AmCham EU
SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Our position

Article 29 Working Party Guidelines on Consent under Regulation 2016/679

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €2 trillion in 2016, directly supports more than 4.5 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

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Speaking for American business in Europe

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General remarks

The General Data Protection Regulation (GDPR) itself lays out many of the parameters of what constitutes valid 'consent'. Further guidance, however, is be useful as our members put these regulations into practice, and is particularly necessary, for example, when considering how to implement the GDPR's rules on children's consent. We therefore welcome the clarity offered by the Article 29 Data Protection Working Party (hereafter WP 29) Guidelines on Consent under Regulation 2016/679 adopted on 28 November 2017 (hereafter 'draft guidelines'). However following elements raise concerns:

- The draft guidelines in some places interpret the GDPR too restrictively. This is particularly true to the interpretation put forward on the contract legal basis.
- The draft guidelines could create 'consent fatigue' among data subjects who find themselves asked to agree to hundreds or even thousands of requests for consent over the course of a year.
- They could undermine the private sector's ability to deliver valuable and popular online services as well as the direct interaction with consumers – without providing any stronger protection for data subjects.
- We are also concerned that at times the draft guidelines do not provide sufficient discretion to controllers to make judgments based on the context of a specific situation (including, for example, their relationship with data subjects and the type of processing involved).

Comments on the introduction

The status of consent among 'six lawful bases' (p.4)

AmCham EU welcomes the emphasis that consent is only one of the available legal bases. It is our long-held view that the best way to avoid consent fatigue is to provide sufficient legal flexibility, in particular through the use of other legal bases, like contract or legitimate interest.

However, the WP 29 states that 'when initiating activities that involve processing of personal data, a controller must always take time to consider whether consent is the appropriate lawful ground'. As no legal ground is privileged over the other, controllers are not required under the GDPR to consider in connection with all processing activities whether consent is available if another basis is available that they find more appropriate. Nor does the GDPR indicates a desire to override national law that define the validity of contracts. Indeed, within these legal constraints, all companies should be free to define what goods and services they offer and under what conditions they do so, including the decision on monetisation. The WP 29 should not try to limit these contractual freedom and individual autonomy, as well as innovation, by forcing on an overly restrictive interpretation.

Accordingly, we would recommend amending the above quoted sentence on page 4 of the draft guidelines to say the following: 'When initiating activities that involve processing of personal data, a controller must always take time to consider the appropriate ground for processing. This may include considering whether consent is the appropriate lawful ground for the envisaged processing'.

Consent under the ePrivacy Directive (p.5)

The issue of consent under the proposed e-Privacy Regulation raises a wide range of problems. At this stage, given that the final scope and content of a new e-Privacy Regulation are still unknown, a discussion of how consent under the GDPR relates to consent under e-Privacy needs to be deferred, noting however, that the goal should be:

- to align the two laws as to available processing grounds;
- to ensure consistent interpretations and applications of these processing grounds;
- to ensure that the interpretation of the GDPR is not extended outside personal data;
- to ensure that the scope of the e-Privacy Regulation be appropriately limited to avoid diminishing the relevance and effectiveness of the GDPR, as described in the above mentioned papers.

Furthermore, the WP should remove its statement that the consent requirements under the GDPR are not 'additional obligations' prohibited under Article 95 GDPR when applied to the e-Privacy Directive.

Elements of valid consent

Free/Freely given consent (p.6-7)

The GDPR is clear that consent(s) must be 'freely given', and that when assessing whether a consent is 'freely given' or not, 'utmost account' should be taken of whether the performance of a contract, or performance of a service, requires the processing to which consent is sought (see Article 7(4) GDPR).

The meaning of Article 7(4), and of the term 'freely given', is critically important to our members and to the European economy as a whole. The draft guidelines interpret the requirement in ways that are not supported by the text of the GDPR. This is particularly true in relation to freemium services and core features of a service:

- **Freemium** - A huge portion of the fast-growing online and digital sectors today rely on targeted advertising in order to monetise services. This segment includes everything from high-quality public-service-oriented news websites through to e-commerce and price comparison sites. As the draft guidelines note, the advertising that enables these websites will frequently be based on online tracking methods (p. 4). However, it is our view that this does not always require consent; other legal bases can be more appropriate. The draft guidelines interpret the requirement to ensure that consent is 'freely given' to effectively require those websites to offer data subjects the opportunity to decline to consent to the advertising associated with the websites – while still enabling data subjects to access the full website service (p. 9). Our view is that the fundamental right of data protection does not need to directly cut against the fundamental model that underpins the Internet; instead, consumers are better served with more transparency and controls related to data-driven advertising. Companies should remain free to decide what services they offer under what condition, including on how to monetise these services. The draft guidelines should state explicitly that *paid* services are feasible alternatives, but not required, for freemium services seeking to rely on valid consent – so that data subjects who do not wish to have their data processed for

monetisation purposes (such as advertising), but that nevertheless wish to access the full service, can choose to pay for the service as an alternative.

- **Core features** - The draft guidelines provide an example of a mobile photo editing app that asks its users for GPS locations – a use which the Working Party deems 'beyond the delivery of the core service provided' (p. 7). Later, the draft guidelines state that there 'needs to be a direct and objective link between the processing of the data and the purpose of the execution of the contract'. Services are rapidly innovating, and what is deemed 'core' to a service one day may not be so the next, and vice versa. There is no 'objective' way to measure what is or is not core to a service. A decade ago, many would have argued that photos are not 'core' to social networks, for example (after all, phone books do not have photos) – but today no one would make that argument. Also, companies should be able to differentiate themselves in the market by offering their users new and innovative features. It is at the very heart of economic freedom to be able to design a product and a service the way one believes to be most attractive to the users. As long as the contract are legal and companies apply robust privacy by design processes and accountable to demonstrate compliance, there should be no artificial limit on this ability to innovate. For this reason, controllers should be left with significant discretion as to what to deem part of (or not part of) the core service – and the draft guidelines should more clearly reflect this point.

Imbalance of power (p.7-8)

Our members fully accept that certain employment scenarios, in particular, can give rise to imbalanced consents. However, the draft guidelines currently go too far, in stating that consent is 'unlikely' to be usable in scenarios involving employees (p.8). There are many scenarios – ranging from cases where employees are given a genuine choice whether or not to bring their own smart device (BYOD) or use a corporate smart device instead, according to their preference, to cases where employees are invited to join an 'employee pet of the month' mailing list – where consent should still be considered a viable basis for processing in the employment context. We urge the WP 29 to do more in the draft guidelines to acknowledge this diversity; an assessment of consent should be carried out on a case-by-case basis, driven by the context of specific situations.

Conditionality (p. 8-10)

Article 7(4) essentially prohibits conditioning the performance of a contract or provision of a service on consent to the processing of personal data that is not necessary for the contract or service. GDPR allows that giving consent for these additional purposes may result in certain benefits to the data subjects, such as a lower fee. The WP 29 should make clear that Article 7(4) does not preclude a controller from providing incentives, including financial incentives, if the individual consents to additional data uses that are not necessary for the performance of the contract.

Granularity (p. 11)

The draft guidelines take an overly restrictive interpretation of whether consent may be collected for multiple purposes by stating that in the example of a retailer that collects data for marketing purposes, it cannot then use the same consent to justify sharing of data with other companies within its own group. This is too narrow. The company may in practice work with other companies within that group to send the relevant marketing messages; similarly, companies also frequently work with affiliates and subsidiaries to complete straightforward operations, such as product delivery. It would rapidly

become burdensome for data subjects to have to consent to each separate company within a group having access to the same data for the same purpose (e.g., marketing, product delivery, etc.).

Furthermore, it is important to underline that Article 6 allows for consent to processing for 'one or more specific purposes' – indicating that consent can be obtained for multiple specific purposes. This could be particularly helpful where purposes are related, conceptually similar or technically dependent on each other, when it could be clearer, more informative or more sensible for the data subject to provide/revoke consent to such multiple purposes together.

We also recommend against interpreting the concept of separate consents as equivalent to 'explicit' consents; the GDPR does not require an explicit consent for each separate processing operation, and the draft guidelines should not de facto impose such a requirement either.

Detriment (p. 11)

The draft guidelines state that 'the controller needs to demonstrate that it is possible to refuse or withdraw consent without detriment (Recital 42)'. It goes on to state that withdrawing consent should 'not lead to any costs for the data subject' or to any 'clear disadvantage for those withdrawing consent.' The draft guidelines should clarify that 'detriment' only applies to withdrawal of consent with respect to processing not necessary for the underlying contract or service. In addition, the withdrawal of consent may have consequences for functionality, as is recognised by the GDPR that the controller should warn in those circumstances. Moreover, where the consent was incentivized and the withdrawal of consent results in reversing the benefits of the incentive, reversing the incentive should not be deemed a 'detriment.'

Informed consent (p. 13-18)

Recital 42 of the GDPR sets out clearly that for a consent to be informed, data subjects must be informed of 'at least the identity of the controller and the purposes for which processing are intended'. This is the minimum information that legislators were clear had to be provided in order for a controller to obtain a valid consent. However, in a section of the draft guidelines titled "minimum content requirements for consent to be 'informed'," the WP 29 references further elements of information, including: the type of data collected and used; the existence of the right to withdraw; information about automated profiling; and information about data transfers. This goes beyond the specific list provided by legislators, and while this information must still of course be provided based on other provisions of the GDPR, the lack of this information in a consent experience should not necessarily invalidate a consent.

These consent notices should also be implementable with UI considerations – i.e. small screen, no screen. The more information controllers are obliged to include in these windows, the less likely the user will meaningfully engage. A limited and understandable set of information, combined with a layered approach acknowledged by the Working Party is a better way to achieve a workable outcome.

Also important, the draft guidelines acknowledge that the GDPR does not prescribe specific forms that information must take in order to obtain valid consent; instead, the GDPR sets out high level principles (e.g., language must be clear and accessible, etc.). This reflects the legislators' view that controllers may ask data subjects for consent in a variety of different ways, depending on the circumstances. A request for consent in the context of a clinical trial, for example, may take a very different form than a request in the context of consumer mail-order marketing. Accordingly, the draft guidelines should avoid making blanket statements about what is or is not clear. The draft guidelines currently state, for

example, that the term 'I know that…' is unclear (p. 14, footnote 35). This blanket statement may not be correct, however, depending on the facts of a given case.

Obtaining explicit consent (p. 18-19)

In the context of special categories of data, certain transfers to third countries, and automated decision-making, the WP 29 suggests that explicit consent will require more of an express action on the part of the individual to grant his or her explicit consent than 'ordinary' consent would. Examples for such additional express actions provided by the WP include two-factor verification, electronic signatures, signed statements, email verification, and the like. The WP should acknowledge a more nuanced picture with respect to how explicit consent may be implemented in a wide range of contexts. Importantly, there should be no automatic presumption that the requirements of 'explicit consent' have not been met where controllers applied the requirements for 'regular' consent under the GDPR. Where 'regular' consent is already 'explicit' due to the nature of the unambiguous indication in a statement or affirmative action, the requirement of 'explicit' consent under Article 9.2(a) may already be fully met. Explicit consent should simply mean that the consent was explicit (clear; express) and that it was demonstrably so. The examples provided by the WP may be useful and appropriate in some context but may not be necessary in other contexts. For example, the WP should acknowledge that affirmative actions, such as (1) ticking a consent box; and (2) subsequently clicking a 'continue' button, may meet the requirements of explicit consent.

Additional conditions for obtaining valid consent

Demonstrate consent (p. 19 -20)

The draft guidelines recommend as a best practice that consent should be refreshed at appropriate intervals. We fully agree that refreshing the consent may be appropriate where the processing activity has substantially changed (for instance, where the data are used for new purposes). However, requiring a regular refresh also in the absence of such substantial changes is not a requirement of the GDPR. Furthermore, this would be unworkable in practice, and would lead to an overload of repeat consent requests. We suggest clarifying in the draft guidelines that consent remains valid unless (i) the information notice noted that consent was only granted for a predefined period, and that period has expired; or (ii) the personal data are used for a new purpose not previously communicated.

Withdrawal of consent

The draft guidelines state that '[…] if consent is withdrawn […] [i]f there is no other lawful basis justifying the processing (e.g., further storage) of the data, they should be deleted or anonymised by the controller.' It should be clarified that withdrawal of consent should not automatically result in the deletion of the data that was previously processed pursuant to the consent as such deletion may be contrary to the individuals expectations and wishes as well as interfere with the exercise of other GDPR rights with respect to the relevant personal data.

Interaction between consent and other lawful grounds (p.22)

Our members fully accept that, if consent was initially communicated as the sole legal basis, and if the data subject withdraws its consent, the controller cannot suddenly 'invent' a new legal basis. However, legitimate scenarios exist in which a data processing can *ab initio* be justified by multiple legal bases. For instance, a controller that has an obligation to process special categories of personal data under applicable local law may wish to also obtain the consent of the data subject for such processing e.g. to ensure that if the legal basis falls away due to a regulatory change, the processing remains legitimate. It is therefore recommended to include in the draft guidelines that if the information notice mentions *ab initio* multiple legal bases for a given purpose (amongst which consent), and consent is subsequently withdrawn, the other legal bases can still be used to justify the processing. Conversely, if the information notice only mentions consent, and consent is subsequently withdrawn, the controller cannot continue the processing on another legal basis.

Also, the draft guidelines state that only one legal basis is permitted per purpose. We do not see the need for this, or how this protects data subjects' rights. This also is not in line with the text of the GDPR, which explicitly states in its article 6.1 that processing shall be lawful only if and to the extent that 'at least' one of the legal bases mentioned in that article applies; and which further states in its article 17.1.b) that the right to be forgotten applies if the data subject withdraws its consent 'and where there is no other legal ground for the processing'. The only correct way to interpret article 17.1.b) is to conclude that the legislator indeed wanted to provide controllers with the option to have multiple legal bases available for one purpose of processing. Therefore, we suggest streamlining the text of the draft guidelines with the rules stipulated by the GDPR and thus to remove from the draft guidelines that, as a general rule, a processing activity for one specific purpose cannot be based on multiple lawful bases. Multiple lawful bases should be permitted for one purpose if the information notice clearly and *ab initio* communicates all lawful bases for that specific purpose.

Specific areas of concerns in the GDPR

Children (p.23-27)

AmCham EU has consistently called for greater clarity concerning the implementation of the GDPR's rules on the consent of children, in particular in the context of information society services under Article 8(1) of the GDPR. We welcome the clarification provided by the draft guidelines that Article 8 will not apply where services are clear that they are not 'offered' to children. We likewise welcome the explanation that controllers should take reasonable efforts, reflecting their discretion and proportionate to risks presented by the data processing, to verify the child's age, and, if needed, to verify parental authorisation. That said, we do not understand the draft guidelines' reference to the age of the child as ending when they are 18 (p. 24). Article 8(1) of the GDPR refers to children as being anything 'under the age of 16'. We welcome the desire for a harmonised approach and reiterate the importance to stick to the current standard of 13.

In our view, companies should be able to trust their users. If they need to try to verify the age of the user if 'they state that they are over the age of the digital consent' (page 25), it can easily trigger a substantial additional data collection, which would counter the objective of Article 11 of the GDPR. Companies should also be able to rely on verification methods that minimise data collection, such as

through email or requesting a password. Collecting credit card information where it is not otherwise required, for example, would again go against the objective of Article 11.

Furthermore, on pages 26-27, the WP 29 notes that consent obtained by a parent expires automatically when a child reaches the age of digital consent and that the consent must then 'be reaffirmed by the data subject personally'. It should be clarified that if the user is under the age of consent then retaining date of birth is a legitimate interest for processing the data. Where a data processor does not want to retain age then they should calculate the number of days remaining before a child reaches the age of consent.

Assessing consent in the context of scientific research

The GDPR states that the term 'scientific research' should be interpreted 'in a broad manner' (Recital 159). The draft guidelines acknowledges this – but then goes on to provide a relatively restrictive interpretation of the scope of scientific research. This narrow interpretation, which could rule out many early stage types of research, imposes conditions on the term 'scientific research' that are not included in the GDPR, and arguably go against the GDPR's specific instruction that the term be interpreted broadly. We suggest that the draft guidelines be revisited on this point. The draft guidelines should also do more to recognise the importance of unplanned research – that is, research that moves in a direction that is not originally planned by those conducting it – instead of stressing the need for the purpose of each part of a research project to be described as precisely as possible as early as possible (e.g., through making available of a 'research plan') to data subjects (p. 28).

Consent obtained under Directive 95/46/EC (p.29)

Recital 171 of the GDPR states that where processing is based on consent pursuant to Directive 95/46/EC, it is not necessary for the data subject to give his or her consent again 'if the manner in which the consent has been given is in line with the conditions of the Regulation […]'. We appreciate the clarification brought by the draft guidelines to limit the retroactivity aspects of the GDPR for the 'unambiguous character' of consent to cases of 'presumed consent based on a more implied form of action by the data subject'. In those situations, as noted in the draft guidance, controllers must assess whether the processing may be based on a different lawful basis. We suggest that the guidance further develops this point, makes reference to Recital 47 of the GDPR and spells out that the legitimate interest may well be a valid substitute of consent – where presumed or implied- in case of processing of data for direct marketing purposes and should ensure consistency with the future e-Privacy Regulation.