

Brussels, 4 February 2015
(OR. en)

**Interinstitutional File:
2012/0011 (COD)**

14707/2/14
REV 2

LIMITE

**DATAPROTECT 147
JAI 803
MI 806
DRS 136
DAPIX 151
FREMP 179
COMIX 569
CODEC 2087**

NOTE

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

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 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.

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, recital 25a0 defines situations in which they might be placed at an unreasonable disadvantage.

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.

Against this background, the German delegation therefore proposes the amendments to the draft General Data Protection Regulation set out in the Annex. The proposals relate to Presidency document 17072/14.

Recital 25

Consent should be given unambiguously by any appropriate method enabling a freely-given, *conscious*, specific and informed indication of the data subject's wishes, either by a written *or electronic* declaration or, *if required by specific circumstances*, by *any other* 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. *Member States may, according to those provisions that provide a margin of manoeuvre for Member States, in particular Article 6 (1) (e), (3) or Article 82 (3), determine cases that require a written declaration.*

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. *It is often not possible to fully identify the purpose of data processing for scientific purposes at the time of data collection. Therefore it is necessary to ensure that consent may also cover as yet unknown issues while keeping with recognised ethical standards for scientific research, as has been the case in the past. Data subjects should have the opportunity to limit their consent to certain areas of research or parts of research projects to the extent allowed by the intended purpose and provided that this does not involve disproportionate efforts in view of the protective purpose.*

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. *The controller should make sure that the data subject has the possibility to access and to store the content of the consent in a reproducible form at the time consent is given.*

Recital 25a0 new

A declaration of consent should be deemed invalid, if it puts the data subject at an unreasonable disadvantage. This is the case, if the consent is not freely given or if the declaration in question is not clear and readily understandable to data subjects or does not contain the information required pursuant to Article 14, in particular if the consent is given through pre-formulated declarations which the controller uses for a variety of cases. Furthermore, any declaration of consent should especially be deemed invalid,

- (i) if the declaration of consent is so unusual within the overall context that the data subject could not reasonably expect such a declaration,*
- (ii) if the use of the declaration is not in line with the principles of Article 5,*
- (iii) if the provision of a service necessary in order to safeguard the data subject's personal circumstances is made dependent on consent and the data subject cannot or cannot reasonably obtain equivalent services from another source without giving such consent,*
- (iv) if 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*
- (v) if 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.*

In order to ensure that consent is given without constraint, consent given in the framework of relationships of dependency between the controller and the data subject 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. This 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 or for the fight against doping or in a researcher-proband or doctor-patient relationship. Such a situation of dependency is however, among others, where an employees' personal data are processed by the employer in the employment context; Article 82 (3) shall remain unaffected.

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.

3. *Prior to giving consent, the data subject shall be informed by the controller, in addition to the information pursuant to Article 14, of the right to withdraw consent at any time and, where appropriate, the consequences of refusing or withdrawing consent.*

4. The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal (...).

5. 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, ***in an intelligible and easily accessible form, using clear and plain language.***

6. *Consent shall be invalid if it puts the data subject at an unreasonable disadvantage, in particular when the declaration of consent is neither clear nor easy to understand, or if the consent is not freely given.*

7. *If consent is given in the framework of relationships of 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. This 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.*