

## Statement regarding the guidelines 1/2024 on processing of personal data based on Article 6(1)(f) GDPR

### Background

---

- For more than 100 years, the German Retail Federation, Handelsverband Deutschland (HDE), has been the umbrella organisation of the German retail sector - the third largest economic sector in Germany - with a total of three million employees and an annual turnover of approximately 535 billion euros. The HDE represents the concerns and interests of around 300,000 retail companies from all sectors, locations, and different company sizes. With 50 million daily customer contacts, the retail sector supplies its customers with the entire range of products - through all sales channels.
- Retailers use personal data for various reasons, for example when selling products and services. Customers buy products and services, browse websites and interact with the retailer in many different ways.
- The European Data Protection Board (EDPB) has now published the Guidelines 1/2024 on processing of personal data based on Article 6(1)(f) GDPR: They analyse the criteria in Article 6(1)(f) GDPR that controllers must meet to lawfully engage in the processing of personal data that is “necessary for the purposes of the legitimate interests pursued by the controller or by a third party”.
- HDE welcomes the EDPB draft guidelines on legitimate interest. However, there is concern regarding possible restrictions through the guidelines, that are above the legal requirements of the GDPR.

### HDE-Position

---

- Every retailer, whether big or small, selling online or face to face, needs to know their customer. For that reason, they need at least some of their customers` personal data.
- Therefore, the guidelines are of great importance, since to be able to process personal data, organisations must first ensure that the processing is lawful. For this, they have to rely on one of the six legal bases set out in Art.6 GDPR, one of which is legitimate interest Art.6(1) (f) GDPR.
- In general, we would welcome it if the guidelines clarified that that the controller does not have to go beyond the GDPR to use legitimate interest as a legal basis. In the following, we would like to illustrate this using the subsequent examples:
  1. **Specification “strictly necessary”:** Regarding elements to be taken into account when assessing the applicability of Art. 6 (1)(f) GDPR as a legal basis, the draft guidelines state: *“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 and that the interests or fundamental rights and freedoms of the person(s) concerned by the data processing do not take precedence over the legitimate interest pursued (...).”*
    - ➔ The wording “strictly” is not included in the GDPR in this context. The inclusion of this tightening of Art. 6 (1)(f) GDPR would put an additional burden on the use of this legal basis, although there is already a necessity and proportionality test. Further burdening retailers by imposing an unnecessary tightening of the provision would be disproportionate. Furthermore, neither of the

words “strictly necessary” are defined further in the guidelines; it would therefore ultimately not be clear in practice when this requirement would be considered fulfilled.

2. **Transparency and information to be provided to data subjects:** The draft guidelines state, that a data subject should receive the legitimate interest assessment on request. This specification is not included in the GDPR itself. Neither Art. 13 nor Art. 15 GDPR provide for such a release. Additionally, such a disclosure would expose information about internal processes unnecessarily.
3. **Case-by-case assessment:** The guidelines should not prohibit more than the legal text of the GDPR itself prohibits. A case-by-case assessment, which must also be documented, is not provided for by Art. 6 (1) f of the GDPR and we take a critical view of this as a general requirement. It should remain possible to make a fundamental decision to use certain data for specified purposes because this is useful/necessary for the objectives of the user. A general assessment might be conceivable in advance.
4. **Going beyond the GDPR:** The draft guidelines state: *“While complying with the GDPR provisions on data subject rights is a legal obligation (and therefore not something that controllers can consider as a mitigating measure in a balancing exercise), some of the rights laid down in those provisions are subject to specific conditions. Going beyond what is strictly required under the GDPR may be seen as an additional safeguard that could be considered in the balancing test.”*
  - With reference additional safeguards, we would welcome it if the guidelines included these in the balancing test and did not require that they go further than the provisions of the GDPR. The requirement of measures outside the GDPR to comply with the GDPR could lead to a disproportionate burden for companies.
5. **Facilitating video surveillance in retail:** In the context of Art. 6 (1) (f) GDPR, the issue of video surveillance in the retail sector is of great importance. Open video surveillance is a proven prevention tool in the retail sector. It increases the chance of detection for potential offenders and thus acts as a deterrent. At the same time, it makes a valuable contribution to the identification of shoplifters and can therefore support police investigations. Open video surveillance is therefore a key tool in the fight against shoplifting. AI support can make it even more effective. The use of AI-supported video surveillance must therefore be possible under data protection law. The data protection supervisory authorities should therefore interpret the requirements of the GDPR in a practical manner.
  - However, due to the restrictive interpretation of Art. 6 (1)(f) GDPR, effective and comprehensive video surveillance is often not possible for retail stores, even in particularly high-risk areas. Legal uncertainty and a high level of bureaucracy in connection with justification to the supervisory authorities are further hurdles when setting up and operating a video surveillance system. Even if the commission of a crime cannot always be prevented immediately in specific cases, rapid investigation and arrest with the help of video surveillance deter other potential offenders from committing similar crimes. Video surveillance therefore has a general preventive effect, even if it is used for repressive purposes in specific individual cases and is generally an important preventive instrument.
  - Because of this important preventive effect, the supervisory authorities must not set excessively high hurdles that disproportionately restrict the use of this instrument in the retail sector in practice. It must also be possible to use the possibilities of AI without disproportionate legal risks. In particular, the support of video surveillance by AI must not lead to the use of AI being taken into account by the supervisory authorities to the detriment of the data-processing retailer when weighing up legal interests in connection with the “legitimate interest”.

- When interpreting Art. 6(1)(f) GDPR, the guidelines therefore should allow the supervisory authorities to follow the premise that video surveillance of salesrooms - including AI-supported video surveillance if necessary - for the prevention and detection of criminal offenses is generally permissible, provided there are no indications of an exceptionally overriding interest in protection of the data subjects in individual cases.
- As mentioned before, with the wording “strictly necessary”, the hurdles for the use of legitimate interest are further increased without the requirement itself being found in the GDPR. This would also mean that AI-supported video surveillance in retail on the basis of legitimate interest - such as the effective detection of theft at self-service checkouts or to enforce bans - would then hardly be justifiable if the AI camera has to be strictly necessary to achieve the purposes pursued. New technology can probably never be regarded as absolutely/strictly necessary, as it has worked without it before. Tightening the requirements at this point could therefore have a downright anti-progress effect.
- It should be clarified in the GDPR that AI-supported video surveillance of salesrooms must be taken into account as a “particularly important interest” when weighing up the interests of the data subjects worthy of protection, insofar as it serves to detect and investigate criminal offenses and enforce domiciliary rights.