

Public Consultation Reply: Guidelines 02/2021 on Virtual Voice Assistants

Introduction

Ecommerce Europe is the sole voice of the European Digital Commerce sector. It represents, via its 23 national associations, more than 100,000 companies selling goods and services online to consumers in Europe. Ecommerce Europe acts at European level to help legislators create a better framework for online merchants, so that their sales can grow further. We welcome the opportunity to provide our feedback to the recently published EDPB's Guidelines 02/2021 on the processing of personal data using Virtual Voice Assistants (VVAs) in relation to the GDPR and e-Privacy Directive.

Remarks

Over the last few years, the developments in the field of Voice and interactive dialogue have rapidly accelerated. Voice assistants have been integrated in smartphones, connected vehicles, smart speakers and smart TVs, and also within e-commerce, the concept of voice commerce is growing. Voice and interactive dialogue offer new opportunities for interaction between consumers and businesses.

With these new techniques, also come new challenges in terms of privacy, personal data protection and transparency. Ecommerce Europe therefore welcomes the EDPB's efforts of publishing guidelines to facilitate compliance of voice assistance with the GDPR and e-Privacy Directive. In particular, the analysis provided of the characteristics of virtual voice assistants, the relevant actors in the VVA ecosystem and the step-by-step description of the processes of voice assistants to carry out an action or to access information are greatly appreciated.

With regards to the proposed application of the GDPR and the e-Privacy Directive to VVAs, Ecommerce Europe would first like to raise a general remark on the relevance and applicability of the e-Privacy Directive. Directive 2002/58/EC is currently under revision and is expected to be replaced in the next years by a Regulation on Privacy and Electronic Communications. The proposed Regulation will have several different provisions from those in the existing Directive, especially on the access to information and storage of information on the data subject's terminal equipment and the legal grounds for processing personal data in telecommunication services. Ecommerce Europe would like to raise the point that, in these guidelines, the EDPB only considers the provisions of the e-Privacy Directive. This can for instance be seen in the quotes on the exemption from the requirement of prior consent under Article 5(3) e-Privacy Directive on page 2 and applicability of the e-Privacy Directive on the storage of or access to data in terminal equipment under Nr. 24, which will need adaption when the e-Privacy Regulation comes in to force. In that perspective, Ecommerce Europe strongly advises the EDPB to consider potential transition efforts and costs for businesses and to consider anticipating the expected relevant changes in the coming Regulation.

With regards to the guidelines on the proposed application of the GDPR and the e-Privacy Directive to VVAs, Ecommerce Europe further would like to raise the following specific points:

- **Paragraph 25** explains that in accordance with the definition of "terminal equipment", smartphones, smart TVs and similar IoT devices are examples for terminal equipment. Consequently, VVAs should be considered as "terminal equipment" and the provisions of Article 5(3) e-Privacy Directive apply whenever information in the VVA is stored or accessed by another than the owner of the terminal equipment. In that perspective, Ecommerce Europe wants to stress that the e-Privacy Directive is under revision and that it is most likely that Article 5(3) will be replaced by new provisions that allow controllers for more storage and assessment possibilities without consent than

in the existing Article 5(3), in particular for reasons of security of electronic communications and the users' terminal equipment or compliance with legal obligations. As mentioned before, to facilitate the transition and avoid transition costs, Ecommerce Europe strongly advises the EDPB when applying Article 5(3) in her guidelines, especially in Paragraphs 28 and 29, to also anticipate on expected relevant changes in the coming Regulation.

- As mentioned in **Paragraph 26**, any subsequent processing of personal data obtained by accessing information in the terminal equipment of the data subject (for VVA the owner of the equipment in which the VVA is integrated) needs a legal basis under Article 6 GDPR to be lawful. In that perspective, **Paragraph 27** states that since the controller, when seeking consent for gaining access to information on the terminal equipment, will have to inform the data subject about all purposes of subsequent processing *“consent under Article 6 GDPR will generally be the most adequate legal basis to cover the subsequent processing of personal data”*, that *“consent will likely constitute the legal basis both for the storing and gaining of access to information already stored and the processing of the personal data”* and that *“Article 6 GDPR cannot be relied upon by controllers to lower the additional protection provided by Article 5(3)”*. This wording implies that the EDPB does not completely rule out situations where another legal basis (not only Article 6(1)(a) GDPR) can justify subsequent processing. However, it appears that the EDPB disqualifies other legal grounds than consent for lawful subsequent processing of data gained from the data subject's terminal equipment or seems to imply that other grounds for lawful processing have a lower status, offer lower protection to the data subject compared to consent or undermine the protection offered by Article 5(3).

Ecommerce Europe is convinced that Article 6 GDPR, which is applicable to the subsequent processing of data, does not provide for any ranking, different status or preference of the different grounds for lawful processing. Furthermore, lawful processing on another ground than consent, when applicable, does not in any way constitute an undermining of the additional protection of Article 5.3 e-Privacy Directive. The fact that consent is the most likely ground for gaining access to information or to place information on the data subject's terminal equipment also does not imply a preference for consent as the most likely ground for lawful subsequent processing. To exploit the full potential of Article 6 GDPR, Ecommerce Europe therefore strongly recommends the EDPB to state **explicitly that all grounds mentioned in Article 6 GDPR can be a lawful ground for subsequent processing of personal data and provide for practical examples** of where subsequent processing of personal data in the context of VVAs could be justified for all the relevant grounds provided for in Article 6 GDPR, especially contractual necessity, legitimate interests and legal obligation.

- In **Paragraph 31**, the EDPB offers *“sex or age”* as examples of *“personal data (...) highly sensitive in nature”*. Even though both sex and age could indeed be processed in a way that can result in a risk to the rights and freedoms of data subjects (depending on the nature of processing, purpose and intended use of the outcomes of processing), sex and gender as data categories by themselves are not considered as highly sensitive under the GDPR (e.g., they are not included in the list of special categories of data under Article 9 of the GDPR). For instance, when gender is exclusively used to address clients properly with “Mr.” or “Ms.” to avoid every reference to sex or age to be qualified as special categories of data. Ecommerce Europe suggest to **explicitly mention that “sex or age” as such are not considered as highly sensitive or to remove any reference to it from this paragraph**.
- In **Section 3.2.2**, the guidelines explain that data subjects should be in the position to understand and identify the roles of each stakeholder involved in the processes of voice assistants to carry out an action or to access information. Stakeholders involved therefore have to carefully assess their

role in the process, especially on their role as controller, joint controller, processor or sub-processor according to the concepts provided for in the EDPB Guidelines 7/2020. As mentioned, this assessment of their role for most stakeholders involved will not be easy due to complicated or evolving scenarios. For traders (considering) offering their goods, services or digital content over VVA systems to consumers that would like information regarding these offers or would like to order these goods, services or digital content using VVAs, it would be extremely helpful if the guidelines would provide for some practical examples of this particular kind of use of VVAs. Examples such as “data subject A buying via VVA a pair of shoes from webshop B or consumer C buying via voice a subscription to an online audio-visual streaming service” would be helpful to explain the role, responsibilities and obligations of the webshop towards the data subject involved. Together with practical solutions, especially on the communication channels to use to comply with information obligations, such practical examples would give especially SMEs insight in their role and show them how to be compliant with both GDPR and e-Privacy responsibilities and obligations.

- In light of the role the several actors in the VVA environment have, we urge the EDPB, when allocating responsibilities and liabilities, especially on information obligations, to take into account the minor role third parties using VVA (intermediation) services offered in a standardised way to them by VVA service providers. Ecommerce Europe explicitly wants to draw attention to the fact that online retailers as joint controllers are in practice not in a position to influence the data processing agreement they have with the VVA service provider. This applies especially in the context of VVA data processing services that are offered to online retailers as a standard product on a “take it or leave it” basis and where the provider of these standard VVA services is dominantly deciding on purposes and means of the processing and where the online retailer, as user of this services and joint controller, has hardly any or no influence or decisive power on the processes conducted by the VVA service provider. In that perspective, Ecommerce Europe strongly recommends taking this unequal position into account when allocating responsibilities between controller and processor and especially direct enforcement activities to those service providers in order to have them design their operations in such a way that allows users of their services to operate in a compliant way when using VVA to inform their customers or to sell their goods, services and digital content.
- In **Paragraph 59**, the EDPB states that “*data controllers should find a way to inform (...) accidental VVA users*”. In Ecommerce Europe’s view, it should be **clarified whether data controllers are indeed under an obligation to provide information** under Article 12 GDPR to accidental users given the fact that said article of the GDPR requires to inform the data subjects about the intended processing (e.g., purposes of process, legal basis, retention periods, etc.). By definition, accidental processing cannot be considered as intended processing as there is no purpose for the data controller to accidentally process personal data in the first place. Thus, Article 12 of the GDPR is likely to be non-applicable in this case. A different interpretation of accidental processing would put an unreasonable and disproportionate obligation on the data controller to cater for all types of unintended processing outside the data controller’s control (within and outside the VVA context). We therefore ask the EDPB to clearly state in the guidelines that there is no obligation to inform the accidental user on purposes of data processing that is never pursued by the alleged (joint) controller.

For any questions on our contribution, please feel free to contact Maike Jansen (maikejansen@ecommerce-europe.eu).