

ICC POSITION ON LEGITIMATE INTERESTS

POLICY STATEMENT

Prepared by the ICC Commission on the Digital Economy

Summary and highlights

This statement outlines the International Chamber of Commerce's (ICC) position on the provision for establishing a data controller or third party's legitimate interests as a legal basis for processing data. ICC emphasizes the critical importance of the provision in a rapidly changing environment, demands innovative uses of data and urges its inclusion in the proposed European Union (EU) General Data Protection Regulation currently under consideration.

Summary

This policy statement outlines the International Chamber of Commerce's (ICC) position about the provision for establishing a data controller or third party's legitimate interests as a legal basis for processing data.

ICC emphasizes the critical importance of the provision in a rapidly changing environment, demands innovative uses of data, and urges its inclusion in the proposed General Data Protection Regulation on data protection currently under consideration. Furthermore, it highlights that when taken as a whole -- including its requirements for transparency and the need to consider legitimate interests in relation to the fundamental rights of data subjects -- the provision requires necessary analysis to promote appropriate decisions by the data controller. The comments discourage policymakers from instituting an exclusive list of legitimate business purposes. Instead, it encourages the development, in consultation with business and other interested stakeholders, of guidance for data controllers about how this provision can be responsibly and practically applied.

Introduction

The European Data Protection Directive¹ (the "Directive"), sets forth several legal bases for processing personal data.² Section II Article 7 Section (f) provides that personal data may be processed if the processing is necessary to pursue the "legitimate interests" of the controller or the third party to whom data are disclosed. The Directive sets out as an exception those instances, where the interests of the controller or third party are outweighed by the interest in the fundamental rights and freedoms of the data subject.

In January 2012, the European Commission tabled a proposal for a General Data Protection Regulation on data protection ("the Regulation"). The European Commission draft would change the approach articulated in the Directive. It would require data controllers to meet more stringent requirements to establish a legitimate basis for processing data about children. The Commission proposal also calls for increased transparency, and asks controllers to document the legitimate interests, inform individuals of what those interests are, and remind them of their right to object to use of the data.

On 12 March 2014, the European Parliament voted on an amended draft of the Commission's proposal. The European Parliament largely reverted back to the Directive's approach to allow legitimate interests as a lawful basis for processing. In considering the Regulation's sections dealing with legitimate interest and its interpretation, ICC highlights the need for precision in drafting and the use of criteria representing reasonable user expectations (as it is impossible to accommodate all personal preferences). Such drafting would also serve to enhance legal certainty and consistency of outcomes.

As the EU legislative process continues, it is important that the basis for processing -- articulated in Art. 7f) of the Directive -- is implemented in the Regulation.

¹ Directive 95/46/EC (Directive on protection of individuals with regard to the processing of personal data and on the free movement of such data).

² The Directive provides that Member States shall provide that personal data may be processed only if:

- (a) the data subject has unambiguously given his consent; or
- (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; or
- (c) processing is necessary for compliance with a legal obligation to which the controller is subject; or
- (d) processing is necessary in order to protect the vital interests of the data subject; or
- (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or
- (f) *processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1 (1).* (emphasis added.)

On 9 April 2014, the Article 29 Working Party issued Opinion 06/2014 on the notion of the legitimate interests of the data controller under Article 7 of Directive 95/46EC. The Opinion included recommendations on how to conduct the balancing test to evaluate the legitimate interests of the data controller, the impact to the individual and additional safeguards that can be put in place to protect the individual. In addition, the Working Party called out specific recommendations for the Regulation, including that there should not be an exclusive list of business purposes, but instead that the legitimate interests legal basis is needed as a flexible mechanism to determine when data processing is appropriate.

ICC agrees with the Article 29 Working Party that legitimate interests should be maintained as a basis for legal processing, particularly in an environment where data uses and technology are rapidly emerging and the need to innovate is paramount. ICC believes that the legitimate interests' provision can provide the necessary strong protections for individuals if properly applied. Given the pace of development in this area, neither businesses nor individuals would be well served by an exhaustive list of recognised legitimate interests, which may not anticipate the trajectory of new technology, business models, or data use. Rather, ICC believes that the most constructive, workable path forward would involve articulation of guidelines to help data controllers determine when their interests are legitimate. Such guidelines would best be developed through a collaborative process involving interested stakeholders to arrive at guidance that is workable and effective in a dynamic data and technology environment. ICC recognises that some illustrative examples related to balancing are provided, but cautions that those must be appropriately considered in context, are not meant to supplement or displace established practices and should not be considered an exhaustive list of the applicability of legitimate interest.

Current and emerging beneficial uses of data require the flexibility provided by the legitimate business interests' provision.

Organizations' ability to establish a legitimate interest as the basis for lawful data processing is critically important in an environment where data is increasingly collected in ways that do not necessarily directly involve the data subject, and at a time when new, beneficial data uses are discovered. In such instances, other grounds, such as the data subject's consent or the need to fulfil a contract's requirements are not available or workable.

The Article 29 Working Party recognized the important role of legitimate interests when they concluded in their opinion:

Article 7(f) should not be seen as a legal ground that can only be used sparingly to fill in gaps for rare and unforeseen situation as "a last resort" – or as a last chance if not other grounds may apply. Nor should it be seen as a preferred option and its use unduly extended because it would be considered as less constraining than the other grounds. Rather, it is as valid a means as any of the other grounds for legitimising the processing of the personal data.³

The European Commission has recognised at least one example of data controllers' need for relying on legitimate interests to lawfully process data: organizations' need for protecting their networks and their customers' networks, information systems and devices.⁴ To provide effective safeguards, organizations must process personal data about the third party attempting to access the network or device. In this context, data controllers must rely on legitimate interests, because they will have neither the consent of nor a contractual relationship with the third party. Moreover, protection of networks, systems and devices necessitates data use without the data subject's consent – allowing bad actors to withhold information from this use by choosing not to consent would make it impossible to identify suspicious behaviour on networks and risk of intrusion.

Use of data for knowledge discovery research to determine its usefulness for analytic processing is another example. Data scientists, researchers, governments and businesses recognise the

³ Opinion 06/2014, p.49

⁴ Recital 39 of the Council's proposal introduces a presumption of legitimate interest for the data controller based on preventing and combatting fraud, anonymising or pseudonymising personal data, and direct marketing.

tremendous power of analytic data processing to serve the goals of medicine, social welfare, education, commerce and civil society. The data fuelling these applications is gathered from a vast array of sources. In many cases the data is not provided directly by the individual. This might make it difficult - if not impossible - to obtain consent to its use for research, as there is likely no contractual relationship with the data subjects.

Yet another example is the use of data by information intermediaries, which collect data from multiple sources, and create value from it. In one case, the data controller compiles real-time geo-location data from vehicles in North America and Europe from a wide array of car models, commercial fleets, and mobile phone apps. This information is combined with other information on weather, local events, and historical traffic patterns to predict traffic flows. The results are conveyed to cars' navigation systems and are used by governments and commercial fleets. While this geo-location example involves business enterprises, information intermediaries may also be non-profits that use data to address issues that would not be taken up by the commercial market.⁵

The legitimate interests' basis for lawful processing contains the necessary balance to promote appropriate decisions by data controllers.

The legitimate interest' basis for lawful processing is well designed to protect individuals from inappropriate use of data. It does not give data controllers the ability to unilaterally determine when their interests are legitimate, but requires that data controllers be transparent about such uses, and that they balance the use against the individual's fundamental rights and freedoms.

The Article 29 Working Party Opinion makes clear the mechanism to evaluate this necessary balance. The Opinion's Annex 1 provides a quick guide, which in part describes how to evaluate the nature and source of the legitimate interests, whether the processing is necessary, and the impact on the individuals. The Recommendations section of the Opinion goes on to describe the importance of allowing the legitimate interests' lawful basis to be "sufficiently flexible" to reflect "the dynamic nature of the relevant contexts."⁶

This approach is particularly apt now, as organizations move to adopt accountability models for data protection and management within their organizations. Accountability requires that organizations wishing to use data in new or innovative ways assess the risk of such use. It further requires that they are answerable for how that assessment is carried out and the resulting decisions.⁷ The balancing demanded of the legitimate interests principle is well supported by the accountability mechanisms currently being adopted by data controllers. Data controllers are increasingly well equipped to carry out the thoughtful, credible analysis that will result in appropriate decisions about legitimate interests. The Article 29 Working Party Opinion recognises the importance of Accountability and provides recommendations on how organizations can demonstrate their responsible implementation of the legitimate interests' lawful basis⁸, and the need for such accountability mechanisms "must remain reasonable and focus on outcome rather than administrative process."⁹ It is important that such accountability requirements do not impose bureaucratic documentation or process requirements that will not scale for organizations of different sizes, structures and industries. ICC supports the overall concept that organizations should adopt accountability mechanisms to demonstrate their responsibility. The current draft of the Regulation contains requirements for many such mechanisms. There does not appear to be incremental value in additional accountability mechanisms specific to the legitimate interests' lawful basis. A better approach, as noted below, would be for the Regulation to call out the need for the balancing of interests, and for multistakeholder organizations to continue to articulate best practices for how to determine that balance within specific contexts.

⁵ Mayer-Schoenberger, V. and Cukier, K., *Big Data: A Revolution That Will Transform How We Live, Work, and Think*. New York, Houghton Mifflin Harcourt, 2013, p. 134-137.

⁶ Opinion 06/2014, p. 51.

⁷ "Data Protection Accountability: The Essential Elements," 2011, and an extensive resource on accountability-based privacy governance may be found at http://www.informationpolicycentre.com/accountability-based_privacy_governance/ (last visited October 9, 2013).

⁸ Opinion 06/2014, p.52

⁹ Opinion 06/2014, p.52 footnote 111.

Legitimate interest includes a totality of the circumstances analysis - what is the legitimate interest of the processing in light of all relevant circumstances - nature of the use, risk of harm, proportionality and applicable mitigation controls, etc. Among the controls which should be considered are the de-identification of personal information, including through anonymisation and pseudonymisation. A benefit of using such de-identification mechanisms would be to provide businesses with greater flexibility in the processing of such data, including for data analytics. Sufficiently anonymised data would fall out of the scope of personal data protection requirements and eliminate a potential risk of harm, thus leading to greater flexibility. The same applies to pseudonymised data, which, while it remains within the definition of personal data, helps to significantly raise the level of protection by eliminating its attribution to the data subject without the use of additional information. Concepts of legitimate interest also include the applicable usage exceptions which enable personal information to be used in specified circumstances.

Where such solutions and controls are correctly implemented (the personal information of a data subject can be appropriately protected and risk of possible harm appropriately mitigated) the use of such de-identified data for alternate purposes beyond those for which they are originally compiled should be permitted. That's why processing of data that has been pseudonymised should be considered a legal basis for processing that would allow further processing of such data, absent an objection by the data subject (Opt-Out).

An exhaustive list of legitimate interests articulated in law would be too rigid and cannot accommodate the needs of a dynamic, innovative marketplace.

ICC agrees with the Article 29 Working Party that articulating and relying on an exhaustive list of legitimate interest will create more problems than it will solve. The data environment, supporting technologies and innovative value-creating business models change rapidly and in often unanticipated ways. The Regulation, and particularly the legitimate interests' provision, will need sufficient flexibility to meet the requirements of this environment going forward. Fixing a list of legitimate interests at a moment in time could create a barrier to innovation and economic growth. It could also have the unintended consequence of choosing one technology or business model over another, and inhibit the natural tendency of technology development to meet consumer needs or to contribute to market resolution or societal issues. While the Article 29 Working Party recommends the Regulation's recitals include a non-exhaustive list of legitimate interests, ICC does not see much value in trying to determine such a list at this time. In recognising the limitations of exhaustive examples, we also highlight the need for precision in drafting and use of objective criteria to help assure applicability and legal certainty of outcomes. **A better approach would involve developing, in collaboration with interested stakeholders, guidance that assists data controllers in determining when a legitimate interest is demonstrated.**

ICC is committed to identifying ways to enable data controllers to lawfully process data by establishing legitimate interests- - where this legal basis exists -- while providing sufficient guarantees that organizations will use the legitimate interest standard in an appropriate, transparent manner.

We propose that a public private dialog with interested stakeholders, be created to develop principles to provide guidance for data controllers that rely on this basis for legal processing. We suggest that an amendment articulating the need for these principles be inserted in the Recital linked to current article 6.

Such an approach offers several benefits: Firstly, it establishes an opportunity for the European Data Protection Board to work with all relevant stakeholders to develop credible, workable guidance. Secondly, it provides the Regulation with sufficient flexibility that it will continue over time to provide needed protections and promote innovation. Thirdly, it will give organizations necessary legal clarity. Finally, it will respond to concerns about the need for increased transparency and discourage attempts to use legitimate interests as a loophole for those wishing to use data in inappropriate ways.

Conclusion

ICC and its members look forward to developing -- with all stakeholders -- an optimal approach to implementing this critically important provision of the future EU Regulation. Identifying solutions to data protection issues is a shared responsibility. ICC looks forward to working with policymakers to continue to protect privacy, while promoting innovation and driving economic growth.

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The International Chamber of Commerce (ICC)

ICC is the world business organization, whose mission is to promote open trade and investment and help business meet the challenges and opportunities of an increasingly integrated world economy.

With interests spanning every sector of private enterprise, ICC's global network comprises over 6 million companies, chambers of commerce and business associations in more than 130 countries. ICC members work through national committees in their countries to address business concerns and convey ICC views to their respective governments.

ICC conveys international business views and priorities through active engagement with the United Nations, the World Trade Organization, the G20 and other intergovernmental forums.

Close to 3,000 experts drawn from ICC member companies feed their knowledge and experience into crafting the ICC stance on specific business issues.

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