



Andrea Jelinek

Chair

European Data Protection Board

Rue Wiertz 60,

B-1047, Brussels

Belgium

27/10/2021

Follow-up Letter to the “Call for consistent interpretation of cookie consent requirement by the EDPB”

Dear Ms Jelinek

We are writing to you following our letter dated 23/07/2021 re. formal involvement of the European Data Protection Board (EDPB) in providing consistent EU-wide guidelines interpreting the requirements for valid consent to the use of cookies and similar technologies, for which we had received an acknowledgement of receipt. However, we did not have the opportunity to further discuss the practical consequences of various interpretations arising from various national data protection authorities (DPA).

Since our initial letter, we have been following closely the developments and we welcome with great appreciation the establishment of an EDBP taskforce on cookie banners. We understand that Gwendal Le Grand, former vice secretary-general of the French CNIL has joined the EDPB to lead the support of law enforcement and cooperation between DPAs. We are glad to see that EDPB is strengthening its organisational and human resources to tackle the aforementioned issues.

This first step relating to cookie banners will only focus on the visible part of currently diverging interpretations of consent requirements. Nevertheless, some other serious different approaches also deal with the scope of the consent itself and exempt cookies, as well as the right to object cookies which would become an unprecedented condition of validity of the consent requirement.

To elaborate further our concerns relating to the absence of a coordinated pan-European approach to the interpretation of prior user consent for the deployment of cookies, we wish to emphasize the following:

- The diverging regulatory guidance and enforcement by the relevant DPAs has led to significant uncertainty and confusion among organisations, especially where the interpretation of the e-privacy legal framework and the GDPR by the DPAs deviate from the text, spirit and intent of the respective legal instrument. This

is notably the case where some DPAs impose that a 'Reject' option prohibiting businesses from further soliciting consent from individuals. Accordingly, even though the adoption of EU-wide guidelines that provide consistent and practical directions for how organisations should address the cookie consent requirements is absolutely vital, it is important that such EU-wide guidance does not deviate from the text of the legal instruments by setting a bar not embodied within the EU legislation.

- As these issues are of a cross-border nature, and ultimately relate to the interpretation of GDPR's consent requirements, the adoption of such EU-wide guidelines should avoid permitting DPAs to circumvent the 'one-stop-shop' mechanism which ensures cooperation between DPAs in the case of cross-border processing. We believe that such understanding of the interplay between the ePrivacy Directive and the GDPR would form an important contribution to EDPB's role in ensuring the consistent application of the GDPR throughout the EU.
- In light of these complex issues, the professionals and industries have developed and put in place different compliance tools and mechanisms. For example, IAB's Transparency and Consent Framework (TCF) v2.0., a widely-adopted tool in the online advertising industry in Europe, takes into account various legal basis for processing for different purposes. This framework today represents mandatory condition to access online digital advertising market, since no publisher, no advertiser and no intermediary agent can run its activities without going through the TCF protocol and its related consent string requirements. However, the DPAs and the EDPB have been relatively silent on the implementation of such tools and mechanisms and their conformity with the legal framework. As the lack of legal certainty and consistency of the current legal position entails a heavy technical, financial and organisational burden on organisations, such organisations tend to follow, at a minimum, industry wide standards. It would be highly appreciated if EDPB could articulate a common analysis of such industry specific tools and mechanisms.

We would highly appreciate if EDPB is considering such harmonisation of regulatory guidance and what will be in the EDPB's agenda on these topics.

We would welcome the opportunity to discuss these issues with you further.

Yours sincerely

Signatories

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www.geste.fr

contact: Mrs. Laure de Lataillade (laure@geste.fr)

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- participating actively in strengthening a rapidly evolving profession, by defining common operating principles, as well as by sharing very diverse experiences and practices.

www.spiil.org

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Call for consistent interpretation of cookie consent requirement by the EDPB

Dear Ms Jelinek

We are writing to you in order to seek the formal involvement of the European Data Protection Board (EDPB) in providing consistent EU-wide guidelines interpreting the requirements for valid consent to the use of cookies and similar technologies.

Diverging regulatory guidance and enforcement

Since 2011, the European e-privacy legal framework has mandated prior user consent for the deployment of cookies, subject to some limited exceptions. Over the years, different approaches to compliance with this obligation have developed and following the GDPR's introduction in 2018, many data protection authorities (DPAs) across the EU have issued their own opinions of what amounts to valid cookie consent. However, in the absence of a coordinated pan-European approach to the interpretation of this requirement, diverging regulatory guidance has emerged across EU Member States. For example:

- The French CNIL recommends on cookie consent that 'Accept' and 'Reject' options should be given equal prominence and provided on the same screen, with the 'Reject' option prohibiting businesses from further soliciting consent from individuals. This position can be directly contrasted with the AEPD's position in Spain amongst others, which allows for the reject options to be provided in a second-layer interface. Meanwhile, the EDPB's own guidelines on consent make no reference to this requirement and instead indicate that organisations have liberty to develop a consent flow that suits their own circumstances.
- The Irish DPC indicates that details about the purposes for which cookies are used can be provided in a second-layer of information in order for consent to be considered informed, while both the CNIL and AEPD expect this information to be provided in the first-layer.

- There are express prohibitions on the use of cookie walls in the guidelines issued in Belgium, Italy and the Netherlands. Yet in France, the Supreme Administrative Court (*Conseil d'Etat*) ruled in July 2020 that the CNIL did not have the power, in a soft law instrument, to generally declare cookie walls unlawful and instead their legality should be determined on a case-by-case basis, notably on the notions of '*acceptable alternatives*' or '*equivalent services*' while interpreting '*freely given consent*'.

Due to these inconsistent regulatory approaches, the enforcement of the law has also been incoherent and ranged from inexistent to very strict.

Lack of certainty and consistency of the current legal position

The current uncertainty and inconsistencies in the interpretation and enforcement of the law have created a fragmented approach to consent in the EU's single market, which seriously undermines the objectives of the GDPR. Organisations seeking to comply with the law in relation to their cross-border operations are presented with a myriad of regulatory approaches to the same obligation. Therefore, while many organisations are trying, in good conscience, to comply with the regulatory framework, this is proving to be very challenging given the degree of divergence in the application of the law.

Data protection authorities are also likely to face increasing challenges in correctly applying the rules following the complaints that have been instigated by *noyb* against hundreds of companies. As you will no doubt be aware, these complaints make various allegations of non-compliance in connection with cookie consent mechanisms, many of which concern issues that are subject to the divergent opinions of DPAs that we have referred to above.

In summary, the lack of a pan-European interpretation of this obligation has led to significant uncertainty and confusion, which has become hugely detrimental to the effectiveness of the legal framework.

Why the EDPB has a vital role to play

It is clear that the only way in which these divergences in interpretation of the law can be adequately resolved is through the adoption of EU-wide guidelines that provide consistent and practical directions for how organisations should address the cookie consent requirements. Given that these issues are of a cross-border nature, and ultimately questions of interpretation of the GDPR's consent requirements, we believe the EDPB is the most appropriate body to undertake this exercise.

This would once again embody the important role that the EDPB has already played in providing guidelines on cookie walls and its opinion on the interplay between the ePrivacy Directive and the GDPR. It would also form an important contribution to the EDPB's role in ensuring the consistent application of the GDPR throughout the EU.

Accordingly, we urge you in your capacity as Chair of the EDPB to treat this matter as a regulatory priority and urgently seek the engagement of the EDPB as a whole to provide clarity and consistency. We would welcome the opportunity to discuss these issues with you further and look forward to hearing from you.

Yours sincerely

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