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## Short statement about the role of consent in the European data protection directive

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The fundamental principle of data protection<sup>1</sup> is not the “consent principle”, but the purpose specification principle, worded in art. 6 of the Data Protection Directive, which foresees that personal data may only be “collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes”, and that they should be “adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed and “accurate and, where necessary, kept up to date”. Often, these two principles – the purpose specification and the data quality principles – are coined as the data minimisation principle.

Even when the aims of a data processing are legitimate according to art. 7, it will only effectively be legitimate if the data collected and the way they are processed are in line with the art. 6 requirements.<sup>2</sup> In other words, if data protection law foresees that personal data may only be processed for a whole range of reasons spelled out in art. 7, such processing must always remain necessary, adequate, relevant and not excessive in relation to a specific purpose (art. 6), which must *additionally* meet one of the aims enumerated in art. 7. So, if, by default, data protection accepts that many interests *and* the consent of the data subject do justify the processing of personal data – which represents an implicit “balance” in favour of these other interests – such processing, nevertheless must remain proportional in the light of specified purposes, or, in other words, meet the principles set out in art. 6 of the directive.

Indeed, article 1 of the Data Protection Directive spells out the fundamental objective that lies at its heart: to protect the fundamental rights of citizens whilst at the same time ensuring the free flow of personal data. In the Data Protection Directive, such reconciliatory operations can be found in article 7 that formulates the “criteria for making a data processing legitimate”. Indeed, articles 7 (e) and (f) of the Directive enshrine that a processing of personal data will be legitimate “if the controller pursues a legitimate aim”. Furthermore, art. 7 (a) declares a processing legitimate if the data subject has given his unambiguous consent. However, since articles 7(e) and (f) do already justify any processing of personal data tending to the realization of a legitimate aim of the data controller, the legitimacy by consent criterion foreseen by art. 7 (a) will often, if not always, be superfluous. So one may wonder if the consent criterion can supersede the other “legitimate aims” criteria, which would perversely imply that consent could legitimize processing for “illegitimate aims”, which indeed would be unacceptable.

There are historical and textual arguments to defend this position. Historically, indeed, the Data Protection Directive had to accommodate pre-existing national legislations on data protection that, at that time, did *not* foresee legitimization by consent of the data subject (France, Belgium, ...). Certainly, this was originally an option taken to protect the data subject (from a consumer-law-ish perspective) who is -almost by definition- in a weaker position, against the data controllers and to prevent possible confusion, conflation and abuse of consent. Politically, that is the reason why consent is not a necessary condition for the existence of a legitimate

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<sup>1</sup> See preamble 28 : “any processing”

<sup>2</sup> See preamble 31 : “in addition”

processing: “processings” that were legitimate under the legislation that pre-existed the implementation of the 1995 Directive did/could not become illegitimate at that time. From a textual point of view, neither the directive, nor art. 8 of the Charter do demand consent in a general way. In art. 7 consent is one of the six alternatives (see also preamble 31: “or ... or ... or...), which are all six already subject to the principles enumerated in art. 6. Article 8 of the Charter is also clear on that point: personal “data must be processed fairly for specified purposes [cf. art. 6] and on the basis of the consent of the person concerned or some other legitimate basis laid down by law [cf. art. 7].”

In the light of the foregoing, the argument that giving consent a “primary status over other criteria” is “in line with Recital 30 of the Directive that considers consent as the first condition to be met for a lawfull data processing” is erroneous. Next to the historical argument, the fact that a certain point is listed first in an “or ... or ... or ...” enumeration of alternatives, cannot be taken as indication of its predominance.

In other words, the predominance of the art. 6 principles (above the legitimate aims listed in art. 7) has to be taken seriously, which implies a reduction of the importance of consent in data protection to its real proportions, namely to one of the six possibilities –including the all round and broadly encompassing aims of art. 7e and art. 7f- that make a processing legitimate. In fact thus, in data protection, there is no “principle of data subject’s consent”.

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