

# ACT RESPONSE TO THE EDPB CONSULTATION ON THE GUIDELINES ON LEGITIMATE INTEREST

## INTRODUCTION

[ACT](#) is the voice of commercial television & VoD in Brussels and directly represents 28 commercial broadcasters that operate throughout the European Union and beyond. ACT member companies finance, produce, promote and distribute content and services benefiting millions of Europeans across all platforms.

ACT welcomes the opportunity to comment on the European Data Protection Board's (EDPB) draft guidelines regarding legitimate interest as a legal basis for direct marketing under the General Data Protection Regulation (GDPR). We therefore share our views regarding the general approach, principles, and specific issues that could potentially impact regulated media services and their sustainable financing models.

## GENERAL COMMENTS

To begin with, an important issue to highlight in the draft guidelines is the differentiation between media-specific data protection practices and business models and those of other sectors, particularly online platforms.

Audiovisual media services operate within a dedicated frameworks and are subject to specific regulations, such as the Audiovisual Media Services Directive (AVMSD), pursue societal objectives and play an essential democratic role, as recognised by the European Media Freedom Act (EMFA). Media companies invest heavily in original content, be it news, cultural, educational or entertainment content. This investment requires sustainable revenue models to secure returns on investment and fund new content creation.

Data is key to both the financing (e.g. advertising) and day-to-day operation of media services (e.g. service optimisation, content recommendation). In many instances, consent or the performance of a contract will be the preferred legal basis, but that is not always the case. It is therefore important that the guidelines offer sufficient flexibility to allow media companies to rely on legitimate interest, where appropriate, and recognize their special role in democratic societies. More flexibility would also contribute to important policy objectives of the EU, such as tackling “consent fatigue”.

## PRINCIPLES

**Commercial interest.** We welcome the EDPB endorsement of the recent ECJ ruling<sup>1</sup> confirming commercial interest, notably direct marketing, as eligible for the ‘legitimate interest’ legal ground. This welcome clarification increases legal certainty and is a positive development.

**Balancing rights: freedom to conduct a business and media pluralism.** Recital 4 of the GDPR emphasizes that while data protection and privacy are essential rights, they are not absolute. Instead, they must be weighed alongside other fundamental rights to achieve a balanced and functional society.

In addition to the protection of personal data, the Charter of Fundamental Rights of the European Union (CFR) also explicitly recognizes the freedom to conduct business (art. 16), freedom of expression

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<sup>1</sup> CJEU, judgment of 4 October 2024, Case C-621/22, KNLT v. AP (ECLI:EU:C:2023:538)

and information and media pluralism (art. 11). The latter is also complemented by the EMFA which notably requires Member States to take into account the impact of regulatory measures on media pluralism. We would therefore suggest more explicit references to the importance of these other fundamental rights and priorities in the balancing test.

However, the option of providing information to the data subject on the balancing test, even before the personal data is collected, seems difficult to apply in practice. It would require information prior to that provided in a privacy statement or notice.

**Reasonable expectations.** We appreciate the guidelines' recognition that "reasonable expectations" must take into account the characteristics of services. This aligns with recent case law<sup>2</sup> which highlights that the reasonableness of data processing expectations is significantly influenced by both the scale of processing and its impact on users. Given the relatively limited impact of broadcasters' data processing on the fundamental rights of viewers compared and impact compared to online platforms, we welcome this context-sensitive approach.

However, the draft guidelines suggest that just because a data processing method is frequently used, this doesn't mean it meets data subjects' legitimate expectations. The guidelines should recognize the role of the information obligations in Articles 12, 13 and 14 GDPR in contributing to shaping data subjects' reasonable expectations, and clarify whether going beyond these requirements could be considered factors that shape data subjects' reasonable expectations regarding their personal data processing. There does not appear to be any justification that the information to be provided should vary according to the legal basis adopted by the controller.

## AUDIOVISUAL MEDIA SERVICES SPECIFIC COMMENTS

The audiovisual industry generally adopts a cautious approach to data processing. It primarily relies on data directly provided by users, such as profile information, and their interaction with content. Data processing and targeting capabilities are limited by practices like pseudonymization and a smaller data pool. This is in stark contrast with the practices of gatekeepers and large online platforms which engage in "deep" or "hyper-profiling," allowing for extensive data processing and highly targeted advertising. These differences should be acknowledged in the guidelines.

**Direct marketing.** We welcome the guidelines' flexible approach towards direct marketing and their recognition that some types of targeted advertising activities fall under the scope of direct marketing and are therefore eligible for legitimate interest. The type of targeted advertising used by AVMS relies in great part on first-party data and is typically less intrusive than that used by large online platforms. Thus, it has a lesser impact on the fundamental rights of viewers.

**Fraud & piracy.** Our members carry out a variety of activities that could fall within the scope of fraud prevention. In particular, our members are very active in the fight against piracy and may rely on legitimate interest, for instance, to detect unauthorized rebroadcasting. We therefore welcome the recognition that a service provider may have a legitimate business interest in ensuring that its customers do not misuse the service (§103), in line with recital 47 GDPR. However, we would welcome a more explicit reference to this issue in the dedicated section.

**Service improvement.** We welcome the recognition in §16 that service improvement can be considered a legitimate interest. However, example 5 seems to contradict this approach. In our view,

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<sup>2</sup> CJEU, judgment of 4 July 2023, Case C-252/21, Meta v. Bundeskartellamt (ECLI:EU:C:2023:537), §123

the guidelines should be consistently clear that service improvement can be a legitimate interest. It is the scale of processing that must be assessed in the context of the balancing test.

**Recommender systems.** AVMS rely on recommender systems to enhance user experiences by offering personalised recommendations based on preferences and viewing habits. These systems are not only crucial to the competitiveness of media offerings by helping users discover relevant content, increasing engagement, and retaining subscribers, but they are also an expression of AVMS's editorial line, control and responsibility. Data can be used in this context and is legitimate.

**Managing subscriptions.** Subscription based services (e.g. Pay TV, VoD) must process consumer data for a variety of purposes ranging from optimising billing to direct marketing about subscription options. In some cases, legitimate interest will be the most appropriate legal basis. We, therefore, find example 3 problematic, as it overly restricts the use of legitimate interest by failing to acknowledge the importance of maintaining relationships with former subscribers, which is essential for encouraging future engagement (e.g. the launch of a new ad-free tier).

**Privacy-enhancing technologies.** We welcome the EDPB's recognition that privacy-enhancing technologies (PETs) can mitigate processing impacts. In our sector, these technologies help make data processing less intrusive by limiting personal data collection and reducing privacy risks. For instance, many tracking technologies follow strict data minimisation principles, using anonymous identifiers to assess content popularity without processing personal data (e.g. URL tracking). We would welcome a more explicit recognition of the role of PETs in the guidelines, for instance by emphasizing their importance in assessing the 'necessary' nature of the legitimate data processing interests.