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NOTE

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

I. Consent to data processing is a central element of data protection law. The objective of consent is to enable data subjects to decide for themselves whether and how data concerning them 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 may pass on responsibility to data subjects or that data subjects will be unable to choose to withhold consent for the processing operation.

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

1. consent by data subjects using pre-formulated 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.

1. Data subjects frequently encounter declarations of consent that are part of long and complex pre-formulated terms of contract or conditions of exploitation which the controller uses for a variety of cases and whose content the data subject cannot change. To protect consumers in such cases, Council Directive 93/13/EEC of 5 April 1993 prohibits unfair terms in consumer contracts. German courts also use the law on general terms and conditions, which implements the Directive in German law, to review data protection statements and the associated declarations of consent. The German delegation proposes an addition to Article 7 to strengthen this useful tool for protecting data subjects in particular in cases where unfair pre-formulated declarations of consent are used and to enshrine the proven interaction between civil consumer protection law and data protection law in European law as well. Based on the law on unfair terms in consumer contracts, the German delegation proposes introducing the possibility of an objective substantive assessment of pre-formulated declarations of consent. Such an assessment will in particular enable an objective review to be carried out in order to determine whether the content of the declaration of consent meets all transparency requirements.

2. Data subjects also require special protection in situations where the declaration of consent places 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 addition to Article 7(2b) defines situations in which they might be placed at an unreasonable disadvantage.

Collective claims should be allowed in particular to effectively prevent the use of declarations of consent which do not meet the transparency requirements or which place the data subject at an unreasonable disadvantage. To that end, the German delegation also intends to propose an addition to Article 76.

3. Consent can be effective only if it is given freely by the data subject. However, doubts as to the voluntary nature of consent arise not only in the case of state coercion, but also in cases where the data subject's decision-making autonomy is significantly restricted on account of legal or actual dependencies. This applies in particular to relationships of permanent dependency such as employment. However, such situations may also include cases in which data are collected on the basis of consent, for example in order to offer additional services to data subjects. In such cases, the possibility of giving consent should not be excluded *per se*.

II. Against this background, the German delegation therefore proposes the following amendments to the draft General Data Protection Regulation. The proposals relate to Presidency document 11028/14. Deletions are shown in ~~strike through~~. This note is submitted without prejudice to the need for further discussions on the scope of consent and subject to any resulting adjustments.

(...)

Recital 25

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 such 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, special protection must be accorded to the data subject. Therefore, consent given on the basis of pre-formulated data protection statements may be subject to an objective substantive assessment, 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

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

Conditions for 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 has given his consent intentionally and unambiguously,**
 - b) **such consent has been recorded, 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 intended purpose of the processing operation, the possibility of withdrawing consent at any time and, where required by the circumstances of the case or on 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 pre-formulated declarations which the controller uses for a variety of cases in respect of data subjects shall be invalid if the declaration in question:**
- a) **is not clear and readily understandable to data subjects, or**
 - b) **does not contain the following information:**
 - aa) **the information required pursuant to Article 14,**
 - bb) **information to the effect that the data subject can withdraw consent for future data processing at any time, and**
 - cc) **where appropriate, information to the effect that the intended data processing operation will be assigned to a party processing data under contract pursuant to Article 26.**
- 2b. Consent shall be invalid if it places 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) **the use of the declaration is not in line with the principles of Article 5,**
 - c) **the provision of a service necessary in order to safeguard the data subject's personal circumstances is made dependent on consent, and if the data subject cannot or cannot reasonably obtain equivalent services from another source without giving such consent,**

- d) **the declaration of consent does not allow separate consent to be given to different data processing operations, despite the fact that this is both possible and appropriate in the individual case concerned, or**
- e) **the performance of a contract is made dependent on consent to the processing of personal data, despite the fact that this is not necessary for such performance and the data subject cannot or cannot reasonably obtain equivalent services from another source without giving such consent.**

2c. **If consent is given within the framework of relationships of permanent dependency between the controller and the data subject, it shall be presumed, unless there is proof to the contrary, that it is not freely given unless the sole purpose of the data processing operation 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 at any time **with future effect**. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal (...).

4. ~~(...)~~ **Paragraphs 2a, 2b and 2c shall 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.**