

Consent



“Nobody can hurt me without my permission”

Mahatma Gandhi

Article 7 of the General Data Protection Regulation (GDPR) sets out conditions for consent:

“Where processing is based on consent, the controller shall be able to demonstrate that consent was given by the data subject to the processing of their personal data.

If the data subject’s consent is to be given in the context of a written declaration which also concerns other matters; the request for consent must be presented in a manner which is clearly distinguishable from the other matters in an intelligible and easily accessible form.

The data subjects shall have the right to withdraw his or her consent at any time.”

Article 8 covers the issue of processing the personal data of a child as being only lawful:

“... if and to the extent that consent is given or authorised by the child’s parent or custodian.”

Data Protection Directive

The previous regulatory regime stated that consent must have been unambiguous, freely given and not given under compulsion or as a result of an act of deceit, and must have constituted a “specific and informed indication” of a person’s wishes. When the consent related to sensitive personal data – revealing racial or ethnic origin, political opinions, religious beliefs, trade union membership, physical or mental health or condition, sex life, or criminal offences committed or alleged to have been committed – the consent must have been explicitly given rather than by implication.

Issues encountered

The question over whether citizens had genuinely consented to the use of their personal data by businesses became a hot-topic under the former Directive and concerns were frequently raised regarding businesses seeking to point to an indication of consent based on “opt-outs”, implied consents or the burying of consents in contractual terms and conditions. It was in this climate that the GDPR was drafted.

Toughening up

The GDPR refers, at Article 4, to consent having to be “freely given, informed, specific and unambiguous”. This is a toughening up of the language used compared to the directive, which reserved this level of certainty solely to sensitive personal data. The indication of the data subject’s wishes must be either “by a statement or by clear affirmative language” and that (as stated in Recital 34) the consent will not be valid if obtained where there is “a clear imbalance

between [the position of] the data subject and the controller”.

Consent must be “unambiguous” and a data subject’s consent to the processing of their sensitive personal data must be “explicit”. Individuals must be able to withdraw consent without detriment.

In order to seek to fetter the ability of businesses to exploit the commercial value of data received beyond the reasons for the business having received it, the GDPR seeks to prohibit the “tying” of a user entering into a contract to the processing of data which is not actually necessary for the service to be delivered. Entities must seek separate consents for different processing operations and must do so in a transparent manner.

Challenge for businesses

The GDPR sees an end to implied consent models, an end to consent for processing employee data, and new rules on obtaining consent for children. The use of that data must be transparent. The changes may present a challenge to the business models of many entities, which should consider the manner and form of the consent that they obtain, in order to ensure compliance with the GDPR.

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