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## EU update



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#### A B S T R A C T

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This is the latest edition of the DLA Piper column on developments in EU law relating to IP, IT and telecommunications. This news article summarises recent developments that are considered important for practitioners, students and academics in a wide range of information technology, e-commerce, telecommunications and intellectual property areas. It cannot be exhaustive but intends to address the important points. This is a hard copy reference guide, but links to outside websites are included where possible. No responsibility is assumed for the accuracy of information contained in these links.

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## 1. EUROPE: Article 29 Working Party publish draft Guidelines on Transparency

*Richard van Schaik, Partner, DLA Piper Amsterdam*

On 12 December 2017, the Article 29 Working Party (“WP29”) published draft guidance on the obligation of transparency, to be found here.

This is an important topic, as transparency is intrinsically linked to fairness and the newly introduced principle of accountability under the GDPR. Please find the highlights below.

### 1.1. Transparency: Key elements

Chapter III of the GDPR provides the basis of the transparency principle. In particular Article 12 cuts this principle into the following elements:

#### 1. “concise, transparent, intelligible, and easily accessible”

The WP29 explains this requirement as follows:

- Information must always be presented efficiently and succinctly, in a way that is clearly differentiated from non-privacy related info (like contractual terms).

- The average member of the intended audience must be able to understand the information provided, which audience should be regularly reconsidered. To that end, using user panels are strongly recommended.
  - Lastly, the individual should immediately become aware of where the relevant information can be found. For apps, necessary information may never be more than “two taps away”, i.e. the information must be included in the app menu.
2. “clear and plain language” – particularly when providing information to children
- The WP29 explains this requirement as follows:
- Information must be simple and concrete, avoiding complex and technical or ambivalent sentences. Under-termined terms such as “some” or “often” and words like “might” or “may” should be avoided.
  - Moreover, translations must be provided in the languages spoken by the targeted individuals, which translations must be accurate at all times.
  - Lastly, where children or other vulnerable groups are targeted, the vocabulary, tone and style of the language shall be appropriate to this audience.

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3. “in writing or by other means, including where appropriate, by electronic means”

The WP29 explains this requirement as follows:

- Information must be in writing, but GDPR also allows other means. Where electronic means (e.g. websites) are used, the WP29 recommends multi-layered and navigable information rather than displaying such information in a single notice. Factors such as the device used and ‘user journey’ should be taken into account in finding the most appropriate modality. The WP29 strongly recommends the seeking of user feedback in this regard.
- Also, (push/pull) pop-up notices, hover-over notices, just-in-time notices and privacy dashboards where privacy preferences can be managed may be used. The WP29 prefers such dashboards to be tailored to the existing service architecture so that individuals are actually encouraged to use it.
- In addition, cartoons, infographics, flowcharts, SMS text messages, media notices and public signage may serve as useful information tools, as well as audio delivery in case of screenless (IoT) tools.
- Note that the use of supplementary standardized icons (which must be universally recognized overtime through the development of a code of icons) is strongly encouraged in view of a “multi-layered approach”.

4. “the information may be provided orally”

The WP29 explains that information may be provided orally upon individual’s request, whereby the controller should enable the individual to re-listen pre-recorded notices. Also, where individuals exercise their rights under Art. 15–22 and 34, the identity of the individual must be proven by other means before providing the oral information.

5. “free of charge”

As a last element, the WP29 explains that individuals cannot be charged for obtaining information, and the provision thereof may never be conditional upon goods or services.

### 1.2. Changes and exceptions

The last important WP29 notes relate to changes in privacy notices and the exceptions to the notification requirement:

- Changes must be actually noticed by individuals by using an appropriate modality (e.g. email) specifically devoted to such changes (instead of ‘covered’ in a marketing email).
- Important to note is that WP29 explicitly considers references to the effect that individuals must check the privacy notice regularly for changes not only insufficient, but also unfair (Art. 5(1)(a) GDPR).
- Additionally, even when no changes are at stake, controllers should remind individuals of the applicable privacy notice at appropriate intervals in case of ongoing data processing activities to ensure individuals remain well informed.
- With respect to exceptions, the WP29 notes that the exception provided for under Art. 14 GDPR must be interpreted narrowly, meaning that – amongst others – information may only be withheld in case the provision thereof is 100% impossible or nullifies the objectives of the processing.

### 1.3. What’s next?

Based on the current version of the guidelines, controllers are prompted to revisit all privacy notices currently in place to ensure that they adhere to the transparency requirements laid down in the GDPR. Notably, the WP29 seems to embrace the idea of the use of a multi-layered and navigable information approach, to be accompanied overtime by standardized icons. However, the final version of the guidelines has to be awaited as the current version is open for comments until 23 January 2018.

## 2. EUROPE: Article 29 Working Party publish draft Guidelines on Consent

### The DLA Piper privacy group

On 12 December 2017, the Article 29 Working Party (WP29) published draft Guidelines on Consent under the General Data Protection Regulation (GDPR). The guidelines expand on the WP29’s ‘Opinion on the definition of consent’ (July 2011), addressing the concept of consent in the context of the enhanced regulatory regime under the GDPR.

The Guidelines apply a strict interpretation of the principles that underpin valid consent in the GDPR. In the UK, they may be read alongside the separate draft GDPR consent guidance issued by the UK Information Commissioner’s Office (ICO) in March 2017.

### 2.1. Elements of valid consent

The Guidelines begin with an overview of the elements of valid consent under Article 4(11), reiterating that consent must be (i) freely given, (ii) specific, (iii) informed, and (iv) unambiguously indicated.

### 2.2. Freely given

In order to freely give their consent, data subjects must have a real choice. The WP29 notes that there are situations where, a data subject will not have real choice because of an imbalance of power in their relationship with the controller (e.g., between an employer and employee, or citizen and public authority). This is reasonably well understood and means employers should, by default, avoid reliance on consent as a lawful basis for processing.

The Guidelines go further and consider in some detail the challenges of collecting consent where the controller is seeking to “bundle” consent with a condition of performance of a contract with the data subject. The presumption is that consent cannot be said to be freely given if interlinked with services where either a withholding, or withdrawal of consent would lead to a detrimental effect on the data subject (e.g., being denied a particular service requested by the customer because consent is refused or withdrawn). While the WP29 appears to leave open the possibility that there may be circumstances where there is an absolute necessity to process personal data to perform a contract, there is clearly a strong presumption that linking consent to issues related to matters relating to

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