

Recommendation
to Permit Legitimate "Business-to-Business" Data Processing
in the Proposal for a European Data Protection Regulation
(COM 2012/11)

When regulating data protection, one has to distinguish clearly between data about private matters and data relating to business activities. Information about individuals in the context of their business activities does not have the same sensitivity as private data. The legitimate interest to process business-related data is much greater. Consequently, data protection law has to distinguish both areas and provide adequate freedom for business-to-business data processing.

In particular, it is crucial to distinguish between private data and business-related data when it comes to the need to advertise products and services by one company to another. Effective competition in the European common market depends on the opportunity to process information about other companies. Such information has to include data on individuals responsible for certain business aspects, for example business contact details on sales or purchasing personnel of a company. Otherwise, businesses would not be able to effectively market products and services that are potentially of interest to other companies. The bureaucratic burdens in relation to such activities have to be balanced as well.

Neither the Proposal for a European Data Protection Regulation nor the amendments proposed by the Rapporteur Jan Albrecht in his draft report dated 17 December 2012 offer a balanced approach for business-to-business activities. We, therefore, recommend the following changes:

Recital 45a and Article 4 (3b) Albrecht Amendment 87: Albrecht's definition of the term "profiling" includes any type of evaluation of individuals, whether sensitive or not. Consequently, any type of evaluation of personal data in the business-to-business context would be treated as profiling, including any type of selection of address data for business-to-business marketing. The definition should not include such types of data processing. The definition should make reference to the sensitivity of the context of the data processing. In addition, the relevant recitals should clarify that the business-to-business context has to be treated differently from data selections in a consumer context.

Albrecht Proposal	Recommendation
(45a) [...] To this end the data subject should be granted clear and unambiguous rights to the provision of transparent, clear and easily understandable information regarding the processing of his or her personal data, the right of access, rectification and erasure of their personal data, the right to data portability and the right to object to profiling. [...]	(45a) [...] To this end the data subject should be granted clear and unambiguous rights to the provision of transparent, clear and easily understandable information regarding the processing of his or her personal data, the right of access, rectification and erasure of their personal data, the right to data portability and the right to object to profiling. <i>Profiling should be regulated with due consideration of the sensitivity of the context of the data processing, for example profiling in business-to-business context should only be limited if and to the extent the data used have a sensitive private context.</i> [...]
(3b) 'profiling' means any form of automated processing of personal data intended to evaluate certain personal aspects relating to a natural person or to analyse or predict in particular that natural person's performance at work, economic situation, location, health, personal preferences, reliability or behaviour;	(3b) 'profiling' means any form of automated processing of <i>a set of</i> personal data, <i>having a substantial impact on the legitimate interests of the data subject due to the types, volume and context of the data used</i> , intended to evaluate certain personal aspects relating to a natural person or to analyse or predict in particular that natural person's performance at work, economic situation, location, health, personal preferences, reliability or behaviour;

Article 4 (1): The definition of "data subject" should exclude businesses, whether or not they are owned or operated by individuals. Otherwise, one has to distinguish between businesses operated by individuals or named after individuals on one side and other businesses operating as legal entities on the other side. The legitimate communication between businesses would be unreasonably impacted by such distinction, which often cannot be made clearly. This issue

already exists under the present European Data Protection Directive (95/46/EC) and should be solved.

Commission Proposal	Recommendation
(1) 'data subject' means an identified natural person or a natural person who can be identified, directly or indirectly, by means reasonably likely to be used by the controller or by any other natural or legal person, in particular by reference to an identification number, location data, online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that person;	(1) 'data subject' means an identified natural person or a natural person <i>to the extent to which the person does not operate as a business and</i> who can be identified, directly or indirectly, by means reasonably likely to be used by the controller or by any other natural or legal person, in particular by reference to an identification number, location data, online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that person;

Article 5 (b): The processing of data for business-to-business purposes should not be restricted by purpose limitations, as long as the processing continues to serve business-to-business purposes.

Commission Proposal	Recommendation
(b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes;	(b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes, <i>provided that the further processing of data collected for business-to-business purposes shall be deemed compatible with the processing for any other business-to-business purposes;</i>

Article 6 (1): One of the core legal justifications to allow businesses to process data in a business-to-business context is the so-called "balance of interest clause". The clause allows data processing, if the business interest overrides the interest of relevant individuals. The bal-

ance of interest clause serves as a justification especially for the processing of data for marketing purposes and can be used in order to overcome purpose restrictions. The data processing does not constitute a significant risk for the individual as a private person, if the information is collected in a business-to-business context and only processed for business-to-business purposes.

Commission Proposal	Recommendation
New	<i>(f) processing of data collected in a business-to-business context for business-to-business purposes of the controller or a third party.</i>

Article 6 (1a), (1b) (d) and (1c) Albrecht: The modifications proposed by Albrecht in the balance of interest clause mention the business-to-business context without providing a suitable solution. Notification requirements as proposed in Article 6 (1a) are not feasible in a business-to-business context. The ways businesses cooperate in require that third party interests need to be taken into account. They should also be able to use data under the balance of interest clause provided by third parties in a business-to-business context. Otherwise, information service providers would not be able to operate in the business-to-business context.

Albrecht Proposal	Recommendation
(1a) If none of the legal grounds for the processing of personal data referred to in paragraph 1 apply, processing of personal data shall be lawful if and to the extent that it is necessary for the purposes of the legitimate interests pursued by the controller, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require the protection of personal data. <i>The data controller shall in that case inform the data subject about the data processing explicitly and</i>	(1a) If none of the legal grounds for the processing of personal data referred to in paragraph 1 apply, processing of personal data shall be lawful if and to the extent that it is necessary for the purposes of the legitimate interests pursued by the controller <i>or a third party</i> , except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require the protection of personal data. This paragraph shall not apply to processing carried out by public authorities in

<p><i>separately. The controller shall also publish the reasons for believing that its interests override the interests or fundamental rights and freedoms of the data subject.</i> This paragraph shall not apply to processing carried out by public authorities in the performance of their tasks.</p>	<p>the performance of their tasks.</p>
<p>(1b) (d) processing of personal data takes place in the context of professional business-to-business relationships <i>and the data were collected from the data subject for that purpose</i>;</p>	<p>(1b) (d) processing of personal data takes place in the context of professional business-to-business relationships;</p>

Article 6 (1c) and 20 Albrecht: The strict limitations on profiling without any consideration as to the sensitivity of the context of the profiling is imbalanced and does not take into account the specifics of data selections in a business-to-business context. Data has to be selected for marketing purposes in order to reach potential addressees that might be interested in the marketing communication. Selecting marketing communication is in the interest of the addressees. Therefore, Article 6 (1c) (d) should be deleted and Article 20 should not apply in a business-to-business context.
