

AI ACT & DATA PROTECTION

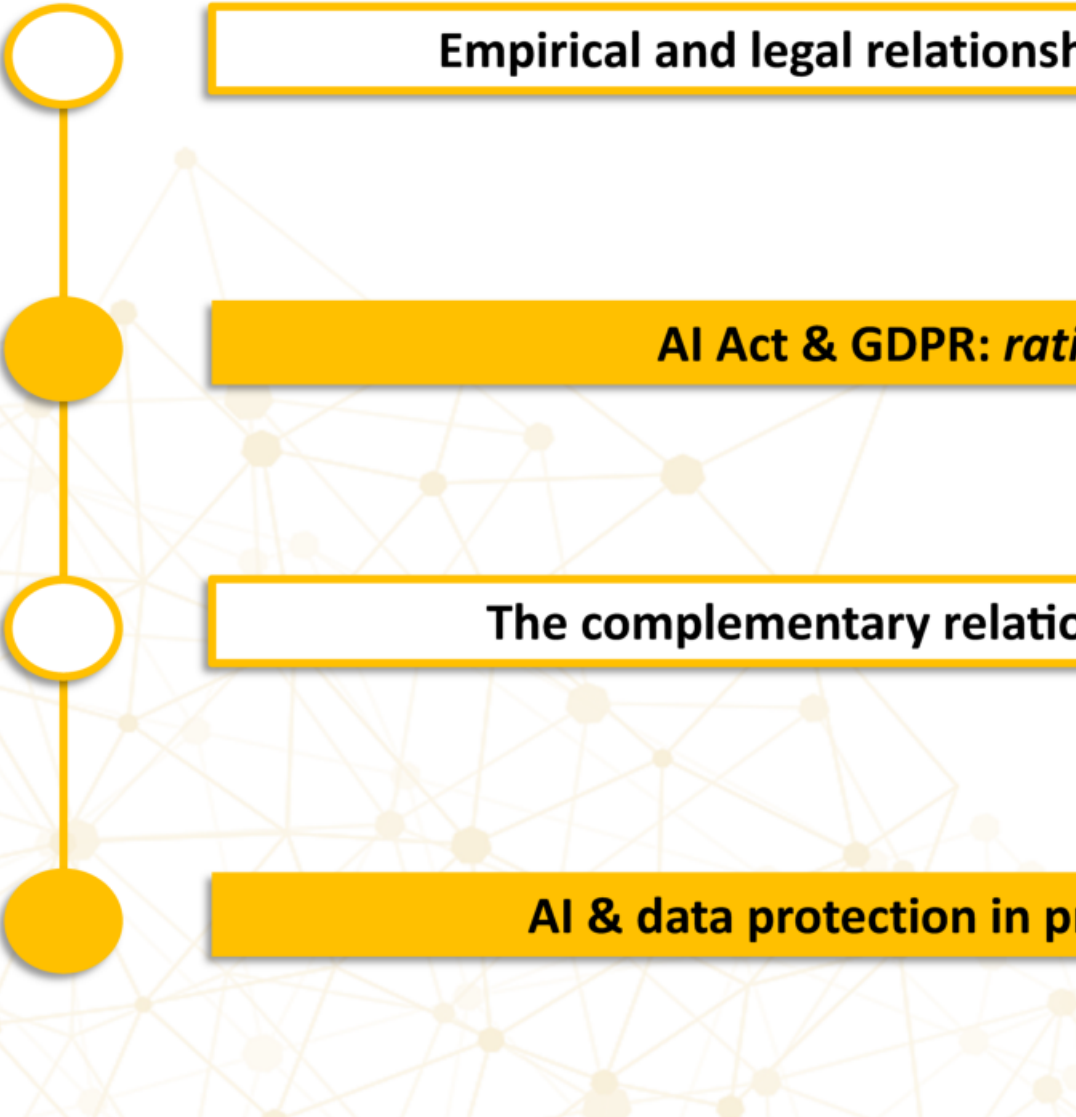
HCRAI

June 27, 2023 – Budapest

Avv. Gabriele Franco

Associate – PANETTA Studio Legale

Agenda



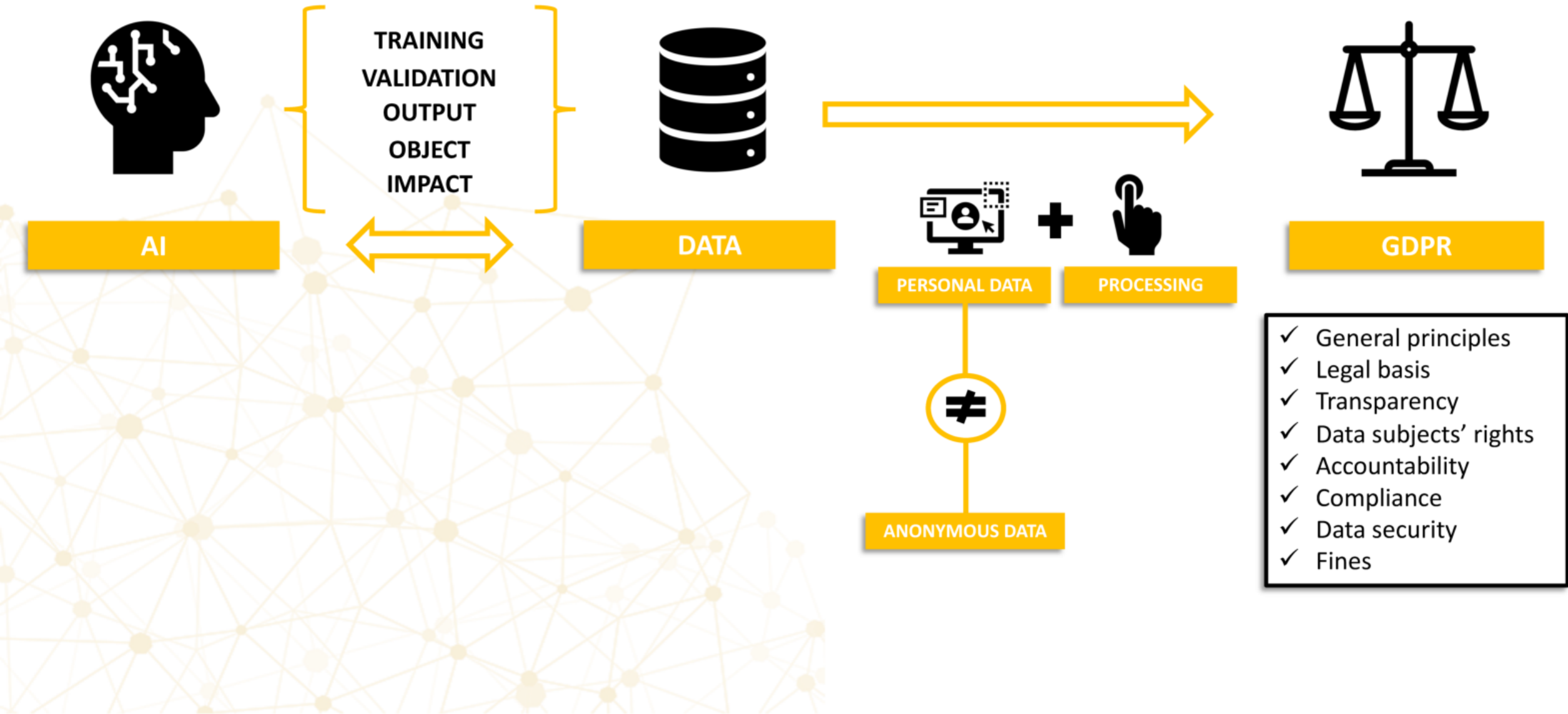
Empirical and legal relationship between (personal) data and AI

AI Act & GDPR: *ratio legis* and legal drafting

The complementary relationship between AI Act and GDPR

AI & data protection in practice: a short journey to Italy

AI & data protection



AI Act & GDPR



GDPR

- ✓ Innovation/protection
- ✓ Risk-based approach
- ✓ Accountability
- ✓ Governance



AI ACT

- ✓ Horizontal approach
- ✓ Processualisation
- ✓ Codes of conducts
- ✓ Penalties

AI Act & GDPR



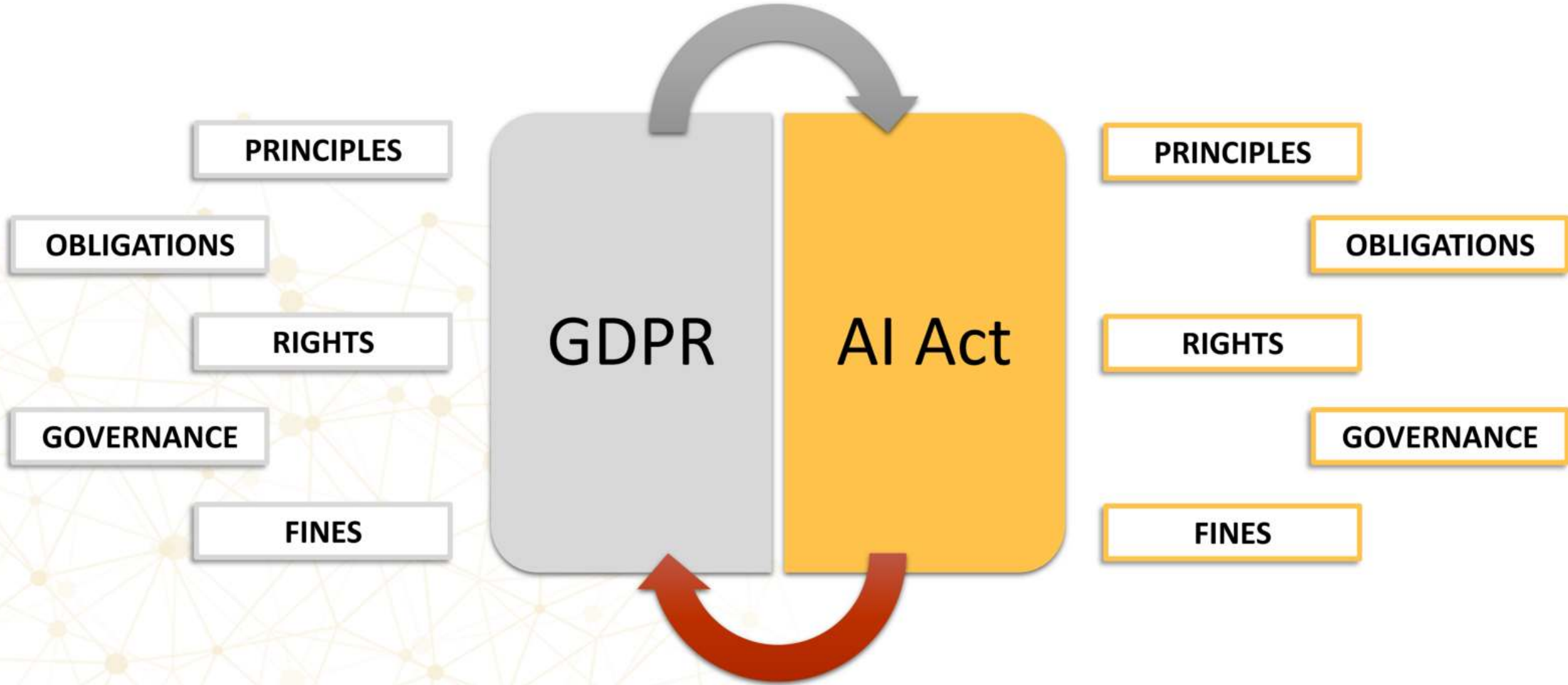
The **EU Commission's proposal**, as well as the **common position taken by the European Council**, do not clarify the **relationship between GDPR and AI Act**. There are only **a few limited references** to the rules on the protection and circulation of personal data in relation to certain aspects of detail (e.g. biometric systems).



The **common position adopted by the European Parliament** aims at aligning the AI Act with the GDPR. The two regulations are expected to **operate complementarily** for the development and adoption of AI in the EU. Among the most relevant changes in this regard are the inclusion of **clarifications on the relationship** between the two regulations, as well as the enrichment of the definition system with references to the GDPR.

In the European Parliament's common position, the protection of personal data is also included among the **general principles that all AI systems should respect** (*«AI systems shall be developed and used in compliance with existing privacy and data protection rules, while processing data that meets high standards in terms of quality and integrity»*).

AI Act & GDPR



AI Act & GDPR



Definition of roles



Lawfulness



Minimisation



Transparency



Type the data



Accuracy and quality



Data subject's rights



Article 22

A NEW GDPR?

AI Act & GDPR



«The EDPB and the EDPS would also like to recall that **data protection authorities (DPAs) are already enforcing the GDPR [...] on AI systems involving personal data in order to ensure the protection of fundamental rights and more specifically the right to data protection.** Therefore, DPAs already have to some extent, as required in the Proposal for the national supervisory authorities, an understanding of AI technologies, data and data computing, fundamental rights, as well as an expertise in assessing risks to fundamental rights posed by new technologies. In addition, when AI systems are based on the processing of personal data or process personal data, provisions of the Proposal are directly intertwined with the data protection legal framework, which will be the case for most of the AI systems in the scope of the regulation. As a result, there will be interconnections of competencies between supervisory authorities under the Proposal and DPAs.

Hence, the designation of DPAs as the national supervisory authorities would ensure a more harmonized regulatory approach, and contribute to the consistent interpretation of data processing provisions and avoid contradictions in its enforcement among Member States. It would also benefit all stakeholders of the AI chain of value to have a single contact point for all personal data processing operations falling within the scope the Proposal and limit the interactions between two different regulatory bodies for processing that are concerned by the Proposal and GDPR. **As a consequence, the EDPB and the EDPS consider that DPAs should be designated as the national supervisory authorities pursuant to Article 59 of the Proposal».**

AI & data protection

With **provision No. 39 of February 2, 2023**, the Italian Garante found that the processing of personal data of users of the **chatbot Replika**, in particular minors, was in breach of **Articles 5, 6, 8, 9 and 25 of the GDPR**.

- During the account creation process, the platform does not provide any **procedure for verifying and checking the user's age**;
- No banning or blocking mechanisms are envisaged in the event of **user declarations explicitly stating that the user is underage**, in addition to the chatbot's display of **responses** that conflict with the protections to be ensured for minors and fragile subjects;
- The features of Replika, which are mainly related to interventions on the humour of the person, may be likely to **increase the risks for the fragile individuals involved**;
- The **privacy policy** of the platform does not comply with the GDPR, in particular in terms of **transparency**, as it does not provide any information on the essential elements of the processing, in particular with regard to the use of the personal data of minors;
- The incompleteness of the privacy policy makes it impossible to identify the **legal basis for the different data processing operations carried out**: in any case, the Garante excludes that, with particular regard to minors, this can – even only implicitly – be found in the contractual rules.

In view of the above, the Garante ordered, on an urgent basis, **the temporary restriction of the processing of personal data of users established on Italian territory**.

AI & data protection

With **provision No. 112 of March 30, 2023**, the Italian Garante found that the processing of personal data of users, including minors, and data subjects whose data are used by **ChatGPT** was in breach of **Articles 5, 6, 8, 13 and 25 of the GDPR**.

- No **privacy policy** is provided to users, nor to data subjects whose data is collected by OpenAI and processed via ChatGPT;
- Lack of an **appropriate legal basis** in relation to the collection of personal data and their processing for the purpose of **training the algorithms** underlying the functioning of ChatGPT;
- The processing of personal data of data subjects is **inaccurate** as the information provided by ChatGPT **does not always correspond to the reality**;
- Lack of any **verification of users' age** in relation to the ChatGPT service;
- The absence of **filters for children** under the age of 13 exposes them to **responses** that are unsuitable for their degree of development and self-awareness.

In view of the above, the Garante ordered, on an urgent basis, **the temporary restriction of the processing of the personal data of users established on Italian territory**.

Takeaways



There is already legislation regulating AI

AI systems will have to comply with both the GDPR and the AI Act

The relationship between these regulations will have to be further investigated

Companies and public bodies should consider (today) the GDPR to be ready (tomorrow) for the AI Act



PANETTA
law firm



Avv. Gabriele Franco

Associate – PANETTA Studio Legale



g.franco@panetta.net



Gabriele Franco



@franco_gab94