On Risk, Balancing, and Data Protection: A Response to van der Sloat

Raphaël Gellert*

In his editorial to the previous issue of this journal,1 editor Bart van der Sloat critically engages with a contribution of mine that was published in EdpL 4/2016.2 I would like to thank van der Sloat for engaging with and discussing my work, as well as for giving me the opportunity to clarify a number of ideas.

As a reminder, here is an excerpt of the abstract of my article:

This contribution investigates this opposition between the rights-based and risk-based approaches to data protection and finds that the two approaches are actually much more similar than is currently acknowledged. Both aim at managing the risks stemming from data processing operations. This is epitomised by the fact that they have the exact same modus operandi namely, two balancing tests, with risk reduction measures (known as safeguards in the legal context) associated to the second balancing. Yet, if both approaches manage data processing risks, they nonetheless do so differently. Whereas the risk-based approach manages risks in a contextual, tailor-made manner, the rights-based approach manages risks from the outset once and for all.3

In the following response, I will address each of his points in a systematic way. I will then conclude with a few lines, which I hope will clarify the scope and intent of my article at the centre of this discussion.

At the heart of van der Sloat’s editorial one can find a criticism of the notion of balancing on a number of accounts, both legal and philosophical.

From a legal viewpoint, van der Sloat argues that there is no balancing test to be found neither in the European Convention on Human Rights [and the EU Charter for Fundamental Rights (EUCFR)], nor in data protection law.4 This is so, despite ample evidence that we have entered what he refers to as ‘an age of balancing’,5 not least because ‘the

---

* Raphaël Gellert, post-doctoral researcher at the Vrije Universiteit Brussel (VUB), Law Faculty, Research Group on Law, Science, Technology, and Society (LSST). For correspondence: <Raphael.gellert@vub.ac.be>

DOI: 10.21552/edpl/2017/2/7

1 Bart van der Sloat, ‘Editorial’ (2017) 3(1) EDPL 1-12.

2 Raphaël Gellert, ‘We Have Always Managed Risks in Data Protection Law: Understanding the Similarities and Differences Between the Rights-Based and Risk-Based Approaches to Data Protection’ (2016) 2(4) EDPL 481-492.

3 ibid 481.

4 van der Sloat (n 1) 4.

5 ibid 2 and see the references.
notion of balancing has entered the juridical realm, including the human rights framework in the last 30 years or so.⁶

Van der Sloat puts forth an analysis of both the Data Protection Directive (DPD),⁷ and the General Data Protection Regulation (GDPR).⁸ In both cases, he argues, the notion of balancing is practically non-existing.⁹ Even though his textual analysis is impeccable, one has to take into account the case law of the Court of Justice of the European Union (CJEU), which in a number of cases has explicitly confirmed the existence of a balancing test within the DPD. This has been most clear with regards to Article 7(f) DPD, which concerns the legitimate interests of the data controller as a means to provide a legitimate basis to the processing of personal data. One can argue that the Court has first seen the existence of a balancing test in the ASNEF case.¹⁰ It has reiterated this position recently in the Breyer case, arguing that the balancing test contained in Article 7(f) precludes Member States from prohibiting and/or prescribing processing operations in advance on the basis of this ground.¹¹ Most useful for the present discussion is the Opinion of the Advocate General (AG) Bobek in the Rigas satiksme case.¹² In his Opinion, the AG has made it explicit that the balancing of the competing interests of the data subject and the data controller are at the heart of Article 7(f).¹³ The Advocate General also argues with adequate references that

The balancing requirement clearly results both from Article 7(f) and from the legislative history of the Directive [insofar as it] was already provided for, in slightly different ways, in the Commission’s initial proposal and also in its amended proposal after the first reading of the European Parliament.¹⁴

From this viewpoint, it is difficult to follow van der Sloat when he argues that the notion of balancing is alien to data protection law. In a similar vein, and even if it is a doctrinal source (which van der Sloat rejects in order to focus on the textual analysis of the DPD and the GDPR), it is also interesting to mention a study by Gutwirth which analyses the data protection purpose limitation principle in the light of the proportionality principle.¹⁵ In this study, Gutwirth shows that the proportionality test with

---

⁶ ibid.
⁹ See, ibid 4: ‘There are no material provisions in either the DPD or the GDPR that refer directly to balancing and even the recitals that do use that concept are not an interpretation of the material provisions, but regard the margin left to the Member States’.
¹³ Case C-13/16 Rigas satiksme (2017), Opinion of AG Bobek, §§ 60–62. See also, §68 of the same Opinion: ‘balancing is the key to the correct application of Art. 7(f)’.
¹⁴ ibid § 66.
the balancing of interests at its core (see, herein below) is clearly a legal principle that can actually be traced back to private law when dealing with issues of abuse of rights.

Concerning the presence of the balancing test in human rights law, and as I have tried to make clear in the article, my use of the notion of the balancing test is directly related to the proportionality test featured in the European Convention on Human Rights (ECHR). As is well-known, the possibility of restricting certain human rights featured in the Convention is bound by the general limitation clauses, which provide for three conditions (legality, legitimate aim, necessity in a democratic society).\(^\text{16}\) The condition of necessity in a democratic society, though unclear and multidimensional, amounts also to an analysis of the proportionality of the measure restricting the right at stake.\(^\text{17}\)

Van der Sloot explicitly argues that the aim of the general limitation clauses, and in particular of the system of derogation provided by Article 15 ECHR, was not to balance the interests of one individual against those of others or against those of the society in general.\(^\text{18}\) However, renowned ECHR scholars like Sudre, explicitly disagree and state the exact opposite.\(^\text{19}\) Further, and as explained by de Sadeleer, ‘the balancing of the “pros and cons”, that is, the weighing of the different interests at play is the proportionality test *stricto sensu*.\(^\text{20}\) In other words, the core of the proportionality test, which is at the heart of the system of restriction in human rights instruments, is the balancing test. This should not be taken to mean that proportionality is only about the balancing of the different rights and interests at play. As de Vries et al have explained, the notion of balancing can be a dangerous one if it is only limited to the strict balancing of interests. However, the authors also show that such balancing can take different shapes that lead to different levels of protection. Contrary to lenient proportionality tests, solely based on the balancing of competing interests, one can put forth a number of elements that strengthen it.\(^\text{21}\) Among these is the so-called necessity test, which consists of determining whether any less-harmful alternatives exist, as well as of what I refer to as safeguards in my paper.\(^\text{22}\) These safeguards will constrain the scope of the envisaged measure, either in substance (e.g., limits on data quantity, conservation duration, etc), or in procedure (e.g., independent supervisory authority, right of appeal and/or redress, etc). This is the reason why in my paper I argue that the data quality principle encompasses all the elements of the proportionality test, with Article 6.1(c)

\(^{16}\) See, eg, art 8§2 ECHR and art 52 EUCFR.


\(^{18}\) van der Sloot (n 1) 4–5.


\(^{22}\) Gellert (n 2) 487.
containing the balancing test per se, and the other provisions that can be understood as one of these safeguards accompanying the balancing (eg, storage limitation, purpose limitation, etc).  

The understanding of the ECHR’s proportionality test as a combination of a balancing test associated with the necessity test and a list of safeguards also brings me to one of van der Sloot’s core arguments. As opposed to a balancing test, he argues that we should follow the approach of a hierarchy linked to a duty of care (ie, spelling out the conditions for restrictions to a right/or the use of power).  

It makes sense for van der Sloot to argue along these lines, since it espouses – so he argues – the deontological logic, which is best suited to the legal discipline, as opposed to the utilitarian one associated with the balancing test. However, I must confess that I am only mildly convinced by van der Sloot’s opposition between the utilitarian approach, relying upon a proportionality test understood as a matter of balancing associated with safeguards, and the deontological approach, relying upon normative decisions in terms of hierarchy associated with conditions for the use of power/restrictions to rights). First, as van der Sloot himself acknowledges, the question of hierarchy is a matter of contextual subjective (or normative choices), and in this sense it is very close to the logic at the heart of the balancing test. Second, I also see little difference between van der Sloot’s concept of conditions for the use of power, and my own notion of safeguards as an integral element of the proportionality test. Both solutions end up with specifying the conditions under which measures interfering with fundamental rights can be taken.

This apparent similarity of positions between van der Sloot and myself leads me to mitigate some of his most fundamental and principled criticisms against the notion of balancing. Van der Sloot argues that the notion of balancing is a utilitarian notion, which allows to prioritise in a sort of objective fashion competing interests. This, he argues, can be criticised for its own sake, and also on account that balancing is never as objective as it pretends, and reveals itself to be on the contrary quite vague and subjective. I would argue that the utilitarian critique of the balancing test is a valid one but only within a specific context. As a matter of fact, in the case of risk management, the criticism against utilitarianism has mostly targeted so-called quantitative cost-benefit analyses, arguably the most utilitarian iteration of the balancing test. Such analyses do indeed balance the aggregated economic costs against the aggregated economic benefits in a sort of quasi-scientific way. However, this way of doing a balancing test has long been criticised for subsuming everything in economic terms and for over prioritising aggregation at the expense of distribution, and objectivity and quantitativeness

23 ibid 486.
24 van der Sloot (n 1) 5.
25 ibid 2 and see his lines on the notion of hierarchy.
26 ibid 5.
27 ibid 2.
28 ibid.
at the expense of subjectivity and qualitatively.\textsuperscript{29} As a matter of fact, in the context of risk, a number of scholars have criticised the utilitarian criticism of the notion of (risk and) balancing. These scholars acknowledge that if ‘risk management practices have undoubtedly altered morality, especially in utilitarian directions, it does not spell the end of morality. To the contrary, the rise of risk entails an attendant rise in new moralities’.\textsuperscript{30} In this sense, one can argue that the notion of balancing can be very utilitarian under some acceptations, but that it can also be non-utilitarian under different acceptations (eg, more distributive, less economic and objectivity-oriented, etc). Furthermore, contrary to what van der Slop argues, the notion of balancing is not a purely relative one.\textsuperscript{31} Even though the proportionality test is a contextual and subjective one, as evidenced by the European Court of Human Rights’ emphasis upon the notion of reason, giving it is not an absolutely relative one.\textsuperscript{32} This is very clear in Article 52.1 of the EU Charter of Fundamental Rights, which provides that restrictions to fundamental rights shall respect the essence thereof. The notion of the ‘essence of fundamental rights’ as a bottom line for restrictions was notably referred to in the Schrems case.\textsuperscript{33}

In sum, if the utilitarian criticism of the balancing test is a prevalent one, the reality of the balancing test seems more nuanced than the criticism admits. In any case, in this short response I have tried to provide evidence that the balancing test is well present in human rights law and in data protection law, and that such presence is precisely under a non-utilitarian modality (see, necessity test, safeguards, protection of the essence of the right, etc).\textsuperscript{34} That is why, once again, I have the impression that van der Slop’s analysis and mine are actually quite close, if it were not for his principled rejection of the very notion of balancing.

Finally, van der Slop makes a last point on balancing and risk. With reference to Article 35 GDPR, he argues that the notion of balancing is absent from risk management itself.\textsuperscript{35} I also disagree with this. First, as has been acknowledged by the Article 29 Working Party in its recent opinion on DPIAs, Article 35 is silent on the methodology to be used when performing an impact assessment,\textsuperscript{36} and therefore is also silent on how to perform the risk management step where I locate the balancing test. Second, van der Slop argues that there is no balancing at stake when mitigating risks by pro-

\textsuperscript{29} See, eg, David KC Jones and Christopher Hood, ‘Introduction’ in Christopher Hood and David KC Jones (eds), Accident and Design: contemporary debates in risk management (UCL Press 1996) 7.

\textsuperscript{30} Richard V Ericson and Aaron Doyle, ‘Risk and Morality’ in Richard V Ericson and Aaron Doyle (eds), Risk and Morality (University of Toronto Press 2003) 4.

\textsuperscript{31} See, van der Slop (n 1) 2–3.

\textsuperscript{32} On this see for instance, Article 29 Working Party, ‘Opinion 01/2014 on the Application of Necessity and Proportionality Concepts and Data Protection within the Law Enforcement Sector’ (2014).


\textsuperscript{34} Even though the application of the proportionality test by the European Court of Human Rights is itself not straightforward and consistent, see Patricia Poupelier and Catherine Van De Heyning, ‘Procedural Rationality: Giving Teeth to the Proportionality Analysis’ (2014) 9 European Constitutional Law Review 230.

\textsuperscript{35} van der Slop (n 1) 9.

viding a number of risk mitigation measures (eg, develop a protocol to check the validity date of food).\textsuperscript{37} So, following his rationale, risk can be successfully mitigated through the adoption of the adequate mitigation measures. In doing so, he forgets that it is traditionally admitted that the notion of zero risk is simply unachievable. At most, it is possible to reduce the risk to an acceptable residual level.\textsuperscript{38} This is precisely the point the balancing test in risk management (‘what level of risk is sufficiently low so that it can be taken?’). Furthermore, risk mitigation measures have a cost of their own that must also be taken into account. This is explicit in the GDPR which argues that in the context of the risk-based approach, the data controller shall take into account the state of the art, the cost of implementation and the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for rights and freedoms of natural persons posed by the processing.\textsuperscript{39}

This is an explicit acknowledgement of the balancing test taking place at the risk management level.

Finally, as a way to conclude and in order to avoid any misunderstandings, I would like to clarify that my contribution should in no way be seen as in favour of the risk-based approach, nor in any way as a plea for replacing data protection law with risk management instruments. As I carefully discuss, there are many challenges associated with risk-based approaches. However, I personally found it very interesting to see that these two approaches (rights-based and risk-based), which have been presented as diametrically opposed, are actually much more similar than it appears. My point is that they have a very similar modus operandi. At the core of each, one can find two proportionality tests, which can be decomposed as a matter of balancing exercises associated to a number of safeguards (or risk mitigation measures). In other words, one of the main messages I try to convene in the article is that when we do a legal proportionality test what we do is actually much closer to risk management than the current framing of the issue allows us to imagine and/or admit. With that article, I have mainly tried to point out this similarity, and spell out some of its consequences as far as the differences between the two approaches are concerned. Because indeed, if the risk-based and rights-based approaches are similar, they nonetheless remain different on a number of levels. At its core, my argument consists in showing and comparing how the proportionality principle operates in the field of data protection, and how it operates within risk management. It is shown that it operates in an extremely similar manner, and this in turns allows for a more subtle reframing of the debate and opposition between risk-based and rights-based approaches to data protection. As I have tried to argue, we should not see the risk-based approach as the ‘evil counterpoint’ of the ‘vir-

\begin{footnotesize}
\item[37] van der Sloot (n 1) 9.
\item[39] art 25.1 GDPR.
\end{footnotesize}
tuous’ rights-based approach precisely because they are so similar. In turn, and in the light of this similarity, the debate should be turned instead towards the different ways in which these approaches operate, and what their respective drawbacks and benefits are.