Comments on the *Guidelines 1/2024 on processing of personal data based on*

Article 6(1)(f) GDPR

As a foreword to the comments below, it must be noted that in all likelihood the *Guidelines 1/2024 on processing of personal data based on Article 6(1)(f) GDPR* (the "**Guidelines**") will prove to be very helpful in providing a better understanding of this legal basis, and will surely result in a sounder and better approach to the use of the legitimate interest, as from now. So it is duty to begin by thanking the EDPB for the time and effort invested in drafting these Guidelines.

That being said, the following comments pursue the aim of confirming the interpretation of certain paragraphs which, even though already fairly clear in their meaning, could still be interpreted within a certain (though small) margin of error, if the hereby pursued clarifications were finally not to be provided by the EDPB.

Thus, please take into account the following comments and requests for clarification:

1. Paragraph 21 sets out to list, in its following paragraphs, some examples of cases where the personal data may be processed in the interest of a third party. It would be useful to clarify in paragraph 21 (for the avoidance of doubt) if the legitimate interest recognized in this list in favour of a third party is *also* recognized as existing *in the controller*, in the same situations described (for example, in paragraph 22: in case the controller needs to process personal data in order to establish, exercise or defend legal claims). It could be taken for granted that the same examples apply to the controller, but it is not actually established in the GDPR in such a clear manner, so it would be useful to take the opportunity to clear doubts on this account, just by adding at the end of paragraph 21 a comment in this regard (such as: "*bearing in mind that the controller will be equally entitled to process personal data in its own legitimate interest in these same contexts*").

2. Paragraph 23 describes a context of processing of personal data in the interest of a third party: the "*disclosure of data for purposes of transparency and accountability*", and provides a specific example of this kind of context. Please clarify if another example of this context ("*disclosure of data for purposes of transparency and accountability*") could be in the event that the controller and a third party company have a non-poaching agreement in place, whereby one party must not seek to hire employees, or take on customers, of the other party, and in order to prove that the agreement is being observed, one party may need to share with the other that his/her employee or customer contacted them voluntarily and of their own free will in order to be hired or serviced (as the case may be). It would be interesting if this example could be confirmed and, if so, added in.

3. Also regarding paragraph 23 ("*disclosure of data for purposes of transparency and accountability*"), an additional situation where this need could arise would be in the case of a group of companies, where the parent company is subject to a legal obligation for which it requires information to be provided by its subsidiaries, in order to comply with said obligation, as the legal obligation requires that the parent company provide information of all -or certain- subsidiaries, as well as its own information (i.e. information of the consolidated group). Should this be the case, the subsidiary should analyze if the specific legal obligation that is requiring the provision of certain personal data to the

parent company, in order for the latter to report the results of the data in a consolidated manner, would also provide the former with a legal basis under Article 6.1.c) of GDPR, that is, compliance with a legal obligation to which the subsidiary is subject, or if the legal obligation does not clearly extend to the subsidiary, in which case it would be interesting if it could be confirmed if the subsidiary may still provide the personal data to the parent company in the legitimate interest of a third party (its parent company) – i.e. under the legal basis of Article 6.1.f) -, in order for the latter to comply with the legal obligation to which it is subject. It would be interesting if this example could be confirmed and, if so, added in.

4. In paragraph 38, it is stated that *"(t)he interests of the data subjects to be taken into account as part of the balancing test include any interest that may be affected by the processing at stake, including, but not limited to, financial interests, social interests or personal interests."* Despite the open-endedness of this list, it would be useful to expressly include the "*professional interests*" of the data subjects in this list, as the professional interests are very important to the common majority of data subjects, and are therefore a very strong and valid point to be taken into account in the balancing test (both for the positive and for the negative potential impact of the processing, as the case may be, on the data subject's professional interests). For example, the processing of personal data of a data subject (namely, his/her professional contact details) in order to execute a contractual relation between the controller and the company where the data subject carries out his/her professional activities could result in an advancement in the data subject's professional career within his employer company, as a result of being regarded by clients as a key contact person.

5. In paragraph 46, we are warned that *"(t)he chilling effect on protected behaviour (…) should also be given due consideration.*" In order to take due care not to incur in this effect, it would be necessary to explore its meaning a bit further, for the avoidance of doubt. Please confirm if the "chilling effect" should be understood as the effect where the data subject refrains from carrying out certain actions, or acts differently than he/she would have normally acted, deriving from his/her perception of a potential negative effect on his/her person as a result of the conclusions that the controller will draw (or would draw) from said actions. If there should be other factors to be taken into account, to verify the existence of this effect, please indicate what else should be considered.

6. Paragraph 54, which is dedicated to the reasonable expectations of the data subjects, includes, within the list of characteristics of the "average" data subjects -interestingly-, *"(t)he (professional) position that the data subject holds and the level of understanding and knowledge of the envisaged processing that they are likely to have in a certain context*", and it sets an example of a context where the professional position would be relevant in the expectations of a data subject. However, *a more general and useful example* where the professional position will -in all likelihood- trigger in the data subject reasonable expectations of personal data processing, would be when a data subject is employed within a "field" area of a company that provides services to other companies (in any given field, such as legal services, IT services, call center services, etc), the data subject will have a reasonable expectation, due to his/her professional "field" role in the company (as opposed to a more "internal" role, such as the accounting department, or the compliance department), that his professional contact information will be shared by

his/her employer company, with the client company, and used by the latter, in order to enable the execution of the services hired by the client company. It would be interesting if this example could be confirmed and, if so, added in.

7. At the end of paragraph 68 it is noted that "*the mere fulfilment of information duties according to Articles 12, 13, and 14 GDPR is not sufficient in itself to consider that the data subjects can reasonably expect a given processing*." However, in this matter the Guidelines provide no specific examples on how to actively dispel the element of surprise on the data subject, further than informing him/her of the data processing. It would be useful to be provided with specific examples which could shed more light on this matter.

8. In paragraph 73, when explaining the notion of "compelling legitimate grounds", it is said that *"(i)n essence, the grounds invoked should be essential to the controller (or to the third party in whose legitimate interest the data are being processed) to be considered compelling*." And accordingly, said paragraph provides two examples of "essential" processing: (i) protection from serious immediate harm, and (ii) protection from a severe penalty. Please confirm if another example of "essential" processing, perhaps related to the other two, could be if the erasure of personal data in the controller's systems would entail a material disruption in the execution of contracts B2B that are still in force, or of their related legal claims which terms have not yet expired, deriving from a loss of validity and/or enforceability of said contracts and/or their related legal claims, due to the "missing" (erased) personal information required for their execution, validity and/or enforceability.

9. Also regarding paragraph 73, but applicable in the same terms to paragraphs 72, 76, 78 and 88, it is repeatedly mentioned, in all of these paragraphs, that after an objection, as per Article 21 GDPR, "*the controller shall no longer process the personal data unless the controller demonstrates compelling legitimate grounds for the processing which override the interests, rights and freedoms of the data subject*", but said Article continues to establish a second exception which would *also* serve to override the interests and rights and freedoms of the data subject, which is: *"(…) or for the establishment, exercise or defence of legal claims.*" Please clarify the reason why this second exception which would also serve to override the said interests and rights and freedoms as per Article 21 (i.e. "*the establishment, exercise or defence of legal claims"*) is not addressed when informing about overriding factors. Alternatively, please include this "second" exception provided in Article 21 GDPR in the mentioned paragraphs, which purpose seems to be to address all of the possible overriding factors, in order to complete the information on said matter.

Thank you for the opportunity to provide comments, and for your time and attention in reading them through.