IAB Europe's response to the EDPB public consultation on draft Guidelines 1/2024 on processing of personal data based on Article 6(1)(f) GDPR

IAB Europe has taken note of the European Data Protection Board's (EDPB) draft "Guidelines 1/2024 on processing of personal data based on Article 6(1)(f) GDPR" (Guidelines), which have been circulated for public consultation until 20th November, 2024. We are grateful for the opportunity to provide comments on the Guidelines.

Preliminary remarks

The draft Guidelines intend to explain and clarify the criteria set down in Art. 6(1) (f) GDPR that controllers must meet to lawfully process personal data on the basis of legitimate interest (LI), and to provide practical guidance on conducting a legitimate interest assessment particularly in contexts such as fraud prevention, direct marketing and information security. They also address the relationship between this legal basis and data subject rights under the GDPR.

The draft Guidelines build on, and update, the previous WP29 Opinion 06/2014 on legitimate interests. Companies need greater clarity on how and when legitimate interest can be used as a legal basis, given that this is often central to their innovative endeavours. In that respect, while we fully welcome the EDPB's initiative to clarify, in practice, the factors that need to be considered when relying on LI as a legal basis, we are concerned that the draft Guidelines do not adequately account for recent developments in technology or for the significant changes to the European Union (EU) legal landscape since the adoption of the GDPR.

This oversight risks limiting companies' ability to leverage LI effectively, as the Guidelines are overly reliant on outdated perspectives. Additionally, the draft Guidelines provide for a stricter interpretation of Article 6(1)(f) in comparison with the previous WP29 Opinion 06/2014, creating a hierarchy between the different legal bases which is not aligned with the GDPR. This may create unnecessary legal hurdles potentially leading to different applications across Member States (MS).

Areas of concern

- The draft Guidelines seem to position LI as more restrictive compared to other legal bases, imposing stricter obligations and going beyond what the GDPR mandates (e.g. suggesting that the results of the balancing tests should be made public to the data subjects before giving consent in order to increase the transparency). The approach of the Guidelines appears overly cautious, often framing data controller and data subject interests as inherently opposed, which is not always the case.
- The draft Guidelines do not sufficiently reflect advancements in EU legislation (e.g., Data Act, Artificial Intelligence (AI) Act) or technological innovations that impact data processing, such as the use of AI and Privacy Enhancing Technologies (PETs).
- The draft Guidelines are not practical, as they refer to a limited number of examples of operations that can be pursued on the basis of LI and also provide more negative examples (whereby the LIA fails) as opposed to positive examples.

Key Recommendations

- Alignment with GDPR- ensuring that the Guidelines reflect the parity of all legal bases as established by Article 6, without introducing unjustified additional requirements for data controllers.
- Acknowledgement of the legislative and technological progress - integrating in the Guidelines changes from recent EU laws that interplay with the GDPR in the context of processing personal data and recognising technological developments that enhance data protection.
- Simplification for practical use - revising the Guidelines to be more actionable by including a greater list of processing activities that are susceptible to be pursued on the basis of LI. It would provide better legal certainty and reduce the potential for divergent interpretations by Data Protection Authorities (DPAs).

1) The draft Guidelines portray LI as more restrictive compared to other legal bases

Although the draft Guidelines emphasise in its introduction that there is no hierarchy between different legal bases indicated in Art. 6(1) of the GDPR[1], the draft Guidelines later implicitly qualify the LI legal basis as more restrictive by adding a requirement of *strict necessity* to the processing. This is contradictory to Art. 6(1)(f) GDPR that only requires for the processing to be *necessary*[2]. The draft Guidelines rely heavily on the judgement of the CJEU in the case C-252/21 between

[1] Draft Guidelines, §1: *In this regard, it should be recalled that the GDPR does not establish any hierarchy between the different legal bases laid down in Article 6(1).*
[2] Draft Guidelines, §13: *The controller may rely on this legal basis only if it has also assessed and concluded that the envisaged processing is strictly necessary for pursuing such a legitimate interest* [...].

Meta Platforms and the Bundeskartellamt to justify its position.[3] However, the implications of this ruling are limited in scope and do not affect the majority of companies - referring often to this particular case makes the Guidelines less neutral and practical for companies, especially smaller ones. The draft Guidelines also suggest that in order to support transparency towards data subjects, the controller should provide the information about the results of the balancing test in the information notice before engaging in the processing (§68 of the draft Guidelines). Even with a layered approach to the provision of information, it is questionable whether this measure would indeed improve the understanding of data subjects. The provision of such information is not required by the GDPR, and appears contrary to the principle of transparency that requires information to be easy to understand, in clear and plain language - given the very legal and technical nature of a balancing test. Additionally, the Guidelines emphasise mostly elements that could lead to the balancing test failing including purely hypothetical situations or highly subjective and unpredictable factors such as the emotional impact on the data subject that controllers cannot reasonably always foresee. This creates an unbalanced approach, focusing disproportionately on potential negatives without acknowledging measures that reduce risks and support the legitimate interest of the controller.

2) The draft Guidelines lack of consideration of new technologies and of the new legal landscape

The draft Guidelines should consider the evolution of the legal and technical landscape since the GDPR's entry into force. First, the EU has introduced several important pieces of legislation aimed at fostering the development of data-driven products and services, such as the Data Governance Act, the Data Act and the Artificial Intelligence Act. The draft Guidelines should account for these substantial legislative changes, in particular by recognising the LI legal basis as a key instrument for AI-related processing activities (such as the training of AI models). While we understand that the EDPB will soon issue an Opinion under Art. 64(2) in connection with AI - it is important for the draft Guidelines, which are intended to have a broad scope of application, to also tackle this matter. Second, the draft Guidelines should equally acknowledge the impact of technological advancement on data processing activities intended at improving the protection of personal data, such as pseudonymisation mechanisms and PETs[4]. In particular, such technologies can be particularly impactful when conducting the balancing test required as part of a LIA. The Guidelines assume that first-party interests are superior to third-party interests[5], which is not always the case, as third-party interests may also be relevant in different ways. In particular, as AI continues to evolve, third-party rights could become increasingly significant, making it crucial to preserve their

[3] CJEU, C-252/21, Meta vs. Bundeskartellamt, judgement of 4 July 2023.

[4] §120 of the draft Guidelines appears to suggest that certain direct marketing activities should not be pursued on the basis of LI, making it difficult for controllers implementing dedicated precaution measures (such as pseudonymisation or PETs) that significantly reduce the possible negative impacts on data subjects.

[5] §30 of the draft Guidelines, *"It should be noted that, in practice, it is generally easier for a controller to demonstrate the necessity of the processing to pursue its own legitimate interests than to pursue the interests of a third party, and that the latter kind of processing is generally less expected by the data subjects."*

relevance and importance in data processing considerations. Additionally, as various interests may be identified as benefiting several categories of stakeholders, the assumption that first-party interests should take precedence requires reconsideration in light of the diverse impacts and evolving technological landscape.

3) The draft Guidelines unjustifiably limit the processing activities that could be pursued on the basis of LI

a) Blanket exclusion of certain processing activities

The draft Guidelines should not assume that certain marketing and advertising data processing activities are automatically excluded from relying on the LI legal basis by stating in §120 that "*the balancing test would hardly yield positive results for intrusive profiling and tracking practices [...] such as tracking individuals across multiple websites, locations, devices, or services*". The assessment of whether LI applies, and the balancing of interests, must always be context-specific, taking into account all relevant factors. Additionally, according to recital 47 of the GDPR and Art. 13(2) of the ePrivacy Directive (ePD), processing personal data for direct marketing purposes can be justified under legitimate interest, particularly when it involves existing customers and products similar to those they have already purchased. This is reinforced by previous guidelines, such as the EDPB Guidelines 8/2020 on the targeting of social media users, which confirm that using CRM data for promoting similar products aligns with legitimate interest ensuring that customers are informed and have the opportunity to opt out[6]. Therefore, the draft Guidelines should clarify that legitimate interest remains a viable option for such targeted advertising when the data processing is limited and involves similar products or services. Moreover, the draft Guidelines should recognise that profiling is not limited to marketing purposes. It can also be used for e.g. statistical analyses (aggregated data) that support a company's operational efficiency and improve the quality of its products and services. The lack of clarity on the diverse purposes of profiling creates legal uncertainty whether legitimate interest can be used for processing activities when profiling is involved. Indeed, the CJEU has already ruled on several occasions that it is forbidden to exclude certain legal grounds in a general way: "*[...] Article 7(f) of Directive 95/46 precludes a Member State from excluding categorically and generically the possibility of processing for certain categories of personal data, without allowing for a balancing of the opposing rights and interests involved in a concrete case. Accordingly, for those categories, a Member State may not definitively determine the outcome of the balancing of the opposing rights and interests, without allowing for a different outcome on account of the particular circumstances of a concrete case [...]*."[7]

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[6] EDPB Guidelines 8/2020 on the targeting of social media users, §66: *"the targeter could invoke the legitimate interest to justify the processing, given that the user was informed that his e-mail address could be used for advertising purposes via social media for services related to the one used by the data subject; the advertising concerns services similar to those for which the user is already a customer and that he had the opportunity to object prior to the processing."*

[7] CJEU, C-468/10 and C-469/10 joined cases Asociación Nacional de Establecimientos Financieros de Crédito and Federación de Comercio Electrónico y Marketing Directo vs Administración del Estado,

b) Uncertainties around product improvement

We welcome the fact that draft Guidelines recognise "product improvement" as a possible legitimate interest. However, the draft Guidelines miss the opportunity to provide a concrete example for relying on the legitimate interest legal basis for this purpose in practice. On the contrary, the draft Guidelines only provide an example of when LI would not be considered as an appropriate legal basis for product improvement (§ 54 of the draft Guidelines, *Example 5*). The provided example is inspired by the factual background of the CJEU Meta vs Bundeskartellamt case that many companies cannot relate to. The final Guidelines should provide more common and positive examples for which LI is an appropriate legal basis.

c) Interplay with Art. 5(3) of the ePrivacy directive

The draft Guidelines aim at clarifying legal requirements that preclude reliance on LI, for example as a result of the consent requirements under Art. 5(3) of ePrivacy Directive (ePD). The draft Guidelines recognise that there might be differences in how some of the MS have implemented the ePD (§117), which may result in consent requirements that go beyond those laid down in the ePD. Surprisingly, the draft Guidelines do not seem to acknowledge that there are also consent exemptions precisely provided by national regulators in certain MS. For instance, some regulators provide exemptions to the consent requirement of Art. 5(3) ePD for the management of advertising spaces (e.g. the AEPD[8] and Traficom[9]) and for audience measurement (e.g. CNIL[10], the Garante[11], AEPD[12]). It is commonly recognised that where a consent exemption applies under ePD, the subsequent processing can generally be pursued on the basis of LI (provided that the necessity test and balancing test have been duly performed and resulted in a positive outcome). As a result, we ask the EDPB to specifically include the management of advertising spaces and

judgement of 24 November 2011 and C-582/14 Patrick Breyer v Bundesrepublik Deutschland, judgement of 19 October 2016.

[8] https://www.aepd.es/documento/guia-cookies.pdf; *"Also belonging to this category, due to their technical nature, are those cookies that allow the management, in the most efficient way possible, of the advertising spaces that, as another element of design or "layout" of the service offered the user, the editor has included in a web page, application or platform based on criteria such as the edited content, without collecting information from users for other purposes, such as personalising that advertising content or other content".*

[9] https://www.kyberturvallisuuskeskus.fi/sites/default/files/media/regulation/Sanoma%20Media%20Finland%20Oy.pdf; *"According to Traficom's assessment, the purpose of the non-personalized distribution cookie on the front page is to enable a specific advertisement to be shown to Helsingin Sanomat readers once a day." and "Traficom considers that the non-personalized distribution cookie of the front page in question is necessary in the sense of Section 205 subsection 2 of the SVPL to provide a service explicitly requested by the subscriber or user".*

[10] The CNIL recently has laid out practical requirements for audience measurement solutions to be exempted from the consent requirement of the ePD, https://www.cnil.fr/fr/cookies-et-autres-traceurs/regles/cookies-solutions-pour-les-outils-de-mesure-daudience.

[11] The Garante recently has provided practical requirements for audience measurement solutions to be exempted from the consent requirement of the ePD, https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9677876.

[12] Also, the AEPD has indicated recently practical requirements for audience measurement solutions to be exempted from the consent requirement of the ePD,https://www.aepd.es/guias/guia-cookies-analiticas-externas.pdf.

the measurement of online audiences as examples of purposes that can effectively be relied on LI.