

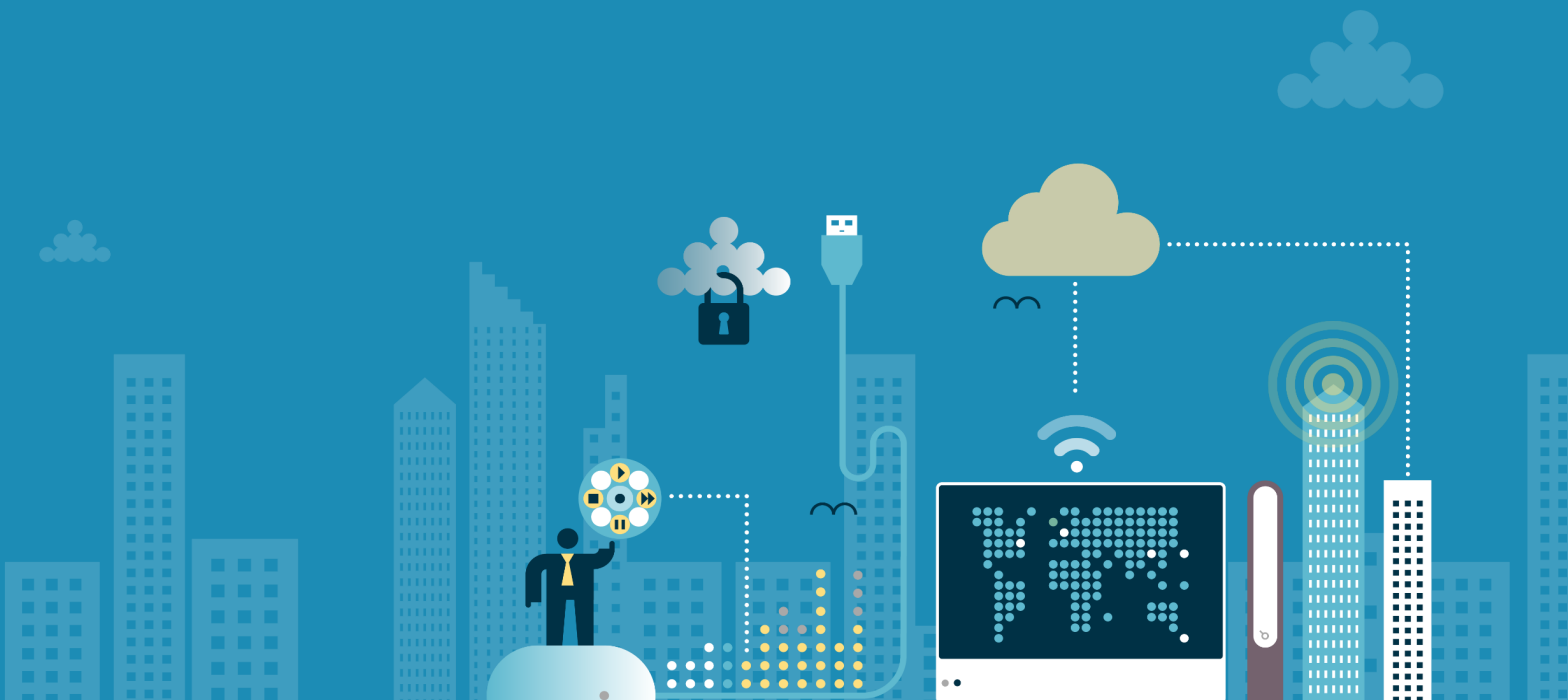
Advice Note



The TONE Knows, Inc.

Memo on the Lawfulness of the TONE Technology and Related Services under Applicable GDPR & UK Data Protection Law

August 2023



Introduction: Advice Requested

We have been asked to provide the following analysis and deliverables to The TONE Knows, Inc. ("**TONE**"):

- An analysis (taking the form of a memo of advice) setting out the lawfulness of the TONE technology and related services (the "**TONE Technology**") under applicable GDPR and UK data protection law. This is set out in Part 1: Memo of Advice;
- A review of a selection of TONE's current marketing statements and suggestions for additional marketing statements that essentially state (to the extent such statements can be accurately and sincerely made) that the TONE Technology is lawful to operate and use under applicable UK data protection law. We understand that the intention is that TONE may incorporate these statements into its marketing materials. This is set out in Part 2: Review of Marketing Statements; and
- An associated more detailed 'Frequently Asked Questions' or 'FAQ' document focussing on the TONE Technology's lawful use under UK data protection law. Again, we understand that the intention is that TONE may incorporate these FAQs into its marketing materials. This is set out in Part 3: Frequently Asked Questions.

Part 1: Memo of Advice

Background

We have been provided with the following information about TONE (with relevant documents set out at Annex 1):

- An Overview slide deck (Executive Overview for a specific customer)
- Information provided through a link to the US healthcare distributor site (co-branded with TONE) to help asset tracking and patient engagement.
- A video prepared for the another customer, which shows various use cases through the consumer journey.
- A video showing various use cases at sports venues, including an EPL Football Club.

In the interests of brevity, except where necessary in the context of our advice, we have not provided a narrative description of the TONE Technology nor other background information, as this is adequately recorded in Annex 1.

For completeness, we predominantly refer in this memo to the UK GDPR¹. However, this should be read to also cover and be read interchangeably with the EU GDPR (which is at the time of writing identical to the UK GDPR) and other key UK data protection laws², unless stated otherwise.

Structure of the memo

In reviewing the lawfulness of the TONE Technology, we have considered the following issues:

- The extent to which it would be lawful for TONE and its customers to process and use personal data collected by the TONE Technology.
- Additional steps that be may be required, or which a customer may enquire about, pursuant to any marketing pitch from TONE etc.

We have necessarily restricted the scope of this memo to an analysis of the key risks in relation to the operation and use of the TONE Technology. In the case of data protection compliance, however, as a general statement, there are wide-ranging ongoing obligations that will apply to the processing of personal data. These general obligations are beyond the scope of this memo, but we would be happy to discuss them separately, if required.

Summary

- The use of TONE Technology does involve the processing of personal data (as defined under the UK GDPR).
- TONE is a processor (rather than a controller) of personal data (as such terms are defined and used under the UK GDPR). This is unlikely to be commercially problematic and will, more likely, facilitate TONE's commercial negotiations with customers.
- A customer that uses TONE Technology may itself do so lawfully subject to common data protection safeguards that customers will be able to implement (or may have already implemented) in relation to their general processing of consumer data.
- Key safeguards and other considerations are detailed as part of this memo.

¹ The full definition of which is as follows: EU Regulation 2016/679 as it forms part of the law of England and Wales by virtue of Section 3, European Union (Withdrawal) Act 2018 (the "UK GDPR").

² Comprising: the Data Protection Act 2018 and the Privacy and Electronic Communications (EC Directive) Regulations 2003.

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Detailed Analysis

1. Does the TONE Technology involve the processing of 'personal data' as defined under the UK GDPR?

We would consider it very likely that the TONE Technology does involve the processing of personal data.

Whilst the contrary position may be arguable, we would not recommend setting up or marketing the TONE Technology (or related services) in such a way that TONE is reliant on its service delivery not involving the processing of personal data. In the current highly pro-digital privacy environment, if tested, we would suggest that the argument that the TONE Technology does not involve personal data processing would be unlikely to prevail. As such, the disruption that may be caused by having to 'unwind' measures taken in reliance on an argument that personal data is not processed means that it is not worth the risk of relying on such an argument.

The UK GDPR states that 'personal data' means any information [1] relating to an [2] identified or identifiable natural person. As such, there are two limbs to the definition:

- The first limb deals with whether information relates to someone. In the case of personal data collected through the TONE Technology, this is invariably the case. The test of 'relating to an individual' provides that data relates to someone if: (i) it is biographically significant (i.e. obviously about them); or (ii) their activities are the focus of the data and the purpose of the data is to determine or influence the way in which they are treated. We would suggest that data collected through the TONE Technology falls within (at least) this second category.
- The second limb deals with whether someone is identified or identifiable. A person is identified if the data would enable them to be known in the physical world (for example, by their name and contact details). This is not the case with the TONE Technology. A person is identifiable in the sense that TONE may not know the person's name or have their contact details and could never actually find them in the real world. However, if the TONE Technology could be used to single the person out in the sense that TONE could, if it wanted to, treat them differently to others on the basis of data it has collected about them, then this does comprise personal data³. We understand that TONE is able to single out a particular mobile device (i.e. an individual's mobile or 'cell' phone), even though it could not associate a named account holder with that device.

As such, the TONE Technology is collecting personal data as defined under the UK GDPR.

2. Is TONE a controller or processor?

On the basis of the information provided, we would consider TONE to be a processor and its relevant customers to be controllers. Moreover, given TONE's commercial objectives combined with the fact that its customers are likely to be more receptive to sharing their consumer data with a third party when such party is acting as a processor rather than controller⁴, this position is unlikely to be contentious.

A controller, as defined in the UK GDPR, is a natural or legal person which, alone or jointly with others, determines the purposes and means of personal data processing. A processor, on the other hand, is a natural or legal person that processes personal data on behalf of the data controller. In order to determine whether an entity is a controller or processor, one must ascertain which of the definitions above apply to the processing activity in question.

³ See, for example, the following UK Information Commissioner's Office's regulatory guidance at 'Previously asked questions' (Latest updates – last updated 21 August 2023) – Is this direct marketing?', which states: "*The PECR and the UK GDPR work alongside each other, so it is important to be aware of any data protection obligations you may also have. If users of your online service can be singled out using information such as their IP addresses, cookie identifiers or MAC addresses, either on their own or in combination with other information, then your processing must also comply with UK GDPR. This is the case even if you cannot link the user to a named, real-world individual.*" <https://ico.org.uk/for-organisations/advice-and-services/innovation-advice/previously-asked-questions/>

⁴ We make this (somewhat generalised) statement on the basis that customers are by reputation inclined to guard their consumer data possessively and given that the ability for a processor to process personal data for its own purposes is highly restricted (see UK GDPR Art 28) this generally means that appointing a processor creates a lower risk of a third party misusing the consumer's data.

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A useful 'rule of thumb' is to ask, in relation to a particular data-set, whether at the end of the relationship between Party A and Party B, would Party A expect (i.e. is the nature of the relationship such that) it could ask Party B to give the data-set back? If so, Party B is more likely to be a processor.

On the information provided, TONE would appear to fall within this second category (both on the legal test and the rule of thumb).

3. Consequences of TONE acting as a processor

To the extent that TONE acts as a processor on behalf of a customer, it will only be permitted to process the relevant personal data it collects on consumers and other end users ("**Fan Data**") on behalf of and on the instructions of the customer. The permitted use of the Fan Data would need to be spelt out in a contract between the parties (discussed further below) and TONE would not be entitled to use Fan Data for its own wider purposes.

The appointment of TONE as processor would need to be governed by a written contract (a data processing agreement), which must contain certain obligations on the processor, as prescribed in the UK GDPR. We understand that this will not be problematic given that TONE is going to enter into a template customer agreement or 'Master Services Agreement ("**MSA**")' with each customer.

Controllers and processors both have joint and several liability – meaning that either TONE or the customer could be held fully liable for any damage suffered by an individual (i.e. the relevant consumer) irrespective of TONE's actual level of responsibility. This would also have to be considered in the MSA.

Notwithstanding the points made above, there are advantages to TONE acting as a processor. Firstly, it would be easier for TONE to contractually limit its liability by clearly articulating the activities it has actual responsibility for (unlike a controller that always has 'overall' responsibility for processing). Secondly, TONE would not be required to identify its own lawful basis for processing (considered further below) nor would it be required to provide individuals (i.e. the consumers) with fair processing information.

Moreover, given that TONE does not, as it stands, have a commercial reason to re-use consumer data (except potentially for its aggregated and anonymised analytics activities, which can be provided for), a customer is more likely to embrace the concept of sharing its consumer data with a processor rather than an independent controller, potentially (as mentioned above) helping with TONE's overall 'sales pitch' to a club.

4. Would a customer be lawfully entitled to use the TONE Technology?

Yes, in light of the TONE Technology's requirement for user (i.e. consumer) consent, the use of TONE Technology will invariably be lawful (assuming of course that the consumer provides their consent).

Under the UK GDPR, a controller (i.e. the customer) must have a valid lawful basis in order to process personal data and this requirement will apply in relation to the collection and use of Fan Data. A processor (i.e. TONE) is not required to independently provide or demonstrate a lawful basis for processing and instead, essentially, sits under the 'umbrella' of the controller's lawfulness.

There is a closed list of lawful grounds for processing and one of these is the consent of the data subject. For consent to be valid under the UK GDPR, it would need to be given by a clear affirmative act, indicating an individual's agreement for a customer to process their personal data. Such consent would also need to be specific, informed and unambiguous.

For completeness, if a controller is processing special category data or personal data related to criminal convictions or offences, it needs to identify both a lawful basis for general processing and an additional condition for processing the special category data. From our understanding of the nature of Fan Data, this is unlikely to be relevant.

Because of the 'accountability principle' (i.e. the UK GDPR requirement to be able to actively demonstrate compliance), a controller is required to identify and document each of the lawful bases that apply at the outset. This would probably be included as part of fair processing information.

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We would suggest that TONE's proposed measures for obtaining consent would easily satisfy the criteria set out above. Moreover, the fact that consent is considered a useful ground to rely on because there is unlikely to be any ambiguity as to whether it has been obtained or not is likely to appeal to customers.

5. Additional points – purpose limitation, direct marketing and analytics

As set out in the introduction, there are wide-ranging ongoing obligations that will apply to the processing of personal data which are beyond the scope of this memo. However, one key requirement worth mentioning is the provision of fair processing information, which a customer (although not TONE) will be required to provide.

A customer will be required to set out the TONE activities in a privacy notice (i.e. 'fair processing information' notice). Individuals have the right to be informed about the collection and use of their personal data. This requirement is often referred to as the 'transparency' requirement of the UK GDPR and organisations generally satisfy it by setting out the relevant information in a 'privacy notice'. As a means of demonstrating its privacy credentials and/or making the use of TONE Technology particularly easy for a customer, TONE could provide a template section that a club could add to its own privacy notice to satisfy this requirement.

Purpose limitation

The UK GDPR's purpose limitation principle requires an organisation to determine at the outset – i.e. before processing or even obtaining the data – the purpose for which it wishes to process personal data. The principle then prohibits the organisation from using the data for any other purposes which are incompatible with this original purpose.

As such, it may be worth TONE discussing at length with each customer the full scope of activities for which the TONE Technology may be used and ensuring that these activities are considered and provided for as part of the customer privacy notice, amongst other measures.

Direct marketing

Related to the point above, given that one of the key applications of the TONE Technology may be direct marketing (i.e. the communication of advertising or marketing material to a particular individual, for example, sending a promotion to a consumer within a stadium in relation to a specific event), each customer which intends to use TONE Technology for the purposes of direct marketing will need to consider the application of the UK GDPR to their direct marketing activities.

In short, with the exception of in-app messaging (i.e. whilst an app is open), the likely direct marketing channels used by a customer in relation to TONE would require user consent. As such, the customer may wish to ensure any consent statement addresses this.

Whilst this will invariably be a consideration of the customer (as controller) rather than TONE (as processor), it could be that TONE, as a means of demonstrating its privacy credentials and/or making the use of TONE Technology particularly easy for a customer, could ensure that it future-proofs any consent mechanism to provide for direct marketing.

Analytics

In the broadest sense, analytics can refer to an organisation breaking down and studying the data it collects through its online (or other) platforms. In that sense, analytics is an umbrella term. Whilst data protection law is important in relation to analytics (because analytics comprises data processing), the more complex rules only apply to the more specific activities of automated decision making and profiling.

Automated decision-making comprises making a decision solely by automated means without any human involvement. Profiling comprises automated processing of personal data to evaluate certain things about an individual.

The UK GDPR gives individuals the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning the individual or similarly significantly affecting the individual. Although there is not an outright prohibition on this activity, businesses may only undertake it where particular circumstances apply and subject to particular safeguards.

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Whilst this may be an area TONE seeks to demonstrate it has considered (as a means of providing reassurance to customers), it is highly unlikely that TONE's activities would touch upon these more restricted activities.

Part 2: Review of Marketing Statements

We set below our review of a selection of TONE'S current marketing statements and provide suggestions for additional marketing statements that essentially state (to the extent such statements can be accurately and sincerely made – which they can (see Part 1 of the Memo)) that the TONE Technology is lawful to operate and use under applicable data protection law:

Existing wording from the Executive Overview for Vodafone:

These statements may be included in any marketing material (on the basis that they are verifiable and accurate in our opinion):

Privacy.

One word. One VERY important word. TONE uniquely, and actively protects individual privacy.

For starters, unlike others, TONE Technology is 100% opt-in. The mobile user can control their ability to participate in the program or not. Also, TONE only knows the user by their device - not by name, ensuring CPPA and EU GDPR compliance. Finally, our technology only listens for our technology. We DO NOT record conversations & DO NOT try to identify and act on spoken "key words". TONE Technology is literally "deaf" to everything except our TONE-Tags®.

Our users enjoy the programmatic benefit, hyper-personalized information, and savings offered through our solutions – WITHOUT compromising their privacy.

Alternative wording suggestions:

These statements (which we have prepared) would also be verifiable and accurate and could be included, subject of course to review by marketing and other relevant teams:

SUGGESTION 1: TONE is a privacy friendly and GDPR compliant solution.

SUGGESTION 2: TONE has been assessed for compliance with the GDPR (and other key UK and European privacy regulations) and can be used in full compliance with data protection and privacy laws.

SUGGESTION 3: We are confident that TONE is a privacy friendly solution and can be used in full compliance with data protection law. Further information is provided in our FAQs.

Part 3: Frequently Asked Questions

Complementing our review of TONE's marketing statements in Part 2, we set out below an associated more detailed 'Frequently Asked Questions' or 'FAQ' document focussing on the TONE Technology's lawful use under UK data protection law:

Frequently Asked Questions

1. The GDPR is a complex law - how are you so confident that TONE is compliant?

We have undertaken a detailed analysis of this area of law.

As part of this analysis, we have taken independent legal advice to assess TONE for compliance with the UK GDPR and other applicable data protection laws in the UK, comprising the EU GDPR, the UK Data Protection Act 2018, and the UK Privacy and Electronic Communications (EC Directive) Regulations 2003.

We have sought to set out the key points from this analysis (and our legal advice) in this FAQ document, although we would also be happy to address specific additional questions if they have not been covered already.

2. Is TONE a controller or processor under data protection law?

TONE is a processor. Apart from using aggregated and anonymised data for the purpose of improving our platform (where you agree to this), we will only process your consumer or customer data in accordance with your instructions and we will not process your data for our own purposes or share it with any third-party controllers.

3. What lawful basis for processing does TONE rely upon?

As mentioned above, TONE acts as a processor (rather than a controller) so it does not independently require a lawful basis for processing. However, the TONE Technology has been set up so that our customers may obtain the user's consent as a lawful basis for processing. We believe that consent is appropriate as a lawful basis and has the advantages of being clear, easy to demonstrate and enabling the user to retain complete control over how their data is processed.

4. How is fair processing information provided to users?

We would recommend that customers check (and, if necessary, amend) their own app or other online privacy notice to cover the use of TONE Technology.

[TONE can provide sample wording for your consideration to help with this.]

5. Do you have a Data Protection Officer (DPO)?

No - whilst privacy is key to our services, we have considered (with independent legal advice) the formal requirement to appoint a DPO and have concluded that TONE does not need a DPO. We do, however, have an individual with responsibility for data protection at TONE and they can be reached through the following email address: tallen@thetoneknows.com.

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