



figo GmbH · Gaußstraße 190c · 22765 Hamburg · datenschutz@figo.io

European Data Protection Board - EDPB

Chair - Andrea Jelinek

Rue Wiertz 60

B-1047 Brussels

- sent via email to: edpb@edpb.europa.eu and

for information to sophie.intveld@europarl.europa.eu -

Open Letter by figo GmbH on the correspondence by EDPB and Ms. in't Veld as Member of the European Parliament on conflicts between PSD2 and GDPR on silent party data (EDPB-84-2018)

Hamburg, 14 August 2018

Dear Ms. Jelinek,

the figo GmbH, located in Hamburg, Germany and being in the final steps of becoming a Payment Institution, offering Payment Initiation Services (PIS) and Account Information Services (AIS), followed [your correspondence](#) with Ms. in't Veld with great interest and acknowledges that the EDPB provides initial guidance on the conflicts between PSD2 and the GDPR. However, clarification on material open issues has not yet been provided, i.e. when it comes to the handling of **silent party data**. Referring to your intention to further monitor this matter, we would like to provide some perspectives from us as an active market participant today and kindly ask you to consider them for further corresponding guidance. We see the following main problems with your initial clarification on silent party data:

The EDPB clarifies the obvious by focusing on Payment Initiation Services

From our point of view the PSD2 example that the EDPB chose to clarify the issue of silent party data (a PISP is allowed to process the payee's (= the silent party in this case) data on the basis of its legitimate interest to perform the contract with the PSU) is rather self-explanatory. Payments cannot be settled without processing such data. Banks also process silent parties' data for the settling of payments every day.

The more necessary clarification for Account Information Services remains vague

Clarification for less obvious cases, namely the processing of silent party data as part of an AIS is carefully avoided by the EDPB. In comparison to the first case, the silent party whose data is processed by an AISP will usually neither notice that its data is processed nor benefit from the processing. In that context, the EDPB states that processing may be lawful on the basis of the legitimate interest of Third Party Providers to perform the contract with the PSU, which *"is limited and determined by the reasonable expectations of data subjects."* What the EDPB fails to provide is any clarification for what kind of AIS use cases a silent party can reasonably expect that its data is processed. Only those that are already well-known from non-automated processes today, such as credit rating, bookkeeping or tax consulting



figo GmbH · Gaußstraße 190c · 22765 Hamburg · datenschutz@figo.io

purposes? Maybe on top those use cases that were already taken into account when PSD2 was established, such as multi-banking or account switching? However, does this mean open banking is a dead-end innovation and more innovative services that go beyond those expectations are not feasible under GDPR? Especially the last question has the potential to prevent rather unknown and small AISP's from growing. Also it remains unclear who is to decide upon these questions. Data Protection and Financial Authorities in countries with a still small AISP market will tend to accept hindering GDPR interpretations, while Authorities of countries with a better developed market and use case experience will recognise consequences of obstacles through data access limitation better - leading to a non-level playing field for GDPR and PSD2 execution in Europe.

So figo's proposal is: An official statement by the EDPB (maybe after consulting the European Banking Authority) clarifying that banks can implicitly expect **GDPR compliance with regard to silent party data**, as long as a **regulated PISP and/or AISP** are requesting access to payment accounts. Such statement is simple and needed to limit the unfortunate room for interpretation that your initial statements provided. There is no comprehensible reason, why supervised AISP and PISP should not be provided with the same extent of rights for processing silent party data than other regulated players within the financial services industry. For the goals of PSD2, i.e. to foster innovation and to strengthen consumer rights, it should be proactively avoided by the EDPB, that courts are the sole interpreters in this case. Services of small AISP's could massively be hindered in the meantime, if banks actually checked and interpreted AIS use cases in order to refuse or limit data access (i.e. also anonymise data) with reference to GDPR. Accepting this practice would also mean disrespecting the data sovereignty of an account holder who wishes to use his data at another - supervised - provider than his bank. Last but not least an unfortunate back and forth referral with regard to competition, data protection and financial supervision competencies is neither to the benefit of EU Open Banking nor its consumers. A common understanding of the need to solve those issues should be of interest to the same extent to each of the involved authorities, including the EDPB.

In a nutshell, figo believes that the discussion initiated by Ms. in't Veld is an important one and hopes that our amending input contributes to a more sustainable result by the EDPB. Also, figo herewith offers further active support to the EDPB in this matter by being a sparring partner and/or by further consulting on the consequences from a market perspective. Accordingly, we decided to publish this letter on our [website](#) to offer other market participants the opportunity to share any differing perspectives with you.

Yours sincerely,

The figo team