from the data processing by Facebook (in the form of aggregated statistics):

> "*... the creation of a fan page on Facebook involves the definition of parameters by the administrator, depending inter alia on the target audience and the objectives of managing and promoting its activities, which* ***has an influence on the processing of personal data*** *for the purpose of producing statistics based on visits to the fan page. The administrator may, with the help of filters made available by Facebook, define the criteria in accordance with which the statistics are to be drawn up and even designate the categories of persons whose personal data is to be made use of by Facebook. Consequently, the administrator of a fan page hosted on Facebook contributes to the processing of the personal data of visitors to its page.*"[5]
>
> and
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> "*The fact that an administrator of a fan page uses the platform provided by Facebook in* ***order to benefit from the associated services*** *cannot exempt it from compliance with its obligations concerning the protection of personal data*."[6]

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[2] Art. 29 WP Opinion 1/2010 on the concepts of "controller" and "processor", p. 14.

[3] Art. 29 WP Opinion 1/2010 on the concepts of "controller" and "processor", p. 14.

[4] CJEU Judgement of 5 June 2018, C-210/16, paragraph 35.

[5] CJEU Judgement of 5 June 2018, C-210/16, paragraph 36, (emphasis added).

[6] CJEU Judgement of 5 June 2018, C-210/16, paragraph 40, (emphasis added).

Consequently, in the CJEU 's view an entity which (i) exercises influence on the data processing and (ii) benefits from the services associated with such processing is not exempted from its respective responsibility for the protection of personal data just because it uses a third party`s (i.e. Facebook`s) platform, but is to be considered a controller.[7]

SIXT has no such comparable influence on the processing of the Data. It is not even in the position to disable the functionalities of the car through which the Data is processed. The processing operations are solely enabled by the car manufacturers.

SIXT also makes no use whatsoever of the car's dashboard services other than providing such built-in features to its customers. SIXT certainly does not access the Data and does not in any other way make use of or benefit from it.

Accordingly, since car rental companies do neither influence the processing of Data nor benefit from such processing, they do not qualify as (joint) data controllers.

2. No obligation to provide for internal procedures to erase Data

Even if SIXT were considered a data controller, Art. 17 GDPR would not require SIXT to procure a manual deletion of the Data in its rental cars prior to renting them to the next customer.

According to Art. 17 (1) (a) GDPR,

> "*the controller shall have the obligation to erase personal data without undue delay where the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed*."

The fact that SIXT customers have full control over the processing of their Data and have the possibility to delete their Data at any time using the deletion functions provided by the car manufacturers in the cars, ensures compliance with Art. 17 (1) (a) GDPR. SIXT is not obliged to define any further internal procedures to erase the Data.

The GDPR only requires the controller to delete certain data under the conditions set out in Art. 17 GDPR but does not specify how such deletion must be conducted, thereby leaving the controller discretion in determining the best way to procure an effective and timely deletion. In order to make such a determination, a controller always has to take into account the general principle of ensuring effective and complete protection of the data subjects (Art. 1 (2) GDPR).

By leaving the deletion of the Data to its customers, SIXT chooses the most data protection-friendly way of procuring such deletion. While the possibility to delete their own Data awards the data subjects full control over such Data, the manual deletion of Data by SIXT employees would amount to an additional processing of Data by such employees who would access the Data knowing (or at least having the opportunity to gain knowledge of) the

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7 See Art. 29 WP Opinion 1/2010 on the concepts of "controller" and "processor", p. 14.

identity of the users who have entered the Data. This is contrary to the principle of data minimization (Art. 5 (1) (c) GDPR), which is further specified in Art. 11 (1) GDPR.

Art. 11 (1) GDPR explicitly states that the controller shall not be obliged to process additional information in order to identify data subjects for the sole purpose of complying with the GDPR. The same principle applies if the controller, as is the case with manual deletion, would need to access personal data (i.e. the Data on the dashboard) of the person whose identity he/she knows (or has the opportunity to know) for the sole purpose of complying with the deletion requirements under the GDPR. From a privacy impact perspective, it is preferable to avoid such additional data processing and rather leave the deletion to the data subject itself.

If and to the extent that the car manufacturers do not already provide to the car users sufficient instructions on how to delete the Data, rental companies could provide such information to their customers, e.g. on an information sheet to be handed to the customers together with the rental documents or on an information sheet that is provided in the cars.

3. Violation of the principle of proportionality

In general, all acts of the European Union have to observe the principle of proportionality. This also follows from SIXT's protection under EU primary law, in particular, under the Charter of Fundamental Rights of the European Union (***CFR***)[8] and the fundamental freedoms. As a consequence, the Provision has to be proportionate, i.e. it must be suitable for securing the attainment of the objective which it pursues and it must not go beyond what is necessary in order to attain it.[9]

An obligation for SIXT to *"define [further] clear internal procedures to erase personal data stored on the car's dashboard before the vehicle can be rented again"* would require the manual deletion by SIXT employees of the Data residing in the dashboard and would result in substantial financial cost by requiring up to ten (10) minutes of additionalworkforce per rental. Furthermore, in many cases, manual deletion of the Data by the SIXT employees would even be impossible, e.g. where cars can be picked up and dropped off on the street without a station (and hence are not accessed by SIXT's employees between rentals). The only "solution" would be for SIXT to refrain from such free-float car rental, which would constitute an unjustifiable disadvantage for rental companies compared to car sharing service providers who are – pursuant to the Draft – not obliged to delete any data.[10] Given the very limited privacy impact at stake and the full control of the customers over the Data, imposing such additional costs would not be proportionate.

Claims under the GDPR are limited by the principle of proportionality. This applies in particular to the right to deletion. The European legislator explicitly granted the Member States discretion in stipulating further limitations to such obligations (cf. Art. 23 GDPR). The national legislators, e.g. in Germany, have already made use of such discretion. Art. 35

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8 See Art. 52 (1) 2 CFR.

9 CJEU, Judgement of 13 November 1990, C-331/88, paragraph 13.

10 Cf. III.4.

(1) of the German Federal Data Protection Act (Bundesdatenschutzgesetz, ***BDSG***) stipulates that the deletion obligation does not apply in cases where the

> *"deletion is not feasible or only feasible with disproportionate effort and where the interests of the data subject in the deletion is to be considered low."*

While it may be arguable whether or not the processing of Data on the dashboard is a "non-automated data processing", it is the purpose of the provision to waive the deletion obligation if this has to be done manually and requires disproportionate effort.

It would require an average of up to ten (10) minutes for a SIXT employee to manually delete all Data. The additional work force necessary for that as well as the financial losses caused by the delay in re-renting the respective cars would result for SIXT alone in an estimated thirty (30) million Euros of additional cost per annum in the EU. At the same time, the interest of data subjects in the deletion is considerably low. Throughout the renting process, data subjects remain in full control of their Data, having the possibility at any time to delete the Data by using the technical deletion possibilities provided for by the car manufacturers (as the data controllers). A customer who decides to voluntarily enter its Data into the dashboard of a rental car in order to benefit from certain comfort features (like the list of favorite radio stations) and then further decides – after having been fully informed about the retention of the Data in the car – not to delete such Data (although being easily able to do so), indicates that he/she does not consider the Data to have a privacy relevance and therefore to be in need of protection.

When assessing the interest of data subjects in the deletion, it further has to be taken into account that the relevant Data does not qualify as sensitive data within the meaning of Art. 9 GDPR. In addition, the privacy impact on the customers is reduced by the fact that even if such Data remains in the dashboard of the car and would therefore be accessible to a subsequent customer, such customer would not be able to link such Data to the previous customer for lack of any *"means likely reasonably to be used to identify the data subject"*[11]. Only SIXT has knowledge of the customer's identity and does not make such information available to other customers. Hence, such Data does not qualify as personal data for the respective subsequent drivers as they have no means to link such Data to the previous driver (as the customer data held by SIXT is not available to them).

4. Violation of the principle of equal treatment

The Provision, as it currently reads, appears to apply only to rental companies but not to car sharing service providers. Therefore, the Provision, if adopted, would not be in line with the principle of equal treatment and non-discrimination, which is a general principle of the law of the European Union and also laid down in Articles 20 and 21 CFR.[12] It requires the EU legislature to ensure, in accordance with Article 52 (1) CFR, that comparable situations must

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11 CJEU C-582/14 para. 42.

12 CJEU, Judgement of 22 May 2014, C-356/12, paragraph 43.

not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.[13]

Rental companies, which would fall under the Provision, and car sharing service providers, which would not, are comparable given the customer's and provider's interests involved. In both cases, the customer can enter the Data into the dashboard. However, the Provision would only affect rental car companies and thereby treat comparable situations differently without a justification. Furthermore, the boundaries between stationary car rental, free-float car rental and car sharing will continue to blur. In the near future, car rental and car sharing will use the same techniques for the purposes of booking and entering cars without a station and without a physical key.

Such unequal treatment could be challenged by SIXT before the CJEU with an Action for Annulment under Art. 263 (4) of the Treaty on the Functioning of the EU.

5. Conclusion

SIXT does not qualify as a controller, as SIXT has no influence on the purposes and means of processing and does not even benefit from the processing.

Any retention obligations pursuant to Art. 17 GDPR are complied with by giving the data subjects full control over the retention of their data. Practically, SIXT suggests that it is for OEMs to provide clear instructions to users of their vehicles on how to delete their personal data, which SIXT would provide to its renters in the vehicle. Primary responsibility should be with the renter to take care of their own data.

Any additional obligation imposed on SIXT would be in violation of the principle of proportionality as it has a substantial negative impact on SIXT's business which is not proportionate compared to the privacy impact which the non-deletion of the Data might have on data subjects, in particular since it is highly unlikely (if not impossible) for any subsequent driver to link such Data to the relevant data subject.

It would also be in violation of the principle of equal treatment and non-discrimination since it treats rental car companies and providers of car sharing services differently without any justification for such different treatment.

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13 CJEU, Judgement of 22 May 2014, C-356/12, paragraph 43.