



THE **IP** MASTER CLASS WEBINAR SERIES

TOP 5 IP INTERACTIONS WITH **GDPR**

MAY 29, 2018

1 PM (CT)

MEET THE PRESENTERS



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What is the GDPR's Purpose?

- **EU People Have Power Over Their Personal Data**

- EU citizens have individual rights exceeding any claims made by any company
- Requires company follows guidelines on tracking the collecting, processing or storing of EU citizens personal data
 - Requires full disclosure from the company regarding how they will use your personal data once it is collected
 - Requires all the privacy notices that oversee consumer data are easy to read and understand
 - Requires an easy and straightforward way for them to opt out and erase their personal data without undue delay
- GDPR levies large fines for non-compliance

What are the Penalties?

- The maximum amount of financial sanctions is increased up to 4% of total worldwide annual sales
- 20 Million Euros

Whichever Is The Greater...

What are the DPA's Saying?

“There will be fines, and they will be significant. I think it is quite clear that when we do identify an infringement that’s of the gravity, duration and scope that is serious, then we are obliged considerably to administer and administrative fine” – Helen Dixon, Irish DPA

“You need to make sure that this question of compliance is not focused on the legal departments, but throughout the company. **It is a strategy question; it’s not a technical legal question.** It has to raise to all levels of the company and obey a strategic decision from the top” – Isabelle Falque-Pierrotian, French DPA; Former Chair, A29WP

“The aim of our office is to prevent harm, and we place support and compliance at the heart of our regulatory action. **Voluntary compliance is still the preferred route, but we will back that up with tough action where it’s necessary**” – Elizabeth Denham, British DPA

“It’s not our first task to fine, it’s our first task to see if you’re compliant, and if you’re not compliant it will be a problem. **There are no grace periods because the period was already two years.**” – Andrea Jelinek, Austrian DPA; Chair, A29WP

Fines aren't the only Sanctions Available

- Order to Halt Data Processing
- Actions against Processing Partners
- Likely more to come...

The Day After....

Opening Shots

- Complaints filed
 - Google
 - Android
 - Facebook
 - Instagram
 - Whats App
- 3.7B & 3.9B Euros Potential for Fines
- Forced Consent
- Facebook also filed on by Surveillance Capitalism

Duck and Cover

- Unroll.me – withdrawal from EU
- Pinterest instapaper
- Tronc
 - Chicago Trib
 - LA Times
- Lee Enterprises
 - St. Louis Post
- A&E

Closing Shop

- CrowdPac – political fund raising
- Klout social media analytics service
- Online Gaming
 - Ragnarok Online – kills EU servers/Block EU access
 - Uber Entertainment - Super Monday Night Combat
- Verve
- Seznam.cz – classmate social network

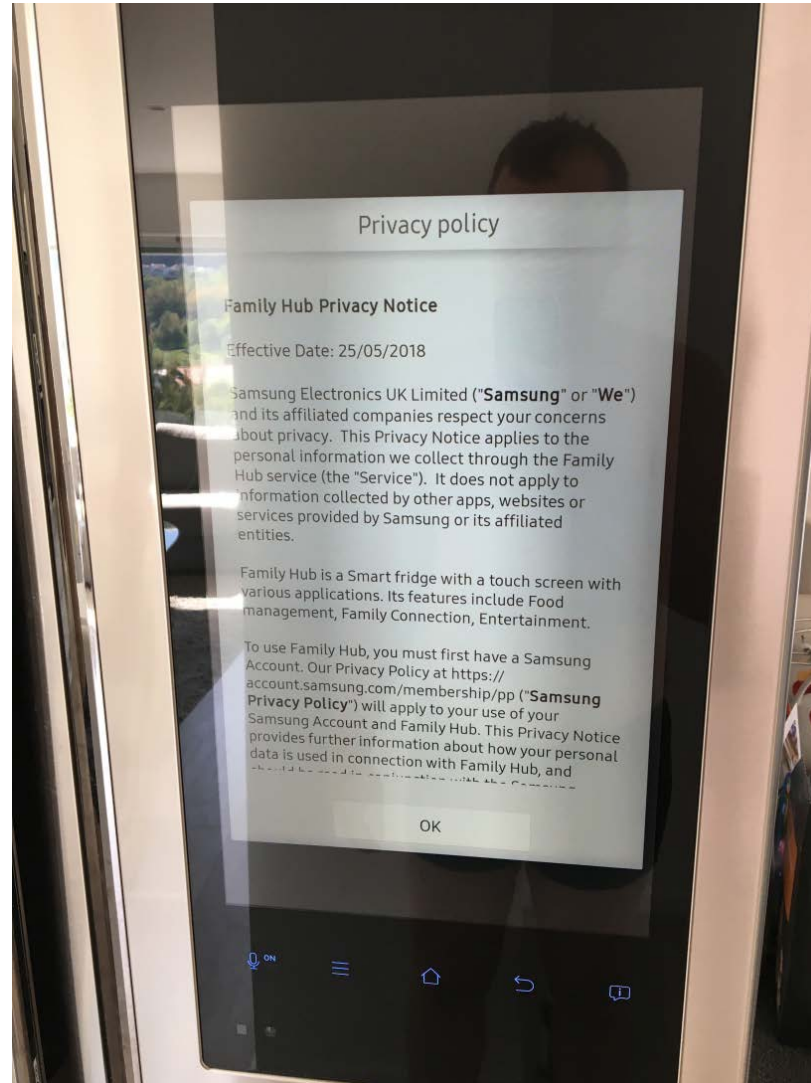
Adtech Impact

- 25%-40% drops in demand volumes
- Revenues following
- Programmatic ad-buys canceled 25%-70%
- Ad-Tech is divided on handling consent

Hall of Shame....Thus far

- Oath/TechCrunch etc.
 - 1st page: Opt-in or highlighted Manage Options
 - 2nd Page: Manage Options – see who partners
 - 3rd Page: Partner List (200+) and default opt-in
 - 4th Page: Partner Opt-out page (+100 checks)
 - Less than 50% worked
 - 2nd Request less than 10% worked
 - Followed by a full page ad

Samsung Smart Appliances



Razer MouseTrap

GDPR, RAZER AND YOU

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To keep pace with the new data protection laws taking effect from May 25, 2018 in the European Union, we have updated our terms of service and privacy policies. We encourage you to review the new changes to our policies by visiting our General Data Protection Regulation (GDPR) page for more information: <https://www.razer.com/gdpr>

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Best Regards,
The Razer Team

Ghostery CC Faux Pax

Happy GDPR Day - We've got you covered!



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Who is Affected by GDPR?

- Extraterritorial Effect
 - The GDPR extends the application of EU legislation to companies outside the EU, in that it will apply to entities established outside the EU that offer goods or services to individuals in the EU and/or monitor the behavior of data subjects within the EU
- Anyone with EU citizens as:
 - Customers
 - Employees
 - Clients
- Vendors who sell services to the previous bullet(Law Firms)

GDPR Continuing Obligations

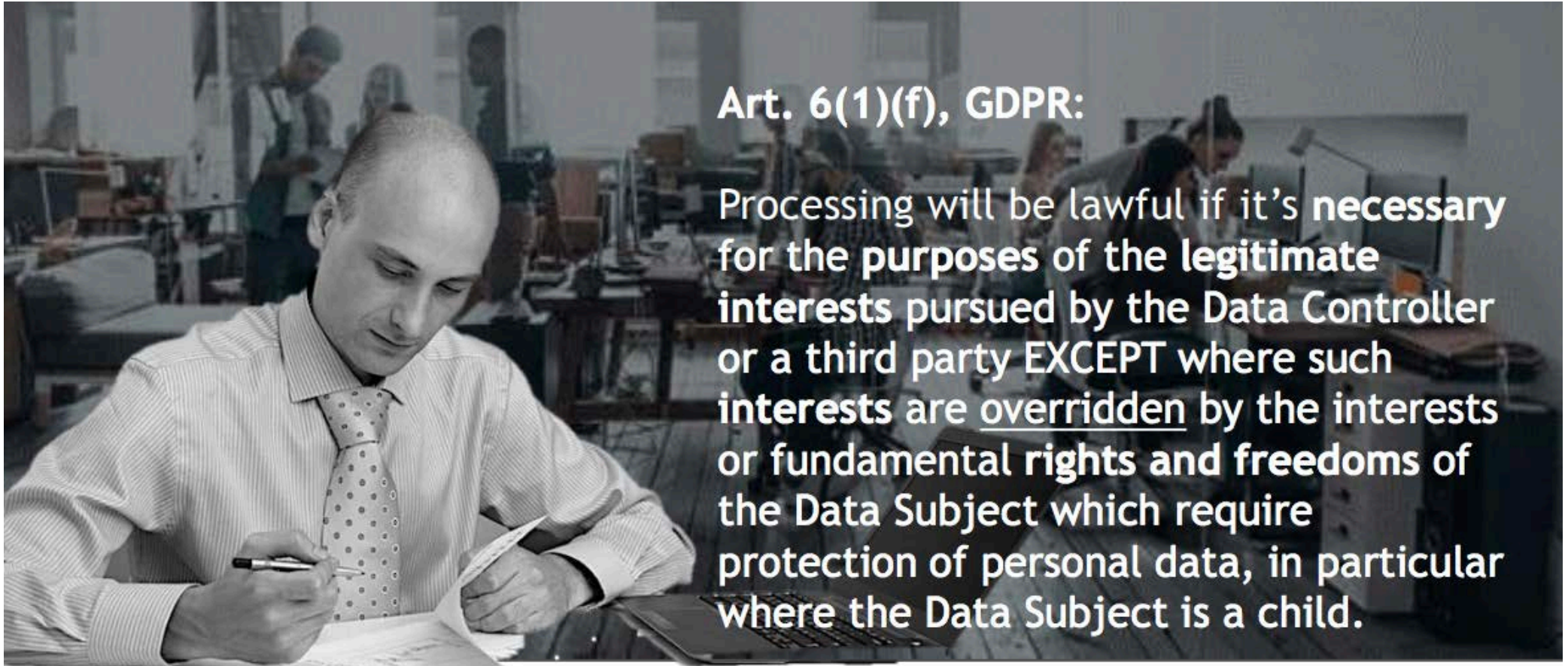
Ensure Privacy is Embedded in the DNA of Your Organizations

- **Privacy Impact Assessments/Data Protection Impact Assessments & Lawful Basis for New Processing Activities**
- **Privacy by Design Initiatives**
- **Vendor Management**
- **Subject Access Rights – Requests**
- **Obligations of Data Protection Officer**
- **Data Protection Agreements (some even asking for Joint Controller Agreements)**
- **Breach Notifications**
- **Ongoing Information Security Initiatives**
- **Training**

QUESTION

Should you use 'legitimate interests' rather than consent to process personal data under the GDPR?





Art. 6(1)(f), GDPR:

Processing will be lawful if it's **necessary** for the **purposes of the legitimate interests** pursued by the Data Controller or a third party **EXCEPT** where such **interests are overridden** by the interests or **fundamental rights and freedoms** of the Data Subject which require protection of personal data, in particular where the Data Subject is a child.

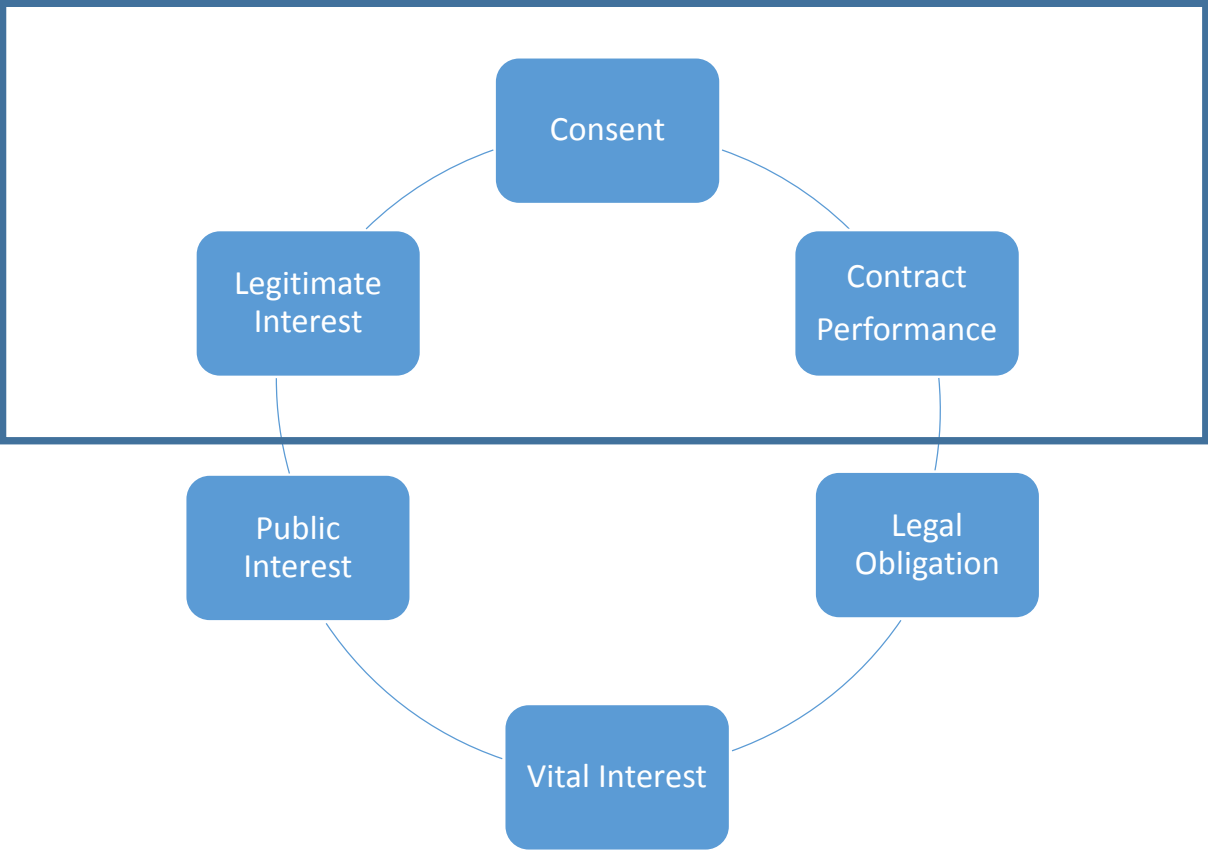
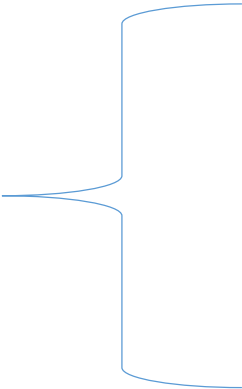


- You must have a **valid lawful basis** in order to process personal data.
- There are **six available lawful bases** for processing. No single basis is 'better' or more important than the others - which basis is **most appropriate** to use will depend on your **purpose** and **relationship** with the individual.
- Most lawful bases require that processing is '**necessary**'. If you can reasonably achieve the same purpose without the processing, you **won't** have a lawful basis.
- You must determine your lawful basis **before you begin processing**, and you should document it. Take care to get it **right first time** - you shouldn't swap to a different lawful basis at a later date without good reason.



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Main Focus
B2B & B2C



What the ICO says about “Legitimate Interests”



- ‘Legitimate interests’ are the **most flexible lawful basis** for processing, but you can’t assume it will always be the most appropriate.



- It’s likely to be most appropriate where you use people’s data in ways they’d **reasonably expect** and which have a **minimal privacy impact**, or where there’s a **compelling justification** for the processing.



- If you choose to rely on ‘legitimate interests’ you are taking on **extra responsibility** for considering and protecting people’s rights and interests.

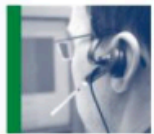


- **Public authorities** can only rely on ‘legitimate interests’ if they are processing for a legitimate reason **other than** performing their tasks as a public authority (NB. Data Protection Bill may provide more wriggle room)



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“What the ICO says about “Legitimate Interests””

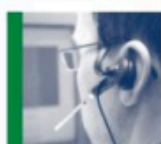


- There are **three elements** to the ‘legitimate interests’ basis. It helps to think of this as a three-part ‘test’. You need to:
 1. Identify a ‘legitimate interest’
 2. Show that the processing is necessary to achieve it
 3. Balance it against the individual’s interests, rights and freedoms.
- The ‘legitimate interests’ can be your **own interests** or the interests of **third parties**. They can include **commercial** interests, **individual** interests or broader **societal** benefits.
- The processing must be **necessary**. If you can reasonably achieve the same result in another less intrusive way, legitimate interests **won’t** apply.



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“What the ICO says about “Legitimate Interests”



- You must **balance** your interests against the individual's. If they would not reasonably expect the processing, or if it would cause unjustified harm, their interests are likely to **override** your legitimate interests.
- Keep a **record** of your 'Legitimate Interests Assessment (LIA) test' to help you **demonstrate compliance** (if required).
- You must include details of your 'legitimate interests' in the **Data Privacy Notice** provided to the Data Subject.



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Legitimate Interest vs The Rest

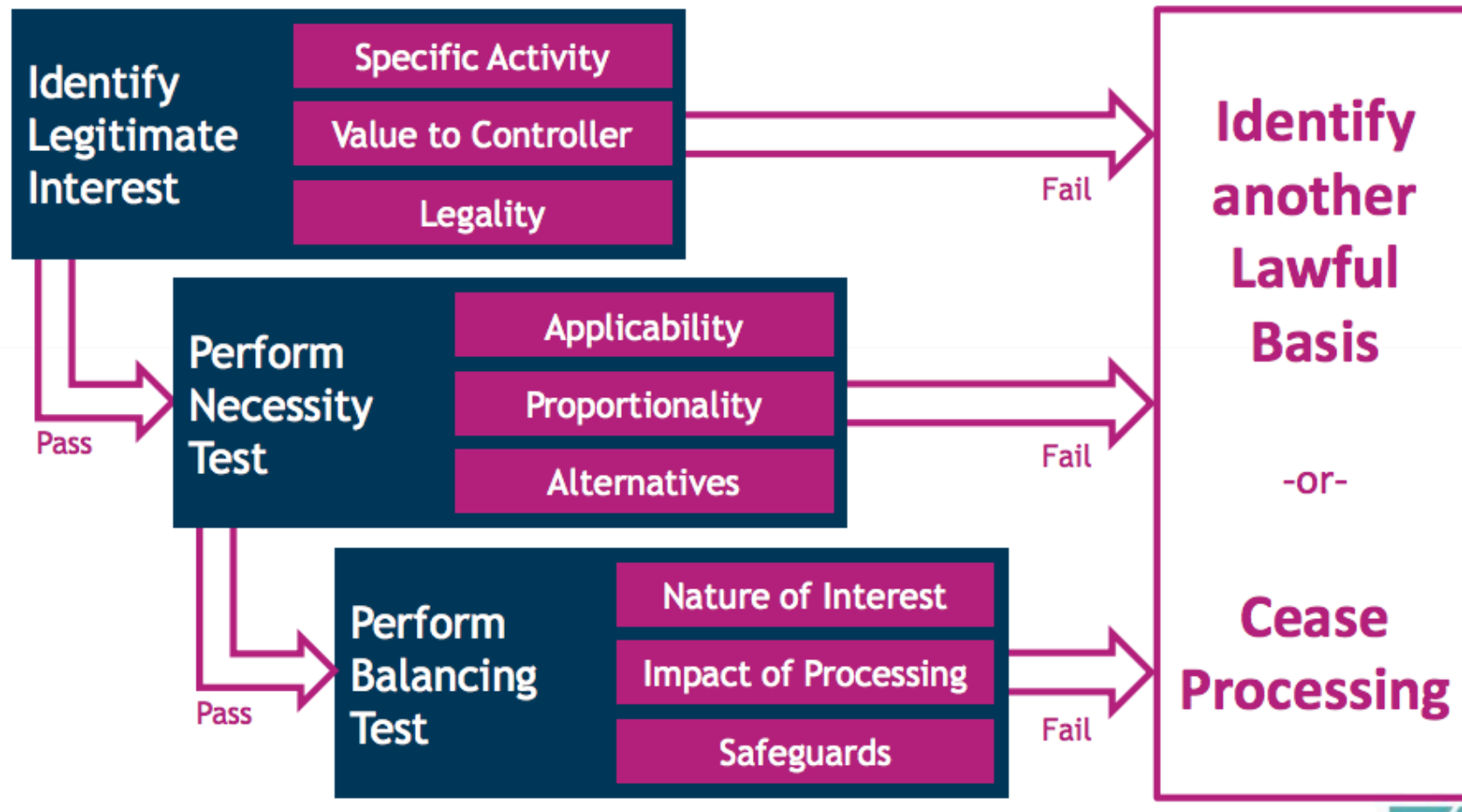
Legitimate Interest

- More flexible
- Not centered around a particular purpose
- Subject has not specifically agreed
- Could apply to any type of processing for any reasonable purpose
- ***Significant accountability onus on controller***

Other Lawful Bases

- Tightly-defined purpose
- Clear guidance for applicability
- Presumes controller and individual interests are balanced

The Legitimate Interest Assessment



Can we Rely on Legitimate Interest?

Probably 😊

Reasonably Expected

Minimal Privacy Impact

Proportionate

Compelling Benefit

Probably Not 😞

Hard to Anticipate

Reasonable Alternatives

Likely Objection

Dubious Legality/Ethics

Likely Harm

Excessive

Public Authority

Unwelcome Responsibility

Does Legitimate Interest Apply?

Recitals 47-50

Definitely

Fraud Prevention

Network/Information Security

Criminal Acts

Public Safety

Maybe

Employee Data

Client Data

Direct Marketing

Intra-Company Transfer

When is Legitimate Interest Likely Lawful?

Marketing Method	LI?
Mail	✓
'Live' phone calls to numbers not on a "do not solicit" list	✓
Emails/text messages to individuals - obtained using 'soft opt-in'	✓
Emails/text messages to business contacts	✓
Automated phone calls	✗
'Live' phone calls to numbers on a "do not solicit" list	✗
'Live' phone calls to those who have previously objected to your calls	✗
Emails/text messages to individuals - without 'soft opt-in'	✗

Lawful Consent

Article 4(11)

Freely Given

Specific

Informed

Unambiguous

ALL elements are required

Marketing campaigns and digital experience designs will have to rethink user interaction to remain lawful

When You Have a Genuine Choice ...

- Different rules apply
- Consider the ramifications

Legitimate Interest

Right to Object

Opportunity to Defend

Legitimate Interest Assessment

Consent

Withdraw Consent

Cease Immediately

Subject Access Rights

In many respects, 'legitimate interests' is an 'expectation test'

Well, don't expect universal applause. In many respects, 'legitimate interests' is an '**expectation test**' that requires companies and organisations to consider whether a Data Subject can reasonably expect their personal data to be processed.

For those Data Controllers that **don't** have a direct relationship with an individual, **this will be a very high bar to clear**. And even for companies and organisations with a direct relationship, the 'expectation test' will be interpreted much more **strictly** than many expect.

Most commentators predict that when the GDPR is fully enforceable after the 25 May 2018, Regulators and Supervisory Authorities will want to make their mark. So expect 'legitimate interest' to play a big part in these cases, as companies and organisations continue to rely on this as a legal basis for the processing personal data for the foreseeable future.



Conclusion

- Using legitimate interest appropriately may help you avoid ‘consent fatigue’
- It can be an effective way of protecting the subject’s interests

However ...

- There is more work compared to other bases
 - Explaining purpose
 - Demonstrating necessity
 - Justifying legitimate interest
 - Additional clarity and detail in the privacy notice
 - Objection handling process
- There is more scope for disagreement over the outcome of the balancing test
- You need to be able to be prepared to prove your compliance in detail
- You need to be serious about protecting the interests of the subject
- The onus is on you

QUESTIONS & DISCUSSION



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Upcoming Presentation



THE IP MASTER CLASS WEBINAR SERIES

**RESPONDING TO
ALICE/101 REJECTIONS
AFTER BERKHEIMER**

**JUNE 7, 2018
1 PM (CT)**