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Article 29 Working Party
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Comments on the Guidelines on Consent under Regulation 2016/679 (WP 259)

The General Data Protection Regulation (the “GDPR”) develops the concept of consent as used in the Directive 95/46/EC and in the e-Privacy-Directive further and provides further clarification and specification of the requirements for obtaining and demonstrating valid consent.

On 28 November 2017, the Article 29 Working Party adopted its WP 259 on “Guidelines on Consent under Regulation 2016/679”, which will be finalized. The Working Paper is a necessary contribution to the creation of legal certainty. From the perspective of the the German Association for Data Protection and Data Security (GDD), it is essential to provide practical guidance.

I. Existing consent relations

WP 259 p. 29 states that controllers are not automatically required to refresh all existing consent relations with data subjects if the respective consent has already been obtained under Directive 95/46/EC. Recital 171 further explains, that it is not necessary for the data subject to give his or her consent again if the manner in which the consent has been given is in line with the conditions of the GDPR.

The GDD holds the opinion that consent obtained under the old legislation already meets the standard of GDPR consent. Even if the GDPR may raise the bar in certain aspects: The principles of lawfulness and fairness based in the Charter of Fundamental Rights of the European Union encompass processing activities under Directive 95/46/EC as well as under the GDPR. The essence of fairness has not been altered.

For this reason, it is not necessary to push additional transparency information onto existing data subjects. The elements named in Artt. 13 and 14, specifically the right to withdraw consent, did not have to be present under Directive 95/46/EC and should not retroactively be considered a requirement for valid informed consent. Processors as well as data subjects require absolute certainty, whether consent once given remains

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a legal basis for ongoing processing activities. A restrictive view on recital 171 diminishes this legal certainty.

II. No need to refresh consent

WP 259 specifically mentions that there is no time limit in the GDPR for how long consent will last. Because of this there is no need to renew an effective consent. It seems inappropriate and disproportionately that consent should be refreshed at appropriate intervals, as WP 259 suggests on p. 20. The continuing right of access (Art. 15) always guarantees the data subject full access to desired information. To improve the information of the data subject and the enforcement of his rights, there is no need to impose an obligation on the practice to renew consent in intervals not defined in time. In addition to that, the data subject has the right to withdraw his consent at any time (Art. 7 para 3 sentence 1) and can thus invalidate a consent effectively. For these reasons, the GDD rejects this suggestion to avoid legal uncertainty and confusion.