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European Data Protection Board

Guidelines 1/2024 on processing of personal data based on Article 6(1)(f) GDPR
Public consultation reference: 10/2024

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About eyeo

eyeo is dedicated to empowering a balanced and sustainable online value exchange for users, browsers, advertisers, and publishers. By building, monetizing, and distributing ad-filtering technologies, we create solutions that allow all members of the online ecosystem to prosper. Our ad-filtering technology powers some of the largest ad blockers on the market, like Adblock Plus¹ and AdBlock², a mobile browser for Android³, and is distributed through partnerships to millions of devices. There are currently 350 million global ad-filtering users, and ~50 million in the European Union, who see nonintrusive advertising that is compliant with the independently established Acceptable Ads Standard.

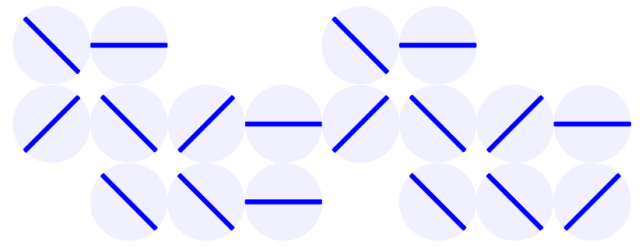
We highly appreciate the commitment of the European Data Protection Board (EDPB) to ensure a consistent application and enforcement of data protection laws across the European Economic Area. The EDPB's public consultation processes for guidelines support industry, civil society and academia in developing a common understanding of EU data protection requirements. We particularly appreciate the opportunity to provide feedback to the Guidelines 1/2024 on processing of personal data based on Article 6(1)(f) GDPR (short: the Guidelines)⁴. Given our active and unique role in the

¹ [Adblock Plus](#)

² [AdBlock](#)

³ [Adblock Browser](#)

⁴ [Guidelines 1/2024 on processing of personal data based on Article 6\(1\)\(f\) GDPR. Version 1.0. Adopted on 8 October 2024](#)



online advertising ecosystem and user-centric product vision, we want to comment and expand on some issues identified in the Guidelines.

Advancing privacy and accountability: Feedback on EDPB’s guidelines on legitimate interest

Promoting a common understanding and fostering the adoption of Article 6(1)(f) GDPR

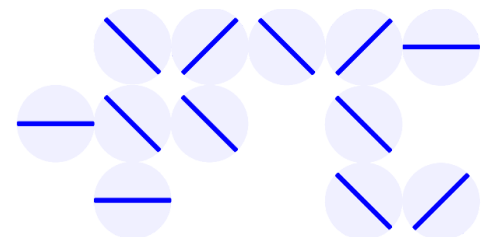
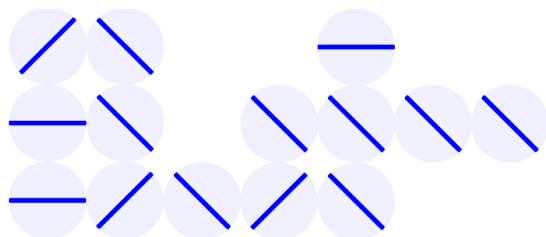
We want to highlight the importance of promoting a common understanding of the concept of legitimate interest pursuant to Article 6(1)(f) GDPR, which supports controllers to fully grasp and implement this legal principle. The EDPB rightfully states that “GDPR does not establish any hierarchy between the different legal bases laid down in Article 6(1)” (paragraph 1) and that “the open-ended nature of Article 6(1)(f) GDPR does not necessarily mean that this legal basis should be seen as one that can only be used as a “last resort” in rare and unforeseen situations, or that Article 6(1)(f) should be seen as a last option if no other legal bases apply” (paragraph 8). We welcome this direct and unambiguous clarification, especially considering that observers noted that the concept of legitimate interest was perceived by many practitioners as “complicated [...] and difficult to grasp in practice”⁵. From our own experience, we noticed that the legal bases of consent⁶ is heavily relied on in our industry instead and seems often to be chosen as de-facto default, even though studies and research⁷ have shown time and again that (extensive) consent regimes rarely increase user autonomy. As a result, click fatigue⁸ also increasingly became an issue

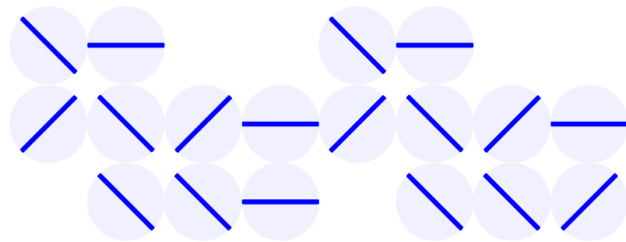
⁵ [Processing Personal Data on the Basis of Legitimate Interests under the GDPR](#) (p. 2)

⁶ Pursuant to Article 6(1)(a) GDPR

⁷ See, for instance, [Ben-Shahar, Omri, and Carl E. Schneider. More Than You Wanted to Know: The Failure of Mandated Disclosure. Princeton University Press, 2014.](#), and [Barrett, Lindsey, Confiding in Con Men: U.S. Privacy Law, the GDPR, and Information Fiduciaries \(March 17, 2019\). Seattle University Law Review \(2019 \) Vol. 42:1](#)

⁸ As described by the EDPB in the “[Guidelines 05/2020 on consent under Regulation 2016/679](#)” as the phenomenon of users encountering consent requests too often, which actually diminishes the “warning effect of consent” (paragraph 87)





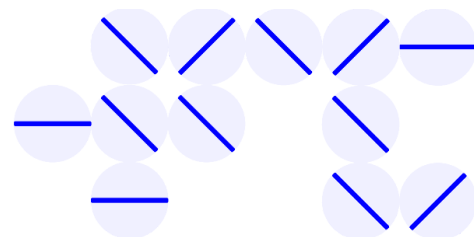
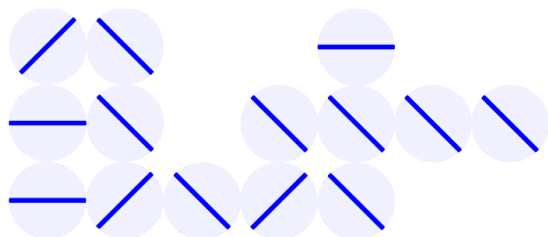
for data subjects. Therefore, we are appreciative of the EDPB's clarification about the equality of all legal bases under Article 6(1) GDPR and urge for a pragmatic approach enabling organizations to rely on legitimate interest on a wider scale.

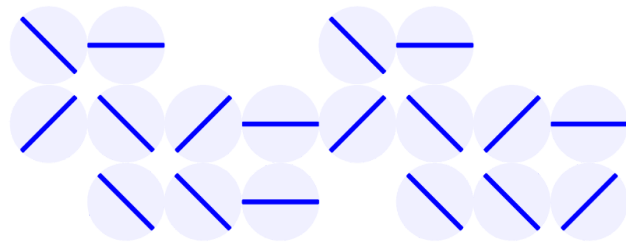
The EDPB provides practical guidance throughout the Guidelines, which is helpful for organizations seeking to comply. One helpful clarification is that when controllers assess the three conditions for lawful processing under Article 6(1)(f) GDPR, the second and third conditions may sometimes overlap and may be merged (section 12). Such guidance is helpful and assists organizations in a pragmatic way. Along the same lines, it is appreciated that the EDPB acknowledges that there “is no exhaustive list of interests that may be considered as being legitimate” and that “a wide range of interests is, in principle, capable of being regarded as legitimate” (paragraph 16). Given the pace of technological developments and new innovations in the digital sector, it is advisable to not pre-define an exhaustive list of legitimate interests. It seems more likely that product innovations or novel use cases require a continuous dialogue between regulatory and supervisory bodies, such as the EDPB, and external stakeholders, to determine which interests are capable of being regarded as legitimate.

Interplay between Article 6(1)(f) GDPR and data subjects

As a user-centric company dedicated to empowering consumers, we firmly support the fundamental principles expounded upon in Chapter III of the GDPR. Hence, the clarifications and guidance on the interplay between Article 6(1)(f) GDPR and data subject rights (paragraphs 61-89) are much appreciated.

Related to the transparency and information requirements, we second the opinion that layered privacy statements or notices informing on the balancing test could avoid information fatigue (paragraph 68). At the same time, the Guidelines state that “[i]n any case, information to the data subjects should make it clear that they can obtain information on the balancing test upon request” (paragraph 68). When assessing the related Articles 13-15 GDPR, it seems that the GDPR does not require controllers to provide information on the particular balancing test upon request, but obliges





controllers to inform the legitimate interests as such⁹. Maybe the final version of the Guidelines could clarify this aspect.

We also welcome the introduction of the concept of reasonable expectations of the data subject (paragraph 50-54). From a practical point of view, we fully agree that it is crucial to take into account “the reasonable expectations of data subjects when weighing its legitimate interest(s) and the interests or fundamental rights and freedom of data subjects” (paragraph 51). When discussing the contextual elements to be considered regarding the reasonable expectations of data subjects, we would like to highlight that one particular characteristic of the relationship with the data subject seems to be missing in the Guidelines: the specific sector in which the controller is operating in. Taking the online advertising industry as an example, it is relevant to note that a wide variety of studies examine the degree to which data subjects understand how online advertising generally works¹⁰. The same is the case for other industries. A sector-specific element related to the reasonable expectations of data subjects seems appropriate and would be in line with other relevant provisions of the GDPR, where sectoral applications and specifications apply¹¹. Hence, we propose to add another example to the listed characteristics of the relationship with the data subject (paragraph 54), outlining the expected understanding of the data subject on the processing sector.

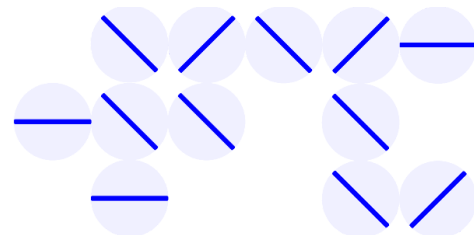
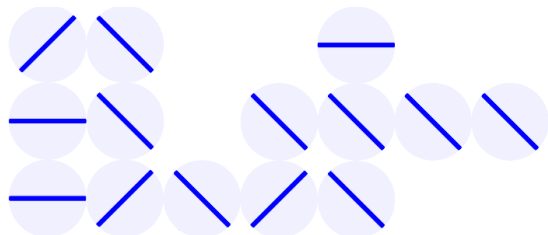
Processing for direct marketing purposes

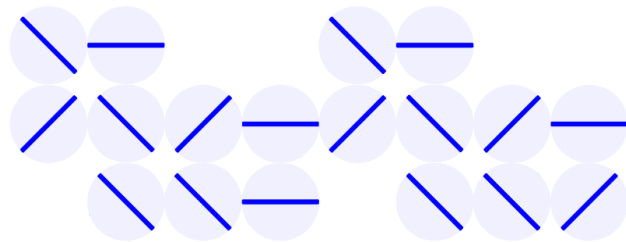
Given our experience and position in the online advertising ecosystem, we would like to provide some observations on the provisions related to direct marketing purposes (paragraphs 109-122). We welcome the references to Recital 47 GDPR throughout the Guidelines, which directly states that the processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest. It is also appreciated that relevant case law, such as CJEU, judgment of 25 November 2021, Case

⁹ Pursuant to Article 13(1)(d) GDPR and Article 14(2)(b) GDPR

¹⁰ See, for instance, [Sahni, Navdeep S. and Zhang, Charles. Are Consumers Averse to Sponsored Messages? The Role of Search Advertising in Information Discovery. Stanford University Graduate School of Business Research Paper No. 3441786](#), or [The Free and Open Ad-Supported Internet: Consumers, Content and Assessing the Data Value Exchange \(IAB\)](#)

¹¹ Pursuant to Article 40 GDPR, Article 45 GDPR, and Recital 92 GDPR





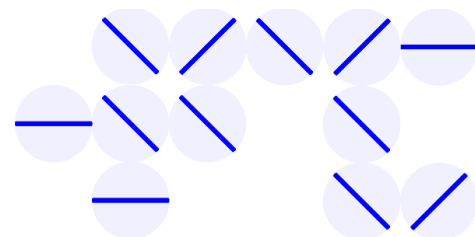
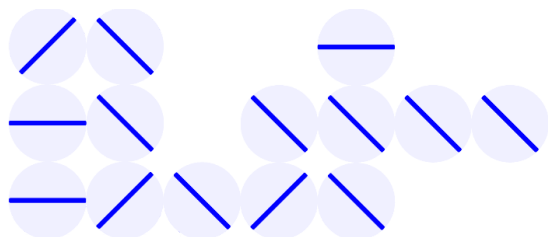
C-102/20, StWL Städtische Werke Lauf a.d. Pegnitz (ECLI:EU:C:2021:954), are worked into the Guidelines. Highlighting this recital of the law and the relevant court cases provide valuable guidance for controllers aiming to establish legitimate interest as a lawful basis for processing personal data in their direct marketing efforts.

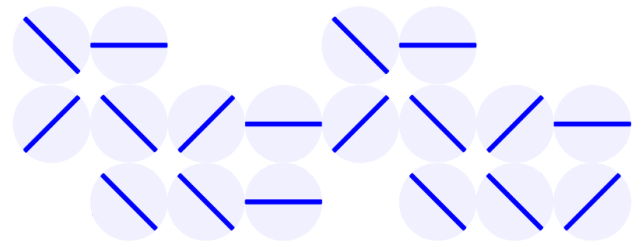
The Guidelines also correctly state that “[d]irect marketing is not defined in the GDPR” (paragraph 109). In the same context, we would like to emphasize the GDPR does neither define “tracking (techniques)” (as referred to in paragraphs 46, 115, 120) nor “targeted advertising” (as referred to in paragraph 95). These terms are often used in the wider online advertising ecosystem, but not necessarily with a stringent and singular definition in the context of privacy laws. Hence, we would generally welcome the establishment of common understandings for these terms and/or more granular information where such terminology is used.

We also noted that the Guidelines reflect the risk-based approach, a key component of the GDPR. The legislator particularly acknowledges the risk-based approach by requiring companies and organizations to implement data protection measures corresponding to the risk level of their data processing. For instance, the processing of data of “sensitive nature, for example health data, would require implementing more stringent measures to comply with the GDPR”¹². The EDPB clarified the risk-based approach as a core principle in the context of processing personal data for direct marketing purposes and legitimate interest pursuant to Article 6(1)(f) GDPR by stating that the “level of intrusiveness of the envisaged marketing practices can be a particularly relevant factor to be taken into account when carrying out the balancing test” (paragraph 120). We strongly endorse this approach, since it allows organizations to differentiate between different types of processing, based on the level of risk associated, and to then apply the balancing test to see if it is possible to rely on legitimate interest.

Generally, we appreciate the examples provided in this context. For instance, the Guidelines discuss “less intrusive marketing activities, for example in the context of an

¹² [European Commission: Are the obligations the same regardless of the amount of data my company/organisation handles?](#)





advertising campaign consisting in sending the same commercial communication (e.g., a catalogue of products) to all existing customers who have already bought products similar to those that are advertised” (paragraph 120). However, given the continued increase of digital advertising compared to non-digital channels¹³, we would encourage the EDPB to also acknowledge some *online* marketing activities that can be considered less intrusive. For example, advertising performance measurements (e.g., measuring if an ad was viewed or clicked on) or audience statistics (e.g., measuring common characteristics, like which audiences were more interested in an ad campaign) could generally be seen as less intrusive processing operations, depending on the implementation of appropriate safeguards, and could enable a controller to assess the applicability of legitimate interest for such processing operations.

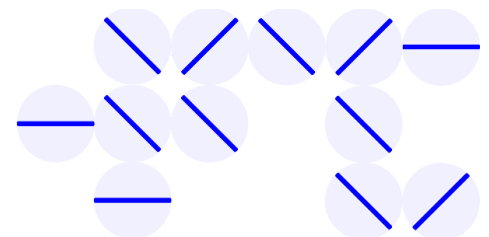
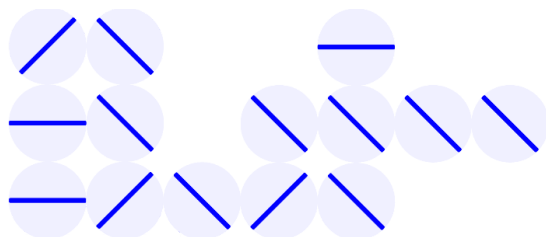
Along the same lines, we appreciate that the EDPB identified the importance of privacy-enhancing technologies related to direct marketing purposes (paragraph 119). Privacy-enhancing technologies play a crucial role in ensuring a consistent GDPR application, particularly in the context of direct marketing and online advertising. In this context, industry groups and standards bodies drive crucial work to develop privacy-enhancing technologies for wider-scale usage. For example, the W3C’s Private Advertising Technology Community Group is working on a browser API for the measurement of advertising performance, with the intent to generate aggregate statistics without privacy risks for data subjects¹⁴. We believe it would be beneficial if relevant technology standard bodies, such as the W3C, exchange and acknowledge perspectives with the EDPB on these topics.

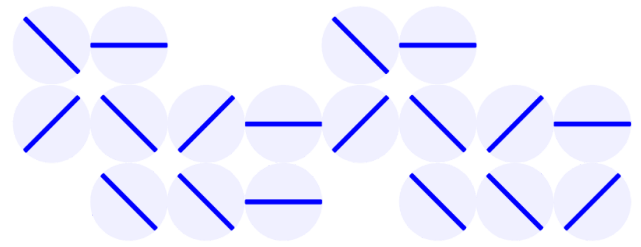
Conclusion

We are grateful for the EDPB’s efforts to clarify the application of legitimate interest under Article 6(1)(f) GDPR, which will help foster a unified understanding of this principle across sectors. The Guidelines rightly emphasize the equal standing of legal

¹³ The global share of digital advertising in total ad revenue was 67% in 2022. This figure is projected to rise to 70% in 2024 and further increase to 73% by 2028. For reference, see [Share of digital in advertising revenue worldwide from 2018 to 2028](#)

¹⁴ See, for instance, [Privacy-Preserving Attribution](#)





bases under GDPR, providing valuable guidance to controllers in assessing legitimate interest without relegating it to a "last resort" status. Furthermore, the practical guidance on merging conditions for lawful processing. Acknowledging privacy-enhancing technologies and highlighting the risk-based approach is essential. To further improve the Guidelines's value for controllers, we propose to include sector-specific context when discussing the reasonable expectations of data subjects and to acknowledge online marketing activities which are less intrusive and could be considered for legitimate interest if appropriate safeguards are in place. Overall, we look forward to continued collaboration to ensure these clarifications evolve with industry advancements.

