

# Consent versus Proportionality Principle: Are the Proportions Right?

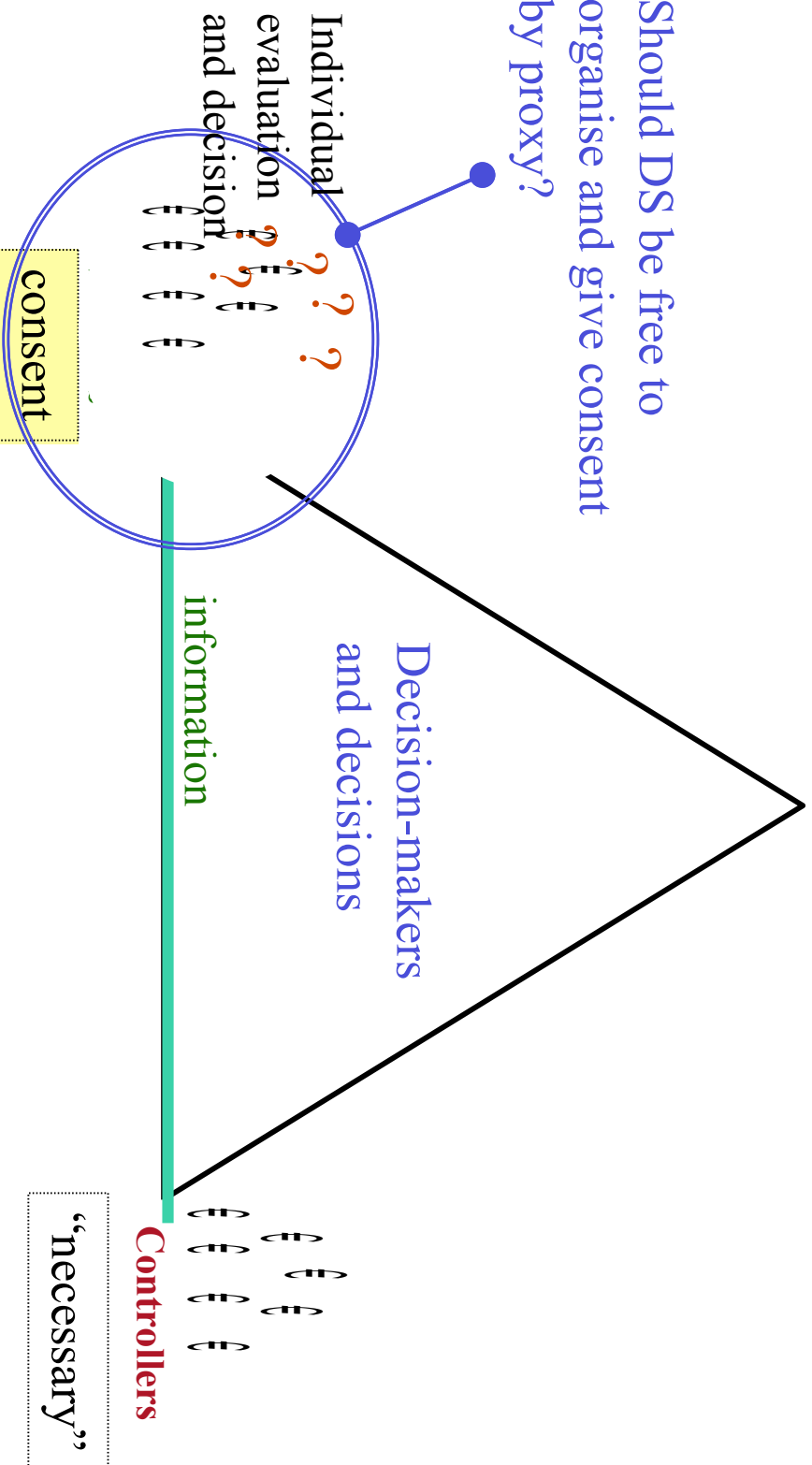
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# Consent as discretionary decision-making

One basic decision concerns the legitimacy of the processing (cf. DPD Art. 7)

Control Licence (cf. DPD Art. 20)  
Data protection authority

Should DS be free to organise and give consent by proxy?



## Role of proportionality principle (PP) in data protection law (I)

- PP operates across manifold areas of law and policy
  - General EU law: (1) suitability; (2) necessity; (3) non-excessiveness
- PP per se not recognised as traditional "fair information practice" principle, but underpins them
- Main manifestation in Dir. 95/46/EC (DPD) Arts. 6(c), 7; Europ. Convention on Human Rights (ECHR) Art. 8(2)
- PP interacts with consent in (at least) following ways:
  - (a) exercise of consent involves, in principle, prop. assessment;
  - (b) non-consensual processing requires satisfaction of PP (DPD Art. 7; ECHR Art. 8)

## Role of proportionality principle (PP) in data protection law (II)

- Q: What role does PP play re. consensual processing? Uncertain, given current state of ECtHR case law.
- Q: What constitutes interference with Art. 8(1) right(s) in data processing context (apart from lack of knowledge/consent)?
- Cannot assume that proportionality principle affords stronger data protection than consent. But PP arguably has potential to, in certain contexts
- Q: What is normative status of consent relative to PP, in context of DPD Art. 7?
  - Prima facie no prioritisation of 7(a) relative to 7(b)-(f). Cf. Norwegian developments; ECtHR case law.
  - Q. is normative prioritisation desirable (de lege ferenda)?

# Collective consent?

Q: Should it be lawful for DS to authorise

interest organisations etc to give

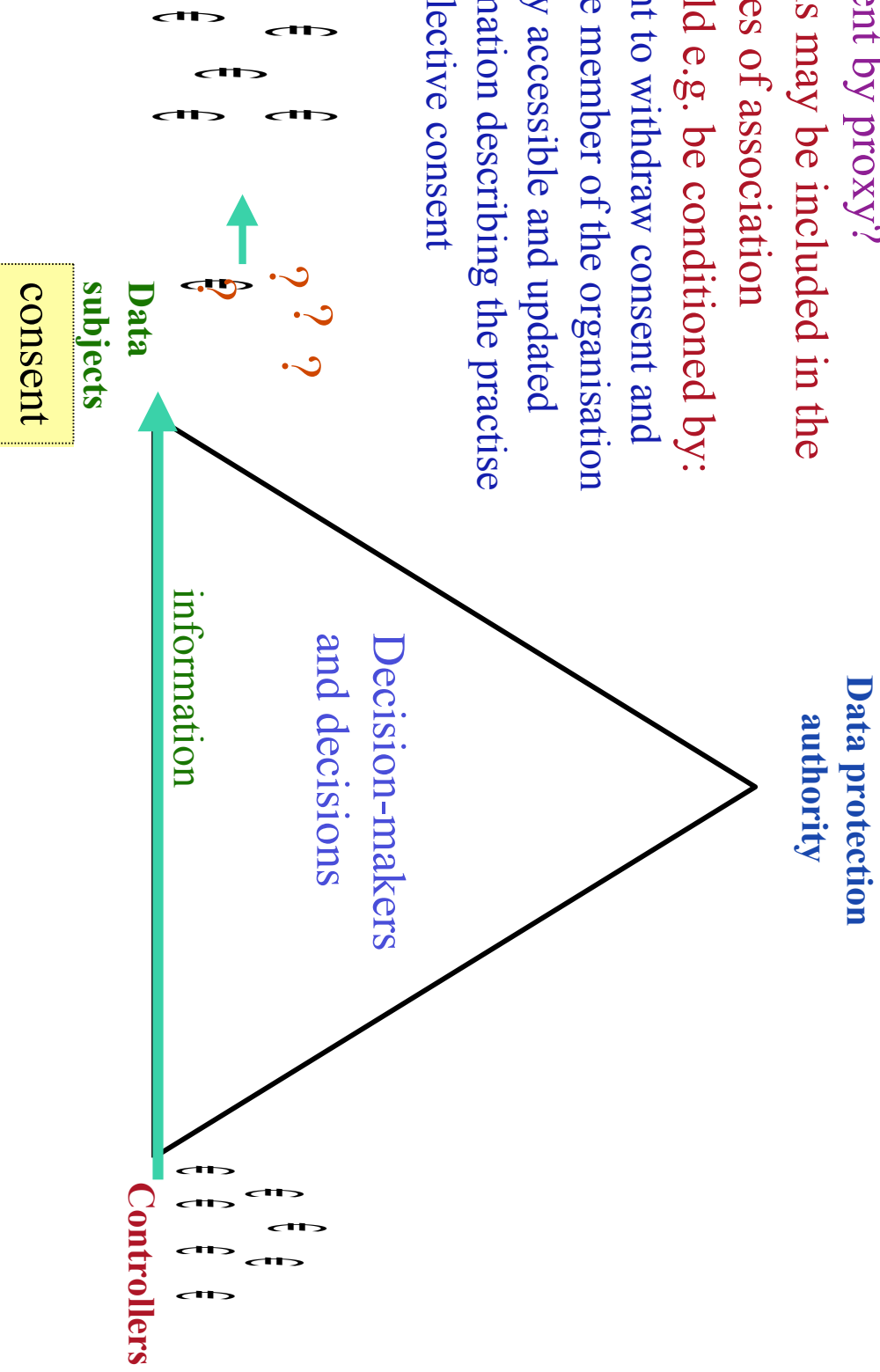
consent by proxy?

Terms may be included in the

articles of association

Should e.g. be conditioned by:

- Right to withdraw consent and still be member of the organisation
- Fully accessible and updated information describing the practise of collective consent



## Pros of collectivising consent

- Better power balance
- Counters “consensual exhaustion”
- Engenders organisational engagement in privacy issues
- Serves to highlight that data protection = collective affair

## Problems of collectivising consent

- Arguably not in line with DPD definition of consent:
  - “... any freely given specific and informed indication of ... wishes ...” (Article 2)
- “Proxies” may not always be trustworthy
- Increased engagement of proxies → increased *disengagement* of data subjects (disengagement already a problem)
- But deserves further consideration, in conjunction with other collectivisation strategies (e.g., class/group actions)