

Cookies: the definition of consent

The draft General Data Protection Regulation, issued by the European Commission on 25 January, sets out requirements for online businesses to gain consent for using cookies and processing personal data. But obtaining consent may not be as straight forward as first thought. Robert Bond and Dominika Kupczyk, of Speechly Bircham, discuss exactly what is meant by gaining meaningful consent and what this means for businesses processing personal data.

EU consent

In terms of data protection there is an ongoing debate as to when and how an individual can meaningfully consent to data processing activities. With the announcement of the proposed EU General Data Protection Regulation on 25 January in which, amongst other things, there are various specific requirements in respect of consent, we take this opportunity to review what businesses need to do in order to ensure that they obtain meaningful consent from data subjects when they process their personal data.

In 2011 three key documents guided us towards the current interpretations of consent:

- Opinion 15/2011 of 13 July 2011 (WP 187) regarding 'the definition of Consent'.
- Guidance from the UK and French Data Protection Authorities on the consent necessary for the setting of cookies in May and November 2011; and
- Opinion 16/2011 of 8th December 2011 (WP 188) regarding 'Online Behavioural Advertising'.

The Definition of Consent

Article 29 of the Data Protection Working Party, in its Opinion 15/2011, set out - as a result of detailed analysis - their views on what is meant by consent. The Opinion states as follows:

- 'Consent is one of several legal grounds to process personal data. It has an important role, but this does not exclude the possibility, depending on the context, of other legal grounds perhaps being more appropriate from both the controller's and from the data subject's perspective.'
- 'Obtaining consent does not negate the controller's obligations under Article 6 (of the Directive) with regards to fairness, necessity and proportionality, as well as data quality.'
- 'The notion of control is also linked to the fact that the data subject should be able to withdraw his consent.'
- 'Transparency is a condition of being in control and for rendering the consent valid.'
- 'In which way can consent be expressed and when should it be sought in order to ensure that it is real consent...although the timing for seeking consent is not spelt out in the Directive, it is clearly implied from the language of the various provisions which indicate that, as a general rule, consent has to be given before the processing starts.'

The Opinion goes on to discuss the mechanism by which consent can be indicated and reminds us that in the Directive, Article 2 (h) refers to consent as 'any indication' of the data subjects' agreement. In the Directive Article 7(a) indicates that consent must be unambiguous and Article 8 talks about 'explicit' consent in relation to sensitive data. Moreover Article 2(h) specifically states that consent shall mean 'any freely given specific and informed indication of his wishes by which the data subject signifies

his agreement to personal data relating to him being processed.' In this sense unambiguous consent requires there to be not only no doubt as to the consent given but also that it is verifiable, and whilst expressed consent requires a positive signification of agreement it does not require 'signature' but on the other hand it must be more than 'opt out'.

So at this point in our analysis we see that the Article 29 Data Protection Working Party regard that, in general, consent has to be:

- under the control of the data subject;
- given after transparent and informed notice;
- indicated in some way that signifies agreement;
- indicated in relation to specific issues;
- unambiguous; but
- does not require signature in the traditional form of a paper signature.

In practice therefore if plain and intelligible and transparent information has been made available to a data subject about the reasons for the scope of and the impact of that data subject's personal data and/or sensitive data being processed, then the consequent action of the data subject whether it be the further continuation of a relationship or an online transaction or the signification of acceptance will all on the face of it equate to consent from an EU perspective.

UK and French Cookies Guidance

In relation to the Privacy Directive of 2009 particularly in relation to cookies the French Supervisory Authority (CNIL) specifically uses the English word 'permission' or 'accord' when referring to consent but to that end it is still 'any freely given, specific and informed indication of will'.

The Information Commissioner in the UK in the Cookies Regulation Guidance says that:

- 'Consent must involve some form of communication where the individual knowingly indicates their acceptance. This may involve clicking an icon, sending an email or subscribing to a service. The crucial consideration is that the individual must fully understand that by the action in question they will be giving consent'.
- 'The level of consent required for any activity has to take into account the degree of understanding and awareness the person being asked to agree has about what they are consenting to. A reliance on implied consent in any context must be based on a definite shared understanding of what is going to happen - in this situation a user has a full understanding of the fact cookies will be set, is clear about what cookies do and signifies their agreement. At present evidence demonstrates that general awareness of the functions and uses of cookies is simply not high enough for websites to look to rely entirely in the first instance on implied consent.'

In this specific instance of consent in relation to cookies the Information Commissioner's Office (ICO) takes the position that for consent to be meaningful the information given by a data controller must be transparent and unambiguous and above all capable of being understood by the data subject. This of course raises the question as to whether or not overly complex legal language defeats the chance of consent being deemed meaningfully given or obtained.

Opinion 16/2011

The Article 29 Data Protection Working Party issued a detailed opinion at the end of 2011

(Opinion 16/2011, of 8 December 2011) focussing on consent in relation to profiling or online behavioural advertising where the overall aim was to explain the need for absolute transparency and 'opt in' in relation to consent and by way of summarising the key points that we learn from the Opinion:

- transparency and informed consent cannot be achieved by unobvious notices;
- icons will only work if they are clearly understood by users;
- notices must be correct and complete; and
- consent is required in the case of cookies whether or not personal data is processed.

In a speech by Neelie Kroes in late December 2011, amongst other things, she said "the part which relates to cookies - Article 5(3) - means that providers need to obtain your consent to place or access cookies or other information on your computer or smart phone unless it is strictly necessary for a service you have already asked for. So if you log into a web service, the cookie that remembers that you are logged in is fine and indeed this makes our lives a whole lot easier online. But a cookie that is used to build a profile of what you are doing online is less ok - it might mean that your web surfing over time is tracked for example in order to match ads against your interests as determined from the profile. The use of such cookies requires your consent."

The International Chamber of Commerce (ICC UK) Cookie Guide

In addition to the regulatory guidance it may be valuable to refer to the current work of the International Chamber of Commerce UK (ICC) in relation to their Cookie Guide which is expected to be published shortly

and in respect of which I am chairing its Legal Expert Group. The Guide is designed to help website operators to provide information to users in a language they can understand and enable users to make an informed choice about whether or not to give their consent. ICC UK has developed four categories of cookies for website operators to use which are based on what cookies do. Each category has been given a definition in the Guide. The point of doing this is two-fold. First, it assists communication with website users by giving them standard notices explaining what cookies are used on a website and what they do. The onus is to give website users the knowledge they need to enable them to give meaningful consent. Secondly, it helps website operators themselves to categorise the cookies they use and assist them in selecting an appropriate method of obtaining meaningful consent to the use of cookies from users of their websites.

The way in which the notice, as set out in the Guide, assists in gathering consent from users will depend on the cookies concerned and the nature of the website, and it is a matter for the website operator to decide on the appropriate consent language. The Guide is intended to make it easier for the user to access information about cookies and be in an informed position to give consent in whatever way the website operator feels will constitute a specific and informed indication of the user's wishes. If the information given to users is consistent across different websites, users will quickly become familiar with what cookies are used and why. ICC UK is keen to develop initiatives that work for all businesses, but it is up to website operators to decide on how they

obtain users consent to the cookies they use on their site.

Some suggestions for methods of obtaining consent made by the ICO are referenced in the Guide and include:

- obtaining consent in the course of acceptance of website terms and conditions;
- settings-led consent - that is, obtaining consent as users through web settings;
- feature-led consent - that is, obtaining consent as users register for or 'switch on' website features;
- function-led consent - that is, consent obtained as a result of users initiating or activating website functions; or
- notice and choice mechanisms, such as sensitively deployed pop ups or header bars.

Draft General Data Protection Regulation

The announcement on 25 January that the draft Data Protection Regulation was published for debate allows us to look at that Regulation in so far as it addresses consent and currently there are a number of specific points that we should note namely:

- Recital 25 says that 'consent should be given explicitly by any appropriate method enabling a freely given specific and informed indication of the data subject's wishes, either by a statement or by a clear affirmative action by the data subject'.
- Article 6 states that 'processing of personal data should be lawful only if and to the extent that at least...the data subject is given consent to the processing of their personal data for one or more specific purposes'.
- Article 7 indicates that the conditions for consent are: (1) the controller should bear the burden of proving that the data subject has given consent for the processing of their personal data

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- for specified purposes;
- (2) if the data subject's consent is to be given in the context of a written declaration which also concerns another matter, the requirement to give consent must be presented distinguishable in its appearance from this other matter;
- (3) the data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal; and
- (4) consent shall not provide a legal basis for the processing, where there is a significant imbalance between the position of the data subject and the controller.
- Article 8 specifically deals with the processing of personal data of a child, indicating that if a child is under the age of 13 years then parental consent is required, but if the child is aged between 13 years and 18 years they themselves can consent but the language to enable consent to be meaningfully obtained must be appropriate to the age and understanding of the individual.
- Article 9 deals with special categories of data and reinforces that sensitive data cannot be processed unless consent is given - subject to a number of limited exceptions.

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