



# Tensions on “Consent” under 2 years of GDPR

**Webinar, Cybersecurity Coalition**

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# Summary

Consent in the GDPR

The crisis of consent

Three tensions on consent:

- **Counterperformance**
- **Cookies**
- **Tension with legitimate interest in marketing, research and vulnerability**

# 1. Lawfulness of processing

## Art. 6 GDPR. Lawfulness of processing

(1) Processing shall be lawful only if and to the extent that at least one of the following applies:

- a. the data subject has given **consent** to the processing of his or her personal data for one or more specific purposes;
- b. processing is **necessary for the performance of a contract** to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
- c. processing is **necessary for compliance with a legal obligation** to which the controller is subject;
- d. processing is **necessary in order to protect the vital interests** of the data subject or of another natural person;
- e. processing is **necessary for the performance of a task carried out in the public interest** or in the exercise of official authority vested in the controller;
- f. processing is **necessary for the purposes of the legitimate interests** pursued by the controller or by a third party, **except** where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks

# In order to choose a legal ground... Article 6 + Articles 17,20,21

No basis is better than the others.  
However, different legal grounds give rise to different rights under the GDPR.

Sometimes, the processing must be 'necessary'

Would data subjects reasonably expect the processing to take place?

Do data subjects have a negotiation power or does the controller have a position of power?

What is the impact of such processing on the subjects?



	Right to erasure	Right to portability	Right to object
Consent			✗ but right to withdraw consent
Contract			✗
Legal obligation	✗	✗	✗
Vital interests		✗	✗
Public task	✗	✗	
Legitimate interests		✗	

Source: Information Commissioner's Office, Guide to the GDPR

## Different Standards for Consent in the GDPR

1. Mere “Consent” (Article 6(1)(a))
2. Child’s Consent + Parental Authorization (Article 8)
3. Explicit consent (Article 9(2)(a))
4. Explicit Consent for automated decision-making (Article 22(2))

## Basic requirements of Consent in the GDPR: Article 6(1)(a) + 7(4)



**Freely given.** This means giving people genuine ongoing choice and control over how you use their data.



**Explicit consent** must be expressly confirmed in words, rather than by any other positive action.



**Non conditional to the provision of a service** and **easy to understand** and presented separate from other terms and conditions



**Informed consent** must specifically cover the controller's name, the purposes of the processing and the types of processing activity



Obvious, **unambiguous** and require a positive action to opt in. The GDPR specifically bans pre-ticked boxes.



There is a **right to withdraw consent** at any time. The controller must inform data subjects about this right.



**There is no set time limit for consent.** The time up to which it will be valid depends on the contexts.



As a means to show accountability, the controller must **keep a record of all consents** to demonstrate they were obtained

# Free consent is not conditional to services

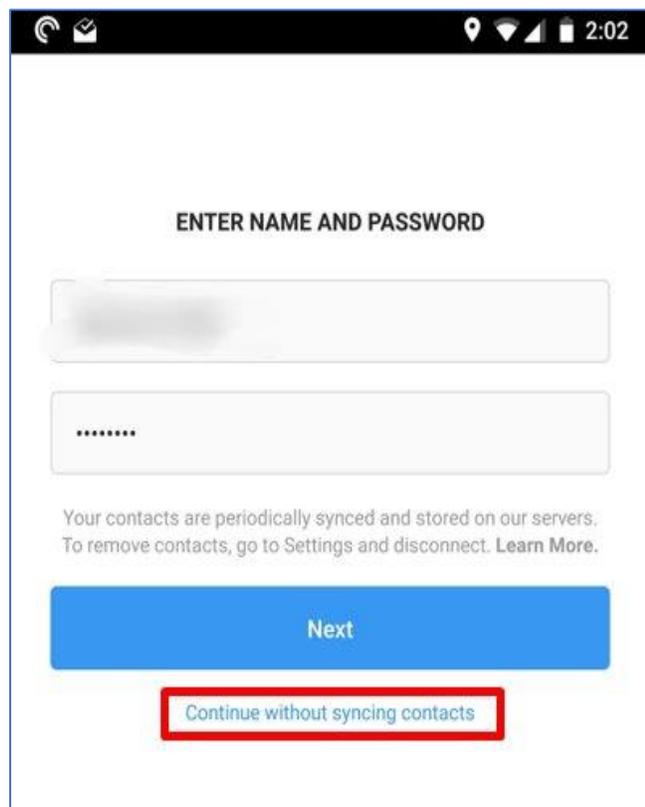
- When assessing whether consent is freely given, utmost account shall be taken of whether, *inter alia*, the **performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract (Art.7(4) GDPR)**

**In sum, consent is not “freely given” if asked in exchange of free services online (for personal data that are not strictly necessary for the contract)**

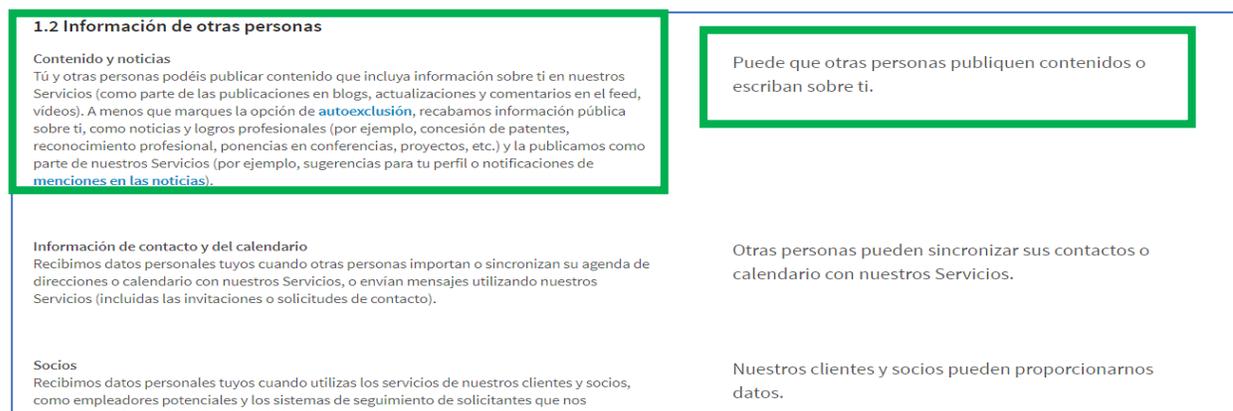
# Good and bad practices of Consent collection



**Instagram** tricks you into syncing all your contacts when picking a username by using unnoticed lettering



**Linkedin** provides a good practice of layered information to obtain informed consent, showing the more detailed information on the left column while showcasing a shorter and simple notice in the right column, using plain language



**European Commission** has clear cookies notice to obtain valid consent which enables the user to actively confirm whether they accept or refuse cookies.





### Topics

1. **GDPR**

2. [Cloud Security](#)

3. [Enterprise Security Architecture](#)

4. [NIS](#)

## Two-year anniversary of the GDPR: What does it mean for data subjects?

### A look back and ahead

On the occasion of the second anniversary of the GDPR, the Cyber Security Coalition and Beltug organized a series of webinars to evaluate the GDPR from the perspective of the data subject, to assess its effectiveness in actively enhancing individual control.

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# An Example from ICO (Guidelines of 2018)



## Example

An online furniture store requires customers to consent to their details being shared with other homeware stores as part of the checkout process. The store is making consent a condition of sale – but sharing the data with other stores is not necessary for that sale, so consent is not freely given and is not valid. The store could ask customers to consent to passing their data to named third parties but it must allow them a free choice to opt in or out.

The store also requires customers to consent to their details being passed to a third-party courier who will deliver the goods. This is necessary to fulfil the order, so consent can be considered freely given - although 'performance of a contract' is likely to be the more appropriate lawful basis.

# Other legal sources to consider when talking about consent

E-Privacy Directive (Directive 2002/58/EC (as amended by Directive 2009/136/EC))

- Article 2(f) and
- Article 5(3)

To know more:

Recital 43, GDPR  
EDPB, Guidelines  
05/2020 on  
Consent in the  
GDPR



**Guidelines 05/2020 on consent under Regulation 2016/679**

**Version 1.1**

**Adopted on 4 May 2020**

The crisis of  
consent

<input checked="" type="checkbox"/>	YES
<input type="checkbox"/>	NO

Ethics Inf Technol (2014) 16:171–182  
DOI 10.1007/s10676-014-9343-8

ORIGINAL PAPER

# The crisis of consent: how stronger legal protection may lead to weaker consent in data protection

Bart W. Schermer · Bart Custers · Simone van der Hof

## I AGREE... OR DO I? — A RIGHTS-BASED ANALYSIS OF THE LAW ON CHILDREN'S CONSENT IN THE DIGITAL WORLD

SIMONE VAN DER HOF\*

- Introduction.....
- Children in a data-intensive, hyperconnected and digital world.....
  - A. Datafication.....
  - B. Hyperconnectivity.....
  - C. Commercialization.....
- The notion of consent.....
  - A. Introduction.....
  - B. The double role of consent.....
  - C. Children's consent.....
    - 1. Children's Online Privacy Protection Act.....
    - B. General Data Protection Regulation.....
- Rights-based analysis of children's consent.....
- The rights-based approach under the UN Convention.....
- General principles.....
- Three core.....

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## 10 reasons why the GDPR is the opposite of a 'notice and consent' type of law

A 'notice and consent' privacy law puts the entire burden of privacy protection on the person and then it doesn't really give them any choice. The GDPR does the opposite of this.

 Gabriela Zanfir-Fortuna [Follow](#)  
Mar 13, 2018

## Turning Privacy Inside Out

Julie E. Cohen\*

em of theorizing privacy moves on two levels, t  
g of an inadequate conceptual vocabulary and the  
ng of an inadequate institutional grammar. Privacy  
ed to protect individual subjects, and so conventio  
rstanding privacy are subject-centered, but subject  
oaches to theorizing privacy also wrestle with deeply  
traditions. And privacy's most enduring institutional fo  
w from its insistence on placing the individual and in  
ontrol at the center. Strategies for rescuing privacy from  
ting both established ways of talking about instituti  
ons for designing institutions inside out e

# From the Data Subject perspective

- Consent fatigue,
- Consent overload
- Empirical reality reveals:
  - Data Subjects are uninterested
  - Transparency fallacy

# From the processor/controller perspective

- Difficult compliance
- Difficult conditions in case of further use

# Legal Tensions



No consent as counterperformance in the GDPR vs. Consent as currency in the *Digital Content and Digital Service Directive*



Consent validity in the GDPR vs. Cookies “easy” consent in e-Privacy



Consent vs. Legitimate interest in sensitive areas (marketing, art&entertainment, Vulnerable subjects, research)

# First tension: Consent as counterperformance: permitted or prohibited?

The GDPR (Art. 7(4) GDPR) affirms that consent for “unnecessary” personal data cannot be conditional to the provision of free services

The Directive 2019/770 on Digital Content/service (Article 3(1)) affirms that consumer law applies also to contracts where unnecessary personal data are “exchanged” for the provision of free consent or services

## ICO on consent as counterperformance (Guidelines on Consent, 2018)

The ICO's view is that it may still be **possible to incentivise consent to some extent**. There will usually be some benefit to consenting to processing. For example, if joining the retailer's loyalty scheme comes with access to money-off vouchers, **there is clearly some incentive to consent to marketing**. **The fact that this benefit is unavailable to those who don't sign up does not amount to a detriment for refusal**. However, you must be careful not to cross the line and unfairly penalise those who refuse consent.

# Legal Literature on the point

## Data Extra Commercium

Václav JANEČEK,\* Gianclaudio MALGIERI†

forthcoming in  
*S Lohsse, R Schulze and D Staudenmayer (eds), Data as Counter-Performance—Contract Law 2.0?*  
(Hart Publishing/Nomos 2019)

**Abstract**—Commerce in some data is, and should be, limited by the law (*data extra commercium*) because some data embody values and interests (in particular, human dignity) that may be detrimentally affected by trade. In this article, drawing on the Roman law principles regarding *res extra commercium*, we investigate the example of personal data as regulated under the EU Charter and the GDPR. We observe that transactions in personal data are not forbidden but subject to what we call a *dynamically limited alienability rule*. This rule is based on two dynamic variables: the nature of data and the legal basis for commercially trading such data (at primary or secondary level). Accordingly, in order to deal with such dynamism and the uncertainty it poses, we propose a general two-stage reasonableness test that should help legal practitioners, judges and law-makers in considering when trade in data is illicit and who (if anyone) shall be held responsible for this mischief. Finally, we show how the two-stage test and the limited alienability rule can advance European contract law and help enforce legal principles of *data extra commercium* in automated and autonomous data trading systems.

**Keywords:** alienability, contract law, data, data commerce, digital assets, Digital Single Market, GDPR, inalienability, ownership, personal data, *res extra commercium*, sensitive data, trade

See, eg, European Data Protection Supervisor, Opinion 4/17 on the Proposal for a Directive on certain aspects concerning contracts for the supply of digital content (EDPS 2017); R Robert and L Smit, 'The Proposal for a Directive on Digital Content: A Complex Relationship with Data Protection Law' (2018) 19 ERA Forum 159



## Second Tension: Valid Consent vs. Cookie Consent

# Tension: Valid Consent vs. Cookie Consent

- Read together the GDPR (Articles 6(1)(f) and 7) and E-privacy Directive (Article 2(f) and Article 5(3))
- The first require strict conditions for Valid Consent, the latter (seems to) permit implicit consent
- The second one is *lex specialis*, but outdated
- More and more DPAs and Courts are giving more value to the GDPR

## CJEU, Planet49, 1 October 2019

«It is not inconceivable that a user would not have read the information accompanying the preselected checkbox, or even would not have noticed that checkbox, before continuing with his or her activity on the website visited» (§55)



The **e-Privacy Directive** and the **GDPR** must be interpreted as meaning that **the consent referred to in those provisions is not validly constituted if, in the form of cookies**, the storage of information or access to information already stored in a website user's terminal equipment **is permitted by way of a pre-checked checkbox which the user must deselect to refuse his or her consent.** (§88)

+

**Processing duration must be clarified!**

# Lessons from CJEU, Planet49

- For cookies consent not e-Privacy Directive alone, but together with the GDPR
- Implicit consent never valid: it should be explicit, real alternative, not opt-out
- Clarify the duration of processing
- The “average” data subject may not read Cookies privacy information

## The EDPB on Cookies and Consent (few weeks ago) Guidelines 05/2020 on GDPR (*and Not on e-privacy*)

39. In order for consent to be freely given, access to services and functionalities must not be made conditional on the consent of a user to the storing of information, or gaining of access to information already stored, in the terminal equipment of a user (so called **cookie walls**)<sup>27</sup>.

40. Example 6a: A website provider puts into place a script that will block content from being visible except for a request to accept cookies and the information about which cookies are being set and for what purposes data will be processed. There is no possibility to access the content without clicking on the “Accept cookies” button. Since the data subject is not presented with a genuine choice, its consent is not freely given.

41. This does not constitute valid consent, as the provision of the service relies on the data subject clicking the “Accept cookies” button. It is not presented with a genuine choice.

## Cookies

Als uw website of applicatie cookies en andere trackers installeert en/of leest op de computers, smartphones of tablets (of andere eindapparatuur) van uw gebruikers, moet u dan hun toestemming verkrijgen? ▼

Als u cookies voor publiekmeting (ook wel statistische of analytische cookies genoemd) wilt installeren en/of lezen, heeft u dan toestemming nodig van de gebruiker van uw website of applicatie? ▼

Hoe verkrijgt u een geldige toestemming? ▼

Kan de voortzetting van het surfen op een website gelden als een toestemming? **No!** ▼

Kunt u uit de browserinstellingen voor cookies afleiden dat er toestemming is verleend? **No!** ▼

Mag u een "cookiewall" plaatsen? **No!** ▼

Moet u een "cookie policy" of "cookiebeleid" aannemen en publiceren op uw website of mobiele applicatie? ▼

Hoe lang kunnen cookies worden bewaard zonder dat u een nieuwe toestemming hoeft te verkrijgen? ▼

Kunt u sociale netwerk-plugins ("vind ik leuk" van Facebook, "Tweet button" van Twitter, "+1" van Google...) zonder voorwaarden opnemen in uw website of mobiele applicatie? ▼

Over welke tools kan een internetgebruiker beschikken om cookies te beperken, te vermijden of te verwijderen? ▼

# DRAFT RECOMMENDATION

ON THE PRACTICAL PROCEDURES FOR COLLECTING THE  
CONSENT PROVIDED FOR IN ARTICLE 82 OF THE FRENCH DATA  
PROTECTION ACT, CONCERNING OPERATIONS OF STORING OR  
GAINING ACCESS TO INFORMATION IN THE TERMINAL  
EQUIPMENT OF A USER (RECOMMENDATION "*COOKIES* AND  
OTHER TRACKERS")

This document is a courtesy translation of the original official  
recommendation in French.

In the event of any inconsistencies between the French version and this  
English courtesy translation, please note that the French version shall prevail.

## Layered

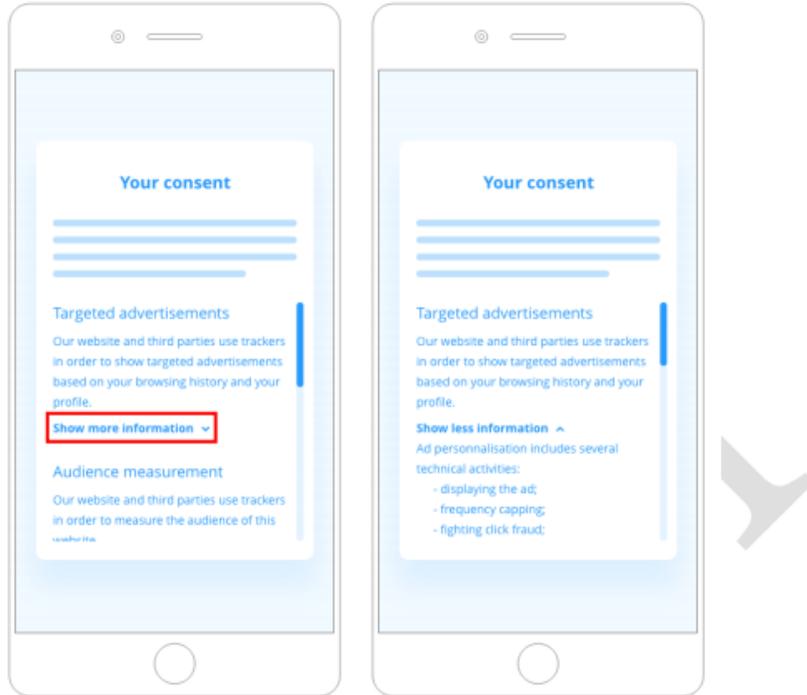


Figure 1 - The details of the purposes are available under a drop-down button that the user can activate on the first level of information.

# The CNIL Draft Recommendation

## Ubiquitous

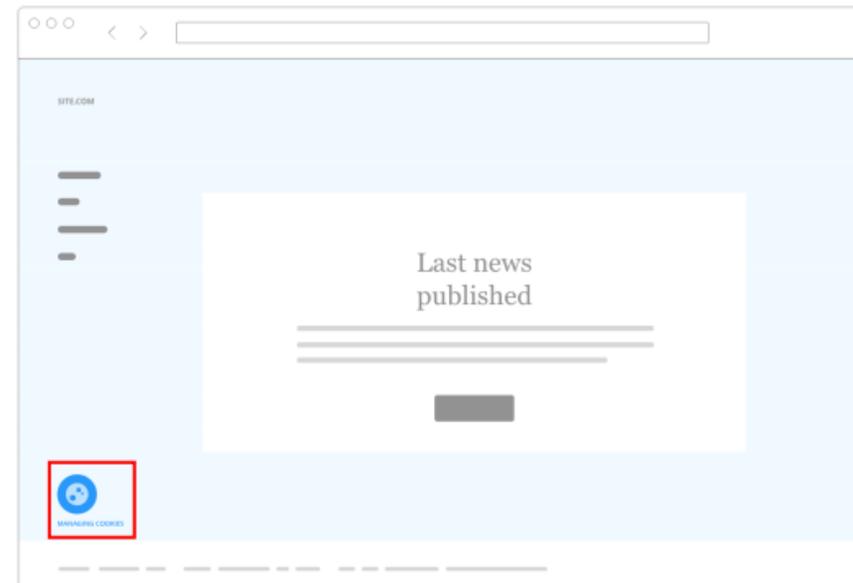


Figure 3 - Example of parameters accessible on all the pages of the site by means of a static "cookie" icon located at the bottom of the screen allowing the user to view the updated list of those responsible for the processing operation(s).

*Free, not conditional*

# The CNIL Draft Recommendation

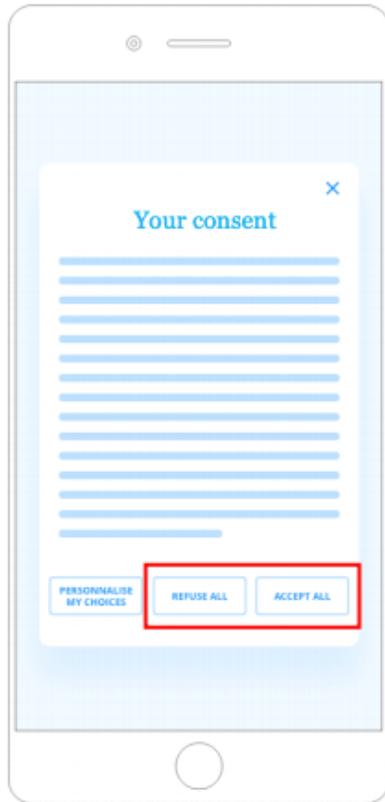


Figure 5 - It is possible to offer global accept and reject buttons, for example by presenting "accept all" and "reject all" buttons that are equally emphasized.

*Granular*

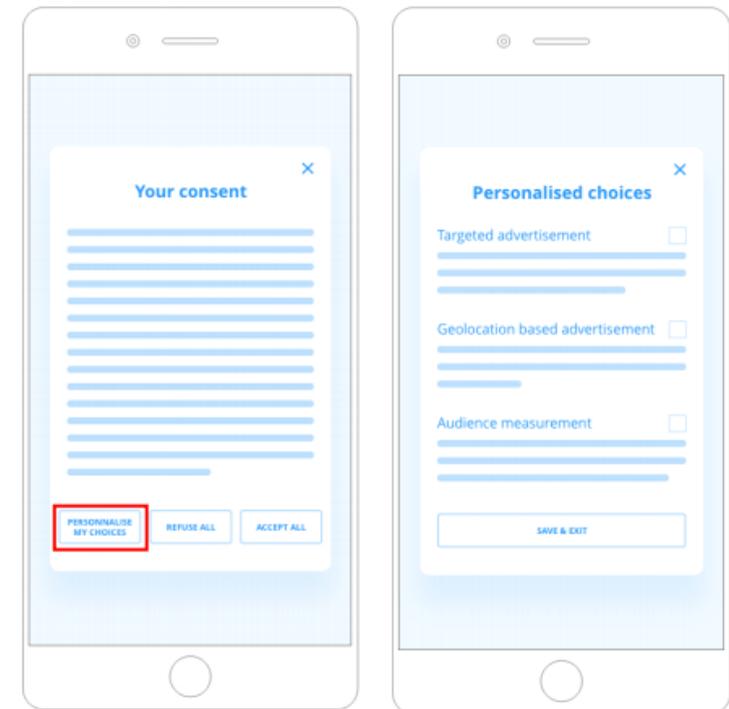


Figure 6 - The possibility of granular consent can be offered on a second level of information via a "customize my choices" button inserted on the same level of information as the links or buttons allowing "accept all" and "refuse all".



[Nick Kivits](#) — woensdag 3 juni 2020, 13:57 | 0 reacties, [praat mee](#)

## STER: reclame personaliseren met advertentiecookies heeft geen toegevoegde waarde



# Third tension: Consent vs. legitimate Interest

*In particular in 3 delicate areas:*

- *Marketing*
- *Research*
- *Vulnerability*

# The alternative between Consent and Legitimate interest: re-reading Art. 6

## Art. 6 GDPR. Lawfulness of processing

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- e. processing is **necessary for the performance of a task carried out in the public interest** or in the exercise of official authority vested in the controller;
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Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks

# In order to choose a legal ground... Article 6 +

No basis is better than the others.  
However, different legal grounds give rise to different rights under the GDPR.

Sometimes, the processing must be 'necessary'

Would data subjects reasonably expect the processing to take place?

Do data subjects have a negotiation power or does the controller have a position of power?

What is the impact of such processing on the subjects?



	Right to erasure	Right to portability	Right to object
Consent			✗ but right to withdraw consent
Contract			✗
Legal obligation	✗	✗	✗
Vital interests		✗	✗
Public task	✗	✗	
Legitimate interests		✗	

Source: Information Commissioner's Office, Guide to the GDPR

# For marketing purposes: is it better 6(1)(a) or 6(1)(f)?

## Reasons for choosing consent

Article 29 Working Party, Opinion on Legitimate Interest affirmed that Legitimate interest is applicable just in non intrusive cases of behavioural marketing, where purposes of profiling are strictly limited to the provision of the service in the future. Consent is recommendable.

Borgesius (2015): Consent always preferable

Vs

## Reasons for choosing Legitimate Interest

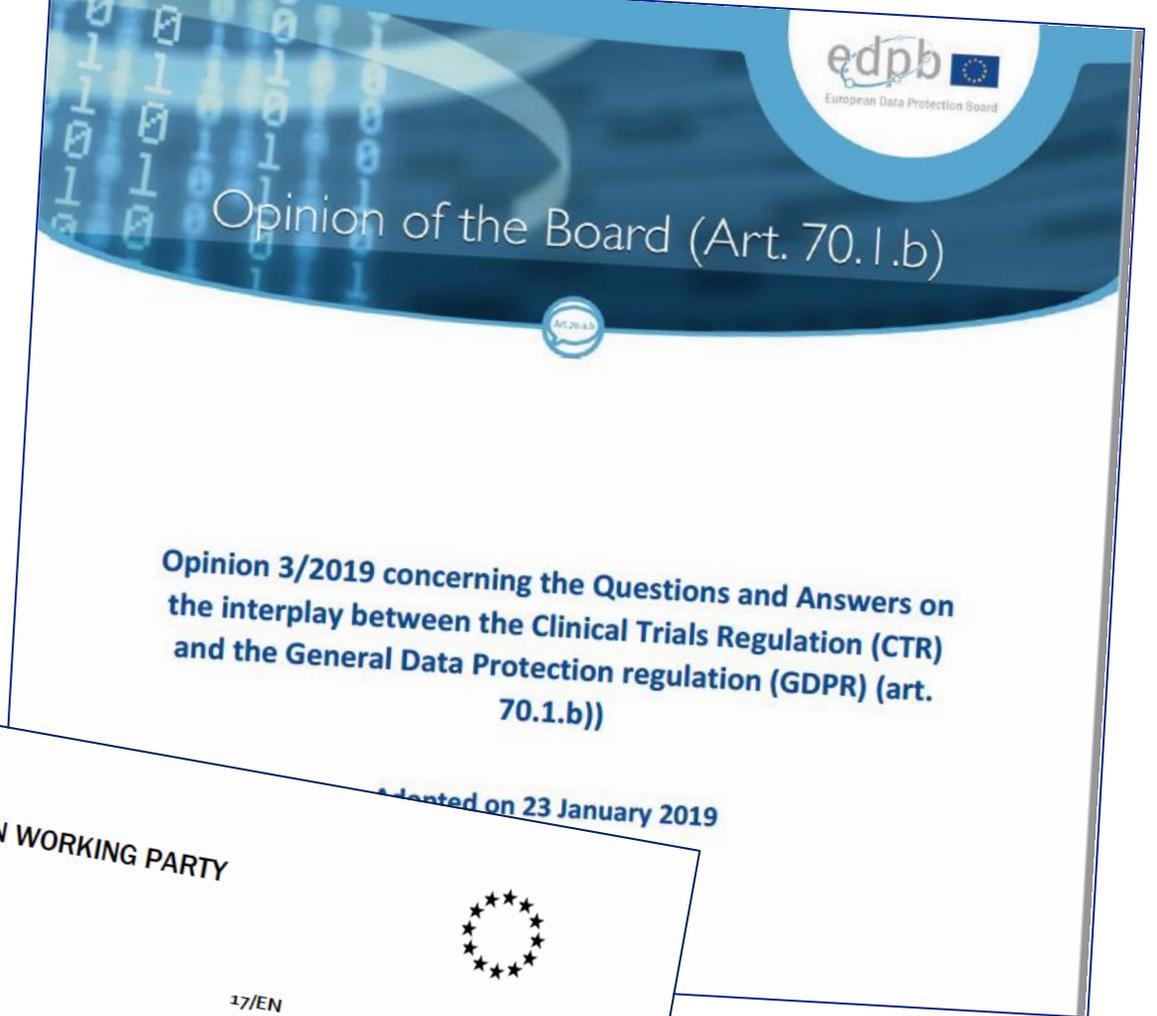
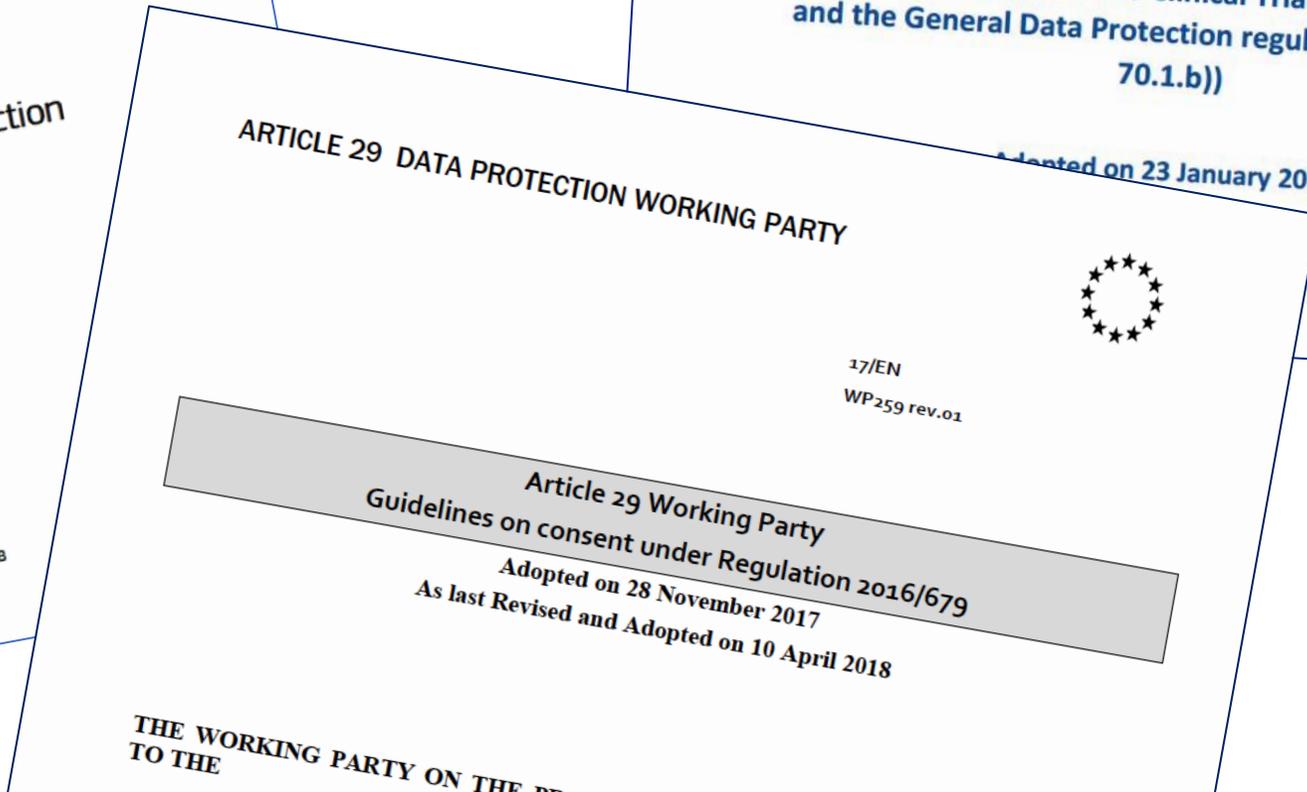
Maybe Legitimate Interest better because: Recital 42 «The processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest»

Balancing test

The right to object gives more protection to subjects in case of marketing (Art. 21(2) and (3))

Empirical evidence that consent is meaningless for marketing

# Consent or legitimate interest in Data processing for Research?



Gianclaudio Malgieri

# The case of Scientific Research

Consent (Arts. 6(1)a and 9(2)a)  
or  
legitimate interest/public interest + 9(2)i/j?

EC Guidelines: Consent as first! (EC sees it as the highest form of *awareness*)

vs.

EDPB on CTR: Consent as last resource (under specific circumstances)!

# Vulnerable data subjects: Consent vs Legitimate interest

Recital 43: No consent in case of significant power imbalance! (e.g., vulnerable individuals)

WP29 on Consent: not in case of subjects' vulnerability

vs

WP29 on Legitimate interest and on Purpose Limitation: In case of Vulnerable Individuals, always consent

# Vulnerable data subject: Consent vs Legitimate interest

Recital 43: No consent in case of significant power imbalance! (e.g., vulnerable individuals)

WP29 on Consent: not in case of subjects' vulnerability

*Processing-based vulnerability*

vs

*Effects-based vulnerability*

WP29 on Legitimate interest and on Purpose Limitation: In case of Vulnerable Individuals, always consent

Gianclaudio Malgieri

# To read more

## **On Legitimate Interest:**

- *Kamara, I., & De Hert, P. (2018). Understanding the Balancing Act behind the Legitimate Interest of the Controller Ground. In E. Selinger, J. Polonetsky, & O. Tene (eds.), The Cambridge Handbook of Consumer Privacy (pp. 321-352). Cambridge: Cambridge University*

## **On E-privacy and the GDPR:**

- V. Papakonstantinou & P. De Hert, 'Big data analytics in electronic communications: A reality in need of granular regulation (even if this includes an interim period of no regulation at all)', *Computer Law & Security Review*, 2012, vol. 36
- Elena Gil González, Paul De Hert & Vagelis Papakonstantinou, 'The Proposed ePrivacy Regulation: The Commission's and the Parliament's Drafts at a Crossroads?' in Dara Hallinan, Ronald Leenes, Serge Gutwirth & Paul De Hert (eds.), *Data Protection and Privacy. Data Protection and Democracy*, in vol. 12 in the Series *Computers, Privacy and Data Protection*, Hart Publishing, 2020,

Thank You



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