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NOTE

From: German delegation
To: Working Party on Information Exchange and Data Protection
Subject: General Data Protection Regulation
- Consent

COURTESY TRANSLATION PROVIDED BY THE GERMAN DELEGATION

I. Consent to data processing is a central element of data protection law. The intention of consent is to enable data subjects to decide freely whether and which personal information should be processed.

The German delegation seeks to further strengthen consent as the legal basis for data processing and as a special aspect of the right to privacy, while countering the risk that data processors pass the responsibility onto data subjects or that the data subject basically cannot choose to not consent to data processing.

In some cases consent may constitute a formalized act and the data subject has no choice or no influence on data processing because of an imbalance between the controller and the data subject. The German delegation identified three cases that require special rules, namely

1. consent by data subjects using standard data protection statements provided by the controller, in particular in connection with contracts;
2. consent that places data subjects at an unreasonable disadvantage; and
3. consent in relationships of permanent dependency.

In detail:

1. Standard Data Protection Statements

Data subjects frequently encounter declarations of consent that are part of long and complex standard terms of contract and use which the controller uses for a variety of cases and which the data subject cannot change. To protect consumers in such cases, Directive 93/13/EEC of the Council of 5 April 1993 prohibits unfair terms in consumer contracts. German courts use the law on general terms and conditions, which implements the Directive in German law, to review data protection statements and the related declarations of consent. The German delegation proposes an amendment of Article 7 to strengthen this reasonable instrument to protect data subjects against standard declarations of consent and to enshrine the successful interaction between civil consumer protection law and data protection law also in European law.

The amendment of Article 7 (2a) is intended to ensure effective protection of data subjects against unfair standard declarations of consent. Based on the law on unfair terms in consumer contracts, the German delegation suggests that a possibility to carry out an unbiased unfairness test of standard declarations of consent be introduced. Such an unfairness test in particular allows for an unbiased review of whether the content of the declaration of consent meets all transparency requirements.

2. Unreasonable Disadvantage

However, data subjects must also be protected in situations where the declaration of consent puts them at an unreasonable disadvantage. Declarations of consent that place data subjects at an unreasonable disadvantage are not an effective legal basis for data processing. To increase legal certainty for data subjects, the proposed amendment of Article 7 (2b) defines situations where data subjects might be put at an unreasonable disadvantage.

Representative actions should be allowed in particular to effectively prevent declarations of consent which do not meet the transparency requirements or put the data subject at an unreasonable disadvantage. To this end, the German delegation intends to propose an amendment of Article 76.

3. Relationships of Permanent Dependency

Consent can be effective only if it is based on a free decision of the data subject. However, it may be doubted whether consent was given voluntarily not only in case of state coercion but also if the data subject's choices are significantly limited due to legal or actual dependencies. This applies in particular to relationships of permanent dependency such as employment. However, these settings may also include cases where data is collected on the basis of consent, for example to provide data subjects with additional services. In such cases, the possibility of giving consent should not be generally excluded.

II. Against this background, the German delegation proposes the following changes to the General Data Protection Regulation. The proposals refer to the Presidency's document No. 11028/14. Deletions are shown in ~~strike through~~.) The German delegation submits this note without prejudice to the need for further discussions on the scope of consent and subject to any amendments that might arise as a result of these discussions.

Recital 25

Consent should be given unambiguously by any appropriate method enabling a freely-given, specific and informed indication of the data subject's wishes, either by a written, oral or other statement or by a clear affirmative action by the data subject signifying his or her agreement to personal data relating to him or her being processed. This could include ticking a box when visiting an Internet website or any other statement or conduct which clearly indicates in this context the data subject's acceptance of the proposed processing of their personal data. Silence or inactivity should therefore not constitute consent. Where it is technically feasible and effective, the data subject's consent to processing may be given by using the appropriate settings of a browser or other application. **In these cases it is sufficient that the data subject receives the information needed to give informed consent when starting to use the service.** Consent should cover all processing activities carried out for the same purpose or purposes. When the processing has multiple purposes, unambiguous consent should be granted for all of the processing purposes. If the data subject's consent is to be given following an electronic request, the request must be clear, concise and not unnecessarily disruptive to the use of the service for which it is provided.

If there is an imbalance between the controller and the data subject, the data subject requires special protection. Therefore, consent given on the basis of standard data protection statements may be subject to an unbiased unfairness test, regardless of whether the controller provides the statement in the context of contracts or quasi-contractual relationships. Likewise, consent that places data subjects at an unreasonable disadvantage is not a suitable legal basis for data processing.

Recital 33

Where processing is based on the data subject's consent, the controller should be able to demonstrate that the data subject has given the consent to the processing operation. In particular in the context of a written declaration on another matter, safeguards should ensure that the data subject is aware that, and the extent to which, consent is given. For consent to be informed, the data subject should be aware at least of the identity of the controller and the purposes of the processing for which the personal data are intended; consent should not be regarded as freely-given if the data subject has no genuine and free choice and is unable to refuse or withdraw consent without detriment.

Article 4

Definitions

For the purposes of this Regulation:

[...]

- (8) the data subject's consent means any freely-given, specific and informed (...) indication of his or her wishes by which the data subject, either by a statement or by a clear affirmative action, signifies agreement to personal data relating to them being processed;

[...]

Article 7

Consent

1. Where Article 6 (1) (a) applies the controller shall be able to demonstrate that unambiguous consent was given by the data subject.
 - (1a) Where article 9 (2) (a) applies, the controller shall be able to demonstrate that explicit consent was given by the data subject.
 - (1b) Consent shall be given in written or electronic form, unless special circumstances require a different form. If consent is given in electronic form, the controller shall ensure that**
 - a) the data subject consented intentionally and unambiguously,**
 - b) consent is logged, and**
 - c) the data subject can access the content of the consent and save it in reproducible form.**

- (1c) Prior to giving consent, the data subject shall be advised of the purpose of processing, the possibility to withdraw consent at any time and, as needed in the individual case or upon request, the consequences of refusing or withdrawing consent.**
2. If the data subject's consent is to be given in the context of a written **or electronic** declaration which also concerns other matters, the request for consent must be presented in a manner which is clearly distinguishable (...) from the other matters.
- 2a. Consent given through standard declarations which the controller uses for a variety of cases shall be invalid, if the standard declaration**
- a) is not clear and easy to understand for data subjects, or**
 - b) does not contain the following information:**
 - aa) information required by Article 14,**
 - bb) information that the data subject can withdraw consent for future data processing at any time, and**
 - cc) information that the intended data processing will be carried out by a third-party data processor pursuant to Article 26.**
- 2b. Consent shall be invalid if it puts the data subject at an unreasonable disadvantage. In case of doubt, an unreasonable disadvantage shall be assumed if**
- a) the declaration of consent is so unusual within the overall context that the data subject must not expect such a declaration,**
 - b) using the declaration is not in line with the principles of Article 5,**
 - c) the data subject is forced to consent to obtain services needed to ensure personal subsistence and if the data subject is not or not reasonably able to obtain equal services from another source without giving consent,**

- d) **the declaration of consent does not allow giving consent to different data processing activities separately, although this is possible and appropriate in the individual case concerned, or**
 - e) **a contract is only fulfilled if the data subjects consents to the processing of personal data, although this is not required to fulfil the contract and the data subject is not or not reasonably able to obtain equal services from another source without giving consent.**
- 2c. **If consent is given in the framework of relationships of permanent dependency between the controller and the data subject, it shall be presumed that it is not freely given unless the sole purpose of data processing is to give the data subject a legal or economic advantage.**
3. The data subject shall have the right to withdraw his or her consent to **future data processing** at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal (...).
4. **Paragraphs (2a), (2b) and (2c) do not apply if the processing of personal data is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.**
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