



EMOTA Comments on the Art29WP Guidance on Consent and Transparency

In brief

- EMOTA strongly supports the objectives of the Art29WP in ensuring a smooth and timely application of the General Data Protection Regulation
- The guidance documents should be completed as soon as possible
- In this short position we point to a few areas where consistency is necessary (e.g. info provision)
- And some other areas where flexibility is necessary (counter-performance, specific information)
- It is crucial to avoid consent, information fatigue and overload
- The goal for the guidance should be to make the GDPR accessible to all, large and small
- Or more clarity is welcomed (children, etc.)
- Clarification is needed to ensure that existing consent should remain valid under the GDPR

General Remarks

EMOTA welcomes the openness of the Article 29 Working Party to integrate input from the various stakeholders regarding such important aspects as consent and the application of the General Data Protection Regulation. As EMOTA has been active in the past debates around the GDPR and involved in the previous consultations, we consider the current guidance documents on Consent and Transparency reflect to an important degree our perspectives.

You will find our comments below:

- EMOTA is concerned that while the changes brought by the GDPR will in practice be somewhat limited, these are not clear to many across the value chain and they bring increased complexity. One such case can be observed in the definition and requirements for consent.
- We call on policy makers to ensure the guidance documents are adopted as soon as possible – being concerned it is already late considering the GDPR will apply already on 25 May 2018.
- Given the complexity, we urge policy makers and enforcement bodies to take a more prominent **“risk based” approach** in the guidance, especially with a view to encourage the use of data by all market players, of all sizes.
- **Providing consent via electronic means:** A certain level of flexibility is needed as the technology channels evolve. Enforcement bodies should avoid being overly prescriptive. Overly strict guidance requiring special written consent procedures would not function in the modern online economy.
- **Ensure consistency** between articles 3, 13 and 14 and recitals 39, 42 in terms of the information provision obligation for a valid consent. Currently it seems that the requirements found in aforementioned legal requirements are not fully consistent and it can be unclear what information are controllers required to provide. The wording used by the Article 29 WP document “at least” is not suitable to achieve legal certainty. Taking the legal framework of the Directive 95/46/EC up, the information to be given should be limited to the most relevant as laid down in recital 42. The concept of **layered privacy notices** (WD 100) should be accepted also with regard to information obligations in the field of consent-based processing.
- **Information overload:** The Article 29WP suggests in the Transparency guidelines that controllers have to



inform data subjects of all the names of the data recipients. In a context where data subjects interact with thousands of information sources and webshops, providing the names of the recipients in each case would only lead to confusion and increased burdens for controllers (some companies will use a great number of processors at the same time, possibly hundreds). We consider it is more important and useful for the data subject to provide information on the categories of recipients as to ensure the data subject is informed on the type of processing and their rights.

- **Information and transparency:** The guidance should not go beyond the provisions found in the GDPR, for example, by suggesting that controllers and processors publish the legal grounds and their balancing test in the case of the legitimate interest.
- **Communication tools:** We welcome the openness of the Art29WP to encourage the use of icons, seals and certification schemes as a voluntary approach. Companies should be allowed to compete on providing the best service possible to consumers and data subjects.
- The GDPR guidance should aim provide for a solution in the **case of contracts based on counter-performance**. It should cover not only free of cost but also ad-based services like download against data but also competitions, raffles and so on. If controllers will not be able to couple such offers with consent in further processing for marketing purposes, these offers will cease to exist because of its lack of refinancing. We call the Article 29 WP not to be too strict in this field. It has to be pointed out, that also article 7.4 leaves a margin (“utmost”).
- **Detriment:** EMOTA opposes the perspective that compliance can only be achieved if controllers provide a perfect equivalent service which doesn’t require consent. This is not realistic and will result in extremely high costs for many smaller companies that won’t be able to rely on data collection for the improvement of their services.
- **Alternative controllers** should be able to rely on **Article 6.1.b (contract) as a legal ground** for the processing. We fear that the current position taken in the guidance would severely or even completely restrict the possibility to have such contracts where data is provided as counter-performance.
- **Legal grounds:** The Art29 WP documents state that consent is not the only legal ground available under the GDPR and it is also not superior or inferior to other legal grounds when used correctly. What is less clear is the interaction with the other legal grounds in Article 6 in the guidance document. The Regulation foresees that controllers and processors should base the processing on *at least one legal ground*. There can be instances where a controller meets the standard for both consent and the legitimate interest (revocation for consent could be a mechanism to object to the legitimate interest). Also the wording around the switching of legal bases is confusing and seems to need further drafting in order to ensure consistency.
- **Granularity:** EMOTA fears that many sellers will have difficulties in assessing their role and requirements in the context of consent when using third party services. EMOTA considers that the GDPR allows for a degree of flexibility in terms of granularity which should be used in order to avoid overburdening both sellers and consumers with information provision obligations. The GDPR specifies that consent can be obtained for one or more specific purposes. For example, if the processing involves the sharing of data with third parties or other group entities for the same operation, this should not require a specific consent each time and be considered as a different purpose.
- **Pre-ticked boxes:** The guidance should clarify that while pre-ticked boxes alone are not accepted as a valid consent under the GDPR, pre-ticked boxes can be part of the consent process as long as the conditions for affirmative action are achieved. Such a granular requirement together with the conditions for specific consent provision would make the system unworkable especially in cases where multiple parties are involved in the collection and processing.
- **Existing consent under Directive 1995/46:** we find it of utmost importance to have clarifications



confirming the consent collected under the 1995 Directive remains valid for the duration of the processing operation initially notified to the data subject. Requiring the re-confirmation of consent would be impossible considering the number of entities data subjects will interact with.

- **Children:** Regarding article 8.2 and the obligation to make reasonable efforts to verify that consent is given or authorised by the holder of the parental responsibility we ask the Article 29 WP to suggest a best practice on how this obligation should be fulfilled. More precision if necessary to ensure that the use of the term *child* does not result in confusion and additional requirements to produce specific terms and conditions for individuals above the consent threshold.
- **Verification of consent:** In the case of consent provided under parental responsibility it should be sufficient to collect payment card details without making any charge. Charging even small amounts to the card will not result in a higher degree of certainty that the parent is aware of the inscription and might even make parents more reluctant to provide the details out of lack of trust – since they are not the “initiator”, or could be blocked by the credit institution because it is typical that very small amounts trigger additional checks for fraud. In the same way, verification by email or other means should be possible not only in cases considered “low risk” – in addition to the fact that no clarity is provided on what this means.

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Contact:
Razvan Antemir
razantemir@emota.eu