Contribution to the Public Consultation on EDPB Guidelines 1/2024 on Processing of Personal Data Based on Article 6(1)(f) GDPR

Points of attention regarding the processing of children's data

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1) Aligning the suitability of Article 6(1)(f) with Children's Rights Impact Assessments (CRIAs)

To determine if Article 6(1)(f) is applicable as a legal basis in a specific case, the Guidelines 1/2024 on processing of personal data based on Article 6(1)(f) GDPR ('the Guidelines') present three cumulative conditions to be fulfilled by the controller: (i) the interest pursued by must be legitimate ('the legitimacy test'); (ii) the processing of personal data must be necessary to achieve the interest at stake ('the necessity test'); and (iii) the interests or fundamental freedoms and rights of data subjects must not take precedence over the interests of the controller or third party ('the balancing test'). Considered together, these three tests ('the legitimate interests test') form the backbone of what controllers are expected to assess and document prior to relying on Article 6(1)(f) to legitimise a given processing operation.

The balancing test is particularly important in the case of children, considering that their best interests should be taken into account by the controller as a *primary* consideration (Article 24 (2) EU Charter; Article 3(1) Convention on the Rights of the Child). While paras. 35 *et seq.* of the Guidelines outline how controllers should generally identify the interests, fundamental rights and freedoms of the data subjects in question, the impact of the data processing activities, and the reasonable expectations of data subjects (points 1 through 3), cases involving children require a specific procedure. According to the UN Committee on the Rights of the Child's General Comment N.° 14/2013, the best interests principle serves as a substantive right; a fundamental, interpretive legal principle; and a rule of procedure. As a rule of procedure, assessing children's best interests in a specific case demands a specialised exercise by following a Children's Rights Impact Assessment (CRIA). CRIAs methodologies take into account the full range of children's rights, i.a. the right to development, freedom of expression, and education but particularly emphasize children's right to be heard (which will enable controllers to determine children's reasonable expectations and could even be understood as mandatory in this case), as well as the need to consider children's evolving capacities and the impacts of data processing on their future interests, calling for a *precautionary* approach.

> *Therefore, we propose that the EDPB consider and suggest CRIAs as specific methodology for identifying children's best interests, which would encompass points 1 through 3 of the proposed methodology for assessing the interests, fundamental rights and freedoms of data subjects (**R1**).*

2) Finalising the test and striking a balance among interests involved

After identifying children's rights at stake as well as their best interests in each situation through CRIAs, controllers can then finalise the balancing test. Children's best interests must be a *primary* consideration and not just one of the criteria to be weighed. Para. 95 of the Guidelines indicates that when legitimate interests coincide with the interests of the child, Article 6(1)(f) could be used as a legal basis. The paragraph continues, stating that when there is a conflict between a controller's legitimate interest and the interests or fundamental rights and freedoms of a child, the latter '*should in general prevail*'. First, para. 95 focuses exclusively on the interests of the controller, which could lead to confusion about whether the interests of third parties can be considered legitimate when processing children's data. Second, the use of the expression '*in general*' suggests that there may be situations where the controller's or third party's interest could outweigh those of children (including for commercial purposes), even when the latter should be considered

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as a primary consideration. However, the Guidelines do not offer any assessment criteria or examples to clarify the circumstances under which this might be the case when interests are in conflict.

Drawing a parallel with the conditions for the exercise of the data subject's right to object under Article 21 GDPR, one could argue that only *compelling legitimate grounds* could justify a controller's legitimate interest overriding the interests, rights, and freedoms of a child. However, as acknowledged in the Guidelines' para. 73, the notion of 'compelling legitimate grounds' is not defined in the GDPR, making it difficult to determine when such grounds could override the data subject's interests, rights, and freedoms.

*For this reason, we suggest that that the EDPB (i) clarify whether the interests of third parties could be considered legitimate when processing children's data based on Article 6(1)(f) (**R2**); (ii) provide specific assessment criteria and examples (following a precautionary approach) where controllers' or third parties' interests could outweigh children's best interests (**R3**); and (iii) provide examples of situations under which the processing of children's data for commercial purposes could occur under Article 6(1)(f) (**R4**).*

Para. 95 also emphasizes two types of purposes for processing personal data, i.e., *extensive* profiling and targeted advertising, which, as provided in Recital 38, GDPR, demand specific protection. In these two cases, the paragraph states that 'subject to certain limited exceptions [, these purposes] will generally not align with the obligation to ensure specific protection of children' and should not be undertaken 'unless controllers can demonstrate that the activities in question […] do not negatively affect the children's interests'. Such wording suggests that extensive profiling and targeted advertising could *only* occur when aligned with children's best interests. First, it is important to mention that Recital 38 demands specific protection for all types of profiling, not only 'extensive' profiling activities. In this sense, the Guidelines could be reducing the scope of Recital 38 without justification. Second, the terms 'negatively affect' are vague and do not clearly delineate acceptable and inacceptable interreferences with children's best interests. Considering that these two processing activities, as we argue below, should not be deemed legitimate for commercial purposes, it is crucial to delineate situations where such interferences may be acceptable, such as in the context of educational initiatives or the implementation of public policies.

*In light of the above, we suggest that the EDPB (i) remove the adjective 'extensive' in para. 95 (**R5**); and (ii) provide clear examples of profiling or targeted advertising that do not 'negatively affect' children's best interests (**R6**).*

More specifically in relation to commercial purposes, the UN Committee on the Rights of the Child's General Comment N.° 25 states that 'States parties should prohibit by law the profiling or targeting of children of any age for commercial purposes'. Within the European Union, this prohibition is already applicable to online platforms in relation to advertisements based on profiling (as per Art. 28(2), DSA) and to media service providers (within the scope of Art. 6a of the AVMSD), which are strong indications of the European legislator to restrict such kind of data processing activities.

*Therefore, we suggest that the EDPB align the Guidelines with General Comment N.° 25 by understanding profiling or targeted advertising for commercial purposes as an interest that would not pass the legitimacy test (**R7**).*

3) Transparency requirements regarding the legitimate interests test

Para. 67 of the Guidelines states that 'when the processing is based on Article 6(1)(f) GDPR, the specific legitimate interest(s) pursued [by the controller] *must* be precisely identified and communicated to the data subject in accordance with Article 13(1)(d) and 14(2)(b) GDPR' (emphasis added). Para. 68, however, leaves the provision of the information concerning the *balancing* test at the *discretion* of the controller. Combined, these two paragraphs severely restrict the amount of information that the controller must provide data subjects on an *ex-ante* basis, which is limited to the interests it pursues (i.e., half of step 1). Missing from the scope of that information *obligation* are: (i) the reasoning to justify that these interests are

'legitimate' (the other half of the legitimacy test), (ii) the outcome of the necessity test, and (iii) the outcome of the balancing test. While reiterating the position expressed by the Article 29 Working Party in its Guidelines on Transparency under Regulation 2016/679, this hinders data subjects' ability to *meaningfully* exercise their right to object since they will find themselves in a situation where they have to challenge a decision the reasoning behind which controllers are *not* required to share as part of the information contained in their privacy policy. This turns the exercise of the right to object intro a two-step process at best. Delays in answering that first request might make the matter worse and further discourage data subjects to rely on the prerogative granted by Article 21 GDPR.

It should be emphasized that this concern applies to *all three components of the legitimate interest test*, not only the balancing test. Although such information is essential for all data subjects, they are all the more important when the interests of the controller are weighted against children's interests, as (i) by assuming one of the roles of the best interests principle as a rule of procedure, it is essential to disclose 'how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases' (General Comment N.º 14/2013, para. 6(c)); and (ii) considering children's vulnerability increases both the substantive and formal threshold for the disclosed information to meet the 'intelligibility' standard as per Article 12(1) GDPR.

*Against this background, we suggest that the EDPB (i) argue in favour of an obligation for controllers to disclose the outcome of the legitimate interest test, including the balancing test, in the information made available to data subjects pursuant to Articles 13 and 14, GDPR (**R8**); (ii) list the minimum elements that such communication should contain (i.a., which interests of the data subjects have been taken into account; what were the criteria used to weight these interests against those pursued by the controller; what are the countermeasures implemented to tip the scale in favour of the interests pursued by the controller) (**R9**); and (iii) clarify, following the same reasoning developed in paras. 113-114 of EDPB's Guidelines 01/2022 on the right of access, that the information on the outcome of the legitimate interests test to be provided under Articles 13 and 14 GDPR should not necessarily be the same as what controllers must provide in response to a right of access request (even if not specifically mentioned in the list of Article 15(1)) (**R10**). As a relative assessment, the information regarding the latter is likely to vary among data subjects, particularly when the controller describes the outcome of the legitimate interests test in their privacy notice in broad terms, without considering children as a distinct group.*