

5Rights comments – EDPB Guidelines on Legitimate Interest

November 2024

Introduction:

The 5Rights Foundation welcomes the opportunity to comment on the EPDB Guidelines 1/2024 on the processing of personal data based on article 6(1)(f) GDPR. These are crucial to ensure that data controllers lawfully process personal data on the basis of legitimate interests as one of the six possible legal bases. Under the UN Convention on the Rights of the Child (UNCRC), as elaborated by General Comment no.25 (2021) on children's rights in the digital environment, children have a right to privacy under article 16. As recognised by the GDPR, notably in recitals 38 and 58, children deserve specific protection with regards to their personal data. Article 6(1)(f) itself further specifies that processing shall be lawful when necessary for the purposes of the legitimate interests [...], except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require the protection of personal data, in particular where the data subject is a child. It is therefore crucial to properly consider the needs and vulnerabilities of children, as well as their rights, in developing the guidelines. This document outlines 5Rights' considerations and input to ensure the considerations of children's rights, in particular their right to privacy, in the development of the EPDB Guidelines on the processing of personal data based on legitimate

5Rights develops policy, creates innovative frameworks, elaborates technical standards, publishes research, challenges received narratives and ensure that children's rights are recognised and prioritised in the digital world. While 5Rights works exclusively on behalf of and with children and young people under 18, our solutions and strategies are relevant to many other communities. Our focus is on implementable change and our work is cited and used widely around the world. We work with governments, inter-governmental institutions, professional associations, academics, businesses, and children, so that digital products and services can impact positively on the experiences of young people.

General comments:

• 5Rights welcomes the guidelines on the processing of personal data based on article 6(1)(f) GDPR as crucial to ensure clarity for data processers in their use of this legal basis for data processing. We strongly support the dedicated chapter on processing of children's personal data (IV.1), to ensure the consideration of their additional rights, specific needs and vulnerabilities in accordance with the UNCRC and its General comment No. 25. Indeed, General comment No. 25 clearly establishes that children's privacy is vital to children's agency, dignity and safety and for the exercise of their rights (para. 67). For this reason, we would also

- recommend the explicit and direct reference to General comment No. 25 in the text of the guidelines.
- Under the balancing exercise (C. 3rd step: methodology for the balancing exercise) we welcome the recognition that the fundamental rights and freedoms of the data subject extends beyond the right to data protection and privacy. We would add to para. 37 that certain protected groups, such as children, have additional rights that must be considered. We support the consideration of the status of the data subject under para. 43 and the emphasis on children in para. 44, which should be reinforced with a reference to existing best practices and internationally recognised standards, notably the UNCRC General comment No. 25 and the Information Commissioner's Office Children's Code. 1 The mention of age of the data subject as one of the contextual elements to be considered in the assessments of their reasonable expectations in para. 54 is welcome. It is important to note that children are not a homogenous group and have different needs and vulnerabilities depending on their evolving capacities and circumstances, such as disabilities. As regards the balancing test, we finally suggest the following addition to the section: "If and when child's rights are in tension, a 'best interests of the child' determination should be carried out, which entails an established procedure set out in the UNCRC and its General comments, and that decisions affecting children should be open to challenge through the best interests process. This determination of the best interests of children should not be confused with the task of balancing children's rights and interests against those of companies, as in these balancing considerations best interests must be a primary consideration and therefore carry more weight in the evaluation, whilst the rights of the child will override the interest of companies.2"
- We support the reference to "precisely articulated" interest and "real and present" as two of the cumulative criteria for the interest to be regarded as legitimate. We however see a lack of detail and clear identification of the interest (e.g. in many cookie banners, the legitimate interests section provides little to no detail as to what the interest is nor how and why it is deemed legitimate under the balancing test). This appears to be in breach of the principle of transparency, which under Article 13 of the GDPR requires the data subject to be provided with information as regards to the legal basis of the processing. In the case of children, data controllers must ensure that the vocabulary, tone style and format of the language is child-friendly and age-appropriate so that the child can easily understand.³ Internationally recognised best practices and standards also recognise such requirements, providing further detail on how to provide children with clear and concise information in a way in which they can access and understand it, and should therefore be referenced therein.⁴
- Data Protection Impact Assessment (DPIA) are mentioned under para. 49 as an obligation under article 35 GDPR in case of high risks. We would suggest noting that

 $^{^{1}}$ See 5Rights Foundation (2022) <u>Approaches to children's data protection A comparative international mapping</u>

² Livingstone, S., Cantwell, N., Özkul, D, Shekhawat, G., and Kidron, B. (2024). <u>The best interests of the child in the digital environment</u>. Digital Futures for Children centre, LSE and 5Rights Foundation.

³ GDPR, recital 38 and 58, Guidelines on transparency under Regulation 2016/679 as last revised and adopted on 11 April 2018.

⁴ See e.g. ICO Children's Code, <u>standard 4 "transparency"</u>; Cf. with others in 5Rights Foundation (2022) <u>Approaches to children's data protection A comparative international mapping</u>.

such DPIA should be conducted in the case of the processing of children's data. This would be in line with the <u>EDPB's Guidelines on Data Protection Impact Assessments</u> which list "vulnerable groups" as one of the criteria that could trigger a DPIA. Under article 35(4), many data protection authorities further included processing involving children in their published lists of processing operations requiring a DPIA.⁵ As required by several international policy and regulatory instruments,⁶ such as the Irish Data Protection Commission's Fundamentals for a Child-Oriented Approach to Data Processing, DPIAs should minimise the "specific risks to children which arise from the processing of their personal data. The principle of the best interests of the child must be a key criterion in any DPIA and must prevail over the commercial interests of an organisation in the event of a conflict between the two sets of interests."⁷

 In general, we would suggest that the guidelines use 'they/their' rather than 'he or she /him or her' as it is more inclusive in addition to being more concise as well as easier to read.

Section on the processing of children's personal data:

- 5Rights strongly welcomes the dedicated section on the processing of children's personal data. In particular, we support the explicit recognition of the specific protection of children's personal data as recognised in recitals 38 and 58 of the GDPR. We believe it is key that the balancing test be recalibrated where the data subjects are children in line with the wording of Article 6(1)(f) GDPR.
- We strongly suggest adding several references across the text to the rights of the child as enshrined in the UNCRC and detailed in its General comment No. 25 – in particular:

<u>Para. 93</u>: 'the provision be interpreted in light of the <u>UNCRC</u> to which all <u>EU Member</u> States are party, as elaborated in its <u>General comment No. 25</u> with regards to the digital environment, and Article 24(2) of the Charter';

<u>Para. 95</u>: 'The EDPB considers that Article 6(1)(f) GDPR may be invoked as a legal basis by a controller where the legitimate interests pursued coincide with the <u>rights and</u> interests of the child.'[...] Therefore, unless controllers can demonstrate that the activities in question which rely on the processing of children's personal data do not negatively affect the children's <u>rights or</u> interests, such activities should not be undertaken.

<u>Para. 96</u>: '[...] the controller must ensure and be able to demonstrate that the children's rights are respected, that their best interests were taken into account as a primary consideration and that appropriate safeguards are in place.'

⁵ Data Protection Commission (2021) Irish Fundamentals: Children Front and Centre: Fundamentals for a Child-Oriented Approach to Data Processing, p.61.

⁶ 5Rights Foundation (2022) <u>Approaches to children's data protection A comparative international mapping</u>.

⁷ Ibid., citing Ireland's Data Protection Commission (2021) <u>Fundamentals for a Child-Oriented Approach to Data Processing</u>, fundamental 13.

<u>Para 97</u>: 'When taking into account the <u>rights and</u> best interests of a child and a child's reasonable expectations in the context of assessing the potential reliance on Article 6(1)(f) GDPR as a legal basis, the controller should bear in mind that this assessment will likely vary greatly with regard to, for example, different age-groups with varying level of understanding or children with disabilities. '

Indeed, as developed in the "Best interests of the child in the digital environment" (Digital Futures for Children, 2024), the bests interests of the child under article 3(1) of the UNCRC is not a substitute nor a replacement for the full range of children's rights. The concept has been largely misused by tech companies, and its flexibility weaponised. It is therefore crucial that companies first and foremost ensure the respect of children's rights rather than "guess" the interests of children.

- We also support the mention of the Digital Services Act (DSA) in para. 95 and the mention of the prohibition of targeted advertising based on the profiling of children's personal data. We would further add a reference to Article 28(1) which requires online platforms to ensure a high level of privacy, safety and security for children. It is indeed crucial to ensure a coherent framework for the respect of the rights of the child across the digital environment.
- In para. 95, we would prefer a reference to profiling rather than extensive profiling in the context of the types of data processing operations that will generally not align with the obligation to ensure the protection of children. This would be coherent with the prohibition of article 28(2) of the DSA. Additionally, several guidelines and best practices developed by data protection authorities, and other national authorities, on children's rights online, specify that profiling should be off by default and delimit strictly potential exceptions.⁸ The GDPR itself, in its recital 71 on automated processing and profiling, provides that such measures should not concern children.

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⁸ UK Information Commissioner's Office (2020) Age Appropriate Design Code, Principle 12; Ministry of the Interior and Kingdom Relations of the Netherlands (Dutch Ministry of Interior) (2021) Code for Children's Rights, Chapter 6; The Swedish Authority for Privacy Protection, The Ombudsman for Children in Sweden and The Swedish Media Council (Authorities of Sweden) (2021) Stakeholder Guide: The Rights of Children and young people on digital platforms, Chapter 2.12.