

Statement by the German Association for the Digital Economy (BVDW) e.V. regarding the European Commission's Roadmap for a report on the application of the General Data Protection Regulation (GDPR).

Introduction

29. April 2020

The German Association for the Digital Economy (BVDW) e.V. has been representing digital business models since 1995. It incorporates the experience of its founding members from the online industry as well as the global perspective from tech players from all over the world. More than 600 companies are now organized within BVDW which means that we cover the entire spectrum of the diverse digital economy. Our positions represent the interests of the industry as a whole which makes BVDW a reliable partner for decision makers in Germany, Europe, and the world.

Contact:

Katharina Rieke
Referentin Digitalpolitik
T:+49 30 206 218 617
rieke@bvdw.org

BVDW would like to start its contribution by reiterating that the General Data Protection Regulation (GDPR) was a key step for the European Union and a milestone in data protection law, aiming to establish harmonized principles of data protection for the Member States and thereby companies of the digital economy operating in the European Union.

At the same time BVDW welcomes the opportunity to provide feedback on the application of the GDPR because there are still elements that lead to legal uncertainties, bureaucracy and thereby massive problems for the digital economy which need to be adjusted to reach the goal of economic growth and enhanced innovation.

It has been two years since the GDPR came into effect and BVDW is of the opinion that the European Commission should use the opportunity of this evaluation report to identify the necessary adjustments in order to support the European digital economy and its growth. We therefore urge the European Commission not to limit this review to the topics specifically laid out in Article 97 (2) of the GDPR. The European Commission should analyse all aspects of the implementation and application.

BVDW would also like to suggest to broaden the involvement of the industry in the debates. For example, the EU's GDPR Multi-Stakeholder Group has been composed of a rather limited group of participants. As the scope of the law is comprehensive and guarantees the protection of personal data both in the context of electronic communication services and information society services, the legal framework will remain the prime legal regime for the ecosystem and is therefore of prime interest. We should therefore have a broad stakeholder participation in the reviewing process.

Securing a European and global level playing field

BVDW would like to stress that it is essential to create a level playing field for the entire industry. **It is therefore of utmost importance that the different European Data Protection authorities (DPAs) agree on common interpretations that the whole ecosystem can rely on and work with.** A harmonised interpretation and thereby application would enhance legal certainty and would thereby result in a truly unified privacy and data protection regime at EU level. This is in the interest of the consumers as well as the businesses. In order to reach these common interpretations, BVDW sees the need for the European Data Protection Board (EDPB) to take the lead.

Additionally, the goal of a legally certain and functioning GDPR should not be undermined by other legislative acts. The proposal and current discussions about the ePrivacy Regulation should therefore be seen against the backdrop of the GDPR evaluation. These two legislative acts need to be understood as a whole and they need to be fully aligned to ensure one working system. As BVDW we therefore encourage the European Commission to consider opening up the legislative text of the GDPR in order to reconsider and incorporate relevant elements of the ePrivacy Regulation. Creating thereby a functioning system with two fully aligned legal texts.

Consent

In order to promote both established and innovative data-driven business models it is crucial to ensure that the provisions of the GDPR are designed in a practice-oriented manner and thus contribute to strengthening the competitiveness of European businesses.

Although consent of the data subject is the original expression of informational autonomy and therefore central, it **does not take precedence** according to the system

of the GDPR. There are a multitude of equal legal bases for the processing of personal data. In addition to bases such as the **performance of a contract**, it takes into account and permits in particular those processing operations which are carried out on the basis of a **legitimate interest** pursuant to Art. 6 para. 1 (f) GDPR.

In cases where consent is actually required for the specific data processing or where the data controller intends to base the data processing on consent, its conditions should be critically reviewed under the aspects of practicability, legal certainty and proportionality and, if necessary, further specified.

One problem from the perspective of BVDW is for example the **proof of consent**, e.g. when using identifiers with personal data outside of log-in structures in the digital domain. Even if the storing of a cookie would be considered sufficient as a proof of consent, such a proof would not be possible anymore if and when the user deletes or updates the device identifiers. Moreover, the person responsible is usually also unable to prove that the subscriber is identical to the person making the declaration. In these cases, the identification of the consenting party would have to be made solely for verification purposes, which would, however, be contrary to the principle of data minimization. Practicable guidelines are therefore required for the proof of consent for providers in the digital area without log-in structures. This could be done, for example, by including an express clarification in Article 11 (1) GDPR that the person responsible is also exempted from providing proof of consent if he or she cannot identify the person concerned.

Secondly, **Conditionality** in Article 7(4) of the GDPR also creates considerable legal uncertainty for European businesses, especially in the digital sector. Advertising is the central instrument for financing information, editorial content and other services on the Internet. Media and communication companies should therefore still be able to effectively use advertising to refinance their offers and services. Thereby being able to offer journalistic-editorial content free of charge. As this is interpreted very differently by the individual European DPAs in the practical application of the GDPR, it should be clarified in connection with recital 43 of the GDPR that the use of the service can be included in a conditional connection with the consent to the data processing for advertising purposes, in case of online offers financed by advertising.

Nevertheless, the central legal basis for data processing for advertising purposes (tracking cookies) is and remains the balancing of interests in accordance with Article 6 paragraph 1 (f) GDPR. The provision is an expression of the basic principle of

a risk-based approach pursued by the GDPR, which is intended to lead to an appropriate balance between the risk of specific data processing and the protective measures to be taken in individual cases. This includes, among other things, processing in pseudonymised form, which the GDPR generally regards as a risk-mitigating and therefore balancing factor (recital 28) and it is therefore to be promoted (recital 29). In practice, the risk-reducing relevance of pseudonymisation measures is assessed in the context of Article 6 (1) (f) GDPR but it is still sometimes called into question or even denied. BVDW is therefore of the opinion that this element needs to be further clarified as well, especially in light of some DPAs partly moving away from pseudonymised data processing as a basic principle of “privacy by design” and thereby valid security measure.

Having shared these first critical elements for the review process, BVDW would like to stress as well that we remain at the disposal of the European Commission to discuss these or any other aspects further and will support the evaluation process with our experts.