

Comments on the Consent Guidelines

The Article 29 Working Party, wp259

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About us

The European Association of Communications Agencies (EACA) represents more than 2,500 communications agencies and agency associations from 30 European countries that directly employ more than 120,000 people. EACA members include advertising, media, digital, branding and PR agencies. Their service offering includes the development of brand-building and promotional ad campaigns along with the creation and distribution of suitable ad formats across a range of media channels.

Preliminary remarks

The Article 29 Working Party has made guidelines on how to interpret the consent rules in the GDPR. These guidelines will also shape the formulation of the ePrivacy Regulation which is currently being negotiated. Both pieces of legislation are of great significance to the advertising industry and advertising agencies whose campaigns are increasingly delivered online. EACA agrees with the need to provide guidelines on the consent rules but is concerned of the current form of the text. The draft guidelines risk making the consent requirements so onerous that relying on consent could become virtually unworkable. Online advertising largely relies on consent as the sole legal ground for data processing, especially in the context of the ePrivacy Regulation.

Below you will find a commentary of the most critical points in the guidelines.

Guidelines

'Free / freely given'

Firstly, the GDPR requires consent to be 'free' / 'freely given'. The interpretation of 'freely given' in the draft guidelines prohibits making access to services conditional on consent to data processing. This is highly disconcerting given the role of online advertising, and particularly targeted advertising, in underpinning the internet economy and funding most of the free content and services that internet users rely on.

If applied, this interpretation of the draft guidelines would heavily impact publishers and other online businesses. If they can no longer deny access to users who reject targeted advertising, they would need to offer their services for significantly less or without any value exchange. Research shows that non-targeted ads bring [less than half the revenue of targeted ads](#). Only advertising which appeals to specific profiles is able to attract enough investment from advertisers.

Without cookies and other tracking tech advertisers are unable to deliver to consumers the targeted, tailored content which they have come to expect. Advertisers will be more susceptible to click fraud which cookies play a role in combatting. Revenue flow from advertisers to publishers, based on the current value that the interplay between publisher content and dynamic advertising creates, will inevitably decrease. The consumer will be asked to pay for content that they have previously accessed for free - which can only be expressed as a negative consequence.

For this reason, EACA calls on the Article 29 Working Party to recognise that service providers should have the

right to conduct their business in accordance with the principle of contractual freedom. No service provider should be obliged to provide full access to its service or content in the absence of users' consent if such consent is required for conducting the provider's business in accordance with the freedom to conduct a business and the right to property. Publishers should have the right to impose a subscription-based service for those users who refuse to give consent to data processing. As it is written in the draft guidelines with regard to Article 7(4) on page 10, this should be acceptable if the user can still access editorial content somewhere else without financial costs.

Granularity

The draft guidelines state that data subjects 'should be free to choose which purpose they accept' should a service involve multiple processing operations for more than one purpose. On the other hand, In its own [draft guidelines](#) published in March 2017, the UK Commissioners Officer suggested that for consent to be unambiguously indicated, each purpose for which personal data is to be processed would need to be separately explained and consented to 'unless this would be unduly disruptive or confusing'.

The ad tech ecosystem is complex and functions on the basis of a complex web of third party cookies to serve, track and verify delivery of content. At any one time a publisher website may play host to more than one hundred. If consent standards were to be applied as the guidelines suggest, a publisher would have to offer the opportunity to actively consent to each of those 100+ cookies prior to access to the site. The consent profile of that particular site would need to be fed back down the daisy chain to the relevant cookie issuers to confirm which could or could not run. This interaction would be replicated on every publisher site the user visits – a deeply frustrating and time consuming business - with likely inconsistency between the consents granted or, more likely, no consent being granted by that user. Consumers and publishers alike will suffer greatly from a diminished UX experience.

In order to find a balance, EACA calls on the Working Party to recognise that people should be able to consent to all purposes with one click, while they would be visible and also available for individual consenting. This would be in the spirit of the best user experience design, avoiding consumers' 'click fatigue' and a negative impact on user experience particularly in mobile environments.

Negative consequences / detriment

Secondly, the Recital language in the GDPR explains that consent will not be considered to have been freely given if the user would suffer 'detriment' if they refused to consent to the proposed data processing. The guidelines state that if the data subject has no real choice, feels compelled to consent, or will endure 'negative consequences' if they do not consent, then consent will not be valid. The nature of the inappropriate pressure or influence and detriment to the data subject can vary.

The user's detriment caused by refusing consent to data processing is interpreted very liberally in the draft guidelines. When there is an alternative, similar service which end-users can choose and which does not require consent, this should not be considered a 'detriment'. It would be the free choice of the end-user to decide which service to make use of.

EACA expresses concern that in the worst case, the draft guidelines could allow even a little inconvenience to render the consent invalid. For this reason, it is important to clarify the scope of 'negative consequences' and 'detriment'.

The role of browsers

Thirdly, the guidelines emphasise the role of browsers in providing settings for consenting to data processing. This has already been proposed under the draft ePrivacy Regulation regarding which EACA has been a strong advocate of minimising the role of browsers as gatekeepers.

The problem with giving browsers primary control over data processing preferences is that they could disable individual internet service providers from collecting and processing information in accordance with the law and user choices, and force them to rely on mechanisms put in place by a limited number of browsers developers. This is dangerous as such browsers/platforms are not only competing with online service providers for marketing revenue, but also increasingly for content. The guidelines risk concentrating market power in the digital space and aggravating existing and/or creating new competition concerns.

Furthermore, the guidelines do not elaborate on how to ensure that browsers satisfy all the consent requirements. It would be very challenging if not impossible for browsers to provide all the information for each website necessary to satisfy the information conditions of the GDPR. EACA therefore asks the Article 29 Working Party to place more emphasis in their guidelines on the development of market-based solutions rather than endorsing a few companies to act as gatekeepers. In addition, the final Guidelines should give clear guidance on how browsers can in practice satisfy all the information/transparency requirements under the GDPR.

Explicit consent

The fourth point is related to the guidelines' requirements for explicit consent. It is written that this could involve 'filling in electronic forms', 'sending emails' or 'uploading scanned documents with the data subjects' signatures'. EACA sees these as justified measures should certain data processing be of particularly sensitive nature. However, besides the above practices, EACA argues that more detailed wording of a consent request could be one way to demonstrate 'explicit consent'. The requirements of compulsory time-consuming extra steps are, already on their own, likely to hinder a lot of users from giving consent even when they fully understand and agree with the processing of their (sensitive) information.

These requirements would be too onerous should a large portion of normal online targeted advertising fall within its scope – a concern made evident in the Article 29 Working Party's draft guidelines on profiling and automated decision-making.

Furthermore, as written in our response to the draft profiling guidelines, EACA would like to avoid a situation where Article 22 of the GDPR is applied as a blanket to all categories of advertising which could potentially have a 'significant' effect on certain individuals. We emphasise this point because, according to the Working Party's profiling guidelines, processing can fall within the scope of Article 22 when individuals are not directly affected, but there is more likelihood than not that they will endure a substantial effect. The Guidelines could thus create confusion, as the lower-sounding threshold of 'substantial effect[s]' could be equated to significant effects. EACA calls on the Article 29 Working Party to review the Article 22 rules with this in mind.

Withdrawal of consent

Fifthly, the Article 29 Working Party's guidelines on consent state that it should be just as easy to withdraw consent as it is to provide it. When consent is obtained via electronic means through only one mouse-click, swipe or keystroke, data subjects must, in practice, be able to withdraw that consent equally as easily. Switching to another interface for the sole reason of withdrawing consent is not allowed.

EACA appreciates the intent of this interpretation but is concerned with how literally the rules are applied.

All websites where one can enter personal details do not offer the possibility to create a username and password to enable users to return later to manage their privacy settings. Lacking that, service providers and users are forced to go through the steps of a Subject Access Request, starting with the authentication of the person, which may require human intervention. As a consequence, the withdrawal of consent may take slightly more time. Furthermore, it is difficult to ensure that all the data is withdrawn in a timely manner if it has been transferred to third parties.

Retrospective effect

Finally, the interpretation of the Article 29 Working Party according to which it is not possible to switch from the legal base that was originally decided to another that would justify continuing the data processing under the new rules from 25 May 2018 onwards is challenging. Not all websites where consent has been previously requested did so according to all the rules valid for GDPR consent, if only for the reason of not having a privacy statement that satisfies the requirements of the GDPR. Should the requirements of legitimate interest and other legal safeguards under the GDPR be satisfied, EACA asks the Working Party to recognise that service providers should be allowed to switch to that basis. This would facilitate the transition to the new data protection rules.

We thank you for the opportunity to submit comments and remain at your disposal regarding the above.

Kind regards,

Dominic Lyle
Director General