

Page 15, para 3 of the Guidelines

"Moreover, it is apparent from the very wording of Article 6(1)(f) GDPR that it is necessary to pay particular attention to the situation where the data subject is a child. As the CJEU held,⁵³ referring to Recital 38 GDPR, children merit specific protection with regard to the processing of their personal data because they may be less aware of the risks, consequences and safeguards concerned and of their rights related to such processing of personal data. The CJEU ruled that such specific protection should, in particular, apply to the processing of personal data of children for the purposes of marketing or creating personality or user profiles or offering services aimed directly at children."

Page 26, no. 93 of the Guidelines

"In particular, it highlighted that, when performing a balancing exercise to assess whether a processing may be based on Article 6(1)(f) GDPR, special care must be taken in relation to the status of children as data subjects, using their best interest as a guide."

Page 26, footnote 114 of the Guidelines

"The concept of the child's best interests should be assessed on a case-by-case basis, either in relation to an individual child or children in general. The assessment should include the impact on all the rights enshrined in the Convention on the Rights of the Child and its Optional Protocols and not only the impact on the rights to privacy and to data protection."

Taking all the above quotations into account, there is still an unacceptably high level of uncertainty whether the decision on processing child's personal data based on legitimate interest is correct or not. It is obvious that article 6 para. 1 f) provides for severe requirements to ensure compliance with EU law, however, both the mentioned provision and commented Guidelines leave too much uncertainty to data users and too much opportunities for interpretation to Data Processing Authorities and even courts. In fact, the Controller can never be sure if measures taken are sufficient, as the concept of 'child's best interest' remains so undefined.

Also reference to a 'case-by-case' assessment seems to be rather the European Data Protection Board's escape from in-depth analysis.

The gap you leave for interpretation will result in many unnecessary penalties. Also the attitude of DPAs may differ in each EU member state.

The most concerning is that the controllers cannot feel safe in such a legal environment.
Certainty of law is one of the most crucial part of the rules of law.

To sum up, I would insist on EDPB to take steps rescuing the controllers from miserable quality of EU legislation, such as at least:

- adding more examples of situations in which processing child's data can be based on legitimate interest and in which it cannot be based on legitimate interest
- preparing examples of balance tests concerning child's data
- Extension of interpretation of concepts relating to processing child's data.

Kind regards