

# CAN WE RELY ON CONSENT FOR PROCESSING PERSONAL DATA IF WE OFFER INCENTIVES, SUCH AS “BUY ONE GET ONE FREE” OFFERS, IN ORDER TO OBTAIN PERSONAL DATA?

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Pulina Whitaker of Morgan Lewis & Bockius LLP provides guidance on good practice under the EU General Data Protection Regulation (GDPR) when seeking to rely on consent when offering incentives, such as “buy one get one free” offers or entry into a free prize draw, in order to obtain personal data.

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The EU General Data Protection Regulation (GDPR) allows for personal data to be processed lawfully in a number of different ways, such as where the organisation has contractual requirements or legal obligations for processing the data or where it is in its or a third party’s legitimate interests. Consent is another lawful processing ground, provided that the consent provided meets the GDPR standards. The UK’s Information Commissioner’s Office (ICO) has said that where there is another lawful processing ground, consent should not be sought or used as the lawful processing ground.

Consent is defined at Article 4(11) of the GDPR as being “any freely given, specific, informed and unambiguous indication of the data subject’s wishes by which he or she, by a statement or by clear affirmative action, signifies agreement to the processing of personal data relating to him or her”.

Article 7 requires the controller to be able to “demonstrate” that the individual has consented to the processing of his or her personal data (where consent is the relevant processing ground). Consent, under the GDPR, “shall be as easy to withdraw as to give consent”. Article 7 also indicates that “account shall be taken” of any conditions attaching to consent in assessing whether it is “freely given”.

The ICO has released a final version of its guidance on consent on 9 May 2018 (see [Legal update, ICO publishes final version of consent guidance](#)). Consistent with the GDPR definition, the ICO’s guidance states that consent must be:

- 1. “Freely given”. There has to be a genuine choice about whether or not to provide consent. The individual should be allowed to refuse to provide consent without detriment. Additionally, consent should be as easy to withdraw as it is to provide. Opt-out arrangements, therefore, must be straightforward. The ICO advises that consent should not be “bundled”.
- 2. “Specific and informed”. Full details of how the personal data will be used and the scope of the consent being granted must be provided in advance of the individual being asked to provide consent.

The ICO advises that organisations should avoid making consent a “precondition of a service” unless it is necessary for that service (in this event, the organisation may have a contractual lawful processing basis rather than consent).

Consent to use personal data for a “buy one get one free” (“BOGOF”) offer is likely to be valid where the data is used for this offer and no other purposes. Details of how the personal data is going to be used and with whom it will be shared will need to be provided, in addition to the other information notice requirements under Article 13. The organisation should refer to its privacy notice or privacy policy when collecting the personal data for the BOGOF offer. The organisation will, however, need to seek fully informed consent to use the personal data for marketing communications or other purposes that are unrelated to the BOGOF offer. Additionally, consent to use special categories of personal data must be “explicit”. If the organisation wanted to require that the individual’s contact details would be used for marketing purposes as a condition of being eligible for the BOGOF offer, this is unlikely to qualify as “freely given” consent.

The principles above would apply to other forms of incentive for obtaining personal data, such as entry into a free prize draw.

For more information generally in relation to consent under the GDPR, see [Practice note, Consent under the GDPR](#).

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