

Consent



At a glance



- Consent is subject to additional conditions under the GDPR.
- Additional requirements include an effective prohibition on “*bundled*” consents and the offering of services which are contingent on consent to processing.
- Consent must also now be separable from other written agreements, clearly presented and as easily revoked as given.
- Specific rules will apply to children in relation to information society services.



To do list



Ensure you are clear about the grounds for lawful processing relied on by your organisation and check these grounds will still be applicable under the GDPR (see section on [lawfulness of processing and further processing](#)).



Consider whether rules on children online are likely to affect you, and, if so, which national rules you will need to follow when obtaining consent (see section on [children](#) for further details).



To do list (cont.)



If your organisation relies on consent to process personal data for the purpose of scientific research, consider offering data subjects the opportunity to consent only to certain areas of research or parts of research projects.



- Where relying on consent as the basis for lawful processing, ensure that:
- consent is active, and does not rely on silence, inactivity or pre-ticked boxes;
 - consent to processing is distinguishable, clear, and is not “*bundled*” with other written agreements or declarations;
 - supply of services is not made contingent on consent to processing which is not necessary for the service being supplied;
 - data subjects are informed that they have the right to withdraw consent at any time but that this will not affect the lawfulness of processing based on consent before its withdrawal;
 - there are simple methods for withdrawing consent, including methods using the same medium used to obtain consent in the first place;
 - separate consents are obtained for distinct processing operations; and
 - consent is not relied on where there is a clear imbalance between the data subject and the controller (especially if the controller is a public authority).



Degree of change

Commentary

Consent - a wider definition

Article 4(11) GDPR defines “the consent of the data subject” as “any freely given, specific, informed and unambiguous indication of the data subject’s wishes by which he or she by statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.”

The requirement that consent be “unambiguous” does not represent a change for practical purposes; Article 7(a) of Directive 95/46/EC (the “Data Protection Directive”) stipulated that where consent is relied on for making data processing legitimate it must be given “unambiguously”. Recital 32 suggests that this may be signified by:

“ticking a box when visiting a... website, choosing technical settings... or by any other statement or conduct which clearly indicates... the data subject’s acceptance of the proposed processing of their personal data. Silence, pre-ticked boxes or inactivity should therefore not constitute consent.”

Explicit consent is still required to justify the processing of sensitive personal data (unless other grounds apply (on which see section on [sensitive data and lawful processing](#)). In addition, explicit consent, in the absence of adequacy or other conditions, can be relied on under the GDPR for the transfer of personal data outside the EU (see section on [transfers of personal data](#)) and as one of the legal bases for the making of automated decisions relating to an individual (see section on [profiling and automated decision-taking](#)).

Steps to validity - distinguishable, revocable and granular

Article 7(1) GDPR requires that where consent is relied on as a ground for lawful processing, controllers should be able to demonstrate that consent was given by the data subject to the processing. The rest of Article 7 is dedicated to setting out the conditions for a valid consent. These are:

- Art 7(2): Consent to processing contained in a written declaration produced by the controller must be distinguishable from other matters in that declaration, intelligible, easily accessible and be in clear and plain language. Recital 42 cites the Unfair Terms in Consumer Contracts Directive ([Directive 93/13/EEC](#)) as the inspiration for these obligations. In practice, this will require consent to processing to be clearly distinguishable within broader contracts or agreements.

Recital 42 also notes that consent will be informed only where the data subject is aware of (at least) the identity of the controller and the intended purposes of processing;

- Art 7(3): Data subjects must have the right to revoke their consent at any time, and it must be as easy to withdraw consent as it is to give it. In practice, as a minimum this is likely to require organisations to allow consent to be withdrawn through the same media (e.g. website, email, text) as it was obtained. The GDPR acknowledges that the withdrawal of consent does not retrospectively render processing unlawful, but requires the controller to inform data subjects of this before consent is given; and
- Art 7(4): Where the performance of a contract, including the provision of a service, is made conditional on consent to the processing of data that is not necessary for the performance of that contract, this is likely to call into question the extent to which consent can be considered to be freely given.

Recital 43 indicates that consent will be presumed not to be freely given if,

- despite it being appropriate in the circumstances, there is no provision for separate consent to be given to different processing operations; or
- “the performance of a contract, including the provision of a service, is dependent on the consent, despite such consent not being necessary for such performance.”

As a result, the provision of a service should not be made contingent on the data subject’s consent to the processing of his/her data for purposes that are unnecessary for the provision of the service.



Where can I find this?

Articles 4(11), 6(1)(a), 7, 8 and 9(2(a))
Recitals 32, 33, 42 and 43

Children and research

Specific conditions apply to the validity of consent given by children in relation to information society services, with requirements to obtain and verify parental consent below certain age limits (see section on [children](#) for further details).

Recital 33 GDPR addresses consent that is obtained for scientific research purposes. It acknowledges that *“it is often not possible to fully identify the purpose of data processing for scientific research purposes at the time of data collection”* and states that:

- data subjects should be able to consent to certain areas of scientific research, where this meets *“recognised ethical standards”* for such research; and
- data subjects should be able to grant consent only to *“certain areas... or parts of research projects to the extent allowed by the intended purpose”*.

Language of consent

- The GDPR requires that consent be intelligible, informed, unambiguous etc. It is unlikely that consent will meet these requirements if the consent is in a foreign language incomprehensible to the individual. When Controllers are considering in which EU languages consent is required, it is likely the GDPR rules on targeting in the context of Territorial Scope may apply (see section on material and territorial scope). If an organisation ‘targets’ a particular EU jurisdiction, it seems reasonable that the consent should be translated into the local language. However, the converse position is not clear from the GDPR i.e. failure to target a jurisdiction may not rule out the requirement to obtain consent in that EU language.