

Fact Sheet on Consent in Research Projects Involving Children and Young People

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](#)

7 May 2024/ lic. iur. Danielle Kaufmann (University of Basel Data Protection Officer), Loredana Martignetti, MA, Simone Mäder, MLaw, Attorney at Law

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 he or she can act “rationally”, i.e. if he or she can understand an action, conceive of its consequences, and act accordingly.

- **Please note:** The more complex an action or situation is and the more serious the potential consequences are, the higher the standards on the ability to act rationally must be.
- «Rational» action requires not only reasoning ability and general life experience, but also know-how: level of education and relevant knowledge must also be taken into consideration.

2. Children and young people as members of society particularly worthy of protection

According to the Federal Constitution² children and young people have the right to the special protection of their integrity (Art. 11 Cst.). The UN Convention on the Rights of the Child, 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 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 and young people’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.³ Older children or young people 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»)⁴. 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 children and young people therefore require a differentiated approach to each individual case.⁵

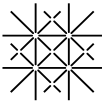
¹ Swiss Civil Code, [CC](#); SR 210.

² Federal Constitution of the Swiss Confederation, Cst., SR 101.

³ 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).

⁴ 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).

⁵ See, among others, *Kurzkommentar ZGB-HOTZ*, Art. 16 N 3.



- When considering a specific case, research design and question,⁶ it is necessary to check whether:
 - 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 young people.⁷
 - Special laws (such as Art. 21 et seq. HRA⁸) stipulate specific age requirements for an autonomous decision by a child.

4. Validity of consent

- From a data protection perspective, a child with capacity of judgement can consent to data processing without legal guardians' permission, as long as no legal transactions are involved and the child's welfare remains protected.⁹
 - **Please note:** The younger the child with capacity of judgement is, 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.¹⁰

5. Can parents or legal guardians consent on behalf of a child with capacity of judgment?

- Holders of parental custody have a comprehensive right of representation". However, if the child has capacity of judgement in regard to the matter in question, he or she must in principle decide autonomously.¹¹
 - **Important:** It is necessary to weigh up the child's personal rights and his or her need for protection (by parents or legal guardians), which decreases as the child gets older.
- From a data protection 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 interference with the child's personal rights, the parents or legal guardians can only consent to data processing if the child with capacity of judgement has consented (e.g., if the research includes photographs of the child or issues of religion, etc.).¹²

6. Final recommendation:

For research involving children and young people, it is strongly recommended to seek legal advice (datenschutz@unibas.ch) and an ethics approval from the University Ethics Committee of the University of Basel (uek@unibas.ch)

⁶ See e.g. for surveys in school classes the recommendations of the German Psychological Society ([DGP](#)).

⁷ See e.g. [guideline](#) of Swissethics about research on healthy children and adolescents.

⁸ Swiss Human Research Act, [HRA](#); SR 810.30.

⁹ 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).

¹⁰ 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.

¹¹ 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.).

¹² 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.