

## The New GDPR – are there still anonymous data within online marketing?

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The EU General Data Protection Regulation (GDPR), which is expected to come into force in May 2018, contains numerous provisions that have practical ramifications for online marketing companies across Europe as well as for companies outside of the EU. Under the existing current law a lot of business models are based on anonymous data. Therefore a lot of companies now face the question, whether there are still anonymous data under the GDPR and if yes, how they can be used.

Under current law, if there are online marketing models, which only use and process anonymous data, then these models do not fall under the data protection laws. This is the advantage of anonymous data in the online marketing industry. On the other side, if personal data would be used within online marketing models, then these models require a prior consent of users, which regularly do not exist.

From a data protection perspective, the question arises whether the processes described are allowable with respect to data protection law within the GDPR's scope of application. Therefore, it is of utmost economic importance for the online marketing industry to answer the question, how online identifiers like IDFA, google Advertiser-ID, cookie-ID etc. have to be evaluated regarding the data protection law. If they would be anonymous – and this is currently a standpoint of a lot of companies in the online marketing industry –, then these online identifiers could be used within online marketing without a separate consent of the users. This is the reason why a lot of companies in the online marketing industry today argue, that a lot of models in the online marketing, especially the use of online identifiers, are anonymous data as the companies cannot identify a person using these identifiers.

Now, under the new GDPR, there is the question whether this position can be sustained. It is stated quite often, that under the GDPR there is no more anonymous data. The discussion, whether online identifiers are personal data or not, should now be cleared as the legal bodies put a new definition of personal data in Art. 4 of the GDPR. This article states that online identifiers are always personal data. Is it therefore right, that a lot of people have the opinion, that as of the new GDPR there will be no more anonymous data? The answer to this questions is not absolutely clear: The GDPR still highlights, that this law has only to be applied, if personal data is used, but not when there is anonymous data.

Recital 26 unambiguously states: „ ... The principles of data protection should therefore not apply to anonymous information, namely information which does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a manner that the data subject is not or no longer identifiable. This Regulation does not therefore concern the processing of such anonymous information, including for statistical or research purposes.“

In this respect, the question whether the abovementioned processing of online identifiers, as, e.g., Advertising IDs, etc., has to be classified as a processing of personal data still remains unchanged.

This is because, from an advertiser or online marketing company point of view, it is still the case - as it was before – that they cannot determine at all, or only with disproportionately high effort, which natural person is behind the online identifier in question. The new Article 4 GDPR seems to imply that online identifiers are supposed to be classified as personal data. However, several places in the recitals suggest that not every online identifier is automatically to be classified as personal data.

In that regard Recital 30 states:

„Natural persons may be associated with online identifiers provided by their devices, applications, tools and protocols, such as internet protocol addresses, cookie identifiers or other identifiers such as radio frequency identification tags. This may leave traces which, in particular when combined with unique identifiers and other information received by the servers, may be used to create profiles of the natural persons and identify them.”

However, the wording of this recital also makes it clear that an online identifier “may” leave such traces, however, it is precisely this wording, “may”, which makes it clear that there may be cases in which online identifiers do not leave such traces.

Thus, the GDPR clarifies that, in the same way as before, there may still be online identifiers which are actually not to be classified as personal data, but which are anonymous. Therefore, there is much to support the view that online identifiers like IDFA and google advertiser-ID can be anonymous, especially looking at recital 30. Consequently, it is a question that has to be decided on a case-by-case basis and which need to be looked at separately in a detailed evaluation, whether the respective online identifier possibly in combination with other data can be used to re-identify a person. However, if an online identifier is so ..., that it cannot be used to build a profile of a natural person or to identify the person, then this identifier stays anonymous. In this last case, the GDPR is not to be applied as it does not cover anonymous data.

As a consequence of this conclusion for the online marketing industry it is expected that companies want to find ways to possibly generate and use anonymous data.