

# Consent for data processing in e-commerce transactions:

## UK empirical evidence

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### Abstract

While the issue of data protection compliance in the online environment has attracted much scholarly attention, there is little empirical evidence as to whether commercial websites comply with data protection law. With expansion of e-commerce, social networking and e-governance, submission of personal data to websites has become an essential prerequisite for taking advantage of any online service. Whereas possession and processing of such data by online service providers represent a key asset for business models in the web 2.0, they also create an issue of major social concern since they might implicate consumer privacy.

In light of the conditions laid down in the Privacy and Electronic Communications (EC Directive) Regulations 2003, this paper outlines the results of an empirical survey examining the data compliance of 200 websites registered with “.co.uk” domain. To lawfully process personal data, the data controller should have consent of the data subject. For the purposes of the empirical survey, we have translated this legal requirement concerning informed and specific consent into variable to test the compliance level of UK websites.

The survey determines the way by which websites collect personal information from data subjects. In particular, it explores the types of data collected and the extent to which such data is collected. The survey also assesses whether consent has been legitimately obtained. This assessment ascertains whether the consent expressly includes marketing purposes for receiving e-mail advertisements, or if it is some general form of consent towards non-explicit purposes. In addition, the survey looks at the way by which consent is obtained from the data subjects. Even though there are many ways to obtain consent in online interactions, for instance by asking the user to click in a box during registration, such consent is deemed only to be valid if users are given the opportunity to freely “opt in” for receiving commercial communications and for permitting transfer of data to third parties.

The survey shows that websites are not always compliant with data protection law. Websites seldom met the explicit consent requirement in relation to data processing. Also the method of obtaining consent is questionable on the ground of legitimacy. The empirical survey forms the basis of future research on data compliance.

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### Introduction

In the aftermath of the *Phorm* case,<sup>1</sup> the issue of UK's compliance with the EU requirement on data protection consent has become preeminent. Following several complaints issued in *Phorm*, the Commission announced in 2010 that it has referred the UK to the European Court of Justice for improper implementation of the EU rules on data protection.<sup>2</sup> Part of this referral was the failure of the UK to implement in national law, namely in the Data Protection Act, the definition of consent as the “*freely given, specific and informed indication of a person's wishes.*”<sup>3</sup> Besides the judicial timeliness of the issue of consent for data processing, this issue is of paramount importance in the online environment. With expansion of e-commerce, social networking and e-governance, submission of personal data to websites has become an essential prerequisite for taking advantage of any online service. At the same time, possession and processing of personal information represent a key asset for online service providers, as it is an increasingly essential component of their business models in the so-called web 2.0. This creates an issue of major social concern, as control over personal information may deeply affect consumer privacy.

Despite the great scholarly attention that has attracted the issue of consent for data processing, there is little empirical evidence as to whether commercial websites comply with data protection law in this respect. This paper fills in this gap in literature by laying down the results of an empirical survey examining the data compliance of 200 websites registered with “.co.uk” domain. The survey primarily assesses whether consent has been legitimately obtained. This assessment ascertains whether the consent expressly includes processing of data for direct marketing purposes, or if it is some general form of consent towards non-explicit purposes. The survey further examines the way in which consent is obtained from the data subjects. Even though there are many ways to obtain consent in online interactions, for instance by asking the user to click in a box during registration, such consent is deemed only to be valid if users are given the opportunity to freely “opt in” for receiving commercial communications.

The paper is divided into two main parts. The first part lays down the legislative framework of consent for data processing. Emphasis is given to the requirement that the data subjects should be duly informed about the purposes of data processing before giving out their personal data. The second part outlines the empirical results by reference to the methodology used for their extraction.

### 1. The legislative framework

Personal data should not be processed unless certain conditions are met.<sup>4</sup> Consent in the collection and processing of personal data is a key concept in data protection law. Whereas the

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<sup>1</sup> Case Ref 5253/08.

<sup>2</sup> Digital Agenda: Commission refers UK to Court over privacy and personal data protection, IP/10/1215, Brussels, 30 September 2010.

<sup>3</sup> Article 2h of 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*, 23/11/1995 P. 0031 – 0050 (hereinafter referred to as the Data Protection Directive).

<sup>4</sup> These conditions fall into three categories, namely transparency, legitimate purpose and proportionality.

requirement of consent features expressly in the Data Protection Act,<sup>5</sup> the meaning of consent in the context of data protection is not defined. Schedule II, s 1, of the Act only stipulates that the lawfulness in the processing of personal data is premised upon condition that the “*data subject has given his consent to the processing.*” Guidance as to the scope and meaning of consent is given however in Directive 95/46/EC,<sup>6</sup> to which the Act gives effect. Consent is there defined 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*”.<sup>7</sup> Relatively similar is the definition provided by Recital 17 of Directive 2002/58/EC<sup>8</sup> under which “[c]onsent may be given by any appropriate method enabling a freely given specific and informed indication of the user’s wishes, including by ticking a box when visiting an Internet website.” Both these definitions, share in common three conditions that consent should fulfil to be valid: it should be *informed*, *specific* and *freely given*. For the purposes of this paper we are focusing on two aspects, namely on whether individuals have been informed about the purposes of data processing before giving their consent and whether the information provided to them has been given in a specific way.

### **1.1. The requirement of informed consent for data processing**

Meant to safeguard autonomy and informational privacy, informed consent is given once the user is provided with information about the purpose of data processing when deciding on whether to consent to this processing or not. The crucial consideration is that the individuals should fully appreciate that they are consenting, and to what they are consenting in, irrespective of the way by which the consent has been given.<sup>9</sup> This consideration splits down into two requirements. The first is that the purpose of the processing should be directly informed to individuals. For instance, in a website there should be a clear indication of the purposes for which the data of an individual will be processed. For the consent of that individual to be valid, the data subject should be given the option of making an informed choice on the basis of *adequate* information about data processing. As a matter of fact, the Data Protection Act makes a distinction between situations where the data have been obtained directly from the data subject and situations where the data have been obtained otherwise.<sup>10</sup> The Act indicates that the informed character of the consent is essential in establishing fairness in the processing of personal data.<sup>11</sup> By virtue of Schedule 1, Part II, Paragraph 2(3),<sup>12</sup> information should cover at least the identity of the company, the purposes of the processing and any further information. This further information should be necessary with regards to the specific circumstances for

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<sup>5</sup> Data Protection Act, 1998.

<sup>6</sup> Data Protection Directive.

<sup>7</sup> Article 2h of the Data Protection Directive.

<sup>8</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), *Official Journal L 201*, 31/07/2002 P. 0037 – 0047 (hereinafter referred to as the e-Privacy Directive)

<sup>9</sup> Douwe Korff, “Comparative Study on Different Approaches to New Privacy Challenges in particular in light of Technological Developments – A.6 – United Kingdom”, June 2010, European Commission, Directorate General, p. 56.

<sup>10</sup> Compare Schedule 1, Part II, Paragraph 2(3) and Schedule 1, Part II, Paragraph 2(1)(b) of the Data Protection Act.

<sup>11</sup> The processing of personal data can only be fair and lawful once the data subjects have given their consent for this processing. This flows from Part I of Schedule I of the Data Protection Act, under which: “*Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—at least one of the conditions in Schedule 2 is met.*”

<sup>12</sup> This broadly corresponds to Article 10 of the Data Protection Directive.

which the data are collected with a view to guarantee fair processing in respect of the individual.<sup>13</sup>

The second requirement of informed consent is the timing of informing individuals on how their data shall be processed. Timing in this context refers to the condition that individuals should be informed about the purposes of processing at the time of the collection of their data. This applies irrespective of the medium or the practical difficulties that may be raised. This flows from the *Innovations* case<sup>14</sup> where the Data Protection Tribunal found that the collection of data in the context of telephone sales, with the intention of being disclosed to third parties for direct marketing purposes, is not fair if the individuals were not so informed at the time of data collection. In this case individuals were “mislead or deceived” and there was no lawful ground for their data being traded in this way. Therefore, data subjects should be aware at the outset of the purposes for which their information will be used so as to be in capacity of making informed decisions over entering this relationship or not. This is in line with the general rule that fairness<sup>15</sup> in the processing of personal data requires *transparency*, i.e. a clear and express indication of how the data shall be used.<sup>16</sup> Fairness in the processing largely depends on the method by which personal data has been collected. For instance, it is highly unlikely to find fairness in cases where the information has been obtained by deceiving or misleading potential consumers, namely where consent has not been informed.<sup>17</sup>

## 1.2. Informed consent in the context of e-commerce

In the context of electronic communications, the consent may be sought either via an opt-in or an opt-out method. Opt-in covers situations where consent is indicated by ticking a box to express agreement to data processing, whereas opt-out refers to where a box may be ticked to indicate objection to data processing (see examples in figures 1 and 3). The Information Commissioner’s Office (ICO) has distinguished between someone who has been offered the option to object but has not used it, and someone positively confirming their consent by ticking a box.<sup>18</sup> Under the rules incorporated in the Privacy and Electronic Communications Regulations, direct marketing is only legitimate if the recipient has previously indicated consent to receiving such communications. This could take place by actively consenting to the marketing, e.g. by ticking an opt-in box to consent to the marketing, rather than to an opt-out box. Opt-out does not result to valid consent. This rule however is subject to limited exceptions. These relate to the use of a “soft opt-in”. Soft opt-in includes for instance pre-ticked boxes (see figure 2 below); users should un-tick, should they not wish that particular service. A soft opt-in may be used where the data have been obtained in the course of a sale of a product/service to the recipient. It is required that the direct marketing should relate only to

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<sup>13</sup> To qualify as informed, consent should be appropriate to the age and capacity of the individual giving it and to the particular circumstances of each case.

<sup>14</sup> *Innovations (Mail Order) Ltd. V. Data Protection Registrar* (Case DA/92 31/49/I), Data Protection Tribunal Decision of 28.9.1993.

<sup>15</sup> Paul M. Schwartz & Joel R Reidenberg, *Data Privacy Law: A Study of U.S. Data Protection*, Charlottesville: Michie Law Publishers, 167-71 (1996).

<sup>16</sup> The importance of transparency becomes more straightforward in situations involving choice of entering in a relationship. In commercial relationships, this element of choice is more than obvious, since consumers may not wish to enter in such relationship if they do not agree with the terms and conditions relating to the processing of their personal data.

<sup>17</sup> This is affirmed by Part II of Schedule I of the Data Protection Act, which provides guidance as to the interpretation of the principle of fairness in the processing of personal data. This section reads that “*regard is to be had to the method by which [personal data] are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed.*”

<sup>18</sup> <<http://www.ico.gov.uk>>

similar products and services,<sup>19</sup> and that the recipient has been given a simple means of refusing the use of his data for such direct marketing at the time of data collection. If these conditions are met, the difference between the soft opt-in and the opt-out boxes becomes very subtle. So whereas opt-in is the legitimate way of obtaining valid consent, soft-opt in mechanisms may be also be lawful if they fulfil the aforementioned conditions. If consent has been obtained via an opt-out it is not lawfully obtained.

The image shows a registration form for Pixmania.com. The top section is titled "Please fill in all the boxes" and includes fields for Title (radio buttons for Mr., Mrs., Ms.), Last Name, First Name, and E-mail. Below these are three checkboxes for marketing preferences: "I would like to be informed of new products and promotions through Pixmania.com.", "I'd like to receive email notifications about invitation-only shopping on Pixmania.com.", and "I would like to receive the best offers from PIXmania's partners (special offers, great deals, games and competitions etc.)". A "VALIDATE" button is present. The bottom section is titled "Register your details here" and includes a "Please complete this form" header. It contains fields for Email address, Password, Confirm Password, First Name, Surname, Telephone number, Mobile number, Full Postcode, Address 1, Address 2, Address 3, Town, and County. There are four checkboxes for consent: "Tick here to confirm that you have read and accepted our terms and conditions", "Tick here if you'd like Exchange and Mart to contact you occasionally with news and offers via email", "Tick here if you'd like third party partners to contact you occasionally with news and offers via email", and "Tick here if you'd like Exchange and Mart to contact you occasionally with news and offers via SMS (please enter your mobile number above)". A CAPTCHA challenge is shown with the words "conceded" and "botent" and a "Register" button.

**Figure 1: examples of opt-in to data processing**

<sup>19</sup> The application of this condition with respect to "similar products and services only" reflects a purposive approach. This means direct marketing should relate to products and services for which an individual would have a reasonable expectation to receive advertisements or other promotional materials. It is unlikely that such soft opt-in would further cover marketing of other products/services offered by third party companies.

## SET UP YOUR ACCOUNT

Please enter your details below.

All the information that you give us is needed to complete the checkout. Topshop will not pass it on to any 3rd parties. To find out more, please read our [privacy statement](#).

Required fields\*

### YOUR EMAIL ADDRESS AND PASSWORD

Email address: \*

Password: \*

Confirm password: \*

Please note: you need a password in order to track your order progress. Passwords should be at least 6 characters long and include 1 number.

### YOUR NAME

Title: \*

First name: \*

Last name: \*

Please sign me up to receive news on Topshop's latest collections, events and promotion through email and post.

[BACK](#)

[CONTINUE](#)

**Figure 2: example of soft opt-in to data processing**

Register with us and make your visits to Argos.co.uk even quicker and easier! \* must be completed

First name:*	<input type="text"/>	Security question:	<input type="text" value="Select a security question"/>
Email address:*	<input type="text"/>	Security answer:*	<input type="text"/>
Confirm email address:*	<input type="text"/>	Telephone:	<input type="text"/>
Password:*	<input type="password"/>	Postcode:*	<input type="text"/>
(min. 6 characters incl. 2 numbers)		Country:	<input type="text" value="United Kingdom"/>
Confirm password:*	<input type="password"/>	<input type="checkbox"/> Remember me	<input type="text"/>

By submitting your details, you agree to the use of your personal information as set out in the privacy policy. This includes for the purposes of administering our website services, placing orders, competitions/prize draws and fraud prevention.

You will also be indicating your consent for your details to be used in our marketing programme and receiving marketing information by email, telephone, SMS text message and other electronic messages such as picture messaging, post and fax as explained in the Privacy Policy, unless you indicate otherwise by ticking the boxes below.

NO - I do not want to receive the email newsletter containing all the latest offers, products and competitions, nor to be kept informed about products and services from the Home Retail Group.

NO - I do not want to share my details with carefully selected companies outside of the Home Retail Group for their marketing programmes

[Cancel](#) [Register](#)

*start now*

Name:

Email address:

Postcode:

[create an account](#)

*log in* (if you have already signed up)

Email address:

Postcode:

[login](#)

We will send an email to notify you when you only have a few days left to save on your favourite sofa ranges. If you do not wish to receive such information, please check the box.

**Figure 3: Examples of opt-out from data processing**

Note that consent may be informed but it may not be specific as dictated by the European Directives. At the same time, specific consent shall always be informed as illustrated below.

### 1.3. The requirement of specific consent for data processing

Fairness in the processing of personal data requires that the consent given by individuals is also specific. This means that the consent should relate to a defined set of activities about which the individual has been informed at the time of giving consent. The practical significance of the requirement of specific consent is highlighted in situations where the purpose for obtaining or processing the data changes after obtaining user consent. In these cases, the consent is not considered to be valid and any activity related to these data shall be deemed unlawful. There are two issues that need to be discussed in light of specificity of valid consent: changes of the purposes after the time of data collection and duration of the validity of the consent.

As to the first issue, changes to the purpose of data collection and data processing after the stage of obtaining user consent mean that the consent cannot any longer be assumed as being specific. Rather, such changes will not be covered by the user consent. That would include for instance data processing for incompatible secondary purposes. Since consent is not specifically given with regard to these purposes, processing will be hence unlawful.<sup>20</sup>

What is more, the requirement of specificity of consent for data processing further implies that the consent for particular uses of personal data is not perpetual. It lasts up to the point where the purpose of processing changes. This applies under two conditions. First, the individual giving consent should have the option to withdraw, and secondly the nature of the consent given and the circumstances of data collection and use should be taken into account. Nonetheless, the option to withdraw consent does not affect the validity of uses of the data that have already been made by virtue of the consent.

For the purposes of the empirical survey, we have translated the legal requirements concerning informed and specific consent into a set of variables to test the compliance level of UK websites. Below we analyse the methodology and outcomes of the empirical survey.

## 2. Empirical survey on UK websites

### 2.1. Method used in empirical survey

For the purposes of this empirical survey, we have adopted the following approach. First, we have selected the sample websites, and secondly we have set up appropriate measures to observe their compliance level.

In relation to the selection of the sample, we have looked at two hundred UK websites with sub-domain '.co.uk'. As our research focuses on collection of personal data in typical e-commerce services, the websites have been clustered under five categories, namely: *goods*, *services*, *informative*, *news & entertainment* and *mobile, internet & telecom*. Primary source of these websites has been Google AD Planner.<sup>21</sup> In the Google AD Planner the preliminary search method is through the 'audience' option, via which one can obtain list of websites.<sup>22</sup>

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<sup>20</sup> Note however that data processing for historical, statistical or scientific purposes is not considered as incompatible with the purposes for which the personal data have previously been collected, insofar as suitable safeguards are set in place. See Recital 29 and Article 6(1)(b) of Directive 95/46/EC.

<sup>21</sup> Google AD Planner is a free media planner tool that helps companies to advertise and build up their target audience.

<<https://www.google.com/accounts/ServiceLogin?service=branding&ltmpl=adplanner&continue=https%3A//www.google.com/adplanner/>> (accessed October 10, 2010) It is a well known standard service used by major companies for commercial purposes. There are other similar services like Alexa and Comcast.

<sup>22</sup> The audience option can be found after entering the username and password on the Google AD Planner homepage.

After selecting the audience option, we have selected various other options in the following way:

Options	Selection
Geography	United Kingdom (England, Scotland, Wales & Northern Ireland)
Language	English
Ranking Method	Best Match
Domain Suffix	‘.co.uk’

For our survey, the aforementioned selection process provided us with top two hundred websites. The websites have been limited within the geographical boundary of the UK with English as the language. We chose the 'best match' method to get a good representation of all big, medium and small size UK websites. In comparison to other available options, this method is best suited for the purpose of our survey. For instance, if we had used 'composition index', we would have got list of smaller websites. Similarly if we had used 'audience reach' it would have showed us larger websites. In addition to the above, from the list of websites, we have also left out banking and financial websites as well as websites that are relatively less likely to process personal data. We assumed that banking websites are likely to show a better level of adherence to the consent requirement, while processing personal data.

In relation to the analysis of the level of compliance, the above outlined consent requirement has been observed by following the survey websites. Particular practices have been tested, compared and analysed, which are directly related to the informed consent requirement.

<u>Informed consent</u>	<u>Practices of survey websites</u>
	<ul style="list-style-type: none"> <li>a) The purpose of processing personal data is stated</li> <li>b) Appropriate method of informing customers is followed</li> <li>c) Customers are provided with the opportunity to give consent after information is provided</li> <li>d) Website informs user about its policy in relation to marketing and advertising</li> </ul>

The above outlined practices are analysed in the following sections.

## **2.2. Questionable information and doubtful consent**

As illustrated earlier the purpose of data processing should be informed to the data subject, and this should be done in an appropriate way.<sup>23</sup> The importance is that the user gets first initial information about the future use of his personal data, before proceeding further with the registration process.

<sup>23</sup> Recital 17 of Directive on Privacy and Electronic Communications, 2002

*Purpose of data processing informed*

In the context of providing necessary processing information to data subjects (hereinafter the users), this section takes into account the general trend of two hundred websites. The purpose of processing is generally stated in the terms & conditions (hereinafter t&c)/privacy policy, and talks about the reason behind collecting personal data and their future use. It has been observed that there is a broad way of representing purpose of data collection. In some websites it has been limited to specific purposes, while in others the purpose has been rather broad.<sup>24</sup> At times it has been difficult to determine the precise scope of statements describing purpose of processing personal data. Even different problem may be associated with the issue that purpose of processing is stated in the t&c instead of a placing somewhere in the area of user registration process. While there may be an inherent problem with the way of stating purpose of processing, this section is limited to the question of finding basic existence purpose of processing statement in the t&c. This observation has been laid down in the following table, where ‘No’ represents the times when the statement was not present.

**Tab1: Are the purposes for data collection stated in the privacy policy?**

		Frequency	Percent
All websites	no	6	3
	yes	194	97
	Total	200	100
goods	no	4	6.3
	yes	60	93.8
	Total	64	100.0
services	no	1	2.3
	yes	43	97.7
	Total	44	100.0
informative	yes	33	100.0
news & entertainment	yes	39	100.0
internet, mobile, telecom	no	1	5.0
	yes	19	95.0
	Total	20	100.0

Out of total two hundred websites, six of them have not stated purpose of processing in the privacy policy. This makes a meagre 3% of the total websites in our survey.

It follows from this table that the great majority of websites state information about data processing and only a few of them do not provide such information at all. This finding is similar in each category of websites. However, even in situations where information is provided it is not clear whether this information adheres to the standard required by the data protection law. This doubt is primarily because of two reasons. First, as observed before, websites do not specifically say about the exact purpose of data collection and sometimes they are quite broad. This leaves the user with considerable doubt in relation to future use of personal data. Secondly, purpose of processing merely states that websites follow certain policy in relation to personal data. However, it is an entirely different proposition whether they

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<sup>24</sup> For example merely stating that the users’ personal data will be used for direct communications and for any other related purpose. Using words like ‘any other purpose’ is not sufficiently precise.

actually abide by such self-proclaimed policy.<sup>25</sup> Thus, it can only be judged in the context of their future practice.

*Informed by any appropriate method.*

While there is an absolute requirement of consent prior to processing the personal data, the law does not say much about the ‘appropriate method’ to be followed in this regard. From what we have seen in the sample survey, websites tend to inform users about data processing in different ways. The most common way and what has been observed in the sample, is to insert the purpose of data processing in terms & conditions (t&c) and the privacy policy. This has been observed throughout, except in few cases where the purpose of processing is not stated (Tab 1). Other than the practice of stating it in an obvious way, websites have informed the purpose of data processing, predominantly in the context of marketing, at the point where user completes the registration process. This way of informing the user about certain purpose of data processing is quite common, although the actual wordings and meaning of such information varies widely. Two popular ways of stating such processing information can be broadly categorised into ‘opt-in’ and ‘opt-out’. In case of opt-in, users are asked to tick in a box, thereby specifically opting in to receive communications. This shows that the websites are going to engage in marketing with personal data and users are informed to provide consent. On the other hand, opt-out also includes cases where users are asked to tick in a box. This tick, however, represents the users’ wish to exclude them from receiving any further communication. Similar to the opt-in method, the opt-out also informs the users about marketing practices with personal data and asks for user’s consent in this regard. The following table represents a fair share of websites choosing between opt-in or opt-out method to inform users about data processing.

The following table represents the way information is presented and we have got a typical example in relation to advertisement. Here the way information is presented by the website represents opt-out. The numbers under ‘no’ refer to situations where an opt-in method is in place.

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<sup>25</sup> Considerable doubt has been posed because of the Phorm case. Websites tend to suppress what they are doing thereby going beyond their spoken words in t&c.

**Tab2: Is consent to advertisement sought via an opt-out method?**

		Frequency	Percent
All websites	no	129	35
	yes	71	65
	Total	200	100
goods	no	38	59.4
	yes	26	40.6
	Total	64	100.0
services	no	30	68.2
	yes	14	31.8
	Total	44	100.0
informative	no	19	57.6
	yes	14	42.4
	Total	33	100.0
news and entertainment	no	28	71.8
	yes	11	28.2
	Total	39	100.0
internet, mobile, telecom	no	14	70.0
	yes	6	30.0
	Total	20	100.0

This table shows more of an even balance between how information is presented in a typical case of information provided in relation to advertising. While seventy one of two hundred websites provide information in an opt-out method, the rest of them present information typically in an opt-in method. The percentage between two existing methods of presenting information stands at 35% for opt-out and 65% for opt-in.

One cannot disagree that in both cases, opt-in and opt-out, sufficient information is provided to a particular user in relation to data processing. A specific example in table 2 indicates that websites under ‘informative’ category are mostly using opt-out method in the context of informing users and for subsequent consent. The reason may be attached to the fact that these websites, namely social networking, family welfare etc are most likely to use personal data for marketing purposes in future. Only concern relates to the contention that these methods would cause confusion, and would mislead the user. For example, method of using opt-out would most likely to be disregarded, while collecting data that are sensitive in nature. Under Data Protection Act for sensitive data, explicit consent should be given by the data subject.<sup>26</sup> This means, information in relation to processing of sensitive data must be explicitly stated in a clear manner to avoid any future claim of deception. So information should be provided in such a manner that ultimately, consent is always given in an opt-in method.

*Informed with an opportunity to convey consent*

Not only the websites are obliged to inform the user about processing of personal data, but are also required to offer the user to provide consent upon receipt of such information. In the absence of such option, information provided to the user about data processing is of little use. A wide variety of ways in this regard is used by websites to facilitate consent and as a result there is no uniformity. Our task is to observe whether the option provided by websites in relation to consent is clear and whether it satisfies the minimum standard. To understand minimum standard practice on the part of a particular website, one of the most popular practices of

<sup>26</sup> Schedule 3 , Data Protection Act. 1998

ticking a box as a sign of providing consent has been taken into consideration.<sup>27</sup> Instead of ticking a box, the other popular way of showing consent is to click the ‘button’ used for completing the registration process. The act of clicking the button amounts to consent to the terms & conditions. In these cases it is expressly written in the area of the button, that the user by clicking gives consent. For the purpose of empirical survey, we considered whether websites provide option by following at least either of the two practices, i.e. ticking a box or clicking the button. The following table represents the results reached on the basis of above outlined parameters.

**Tab3: Is there consent present during registration?**

		Frequency	Percent
All websites	no	16	8
	yes	184	92
	Total	200	100
goods	no	10	15.6
	yes	54	84.4
	Total	64	100.0
services	no	4	9.1
	yes	40	90.9
	Total	44	100.0
informative	no	2	6.1
	yes	31	93.9
	Total	33	100.0
news and entertainment	yes	39	100.0
internet, mobile, telecom	yes	20	100.0

The above table shows that sixteen websites out of two hundred do not provide an option for the user to give consent. This makes 8% of the total websites, which fails to provide consent option for the user even after providing purpose of processing in the t&c

It is evident from the above table that the user does not always get the opportunity to provide consent. Comparison between the tables 1 and 3 shows that although the user is informed, not always he is given the opportunity to provide consent. For example, in case of websites coming under ‘goods’, sixty out of sixty four (93.8%) do provide information concerning purpose of data processing (Tab 1), yet only fifty four of them (84.4%) actually provide an opportunity for the user to convey consent in return (Tab 3). Similar observation can be made in relation to websites under the categories of ‘services’ and ‘informative’ (compare Tab 1 and 3). The absolute requirement of consent prior to processing personal data is not fulfilled in cases where users are unable to convey consent. While all of the above have outlined specification in relation to information and consent, a highly contentious issue has been taken into account in the following section. This relates to receiving direct marketing communications from the website.

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<sup>27</sup> This example has been provided under Recital 17 of the Directive on Privacy and Electronic Communications, 2002

*Informed direct marketing policy with personal data*

An individual is well within his rights to prevent processing of personal information for the purpose of directing marketing. The Data Protection Act provides some guideline in relation to the meaning associated with direct marketing. It means communication, which is directly meant for the user whose data has been processed and includes information about selling products, services and any promotional offers.<sup>28</sup> This right of course gives the opportunity to opt-out from direct marketing services and if the user so desires he is free to inform the data controller.<sup>29</sup> The website, who is the data controller, upon receiving such instruction from the user is obliged to stop further direct marketing communication.

For transparency and in all fairness, the user should be informed whether the website, at a future date, will be using users' personal data for the purpose of direct marketing.<sup>30</sup> To be transparent in relation to data protection policies, the user should be informed about direct marketing in the first place. This enables the user to decide at the outset whether to enter into a relationship with the website or not. Even if the website gives future opt-out option, it is unthinkable that the website will take the users' consent for granted in relation to direct marketing. Also, it may be the case that the website providing the opt-out option at later date is not following the process adequately. This makes the issue of informing the user about direct marketing at the initial stages even more important. To explore further, direct marketing policy table (Tab 4) will be compared to Tab 5 dealing with opt-out opportunity given to users at a later date. The following table takes into account the websites that inform the users about their direct marketing policies.

**Tab4: Is direct marketing stated in privacy policy?**

		Frequency	Percent
All websites	no	52	26
	yes	148	74
	Total	200	100
goods	no	17	26.6
	yes	47	73.4
	Total	64	100.0
services	no	14	31.8
	yes	30	68.2
	Total	44	100.0
informative	no	7	21.2
	yes	26	78.8
	Total	33	100.0
news and entertainment	no	8	20.5
	yes	31	79.5
	Total	39	100.0
internet, mobile, telecom	no	6	30.0
	yes	14	70.0
	Total	20	100.0

<sup>28</sup> Section 11, Data Protection Act, 1998

<sup>29</sup> *ibid*

<sup>30</sup> *Phorm* case provides us with an example of lack of transparency in data processing.

This table shows that fifty two websites out of two hundred do not actually inform the user about their direct marketing policy in the t&c, thereby representing about 26% of the total number of websites used in our survey.

These websites are well represented in all of the five categories. Users signing up with these websites are not even aware whether their personal data, at a later date, would be used for direct marketing purposes. In relation to these websites, if the user receives direct marketing communications at a later date, it might be argued that information about direct marketing was not provided at point of entering into the contract. As a result, in absence of information, no consent can be associated with the receipts of such direct marketing communications. In relation to this issue it must be taken into consideration number of websites that actually provides opt-out options from direct marketing at a later stage.

**Table 5: Can you opt out of advertising at later stages?**

		Frequency	Percent
All websites	no	56	28
	Yes	144	72
	Total	200	100
goods	no	19	29.7
	yes	45	70.3
	Total	64	100.0
services	no	9	20.5
	yes	35	79.5
	Total	44	100.0
informative	no	10	30.3
	yes	23	69.7
	Total	33	100.0
news and entertainment	no	13	33.3
	yes	26	66.7
	Total	39	100.0
internet, mobile, telecom	no	5	25.0
	yes	15	75.0
	Total	20	100.0

The above table shows that fifty six websites out of two hundred do not expressly provide the opportunity to opt-out from direct marketing communications at a later date. Similar to table 4, about 28% percent represents such websites divided under five categories.

Websites are not always up to the task of providing reasonable options to opt-out at a later stage. The table above provides evidence that a reasonable number of websites do not state how to opt-out in relation to direct marketing communications. This practice is not transparent and far from being fair since this is the only way for the user to stop receiving commercial communications. On top of that, if the user is not aware of direct marketing policies at initial stages, then the situation becomes even more difficult. One might argue that websites not stating the way to opt-out are the websites that do not say anything about the direct marketing policy in t&c (Tab 4). These should be websites that simply do *not* process personal data for direct marketing at all. While this may be the ideal situation, it will take lot of persuasion to believe that not stating the direct marketing policies in the t&c, and not providing users with

opt-out instructions, will automatically guarantee non-receipt of direct marketing communications.

### 3. Specific consent for informed purpose

Further to the legal requirement for consent to be specific, in the following section we examine instances of specific consent as provided by two hundred websites in our survey. We have previously observed that websites do state direct marketing policies in their t&c.<sup>31</sup> In the section below we examine whether users get specific option to provide consent in conjunction with the information provided. The following table presents number of websites that provides opportunity to users in relation to marketing activities.

**Tab6: Is specific consent to marketing given?**

		Frequency	Percent
All Websites	no	56	28
	yes	144	72
	Total	200	100
goods	no	18	28.1
	yes	46	71.9
	Total	64	100.0
services	no	15	34.1
	yes	29	65.9
	Total	44	100.0
informative	no	8	24.2
	yes	25	75.8
	Total	33	100.0
news and entertainment	no	7	17.9
	yes	32	82.1
	Total	39	100.0
internet, mobile ,telecom	no	8	40.0
	yes	12	60.0
	Total	20	100.0

The results outlined in table 6 indicate that 72%, i.e. one hundred forty four of two hundred websites actually provides specific opportunity to the user in relation to consent for marketing purposes. This consent is given by the user at the time of entering into a relationship with the website. It is evident that the information about marketing activity is provided in advance and at the time of data collection. This makes the consent specific in relation to the purpose of processing.<sup>32</sup> Albeit less in number there are websites that do not provide such opportunity. This does not mean that those websites in the long run will refrain from marketing and using users' personal data. Once again if the question of transparency and fairness is raised, the most likely answer would be to inform and ask for consent in advance instead of keeping it for later stages. If one compares the situation in this section to table 4, information about direct

<sup>31</sup> Table 4, informed direct marketing policy with personal data

<sup>32</sup> Comparing tables 4 & 6 indicates that websites stating the direct marketing policy in the t&c are more likely to ask for specific consent during registration in relation to marketing purposes.

marketing is not always stated in the t&c.<sup>33</sup> There is no opportunity to provide consent in situations where direct marketing policies are not stated in the t&c or at the time, when user enters into a relationship with the website. Without valid consent, any future practice of sending direct marketing emails would be considered illegal. This situation emphatically points to the lack of uniformity: providing information and subsequent opportunity to the user for specific consent. Essentially practices on the part of websites can be made a lot transparent than they actually are.

## **Conclusion**

Consent for data processing is a key requirement of UK data protection law. To be in compliance with this requirement, websites should inform individuals at the outset to which activities in particular they are providing their consent. Empirical evidence indicates that this requirement is not fully met. Our survey of 200 websites under the “.co.uk.” domain suggests that websites seldom met the requirement for informed and specific consent in relation to data processing. Whereas in their great majority websites provide individuals with information as to the purposes of data collection, a good percentage of them do not state purposes of direct marketing in their privacy policies. Those latter websites also fail to provide individuals with the specific purposes for which their data are going to be processed; this means that if individuals consent to this kind of data processing, consent is not going to be specific and hence not valid. Websites that do not state the direct marketing policy in the t&c are highly unlikely to meet the requirement for specific consent in relation to marketing purposes at the registration stage. What is more, the method of obtaining consent is questionable on the ground of legitimacy; some websites do not seek consent for data processing at the registration stage. A significant number of websites have set opt-out – instead of opt-in – mechanisms for the receipt of advertisements, and only a half of those websites provides users with the opportunity to opt-out from receiving promotional materials at later stage. This means that the requirement for informed and specific consent for data processing is not fully respected. Transparency and fairness in data processing could be better achieved should websites informed individuals about their marketing policies at the outset and were more cautious in the application of opt-out mechanisms.

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<sup>33</sup> Table 4, informed direct marketing policy with personal data.