

Anu Talus

Chair of the European Data Protection Board

Mr Moritz Körner
Member of the European Parliament

Brussels, 15 December 2023

by e-mail only

Ref: OUT2023-0099

Subject: Your letter to the EDPB of 9 November 2022

Dear Mr Körner,

Thank you for your letter of 9 November 2022 which contained your questions about the ‘Do Not Track’ function in Internet browsers and the related use of Article 21(5) GDPR. In this letter, we will also refer to the equivalent provision under Article 23(3) Regulation 2018/1725.

As a preface to our answer, the EDPB recalls that, under Article 5(3) Directive 2002/58/EC (‘ePrivacy Directive’) and in line with the CJEU’s judgment in C-673/17 *Planet49 GmbH*, a website operator is only permitted to use cookies that are not strictly necessary (including those used for tracking) where the user has actively consented to their use. The concept of consent is defined under the Article 4(11) GDPR and requires a ‘freely given, specific, informed and unambiguous indication of a data subject’s wishes’. These elements have also been interpreted by, *inter alia*, the EDPB Guidelines 05/2020 on consent¹. The EDPB also notes that, should a data subject wish to withhold their consent, there is no legal requirement for the data subject to ‘object’ to the request *per se*; rather, in such cases, the data subject simply does not provide their consent. Equally, Article 7(3) GDPR notes that data subjects ‘shall have the right to *withdraw* [their] consent at any time’ [emphasis added]. If, therefore, a data subject had previously given their consent but has now changed their mind, this would be effected by withdrawing that consent and not through an objection to the processing under Article 21(1) GDPR.

The EDPB further recalls that the material scope of the right to object is set out by Article 21(1) and (2) GDPR. Of these provisions, Article 21(1) GDPR only applies to processing which is necessary for the performance of a task carried out in the public interest under the Article (6)(1)(e) GDPR or to processing which is necessary for a legitimate interest under Article 6(1)(f) GDPR. Meanwhile, Article 21(2) GDPR is focused on processing performed for the purposes of direct marketing.

¹ EDPB Guidelines 05/2020 on consent under Regulation 2016/679, version 1.1 adopted on 4 May 2020, available at: https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-052020-consent-under-regulation-2016679_en



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While Article 21(5) GDPR may, therefore, be relevant to certain tracking activities, the EDPB notes that this provision should not be read as imposing a general requirement that website operator respect a user's Do Not Track settings. Further, a website operator wishing to use cookies which are not strictly necessary (including tracking cookies) should still take the required steps to actively obtain consent from users whose Do Not Track flag is set to permit tracking.

Regarding enforcement actions, the EDPB is aware that some complaints have been dealt with regarding websites' failure to respect Do Not Track signals. However, these have been dealt with as part of allegations of no or invalid consent, rather than under Article 21(5) GDPR or Article 23(3) Regulation 2018/1725, and the EDPB is not aware of any enforcement actions under either Article 21(5) GDPR or Article 23(3) Regulation 2018/1725 which relate to the Do Not Track function in Internet browsers *per se*. In this context, the EDPB also emphasises the importance of Article 5(3) ePrivacy Directive and notes the importance of the elements discussed above for future approaches to enforcement. Nevertheless, it is important to note that some supervisory authorities do encourage controllers to respect Do Not Track flags, and the European Data Protection Supervisor noted that respecting such flags, when set to not permit tracking, was a requirement for websites of EU Institutions and Bodies.

Finally, the EDPB would like to take this opportunity to reiterate our commitment to the protection of data subject rights. Thank you again for your letter and the EDPB sends its apologies for the delay in our response.

Yours sincerely,

Anu Talus