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The Concept of Consent in the Protection of Informational Privacy

Consent as a voluntary and informed choice forms, or is at least purported to form, an important basis for the processing of personal information. A person's ability to consent to the processing of their personal data is one of the conditions under the EU data protection regime that make the processing by commercial data controllers fair and lawful.

The existence of real consent is often questionable in many of the contracts consumers enter into with online service providers, in particular, in relation to individuals' consent to the use of their personal data by online service providers. The emergence of user content generated online services (like online social networks services), whose commercial success depends on the disclosure by their users of substantial amounts of personal data brings this problem to a head. In privacy policies used by online service providers, consent is often "implied" on the basis of complex (and often unread) "fair information notices" that grant the service provider wide-ranging rights to process personal data, often for purposes unrelated to the service provided to users. In addition, one can observe a growing tendency among service providers to use technological means to obtain user consent, for example in the form of default privacy settings and pre-ticked boxes. Often, little information is provided to users on how these settings can be reversed and how users' objection to certain forms of processing or their withdrawal of consent can be signified. Users are faced with a kind of Hobson's choice: either to accept the provider's terms or to refrain from using the services they provide.

This paper first traces the role of concept of consent in informational privacy and the current discussions on consent during the revision of the EU Data Protection Directive; then questions the reliability of the concept of consent by examining empirical evidence of current practices followed by user content generated services gathered in the course of a Europe-wide study of privacy policies and technological measures used to obtain user consent. By looking at developments on consent in other areas of law, it will argue that the current weakness in the concept of consent is not a 'new' issue and findings and models used in other areas of law may be used to address some of the failures of the consent model in informational privacy