

Consultation of EDPB's Guide Line 1/2024

Consulting Reference: 10/2024

Dear EDPB,

During reading your guideline draft of 01/2024 I have to comment and correct you at many points.

1.

a) Page 4 "Article 8 of the Charter"

The recital of basic rights of privacy is incomplete because they are many other further to European law privacy is guaranteed in at least two state constitutions¹ alluded to the "Volkszählungsurteil"² of the Federal Constitution Court (BVerfG) where privacy is indirect part of men's dignity due to at time of the judgement new ways of processing data where you can everywhere profile someone in seconds. Also you have the guarantee to know who gets your data when (see margin number 146).

More correct is "People in the EU have at least the right of [...]".

b) "before a controller starts processing personal data, it must identify the applicable legal basis and ensure that the requirements of at least one of the legal bases in Article 6(1) GDPR are fulfilled."

Sadly you only take the lawfulness as the principle of accountability but lawyers could interpret this as "The EDPB only says you have to care about lawfulness if you set up a processing procedure." You should add an in exemplum "inter alia".

c) "objectives set out in Article 1 GDPR"

I as a person who reads a lot of annually reports of DSAs had to look up for the objectives of the GDPR. Simplify this to write down the objectives or add the objectives with an at least.

d) Paragraph 5

Use this as introduction at the start or make this as a new chapter.

e) Paragraph 8

You forget to write about the exaptation in Recital 49 where authorities only can use a legitimate interest if they is a "strictly necessary and proportionate" for IT security.

f) Paragraph 9

1 Like Article 33 of Saxonian Constitution, Article 33 Berlin Constitution and Article 4a of Rhineland-Palatine's constitution.

2 ECLI:DE:BVerfG:1983:rs19831215.1bvr020983

To simplify this you can use “If you need to look for a legal basis, you will go through Article 6.1 systematically if there is a legal basis for lawful processing.”

g) Recital 12

„Data Protection Officer (DPO) (if designated),¹⁴ [...] ¹⁴ See Article 38(1) GDPR.”

It is better to refer to WP 243 because you refer to the opinion of the DPAs who execute the GDPR and regional laws (like in Germany the Bundesdatenschutzgesetz or in Rhineland-Palatine (“RLP”) the Landesdatenschutzgesetz supervised by the “State Commissioner for illegal data processing and intransparency” (“LfDI RLP”) if you only see DS4 (they are not using any power according to Article 58.2c) although if you have C-154/21 Recital 39 and AN 14 K 20.00941 (Recital 43) in mind and read the notice of the school you see how illegal both administrative acts are) and IF (see Gsell ./ Land RLP or Deleja-Hotko ./ Land RLP).

h) Recital 14

It is better to formulate a case where you stress the controller is not an authority like

„A person wants to send a newsletter to every mail address in his customer database for direct marketing. He/She has already informed at the registration that he wants to send promotion mails and his correct data processing declaration.“

i) Recital 20

The paragraphs of the box do not have a recital and the left margin of the inner text is not as uniform as the other examples. But it is worth to say you are not using any names because these could be advertisements if these are brands. To provide a better context you should introduce with the “disclaimer”.

j) Recital 21 to 27

You do not stress this is prohibited by an authority to use legitimate interests. It could be a risk of unlawful data processing if one administration without any knowledge due to a structural problem only reads the guideline and not i. e. the GDPR. Unfortunately, this fear should be taken seriously because the school's principle of my last school only randomly read the administrative regulation and broke my fundamental right (Article 5.1.1 alternative 2) of accessing administrative information.

k) Recital 50

“The interests and fundamental rights of the data subject could in particular override the interest of the data controller where personal

data is processed in circumstances where data subjects do not reasonably expect further processing.”

After research in Handbuch der Informationsfreiheit³ and Rhineland-Palatine's transparency law and its administrative regulation about freedom of information in Germany it is unclear whether you can use a legitimate interest to access to information or not. Recital 4, 152 and Article 85 says this right should not be prohibited due to data protection but this guideline draft does not defers to it.

In reality this could harden the right because normally the applicant who in this example applies information under German law can use his interest of the information (in Germany including basic right) but on the other side the data subject could use the basic right of informational self-determination which can derived from the the men's dignity.² Which is more important is the question.

This causes an unclear situation where I doubt any Germany Commissioner for data protection and freedom of information has investigated in the reports (which are often part of these according to Article 59 GDPR (like BfDI does it but not LfDI RLP)) but Saxony's uses this in their mock-up application.

In exemplum the Ministry of Interior of RLP only mentions consent as lawful (see administrative regulation LTranspG 13.1.2⁴ but the law also say “by law” (§ 16.1 LTranspG).

We do not have clear guidelines where a legitimate interest is lawful in freedom of information.

This topic is also relevant for the rest of the EU due to i. e. 2003/4/EG or laws for freedom of information (the the Austrian UIG or IFG). This is also relevant for the guideline of the Austrian IFG by the DSB (Austrian DSA).⁵

I) Recital 54

Please give the bullet points a chronological order to avoid counting them every time.

Unfortunately I could not refer to more of you guideline due to time reasons.

Best Wishes,

Lang Leon Pan

3 978-3-910591-02-8 (German)

4 <https://www.landesrecht.rlp.de/bsrp/document/VVRP-VVRP000004093> (German)

5 <https://www.dsb.gv.at/aufgaben-taetigkeiten/Informationsfreiheitsgesetz.html> (German)