ONTIER

PRIVACY AND DATA PROTECTION INTERNATIONAL TEAM

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NEW FEATURES OF CONSENT IN REGULATION (EU) 2016/679

The most commonly used method of legitimising the processing of personal data is through consent from the data subject. The GDPR introduces further restrictions and obligations on the Data Controller for obtaining consent.

Current situation

The processing of a data subject's personal data must be based on one of the grounds in Article 7 of Directive 95/46/EC which allows personal data to be processed when consent has been received from the data subject, however the following cases also apply:
(i) where it is necessary to enforce a contract in which the data subject is a party;
(ii) where it is necessary to comply with a legal obligation;
(iii) where it is necessary to protect the vital interests of the data subject;
(iv) where it is necessary to meet a public interest; or
(v) where the Data Controller has a legitimate interest to perform acts of processing.
Article 2(h) of Directive 95/46/EC defines consent as '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'. Article 7 requires unambiguous consent, while Article 8 demands a more rigorous form of consent for cases involving sensitive personal data, e.g. data on religious or philosophical beliefs. In these cases consent must be explicit (not just unambiguous).
The Article 29 Working Party is a data protection advisory and it has opined that unambiguous consent "must leave "*no doubt*" as to the data subject's intention to deliver consent." However, in practice, passive consent or consent based on inaction, have been tolerated e.g. 'opt-out' mechanisms.

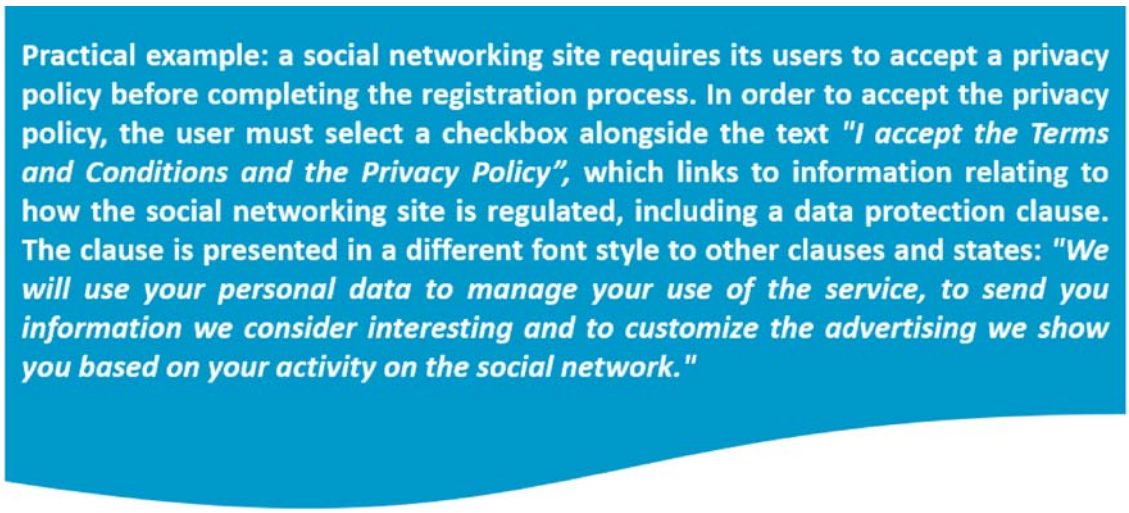
What's new?

The GDPR maintains the dichotomy between unambiguous and explicit consent established by Directive 95/46/EC. However, the GDPR modifies the concept of unambiguity, and extends the situations in which consent must be explicit.
Article 4.11 of the GDPR defines consent as '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.'
The most important change to consent introduced by the GDPR is that an active and affirmative act is required for consent to be valid. Recital 32 indicates that it is enough to select 'a box when visiting an internet website, […] or conduct which clearly indicates in this context the data subject's acceptance of the proposed processing of his or her personal data.' Further, it clarifies that 'silence, pre-ticked boxes or inactivity should not therefore constitute consent.'
Valid consent requires an active demonstration on the part of the data subject, and must also comply with the following new conditions from Article 7 of the GDPR:
- The Data Controller must be able to prove they have received consent.
- The Data Controller must obtain specific and independent consent for each process to be performed, so that the data subject has the option to accept certain purposes and reject others.
- When consent is given in the context of a written statement also dealing with other matters, the request for consent shall be shown in a distinctive way from the other matters. E.g. the use of capital letters, or different font colours or sizes.
- The data subject must be able to withdraw consent at any time by using a method as simple as the method used to grant consent.
- Consent must have been freely given. The existence of a clear imbalance of power between the data subject and the Data Controller could make it unlikely that consent was

freely given e.g. “where the controller is a public authority."
- The data subject must have been informed of certain circumstances before the submission of consent, such as the Data Controller’s identity or contact details.
The GDPR establishes that consent must be explicit when processing special categories of data. This includes not only the kinds of sensitive data already mentioned by Directive 95/46/EC, but also genetic and biometric data. Explicit consent is required when the Data Controller is going to perform profiling of data subjects or when consent is used to legitimise an international transfer of data to a state which does not ensure an adequate level of protection. The differences between explicit and unambiguous consent have been narrowed, given that the latter now requires an affirmative and active action from the data subject.
Finally, the GDPR introduces a specific regulation for processing the personal data of children in relation to offering information society services. Article 8 of the rule states that when a child is under a certain age, defined by each Member State (with a minimum limit of 13 years), the processing of data to offer them goods or services requires parental authorisation.

What to do to adapt?

Data Controllers who process personal data based on consent from the data subject should evaluate their protocols used to obtain that consent and adapt to the conditions described. Most importantly they must ensure their protocols require specific and affirmative action from the data subject.



Practical example: a social networking site requires its users to accept a privacy policy before completing the registration process. In order to accept the privacy policy, the user must select a checkbox alongside the text *"I accept the Terms and Conditions and the Privacy Policy”*, which links to information relating to how the social networking site is regulated, including a data protection clause. The clause is presented in a different font style to other clauses and states: "*We will use your personal data to manage your use of the service, to send you information we consider interesting and to customise the advertising we show you based on your activity on the social network."*

TEAM

Joaquin Muñoz Rodríguez (Spain)
Pablo Uslé Presmanes (Spain)

Ana Rocha (Portugal)
Ana Festas Henriques (Portugal)

Derek Stinson (UK)
Paula Enríquez (UK)

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Rua Vitor Cordon Nº10A, 4º piso - 1249 - 202 Lisboa | Portugal
Tel. (+351) 213 223 590 / Fax (+351) 213 223 599

Rua Pedro Homem de Melo, n.º 55 - 8.º piso - 4150 - 599 Porto | Portugal
Tel. (+351) 223 190 888 / (+351) 220 924 945

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