

This document has been drafted in personal capacity and for academic interest

Questions and comments

Regarding Guidelines 06/2020 on the interplay of the Second Payment Service Directive and the GDPR, Version 1.0, adopted on 17 July 2020

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Comments on chapter 3: explicit consent

3.1 Consent under the GDPR

Questions on the practicalities of the lawful processing of special categories of personal data.

(1) In principle, under GDPR the processing of special data categories is prohibited. What is the opinion of the EDPB on the practicalities for PSPs of finding out before the processing of special data categories if indeed any special data categories will be processed? Moreover, what is the EDPB's opinion on the practicalities of finding out before the processing of special data categories if any special data categories will be processed originating from silent parties?

a) Furthermore, if indeed any special data categories will be processed, in our opinion the processing would have to be based on either one of the two grounds:

- i) Article 9 (2) (a): the data subject has given explicit consent;
- ii) Article 9 (2) (g): processing is necessary for reasons of substantial public interest.

(1) If the processing is to be lawful on the basis of article 9 (2) (a) this would entail that the PSP would have to obtain explicit consent from every new customer. This brings us back to the practical side of the issue. What is the EDPB's opinion on the practicalities of asking for explicit consent? Moreover, what is the EDPB's opinion on the practicalities of asking silent parties for explicit consent?

(2) We recognize the practical issues of asking (silent) parties for explicit consent. We are therefore of the opinion that PSPs should be able to lawfully process special data categories data on the ground of article 9 (2) (g). Does the EDPB share this opinion? If this opinion differs, what is the reason for this consideration?

3.2 Explicit consent under PSD2.

(1) In guidelines 05/2020 on consent under the GDPR, the EDPB outlines the requirements for obtaining explicit consent under GDPR in chapter 4, page 20-22.

(a) In its guidelines 06/2020 on the interplay of the Second Payment Services Directive and the GDPR, under **.38**, the EDPB states that article 94 (2) PSD2, is a requirement of contractual nature and should be understood in coherence with the applicable data protection legal framework in a way that preserves its useful effect. As the EDPB refers to its stance from the EDPB letter on 5 July 2018, page 4, it

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seems the EDPB has reiterated its stance. We would be interested further clarification on this point, specifically on the following points:

- (i) As the EDPB states article 94 (2) PSD2 should be interpreted in the light of the GDPR, should one interpret 'explicit consent of contractual nature' in the same way as outlined in guidelines 05/2020 on consent under GDPR in chapter 4, page 20-22?
 - 1) If so, does this mean that if a PSP has obtained explicit consent and thus lawfully processes special data categories under article 9 (2) (a) GDPR, a PSP can assume that it complies with article 94 (2)?
 - 2) If not, we would be interested in clarification on the substantive conditions for explicit consent under Article 94 (2).
 - (ii) Regardless of whether article 94 (2) should be interpreted in the same way as outlined in guidelines 05/2020 consent under GDPR in chapter 4, page 20-22, does the EDPB concur that an additional (besides the applicable data protection law) requirement for lawful processing of personal data unintentionally creates an extra obstacle for certain fintechs regulated under PSD2? After all, for PISPs to process personal data lawfully they would have to base the processing on one of the grounds listed in article 6 GDPR *and* on explicit consent under article 94 (2) PSD2. In the light of one of the main goals of PSD2, this extra requirement seems to be unfair. Especially since some fintechs remain out of PSD2's scope.
- (2) Pursuant to article 33 (2) PSD2 the requirement laid down in article 94 (2) PSD2 does not apply to AISPs. We would be interested in hearing the EDPBs explanation of the rationale behind this exception, as AISPs might, process just as much sensitive data as PISPs.
- (3) Article 66 (2) and 67 (2)(a) of the PSD2 provides for the requirement of explicit consent for the provision of the payment services. Should these requirements of explicit consent be interpreted in the same way as outlined in outlined in guidelines 05/2020 consent under GDPR in chapter 4, page 20-22?

Lastly, we thank the EDPB for the initiative to allow the public to send their feedback on the guidelines 06/2020 on the interplay of the Second Payment Services Directive and the GDPR. We believe it is through public discussion, or regulatory conversations if you will, that better regulation comes to exist.