Die Werbewirtschaft

Zentralverband der deutschen Werbewirtschaft ZAW e.V.

Response to the EDPB public consultation on Guidelines 3/2025 on the interplay between the DSA and the GDPR

October 2025

About ZAW

The German Advertising Federation (ZAW) is the central association of the advertising industry in Germany. It represents 43 associations from the advertising industry, the media, advertising agencies and professions, and research. As the industry's 'round table', it formulates joint policies and balances advertising industry interests. It is registered at the EU Register under 12238962750-40.

EXECUTIVE SUMMARY

We welcome the European Data Protection Board's (EDPB) intention to create legal certainty in the interaction between the DSA and the GDPR with its Guidelines 3/2025. The consistent application of both legal acts is in the interests of advertisers, especially SMEs, users, publishers and supervisory authorities.

The advertising industry is expressly committed to high data protection standards. However, the aim of a guideline re to the interaction of the DSA and GDPR should be to ensure data protection, digital competitiveness and media diversity in equal measure. This requires coherent, practical and innovation-driven interpretation.

The guidelines presented contain several passages that create questionable and unnecessary interpretations of provisions, legal uncertainty and impair the interaction between existing regulations – in particular the DSA, the GDPR and the ePrivacy Directive. We therefore suggest that the guidelines be clarified on key points and geared towards a balance between data protection, economic viability and legal coherence.

I. Application of Article 22 GDPR to advertising

In paragraph 62 of the guidelines, the EDPB suggests that the presentation of advertising may be considered an "automated decision" within the meaning of Article 22(1) GDPR.

> *"The provisions in Article 26(1) DSA on advertising transparency also may, depending upon the particular characteristics of the case, relate to data processing practices that might fall within the scope of automated individual decision-making and profiling that fulfil the criteria of Article 22(1) GDPR, if the profiling in question leads to a decision that produces legal effects or similarly significantly affects data subjects."*

This interpretation is inaccurate and legally inappropriate. Article 22 GDPR and Article 26 DSA are not related in terms of their structure or content: Article 26 DSA regulates the transparency and responsibilities of online platforms with regard to the presentation and labelling of advertising as such, irrespective if the placement of an ad is linked to processing of personal data or device related information. One of its objectives is to ensure transparency in the duty to provide information to users – for example, who commissioned an advertisement and according to which general criteria it

was displayed. Article 22 GDPR, on the other hand, refers to individual automated decisions that have legal effects on a person or similarly significantly affect them.

These standards therefore pursue different protection purposes:

- Article 26 DSA concerns communicative transparency obligations for online platforms,
- Article 22 GDPR regulates decisions with potential legal effects, such as lending or automated personnel decisions.

The GDPR provision is neither required for the application nor for the correct interpretation of Article 26 DSA – neither in light of its purpose nor according to the wording of Article 26 DSA itself. Therefore, the repetition of an interpretation of Article 22 GDPR, which originates from a different legal context and which, in our view, is incorrect, should be deleted from this Guideline. This would serve legal clarity and reliability and would be in line with the actual purpose of the Guideline.

However, since the draft nevertheless contains references to Article 22 GDPR, we will briefly comment on these and assess the persuasiveness of the Guideline set out therein.

Lack of legal or similarly significant effect: The application of Article 22 GDPR to the presentation of advertising – in particular to personalised advertising, which enjoys a high level of consumer acceptance[1] – misjudges the nature of advertising communication and exceeds the factual scope of the provision. Advertising is not a decision about the user, but part of a communication process between the provider and the recipient. It has no legal effect, but is ultimately an expression of freedom of expression and information and freedom to conduct a business (Articles 11 and 16 of the EU Charter of Fundamental Rights).

The presentation of advertising does not lead to any change in the legal status or factual situation of the user. Rather, it is an invitation to obtain information. Even if advertising is personalised, it remains a communicative act – not an automated decision about a person within the meaning of Article 22 GDPR. The user's perception or attention triggered by advertising may be subjective, but it is not legally relevant. Equating personalised advertising with an "automated decision" would overstretch the concept of Article 22 GDPR, as it would effectively cover every instance of content delivery.

Practical consequences of incorrect application: If the display of advertising fell under Article 22 GDPR, companies would only be allowed to carry out such processes if one of the three narrow exceptions in Article 22(2) GDPR applied. Since advertising is generally neither for the performance of a contract (Article 22(2)(a) GDPR) nor based on a legal obligation (Article 22(2)(b) GDPR), the only option would effectively be the explicit consent (Article 22(2)(c) GDPR), meaning no more advertising without prior, explicit opt-in.

[1] Optimisation over reform: Understanding EU consumers' perception and knowledge of the ad-funded internet and related privacy rights issues (IAB Europe, 2025, pp. 10-13); Consumer study on personalised advertising (McKinsey, 2019).

This would lead to a double consent requirement, as consent is already required under Article 6(1)(a) GDPR and Article 5(3) ePrivacy Directive. The result would be even more complex consent processes (consent banners), which would increase neither consumer-friendliness nor legal certainty. Rather, this double consent requirement would pose major bureaucratic challenges for the vast majority of digital services, especially for SMEs, and would lead to even greater "consent fatigue" among users, which ultimately stands in the way of increasing digital competitiveness in the EU.

The existing protection framework is sufficient: The existing transparency and consent requirements already offer a high standard of protection in European data protection law. Extending Article 22 of the GDPR to advertising would be disproportionate, legally unfounded and technically difficult to implement.

> We note that the references to Article 22 GDPR in the draft Guidelines are (i) misplaced in the context of the interplay between the DSA and the GDPR and (ii) not convincing in substance and therefore request that the respective passages be removed in the final version of the Guidelines.

II. Processing of personal data for the implementation of Article 26 DSA

Paragraphs 51-56 of the guidelines deal with the legal basis for data processing in connection with the implementation of Article 26 DSA. In our view, clarification is necessary to ensure legal certainty for all parties involved in the advertising value chain.

Legal basis: For platform operators who must comply with transparency obligations under Article 26 DSA, Article 6(1)(c) GDPR (legal obligation) should apply as the legal basis. For third-party providers who provide technical support (e.g. ad tech service providers), Article 6(1)(f) GDPR (legitimate interest) is appropriate, provided that the processing is limited to the fulfilment of the transparency obligation.[2] It would be even better if the EDPB also recognised *legitimate interest* in the guidelines as straightforward for the purposes of compliance with Article 26(1) DSA.

> We ask the EDPB to revise paragraphs 51-56 of the Guidelines accordingly to take these considerations into account. Paragraphs 51-56 should emphasise more clearly that the *legal obligation* under Article 6(1)(c) GDPR for platform providers and the *legitimate interest* under Article 6(1)(f) GDPR for third-party companies constitute an appropriate and practicable legal basis for compliance with Article 26 DSA.

Avoiding excessive restrictions: The Guidelines rightly refer in paragraph 78 to the need for appropriate technical and organisational measures required of third-party companies. However, the restrictions on third-party access to data are overrated:

[2] CJEU, *KNLTB,* 4 October 2024, C-621/22, EU:C:2024:858.

"[...] Compliance with the transparency obligations set out in Article 26 DSA should not entail further sharing of personal data with intermediaries [...]"

The decisive factor is not a general ban on data exchange, but rather purpose limitation and data minimisation in accordance with Article 5 GDPR. A functioning transparency system requires limited but lawful data sharing along the ad tech chain.

> The Guidelines should therefore avoid suggesting any general prohibition on data transfers in the context of Article 26 DSA. What matters is not the avoidance of data flows per se, but compliance with the principles of purpose limitation and data minimization under Article 5 GDPR. Paragraph 78 should be amended to emphasise that, rather than a general warning against the transfer of personal data in connection with the implementation of the transparency obligations of the DSA, it is important to observe the principles of purpose limitation and data minimisation in accordance with Article 5 of the GDPR.

III. Interpretation of Article 9 GDPR

With regard to **paragraphs 72-76**, we share the concern that the EDPB suggests an overly broad interpretation of Article 9(1) GDPR in the Guidelines. Such an interpretation carries the risk that a large number of data-based processing operations – particularly in the area of targeting – would be incorrectly classified as processing of special categories of personal data.

Risk of overstretching the term: Recent ECJ case law has already significantly expanded the scope of Article 9 GDPR.[3] In practice, this means that even indirectly derivable information – such as general interests or usage habits – could be considered special categories, even if it is not specifically used or recognised. The Guidelines go even further: such an approach would have far-reaching consequences as it would effectively prohibit many forms of targeting, even if no conscious processing of special categories takes place because profiling processes would be largely prohibited unless *explicit* consent in accordance with Article 9(2) of the GDPR.

However, such consent would be impossible to obtain in practice, as users cannot know or understand in advance what inferences or assessments are made within complex algorithmic systems. The result would be that companies, especially SMEs, would refrain from using entire categories of data-based advertising out of caution. This would significantly limit the reach and profitability of data-based advertising, thereby jeopardising the refinancing of freely accessible digital services:

The European digital economy rests on advertising-funded services providing free access to information, entertainment, and communication. A smart regulatory approach should promote, not

[3] CJEU, *Lindenapotheke,* 4 October 2024, C-21/23, EU:C:2024:846, para. 90; CJEU, *Bundeskartellamt,* 4 July 2023, C-252/21, EU:C:2023:537, para. 70; CJEU, *OT v Vyriausioji tarnybinės etikos komisija,* 1 August 2022, C-184/20, EU:C:2022:601, para. 128.

prevent, innovation and reconcile the legitimate interests of businesses, consumers and society.[4] In particular, data-based advertising finances free access to high-quality, reliable journalism and content services on the internet: the value of ad-financed content and services used by European consumers amounts to around €212 per month.[5]

Need for targeted and purposeful derivation: The decisive factor should therefore be the objective criterion, namely whether the controller deliberately aims to derive or use special categories of personal data. In the absence of such deliberate processing, Article 9 GDPR should not apply. The mere theoretical possibility that conclusions about sensitive characteristics could be drawn from data is not sufficient.

Consistency with the DSA: Article 28(3) DSA already contains an explicit prohibition on personalising advertising on the basis of special categories of personal data. An additional extension of Article 9 GDPR to cases where no targeted derivation of such characteristics takes place, as envisaged in the current stage of the guidelines, would lead to double regulation and legal uncertainty between the DSA and the GDPR.

> We therefore ask the EDPB to include in paragraphs 72-76 a reference to the fact that Article 9(1) GDPR is only applicable if there is an actual, purposeful inference of special categories of personal data, i.e. that there must be an actual conclusion by the controller. The mere possibility of an inference must not be sufficient.

Conclusion

We accordingly invite the EDPB to ensure legal clarity, consistency and proportionality in the final Guidelines 3/2025. The interaction between the DSA and the GDPR must not create new uncertainties, but must act as a connecting element between data protection and digital competitiveness. The aim is to achieve a balanced regulatory framework that protects fundamental rights without hindering innovation. Only a coherent and practical application of the DSA and the GDPR will ensure that data protection, media diversity and competitiveness remain equally protected.

To this end, the following key points should be included:

1. The provisions of Article 22 GDPR are not convincing. They should therefore be deleted or revised in such a way that advertising does not alter a user's rights or obligations and is purely communicative in nature.

[4] The Impact of Digital Advertising on Europe's Competitiveness: A Study on the Role of Digital Advertising in Europe (CIPL, 2025).

[5] Optimisation over reform: Understanding EU consumers' perception and knowledge of the ad-funded internet and related privacy rights issues (IAB, 2025, pp. 3-5).

2. Confirmation that Article 6(1)(f) GDPR (legitimate interest) – in addition to Article 6(1)(c) GDPR (legal obligation) for platform operators – is an appropriate and practicable legal basis for third parties (e.g. ad tech service providers) in supporting the transparency obligations under Article 26 DSA.

3. Addition that a blanket ban on data transfer must not be decisive when implementing the transparency obligations under Article 26 DSA. Rather, compliance with the principles of purpose limitation and data minimisation pursuant to Article 5 GDPR is decisive. Only in this way can transparency obligations be effectively fulfilled without causing unnecessary restrictions on lawful and technically necessary data flows along the advertising value chain.

4. Clarification that Article 9(1) GDPR only applies if the controller deliberately and purposefully derives special categories of personal data. The mere theoretical possibility of derivation is not sufficient for this.

Contact

Svenja Brandt

Am Weidendamm 1A
10117 Berlin

+49 30 59 00 99 -719 Telephone
+49 30 59 00 99 -722 Fax

brandt@zaw.de