

**Contribution of Kobyłańska Lewoszewski Mednis sp.j. (law firm)  
to EDPB public consultation on “Guidelines 1/2024 on processing of personal  
data based on Article 6(1)(f) GDPR”**

We welcome the opportunity to express our thoughts on the new guidelines. We hope that our contribution will facilitate further development of data protection in the EU.

While we agree with the general meaning of the guidelines and the intentions of the EDPB, we note that the wording may be misleading in some cases.

The current version of the guidelines can be interpreted as prohibiting data processing for marketing purposes using electronic means of communications on the basis of legitimate interest. We believe this is not the intended outcome of the guidelines.

Our understanding is that the guidelines indicate that:

- The ePrivacy directive should be treated as *lex specialis* in relation to the GDPR. Therefore, when a given situation falls within the material scope of both of these pieces of legislation, the ePrivacy directive precludes the application of the GDPR and only the ePrivacy directive should apply (paragraph 117).
- In relation to direct marketing, the ePrivacy directive only regulates the sending of unsolicited marketing communications. Other data processing, such as data collection and storage, carried out “for purposes of direct marketing” is exclusively subject to the provisions of the GDPR (footnote 143).

Therefore, we conclude that EDPB is of the opinion that:

- For the sending unsolicited marketing communications to be lawful, a legal basis resulting from Article 6(1) GDPR is not required. For this action consent resulting from Article 13(1) of the ePrivacy directive is needed. Alternatively, if under national law implementing Article 13(2) of the ePrivacy directive, controllers may use electronic contact details of customers gathered in the context of the sale of a product or a service, consent is not required to send direct marketing related to the controller’s products or services.
- Other processing operations such as collecting and storing personal data for marketing purposes or for sending marketing communication via traditional mail may take place on the basis of legitimate interest, that is Article 6(1)(f) GDPR.

In this regard, the following paragraph of the guidelines, may cause confusion and may lead to misinterpretation of the guidelines:

“114. Most significantly, under the ePrivacy Directive, the sending of unsolicited communications for purposes of direct marketing by email, SMS, MMS and other kinds of similar applications can only take place with the prior consent of the individual recipient.<sup>137</sup> In this respect it should be noted that the consent to be obtained should meet the requirements set out in Article 4(11) GDPR.<sup>138</sup> **Therefore, in this context, the processing for direct marketing purposes may not be based on Article 6(1)(f) GDPR.**”

This last sentence can be understood as a lack of possibility to base personal data processing on legitimate interests for marketing purposes if a controller plans to send direct electronic communications. This, of course, cannot be the case, because the processing of personal data for marketing purposes includes many operations such as storing, organising, reviewing. Where a controller has a relevant and appropriate relationship with a data subject and processes the personal data for marketing purposes on basis of legitimate interests, the controller may wish to send some electronic communication. If the electronic communication is unsolicited, this may be done after obtaining consent to such sending.

Taking into account that recital 47 of the GDPR states that “the processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest”, we believe that this was not the intention of the EDPB to change this rule. As a result paragraph 114 of the commented guidelines could be read as meaning that sending unsolicited communications cannot be based on other legal basis than consent (Article 13(1) of the ePrivacy directive). However, this does not exclude processing of personal data for direct marketing purposes on basis of legitimate interests.

This interpretation is consistent with footnote 143 of the guidelines – the last sentence implies that where the sending of direct advertising messages is not completely prohibited in a given member state, the collection of personal data for the purposes of direct marketing may be based on legitimate interest.

To make the guidelines more understandable, we suggest:

- replacing the last sentence of the paragraph 114 with a statement that it is possible, in this context, to lawfully base certain processing operations such as collection and storage of personal data for the purposes of direct marketing on Article 6(1)(f) GDPR.

This change will help controllers stay compliant with the GDPR as well as the ePrivacy directive and remove ambiguities concerning the correct legal basis for sending unsolicited electronic communications and processing personal data for direct marketing.

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