

Reply to the EDPB consultation on guidelines 1/2024 on processing of personal data based on Article 6(1)(f) GDPR

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Leem is the French business association representing pharma companies operating in France. Leem has 267 member companies, amongst which 50% of SMEs, performing activities of research and development, manufacturing, marketing and distribution of medicines.

Direct marketing :

The draft guidelines, § 14, indicate that *“Recital 47 of the GDPR makes clear that a “legitimate interest could exist for example where there is a relevant and appropriate relationship between the data subject and the controller in situations such as where the data subject is a client or in the service of the controller.”*

However, the 3 examples provided in pages 8-9 only refer to situations where the legal basis should not be legitimate interest.

Also, the draft guidelines, § 109, indicate that *“According to Recital 47 GDPR, the processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest.”*

However, the entire section 4 of the draft guidelines focus on the *“sending of direct marketing communications”* rather than *“direct marketing purposes”* in general. As a consequence, the draft guidelines clarify the situations where legitimate interest is not the most appropriate legal basis but provide little guidance on situations where data controllers could actually rely on legitimate interest.

Would it be possible to include examples in the guidelines, illustrating situations where data controllers could actually rely on legitimate interest to process personal data for direct marketing purposes?

Section IV § 4.2: Compliance with specific legal requirements that preclude reliance on Article 6(1)(f):

The draft guidelines, § 114, indicate that *“under the ePrivacy Directive, the sending of unsolicited communications for purposes of direct marketing by email, SMS, MMS and other kinds of similar applications **can only take place with the prior consent of the individual recipient.**”*

At the end of the section, § 117, the draft guidelines indicates that *“In any event, controllers should also assess the scope of application of the national rules implementing the ePrivacy Directive at Member State level, **which may occasionally impose consent requirements that go beyond those laid down in that Directive (e.g., with respect to direct marketing towards professionals).**”*

However, the draft guidelines do not mention the fact that in some Member States, such as France, the scope of the ePrivacy Directive is limited to B to C relationships. In fact, the French Supervisory Authority (CNIL) considers that **sending direct marketing communications toward professionals (i.e., in the context of B to B relationships), can take place based on the controller's legitimate interest:** https://www.cnil.fr/sites/cnil/files/atoms/files/referentiel_traitements-donnees-caractere-personnel_gestion-activites-commerciales.pdf . This approach is very well received by data controllers and data subjects/professionals.

It would be important to recall this, to avoid an interpretation of the EDPB guidelines as precluding reliance on legitimate interest for direct marketing communications in the context of B to B relationships.
