

# Consent-based data protection

*Necessary (limits?), Fragile (framework!)  
And collective vigilance required ...*



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# Introduction – Role of Consent



- **Vector for autonomy (control of one's information)**
- **Legitimate basis - Legal ground for processing**

# Brief historical overview



## ➤ Legitimate basis

## ➤ Conditions for validity + and + specified and reinforced

- OECD Guidelines (1980)
- Convention 108 – CoE recommendations (1981)
- Directive 95/46/EC of the EU (1995)
- APEC Privacy Framework (2005 - Choice)
- EU Charter of Fundamental Rights (2000 - 2007)
- EU COM Proposal for a Regulation (2012)

# Starting point of my reflections ...



- No matter how detailed they are, all conditions for validity of consent cannot / will not always be met
- Consent is invoked abusively all too often and this should be avoided (false data subject "consent")

## HOW?

# Reinforcement of Consent



- Suggestion 1: **LIMITING** consent as a legal ground for processing (**formalised exclusion** of consent in certain cases)
- Suggestion 2: a reinforced **FRAMEWORK** for consent as a legal ground for processing

# Suggestion 1: LIMITED use of consent



- **Art. 8 § 2, a) Dir. 95/46/EC: the prohibition to process sensitive data CANNOT be lifted with consent (intervention of the legislator)**
  - **EMPLOYMENT: (sensitive) data processing**
    - *BE: only if benefit –fundamental right turned into commodity? Commercialisation?*
    - *LUX: surveillance*
  - **GENETIC data (Italian Data Protection Code)**

REMARK: // other areas of law and ECHR case law (*Wilson v. UK*)

- **JUDICIAL data (Directive 95/46/EC)**
- **[Specificity of the public sector]**
- **What about the EU COM proposal for a regulation?**

# Suggestion 1: Food for Thought



- Evaluation of the implementation of art. 8 § 2, a) Dir. 95/46/EC?
- Intervention of the EUROPEAN or NATIONAL legislator?
- Legal certainty or over-prescriptive?
- For ANY data processing operation or for SENSITIVE data only?
- Paternalism? How to make sufficient qualifications (nuances)?
- Reinforced protection? Or risk that consent will be done away with to the advantage of less "privacy-friendly" legal bases?

# Suggestion 2: Additional Framework for INDIVIDUAL Consent



- **Additional safeguards provided for by "data protection" law**
  - Consent AND authorisation
  - Consent AND collective information
  
- **Additional safeguards provided for by other equally applicable rules**
  - Medical activities and scientific research:
    - *Ethics committee*
    - *Legislation on "patient rights"*
  - Protection of minors: existing protection/representation mechanisms



# Suggestion 3: REINFORCED control



## ➤ Awareness-raising

## ➤ Control

➤ DPA's

➤ Sectors: Codes of conduct

- *FEDMA – online marketing for children*

➤ ...

# Conclusion?



- **Adelante con el debate!**
- **Muchas gracias por su atencion**

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