



**The PwC DPO voice - Consent - N°6 - June 2017 Edition**

“What is simple is always wrong. What isn’t, is unusable.”<sup>1</sup> This quotation from Paul Valéry is particularly apt when dealing with the issue of consent in relation to the processing of personal data.

At first glance, consent is rather appealing because it seems to be a very easy way to allow entities to legitimise anything possible and imaginable that can be done with data. From the way in which sensitive data is processed, to selling it and transferring it outside the European Union, everything is now possible... So just add a small paragraph in the terms and conditions in size-2.5 Times New Roman – job done! Afraid not: to the contrary, it’s very likely that data officers – who might be complacent with the ease of collecting data – will be the ones who are caught out.

Here are the reasons why caution should be exercised:

- **Any consent granted can be withdrawn.** A contingency plan must be drawn up regarding the processes, the operational risk and how to effectively manage withdrawn consent.
- **The data officer is responsible for proving that consent has been granted.** While proof of consent is free between legal persons, this is not the case when natural persons are concerned. Therefore, there must be an ad hoc mechanism that confirms that consent has not been withdrawn at any point in the life cycle of the data processed in this regard.

<sup>1</sup> This is an unofficial and literal translation of the original quotation, which is in French: “Ce qui est simple est toujours faux. Ce qui ne l’est pas est inutilisable.”

- **Consent must be informed and unambiguous.** Therefore, it must stem from an affirmative act (not a tacit agreement, such as a pre-ticked box) based on clear and comprehensible wording that is tailored to the data subject. The data subject must be informed in an indisputably transparent manner, and consent must be reobtained whenever the grounds for its collection change.
- **Consent must be free and specific.** The data subject must not be placed in a situation whereby they have no alternative other than to accept, either due to a relationship of subordination or because refusing would be detrimental to them.
- **The consent of a child aged under 16** must be authorised by someone with parental authority over that child. For this reason, a mechanism must be implemented that verifies the data subject's age and, where necessary, the existence of the relationship of parental authority.

Thus, you realise pretty quickly that although consent might look simple, it actually involves a far more restrictive regime.

Each item of personal data should be analysed, taking into account its purpose(s), the types of data concerned, the various flows, etc. and justifying the data processing based on legitimacy rather than mere consent. Although this will result in effort needing to be made, doing so will (among other advantages) enable entities to play their role in forming a data-processing register in accordance with the new Regulation, to be more proficient in data management and to contain the risk of disputes.

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