

Privacy Update

Lorenz Privacy Team

Obtaining Consent In Europe. Mission Impossible?

On July 13, 2011 the Article 29 Working Party (hereinafter: the “WP 29”) adopted its opinion on the definition of consent (hereinafter: the “Opinion”).

The Opinion clarifies the concept of consent as currently used in the Data Protection Directive (95/46/EC) and the e-Privacy Directive (2002/58/EC) as the legal basis for processing personal data. Furthermore the WP 29 formulates policy recommendations for the review of the Data Protection Directive (95/46/EC).

Generally, consent is defined as “any freely given specific and well informed indication of his wishes by which the data subject signifies his agreement to personal data regarding him being processed”. The Opinion breaks down the definition into different conditions for consent to be valid:

- First, consent is “any indication of wishes...signifying the data subject’s agreement”. “Any indication” indicates that there are no limits as to the form of consent. However it is clear that some kind of action from the data subject is required (i.e. written or oral statement or any behavior from which the consent can reasonably be inferred, such as dropping a business card into a glass bowl).
- Second, consent should be “freely given” (i.e. the data subject should have a real choice and there may not be a risk of deception, intimidation, coercion or significant negative consequences suffered in relation to the refusal to consent). The freedom of choice can be affected by certain situations and contextual elements (e.g. situation of subordination or dependency such as in the context of employment and other contextual elements such as financial, emotional or practical consequences related to refusing processing of personal data).
- Third, consent should be “specific” (i.e. clearly and precisely refer to the exact purposes of the intended processing). Consequently, blanket consent is not permitted. The Opinion calls for specific consent clauses separated from the general terms and conditions in a contract.
- Finally, the consent needs to be “informed”. The information provided to data subjects should meet a certain quality standard (i.e. in plain text, without use of jargon and understandable) and be clear and sufficiently conspicuous to ensure that data subjects notice the information.

In addition to the above mentioned conditions, consent must be unambiguous and in certain cases (i.e. processing of sensitive data) explicit. To obtain unambiguous consent, data controllers should provide a procedure that leaves no doubt about the intention of the data subject to give his/her consent. This could be accomplished by a procedure seeking express consent (i.e. written/oral statement or a check the box system) or by a procedure through which a clear inferred consent can be obtained (e.g. clearly informing an individual that he will be deemed to have consented when he provides his information). Consent inferred

from a failure to act or silence of the data subject (e.g. by using pre-checked boxes on a website or by not changing default setting on a website) does not meet the requirement of unambiguous consent.

For the processing of sensitive data, the data subject should give his/her explicit consent. This encompasses an active response (i.e. oral or written response such as signing a consent form or engaging in an affirmative action such as checking a box on a website or clicking on certain icons) by which the data subject signifies his/her agreement with the processing of sensitive data. Consequently, consent that is inferred from actions and/or inactions of the data subject cannot be considered as being explicit and therefore opt-out solutions are not sufficient.

Concluding, the Opinion includes various proposals to be considered in the review of the Data Protection Directive, such as:

- Clarifying that consent always has to be unambiguous.
- Reinforcing the burden of proof of data controllers so that they are compelled to put into place procedures to seek and prove unambiguous consent.
- Explicitly including additional requirements regarding quality (i.e. easily understandable, in clear and plain language) and accessibility (i.e. conspicuous, prominent and directly accessible) of the information to be provided to the data subject.
- Clarification regarding individuals lacking legal capacity to consent (e.g. inclusion of provisions regarding the requirement to obtain consent of parents or representatives, harmonization of the age of legal capacity to consent with data processing, age verification mechanisms, adaptation of information to be provided to children).

The full text of the Opinion is available [here](#) .

Data Protection Team
Lorenz Brussels