

VZBV COMMENTS ON THE ARTICLE 29 WORKING PARTY GUIDELINES ON CONSENT UNDER THE GDPR

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Editorial information

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I. INTRODUCTION

Verbraucherzentrale Bundesverband (vzbv) welcomes the Article 29 Working Party (WP29) Guidelines on the concept of consent under Regulation 2016/679 (GDPR).

The consent of the data subject as a legal basis for the processing of personal data has already been a key concept in the former Data Protection Directive and in the ePrivacy Directive. Although the consent was strengthened in the GDPR, it is still necessary to provide clarification and guidance on the corresponding provisions. vzbv is in favour of an strict interpretation of Article 7 GDPR and supports the WP29's approach and most of its interpretations.

But there are still some open issues that might need more elaboration, in particular the question under which circumstances consent can be considered "freely given". With regard to the common practice on the internet, WP29 should consider explicitly addressing so called tracking walls and make clear that consent for online behavioural advertising and tracking on the internet should not be considered legitimate if the data subject cannot use information society services without accepting such practices.

Another important point that requires clarification is the relation between Article 7(4) GDPR and the approach of the European Commission in its proposal for a Directive on contracts for the supply of digital content (COM/2015/634 – 2015/0287 (COD)) to recognise personal data as an counter-performance for a contract or for the provision of digital content, although this proposal is still under discussion by the European co-legislators.

Thirdly, WP29 provides a strong interpretation of the conditions for consent of a child. vzbv supports this interpretation. However, it is not clear under which circumstances an information society service is considered to be "offered directly to a child". An understanding of this term that is too broad might lead to data processing on a massive scale which could weaken the protection of personal data instead of strengthening it.

Conclusion

The guidelines on consent laid out by WP29 now are an important step for the interpretation of the GDPR. If some remaining issues are solved, these guidelines will give legal certainty to all market actors, will lead to harmonised enforcement by the data protection authorities all over Europe and help to reach the GDPR's key objectives: to protect the fundamental rights and freedoms of natural persons with regard to the processing of personal data and to ensure the free movement of such data.

About vzbv

Verbraucherzentrale Bundesverband - vzbv - is a non-governmental organisation acting as an umbrella for 41 German consumer associations. vzbv represents the interests of consumers in public and vis-à-vis legislators, the private sector and civil society. vzbv's goal is to protect and empower consumers by lobbying and campaigning at national and European levels, by taking collective legal action on behalf of consumers and by ensuring that the consumers' voice receives broad media coverage. vzbv also provides professional training for the staff of consumer organisations.

II. COMMENTS ON THE GUIDELINES IN DETAIL

1. INTRODUCTION

(1) vzbv welcomes that WP29 clarifies in its Guidelines that the principles relating to processing of personal data – like purpose limitation, data minimisation, lawfulness, fairness and transparency – must be respected, even if the processing of personal data is based on the consent of the data subject. For example, consent should not legitimise the collection of data which is excessive in relation to a particular purpose.

(2) vzbv also welcomes the explanation that the requirements for consent under the GDPR are not considered as an "additional obligation" with regard to Article 95 GDPR. vzbv agrees that the conditions set out by the GDPR for obtaining valid consent are preconditions for lawful processing of personal data. For situations falling within the scope of the ePrivacy Directive and the future ePrivacy Regulation, the conditions of the GDPR for obtaining valid consent should therefore always apply.

2. CONSENT IN ARTICLE 4(11) OF THE GDPR

(3) No comments provided

3. ELEMENTS OF VALID CONSENT

Ad 3.1. Free / freely given

(4) vzbv shares WP29's view that *"the element 'free' implies real choice and control for data subjects"* and is in favour of a strict interpretation of Article 7 GDPR and in particular of Article 7(4) GDPR. Therefore, vzbv welcomes that example 1 sets clear that online behavioural advertising (OBA) is not necessary for the provision of a mobile app for photo editing and that consent cannot be considered as being freely given when data subjects cannot use the app without consenting to OBA.

But with regard to the common practice on the internet, WP29 should also consider explicitly addressing so called tracking walls, i.e. the practice whereby access to a website or service is denied unless individuals agree to be tracked on other websites or services. OBA is not necessary for the provision of a website, therefore such a "take it or leave it" approach – where the consumer cannot use the website without accepting OBA – is not legitimate.

Ad 3.1.1. Imbalance of power

(5) At the end of this section, WP29 points out that *"imbalances of power are not limited to public authorities and employers, they may also occur in other situations"*. vzbv would welcome if WP29 would provide some practical examples of these *"other situations"*.

(6) In the same paragraph, WP29 highlights, that *"consent can only be valid if the data subject is able to exercise a real choice, and there is no risk of deception, intimidation,*

coercion or significant negative consequences (e.g. substantial extra costs) if he/she does not consent.”

It is confusing though that WP29 chose the wording “*no significant negative consequences*” and “*no substantial extra costs*” here, while it speaks about “*no negative consequences*” and “*no further costs*” in the same context in the other sections. To avoid confusion, WP29 should choose a consistent approach and wording and delete the words “significant” and “substantial”.

Ad 3.1.2. Conditionality

(7) In this section, WP29 addresses questions on Article 7(4) GDPR. Article 7(4) GDPR refers to “*the performance of a contract*”. WP29 should also point out here that the conclusion of a contract is a precondition and an integral part of the performance of a contract and therefore also covered by Article 7(4) GDPR. Otherwise, there could be the interpretation that the conclusion of a contract can be made conditional on consent to the processing of personal data despite such consent not being necessary for such conclusion.¹

(8) Also, WP29 emphasises in this section that “*the GDPR ensures that the processing of personal data for which consent is sought cannot become directly or indirectly the counter-performance of a contract. The two lawful bases for the lawful processing of personal data, i.e. consent and contract cannot be merged and blurred*”.

Although the European Commission’s proposal for a Directive on contracts for the supply of digital content (COM/2015/634 – 2015/0287 (COD)) is still under discussion by the European co-legislators, vzbv would welcome a deeper elaboration of the relationship between Article 7(4) GDPR and the approach of this proposal to recognise personal data as an counter-performance for a contract or for the provision of digital content.

(9) Later in this section, WP29 noted that “*the wording of Article 7(4) is not construed in an absolute manner*” and that “*there might be very limited space for cases where this conditionality would not render the consent invalid*”. vzbv suggests to include examples to demonstrate in what type of situation this conditionality would not infringe the provisions of the GDPR.

(10) Furthermore, WP29 states that “*Article 7(4) has been drafted in a non-exhaustive fashion by the words “inter alia”, meaning that there may be a range of other situations which are caught by this provision*”. Again, examples would help to understand these “*other situations*”.

Ad 3.2 Specific

(11) vzbv agrees that consent has to be specific. In this respect, vzbv is surprised to see example 7 on granularity. The example indicates that consent is not valid if the situation is as follows: “*within the same consent request a retailer asks its customers for consent to use their data to send them marketing by email and also to share their*

¹ See also *Schätzle*; Zum Kopplungsverbot der Datenschutz-Grundverordnung; PinG 05.2017; p. 203-208 <https://www.pingdigital.de/ce/zum-kopplungsverbot-der-datenschutz-grundverordnung/detail.html>

details with other companies within their group". WP29 argues that this consent is not granular as there is no separate consents for these two separate purposes.

But in vzbv's view this consent would be invalid even if there were separate consents for these two separate purposes since the purpose "*share their details with other companies within their group*" is not specific.

Ad 3.4. Unambiguous indication of wishes

(12) In footnote 40, WP29 quotes the European Commission's Impact Assessment that "*the use of default options which the data subject is required to modify in order to reject the processing ('consent based on silence') does not in itself constitute unambiguous consent*".

This is a very important point. Therefore, WP29 should also include this in the text of these guidelines and make clear that the settings for information society services or web browsers must be set in such a way by default that they object to the processing of personal data if these settings are to be used to express consent to such processing.

4. OBTAINING EXPLICIT CONSENT

(13) No comments provided

5. ADDITIONAL CONDITIONS FOR OBTAINING VALID CONSENT

(14) No comments provided

6. INTERACTION BETWEEN CONSENT AND OTHER LAWFUL GROUNDS IN ARTICLE 6 GDPR

(15) vzbv particularly welcomes WP29's clarification that a processing activity for one specific purpose cannot be based on multiple lawful bases and that it is not possible to modify the lawful basis in the course of processing. If this were possible, the provisions of the GDPR and data subjects' rights could easily be undermined.

7. SPECIFIC AREAS OF CONCERN IN THE GDPR

Ad 7.1.2. Offered directly to a child

(16) WP29 interprets the term "offered directly to a child" very broadly. vzbv is interested in WP29's view of what constitutes the differences between the terms "offered to a child" and "offered directly to a child". vzbv understands the term "offered directly" in such a way that the service uses language or a layout that is specifically directed to children or designed to appeal to them. The same would be the case if the data controller becomes aware that their services are particularly used by children.

For example, an information website about cars that chose to rely on consent for processing personal data would fall within the scope of Article 8, according to WP29's interpretation, if it does not make clear to potential users that it is only offering its

service to persons aged 18 or more, even if only very few of these users would actually be children.

vzbv fears that an understanding of the term “offered directly to a child” that is too broad might lead to more data processing since, as a consequence, all information websites etc. would be considered to be offered directly to a child and therefore would have to verify the age of their users.

Ad 7.1.3. Age

(17) WP29 is right to point out in this section that “*the mechanism chosen to verify the age of a data subject should involve an assessment of the risk of the proposed processing*”. It might be helpful if WP29 provided some examples for low-risk and high-risk situations.

Ad 7.1.4. Children’s consent and parental responsibility

(18) Like in the section before, WP29 states that “*what is reasonable, both in terms of verifying that a user is old enough to provide their own consent, and in terms of verifying that a person providing consent on behalf of a child is a holder of parental responsibility, may depend upon the risks inherent in the processing as well as the available technology*”. Again, some examples for low-risk and high-risk situations might be helpful to assess these situations.

Ad 7.2. Scientific research

(19) vzbv sees the risk that the exceptions for scientific research purposes could be used to circumvent the legal requirements of the GDPR. Therefore, vzbv supports the narrow understanding of the term “scientific research” like pointed out by WP29. Exemptions for these purposes shall not relieve data controllers in general from their obligations regarding specific consent.

8. CONSENT OBTAINED UNDER DIRECTIVE 95/46/EC

(20) No comments provided