

Consent: Some basic questions of policy and approach.

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Consent can be seen as the 'cure all' for privacy problems – the silver-bullet that empowers the individual - the gold standard of individual control. But this is only part of the story. In many cases consent just isn't feasible or desirable; in situations where you have no choice and maybe shouldn't have a choice, where you don't understand the consequences of giving or withholding consent or where you just can't be bothered to say yes or no all the time. But consent is special – it does give people informational power.

In European data protection law consent is often given a primacy that it doesn't always deserve. It is first on the list of 'legal bases' for processing personal data but that could be a drafting accident. There is no obvious rationale for consent coming first – it is no more reliable a basis for processing personal data than any of the other 'conditions for processing'. Organisations collecting and using information about people sometimes feel compelled to get their consent for this even though they could just get on with it; if for example, what they are doing is in their legitimate interests and does not override individuals' rights or freedoms – an approach that may well suit the individuals whose information they are using.

There is a real danger of 'consent fatigue', where being presented with constant privacy choices may well become a disturbing irritation. I think we see this already with cookies – how many times do I have to accept or reject cookies during an evening browsing the internet? Maybe what we want is for the services we use to run quietly in the background, operating in a fair and predictable way – with no nasty informational surprises – but with clear, meaningful choices given at appropriate times when they really matter; do you really want all your professional email contacts to automatically become your social-networking 'friends'? I think we need to do more research on where those sensitive points lie where people really do want to be given the opportunity to say yes or no. The 'default' privacy settings of the browsers, services etc. we use online are also critical – they need to come preconfigured in a way that most

people are happy with most of the time, so we can sit back and enjoy our online experience with the minimum inconvenience and effort on our part.

Some further thoughts

- The traditional view: consumers want more choice. This makes more control. This makes more privacy. But what do people actually want?
- To achieve this: more detailed privacy notices and more detailed consent-gathering mechanisms.
- In data protection law there are generally alternatives to consent – e.g. to process personal data where this is a legal duty or where it is in the data controllers' legitimate interests.
- Consent does not have any primacy as a 'legal basis' for processing personal data, even though it appears first in the list.
- However, the provision or withdrawal of consent does empower and provides choice and control in a way that the other legal bases do not.
- The 'cookie directive' was possibly last-minute and not subject to a great deal of debate. Has this empowered citizens or caused inconvenience with little privacy or control benefit?
- Did it fail to recognise the relatively low risk forms of personal identification associated with setting cookies?
- Did it fail to recognise the cookies make the internet work easily for people and that despite (probably quite high) degrees of technological unawareness, internet users might understand and accept this?

So when is consent appropriate?

- Where the law says so – e.g. electronic marketing rules
- Where the processing is likely to be unexpected or objectionable (secondary uses of health data)
- Where there are specific limitation rules on further use or disclosure – e.g. confidential medical or financial data
- Where it is a corporate objective as part of an 'ethical' approach to consumer relations.

So when *isn't* consent appropriate?

- Where in reality you have no choice – state information collection and use

- Where the effects of withholding consent would have prejudicial results – e.g. crime prevention
- Where the processing is likely to be expected and not objectionable
- For necessary and relevant data processing where you request a service and can't have it without certain data processing taken place

So what do people want?

- Unobjectionable processing to 'run in the background' in a fair, predictable way with the minimum personal effort
- Better corporate sensitivity to when consent is appropriate
- Control over the monetisation of their personal data – e.g. in telecoms contexts: do they have a right to this?
- Complex choice mechanisms in social networking contexts

Some questions

- What evidence is there for when people want to exercise choice over data processing?
- What sort of mechanisms do they want and when – time, complexity, repetition (e.g. cookies)?
- How far does consent implied from a relevant action take us?
- Will people 'pay for choice' – e.g. no-ad versions of phone apps?
- Are people getting better managing control over their personal data or do they have consent-fatigue?
- Can we expect people to become more 'activistic' in this space? Or their representatives / pressure groups?
- People can be unrealistic: healthcare without health records
- Are online alternatives to T&C type privacy notices and accessible 'real time' control mechanisms changing the landscape?
- Will the high-standard positive action, demonstrable consent requirement in the 'new' DP Regulation help?