

Comments on Guidelines 1/2024 on processing of personal data based on Article 6(1)(f) GDPR Version 1.0 as Adopted on 8 October 2024

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Section II 2.1 Special Category Data and Legitimate Interests

- **Legal Limitation under Art. 9 GDPR:**

- It should be explicitly noted that *special category data* cannot be processed under the legal basis of *legitimate interests*¹. Article 9 GDPR provides an exhaustive list of conditions for processing such data, and legitimate interests are not among them.
- Any guidelines or interpretations suggesting otherwise would conflict with the fundamental principles outlined in GDPR Article 9 and Recital 51.

Section II: Impact Assessments for Legitimate Interests

- **Controller's Responsibility:**

- The responsibility for carrying out the legitimate interests assessment lies solely with the data controller. This obligation cannot be delegated to data subjects or third parties for execution and subsequent verification.
- Such delegation, as reportedly practiced by platforms like Instagram, contradicts the accountability principle in GDPR (Art. 5(2)) and undermines the data subject's rights.²

¹ It is to be noted that while Article 9 does not include the use of legitimate interest as a legal basis, it also does not prohibit its use as long as one or more legal bases provided for within Article 9 are followed.

² Instagram as an online social network supports the right to object to legitimate interests by providing data subjects with an online form to fill in. This form asks for information regarding the specific objections the data subject has to the (apparent) legitimate interests, which then Instagram analysis to determine for validity, and to routinely reject the objection – thereby denying the right to object under GDPR. It is to be noted that nowhere in GDPR is it stated that the data subject must provide justifications for their objections, or that the controller has the right to assess the validity of such objections. The wording of Article 21-1 is clear that the Controller has the obligation to demonstrate *its interests* override the *general interests of the data subject* as well as the rights and freedoms of the data subject. Therefore, such implementations of legitimate interests violate the fairness and accountability principles under GDPR Article 5.

- This responsibility is distinct from the data subject's *right to object* under Art. 21 GDPR, as clarified in Recital 72.

Section III Section 4: Right to Object

- **Absolute Nature of the Right:**
 - The data subject's right to object under GDPR does not require justification³. Article 21(1) explicitly states that the data subject may object to processing at any time, without stipulating a need to provide reasons for the objection.
 - While the controller may request additional information, it cannot impose this as a mandatory condition for exercising the right. Doing so would dilute the practical enforceability of the right and contravene Recital 69.
- **Compelling Legitimate Grounds:**
 - If a controller wishes to override an objection, it must demonstrate *compelling legitimate grounds* that outweigh the interests, rights, and freedoms of the data subject, as per Art. 21(1).
 - Sufficient details about the grounds should be transparently communicated to the data subject. The lack of such disclosure undermines the principle of fairness and transparency under Art. 5(1)(a) GDPR.
- **Examples for Clarity:**
 - In Point 73 of the EDPB Guidelines, the example scenario represented in 'Example 5' should also illustrate whether the interests discussed in the scenario as pursued by the controller (e.g., social media advertising based on legitimate interests) meet the threshold of being "compelling."
 - Interpretation of the current guidelines suggests that such interests are unlikely to be compelling, and processing activities like targeted advertising should cease upon objection⁴.

New Section: Interplay of Legal Bases in Art. 6 and Art. 9

- **Combination of Legal Bases:**
 - A section should be added on the interplay of Legitimate interests as a legal basis with other legal basis defined in Art.6 and Art.9. The wording of GDPR

³ For relevance, refer to footnote 2

⁴ Based on the interpretation that such activities, which frequently use excessive data collection, profiling, tracking, and sharing this information with thousands of third parties – often alongside consenting malpractices, are not manifestly necessary for the Controller to carry out, and therefore cannot form the basis for legitimate interests overriding the rights of the data subject who has a legitimate objection to prevent such proliferation of their personal data without any oversight or control on their part. By performing such erroneous assessment of legitimate interests, the Controller is also failing to uphold the rights of the data subject, in particular the right to object under GDPR.

Art.6 states "*Processing shall be lawful only if and to the extent that at least one of the following applies*", where legitimate interests is one of the legal basis, with the other legal bases being: (6-1a) consent, (6-1b) contract, (6-1c) legal obligation, (6-1d) protect vital interests of person, (6-1e) public interests or official authority, and (6-1f) legitimate interest of controller or third party. This means that there can be a combination of legal bases that are used to justify processing.

- The simplest of these for legitimate interests is the combination of multiple legitimate interests which together justify the processing of personal data - this can be interests of the controller of the third party. Where such multiple legitimate interests act as the legal basis over the same data, it is imperative that this be communicated transparently and taken in to account for activities such as assessment of legitimacy - which should be carried out for ALL legitimate interests and not just the single/direct interest under consideration as they all govern the same processing operations, as well as the implications of objecting to one interest while others are 'active'.
- **Incompatibility Between Consent and Legitimate Interests:**
 - Further in the section above, a specific note must be added regarding the erroneous use of consent as a complimentary legal basis alongside legitimate interest. For example, on websites often the consent dialogue provides users with a choice to provide consent - which when refused uses legitimate interest as a legal basis. This is a paradoxical use of legal basis as consent is purely opt-in i.e. the data subject must affirm that the processing may carry out while legitimate interests are purely opt-out i.e. the processing is carried out without permission from the data subject, who must object to stop the processing.
 - By using both consent and legitimate interests in the same processing operation, the organisation is violating both consent and legitimate interests conditions. Specifically, for consent, but not respecting the decision of the user (i.e. refusing consent), and for legitimate interests by failing to take into account that there is an effective alternative means to justify the processing (through consent). And therefore, these two legal bases cannot be used complementarily.
 - The EDPB Guidelines should explicitly address and prohibit this contradictory practice.

Recommendations

- Include additional examples in relevant sections to clarify complex concepts, particularly around *compelling interests* and *interplay of legal bases*.
- Strengthen guidance on the transparency obligations of controllers when multiple legal bases or interests govern the same data processing activity – especially related to consent.

- Highlight the consequences of misapplying or conflating legal bases to improve adherence and enforcement consistency across jurisdictions.
- Include additional guidance on the implementation of right to object, with clarity on the controller's obligation to consider all objections and limit its assessments to its own legitimate interests when considering compelling reasons to override the objections of data subjects as well as their rights and freedoms.

By addressing these concerns, the EDPB Guidelines can offer clearer and more actionable guidance, ensuring better alignment with GDPR principles and jurisprudence, and thereby promoting the responsible use of legitimate interests as a useful legal basis under GDPR.

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