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edpd
European Data Protection Board
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April 2, 2019

Public Consultation on Guidelines 1/2019 on Codes of Conduct and Monitoring Bodies under Regulation 2016/679

Dear Sir or Madam,

We are very grateful for this opportunity to participate in the public consultation on the "Guidelines 1/2019 on Codes of Conduct and Monitoring Bodies under Regulation 2016/679". The following three aspects are, in our opinion, particularly worthy of comment. Before presenting these, however, please allow us to briefly introduce the ADM to you:

The **ADM Arbeitskreis Deutscher Markt- und Sozialforschungsinstitute e.V.** represents the private-sector market and social research agencies in Germany. It was established in 1955 and is the only trade association of its kind. At the time of writing, 72 agencies are members of the ADM, together accounting for some 83 percent of turnover on the German market for market, opinion and social research (2.45bn € in 2017). According to its statutes, the duties of the ADM include preserving and promoting the scientific nature of market and social research, ensuring the anonymity of individuals participating in scientific research studies, and developing codes of professional conduct and canons of professional ethics.

A. Practical notes on drawing up codes of conduct

The "Guidelines 1/2019" of the European Data Protection Board reflect the Board's legal opinions on the provisions under Art. 40 and 41 of the GDPR. These interpretations and concretisations of the sometimes very abstract legislative provisions of the GDPR provide important support to the associations responsible for drawing up formally correct codes of conduct to ensure the proper application of the GDPR. This is exemplified, in particular, by the

comments concerning the decisions to be taken with regard to the national or transnational scope of a code of conduct and monitoring compliance with the code by one or more internal or external monitoring bodies.

At the same time, the remarks in the “Guidelines 1/2019” on these – but also other – aspects point to a fundamental problem with codes of conduct for the proper application of the GDPR. The diversity of different contexts for which codes of conduct are developed limits the degree to which their contents can be concretised. European legislators have taken this problem into account by codifying the possible contents of such codes of conduct in Art. 40(2) GDPR as a list of examples rather than a complete and definitive list. The above-mentioned problem of diversity not only affects codes of conduct for processing personal data specific to a certain industry; it also applies to the circle of addressees of the code and the means of monitoring compliance with a code of conduct.

B. Consultation and monitoring compliance with codes of conduct

In view of the diversity of contexts for which codes of conduct are being drawn up, there is a risk that individual requirements of the “Guidelines 1/2019” may not be appropriate for certain industry-specific codes of conduct and may therefore not be applicable. For example, No. 28 of the “Guidelines 1/2019” requires a draft code to be presented not only to the members of the association acting as the code owner, but also to its clients for consultation. In the case of market, opinion and social research, this requirement goes too far and ignores realities. The ADM is currently drawing up a code of conduct for the proper application of the GDPR in market, opinion and social research. The addressees of this code of conduct are market, opinion and social research agencies that must, of course, be heard in the context of a consultation. However, their public and private clients are not addressees of this code of conduct, and it would therefore be inappropriate to consult them too when drawing up the code.

Section No. 27 of the “Guidelines 1/2019” contains the requirement that a draft code for the proper application of the GDPR should identify a monitoring body. This requirement does not take into account the variety of different contexts in which such a code may be drawn up. It may be appropriate if the association drawing up the code intends to limit the application of the code to its own members and to arrange for compliance to be supervised by an internal monitoring body. However, identifying a monitoring body does not make sense if the code is to be applied throughout an entire industry and compliance is to be supervised by external monitoring bodies. Both these conditions apply to the code of conduct for the proper application of the GDPR in market, opinion and social research currently being drawn up by the ADM. Undoubtedly, both internal and external monitoring bodies could meet the necessary formal criteria. In view of the industry-wide acceptance that is required in the latter case, though, external monitoring bodies would clearly be preferable to an internal monitoring body within the trade association.

It is undoubtedly the responsibility of the association drawing up the code of conduct not only to determine the necessary contents of an industry-specific code of conduct for processing personal data, but also to decide on the criteria to be used in assessing conformity to the code and – where necessary – the concrete formal requirements to be met by monitoring bodies for the specific industry. However, it would be an inadmissible interference in the market, both in terms of the law of associations as in terms of competition law, if the trade association in question were to identify an external monitoring body and therefore more or less automatically exclude other potential monitoring bodies.

C. Competence for accreditation of monitoring bodies

According to Article 41(1) and 41(5) GDPR, the competent supervising authority is responsible for the accreditation of monitoring bodies and for revoking their accreditation. Article 41(3) GDPR specifies that the competent supervising authority must submit the draft requirements for the accreditation of a monitoring body to the European Data Protection Board. The responsibility of the competent supervising authority for drafting the criteria for the accreditation of a monitoring body resulting from these legislative provisions is not explicitly codified in the GDPR. However, the legislative provisions of the GDPR do not permit any other interpretation. For this reason, the responsibility of the competent supervising authority for drawing up the criteria for the accreditation should be set out more clearly in No. 60 and other pertinent passages of the “Guidelines 1/2019”.

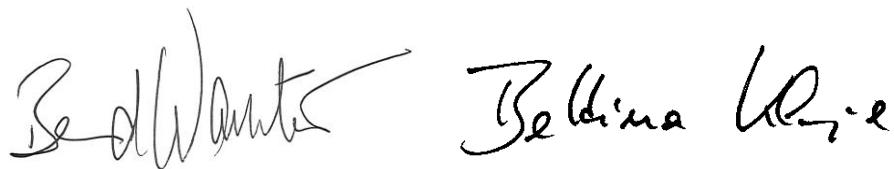
Notwithstanding the responsibility of the competent supervising authority for developing the criteria for the accreditation of a monitoring body, the industry association responsible for drawing up a code of conduct for the proper application of the GDPR also has a duty to cooperate in this, if and insofar as industry-specific features are necessary as part of the criteria for an accreditation.

D. Conclusions

From the above remarks it can be concluded that, on the one hand, the “Guidelines 1/2019” contain a series of important observations that are of practical relevance to industry associations drawing up and responsible for codes of conduct for the proper application of the GDPR. On the other hand, the “Guidelines 1/2019” ought to be revised and concretised with regard to the above-mentioned aspects, to make them more relevant to practical applications.

Finally, we would like to once again express our gratitude for being given this opportunity to comment on the "Guidelines 1/2019". If you have any questions or require further information, we will of course be happy to assist you.

Kind regards

Two handwritten signatures are shown side-by-side. The signature on the left is "Bernd Wachter" and the signature on the right is "Bettina Klumpe".

Bernd Wachter
Chairman

Bettina Klumpe
Managing Director