

# CONTENTS

Preface	xii
<b>1 <i>Introduction</i></b>	<b>1</b>
<hr/>	
<b>i. General</b>	<b>1</b>
<b>ii. Legislation History of the Directives, Review of the Framework Directive, and Probable Future Legislative Developments</b>	<b>4</b>
Legislative History of the Directives	4
Review of the Framework Directive	6
Probable Future Legislative Developments	7
<b>iii. Aims and Purposes: The Directives’ “Constitutional” Status</b>	<b>8</b>
Protection of Personal Data	9
<b>iv. Definitions</b>	<b>10</b>
<i>Data Subject</i>	10
<i>Identifiable Person</i>	10
<i>Personal Data</i>	10
<i>Processing of Personal Data</i>	
<i>Disclosure</i>	12
<i>Personal Data Filing System</i>	12
<i>Controller</i>	12
<i>Processor</i>	12
<i>Third Party</i>	12
<i>Recipient</i>	13
<i>The Data Subject’s Consent</i>	13
<b>v. A New Core Concept: Processing</b>	<b>13</b>
<b>Notes</b>	<b>14</b>

## 2 *Scope of the Framework Directive* 18

---

<b>i. The Directives' Limitation to Matters within the Scope of Community Law; the Wider and Implementation by the Member States</b>	18
<b>ii. The Directives' Applicability to Automated Processing of Personal Data and to the Processing of Personal Data in Otherwise "Structured" Manual Filing Systems</b>	19
Systems and Operations Covered	19
Limited Temporary Exemptions	21
<b>iii. Remaining (Permanent) Exemptions</b>	22
Introduction	22
"Purely Personal" Processing	22
Processing for "Journalistic, Artistic, or Literary" Purposes	23
Processing for the Purpose of Historical Research	25
<b>iv. Territorial Scope of the Directives (the Question of "Applicable" Law): Extraterritorial Effect of the Directives on Non-EU Data Controllers</b>	25
The Situation Concerning Controllers Established in the EU/EEA	25
The Situation Concerning Controllers Not Established in the EU/EE	29
<i>Notes</i>	30

## 3 *Data Protection Principles and Criteria for Lawful Processing* 34

---

<b>i. Principles and Criteria Concerning the Processing of Non-Sensitive Data</b>	34
The Data Protection Principles	34
GENERAL	34
PURPOSE SPECIFICATION AND LIMITATION	35
FAIRNESS	37
The Data Processing Criteria	38
GENERAL	38
CONSENT	39
CONTRACT	40
BALANCE	42

<b>ii. Sensitive Data &amp; Sensitive Processing</b>	<b>44</b>
Special Rules on the Processing of the Main Categories of “Sensitive Data”:	44
IN-PRINCIPLE PROHIBITION	44
MISCELLANEOUS EXCEPTIONS FOR NON-COMMERCIAL PURPOSES	44
CONSENT	45
NOT-FOR-PROFIT ORGANIZATIONS	46
Special Rules on the Processing of Data on Criminal Convictions et al.	47
Special Rules on the Use of National Identification Numbers and Other “Identifiers of General Application”	48
Restrictions on the Taking of Fully Automated Individual Decisions	48
IN-PRINCIPLE PROHIBITION	48
LIMITS OF THE PROHIBITION: WHAT KINDS OF DECISIONS ARE COVERED	49
EXCEPTIONS TO THE PROHIBITION	51
Restrictions on Other Processing Operations “Likely to Present Specific Risks to the Rights and Freedoms of Subjects”	54
<b>iii. Implications for the Direct Marketing Industry</b>	<b>55</b>
The Necessary First Step: Clarifying One’s Operations	55
General	55
SPECIFYING THE PURPOSES OF THE PROCESSING	56
CLARIFYING THE CRITERIA THAT “LEGITIMIZES” THE PROCESSING	56
IDENTIFYING THE CONTROLLER	58
LIST OWNERS, LIST BROKERS AND LIST USERS	58
COOPERATION BETWEEN COMPANIES	58
Some Specific Types of Operations	59
USING CUSTOMER- (MEMBER-, SUBSCRIBER-, DONOR-) GENERATED DATA FOR ONE’S OWN MARKETING	59
CLEANING AND QUALITY CONTROL OF LISTS	60
RETAINING DATA FOR SUPPRESSION FOR DEDUPLICATION PURPOSES	61
DISCLOSING CUSTOMER DATA FOR MARKETING BY OTHERS (RENTAL, SALE, EXCHANGE), CONTRACTUAL, AND/OR IN-HOUSE ARRANGEMENTS	61
HOST MAILINGS	63
FILE ENHANCEMENT; GEO- OR PSYCHO-DEMOGRAPHIC OVERLAYS; DATA MATCHING/LINKING OF DATABASES	64
ANALYSIS AND PROFILING: THE USE OF ANONYMOUS OR STATISTICAL DATA FOR RESEARCH PURPOSES	65
CREATING ALL-PURPOSE “DATA WAREHOUSES” OR “DATA MINES”	66
<b>Notes</b>	<b>67</b>

<b>4 <i>Informing Data Subjects</i></b>	<b>71</b>
<hr/>	
<b>i. General</b>	71
<b>ii. Informing Data Subjects When Data Are Obtained Directly from Them</b>	72
General	72
INFORMATION THAT MUST ALWAYS BE PROVIDED	72
ADDITIONAL INFORMATION THAT MAY HAVE TO BE PROVIDED	74
WHEN INFORMATION MUST BE PROVIDED	77
<b>iii. Informing Data Subjects When Data Are Not Obtained Directly from Them</b>	78
General	78
INFORMATION THAT MUST ALWAYS BE PROVIDED	79
ADDITIONAL INFORMATION THAT MAY HAVE TO BE PROVIDED	80
WHEN THE INFORMATION MUST BE PROVIDED	80
<b>iv. Collecting Some Data from the Data Subject and Additional Data Otherwise</b>	83
<b>v. Exceptions (Exemptions and Restrictions)</b>	85
Specific Exceptions to the Duty to Inform	85
GENERAL EXCEPTIONS	87
<b>vi. Implications for Direct Marketing</b>	87
Informing Data Subjects of the Identity of the Controller and the Purposes of the Processing	87
Informing Customers of the Use by a Company of That Company's Own Basic Sales Data for Its Own Marketing	88
Informing Customers of the Use by a Company of Other Internal Data on Them for Its Own Marketing	89
Informing Customers of the Use by a Company of Additional Outside Data for Its Own Marketing	89
Informing Customers of Disclosure of Their Customers' Data (Lists) to Third Parties for Direct Marketing Purposes by Those Third Parties	89
Informing Data Subjects of the Use of Basic Data Bought-in from Other Companies for Direct Marketing Purposes	90
Informing Data Subjects of the Use of Publicly Accessible Data on Them for Direct Marketing	90
Informing Data Subjects Who are Not Customers of the Use of Extensive Data or "Profiles" on Them for Direct Marketing	91
<b>Notes</b>	<b>91</b>

## 5 *Rights of Data Subjects* 94

---

<b>i. Substantive Rights Set Out in the Framework Directive</b>	94
Rights Old and New	94
WITHOUT CONSTRAINT AT REASONABLE INTERVALS AND WITHOUT EXCESSIVE DELAY OR EXPENSE	95
THE RIGHT TO CONFIRMATION OF WHETHER ONE’S DATA ARE PROCESSED BY A PARTICULAR CONTROLLER AND TO OBTAIN DETAILS OF THE PROCESSING IF THEY ARE	96
THE RIGHT TO BE GIVEN A COPY OF ONE’S OWN DATA	96
THE RIGHT TO HAVE ONE’S OWN DATA RECTIFIED, ERASED, OR BLOCKED AS APPROPRIATE	97
THE RIGHT TO HAVE THIRD-PARTY RECIPIENTS OF SUBSEQUENTLY CORRECTED, ERASED, OR BLOCKED DATA INFORMED OF THE RECTIFICATION, ERASURE, OR BLOCKING	98
THE GENERAL RIGHT TO OBJECT	98
THE SPECIFIC RIGHT TO OBJECT TO DIRECT MARKETING USE OF ONE’S DATA	99
THE ALTERNATIVE REQUIREMENTS OF THE FRAMEWORK DIRECTIVE CONCERNING THE SCOPE AND SUBSTANCE OF THE RIGHT TO OBJECT TO DIRECT MARKETING USE OF ONE’S DATA	100
THE (ALTERNATIVE) CONDITIONS ATTACHED TO THE RIGHT TO OBJECT TO DIRECT MARKETING USE OF ONE’S DATA	101
THE RIGHT TO NOT BE SUBJECT TO FULLY AUTOMATED “SIGNIFICANT” DECISIONS BASED ON A “PERSONALITY PROFILE”	102
<b>ii. Additional Data Subject Rights and Rights of Legal Persons Contained in the Telecommunications Data Protection Directive and in the Directive on Privacy and Electronic Communications</b>	103
General	103
FIELDS OF APPLICATION OF THE SUBSIDIARY DIRECTIVES	105
ADDITIONAL DEFINITIONS	105
<i>Electronic communications network</i>	107
<i>Public communications network</i>	107
<i>Electronic communications service</i>	107
<i>Public communications network</i>	108
<i>User</i>	108
<i>End User</i>	108
<i>Consumer</i>	108
<i>Subscriber</i>	108
<i>Traffic data</i>	108
<i>Location data</i>	108
<i>Communications</i>	109
<i>Call</i>	109

<i>Value-Added Service</i>	109
<i>Electronic mail</i>	109
THE RIGHT TO BE INFORMED OF SECURITY RISKS	109
THE RIGHT TO CONFIDENTIALITY OF COMMUNICATIONS	111
RESTRICTIONS ON THE USE OF TRAFFIC DATA	113
NEW RESTRICTIONS ON THE PROCESSING OF LOCATION DATA IMPOSED BY DPEC	117
THE RIGHT TO RECEIVE NON-ITEMIZED BILLS	118
THE RIGHT TO PREVENT CALLING-LINE AND/OR CONNECTED LINE IDENTIFICATION AND CALL FORWARDING	119
RESTRICTIONS ON THE CONTENTS AND ON THE USE FOR DIRECT MARKETING PURPOSES OF DIRECTORIES OF SUBSCRIBERS TO TELECOMMUNICATIONS (OR ELECTRONIC COMMUNICATIONS SERVICES)	120
RESTRICTIONS ON THE MAKING OF UNSOLICITED DIRECT MARKETING CONTACTS WITH SUBSCRIBERS THROUGH VARIOUS MEANS	125
<b>iii. Exceptions (Exemptions and Restrictions)</b>	130
<b>iv. Implications for the Direct Marketing Industry</b>	134
The Right to “Opt In” or “Opt Out” of Direct Marketing Use of One’s Data (Summary)	134
MAILING, TELEPHONE, FAX AND EMAIL PREFERENCE SERVICES	136
THE RIGHT TO NOT BE SUBJECT TO ”SIGNIFICANT” AUTOMATED DECISIONS BASED ON A PERSONALITY PROFILE (SUMMARY)	137
CONFIRMATION OF THE USE OF PERSONAL DATA FOR DIRECT MARKETING PURPOSES	137
PROVIDING A COPY OF DATA USED FOR DIRECT MARKETING PURPOSES (INCLUDING INFORMATION ABOUT SOURCES)	138
CORRECTING, ERASING OR “BLOCKING” DATA USED FOR DIRECT MARKETING PURPOSES	138
<i>Notes</i>	139
<b>6 <i>Supervision, Notification and Enforcement</i></b>	145
<b>i. The National and European Supervisory Authorities</b>	145
Background	145
THE FRAMEWORK DIRECTIVE’S REQUIREMENTS AS TO THE NATURE, STATUS, FUNCTIONS, AND POWERS OF NATIONAL DATA PROTECTION AUTHORITIES	146
THE EUROPEAN REGULATORY SYSTEM	147
<b>ii. Notification (Registration) of Processing Operations</b>	147
<b>iii. Prior Checking of “Risky” Operations</b>	151

<b>iv. Individual Remedies</b>	152
General	152
THE JUDICIAL REMEDY OF ART. 22 OF THE FRAMEWORK DIRECTIVE	152
THE RIGHT TO COMPENSATION FOR DAMAGES	153
ADMINISTRATIVE REMEDIES	154
CLAIMS SUBMITTED TO THE NATIONAL DATA PROTECTION AUTHORITIES	155
<b>v. Enforcement Powers of the National Data Protection Authorities</b>	157
<b>vi. Sectoral Self-Regulation and Codes of Conduct</b>	159
<i>Notes</i>	166
<b>7 <i>Transborder Data Transfers</i></b>	169
<hr/>	
<b>i. Background</b>	169
<b>ii. The “Free Zone” for Data Transfers within the EU and the EEA</b>	170
<b>iii. The European Regime for Transfers of Personal Data to Non-EU/EEA (“Third”) Countries</b>	171
General	171
Determining Whether There Is “Adequate” Protection	172
GENERAL	172
ADEQUACY OF THE SUBSTANTIVE RULES	174
EFFECTIVENESS OF THE SUPERVISORY AND ENFORCEMENT SYSTEM	175
TAKING INTO ACCOUNT SPECIFIC RISKS	176
ADEQUACY OF PROTECTION IN STATES PARTY TO THE COUNCIL OF EUROPE CONVENTION	177
PROVIDING ADEQUATE PROTECTION THROUGH SECTORAL (SELF-) REGULATION	180
THE PROCEDURE FOR ASSESSING ADEQUACY (“COMITOLGY”)	183
CHARACTERISTICS OF THE FIRST FINDINGS OF “ADEQUACY” AND RELATED WORKING PARTY OPINIONS	187
REMAINING AMBIGUITY	190
Transfers to Third Countries with “Adequate” Protection	192
Transfers to Countries without “Adequate” Protection	193
GENERAL	193
MANDATORY EXCEPTIONS	193
DISCRETIONARY EXCEPTIONS (NATIONALLY APPROVED CONTRACT CLAUSES ETC.)	194

EUROPEAN SUPERVISION OVER THE GRANTING OF EXCEPTIONS	195
STANDARD EUROPEAN CONTRACT CLAUSES	195
CLAUSES COVERING CONTROLLER-TO-CONTROLLER TRANSFERS	199
CLAUSES COVERING CONTROLLER-TO-PROCESSOR TRANSFERS	210
INTRA-CORPORATE RULES (INTRA-CORPORATE DATA PROTECTION CODES OF CONDUCT)	221
<b>iv. Applying the New European Regime to Transfers of Personal Data from the EU to the USA: The “Safe Harbor” Arrangements</b>	<b>248</b>
Background	248
WHEN SAFE HARBOR ARRANGEMENTS ARE NOT NEEDED	249
WHEN SAFE HARBOR ARRANGEMENTS CAN AND CANNOT BE USED	251
USING SAFE HARBOR PRINCIPLES AS PART OF CONTRACT CLAUSES	255
SUBSTANTIVE REQUIREMENTS OF THE SAFE HARBOR	257
RIGHTS OF DATA SUBJECTS UNDER THE SAFE HARBOR ARRANGEMENTS	268
THE RIGHT OF ACCESS AND CORRECTION	269
THE RIGHT TO COMPENSATION	275
EXCEPTIONS AND DEROGATIONS FROM THE SUBSTANTIVE SAFE HARBOR REQUIREMENTS	277
THE GENERAL EXCEPTION CLAUSE	279
INTERNAL MEASURES REQUIRED TO IMPLEMENT THE SAFE HARBOR ARRANGEMENTS	281
EXTERNAL SUPERVISION AND ENFORCEMENT OF THE SAFE HARBOR ARRANGEMENTS	283
<i>General</i>	283
<i>Individual Redress</i>	285
<i>General “Consequences” and “Sanctions” Relating to                 Non-Compliance</i>	287
<i>Cooperation with EU Data Protection Authorities</i>	289
<i>Exemptions from the Procedural Requirements of Safe                 Harbor Arrangements</i>	292
HOW TO JOIN SAFE HARBOR ARRANGEMENTS	292
THE CONSEQUENCES OF LEAVING THE SAFE HARBOR	295
PRELIMINARY EVALUATIONS OF THE OPERATION OF THE SAFE HARBOR	296
<i>Notes</i>	302
About the Author	317
Index	318