

ARTICLE NO. 4

CONSENT RULES UNDER THE VIETNAMESE DRAFT LAW ON PERSONAL DATA PROTECTION AND THE GENERAL DATA PROTECTION REGULATION

Abstract: *This Article provides a comparative overview of Vietnam's Draft Law on Personal Data Protection ("**Draft Law**") and the EU General Data Protection Regulation ("**GDPR**"), focusing specifically on data subject consent. The GDPR has become a global standard for data privacy, emphasizing valid and informed consent as a core requirement for lawful data processing. Similarly, the Draft Law introduces significant obligations for businesses to obtain and manage consent in a transparent and accountable manner. This article examines the key consent-related provisions in both regulations, the compliance challenges they present, and their broader role in safeguarding individual privacy and promoting responsible data practices.*

Keywords: #PersonalData #GDPRvsDraft Law #DataPrivacyLaw #LegalFramework

I. Data subject's consent under the Draft Law

The Draft Law defines Data Subject Consent as clear, voluntary, and affirmative information given by the data subject permitting the processing of their personal data.

Content of Consent: The Draft Law requires that data subjects must be informed about the type of personal data being processed, the purpose of processing, the organizations or individuals involved in the data processing activities, as well as the rights and obligations of the data subject. This ensures that consent is fully informed, enabling individuals to make conscious and deliberate decisions regarding their personal data.

Form of Consent: The Draft Law stipulates that consent must be expressed clearly and transparently. Acceptable forms of consent include written statements, voice recordings, ticking an opt-in box, consent syntax in messages, selecting technical settings to signify agreement, or any other action that clearly indicates consent. This provision underscores the need for a demonstrable and unambiguous expression of the data subject's will.

Silence is not Consent: The Draft Law explicitly states that silence or non-response cannot be construed as consent. This establishes a higher standard for obtaining consent, ensuring that individuals actively and consciously provide their permission. It reinforces the principle that meaningful consent must involve a positive act by the data subject.

Furthermore, the Draft Law provides for the right to withdraw consent, ensuring that individuals maintain control over their personal data by allowing them to revoke their consent at any time. The withdrawal of consent must be respected and does not affect

the lawfulness of data processing activities carried out prior to the withdrawal. Upon receiving a request for withdrawal, the data controller or processor must inform the data subject of any potential consequences arising from such withdrawal. Once consent is withdrawn, all parties involved must immediately cease the processing of the relevant personal data, ensuring full compliance with the data subject's decision. However, the Draft Law has defined personal data processing to include both storage (which is ongoing and is one of the bases for any other personal data processing actions), deletion, and destruction (which can take place after the data subject withdraws consent). Immediately ceasing data processing is theoretically and practically inappropriate and does not protect the rights and interests of the data subject.

II. In comparison to the “consent” under GDPR in EU

When comparing the provisions on consent under the Draft Law with those under GDPR, it is evident that both emphasize the form and requirements of consent. Both regulatory frameworks aim to ensure that consent provided by data subjects is voluntary, specific, informed, and unambiguous.

2.1. Primary mechanisms for obtaining consent: Opt-In and Opt-Out

Both the Draft Law and the GDPR acknowledge 2 (two) primary mechanisms for obtaining consent: opt-in and opt-out.

Under the GDPR, **opt-in** requires an explicit action from the individual to signal their consent to data collection and processing. This could involve activities such as ticking an unchecked box or clicking a "subscribe" button. Opt-in is the preferred and, in many cases, the mandatory mechanism for consent under the GDPR.

Opt-out under the GDPR provides a pre-selected option for consent but must offer a clear and straightforward method for individuals to withdraw their consent, such as through an unsubscribe link or preference management settings. However, the GDPR discourages reliance on opt-out mechanisms for obtaining valid consent, reserving it only for very limited circumstances.

Despite the general alignment between the Draft Law and GDPR regarding the voluntary, specific, informed, and clear nature of consent, the GDPR provides a more detailed framework for valid consent under Recital 32, Article 4(11), and Article 7 of GDPR. These provisions establish specific criteria that consent must meet to be considered valid. Under the GDPR, consent must have 7 (seven) key features:

- **Unbundled:** Consent requests must be presented separately from other terms and conditions. Consent cannot be a precondition for accessing a service unless necessary for service provision.

- Active: Consent must be obtained through an affirmative action by the data subject. Pre-ticked opt-in boxes are explicitly prohibited.
- Clear: Requests for consent must be worded clearly and understandably, without the use of confusing language, double negatives, or hidden opt-out mechanisms.
- Granular: Individuals must be given separate options to consent to different types of data processing wherever appropriate.
- Named: The consent request must identify the organization seeking consent and any third parties who will rely on the consent.
- Easy to Withdraw: It must be easy for individuals to withdraw consent at any time, and organizations must clearly inform individuals how to do so.
- Documented: Organizations must maintain records of consents obtained, including what the data subject was told and when and how consent was given.

From the above content, it is easy to see that the Draft Law currently does not expressly regulate the use of pre-ticked boxes as a method of obtaining data subject consent. This omission presents significant risks to the integrity of consent and the protection of data subjects' rights.

Without an explicit prohibition, data controllers or processors may exploit this gap by pre-selecting consent options, thereby undermining the principle that consent must be a clear, affirmative, and informed action taken by the data subject. Pre-ticked boxes create a presumption of consent without requiring any positive act from the individual, leading to a higher likelihood of individuals unwittingly agreeing to the processing of their personal data without genuine understanding or intent. It increases the risk of inadvertent consent, particularly in complex or lengthy forms where individuals may overlook pre-selected options. Consequently, data subjects may be exposed to unwanted or unauthorized data processing activities, potentially resulting in privacy violations and broader misuse of their personal information.

2.2. Electronic consent methods under the Draft Law and the GDPR

When comparing the methods of obtaining consent under the Draft Law, it is notable that the Draft Law explicitly prescribes a specific method for obtaining consent in the electronic environment, namely requiring data subjects to tick a consent box.

In contrast, under the GDPR—specifically Article 12(1)—the means of obtaining consent are described more broadly as “...by electronic means,” without specifying a particular method. This broader phrasing allows for greater flexibility in how consent can be obtained, accommodating various technologies and evolving communication practices.

It can thus be observed that obtaining consent by “ticking a consent box” is merely one example of providing consent through electronic means. By narrowly specifying only one method, the Draft Law potentially limits the flexibility for both data controllers and data subjects, particularly as new technologies offer alternative ways for individuals to affirm their consent clearly and unambiguously. Therefore, it would be advisable for the Draft Law to adopt a more flexible approach, similar to the GDPR, by recognizing a wider range of electronic means through which valid consent can be expressed.

III. Consent withdrawn

Under Article 7(3) of the GDPR, people have the right to withdraw their consent at any time, and doing so should be as easy as giving it. Consent is only valid if it can be reversed without hassle. While giving and withdrawing consent don't have to be the same action, withdrawing should be straightforward. For example, if consent is given online through a click, swipe, or keystroke, withdrawing it should follow a similarly simple process. If consent is granted via a platform—such as a website, app, or device interface—users must be able to withdraw it using that same platform.

Importantly, users withdrawing consent shouldn't face obstacles like fees or reduced service quality. Once consent is withdrawn, the organization processing the data must stop and cannot use another legal reason to continue.

According to EDPB guidelines on Consent under Regulation 2016/679, once consent has been withdrawn, the personal data need to be deleted unless it can be processed on another legal ground (for example storage requirements or as far as it is a necessity to fulfil the contract).

IV. Processing may occur without the data subject's consent

The Draft Law provides for specific circumstances under which personal data may be processed without the data subject's consent. These circumstances include:

- To protect the life and health of the data subject or another individual in emergency situations;
- The disclosure of personal data in accordance with legal provisions;
- The processing of data by competent state authorities in cases of national defense, national security, public order and safety emergencies, major disasters, or dangerous epidemics; or in situations where there is a threat to national defense or security that has not yet reached the level requiring a declaration of emergency; as well as for the prevention and suppression of riots, terrorism, crime, and legal violations as prescribed by law;
- To perform contractual obligations between the data subject and relevant agencies, organizations, or individuals under the law.

For activities of state authorities that are stipulated under sector-specific laws.

In these cases, the regulations recognize the necessity of processing personal data without explicit consent to protect essential interests, maintain public interests, or fulfill legal obligations. Such exceptions seek to strike a balance between the protection of privacy rights and the legitimate interests and obligations related to public welfare or legal compliance.

However, the Draft Law lacks clear definitions and specifications regarding the scope of these exceptional cases, the limits of data processing without consent, and the competent authorities responsible for determining when these exceptions apply. The absence of detailed guidance raises concerns over potential abuse of these provisions, which could lead to unjustified infringements on personal data privacy.

In contrast, the GDPR provides more detailed and precise conditions under which personal data may be processed without the data subject's consent. Under Article 6(1) of the GDPR, consent is only one of several lawful bases for processing personal data. Processing may also be justified under the following grounds:

- The performance of a contract to which the data subject is a party;
- Compliance with a legal obligation to which the data controller is subject;
- Protection of the vital interests of the data subject or another natural person;
- The performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
- The legitimate interests pursued by the data controller or a third party, provided that such interests are not overridden by the data subject's fundamental rights and freedoms.

This structured approach under the GDPR offers clearer criteria for non-consensual data processing, ensuring greater transparency, accountability, and protection for data subjects. In comparison, the Draft Law would benefit from adopting similarly detailed and stringent conditions to minimize the risks of arbitrary or disproportionate interference with personal data rights.

V. Challenges

The Draft Law outlines several scenarios where personal data may be processed without the data subject's consent but fails to define these exceptions with sufficient precision. The lack of clear definitions, boundaries, and criteria for applying these exceptions raises the risk of arbitrary interpretation and misuse. Unlike the GDPR, which provides a detailed and structured framework for processing without consent, the Draft Law should clearly articulate the scope, limits, and safeguards applicable to each

exception to ensure greater transparency and protect against potential abuse of personal data.

The Draft Law should broaden its scope of acceptable forms for obtaining consent to be consistent with GDPR standards. Expanding the methods would enhance flexibility and practicality for data controllers and processors while still upholding the essential principles of voluntary, informed, specific, and unambiguous consent. This would also facilitate better adaptation to evolving technologies and business practices, ensuring that the consent mechanisms remain effective and user-friendly across various platforms and communication channels. A more flexible approach would encourage compliance while preserving the data subject's rights and autonomy.

Explicitly Prohibit the Use of Pre-Ticked Boxes: The Draft Law should clearly stipulate that the use of pre-ticked boxes, default settings, or any other form of passive consent mechanism constitutes an invalid method of obtaining consent. Instead, consent should only be deemed valid when it results from an active, informed, and deliberate choice made by the data subject. By explicitly prohibiting passive consent practices, the Draft Law would not only reinforce the requirement for meaningful consent but also promote greater transparency and accountability in personal data processing activities. Furthermore, adopting this approach would align Vietnam's legal framework with international best practices, particularly those established under GDPR, thereby strengthening the overall protection of data subjects' rights.

The Draft Law should further refine its provisions on data subject consent by adopting more comprehensive, clear, and flexible standards. Strengthening these requirements would better safeguard personal data rights and promote transparency and accountability in data processing activities.

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