Public consultation on: Guidelines 1/2024 on processing of personal data based on Article 6(1)(f) GDPR

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*(*The comments below represent exclusively the personal point of view of the author)*

The Guidelines in question represent very useful examples in order to evaluate the reasoning and criteria to adopt for the execution of a Legitimate Interest assessment (LIA). The material is detailed and remarks the fundamental approach (to always apply) of a case by case assessment in relation to the specific real scenario object of a LIA and explaining the 3 steps to follow.

Regarding the first step related to the "legitimate" nature of the interest pursued strictly related also with the second step of necessity of the processing to pursue the legitimate interest, it is important to note that in practice it is not always clear to evaluate the case.

Indeed, in our modern era, the technology is pervasive in almost all the scenarios and although in theory a legitimate interest could be identified, however, it is not always easy to declare it "in nature" due to the fact that the legitimate interests are general open concepts. Sometime these general open concepts (like for example the "security") and also the related concept of "necessity" of the processing to pursue are difficult to assess.

The technology in itself, indeed, in some scenario (or in the majority of scenarios – it depends by own point of view -) is not necessary "in nature". Thus, the second step of necessity - when for example using technological tools - is not easy to pass if we think that we might use or keep to use "manual" tools. This could be a

crucial point because if we may “declare” the use of technological tools not strictly necessary “in nature” a lot of legitimate interests, consequently, would be difficult to realize in practice because the way to pursue them is, in the majority of cases, made by the use of technological tools. Consequently, the third step related to the balancing of the rights of the data subjects will not even be reached as a step to carry out. Probably, in our modern era, the real step and exercise to carry out mainly would be directly to focus on the exercise of balancing the rights of data subjects to the technology in a case by case scenario.

In conclusion, it is important to advertise that the LIA in itself, represents a risk for the data controllers and mostly for the data subjects because in a lot of scenarios the assessment is based on the self-accountability exercise on open concepts. Thus, although after the introduction of the GDPR the LIA has become a new useful “legal tool” in order to assess the legal basis of the legitimate interest of a process, in some (or a lot of scenarios, it depends on point of view) the old preventive and compulsory methodology of notification of risk scenarios to the competent Data Protection Authority (like for example in Italy before the GDPR) would still represent a valid and more safety approach in a lot of scenarios.

Marco Costantini

Data Protection Officer