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European Data Protection Board
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Brussels

November 19, 2024

Contribution to public consultation on Guidelines 1/2024 on processing of personal data based on Article 6(1)(f) GDPR

Dear Sirs,

Orsingher Ortu - Avvocati Associati law firm ("***OOAA***" or "***We***"), an Italian law firm offering legal assistance, *inter alia*, on data protection matters**,** hereby intends to provide its contribution to the public consultation launched by the European Data Protection Board ("***EDPB***") on October 9, 2024 in order to acquire feedback on the guidelines 1/2024 on the processing of personal data based on Article 6(1)(f) GDPR ("***Guidelines***").

Specifically, with this contribution, OOAA intends to provide its comments and recommendations on the following paragraphs of the Guidelines.

i) PARAGRAPH 24

> ***"Historical or other kinds of scientific research. Another important context where processing in the legitimate interests of third parties may be relevant is historical or other kinds of scientific research".***

***Comment*:** we believe that a generic reference to "*other kinds of scientific research*", without a clear definition of «scientific research», is likely to raise several interpretive doubts for data controllers, who would then have to arbitrarily assess whether a research activity, for the purpose of invoking legitimate interest as an appropriate legal basis, could be actually considered scientific research. In this regard, GDPR provides a rather broad definition of scientific research, stating in recital 159 that "*for the purposes of this Regulation, the processing of personal data for scientific research purposes should be interpreted in a broad manner including for example technological development and demonstration, fundamental research, applied research and privately funded research*". Therefore, as confirmed by the European Data Protection Supervisor, "*not only academic researchers but also not-for-profit organizations, governmental institutions or profit-seeking commercial companies can carry out scientific research*"[1]. However, the lack of a clear definition within the

[1] "*A Preliminary Opinion on data protection and scientific research*", European Data Protection Supervisor, pag. 11, available at: https://www.edps.europa.eu/sites/default/files/publication/20-01-06_opinion_research_en.pdf.

meaning of the GDPR is even more blatant when looking at other European laws, such as the Directive EU 2019/790 ("***EU Copyright Directive***"), where the lawmaker has instead taken a strong position and provided specific requirements for an activity to be qualified as "scientific research". Indeed, recital 12 of EU Copyright Directive provides that: "*The term «scientific research» [...] should be understood to cover both the natural sciences and the human sciences. Due to the diversity of such entities, it is important to have a common understanding of research organizations. They should for example cover, in addition to universities or other higher education institutions and their libraries, also entities such as research institutes and hospitals that carry out research. Despite different legal forms and structures, research organizations in the Member States generally have in common that they act either on a not-for-profit basis or in the context of a public-interest mission recognised by the State. Such a public-interest mission could, for example, be reflected through public funding or through provisions in national laws or public contracts. Conversely, organizations upon which commercial undertakings have a decisive influence allowing such undertakings to exercise control because of structural situations, such as through their quality of shareholder or member, which could result in preferential access to the results of the research, should not be considered research organizations for the purposes of this Directive*".

In addition, it should be noted that, compared to the previous Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC issued by the Article 29 Data Protection Working Party on April 9, 2014 ("***WP29 Opinion***"), the Guidelines have removed within the same paragraph the following underlined sentence: "*Historical or other kinds of scientific research. Another important context where disclosure in the legitimate interests of third parties may be relevant is historical or other kinds of scientific research, particularly where access is required to certain databases*", which nevertheless provided a useful, if still general, example for data controllers to understand when legitimate interest may actually be invoked for scientific research activities.

***Recommendation*:** we recommend *(i)* providing a more detailed definition of «scientific research», adding some examples and clarifying what specific requirements a research activity must meet in order to be qualified as «scientific research» under the GDPR, and *(ii)* putting back the sentence "*particularly where access is required to certain databases*" included in the previous WP29 Opinion.

ii) PARAGRAPH 25

> ***"General public interest or third party's interest. <u>Interests of third parties, as mentioned in Article 6(1)(f) GDPR, are not to be confused with interests of the wider community (general public interests), although in some cases the interests pursued by a specific controller or a specific third party may also serve broader interests</u>. The interests of the wider community are mainly subject to the justifications provided for in Article 6(1)(e) or (c), if controllers are tasked or required by law to preserve or pursue such interests. This is the case, for instance, when private operators are obliged to assist law enforcement authorities in their efforts to combat certain illegal activities. [...]".***

Comment: we believe that the paragraph does not adequately clarify the difference between the public interest (understood as the interest of the wider community) and «*broader interests*» that may also involve interests of a large group of third parties. Indeed, the Guidelines merely offer as an example the case where the interest of a single third party may exist (see example no. 4 of the Guidelines), without instead considering cases where the interest should be understood in a broader sense and not only related to a single person. In this sense, by way of example, processing activities carried out for the purpose of scientific research and/or fraud prevention, as expressly provided in the GDPR, may be carried out on the basis of a legitimate interest, although such activities in fact may also represent an interest for many third parties or even the wider community. While it is true that more than one legal basis may be relied upon for the same processing (indeed, the same activity could be carried out on the basis of both a legitimate interest and public interest), nevertheless, a clearer definition of «third party's interests» is essential for all cases where EU or Member State law do not expressly stipulate that a certain activity constitutes public interest and therefore data controllers must assess whether or not a certain legitimate interest, which benefits a wider group of third parties, may fall within the meaning of "third-party's interest" under Art. 6(1)(f) GDPR and to what extent.

Recommendation: we recommend further clarifying (if necessary, by adding some examples) the difference between public interest and third parties' interest, particularly in cases where data controllers carry out processing activities that benefit large groups of third parties, or even the wider community (despite such activity not being formally recognized as public interest by EU nor Member State laws).

iii) PARAGRAPH 29

> ***"Assessing what is "necessary" involves ascertaining whether in practice the legitimate data processing interests pursued cannot <u>reasonably be achieved</u> just as effectively by other means less restrictive of the fundamental rights and freedoms of data subjects. If there are <u>reasonable</u>, just as effective, but less intrusive alternatives, the processing may not be considered to be "necessary". In this context, the CJEU expressly recalled that the condition***

relating to the need for processing must be examined in conjunction with the "data minimisation" principle enshrined in Article 5(1)(c) GDPR, in accordance with which personal data must be "adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed [...]".

Comment: this paragraph does not clarify the threshold within which, subject to the general principle of minimization, an as-effective and less intrusive alternative should be considered «reasonable». In any case, granted that not all of as-effective and less intrusive alternatives existing in nature can be intended reasonable, we believe that this assessment should always be carried out taking into account the negative impacts that would burden data controllers if they were to lean toward such an alternative (including, possible additional implementation costs, loss of efficiency, loss of security, *etc*.).

Recommendation: we therefore recommend clarifying, if necessary even by adding an example, when an as-effective and less intrusive alternative can be considered «reasonable» and when it cannot.

iv) PARAGRAPH 73

"The notion of "compelling legitimate grounds" is not defined in the GDPR. However, it is clear from the wording of Article 21 GDPR that the assessment to be made by the controller to demonstrate that there are legitimate grounds that take precedence over the interests and rights and freedoms of the data subject is different from the balancing exercise to be made under Article 6(1)(f) GDPR. [...] In other words, not all conceivable legitimate interests that may justify processing under Article 6(1)(f) GDPR are relevant in this context. Only interests that can be recognised as "compelling" may be balanced against the rights, freedoms and interests of the data subject to assess whether there are grounds for processing that take precedence, despite the objection of the data subject. In essence, the grounds invoked should be essential to the controller (or to the third party in whose legitimate interest the data are being processed) to be considered compelling. This might be the case, for example, if a controller is compelled to process the personal data in order to protect its organization or systems from serious immediate harm or from a severe penalty which would seriously affect its business. In contrast, showing that the processing would simply be beneficial or advantageous to the controller would not necessarily meet this threshold. The presence of compelling legitimate grounds needs to be assessed on a case-by-case basis and be linked to a specific objection".

Comment: Guidelines provide that legitimate interest, in order to be defined as «compelling», requires further and stronger grounds than those relied upon within the original balancing test carried out under Article 6.1(f) GDPR; indeed, "*the grounds invoked should be essential to the controller (or to the third party in whose legitimate interest the data are being processed)*". However, it is unclear to what extent and on the basis of which criteria the processing should be considered «essential». Indeed,

the Guidelines, echoing what has already been held in the EDPB's Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679, provide only generic examples of compelling interests such as protecting "*its organization or systems from serious immediate harm or from a severe penalty which would seriously affect its business*". In this regard, it should first be noted that the circumstance that the data controller in the absence of certain processing risks a penalty, if understood as a fine prescribed by law, suggests that such processing should be primarily based on a legal obligation under Art. 6(1)(c) GDPR and not on a legitimate interest. In any case, regardless of the meaning of «penalty» (which in most cases would be expected to be pecuniary in nature), the examples above thus suggest that data controllers, in considering a legitimate interest as «compelling», could certainly take into account the serious economic impacts they would face should such processing cease.

Recommendation: considering the relevance of such a definition (which would allow data controllers to limit a data subject's right) and the opportunity missed by the EDPB to provide more guidance in previous "Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679", we recommend that the definition of «compelling» legitimate interests be definitely clarified in these Guidelines, through the inclusion of specific examples (in addition to those already mentioned) clarifying when an interest can actually be considered «essential».

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We sincerely thank you for the opportunity to provide our feedback on the Guidelines and hope that the EDPB will embrace our recommendations above.

Yours faithfully.

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