

Legitimate Interest of the Data Controller New Data Protection Paradigm: Legitimacy Grounded on Appropriate Protection*

ABSTRACT

Both Directive 95/46/EC and the new data protection framework proposed by the European Commission (the Draft Regulation published on January 25, 2012) aim to find an appropriate balance between data subjects' rights and safeguards, and the free processing (and flow) of information across the European Union (and beyond), for an economic, compatible growth in line with the expectations of society (the "appropriate balance").

Therefore, lawful processing should be subject to the so-called "balancing test" which establishes the ultimate level of protection that can effectively be guaranteed when personal data is processed. In this respect, it can be argued that the Draft Regulation contains a set of requirements and obligations that can be described as a comprehensive 'Data Protection Compliance Program' ("DPCP") which itself creates an "appropriate balance" between data protection and free flow of information/data.

The Draft Regulation aims at introducing a prescriptive legal model in the corporate management structure in order to ensure that personal data are processed in an environment which provides adequate safeguards from the start. Instead of limiting its intervention to principles and rules of law, the legislator has narrowed the entrepreneurial freedom of choice by setting out specific legal provisions and obligations related to corporate organization in order to handle personal data adequately. An overall reading of the document clearly shows the intention of depicting a well-structured and consistent personal data handling system, imposed on data controllers and processors. The high level of safeguarding of personal data pursued by both Directive 95/46/EC and the subsequent Draft Regulation is achieved by a management method applied to the whole personal data handling process from start to finish; by law, this method should now be complied with by all controllers whenever personal data is processed.

The legal scenario as it stands will be profoundly modified by the Draft Regulation. The reform --- having already fostered data safeguards through the data protection compliance program --- is now advancing a further step, by simplifying personal data processing and improving the free flow of information. The DPCP, in fact, demonstrates that the data controller has fulfilled his duties and obligations of protecting personal data during processing. Consequently, when compliance with the DPCP is achieved, the data processing legitimacy requirement is met and data processing is presumed to be legitimate on this ground. Other more traditional legal bases of achieving legitimacy, such as data subject consent to processing, seem to become less relevant because these other legal bases do not necessarily offer an appropriate level of protection of personal data, nor do they support a flexible implementation of the user control paradigm.

Companies should therefore be allowed to process personal data upon the condition that they have implemented (and can prove they have implemented) the DPCP, while processing of personal data by controllers and free flow of information would not be unnecessarily impinged.



** This paper has been written in the middle of the data protection reform. Amendments proposed by Rapporteurs have come one after the other. The authors have decided to focus their analysis on the version of the General Data Protection Regulation published by the EU Commission on 25 January 2012.*

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