PUBLIC CONSULTATION on the "Guidelines 10/2020 on restrictions under Article 23 GDPR"

COMMENTS BY	
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6	3.1 Respect of the essence of the fundamental rights and freedoms 14. One of the main objectives of data protection law is to enhance data subjects' control over personal data concerning them. Any restriction shall respect the essence of the right that is being restricted. This means that restrictions that are extensive and intrusive to the extent that they void a fundamental right of its basic content, cannot be justified. In any case, a general exclusion of all data subjects' rights with regard to all data processing operations as well as a general limitation of the rights mentioned in Article 23 GDPR of all data subjects for specific data processing operations or with regard to specific controllers would	**Here it would be useful to include some concrete examples, perhaps at the end of the paragraph.**

	not respect the essence of the fundamental right to the protection of personal data, as enshrined in the Charter. If the essence of the right is compromised, the restriction shall be considered unlawful, without the need to further assess whether it serves an objective of general interest or satisfies the necessity and proportionality criteria.	
6, 7	3.2 Legislative measures laying down restrictions and the need to be foreseeable (Rec. 41 and CJEU case law) According to Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter shall be 'provided for by law'. This echoes the expression 'in accordance with the law' in Article 8(2) of the European Convention of Human Rights8, which means not only compliance with domestic law, but also relates to the quality of that law without prejudice to the nature of the act, requiring it to be compatible with the rule of law. In particular, the domestic law must be sufficiently clear in its terms to give citizens an adequate indication of the circumstances in and conditions under which controllers are empowered to resort to any such restrictions. 8 See in particular, European Court of Human Rights, 14 September 2010, Sanoma Uitgevers B.V. v. The Netherlands, EC:ECHR:2010:0914JUD003822403, paragraph 83: "Further, as regards the words "in accordance with the law" and "prescribed by law" which appear in Articles 8 to 11 of the Convention, the Court observes that it has always understood the term "law" in its "substantive" sense, not its "formal" one; it	**Also in the light of the ideas included in note 8, it would be appropriate to expressly indicate that the 'soft law' provisions on these issues have the same substantial legal force as the hard law provisions. Indeed, in our country (Italy), a large part of the applicable privacy laws are being developed by the Data Protection Authority (DPA) or by other administrative authorities, such as Italian Competition Authority (AGCM), Ministries, etc., as well. A striking and very recent example is provided by the rules on *digital contact tracing*.**

	has included both "written law", encompassing enactments of lower ranking statutes and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament, and unwritten law. "Law" must be understood to include both statutory law and judge-made "law". In sum, the "law" is the provision in force as the competent courts have interpreted it".	
9	3.4 Data subjects' rights and controller's obligations which may be restricted 35. In accordance with Article 23 GDPR, only Article 5 as far as its provisions correspond to the rights and obligations provided for in Article 12 to 22, Articles 12 to 22 and 34 GDPR can be restricted. The restrictions to obligations regard restrictions to the principles relating to the processing of personal data as far as its provisions correspond to the rights and obligations provided in Article 12 to 22 GDPR and to the communication of a personal data breach to the data subjects . Article 5 GDPR, which establishes the principles relating to the processing of personal data, is one of the most important articles in the GDPR. Restrictions to the data protection principles need to be duly justified by an exceptional situation, respecting the essence of the fundamental rights and freedoms at issue and following a necessity and proportionality test.	**It would be advisable to provide here some more details on the 'necessity and proportionality tests' or at least precise references to the further points where more information about them is reported.**
12	4.6 Risks to data subjects' rights and freedoms 58. Article 23(2)(g) GDPR requires that the legislative measure include the risks to data subject's rights and freedoms entailed by the restrictions. This is a very important step, which helps in the necessity and	**Not only would I suggest to give here a few more references on the DPIA, but essentially in similar cases in my opinion it should be made mandatory, given the significant scope of the risks involved.**

	proportionality test of the restrictions. 59. The goal of this assessment of the risks to data subjects' rights and freedoms is twofold. On the one hand, it provides an overview of the potential impact of restrictions on data subjects. On the other hand, it provides elements for the necessity and proportionality test of the restrictions. In this regard and if applicable, a data protection impact assessment should be considered. 60. The legislator should assess the risks to data subject's rights and freedoms from the perspective of the data subjects. It is not always mandatory to perform a DPIA, but concrete risks to data subjects – such as erroneous profiling leading to discrimination, reduced human dignity20, freedom of speech, the right to privacy and data protection21, a bigger impact on vulnerable groups (such as children or persons with disability), to mention a few - may be stated in the legislative measure, if applicable. 61. When such assessment is provided, the EDPB considers necessary to include it in the recitals or explanatory memorandum of the legislation or in the impact assessment22.	
14	6 CONSULTATION WITH THE SAS (ARTICLES 36(4) AND 57(1)(C) GDPR) 71. At that stage and if applicable, the SAs may ask for a data protection impact assessment (DPIA) under Article 35 GDPR. That assessment will be helpful in the description of the risks to the data subjects' rights mentioned above in point 4.6.	**Under similar circumstances, it would be unthinkable not to make and keep a DPIA available, fully disclosed indeed.**