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# Freedom to Conduct a Business and Right to the Protection of Personal Data

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**Abstract**

In the Digital Ecosystem the relationship between freedom to conduct a business and the right to personal data protection is complicated and intricate, also considering that both right and freedom are not an absolute right and should be balanced following the principle of proportionality. The asserted higher axiological value of the right to personal data protection over the freedom to conduct business cannot be intuitively assumed, as doing so could lead to irrational bias and a one-sided view, resulting in the narrow and absolute enforcement of a single right. It is reasonable to explore the possibility of a "graduated axiological" assessment of the multiple rights encompassed within the right to personal data protection, considering the specific right related to the personal data in question and therefore to look for a moving beyond the absolute primacy of consent as the legitimate legal basis for personal data processing in favor of greater consideration of the 'legitimate interest' of the data controller and/or third parties.

## 1. Introduction

In digital spaces, ranging from electronic communication networks to social platforms, and extending to the new realms created by metaverses, the interests of digital economy enterprises and digital users intertwine and intersect on a daily basis, aiming for a balanced equilibrium that enables their fruitful coexistence.

While the interest of digital economy enterprises – much like all professional economic operators – typically and legitimately revolves around maximizing profit derived from their entrepreneurial activities, the primary interest of digital users is to be able to access the digital services and content offered online, fully benefiting in this realm from the fundamental rights recognized for every individual, as delineated by the regulatory framework outlined in the studies of Digital Constitutionalism.

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From the perspective of the freedoms and rights that legally shape the relationships taking place online, the aforementioned situation sees a typically antagonistic juxtaposition (although not based on legislative data). On one hand, there is a freedom widely (albeit diversely) recognized in Western legal systems for professional economic operators, namely the freedom to conduct business or, to use the Italian Constitution's terminology, the freedom of economic initiative. On the other hand, there is the protection of personal data, gradually emerging as a fundamental right within the Weltanschauung of the regulation that underpins the specific realm of the European integration process, which broadly aligns with the Digital Single Market today.

The relationship between freedom to conduct a business (a freedom present since the inception of the European integration process) and the right to personal data protection (a fundamental right of more recent emergence) immediately appears complicated (due to the multiple elements to be taken into consideration) and intricate (given the numerous interactions among these elements, not always immediately decipherable), especially when considered in the context of what remains the cornerstone of the European integration process, namely the creation of the Single Market and, specifically, the aforementioned Digital Single Market.

Within the framework of the European Digital Decade, this relationship must necessarily align with the "European Declaration on Digital Rights and Principles for the Digital Decade" (2023/C 23/01) and, consequently, be a consistent part of "*a European way for the digital transformation, putting people at the centre, built on European values and EU fundamental rights, reaffirming universal human rights, and benefiting all individuals, businesses, and society as a whole*".

On the other hand, on one side, Whereas 4 of Regulation (EU) 2016/679 ('GDPR') acknowledges that the right to personal data protection is not an absolute right, that this right should be considered in light of its social function, and should be balanced – following the principle of proportionality – with other fundamental rights (among which the freedom to conduct a business is explicitly mentioned). On the other side, freedom to conduct a business itself is not an absolute right and may be subject to limitations when there is a need to protect the rights of others, in accordance with the inherent principle of proportionality.

Now, the axiological prevalence of the right to personal data protection (as a personality right) over the freedom to conduct a business (as an economic liberty)

seems generally established and accepted in the reasoning of legal operators and scholars. Indeed, based on reflections developed in the past, especially in relation to the right to property, it is useful to recall the distinction (with significant value implications) proposed among scholars between 'inviolable fundamental rights' (pertaining to individuals) and fundamental rights not accompanied by the attribute of inviolability (which would include property and private economic initiative). The former would serve as the foundation of a democratic State based upon rule of law, while the latter would shape the rule of law (already well grounded) in a specific way. Similarly, a more recent reconstruction has articulated the inviolability of rights into 'strict inviolability' (referring only to personal rights) and 'broad inviolability' (applying to property and private economic initiative).

Following this line of thought, in general, while the right to personal data protection seems to be strongly inviolable, the freedom to conduct a business is recognized to have a more permeable inviolability, and thus somewhat weakened.

The distinction and consequent diversity in axiological value between fundamental rights and economic liberties have already generated, albeit in the distinct context of social rights and the right to strike, the specific question of whether there exists a hierarchical relationship between fundamental rights (as general principles of European law) and the four fundamental economic freedoms enshrined in the Treaties (see Advocate General Stix Hackl's conclusions in case C-36/02, para. 48). A somewhat general and unresolved response was given to this question by the Advocate General; he stated that fundamental economic freedoms should be interpreted "*in conformity with fundamental rights, which can also be understood to mean a form of interpretation in conformity with primary legislation or interpretation in accordance with constitutional principles. As far as possible, therefore provision of Community law are to be interpreted in such a way as to be reconcilable with relevant fundamental rights*" (*Omega*, case C-36/02, Opinion of Advocate General, 18 march 2004, para. 57).

In this context, while the foundational approach of European legal systems that prioritize human dignity as a primary and insurmountable value, a cornerstone of the entire fundamental rights architecture, is not contestable (and in my opinion is not desirable to be contested), it is legitimate to question – for the sake of a correct and balanced analysis of the relationship between freedom to conduct a business and the right to personal data protection, as well as their necessary balance respecting the principle of proportionality – whether the right to protect (or perhaps more accurately, the right to control – in the sense of governing – one's personal data,

according to the principles of so-called "user freedom") is positioned at the same axiological level as other personal rights.

Furthermore, while maintaining the superior axiological gradient of the right to personal data protection, it is not equally clear how this should be specifically applied. One viable approach could be for the GDPR – with its principles (especially those in Article 5), detailed guidelines, procedures, and pathways – to provide the tools for legal practitioners, scholars, and anyone tasked with enforcing the law (especially the data controller) to identify the 'essential core' of personal data protection. However, this essential core cannot be apodictically determined by invoking a generic and absolute unavailability of the rights of the data subject, as this would unjustifiably eliminate any consideration of freedom to conduct a business and relinquish any balancing process between the latter and the right to personal data protection, which is certainly not an overbearing right.

Adopting this perspective, it's crucial to note that the right to personal data protection is constituted – primarily for the data subject – by a "bundle of rights" (the right of access, the right to rectification, the right to erasure or the so-called "right to be forgotten", the right to restriction of processing, the right to data portability, the right to object, the right not to be subject to automated individual decision-making, the right to lodge complaints with the supervisory authority). The axiological precedence relationship compared to the freedom to conduct a business can inevitably take on differentiated connotations for each of these, ensuring – in favor of the specific right to personal data protection – the least possible impact on this conflicting liberty.

Lastly, while remaining within the perimeter of the GDPR, it is worth exploring the profile of the legitimate interest of the data controller (or third party) as a basis for the legitimacy of personal data processing. One could, indeed, inquire whether – in light of a possible consideration of personal data as an object of consideration (see Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services) – the freedom to conduct a business regarding the processing of consumer/user personal data does not regain (at least partially and/or with limitations) an axiological parity (or, at the very least, an "axiological reapproaching") in terms of the legitimate interest of the company in pursuing its profit objectives.

## 2. The Freedom to Conduct a Business as a Fundamental Right

The original European Treaties do not reference the freedom to conduct a business or the freedom of economic initiative. Recognition of the freedom to conduct a business awaited the Charter of Fundamental Rights of the European Union (hereinafter, the 'Charter'), where explicit acknowledgment of this freedom appears in one of the European constitutional texts.

However, it cannot be doubted – given the complexity of the evolution of the European integration process on all fronts (political, regulatory, and case law) – that as the European Union is founded on a market economy, the freedom to conduct a business constitutes one of the cornerstones of the European economic constitution from its inception. This undoubtedly represents one of the general principles. This assertion is initially supported by the (though not numerous) case law of the Court of Justice of the European Union (hereinafter 'EU Court of Justice'), which, in the context of protecting fundamental rights (as general principles of European law) recognized in the constitutional traditions common to the Member States, has affirmed that the "*free exercise of trade, work, and other economic activities*" enjoy similar protection to the fundamental right of property (*Nold*, case 4/73, para. 14). On the other hand, within this case law of the European Court, it has been clearly stated from the outset that the freedom to conduct a business is not an absolute right and that – while retaining its substance – it can be subject to limitations.

Thus, the recognition of the freedom to conduct a business as a fundamental right by Article 16 of the Charter ("*The freedom to conduct a business in accordance with Community law and national laws and practices is recognised*") is based on the case law of the EU Court of Justice, which has always recognized the freedom to carry out economic and commercial activities, as well as contractual freedom. Additionally, Article 119 of the Treaty on the Functioning of the European Union (TFEU) recognizes free competition. The freedom to conduct a business has thus found its place in Title II of the Charter, dedicated to 'Freedoms', nestled between the freedom to choose an occupation and right to engage in work (Article 15) and the right to property (Article 17), with which it shares contact points that can influence its understanding and application.

From a purely textual perspective, it is observed that while in other articles of "Title II – Freedoms" the rights or freedoms are clearly affirmed or prohibited, the freedom to conduct a business is (simply?) recognized. This might be attributed to the fact that it has always been understood as a freedom that must be considered in relation

to European Union law and national laws and practices, within a dialectical relationship (and thus requiring balance) among different rights (and even national practices). Indeed, apart from the general limitations (applicable – pursuant to Article 52 – to all rights and freedoms affirmed or recognized by the Charter), the freedom to conduct a business encounters explicit and specific limitations in Union law (not just the Treaties, but also all derivative law and European case law) and in national laws and practices (which raises the issue of differentiated recognition based on individual national legal systems).

Although in some judgments, European judges have not been particularly analytical in the balancing process (see *Scarlet Extended*, case C-70/10; *Deutsches Weintor*, case C-544/10; *Sabam*, case C-360/10), it can first be noted that the freedom to conduct a business recognized by Article 16 of the Charter, as repeatedly emphasized, does not constitute an absolute right (see *Sky Österreich*, case C-283/11). Its protection depends on its social function in relation to the specific context in which it is invoked, leading to greater or lesser compressions concerning the fundamental right with which it must contend. This greater or lesser compression must obviously occur in accordance with procedural guarantees by all involved parties, primarily without irremediably suppressing its essential core.

Regarding procedural guarantees, limitations on the freedom to conduct a business must be prescribed by law and respect the principle of proportionality (see *Aget*, case C-201/15), meaning they must be necessary and effectively serve: (i) purposes of general interest recognized by the EU (see *Neptune*, case C-157/14; *Lidl*, case C-134/15, *Dextro*, case T-100/15); or alternatively, (ii) the need to protect the rights and freedoms of others.

Regarding the existence of an essential core of freedom to conduct a business that these limitations cannot touch, it can be anticipated that even this essential core assumes a variable perimeter depending on the general interest or the right/freedom with which freedom to conduct a business is in competition. Ultimately, this core can be linked to the indispensable necessity that entrepreneurial activity is not entirely prevented or suppressed and that entrepreneurs retain the necessary autonomy in decision-making regarding resource use, without suffering unsustainable economic losses that could jeopardize their existence (see *Alemo-Herron*, case C-426/11; *UPC Telekabel Wien*, case C-314/12; *Anie and others*, cases C-798/18 and C-799/18).

## 3. The Protection of Personal Data as a Fundamental Right

The formal status of the right to the protection of personal data as a fundamental right is established by its inclusion in the Charter and the Treaties, as well as by explicit declarations from European judges in the cases brought before them.

This status is primarily affirmed by the inclusion of the right to the protection of personal data in the Charter, where Article 8 (within the section dedicated to 'Freedoms') states that "*Everyone has the right to the protection of personal data concerning him or her*". This fundamental right is also provided in Article 16(1) of the Treaty on the Functioning of the European Union (TFEU). Furthermore, the character of the right to the protection of personal data as a fundamental right had already emerged in derivative law (with Directive 95/46/EC, in which the protection of personal data processing was considered part of the broader protection of private life) and has been repeatedly emphasized in the case law of the EU Court of Justice. It is largely due to the work of the EU Court of Justice that the protection of personal data has evolved over time, shifting from being considered a mere exception to the economic freedoms enshrined in the Treaties to its current "constitutionalized" configuration oriented towards fundamental rights.

However, it must be reiterated that the protection of personal data, despite being formally elevated to a fundamental right for European citizens, is not an absolute right, as this right can be subject to certain exceptions. These exceptions are designed to allow the exercise of other fundamental rights or to avoid interference with specific State interests. Such limitations are not explicitly found in Article 8 of the Charter (which, contrary to the European Convention on Human Rights, does not contain explicit references in this regard), but they stem from a broader approach dictated by the EU Court of Justice. According to this approach, the aforementioned provision must be construed not as an absolute value but while considering its social function (*Schecke and Eifert*, cases C-92/09 and C-93/09). Notably, in the well-known decision in the *Google Spain* case (case C-131/12), European judges did not hesitate to strike a balance between conflicting interests, ultimately giving precedence to the right to privacy and personal data protection over the economic freedom of electronic service providers.

The General Data Protection Regulation (GDPR) (Article 1) expresses an ambivalent and seemingly conflicting purpose, as it aims to support both the protection of personal data and the guarantee of their free movement. It is from this tension between personal data protection as an autonomous fundamental right and the potential exploitation of data as a commodity and economic activity that the need for balance arises. This balance is achieved through the application of the principle of proportionality, determining the substance of the rights involved in terms of measures and specific activities. This is evident, as previously mentioned, in Recital 4 of the GDPR, which characterizes the protection of personal data as a non-absolute right while also contemplating and prescribing its reconciliation with other enumerated fundamental rights. A close examination of the GDPR reveals its

provisions are permeated with requirements for balancing personal data protection with other rights.

In the GDPR, the responsibility of balancing rights lies with the data controller (Articles 33 and 34 of the GDPR), who is required to adopt a proactive approach in this regard and demonstrate to supervisory authorities that appropriate technical measures have been taken to ensure data processing security and prevent risks (Article 24 of the GDPR), in line with the principle of case-by-case assessment. This approach will feature in numerous decisions that almost always address issues related to the digital dimension or, more specifically, the extraterritoriality and circulation of data.

In conclusion, the case law of the EU Court of Justice (as well as the European Court of Human Rights) has shown that the balance – which is always possible – cannot automatically lead to the complete sacrifice of one or the other legally protected position. Concerning restrictions on the fundamental right to the protection of personal data, both the European Court of Human Rights and the EU Court of Justice have contributed, each in its own system and with its own tools, to define certain inviolable limits. In turn, the GDPR has embraced and formalized the orientation towards fundamental rights pursued by the EU Court of Justice, which has consistently reiterated the principle that the regulation of a highly technological or specific sector should not deviate legal science from its social dimension, where the individual assumes the central role in the protection and substance of rights.

As previously mentioned, within this balance, the protection of personal data is supported by the central value of respecting human dignity in European legal systems. Thus, the responsibility entrusted to data controllers aligns with the diligent attention demonstrated by judicial bodies towards human dignity, which also influences the careful and essential activities of individual national supervisory authorities.

To my knowledge, the EU Court of Justice has only faced the protection of personal data as a fundamental right in conjunction with other formally recognized fundamental rights in two cases. These cases are *Promusicae* (case C-275/06) and *Satamedia* (case C-73/07).

In the *Promusicae* case (decided in January 2008), the EU Court of Justice emphasized the need to reconcile obligations related to the protection of various fundamental interests (intellectual property, effective judicial protection, personal data protection). It observed generally that " *the Member States must, when transposing the directives mentioned above* [Note: Directive 2000/31, Directive 2001/29, and Directive 2004/48]*, take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order*" (para. 68).

In the *Satamedia* case (decided in December 2008), European judges concluded that the right to the protection of personal data must "*to some degree, be reconciled with the fundamental right to freedom of expression*" (para. 53), and that "*the obligation to do so lies on the Member States*" (para. 54). They emphasized that "*in order to achieve a balance between the two fundamental rights, the protection of the fundamental right to privacy requires that the derogations and limitations in relation to the protection of data provided for in the chapters of the directive referred to above must apply only in so far as is strictly necessary*" (para. 56).

In a general sense, it can be observed that in both of the above-mentioned cases, the EU Court of Justice did not provide legal practitioners, scholars, and anyone tasked with enforcing the law with a sufficiently defined balancing criterion between conflicting rights. Instead, it essentially left the evaluation to national courts, adopting what has been termed a "deferential approach," or a cautious consideration of the rights of national legal systems and their internal actors.

This approach by the EU Court of Justice can present positive aspects, such as a pluralistic approach that respects the diverse legal identities of Member States, but it also has negative aspects, such as more or less significant underlying incoherence in the regulation of the internal market (due to the creativity of national legislators) and a potential "weakening" of other fundamental rights (property rights, freedom of expression).

## 4. Towards a More Balanced Approach between the Freedom to Conduct a Business and Personal Data Protection in the Digital Ecosystem

The asserted higher axiological value of the right to personal data protection over the freedom to conduct business cannot be intuitively assumed, as doing so could lead to irrational bias and a one-sided view, resulting in the narrow and absolute enforcement of a single right. The inquiry into the nature of the right to personal data protection must first and foremost focus on a more precise and current identification of the essential core of the 'right to personal data protection.' The specific characteristics of the right to personal data protection within the broader context of personality rights must also be duly considered, recognizing the non-monolithic nature of an individual's interests in their "own" personal data and the diverse protection needs that stem from this.

In particular, the concept of “dispossession” of personal data and the legal illegitimacy of their "monetization" may not be entirely convincing. The Western legal tradition, which places the individual at the center of rights, should prompt a greater emphasis on user freedom. This entails the individual's capacity to control and manage their personal data freely and knowingly within a fully transparent

context, even to the extent of transferring them as an asset. If the assumption of the illegitimacy of commodifying personal data were challenged or at least reconfigured in a non-unmodifiable and monolithic concept, this would lead to a distinct position for the right to personal data protection within personality rights and subsequently necessitate its repositioning in axiological terms. It is reasonable to explore the possibility of a "graduated axiological" assessment of the multiple rights encompassed within the right to personal data protection, considering the specific right related to the personal data in question.

From another, albeit related perspective, a deeper ontological analysis of the right to personal data protection should reveal the multifocal nature of personal data protection. This complexity becomes evident when balancing the individual right that personal data protection embodies with specific entrepreneurial activities, which may be more or less antagonistic to one another. Thus, a careful and analytical assessment of both the specific right (in which personal data protection is embodied in the given case) and freedom (the specific free entrepreneurial activity intended) is required. This enables a balanced approach where minimal sacrifice of one (freedom) achieves broader and deeper protection of the other (the right). This balancing process must be devoid of axiological biases and rigorously grounded in the specific analysis of the interests of the parties involved. As Italian Constitutional Court teaches, the balancing operation must not follow an unalterable hierarchical structure but be conducted case by case in a flexible manner.

Therefore, concerning the solutions found in the aforementioned balancing process, it is perhaps necessary to move beyond the understandable preference for the golden rule of the data subject's consent in relation to the legal basis for personal data processing. It's important to give due consideration (meaning not to exclude it beforehand and evaluate it with greater and specific attention) to the possibility that personal data processing may serve the legitimate interest of the data controller in developing their business activity. This consideration should likely also account for the size and economic power of the company and its potential impact on the rights of digital users, both individually and collectively. Such consideration is particularly relevant when personal data can be viewed as a shareable tangible asset, especially when third parties can offer innovative services or content to individuals through personal data processing.

Moreover, the aspect of legal regulation becoming obsolete in the face of technological advancements and new data processing capabilities should not be disregarded. This issue can make obtaining consent, often a legal basis, extremely

challenging or even stifling, particularly in contexts such as health data processing. The current legal regulation, when considered more broadly, seems to overly emphasize a one-sided top-down approach to the relationship between business freedom and the right to personal data protection. The resulting prescriptions can rigidly hinder the necessary flexibility required for a fair balance of rights and interests.

The evolving development (still in progress) of a notable incident occurred at the end of March 2023, where the Italian Data Protection Authority issued a provision (No. 112 of March 30, 2023) temporarily restricting personal data processing by ChatGPT, provides a direction toward greater recognition of legitimate interest as a legal basis for personal data processing. In this provision, the Italian Data Protection Authority instructed the company owning ChatGPT (OpenAI L.L.C.) "*5. To modify the legal basis of personal data processing for users' algorithm training, removing any reference to the contract and adopting consent or legitimate interest as the legal basis for processing concerning the company's competence evaluations within an accountability framework.*" This instruction can be seen as a prudent, yet quite intriguing, opening by the Italian Data Protection Authority toward moving beyond the absolute primacy of consent as the legitimate legal basis for personal data processing in favor of greater consideration of the 'legitimate interest' of the data controller and/or third parties. Such a path would likely require an evolving interpretation/understanding of 'legitimate interest' that – while respecting the rights of individuals (including foremost the right to object, exercised in a context of assured transparency and a well-considered awareness of digital users who are, in turn, the full and equal holders of user freedom in the face of recognized and not diminished freedom to conduct business) – does not undervalue the value of technological innovation to benefit the entire community.

In fact, the analysis of a broad and fundamental theme should not be overlooked: the relationship that should ideally exist between the use of personal data and innovation as a moment of progress in human affairs to address crises and issues that could be better tackled through personal data processing (from climate change to food crises, from biological research to personalized medicine). The necessity of not impeding innovation can potentially, in some instances (to be assessed case by case), legitimize the interest arising from or connected to business activity relating to the aforementioned crises or issues. In this context, shifting from the legal basis of consent to legitimate interest would also increase the accountability of the company processing personal data. Regarding this, additional points for consideration (including the so-called 'public data,' collected by public administrations, which

often represent unused assets) are provided by the Data Governance Act proposal - which seems to embrace the principle of data monetization - and future European regulatory instruments concerning artificial intelligence.

A final observation: the "vision" of European data protection policy appears to be a typically Western "ideological stance" in the Western Legal Tradition. This vision places individual rights at the core of the legal system (just as individuals are central to legal relationships), often in contrast to the rights of other individuals (whether natural or legal persons) and/or public authorities. This is in line with our traditional structures and categories of 'private law' and 'public/constitutional law,' which we so often reflect upon (or should reflect upon) when engaging in comparisons between legal concepts and legal systems. As mentioned at the beginning, this vision has led to the development and establishment of the category of 'inalienable rights' and 'fundamental rights.'

It must be acknowledged, however, that this vision is relative and not universally shared on a global level. While this space does not allow for an in-depth exploration of the relativity of the Western vision of the right to personal data protection and the resulting implications for the relationship between business freedom and the right to personal data protection - both in general and in specific terms - it remains to be questioned whether, in regard to this fundamental right, a more open (yet not submissive) vision that considers the collective interest could lead to a reevaluation of certain aspects (manifestations) of the inviolability of the right to personal data protection of the individual. This could be particularly relevant when there is a primary general interest (such as innovation in the medical field) and the essential core of an individual's dignity can still be preserved through appropriate measures.

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