

## 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.

This information sheet is available in line with [CC BY-SA 4.0](#)

14 February 2024/ lic. iur. Danielle Kaufmann (University of Basel Data Protection Officer), Loredana Martignetti, MA

#### 1. Capacity of judgement as a fundamental prerequisite for consent

According to Art. 16 of the Swiss Civil Code<sup>1</sup>, 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 and adolescents as particularly vulnerable members of society

Under the Federal Constitution<sup>2</sup> children and adolescents are particularly vulnerable members of our society (Art. 11 Cst.). The UN Convention on the Rights of the Child (UN-CRC), which Switzerland has ratified, also emphasizes the special position of children and young people. It is based on the principles of the right to respect for the best interests of the child (Art. 3 UN-CRC), the right to life and development (Art. 6 UN-CRC) and the right to be heard and to participate (Art. 12 UN-CRC). For research with children and adolescents Art. 12 UN-CRC is particularly relevant.

#### 3. 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.<sup>3</sup> Older children or adolescents are capable of acting rationally depending on the situation. Accordingly, in some circumstances a child may have capacity of judgement despite being a minor («limited inability to act»)<sup>4</sup>. Their capacity of acting rationally must therefore be assessed individually for each specific action or decision – including the decision to consent to a research project.
- Research projects involving minors therefore require a nuanced consideration of the individual case.<sup>5</sup>
- When considering a specific case and question, it is necessary to determine whether:

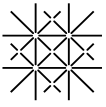
<sup>1</sup> Swiss Civil Code, [CC](#); SR 210.

<sup>2</sup> Federal Constitution of the Swiss Confederation, Cst., SR 101.

<sup>3</sup> 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).

<sup>4</sup> 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).

<sup>5</sup> See, among others, [Kurzkomentar ZGB-HOTZ](#), Art. 16 N 3.



- The child already has capacity of judgement and therefore can or must consent. Swiss law does not specify how the capacity of judgment is to be assessed. However, there are recommendations and guidelines on what needs to be taken into account when assessing the capacity and consent of children and adolescents.<sup>6</sup>
- Special laws (such as Art. 21 et seq. HRA<sup>7</sup>) stipulate specific age requirements for an independent decision by a child.

#### 4. 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.<sup>8</sup>
  - **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. If the child with capacity of judgement is older, it may be reasonable to notify the parents, depending on the situation.<sup>9</sup>

#### 5. Can parents consent on behalf of a child?

- Holders of parental custody 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.<sup>10</sup>
  - **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.).<sup>11</sup>

#### 6. Final comments:

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

---

<sup>6</sup> See e.g. [guideline](#) of Swissethics about research on healthy children and adolescents.

<sup>7</sup> Swiss Human Research Act, [HRA](#); SR 810.30.

<sup>8</sup> 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).

<sup>9</sup> 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.

<sup>10</sup> 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.).

<sup>11</sup> 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.