

To consent, or not to consent

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Numerous data leakage accidents, unauthorized transfers of personal data, processing without consent, email boxes full of direct marketing messages, etc., have motivated the European Commission to put forward a proposal for a regulation which substantially changes European privacy laws.

This article focuses on consent for data processing and on profiling and compares the current situation with the new regime.

European Commission to become a “super-data protection authority”?

The new regulation visibly increases the Commission’s influence over the EU privacy framework. National data protection authorities will continue to have competency “on the ground” to pursue individual cases. In order to strengthen compliance with privacy laws, they will gain power to impose significant fines (up to 2% of the company’s annual global turnover).

Telling people what you are doing with their personal data is not “consent”

Current legal provisions require that companies which process personal data must obtain freely given, informed and specific consent from the individuals whose data is to be processed. For processing of sensitive data, consent must be explicit. Depending on the circumstances, consent may take the form of an “opt-in” or an “opt-out”.

European Commission introduces “explicit” consent as a standard form of consent

The new regulation fundamentally changes this approach and states that consent shall generally be explicit. This means that it may no longer be possible to “hide” the consent in the General Terms & Conditions. In the online environment, such approach will effectively lead to many more “pop-up boxes” on the user’s screen.

Since the creation of the Internet, people have tried to get a better understanding not only of what users buy, but also which ads they click on or which websites they access

Several incidents have revealed that companies possess large databases full of personal data and consumer profiles. While companies believe that they own rights to such compilations (i.e. trade secrets or database rights), such databases have often been compiled without the consent of the individuals concerned. Most consumers hardly understand how tracking technologies work and have therefore very few opportunities to control how their personal

data is used. Consumers are unaware that their preferences are being tracked and built into huge databases.

Monitoring of pages visited by the users for an assessment of potential opportunities

Profiling means identifying a certain person with a certain group, observing or tracking user behavior (i.e. monitoring of visited pages or ads clicked on). It is often used for an assessment of opportunities or risks based on patterns in the past behavior.

The data necessary for creating profiles are obtained for example by making people disclose more information than necessary (failing to indicate that further disclosure of data is voluntary), when participation in the initial contract is made conditional on further disclosure of data or when the purpose of processing is not sufficiently described.

European Commission introduces stricter rules on profiling

In the new proposal, unless profiling could be justified under the contract with the user or provided for by law, data controllers will need to obtain explicit consent to create profiles. Passive or assumed consent will not be sufficient. A right to object with profiling will always need to be offered.

Consent given freely

Requesting people to provide more information than would normally be needed and making it a condition of the performance of the initial contract will not be considered as freely given.

Informed consent

If consent is to qualify as informed, it needs to be drafted in simple language that is easily understandable by an average user. It needs to be given to the individual directly, not just “be available somewhere”. Requirement to change default privacy settings or pre-ticked boxes will not constitute an informed consent.

Specific consent

If consent refers to an open-ended set of processing activities, it will not be specific. The wide consent contained in the General Terms & Conditions will not qualify as specific consent.

Explicit consent

Explicit consent is an express consent, i.e. written signature or filling out of the registration form. Patients who are informed that their medical file will be transferred to a researcher unless they object will not meet the requirements of explicit consent.

Opt-in consent

The user agrees with the processing after having been presented with a choice. Such consent must be given prior to processing. Opt-in consent is required, for example, for placing cookies on the user’s computer.

Opt-out consent

Allowing users to “opt-out” means giving them the possibility to object to processing. Within the content of an existing customer relationship it is allowed to offer similar products to the user (direct marketing). However, individuals should have the option of objecting to direct marketing.



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