

Norwegian Consumer Council Comments on EDPB Guidelines 2/2019 on the processing of data under Article 6(1)(b) GDPR in the context of the provision of online services

The Norwegian Consumer Council (Forbrukerrådet) supports the interpretations given by the EDPB regarding the processing of data under Article 6(1)(b) of the GDPR in the context of the provision of online services. Article 6(1)(b) constitutes one of the six legal bases enabling the lawful processing of personal data under the GDPR. It allows for the processing of personal data to the extent that is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract.

The digital economy is increasingly dominated by service providers that collect and process vast amounts of personal data. Consumers have little control over this collection, which often happens without the consumer being aware of the processing. It is vital that Article 6(1)(b) of the GDPR is interpreted narrowly regarding what constitutes “necessary” for the provision of a contract, so that a too wide interpretation does not allow digital service providers circumvent the data protection principles of the GDPR. This is a prerequisite to ensure that the principles of fairness, purpose limitation, data minimisation, and transparency are protected.

Many online service providers have business models that include the monetization of personal data, for example through behavioural advertising. This data collection and processing, which can be used for profiling and similar purposes, poses significant risks for the data protection and privacy rights of consumers. Therefore, it is particularly important that the financial incentive to maximise data collection is not interpreted to be “necessary” for the provision of a contract, except in the narrow cases where the collection and processing of



personal data is the main feature of the service that the consumer is signing up for.

As an example of how Article 6(1)(b) can be used in an attempt to circumvent the data protection principles of the GDPR, we would like to point to Facebook's Data Policy. The Facebook policy lists "as necessary to fulfill our Facebook Terms of Service or Instagram Terms of Use" as a legal basis for processing data.¹ This has already been pointed out in a complaint filed against Facebook by the NGO None Of Your Business (NOYB), which refers to this practice as "an attempt to falsely associate this form of consent with Article 6(1)(b) of the GDPR."²

Due to the vast amount of online contracts encountered in the digital sphere, along with the length and legalese language, consumers generally do not read terms and conditions, as this is an unsurmountable task. This makes it particularly important that service providers should not be at liberty to include collection and processing of personal data as a prerequisite for the provision of a service, unless strictly "necessary" for the provision of the contract under the interpretation provided by the EDPB, or unless another valid legal ground for processing is fulfilled. The inclusion of contract provisions that require the collection and processing of personal data, for example for behavioural advertising or analytics purposes, should therefore fall outside of the scope of Article 6(1)(b).

In addition to strongly supporting the EDPB interpretation of the requirement for "necessary", we would like to particularly emphasize the following points made in the guidelines. Several of these points echo comments submitted by the European Consumer Organization BEUC, which the Norwegian Consumer Council is a member of:

- Privacy and data protection is a fundamental right under the Charter of Fundamental Rights. Personal data can therefore not be considered a tradeable commodity. This is a key point that we are happy to see emphasized by the EDPB, as it lays the fundament for the rest of the

¹ Facebook Data Policy. <https://www.facebook.com/about/privacy/update> (22.05.2019)

² Page 4 of NOYB complaint against Facebook. <https://noyb.eu/wp-content/uploads/2018/05/complaint-facebook.pdf>



GDPR. Facets of the “data economy” such as scale, reproducibility, and inferred data, means that the monetary value of personal data is nearly impossible to calculate. In any case, the commodification of a fundamental right is a major concern, and it is important that the EDPB takes a strong stand on the issue.

- Behavioural advertising does not constitute a necessary element of online services. It is not necessary to create profiles of the consumer in order to deliver online services (with some narrow exceptions).
- In order to respect the principles of purpose limitation and data minimisation, the purposes of processing must be clearly and specifically identified. Service providers cannot use vague terms, such as “improving users’ experience” or “marketing purposes” to meet the legal requirements set forth in Article 6(1)(b).
- Online services are also subject to the requirements laid down in other fields of law, such as consumer law and competition law. Consumer contracts must comply with the requirements imposed by consumer protection law for processing based on those terms to be considered fair and lawful. Therefore, in order to use Article 6(1)(b) as a legal basis for processing, the data controller has to be able to demonstrate that a contract exists, that the contract is valid pursuant to applicable law and that the processing is objectively necessary for the performance of the contract.
- The legal basis for processing must be identified at the outset of processing and data subjects must be informed specifically about what legal basis applies for each specific purpose for processing, in line with Articles 13 and 14 GDPR.
- It is very important to distinguish between entering into a contract and giving consent in the sense of Article 6(1)(a). If processing the data is necessary for the performance of a contract, consent cannot be the legal basis for processing. Companies should make sure to avoid any confusion for consumers regarding what the applicable legal basis is as this has implications for their rights and expectations. The signature of a contract or acceptance of terms of service does not correspond to giving consent under Article 6(1)(a).
- Article 9(2) GDPR does not include “necessary for the performance of a contract” as a legal basis for processing special categories of data. Online services processing data that fall under a special category (e.g.



health related data) must use one of the legal bases in Article 9(2), notably, explicit consent.

- Assessing what is “necessary” for the performance of a contract or taking pre-contractual steps at the request of the data subject involves a combined, fact-based assessment. If there are realistic, less intrusive alternatives to achieve the identified purpose, then the processing is not “necessary”. Processing which is useful for the online service but not objectively necessary for the performance of the contract or taking the relevant pre-contractual steps cannot be covered by Article 6(1)(b), even if such processing is necessary for other business purposes of the company.
- To use Article 6(1)(b) the controller must be able to demonstrate how the main object of the specific contract with the consumer cannot be performed if the specific processing of the personal data in question does not take place. The fact that some processing is covered by a contract does not automatically mean that the processing is necessary for its performance. A contract cannot artificially expand the categories of personal data or processing operations needed by the controller to perform the contract, for example by adding express terms to allow the use of data for advertising purposes in the contract.
- It is important to consider the perspective and expectations of the consumer regarding the contractual purpose when assessing whether the data processing in question is necessary for such purpose.
- In case of bundling into one contract several separate services or elements of a service that can be performed independently, the applicability of Article 6(1)(b) should be assessed in the context of each service separately. Also, if the controller relies on consent for certain data processing operations, consent will not be valid if the performance of the contract is made conditional on the consumer’s consent to the processing of personal data that is not necessary for the performance of the contract, as per Article 7(4) GDPR.
- Regarding pre-contractual steps, Article 6(1)(b) would not cover unsolicited marketing or other processing which is carried out solely on the initiative of the data controller, or at the request of a third party.
- Article 6(1)(b) is not an appropriate lawful basis for processing for the purposes of improving a service or developing new functions within an existing service.



- The personalisation of content could sometimes be regarded as necessary for the performance of a contract with the service user. This would depend on the nature of the service, how the service is presented to the user, the users' expectations and whether the service can be provided without personalisation. When personalised content delivery is intended to increase user engagement but is not an integral part of the service, Article 6(1)(b) does not constitute the appropriate legal ground for processing.

In conclusion, the Norwegian Consumer Council believes that the proposed EDPB Guidelines constitute clear and valuable guidance for data controllers and data processors. We hope that these Guidelines are adopted with an intact narrow interpretation of "necessary", in order to facilitate strong data protection and privacy for European consumers.

Regards,

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