

The General Data Protection Regulation

The “reinforced” consent

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Esch-sur-Alzette (Belval)



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Outline

- Definition of consent
- Elements of valid consent
 - freely given consent
 - specific consent
 - informed and unambiguous consent
- Strengthening the data subject's rights
- Specific applications

Definition of consent (1)

GDPR (art. 4, point 11)

*“any freely given, specific, informed and **unambiguous** indication of the data subject's wishes by which he or she, by a **statement or by a clear affirmative action**, signifies agreement to the processing of personal data relating to him or her”*

Directive 95/46 (art. 2, letter h)

“any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed”

Definition of consent (2)

- Articles 7 et 8, recitals 32, 33, 42, 43, 54, 171
- Consent pursuant to directive 95/46 → valid if given in line with the conditions of the GDPR, if not:
 - ask for new consent
 - find another lawful basis for processing
 - stop the data processing
- Consent must be given prior to the processing activity
- Consent remains one of the six lawful bases to process personal data

Elements of valid consent

Valid consent

Freely given

Specific

Informed and unambiguous



Freely given consent

- **Conditionality**: a contract shall not be conditional on the data subject consenting to the processing of personal data not necessary for the performance of that contract / service
- **Granularity**: separate consent must be possible for different purposes
- **Imbalance of power**: freely given consent?
 - processing activities in an employment context
 - processing activities by public authorities

Specific consent

- *“the data subject has given consent to the processing of his or her personal data for one or more specific purposes”*
- New purpose → new consent
- Pre-formulated declaration of consent:
 - consent must be distinguished from other questions
 - declaration in an intelligible and easily accessible form
 - using clear and plain language

Informed and unambiguous consent

- Importance of the general right of information:
 - identity of the data controller
 - different purposes of the processing
 - existence of the right to withdraw consent, etc.
- Different manners to give consent:
 - oral or written statement
 - every conduct clearly indicating the data subject's acceptance
 - ≠ consent in case of silence, pre-ticked boxes or inactivity

Strengthening the data subject's rights (1)

- Obtaining explicit consent:
 - processing of special categories of data
 - automated individual decision-making
 - data transfers to third countries
- *“it shall be as easy to withdraw as to give consent”*
- right to be forgotten in case of withdrawal of consent

Strengthening the data subject's rights (2)

- Right to data portability
- Burden of proof lies with the controller
 - application of the “accountability” principle
 - foresee an archiving system to document consent
- Sanctions in case of violation of the conditions applicable to consent

Specific applications

- Children's consent:
 - information society services offered directly to a child (e.g. online games)
 - >16 years: lawful; <16 years: consent of the parents
 - a national law may provide for a lower age (>13 years)
- Processing for scientific research purposes:
 - purposes not fully identified at the beginning of a project
 - possibility of a more general consent
 - step by step consent in accordance with the progress of the project

A silhouette of a person's head and shoulders is centered on a light gray background. The silhouette is filled with a pattern of binary code (0s and 1s) in a light gray color. The background is framed by a red border on the left and bottom, and a blue border on the right and top.

Thank you for your attention !