

The Consumer Voice in Europe

BEUC COMMENTS ON THE ARTICLE 29 WORKING PARTY GUIDELINES ON CONSENT AND ON TRANSPARENCY UNDER THE GDPR



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Why it matters to consumers

Guaranteeing transparency around the use of personal data and ensuring that, whenever requested, consent is informed and freely given, are two key elements of the General Data Protection Regulation (GDPR). Both elements are essential to allow consumers to be in control of their personal data and ensure fairness and transparent processing.

1. General Remarks

BEUC welcomes these Guidelines and the efforts made by the Article 29 Working Party (WP29) to bring further clarity on the provisions of the GDPR that relate to transparency and consent.

BEUC agrees with the approach taken by the Working Party and its interpretation of the relevant provisions. Transparency and consent are two key pillars to ensure that individuals are in control over their personal data and that processing of such data is done in a fair manner.

The GDPR is a milestone. We have high hopes that it will bring real benefits for consumers and real changes in terms of how businesses approach data protection and privacy issues. We expect that companies using consumers' personal data will follow these guidelines and fully respect the obligations established by the GDPR. If that is not the case, we call on the Data Protection Authorities to take a firm stance and duly exercise their enforcement powers.

2. BEUC Comments

2.1. Guidelines on consent

The Guidelines provide a thorough analysis of the notion of consent under the GDPR. BEUC welcomes this analysis and fully supports the stance taken by the WP29. Consent is a key element for the empowerment of the individual, as long as all the requirements laid out in the GDPR are met.

Consent must be unambiguous (explicit in the case of special categories of data), specific, informed and freely given. When consent is requested, the individual must be properly informed about what he is asked for and what he would be consenting to and must have a genuine choice.

First, it is very important to underline the clarification that obtaining consent does not negate or in any way reduce the controller's obligations to observe the principles of processing enshrined in the GDPR. Also, we welcome the clarification that, while the e-Privacy Regulation remains work in progress, the references in the existing e-Privacy Directive to the repealed Directive 95/46/EC shall be construed as references to the GDPR

and that the GDPR conditions for obtaining valid consent are applicable in the situations falling under the scope of the e-Privacy Directive.

In relation to the elements that are necessary for consent to be valid, we would like to underline that, as the Working Party rightly points out, the fact that **consent must be freely given** implies real choice and control for data subjects. If the data subject has no real choice, consent will not be valid. Notably, if consent is bundled up as part of terms and conditions it will be presumed not to have been freely given.

Article 7(4) plays a fundamental role to ensure that consent is freely given. We share and fully support the Working Party's assessment of this article. However, we regret that the Working Party has not taken the opportunity to address what this provision means for so-called "tracking walls" which consumers constantly face online, and which require that they give their consent to being tracked for targeted advertising purposes to be able to access the website, something which in our opinion falls precisely in the type of situations Article 7(4) seeks to prevent. Further guidance from the Working Party on this specific issue would be welcome. We would also suggest the inclusion of practical examples illustrating situations where "conditionality" would not infringe the provisions of the GDPR.

BEUC would also like to underline the requirements related to **granularity** and **specificity** of consent. If a controller is relying on consent, the data subject must give it for a specific processing purpose and, when the processing has multiple purposes, consent should be given separately for each of them.

Consent must also be **informed**. Consent requests must include all the necessary information to enable data subjects to make informed decisions and understand what they would be agreeing to and the impact of their choices. Consent requests and related information need to be separate from information about other matters. We welcome that this is clearly explained in the guidelines, as well as the information that must be given for consent to be valid, and how it should be provided.

Another key element to guarantee that individuals have a genuine choice is that it must be possible to **refuse or withdraw consent without detriment**. We welcome that the Working Party underlines the fact that it is the controller that has the burden of proof. We would suggest the addition of a practical example to illustrate which situations a refusal or withdrawal of consent would or would not be considered detrimental, especially in relation to cases where withdrawal of consent would lead to costs or downgrades in the performance of the service.

We also welcome the clarifications provided in relation to what shall be considered an **"unambiguous"** indication and a **"clear affirmative act"** to give consent. We would like to particularly underline that silence or inactivity on the part of the data subject, as well as merely proceeding with a service cannot be regarded as an indication of choice. Also, a blanket acceptance of terms and conditions cannot be considered a clear affirmative action to consent to the use of personal data, and controllers cannot use pre-ticked boxes or opt out constructions that require intervention from the data subject to prevent agreement.

BEUC also welcomes the guidance on the conditions for **explicit consent** and the means to provide it. In this regard, we would like to bring the attention of the Working Party a particular issue related to sectorial legislation in the financial services area. While financial data is not included in the special categories of data under the GDPR, in the new Payment Services Directive 2015/2366 (PSD2), there are several references to explicit consent. In terms of consumer protection, the most important question is related to how, if the consumer gives explicit consent, an "account information service" can have access to all the information available on his bank account (Article 67 of the Directive). In the PSD2, the conditions for explicit consent are not defined. BEUC would like to be sure that the

conditions for explicit consent under the GDPR, as interpreted in these WP29 guidelines, also apply to the data processing operations which require explicit consent under the PSD2. It is our understanding that the GDPR should indeed apply as Article 94 of the PSD2 states that all processing of personal data for the purposes of the Directive shall be carried out in accordance with the 1995 Data Protection Directive, which has been replaced by the GDPR. We would welcome the Working Party's opinion on this issue.

Children

The WP29 analyses a series of specific concerns related to children's consent. First, it would be important to clarify what the term "child" means in the context of the GDPR. In footnote 56 there is a reference to the definition of child under the UN Convention on the Protection of the Child (i.e. anyone under 18 unless under the law applicable to the child majority is attained earlier). It would be helpful to indicate more clearly that this is indeed the definition of "child" that should be applied, as seems to be the case when looking at the indications regarding what would be considered, or not, to be a service "offered directly to a child". We would welcome a list of clear indicative criteria for assessing whether a service is "offered directly to a child". More generally, we would also welcome a dedicated set of guidelines addressing in a comprehensive manner all issues related to the GDPR and children's data protection.

Scientific research

We welcome the Working Party's analysis and would like to underline the importance of ensuring that the flexible approach of Recital 33 is subject to strict interpretation and a high degree of scrutiny. Scientific research purposes must not be misused as a way of navigating around essential aspects of consent.

2.2. Guidelines on transparency

We welcome and fully support the Working Party's analysis of the different transparency obligations under the GDPR and their practical implementation. Transparency is a key principle from a consumer perspective. Individuals cannot be empowered, take informed decisions and exercise their rights if they do not know or do not understand what is going on. Transparency is essential to ensure the fairness of processing and that companies can be held accountable.

As the WP29 points out, the **quality, accessibility and comprehensibility** of the information which must be provided to data subjects is as important as the actual content of the information. Companies should present the information efficiently and succinctly. The information should be easily accessible, easily understandable and clearly differentiated from other non-privacy related information. Users shall not be required to seek out the information, it should be immediately apparent for them where to find it. For example, as the Working Party points out, apps should make available all the necessary information prior to download.

It is very important to underline that companies need to keep in mind the intended audience and tailor the information accordingly (especially with regard to children). Companies must move away from simply providing long, complex, legal documents that are almost impossible for users to read or understand and adopt a more **user-centric approach**. We strongly welcome that the WP29's position is that companies should not only provide the prescribed information under Articles 13 and 14 but also seek to spell out the kind of effects and consequences that the specific processing described in a privacy notice will have on the data subject.

Another key point is the obligation to use **clear and plain language**. The WP29 underlines that information should be provided in as simple a manner as possible, avoiding complex sentences and language structures. We strongly welcome that the Working Party particularly underlines that information should be concrete and definitive, not overly legalistic or technical, avoiding excess nouns and writing should be in the active instead of the passive form. As the WP29 clearly states, formulations such as “We may use your personal data to develop new services” do not meet the requirements of the GDPR. They are not sufficiently clear nor concrete. Words such as “may”, “might”, “some”, “often” and “possible”, which are extremely abundant in the privacy policies we see today, should be avoided.

In terms of how the information should be provided, BEUC welcomes the recommendation to use **layered privacy statements/notices**. Such notices would allow users to navigate the elements that are of most interest to them and facilitate the reception of the information, with the most important information contained in the first layer. Otherwise, as the Working Party points out, it is critical that the method(s) chosen by the controller to provide the information is/are appropriate to the circumstances. While the default position is that information should be provided in writing, the GDPR gives enough room for controllers to use other means to provide the necessary information.

The information shall be provided **free of charge**. In this regard, we welcome that the Working Party makes very clear that information to be provided under the transparency requirements cannot be made conditional upon financial transactions, for example the purchase of services or goods. Where free services are being provided to the data subject, the information must be provided prior to, rather than after the sign-up to the service.

Another very important point we would like to underline is that **transparency applies throughout the processing life cycle**. For example, as the Working Party explains, the controller should take all measures necessary to ensure that changes to the privacy policy are communicated in a way that ensures that most recipients will notice them. We welcome that the Working Party clearly states that references in the privacy notices to the effect that the data subject should regularly check the notice for changes or updates, as we often see now, are considered not only insufficient but also unfair.

In terms of the **timing** for the provision of information, we welcome the WP29’s position that data controllers should provide the information to data subjects well in advance of the stipulated time limits.

Regarding the **modalities** for the provision of information, BEUC welcomes the different examples provided by the Working Party regarding formats and tools that can be used to deliver the information (layered notices, push and pull notifications, privacy dashboards, etc.). In principle, we agree that standardised machine-readable icons can also help making privacy notices simpler and easier to understand. However, as the WP29 rightly underlines, the standardisation of these icons is essential. Otherwise, icons could lead to more confusion.

We would also like to underline the points made by the Working Party in relation to **further processing**. Information in relation to further processing for compatible purposes must be provided prior to that further processing and a reasonable period should occur between the notification to the data subject and the processing taking place. The more intrusive (or less expected) the further processing the longer the period should be.

In terms of **sharing of data with third parties**, we strongly welcome that the default position is that the controller should provide information on the actual (named) recipients of the personal data. If the controller opts to provide only the categories of recipients, it must demonstrate why it is fair to take this approach and the categories of recipients

should be as specific as possible, indicating the type of recipient, the industry sector and sub-sector and the location of the recipients. Formulations such as “we share data with our business partners”, should be considered insufficient.

Finally, we fully support the WP29’s position that the **exceptions** to the obligation to provide information shall, generally, be interpreted and applied narrowly.

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