



Fact Sheet on Consent in Research Projects Involving Children

Focus: capacity of judgement

Please note that the information below is not legally binding. This information sheet is intended only as an aid. For general advice on consent, please take note of the information sheet on informed consent when collecting personal data.

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1. Capacity of judgement as a fundamental prerequisite for consent

- According to Art. 16 of the Swiss Civil Code¹, a person (regardless of age) possesses the capacity of judgement if they can act “rationally”, i.e. if they can understand an action, conceive of its consequences, and act accordingly.
 - **Please note:** The more complex an action or situation and the more serious the possible consequences, the higher the standards imposed on the ability to act rationally must be.
 - «Rational» action requires not only reasoning ability and general life experience, but also specialist knowledge: level of education and relevant knowledge must also be taken into consideration.

2. Children’s capacity of judgement (see Art. 305 in conjunction with Art. 18 et seq. Swiss Civil Code)

- Swiss law does not specify a minimum age at which a presumption of capacity for judgement exists.² Accordingly, in some circumstances a child may have capacity of judgement despite being a minor («limited inability to act»)³
- Research projects involving minors therefore require a nuanced consideration of the individual case.⁴
- When considering a specific case and question, it is necessary to determine whether:
 - The child already has capacity of judgement and therefore can or must consent
 - Special laws (such as Art. 21 et seq. HRA⁵) stipulate specific age requirements for an independent decision by a child.

3. Validity of consent

- From a data privacy perspective, a child with capacity of judgement can consent to data processing without parental permission, as long as no legal transactions are involved and the child’s welfare remains assured.⁶
 - **Please note:** The younger the child with capacity of judgement, the earlier one should have a joint discussion of consent or even obtain additional consent from the parents.

¹ Swiss Civil Code, [CC](#); SR 210.

² The Federal Supreme Court avoids setting strict age limits (see [BGE 134 II 235](#), E.4.3.2.); however, this refusal leads to significant legal uncertainty in practice and extensive guidance for evaluating capacity of judgement is therefore available (e.g. SAMS [recommendations](#); Swissethics [guidelines](#) for research involving minors; [expert report](#) on trans children in schools).

³ See Art. 305(1) in conjunction with Art. 18 et seq. Swiss Civil Code, according to which a minor child with capacity of judgement can independently receive advantages without payment, manage minor affairs of daily life, and exercise the rights due to them based on their personhood (see BSK ZGB-I *Schwenzer/Cottier*, Art. 304/305 N 3).

⁴ See, among others, *Kurzkommentar ZGB-HOTZ*, Art. 16 N 3.

⁵ Swiss Human Research Act, [HRA](#); SR 810.30.

⁶ Any [legal transaction](#) executed by a child requires the consent of a parent or legal representative to be valid (see Art. 19(1) Swiss Civil Code; see, among others, BK-BUCHER, Art. 19 Swiss Civil Code N 9).



If the child with capacity of judgement is older, it may be reasonable to notify the parents, depending on the situation.⁷

4. Can parents consent on behalf of a child?

- Parents do have a comprehensive right of representation under the aegis of “parental care”, if the child has capacity of judgement in regard to the matter in question, the child must decide on their own.⁸
 - **Important:** It is necessary to balance the child’s personal rights and their need for protection (by parents), which decreases as the child gets older.
- From a data privacy perspective, it is particularly important to clarify what personal data will be processed for the research project.
 - **Please note:** Depending on the severity of the encroachment on the child’s personal rights, the parents can only consent to data processing if the child with capacity of judgement has consented (for example, if photographs of the child are involved or on issues of religion, etc.).⁹

5. Final comments:

- It is advisable to obtain legal advice regarding research projects involving children (datenschutz@unibas.ch)!
- The consent of the responsible ethics committee must be obtained for research projects involving children.

⁷ Beyond legal transactions, it has not yet been satisfactorily clarified whether a child can consent alone or whether additional consent from the parents is required.

⁸ According to the Federal Supreme Court, a minor with capacity of judgement can exercise their strictly personal rights independently (see [BGE 134 II 235](#), E.4.1.).

⁹ This particularly applies to the exercise of rights that the child possesses based on their personhood (see, among others, BSK ZGB I *Schwenzer/Cottier*, Art. 304/305 N 6); see [Article](#) concerning images of children on social networks.