

C.13 Balancing Tests

Authors: Winfried Veil

Last update: 2021-06-06 14:22:28 | By: Winfried Veil

Created at: 2021-06-06 10:12:05

In at least 82 provisions (!), the GDPR obliges every controller to make complicated balancing decisions [detailed [Tiles BD](#)]. Thus, there are in the GDPR:

3 fairness tests

8 balancing of interests

2 compatibility tests

11 suitability tests

30 necessity tests

12 Appropriateness tests

3 Proportionality tests

13 Risk assessments

The problem with the multitude of these balancing decisions is that they affect everyone who is processing personal data equally. According to the "one size fits all" approach of the GDPR [\[Tile C.02\]](#), not only public bodies but also private individuals are subject to the obligation to make these balancing decisions. However, many of the balancing decisions of the GDPR have their origin in the state-citizen relationship [\[Tile BD.01\]](#). This means that originally only the state was obliged to check the proportionality of its interference with the fundamental rights of the citizen in advance. Under the GDPR, legal persons under private law, but also natural persons, must make similar balancing decisions that otherwise only the state has to make.

Another problem with the numerous balancing decisions is that the *Schutzgüter* of the GDPR are not clearly defined [\[Tile C.06\]](#). Since the impairment of a *Schutzgut* of the GDPR must be weighed against the rights and freedoms of the controller in the balancing decisions, it is often unclear for the controller which impairments he must include in the balancing. Thus, there is a lack of a balancing standard.

Another problem is the lack of a coherent concept of limits to the data protection right [\[Tile C.07\]](#): Controllers can often rely on fundamental rights for their processing of personal data [\[Tile CO.01\]](#); however, the GDPR does not specify what weight these have in the respective balancing. Thus, the balancing standard is also lacking in this respect (for the other balancing standards of the GDPR, see [Tiles BC](#)).

).

Furthermore, it is questionable whether and to what extent the same or less stringent standards apply to citizens than to public bodies when making balancing decisions. In administrative and constitutional law, weighing decisions are clearly structured. The same requirements cannot be imposed on legal laypersons ("parallel evaluation in the layperson's sphere").

It is also questionable whether and to what extent the same standards apply to private persons when making the balancing decisions or whether there should not be gradations between small, medium and large enterprises and between natural persons, associations and companies.