

# “LEGITIMATE INTEREST” AS LEGAL BASIS FOR PROCESSING PERSONAL DATA

vzbv comments on the European Data Protection Board’s “Guidelines 1/2024 on processing of personal data based on Article 6(1)(f) GDPR”

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## RELEVANCE TO CONSUMERS

The European Data Protection Board (EDPB) “Guidelines on processing personal data under Article 6(1)(f) GDPR” – the legal basis of “legitimate interests” – are an important building block for safeguarding consumer rights. This legal basis allows data processing for an organisation’s legitimate interests, provided such interests do not override the individual’s rights and freedoms.

For consumers, however, this flexibility raises significant concerns regarding their rights and freedoms. With the rapid expansion of data collection technologies, the ambiguity surrounding “legitimate interests” creates risks of misuse, where commercial goals could overshadow the right of consumers to the protection of their personal data. Consumers face increased risks of their personal data being used in ways that may not align with their interests or expectations. When businesses rely on “legitimate interests,” consumers are often unaware of the processing activities and their data subject rights limiting their ability to control or challenge these processing activities and reducing trust in digital services.

It is important to ensure that consumers’ rights are not subordinated to commercial objectives. Clear, consumer-focused guidance from the EDPB is essential to prevent legitimate interests from being used as a broad justification for extensive data processing.

## 1. GENERAL REMARKS

The Federation of German Consumer Organisations (vzbv) welcomes the efforts of the EDPB to provide more clarity regarding the processing of personal data based on Article 6(1)(f) of the General Data Protection Regulation (GDPR). vzbv understands that, following the rulings of the European Court of Justice (CJEU) inter alia in the cases *Meta v Bundeskartellamt* (C-252/21), *SCHUFA Holding* (joined cases C-26/22 and C-64/22), and *Koninklijke Nederlandse Lawn Tennisbond* (C-621/22), there is a need for guidance.

Especially the preliminary ruling in the *Koninklijke Nederlandse Lawn Tennisbond* case, which confirms that a purely commercial interest may qualify as a legitimate interest for processing personal data under Article 6(1)(f) of the GDPR, has sometimes been interpreted to suggest that the mere existence of a company’s commercial interest is sufficient to justify data processing on this legal basis. However,

as the EDPB Guidelines clearly indicate, this interpretation is a fundamental misunderstanding.

vzbv therefore welcomes that the EDPB clearly outlines the three-step assessment and especially emphasises that the controller must demonstrate that there are no other reasonable, yet less privacy-intrusive, alternatives to achieve the pursued legitimate interests. The EDPB is also correct in highlighting that the mere fact that certain types of personal data are commonly processed within a particular sector does not suffice to establish a legitimate expectation on the part of the data subject. Similarly, it is insufficient for the controller to simply fulfil its information obligations under Articles 12, 13, and 14 of the GDPR. Neither of these factors alone necessarily means that the data subject can reasonably expect such processing.

Overall, the EDPB guidelines will help to clarify an important provision of the GDPR and prevent misinterpretations. vzbv is grateful for the opportunity to comment and would be pleased if its comments and suggestions will be taken into account in further negotiations.

## 2. DETAILED COMMENTS

### 2.1 Paragraph 40

vzbv welcomes the EDPB's comments on processing of special categories of personal data under Article 9 GDPR ("sensitive data"). Notably, it correctly recognises that a data set should be regarded as sensitive if it may contain individual sensitive data.

However, vzbv believes the EDPB's comments could be expanded. Additional clarification is needed, as Article 6(1)(f) is frequently used as a legal basis for collecting large amounts of information from websites and other digital services ("scraping") to train AI applications. Companies engaging in such large-scale scraping – particularly from platforms like Reddit or social networks like X.com – cannot reasonably ensure that no sensitive data is processed. Accordingly, large-scale scraping of personal data from public or semi-public sources should generally fall under Article 9 GDPR.

The EDPB notes that "the processing of special categories of personal data ('sensitive data') is only allowed under specific additional conditions set out in Article 9(2) GDPR." While this is correct, in the context of processing personal data based on Article 6(1)(f), Article 9(2) offers only three exceptions to the processing prohibition in Article 9(1):

1. the data relate to members or close associates of political, philosophical, religious, or trade union organisations and are processed solely by those organisations (Article 9(2)(d)); or
2. the data have been made "manifestly" public by the data subject (Article 9(2)(e)); or
3. the data are strictly necessary for legal claims (Article 9(2)(f)).

Of these, usually only Article 9(2)(e) could apply to such scraping. However, a data subject's openness about a sensitive characteristic does not imply unrestricted authorisation to collect data on that characteristic (see CJEU *Schrems v. Meta* (C-

446/21)). Controllers, therefore, cannot assume that such openness permits using sensitive data to train AI models based on Article 6(1)(f).

Additionally, the principle of data minimisation (Article 5(1)(c)) restricts the large-scale aggregation of data for commercial purposes without time limitations or differentiation of data types (see CJEU *Schrems v Meta* (C-446/21)). Unless limited to relevant and necessary data for a defined period, such practices violate the GDPR.

vzbv thus advocates including the use case of processing personal data for training AI systems on the basis of Article 6(1)(f) as example in Chapter IV of the Guidelines, highlighting associated challenges and GDPR requirements.

## 2.2 Example 5:

The example is generally appropriate for illustrating the limits of Article 6(1)(f) as a legal basis for behavioural advertising by an online social network. However, an alternative example would be more beneficial if it offered guidance in areas not yet clarified by the CJEU. For instance, such an example could demonstrate the boundaries of Article 6(1)(f) as a legal basis, specifically in the context of behavioural advertising on the open internet by publishers and the adtech industry.

## 2.3 Paragraph 68:

vzbv agrees that merely fulfilling the information obligations under Articles 12, 13, and 14 of the GDPR cannot suffice to assume that data subjects reasonably expect a given processing. Interpreting it otherwise would render Recital 47's requirement meaningless, which stipulates that controllers must consider data subjects' reasonable expectations when balancing their legitimate interests against those of the data subjects. If this requirement could always be satisfied by merely fulfilling information duties, it would lack any added value.

## 2.4 Paragraph 71:

Further clarification and examples regarding the interpretation of "particular situations" would be highly valuable. It is evident that it is not sufficient as a justification that the data subject simply does not want the processing to be carried out. However, the exact level of strictness for this criterion remains ambiguous. Some too extreme interpretations for example suggest that a risk to life, property, or similar conditions may be required to substantiate such an objection. Additionally, the form and degree of detail needed for the data subject's explanation of their particular situation are not clearly defined. From vzbv's perspective, these requirements should not be so strict as to discourage consumers from exercising their right to object or to make this process unduly burdensome.

## 2.5 Paragraph 95:

vzbv welcomes the EDPB's stance that, in cases of conflict between a controller's legitimate interests and a child's interests or fundamental rights and freedoms, the child's rights and freedoms should generally take precedence. Certain data processing operations are indeed unlikely to meet the obligation of ensuring specific

protection for children. According to vzbv, this is particularly true for profiling and targeting for advertising purposes, as highlighted in guidelines wp251rev.01 and 8/2020 from the Article 29 Working Party and the EDPB. These practices are of such concern that Regulation (EU) 2022/2065 prohibits online platform providers from using advertisements based on profiling when they know, with reasonable certainty, that the service recipient is a minor. Given this context, it is perplexing that the EDPB considers only extensive profiling and targeted advertising under Article 6 as data processing operations that generally fail to meet the obligation of specific protection for children. Rather, this wording adds uncertainty as to the point at which profiling and targeted advertising activities must be considered extensive. The above-mentioned guidelines do not contain such a limitation. Therefore, vzbv recommends to delete the word "extensive" in this paragraph.

## 2.6 Paragraph 121:

vzbv agrees that, in the context of direct marketing, the data subject's reasonable expectations must be considered in the balancing test and that relevant factors include whether the recipient is an existing customer, the nature of the marketed products and services, and the likelihood that the data subject would expect to receive direct marketing for these products and services.

However, direct marketing is often based on data processing by multiple controllers, such as when addresses are traded or shared with partner companies who use them for their own marketing purposes. Some therefore take the view that address data brokering for marketing purposes could also be based on Article 6(1)(f). However, this type of data processing is way beyond what consumers can reasonably expect. Furthermore, address data brokering should not be equated with direct marketing, as this practice is much more intrusive. In this context, vzbv encourages the EDPB to provide clarification on address data brokering and to state that it cannot be justified under Article 6(1)(f).

## 2.7 Paragraph 122:

vzbv would welcome further guidance from the EDPB on interpreting Article 21(5) regarding the right to object. According to this provision, in the context of digital services, the data subject should be able to exercise their right to object through automated means using technical specifications. However, this provision has not yet been applied in practice, likely due to ambiguity around what constitutes a "technical specification."

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