

The freely given consent and the “bundling” provision under the GDPR

Computerrecht 2017/153

Under European data protection law, consent of the data subject is one of the six grounds for lawful processing of personal data. It is such an important ground that lawmakers considered it necessary to provide a legal definition of consent. One of the conditions under this definition is that it needs to be “freely given.” The General Data Protection Regulation (GDPR)³ has further expanded on this concept in Article 7(4). It refers to a situation under which consent might not be considered “freely given.” If consent is invalid because it is not freely given, the processing is usually unlawful. Consequently, a legal basis for processing is missing. Therefore, this is an important provision. Yet the wording of this new provision is vague and its scope is unclear. Thus, the question arises as to how Article 7(4) should be applied. In this paper, the authors tease out the assessment criteria for the application of this provision on the basis of its text, structure and history. These criteria will then be applied to hypothetical cases in the final section.

1. Introduction

As a starting point, consent indicates that the data subject agrees with data processing and also presupposes that he or she is aware of the consequences of consenting.⁴ Similar argument can be found in the Article 29 Working Party (Working Party), in the Opinion on consent, which highlights that consent brings control over personal data to the data subject.⁵

In addition, the relevance of consent is recognized by the EU Charter of Fundamental Rights⁶ in the Article 8(2), on the right to the protection of personal data. Article 8(2) pro-

vides that, alongside the principle of fairness and purpose limitation, processing of personal data can be based on the consent of data subject or other legitimate basis. According to Working Party, consent can be seen as “an essential aspect of the fundamental right to the protection of personal data.”⁷

The Data Protection Directive⁸ introduced the definition of consent⁹ as “any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed.” A slightly adapted definition of consent also exists under the GDPR.¹⁰ According to Recital 32, the indication of the wishes of the data subject needs to be an affirmative act that is freely given, specific, unambiguous, and informed. If all of these conditions are met, consent is considered valid.

Unlike the Data Protection Directive, the GDPR provides further clarification of some of the conditions of consent. The term “informed” means that the data subject is at least informed about the identity of the controller and the purpose of the data processing.¹¹ “Specific”¹² refers to the purpose of the data processing, and, as such, consent should relate to all processing activities and if there are multiple purposes, it should be explicitly given for each of them.¹³ The term “unambiguous” is not explicitly defined in the GDPR, the Opinion on consent offers some clarity on this term. It points out that there should be “no doubt” that the data subject had the intention to consent. The controller should ensure that there are clear procedures in place to make sure consent is clearly given and not merely inferred. In order to do so, the controller’s request for consent must be made “in an intelligible and easily accessible form, using clear and plain language.”¹⁴

1 Bojana Kostić is a Research Master student at the Instituut voor Informatierecht of the University of Amsterdam. She is a lawyer with previous work experience in human rights, including digital rights. Emmanuel Vargas Penagos is a Research Master student at the Instituut voor Informatierecht of the University of Amsterdam. He is a lawyer with a specialisation in journalism from Los Andes University. He works at the Foundation for Press Freedom in Colombia (FLIP) in subjects related to the freedom of expression and access to public information. Additionally, he has also worked with the Colombian government on the same subjects.

2 The authors would like to express their gratitude to Dr. O.L. (Ot) van Daalen for his guidance and support during the process of writing this article.

3 Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, Official Journal of the European Union, L 119/1.

4 Peter Blume, The inherent contradictions in data protection law, *International Data Privacy Law* 2(1): 26-34, 2012, p. 29.

5 Article 29 Working Party, “Opinion on the definition of consent” (WP 187), 13 July 2011, p. 2.

6 European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02.

7 Article 29 Working Party, “Opinion on the definition of consent” (WP 187), 13 July 2011, p. 5.

8 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal L 281.

9 Article 2(h) Data Protection Directive.

10 Article 4(11) GDPR, For clarification: the definition of consent under the GDPR introduces that the consent has to be expressed by a statement or by a clear affirmative action in addition to the other elements that are the same as in the Data Protection Directive.

11 Recital 42, other relevant information is listed in Recital 39: [i]n particular, information to the data subjects on the identity of the controller and the purposes of the processing and further information to ensure fair and transparent processing in respect of the natural persons concerned and their right to obtain confirmation and communication of personal data concerning them which are being processed.

12 For further analysis see: Article 29 Working Party, “Opinion on the definition of consent”, WP 187, 2011, p. 17-19.

13 Recital 33 and 39.

14 Article 7(2).

Several Articles¹⁵ in the GDPR refer to the requirement of “explicit” consent, most notably in the context of sensitive data processing. However, this condition is not specifically mentioned in the definition of consent.¹⁶ Explicit consent means that the data subject has the ability to actually demonstrate the willingness to consent by clicking a box or changing some specific settings, or actively expressing the statement in another way, with the result that consent is clearly seen as an affirmative and explicit act. Pre-ticked boxes, opt-out solutions, or silence do not lead to an indication of wishes, and therefore do not constitute valid consent.¹⁷ In sum, implicit consent is not allowed when the GDPR requires “explicit” consent.

Under the GDPR, the term “freely given” is not explicitly defined. From Recital 42, it can be inferred that freedom of choice and the ability to withdraw consent could be regarded as the main elements of “freely given.” Furthermore, Article 7(4) provides a circumstance that may affect “freely given” consent: the performance of a contract, including the provision of a service that is made dependent on the consent to data processing, which is not necessary for the performance of said contract.

The Article 7(4) situation is sometimes called “bundling”, because the controller bundles consent for – in short – “necessary” purposes together with consent for those processes that might be considered “unnecessary.” An example of “bundling” could be if a person plans to buy a plane ticket online, and it may be that he or she will need to consent not only to sharing personal data that are necessary for this transaction, but also to allow the use of data for marketing purposes. These additional processing activities are not essential for the controller to perform the contract. Requesting consent for online transactions together with marketing purposes, and making the purchasing dependent on this consent, will most likely lead to the conclusion that consent is not “freely given”.

“Bundling” consent could be seen as a mechanism for the controller to “force” the data subject to consent and to allow the use of the data for purposes other than those which are essential for the performance of the contract. Although there is a lack of literature and case-law covering this issue, it can be reasonably assumed that the “bundling” of consent can have negative implications for the individuals.

This paper will try to fill the gap that exists in literature regarding the assessment criteria of “bundling” consent, as prescribed in Article 7(4). Potentially, this contribution might be relevant for the data protection community and, in particular, supervisory authorities by providing suggested steps for the possible interpretation of Article 7(4), with a view to shedding more light on its practical application.

15 In terms of profiling, processing can be carried out when “[t]he data subject has given explicit consent.” (Article 22(2)(c)).

16 Article 9(2) of the GDPR.

17 Recital 32 of the GDPR.

The first section will focus on the textual interpretation of Article 7(4). The analysis will be combined with the legislative history of the norm as well as relevant documents issued by the data protection entities in the EU. The possible interpretation of the norm is proposed in the second chapter. Following this, the proposed interpretation is applied to a range of hypothetical cases, before a conclusion is put forward.

2. The different elements of Article 7(4)

Article 7(4) reads:

“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.”

This provision contains several elements relevant to its interpretation:

- i. “utmost account” and “inter alia”;
- ii. “freely given”;
- iii. “conditional”;
- iv. “necessary for the performance of a contract”.

These terms will be discussed in more detail in the following paragraphs.

2.1 The terms “utmost account” and “inter alia”

The term “utmost account” suggests that *special relevance* should be given to the conditions described in this provision. This supposed relevance is underlined by the fact that a specific provision, Article 7(4), is dedicated to this particular criterion, while other potential criteria have not been spelled out in a specific Article.

The term “utmost account” is, however, nuanced by the subsequent use of the words “*inter alia*” (among others). This appears to suggest that the criterion described in Article 7(4) is merely one of a set of factors to be applied in the assessment.

2.2 The term “freely given”

In the Opinion on consent, the Working Party states that “freely given” means that the data subject can “exercise real choice” and that there is no risk of “deception, intimidation, coercion or significant negative consequences” if a person does not consent.¹⁸ In the authors’ view, there is a clear link between these elements. It is hard to claim that a person had a “real choice” if he or she was deceived, intimidated or coerced to consent.

This Opinion explores this notion in terms of electronic health records and in the context of employment. In the first case, freely given consent is defined as a “voluntary

18 The GDPR replaces the Working Party by a European Data Protection Board (Article 68). But the WP’s opinions remain relevant, as the GDPR partly uses the same terminology as the Data Protection Directive.

decision" expressed without the threat of non-treatment. It also includes "genuine free choice" and the ability to withdraw consent without negative consequences. In the context of employment, consent will not be deemed as freely given if it is made dependent on certain conditions and if a person has no possibility to refuse consent. The consent will, in principle, not be valid if it was requested as a condition for employment.¹⁹

The other scenarios that are analysed in the Opinion can be summarised using this principle: if a person cannot refuse consent or withdraw it without detriment, such consent might be considered as not being freely given.²⁰ Freely given consent includes the ability to exercise a choice that is not made dependent on certain conditions.²¹ Consent that is obtained without this choice "cannot be claimed to be a legitimate ground to justify the processing".²²

In terms of online cookies, "freely given" consent, according to the Working Party's Working Document²³ means that the user was given a "real and meaningful" choice to refuse or accept cookies. In addition, the user should have the possibility to refuse cookies and still be able to browse the page. If certain cookies are not relevant for the use of the services provided and only "provide for additional benefits of the website operator" the user should be in a position to refuse them.²⁴

The interpretation in the Working Party²⁵ Opinions is in line with Recital 42 of the GDPR. The Recital provides, in part: "[c]onsent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment." It is noticeable that there is a link between the Opinions of the Working Party and Recital 42 regarding the elements of freely given consent. In terms of the free choice of the data subject, the Opinion could be interpreted as suggesting that it includes: i. the ability of the data subject to make a voluntary decision that is not made dependent on certain conditions; and ii. the lack of deception, intimidation, coercion or significant negative consequences if a person does not consent. Moreover, the term genuine free choice, used in Opinion on consent,

is identical to that used in Recital 42, which makes the link even more apparent. The Opinion and Recital 42 both refer to the right to withdraw or refuse consent as the second element of the "freely given" condition.

The term "freely given" is further expanded on in Recital 43, which sheds light on the relevance of Article 7(4):

"Consent is *presumed* not to be freely given if it does not allow separate consent to be given to different personal data processing operations despite it being appropriate in the individual case, or *if the performance of a contract, including the provision of a service, is dependent on the consent despite such consent not being necessary for such performance*" (emphasis added).

In other legal contexts, the use of such a 'presumption' is intended to provide a distribution of the burden of proof in special circumstances. For example: (i) In *Anic*, a competition law case, the European Court of Justice established that, "subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption" that if an undertaking took place in concerting arrangements and remained active on the market, it took account of information exchanged with its competitors in order to determine their conduct on the market.²⁶ (ii) In *Feryn*, the Brussels Labour Court referred questions related to Article 8 of Directive 2000/43²⁷, which establishes that "where there are facts from which it may be presumed that there has been direct or indirect discrimination, it is for the defendant to prove that there has been no breach of the principle of equal treatment"²⁸. The Court of Justice of the European Union has established that public statements of an employer declaring that the company will not recruit employees of certain ethnic or racial origin are sufficient for the mentioned presumption. Therefore, the employer must prove that there was no breach of the principle of equal treatment.²⁹ In both cases, when special circumstances were established, the burden of proof shifted because of the presumption.

Furthermore, one could argue that, based on the previous analyses of case-law, and as a result of the presumption established in Recital 43, the controller has to prove that consent was freely given. This shift of the burden of proof to the controller becomes more apparent when looking at Article 7(1). One way to interpret the link between these two articles and Recital 43 could be as follows. While in Article 7(1) the controller merely has to prove the existence of consent, in Article 7(4), if the controller makes a contract dependent

19 Article 29 Working Party, "Opinion on the definition of consent" (WP 187), 13 July 2011, p.13-17.

20 *Ibid.*, "Reliance on consent should be confined to cases where the individual data subject has a genuine free choice and is subsequently able to withdraw the consent without detriment", p. 13.

21 The Opinion on consent stresses that in a situation in which consent is a condition of employment, the worker is, in theory, able to refuse consent, but the consequence is a loss of the employment opportunity. "Further, in the e-health records example, the Opinion points out that patients refusing to use the e-health system and are requested to pay substantial extra cost implies that there is a "clear disadvantage" for those who refuse to consent, "consent is therefore not sufficiently free.", p. 13-15.

22 *Ibid.*, p. 16

23 Article 29 Working Party, "Working document providing guidance on obtaining consent for cookies" (WP 208), 2 October 2013.

24 *Ibid.*, p. 6.

25 Although Opinions are not legally binding, they are a relevant source for the interpretation of the data protection norms. Among other articles see: Frederik J. Zuiderveen Borgesius; Personal data processing for behavioral targeting: which legal basis? *International Data Privacy Law* 2015; 5 (3), p. 165

26 ECJ EU 8 July 1999, C-49/92, ECLI:EU:C:1999:356 (*Commission/Anic*), par. 96.

27 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180, 19/07/2000 P. 0022-0026.

28 CJEU EU 19 November 2009, C-540/07, ECLI:EU:C:2009:717, (*Centrum voor gelijkheid van kansen en voord racismebestrijding/Firma Feryn NV*), par. 30.

29 *Ibid.*, par. 34.

on consent to processing for “unnecessary” purposes, the controller has to rebut the presumption by proving that consent was freely given. This special circumstance triggers a shift of the burden of proof, like in cases of *Anic* and *Feryn*. Hence, the controller has to prove that consent was freely given.

In sum, Article 7(1) refers to the existence of consent, which only requires an affirmative and explicit action like the ones established in Recitals 32 and 42. Article 7(4), on the other hand, refers to the validity of consent by triggering an additional burden to the controller, namely proving that consent was freely given.

Such an interpretation is in line with the history of the provision. The original Commission proposal merely stated that consent shall not provide a legal basis for the processing, “where there is a significant imbalance between the position of the data subject and the controller.”³⁰ The European Parliament, in 2014, instead proposed a prohibition on bundling, while the Council in 2015 then proposed to completely erase Article 7(4), and transfer its substance to Recital 34, and it was here that the ‘presumption’ was introduced:

“Consent is presumed not to be freely given, if it does not allow separate consent to be given to different data processing operations despite it is appropriate in the individual case, or if the performance of a contract is made dependent on the consent despite this is not necessary for such performance and the data subject cannot reasonably obtain equivalent services from another source without consent.”³¹

The text of this Recital was ultimately transformed into the final version of Article 7(4) in the trilogues.³² History shows that the legislator consciously departed from an outright prohibition on “bundling”, and instead opted for a more nuanced approach.³³

The next question is how this presumption can be rebutted. Here, Recital 42 can prove useful. As previously mentioned, Recital 42 provides that consent will not be considered “freely given” if the data subject has no choice, or is unable to withdraw consent without detriment. It could be concluded

that in the reverse situation, e.g. where the data subject *has* a genuine and free choice and *is* able to refuse or withdraw consent without detriment, consent *should* be regarded as freely given. In such an interpretation, this Recital provides criteria related to how the presumption, under Article 7(4), can be rebutted. These criteria would imply that if Article 7(4) applies, the data controller must prove that the data subject (i) *did*, in fact, have a genuine or free choice; or (ii) *was*, in fact, able to refuse or withdraw consent without detriment.

There are, however, two reasons to be cautious of this interpretation. Firstly, it is unclear how to connect the wording of Recital 42 with the analysis of “freely given” consent in the Opinions of the Working Party. Secondly, Recital 42 refers to the conditions when consent should *not* be regarded as freely given. It is not clear whether free choice and right to refuse or withdraw consent, are the *only* conditions. It is thus also unclear whether consent is freely given if the controller proves that these conditions are *not* fulfilled.

2.3 The term “conditional”

The next question to consider is *when* the conditions described in Article 7(4) are fulfilled. Here, the first requirement is that the performance must be “conditional” on consent for, what might be considered, “unnecessary” processing. This provision appears to be straightforward. In essence, it means that the data controller ensures that if the data subject does not provide consent, the controller will not perform the contract. The controller can achieve this either by way of contractual means (by stating in the contract that it will only be performed if consent for certain processing is provided) or through technical means (e.g. through an app which does not install or function if consent is not provided).

2.4 The term “necessary for the performance of a contract”

The more difficult point is to determine under which circumstances processing *is* not necessary for the performance of a contract.

The main clarification for the interpretation of this term can be found in Article 6(1)(b). This provision states that processing shall be lawful if processing is “necessary for the performance of a contract” to which the data subject is a party. In this regard, this provision is very similar to Article 7(1)(b) of the Data Protection Directive.

The wording in Article 6(1)(b) mirrors the wording in Article 7(4). This could mean that both should have an identical meaning. This is underlined by the fact that the European Parliament proposed to prohibit “bundling” for purposes “not necessary for the execution of the contract or the pro-

30 Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM/2012/011 final – 2012/0011 (COD).

31 Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) – Preparation of a general approach, 9565/15.

32 Negotiation between the Council and the European Parliament, assisted by the Commission.

33 Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) [first reading] – Political agreement, 5455/16.

vision of the service, pursuant to Article 6(1), point (b)."³⁴ The reference to Article 6(1)(b) was erased in later versions, although the term "execution of the contract" was also changed to reflect the wording of Article 6(1)(b) ("necessary for the performance of the contract").³⁵

The European Data Protection Supervisor has stressed the link between both Articles by stating: "Assessing whether consent is freely given depends in part on (a) whether there is a significant imbalance between the data subject and the controller and (b) in cases of processing under Article 6(1) (b), whether the execution of a contract or the provision of a service is made conditional on the consent to the processing of data that is not necessary for the these purposes (see Article 7(4))."³⁶

According to Opinion 06/2014, the term "necessary for the performance of a contract" needs to be interpreted strictly and does not cover situations of processing "not genuinely necessary for the performance of a contract, but rather unilaterally imposed on the data subject by the controller."³⁷ The existence of a contract does not immediately establish the necessity of the processing. In the same line, "the exact rationale of the contract, i.e. its substance and fundamental objective" needs to be determined.³⁸ Moreover, Opinion 08/2014 interprets the term "necessity" as a "direct and objective link between the processing itself and the purposes of the contractual performance expected from the data subject."³⁹ Thereby, under Article 6(1)(b), processing would likely be considered "necessary" if it has a direct and objective link to the purposes and objectives of the contract.

In summary, there is a link between Article 7(4) and Article 6(1)(b). This link, in principle, indicates that the necessity of the processing for the performance of the contract must be established. Thus, if the processing is necessary, it will fall under the remit of Article 6(1)(b),⁴⁰ whereas, if it is not

necessary and consent is required as a condition for the performance of the contract, Article 7(4) will apply.

3. Proposals for the interpretation and application of Article 7(4)

In principle, any interpretation of Article 7(4) should seek to achieve a "user friendly" balance between the rights of privacy and data protection⁴¹ and other conflicted interests. This line of thinking is supported by the reasoning applied in the *Google Spain case*.⁴² The Court of Justice of the European Union established that, in principle, the right to data protection overrides the economic interest of search engines.⁴³ In keeping with this reasoning, in cases where Article 7(4) applies, there will most likely be a conflict between the same rights and interests as in the *Google Spain case*, and it could be argued that data protection will take priority over the controller's interest. Thus, the rebuttal of the presumption implies a high burden of proof on the controller. However, this should not mean that the controller has no possibility of proving that consent was "freely given."

Based on the previous analysis, one way to interpret Article 7(4) could be:

- i. Article 7(4) applies in situations of performance of contracts, including the provision of services.
- ii. An assessment should determine if the data processing is necessary for the purposes of contract performance. According to Opinion 06/2014 of the Article 29 Working Party, the term "necessary for the performance of a contract" needs to be strictly interpreted.⁴⁴

Example 1: Bestcomics.com, a start-up company from Amsterdam, offers its users legal access to high quality versions of comic books. The users are paying for this service. They must provide their emails and payment details to access the content. When the payment of the comic rental fee is finalised, the user receives an email message with a code that allows them to unlock the product that he or she has rented.

In this case, the data controller and the data subject are parties in a contract. For the performance of the contract, a specific type of data is necessary. There is a direct and objective link between the processing of the data and the purpose of the contract and, as such, this example would fall under Article 6(1)(b) and would not require an assessment related to Article 7(4).

- iii. If the data is going to be processed for what could be deemed "unnecessary" purposes, the data controller is required to find a different ground for processing. If

34 Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Jan Philipp Albrecht, Report on the proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), (COM(2012)0011 – C7-0025/2012 – 2012/0011(COD)).

35 Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) [first reading] – Political agreement, 5455/16.

36 European Data Protection Supervisor, "EDPS recommendations on the EU's options for data protection reform", Official Journal of the European Union(C 301/1), 9 October 2015.

37 Article 29 Working Party, "Opinion on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC" (WP 217), 9 April 2014, p. 16.

38 *Ibid.*, p. 16.

39 Article 29 Working Party, "Opinion on recent developments on the Internet of Things" (WP 223), 16 September 2014, p. 15.

40 Article 29 Working Party, "Opinion on the definition of consent" (WP 187), 13 July 2011, p. 8. E.g. direct marketing, detailed prior-checking, creation of profiles, etc. are some of the data processing performances that fall outside the scope of Article 6(1) (b), and where consent is required "Either the processing is necessary to perform a contract, or (free) consent must be obtained".

41 Article 7 and Article 8 of the Charter of Fundamental Rights of the European Union.

42 CJEU EU 13 May 2014, C-131/12, ECLI:EU:C:2014:317 (*Google Spain SL*), par. 81.

43 *Ibid.*, par. 99.

44 Article 29 Working Party, "Opinion on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC" (WP 217), 9 April 2014, p. 16.

the controller opts for consent, the next step is to determine whether the performance of the contract is made conditional on that consent. If it is, such consent is presumed not to be freely given.

Example 2: Bestcomics.com has decided to request access to users' Facebook accounts in order to gain more personal data. To access the Facebook accounts and collect personal data available on those pages, Bestcomics.com decides to request from users to consent. In order to obtain access to the comic books, users must allow Bestcomics.com access to their Facebook accounts.

In this case the controller is trying to process data for purposes that are not necessary for the performance of the contract. To do so, the controller is required to obtain the consent of the data subject. Consent should meet the conditions set out in Article 4(11). If the data controller makes the performance of the contract conditional on data processing that is not necessary for that performance (in other words, "bundling" consent), the consent is presumed not to be freely given.

- iv. To rebut this presumption the data controller should prove that the data subject had a *free or genuine choice* or that it was possible to *withdraw* consent without detriment.

Example 3.1. "External choice": The users of Bestcomics.com complain to the supervisory authority that they obliged to consent. Bestcomics.com argues that there are alternative web pages where the users could rent comic books.

In this case, the data controller is still considered to be "bundling" the consent of the data subject. However, the controller seeks to justify company's conduct by claiming that the data subject has "external choices." Since the data subject has a free choice, it could be argued that the controller is in a position to rebut the presumption of involuntariness.

Example 3.2. "Internal choice": Bestcomics.com decides to offer a premium service to obtain consent for accessing users' data on their Facebook accounts. The rental contract now includes the following clause: "Users who consent to Bestcomics.com accessing their data on their Facebook accounts can rent special editions of each comic book, which include comments from the authors. However, if a user does not consent, he or she can still rent the "standard" versions of the comic books."

In this scenario, the consent of the data subject is still being bundled. However, the data controller is now offering an "internal" choice. The existence of a choice provides the data subject with an alternative, either to consent and gain access to a premium product or to simply access the "standard" version of the comic books. This alternative choice could contribute to the claim that consent is freely

given. As a consequence, the presumption of involuntariness could potentially be rebutted.

Example 3.3. Withdrawal clause: Bestcomics.com enables an option on their website which allows users to withdraw consent for the use of data on their personal Facebook accounts. This withdrawal option does not affect the user's ability to access comic books in the future.

In this scenario, the consent of the data subject is again being bundled. The data controller is enabling a "withdrawal clause" without detriment and this could be seen as a valid argument to rebut the presumption that consent was not freely given.

It is difficult to determine whether the proposed means to rebut the presumption in the examples such as "internal and external choices" are in accordance with the GDPR, and which conditions they should meet. In sum, it is reasonable to conclude that the concept of "freely given" and the possibilities to rebut the presumption are still insufficiently clear.

4. Conclusions

The main conditions for valid consent remain the same in the GDPR. Article 7(4) has probably been introduced in order to strengthen the "freely given" characteristic of consent. This Article targets "bundling" consent, which could be seen as an act of "coercion" of data subjects to consent to data processing that is not necessary for the contractual transactions. However, by establishing a presumption and not a full prohibition, Article 7(4) appears to recognise that there may be some exceptional cases in which bundled consent would be allowed.

Article 7(4) must probably interpreted as follows. Even if Article 7(4) applies, the controller can prove that the consent was freely given and thus valid. The ways to rebut the presumption were proposed in the analysis of hypothetical cases, but since it is an open-ended norm, there may be other means that the controller can use to prove that the consent was "freely given."

In the end, this paper may serve to stimulate debate over other potential interpretations of Article 7(4). However, it is for the courts and supervisory authorities to delineate the boundaries between "freely given" consent in "bundled" scenarios.