



COMECE Secretariat contribution
European Data Protection Board public consultation
Guidelines 1/2024 – processing of personal data based on Art. 6(1)(f) GDPR
(Version 1.0)

1. Introduction

The **Catholic Church supports and values protection of personal data** and has specific and well-developed internal rules on the matter. The Church appreciates the approach taken with the General Data Protection Regulation to strengthen data protection and citizens' rights. It supports the effort to reinforce fundamental rights in the EU and is committed to guarantee a high level of data protection in its structures.

The COMECE Secretariat¹ would like to restate its appreciation for the **valuable support and guidance provided by the European Data Protection Board** to all actors that process data in the European Union. EDPB Guidelines are an effective tool to better understand the implications and intricacies of a complex text such as the GDPR and they genuinely contribute to ensuring greater legal certainty. This is also the case with the draft Guidelines on 'legitimate interest' as a legal basis for data processing.

In welcoming this text, the COMECE Secretariat, aided by its Legal Affairs Commission, is pleased to provide some background on the **recourse to this legal basis on the part of Church structures** (cf. paragraph 2 of this submission) and to formulate some constructive **remarks and suggestions concerning the draft EDPB Guidelines** (cf. paragraph 3 of this submission).

2. The legal basis of 'legitimate interest' in the Catholic Church

While other legal bases may be available to the Church in accordance with the specific national legal contexts and practices, the legal basis concerning 'legitimate interests pursued by the controller or by a third party' (Art. 6.1, point f) has **great relevance for the data processing** carried out by **Church structures** in the EU Member States.

¹ We would like to underline that, while the only viable option available on the EDPB consultation webpage is 'Non-governmental organisation (NGO)', the correct categorisation for the COMECE Secretariat, in compliance with Article 17 TFEU and with the rules concerning the EU Transparency Register, is 'Organisation representing churches and religious communities'.

Already under Directive 95/46/EC, this legal basis was crucial with regard to data processing related to Church **sacramental records**² and continues to be under the GDPR.

Compliance on the part of the Church with the requirements of EU data protection law on 'legitimate interests' have been **repeatedly validated and recognised in multiple national decisions**³, most recently in the landmark decision of the Irish Data Protection Commission 'In the matter of the Archbishop of Dublin' (27 February 2023)⁴. A number of elements of this decision are referenced below where appropriate.

The considerations made in this paragraph (pages 2-5) do not affect the role of **national DPA's and of the Church in the Member States** in providing **determinations and assessments** in accordance with national legal contexts and State-Church relations; and are without prejudice to further elements that may be provided in the future in **dialogue with the EDPB**.

Step 1 (Pursuit of a legitimate interest by the controller or by a third party)

In particular with regard to data processing related to its **sacramental records**, the Catholic Church and its structures are in a position to refer to their legitimate interest to **know who has received sacraments**, and therefore, also to know **who belongs to the community**/does not belong to it. It is about the legitimate interest of the Church in the **effective administration** of the sacraments and of the Church as a whole⁵.

Registering its members and keeping records concerning the sacraments that have been administered is part of the Church's **right to internal organisation** and is based on **interests that are central to the proper functioning of key aspects of the Catholic faith** (sacraments and their administration constitute one of the main reasons for the existence and operation of the Church in Europe and in the world and some of them, e.g. baptism, **can be administered only once**).

² The registers held within the Catholic Church at the parish level, concerning the sacraments that have been administered within the Church itself in accordance with Canon Law, e.g. baptism, confirmation, marriage, ordination.

³ Cf. the French *Conseil d'État* judgment of 2 February 2024 <https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2024-02-02/461093> and the previous judgment of the French *Cour de Cassation* of 19 November 2014 <https://www.legifrance.gouv.fr/juri/id/JURITEXT000029789364>. Similar consolidated jurisprudence exists in other countries e.g. Italy, Austria.

⁴ The decision of the Irish Data Protection Authority has a DPC Case Reference IN-19-7-6 and is available at the link https://www.dataprotection.ie/sites/default/files/uploads/2023-09/20230907_Decision%20IN-19-7-6_Inquiry%20into%20processing%20of%20Church%20Records%20by%20the%20Archbishop%20of%20Dublin%20%28%27the%20Archbishop%27%29.pdf. Further quotations made in this submission will simply refer to 'DPC decision' and to the relevant paragraph(s).

⁵ DPC decision, § 568. The Irish Data Protection Annual Report 2003, page 37, recognised the importance of the baptism register in its case study 8, stating that it was "*essential for the administration of Church affairs to maintain a registers of all the people who have been baptised*", cf. https://www.dataprotection.ie/sites/default/files/uploads/2018-12/annual_report_2003.pdf.

Such processing is important and relevant not only for the local Church community/ecclesiastical data controller - be it at the parish or diocesan level - but **also for the universal Church**.

Baptism is the **first and basic sacrament of Christian initiation**, which according to a **key tenet** can **only be received once**. The relevant registers are a factual record and trace of historical events which constitute entry into the Christian community and also a way to access other sacraments within the Church, e.g. marriage.

Therefore, the Church can refer to a legitimate interest in maintaining on a permanent basis an **accurate record** of all those persons who have been baptised, **to ensure that certain sacraments are not administered more than once**. The same applies to sacraments such as confirmation, matrimony and Holy Orders.

Baptism registers, in particular, are **used to check the status of a person within the Church** prior to receiving another sacrament. In view of receiving the sacraments of confirmation and marriage, Holy Orders, it is necessary to establish that the person has been baptised and that there is no impediment (e.g. a man who has entered marriage would not be able to be ordained). The baptism register also acts as a **'gateway' to all the records of a person's life within the Catholic Church**⁶.

The **legitimate interests** outlined above are **firmly grounded in core fundamental rights**, in particular: **freedom of thought, conscience and religion**, including the right of religious denominations to manage their internal affairs and to self-determination (Article 10 of the EU Charter); as well as **freedom of association** (Article 12 of the EU Charter). When a fundamental right or freedom is expressed, a legitimate interest can be considered present.

Recital 4 GDPR states that the Regulation *"...respects all fundamental rights and observes the freedoms and principles recognised in the Charter as enshrined in the Treaties, in particular... freedom of thought, conscience and religion... and cultural, religious and linguistic diversity"*. This also entails that data protection rules have to be interpreted in a way that ensures full respect for such fundamental rights.

Recital 47 GDPR can also be invoked, as: a) the *"...relevant and appropriate relationship between the data subject and the controller"* is clearly present between a data subject who has undergone certain sacraments in the Church and the Church entity as data subject⁷; b) preventing identity fraud also presents a close link with the above-described context.

⁶ On the identification of a legitimate interest cf. also DPC decision, §§ 527-540. It is to be noted that in accordance with Canon 535, §2 of the Code of Canon Law *"In the baptismal register are also to be noted confirmation and those things which pertain to the canonical status of the Christian faithful by reason of marriage, without prejudice to the prescript of Can. 1133, of adoption, of the reception of sacred orders, of perpetual profession made in a religious institute, and of change of rite. These notations are always to be noted on a baptismal certificate"*.

⁷ DPC decision, § 535.

The **interests** in question are also clearly ‘**present and effective**’ in nature during the lifetime of the data subjects, as also proved by the process which is undertaken to verify the sacramental status of a data subject, often prior to that data subject receiving another sacrament such as that of marriage⁸.

Step 2 (Necessity of the processing to pursue the legitimate interests)

As for the necessity test, retaining the names of all persons who have been baptised in an original parish record is the **only reasonable way and instrument available to pursue the above-said aims**⁹. In the absence of complete and accurate records of all persons who have been baptised, it would be impossible to operate the central Church principle that baptism - as well as other sacraments - may only be administered once; and to establish the status of a person vis-à-vis the Church community itself. Thereby, a **core aspect of the freedom of religious practice** would be **seriously interfered with**.

Personal data processed in a baptism register are also **limited to what is strictly necessary** in order to achieve the legitimate interests outlined above and the principle of **data minimisation** is complied with, being the relevant data the minimum amount required to achieve the legitimate interests (i.e., the name of the data subject and the date of baptism)¹⁰.

Step 3 (Balancing exercise)

Concerning the balancing exercise, when it comes to data processed by Church structures, the assessment does not concern only the data processor and the data subject, as the Church processes data not only on the basis of its own fundamental rights, but **also on behalf of the members of the Church**.

The close link with the exercise of **core fundamental rights** (Articles 10 and 12 EU Charter) has already been highlighted above and has **high relevance** also for Step 3.

As recalled on the basis of EU jurisprudence by the draft Guidelines (§ 33) the purpose of the balancing exercise is not to prevent any negative impact on the data subject, but to **prevent a disproportionate impact**. In the case of baptism records - and more generally of sacramental records - relevance can be granted to the fact that: the processing of the personal data is not intensive; the personal data collected and recorded are not extensive and consists of no more than is strictly necessary than what is required to pursue the legitimate interests; there are strict rules on who can access this data and this is limited to few officially determined individuals¹¹.

⁸ DPC decision, § 539.

⁹ DPC decision, § 549.

¹⁰ DPC decision, § 547.

¹¹ DPC decision, § 556.

The presence of **adequate and sufficient safeguards** mitigates significantly the impact on data subjects, considering that sacramental records are: kept private and secure; subject to strict rules of confidentiality; not publicly accessible and only accessible by a very small number of authorised individuals¹² (those interested in the mentions which concern them, ministers of religion and persons working under their authority)¹³. The existing Church practice of **annotating on the margin of records** the wishes of the data subject concerning the baptism entry also appropriately safeguards the data subject's rights and has a positive impact on the balancing¹⁴. Furthermore, data are not used for any profit-making purpose.

The '**reasonable expectation**' element (Recital 47) is also present, as data subjects who are believers and raised in the Catholic faith should reasonably a) expect the personal data to be processed permanently in a baptism record for the purposes of ensuring that the data subject has been baptised, and to ensure that there is no impediment to that data subject receiving a further sacrament (e.g. confirmation, marriage); b) have knowledge that certain sacraments are received only once in the Church¹⁵. All information on the vision of the Church on parish registers and sacraments is made widely available to the data subject by the Church itself with various means (webpages, forms, other non-electronic information tools).

3. Remarks on specific elements of the draft EDPB Guidelines

Paragraph 9

In this passage it would be useful to explicitly underline that there is **no hierarchy** among the various legal bases of Article 6 GDPR. Determining the legal basis for the processing falls within the responsibility (§ 3 of the draft Guidelines) and under the **autonomy of the controller**. Recourse to 'legitimate interest' as a legal basis should not be penalising for the data subject or be looked upon with suspicion by national authorities.

Paragraph 17

We welcome the explicit reference to the fact that "*...the concept of "legitimate interest" within the meaning of Article 6(1)(f) GDPR is **not limited to interests enshrined in and determined by law***", considering that misunderstandings emerged at the national level.

¹² DPC decision, §§ 566 and ff.

¹³ Cf. the judgment of the French *Conseil d'État* of 2 February 2024, § 7.

¹⁴ DPC decision, § 567.

¹⁵ DPC decision, § 536-537.

Paragraphs 44 and 91 - 97

The **role of parental authority** should be more explicitly integrated in the references of the draft Guidelines concerning data processing involving children¹⁶.

Paragraphs 55 and ff.

For its particular relevance in providing guidance and clarification, we would recommend **retaining the statement contained at page 30 of the Article 29 Working Party Opinion 06/2014** that: *“Legitimate interests of the controller, when minor and not very compelling may, in general, only override the interests and rights of data subjects in cases where the impact on these rights and interests are even more trivial. On the other hand, important and compelling legitimate interests may in some cases and subject to safeguards and measures justify even significant intrusion into privacy or other significant impact on the interests or rights of the data subjects”*.

Paragraphs 71 - 75

a) Explanations concerning the right to object

The EDPB draft Guidelines extensively address the right to object in §§ 71-75. This should be compared with the fact that essentially, in the GDPR only Recital 69 - apart obviously for Article 21 - illustrates the right to object. Compared to the limited indications about the right to object contained in the GDPR, the **EDPB draft Guidelines seem to excessively ‘colour’ this right**.

It should be noted that all controllers processing data on the basis of Article 6.1, point f GDPR are inherently dealing with the fact that Article 21 GDPR always introduces a factor of *uncertainty regarding the basis of their processing*.

Considering the balancing exercise already embedded in the third step of the assessment under Article 6.1, point f, Articles 21 / 17.1, point c GDPR lead to a particularly significant tension with the principle of legal certainty, to which the data controller is entitled.

The balancing assessment required by the third step of Article 6.1, point f GDPR must be reassessed by the controller, with substantiation, each time Article 21 GDPR is invoked. Furthermore, one has to bear in mind that the threshold for invoking Article 21 GDPR is quite low.

In the light of the above, in our view, the draft goes **too far in substantiating on the requirement for a successful invocation of Article 21 GDPR**.

¹⁶ DPC decision, § 555.

Article 21 GDPR states that the data subject must provide "...grounds relating to his or her particular situation".

Considering that the threshold for invoking Article 21 GDPR is quite low, we would **not support the inclusion of the additional element described in § 71** "...the fact that the data subject has not elaborated much on their 'particular situation' in their objection is not per se sufficient to dismiss the objection."

Should this sentence be retained, it would not only exacerbate the inherent legal uncertainty stemming from the interaction of Article 6.1, point f GDPR (including the relevant balancing act) with Article 21 GDPR, but it would also imply that a successful invocation of Article 21 GDPR need not involve much substantiation.

Therefore, we would suggest that the **sentence** in question **be removed** from the text. In our view, this passage seems to have no basis in the interpretation of Article 21 GDPR itself and to be not aligned with the interpretation of provisions on 'legitimate interest'.

This is even more important considering the presumption in favour of the data subject deriving from Recital 69 of the GDPR.

b) Legitimate interest vs. compelling legitimate grounds

The GDPR underlines at Article 21 that it is up to the controller to demonstrate that its compelling legitimate grounds for processing override the interests, rights and freedoms of the data subject.

The draft Guidelines at §§ 14 - 18 provide an outline of what constitutes a 'legitimate interest'. Paragraph 73 attempts to clarify the idea of 'compelling legitimate grounds'.

However, care must be taken that the interpretation given to the rights under Articles 17 and 21 GDPR does **not restrict the concept of 'legitimate interests'**. In particular the passage "... not all conceivable legitimate interests that may justify processing under Article 6(1)(f) GDPR are relevant in this context. Only interests that can be recognised as "compelling" may be balanced against the rights, freedoms and interests of the data subject to assess whether there are grounds for processing that take precedence, despite the objection of the data subject" may inadvertently create legal uncertainty (e.g. some actors may be led to think that there are two 'different types' of legitimate interests).

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COMECE Secretariat