V N O N C W

MKB Nederland

Reaction to the consultation of the EDPB regarding its draft Guidelines 1/2024 on processing of personal data based on Article 6(1)(f) GDPR, version 1.0 as adopted on October 8, 2024.

From:	VNO-NCW and MKB-Nederland
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VNO-NCW and MKB-Nederland welcome the opportunity to provide input on the draft Guidelines 1/2024 on processing of personal data based on Article 6(1)(f) GDPR.

We underline the importance of the wording in recital 4 of the GDPR: the processing of personal data should be designed to serve mankind. The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality.

We also underline within the context of the principle of proportionality, the acknowledged need for supervisors to take the specific situation of micro, small and medium-sized enterprises into account.[1] Within this context, it is important to provide practical, easy-to-read & use and proportionate guidance.

Taking these considerations into account, we have the following comments and suggestions regarding the draft Guidelines 1/2024 on processing of personal data based on Article 6(1)(f) GDPR:

<u>General suggestions</u>:

1. We suggest including an easy-to-read checklist/step-by-step plan.

2. We suggest including more positive wording and examples to highlight situations where legitimate interest can be relied upon as legal ground for the processing of personal data.

<u>Comments and suggestions regarding specific points of the draft Guidance</u>:

3. Executive summary, fifth paragraph; and point 17 of the draft Guidelines:

   "*not all interests of the controller or a third party may be deemed legitimate; only those interests that are* ***lawful, precisely articulated*** *and present may be validly invoked to rely on the Article 6(1)(f) GDPR as a legal basis.*"

   <u>Comment 1</u>: As a result of the incorrect 5 yearlong diverging interpretation by the Dutch DPA of 'lawfulness' of a legitimate interest, it is of utmost importance that the EDPB Guidance on Legitimate interest make very clear what the European Court of Justice means by **lawful**. It is not limited to interests enshrined in and determined by law; it requires that the alleged legitimate interest is not contrary to the law.

   <u>Comment 2</u>: Including ***precisely articulated*** as a separate requirement in the assessment of a legitimate interest is not correct and confuses more than it clarifies.

   <u>We suggest</u>: to amend the wording as follows:

[1] Recital 13 of the GDPR.

"*not all interests of the controller or a third party may be deemed legitimate; only those interests that are lawful and present (non-hypothetical) may be validly invoked to rely on the Article 6(1)(f) GDPR as a legal basis. The concept of 'legitimate interest' is not limited to interests enshrined in and determined by law. A legitimate interest may not be contrary to the law. A wide range of interests is, in principle, capable of being regarded as legitimate. To assess and document whether an interest is lawful the interest needs to be precisely articulated (not vague).*"

We refer to recitals 38, 39 and 40 of the judgment of the European Court of Justice in the Koninklijke Nederlandse Lawn Tennisbond vs Autoriteit Persoonsgegevens (C-621/22 / ECLI:EU:C:2024:857):

> (38) As regards, first, the condition relating to the pursuit of a 'legitimate interest', it should be emphasised that, in the absence of a definition of that concept in the GDPR, as the Court has previously held, a wide range of interests is, in principle, capable of being regarded as legitimate (see, to that effect, judgment of 7 December 2023, *SCHUFA Holding (Discharge from remaining debts)*, C-26/22 and C-64/22, EU:C:2023:958, paragraph 76).
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> (39) As is also apparent from recital 47 of the GDPR, which concerns the concept of 'legitimate interest', the EU legislature did not require that the interest pursued by a controller be provided for by law in order for the processing of personal data carried out by that controller to be legitimate within the meaning of point (f) of the first subparagraph of Article 6(1) of that regulation. That finding is particularly true given that that recital cites, by way of example, direct marketing purposes in general as legitimate interests that may be pursued by a controller.
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> (40) However, while the concept of 'legitimate interest', within the meaning of point (f) of the first subparagraph of Article 6(1) of the GDPR, is not limited to interests enshrined in and determined by law, it requires that the alleged legitimate interest be lawful.

We also refer to recital 122 of the judgment of the European Court of Justice in the Meta vs Bundeskartellamt, Case C-252/21; ECLI:EU:C:2023:537:

> (122) Third, as regards the 'product improvement' objective, it cannot be ruled out from the outset that the controller's interest in improving the product or service with a view to making it more efficient and thus more attractive can constitute a legitimate interest capable of justifying the processing of personal data and that such processing may be necessary in order to pursue that interest.

4. Point 1 of the draft Guidelines:

"*Consequently, before a controller starts processing personal data, it must identify the applicable legal basis and ensure that the requirements of at least one of the legal bases in Article 6(1) GDPR are fulfilled. 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).*"

<u>Comment:</u> We support including this clarification.

5. Point 9 of the draft Guidelines:

CONCEPT

"*Article 6(1)(f) GDPR cannot be considered as a legal basis "by default". On the contrary, before relying on such a legal basis, the controller should perform a careful assessment of the planned processing and follow a specific methodology. The open-ended nature of Article 6(1)(f) GDPR*[8] *does not necessarily mean that this legal basis should be seen as one that can only be used as a "last resort" in rare and unforeseen situations, or that Article 6(1)(f) should be seen as a last option if no other legal bases apply. Nor should Article 6(1)(f) be seen as a preferred option by controllers and its use should not be unduly extended to circumvent specific legal requirements or because it would be considered as less constraining than the other legal bases in Article 6(1) GDPR. In other words, Article 6(1)(f) should not be considered as an~~–~~"open door" to legitimise all data processing activities which do not fall under any of the other legal bases in Article 6(1) GDPR. Rather~~,~~ it should be recalled that Article 6(1)(f), like each of the legal bases set out in Article 6(1) GDPR, must be interpreted restrictively.*[9]

<u>Comment 1</u>: the word 'necessarily' in the second sentence confuses the reader. It does not provide the necessary clarification.

<u>We suggest</u>: to delete the word 'necessarily' in the second sentence.

<u>Comment 2</u>: a significant and clarifying part of the former WP29 Guidelines on Legitimate Interest are missing in the updated version of the Guidelines.

<u>We suggest 2</u>: to replace <u>the last sentence</u> with the original wording from the former WP29 Guidelines (updated the reference to the relevant article):

"*Appropriate use of Article 6(1)(f), in the right circumstances and subject to adequate safeguards, may help prevent misuse of, and over-reliance on, other legal grounds. An appropriate assessment of the balance under Article 6(1)(f), often with an opportunity to opt-out of the processing, may in some cases be a valid alternative to inappropriate use of, for instance, the ground of 'consent' or 'necessary for the performance of a contract'. Considered in this way, Article 6(1)(f) presents complementary safeguards compared to the other pre-determined grounds. It should thus not be considered as 'the weakest link' or an open door to legitimise all data processing activities which do not fall under any of the other legal grounds.*"

6. Point 12 of the draft Guidelines:

"*In order to determine whether a given processing of personal data may be based on Article 6(1)(f) GDPR, controllers must carefully assess whether the three cumulative conditions listed above can be met so as to ensure that the processing is lawful.* [12] *This assessment should follow the three-step process outlined below, although in some circumstances the examinations of the second and third conditions may merge in so far as the assessment of whether the legitimate interests pursued by the processing of personal data cannot reasonably be achieved by less intrusive means requires a balancing of the opposing rights and interests at issue.*[13] *The assessment should be made at the outset of the processing, with the involvement of the Data Protection Officer (DPO) (if designated),*[14] *and should be documented by the controller in line with the accountability principle set out in Article 5(2) GDPR.*"

CONCEPT

Comment: It might not be necessary that the DPO looks into every use of legitimate interest. We refer to the WP29 guidelines on DPO (16/EN WP 243 rev.01, endorsed by the EDPB) in which is - correctly - stipulated that the DPO needs to fulfill its duties in a risk-based manner. For instance, for very similar processing activities, the DPO might not need to be involved each single time. In the event of a high-risk processing activity the DPO will be involved within the scope of the DPIA.

We suggest: to add the wording "needed and" before "designated"

The text including this suggested wording would read as follows:

"*In order to determine whether a given processing of personal data may be based on Article 6(1)(f) GDPR, controllers must carefully assess whether the three cumulative conditions listed above can be met so as to ensure that the processing is lawful.* [12] *This assessment should follow the three-step process outlined below, although in some circumstances the examinations of the second and third conditions may merge in so far as the assessment of whether the legitimate interests pursued by the processing of personal data cannot reasonably be achieved by less intrusive means requires a balancing of the opposing rights and interests at issue.*[13] *The assessment should be made at the outset of the processing, with the involvement of the Data Protection Officer (DPO) (if needed and designated),*[14] *and should be documented by the controller in line with the accountability principle set out in Article 5(2) GDPR.*"

7. Point 18 of the draft Guidelines:

"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, this is just an example of a possible indicator that an interest may be qualified as "legitimate", and it is without prejudice to the controller's obligation to assess and ensure that all of the three cumulative conditions for relying on Article 6(1)(f) GDPR as a legal basis are met for the envisaged processing operations.

Comment 1: Recital 47 does not address whether an interest is lawful or unlawful but provides examples of interests. The link with the subsequent example (example 1) about an unlawful interest is missing. The example does not seem to be related to point 18 but related to point 17. It is of utmost importance that the EDPB Guidance on Legitimate interest makes very clear what the European Court of Justice means by lawful. It is not limited to interests enshrined in and determined by law; it requires that the alleged legitimate interest is not contrary to the law. Examples which address this are welcome.

We suggest: to move example 1 to point 17 and add the wording "of an interest contrary to the law" in the caption of Example 1.

CONCEPT

Comment 2: Example 2 does not provide the necessary clarification. It does not address whether an interest is present (not speculative/hypothetical) nor whether an interest is lawful or unlawful. This example seems to hustle 2 different requirements: Article 5 paragraph(1)(b) and article 6(1)(f) GDPR.

We suggest: to not tangle different requirements but keep it as clear as possible. We suggest deleting example 3.

Comment 3: The interplay between the ePrivacyDirective and the GDPR needs to be addressed in Example 3 (not all DPAs, however, are mandated to provide guidelines regarding the ePrivacy directive, therefore cooperation with the respective authorities on the ePrivacy Directive is needed to provide the necessary clarification; or the example replaced by another example without such interplay).

8. Point 19 (and further) of the draft Guidelines:

The Section 'Interest pursued by the controllers or a third party'.

Comment: in the section 'Interest pursued by the controllers or a third party', it would be helpful if the EDPB clarified that the term 'the controllers' includes both the 'first controller' as well as a possible 'second controller' to which the personal data may be disclosed. It would be welcomed if also is included that the 'second controller' determines its own purpose and means of processing, consequently, irrespective of the fact that the first controller must conduct the legitimate interest impact assessment, the 'second controller' must ensure compliance with all obligations of the GDPR independently from the 'first controller'.

We refer to the wording in recital 47 of the GDPR:

The legitimate interests of a controller, including those of a controller to which the personal data may be disclosed, or of a third party, may provide a legal basis for processing, provided that the interests or the fundamental rights and freedoms of the data subject are not overriding, taking into consideration the reasonable expectations of data subjects based on their relationship with the controller. Such 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. At any rate the existence of a legitimate interest would need careful assessment including whether a data subject can reasonably expect at the time and in the context of the collection of the personal data that processing for that purpose may take place. The interests and fundamental rights of the data subject could in particular override the interest of the data controller where personal data are processed in circumstances where data subjects do not reasonably expect further processing. … The processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest.'

9. Point 30 of the draft Guidelines:

"It should be noted that, in practice, It is generally easier for a controller to demonstrate the necessity if the processing to pursue its own legitimate interest than to pursue the interests of a third party, and that the latter kind of processing is generally less expected by the data subjects."

Comment: whether a data subject expects processing of personal data in the interest of a third party, depends on the specific case at hand and needs to be accessed on a case-by-case basis. For instance, a curator and the interests of the creditors.

We suggest: to refrain from generalizing.

We refer in this context to recitals 46-49 of the judgment of the European Court of Justice in the Koninklijke Nederlandse Lawn Tennisbond vs Autoriteit Persoonsgegevens (C-621/22 / ECLI:EU:C:2024:857):

> (46) While it is ultimately for the national court to assess whether, in relation to the processing of personal data at issue in the main proceedings, the three conditions referred to in paragraph 37 of the present judgment are satisfied, it is open to the Court, when giving a preliminary ruling on a reference, to give clarifications to guide the national court in that determination (judgments of 4 July 2023, *Meta Platforms and Others (General terms of use of a social network)*, C-252/21, EU:C:2023:537, paragraph 96, and of 7 December 2023, *SCHUFA Holding (Discharge from remaining debts)*, C-26/22 and C-64/22, EU:C:2023:958, paragraph 81 and the case-law cited).
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> (47) In the present case, as regards, first, the condition relating to the pursuit of a legitimate interest by the controller or by a third party, within the meaning of point (f) of the first subparagraph of Article 6(1) of the GDPR, the referring court refers to the commercial interest of the controller, that is to say a sports federation such as the KNLTB, which consists in the disclosure, for consideration, of the personal data of its members to third parties, namely, in this case, a company that sells sports products and a provider of games of chance and casino games in the Netherlands, for advertising or marketing purposes, in particular so that that company and provider may send advertising messages and special offers to those members.
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> (48) In that regard, the Court has not ruled out the possibility that a commercial interest of the controller which consists in the promotion and sale of advertising space for marketing purposes may be regarded as a legitimate interest within the meaning of point (f) of the first subparagraph of Article 6(1) of the GDPR (see, by analogy, judgment of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, paragraph 73).
>
> (49) In those circumstances, a commercial interest of the controller such as the one referred to in paragraph 47 of the present judgment could constitute a legitimate interest, within the meaning of point (f) of the first subparagraph of Article 6(1) of the GDPR, provided that it is not contrary to the law. It is, however, for the referring court to assess, on a case-by-case basis, whether such an interest exists, taking into account the applicable legal framework and all the circumstances of the case.

10. Point 35 (and further) of the draft Guidelines, the section ‘Data subjects’ interests, fundamental rights and freedoms’

    Comment: in the section ‘Data subjects’ interests, fundamental rights and freedoms’ the EDPB gives examples of three relevant interests: financial, social, or personal.

    We suggest: It would be helpful if the EDPB provided more examples and elaborated on the essential characteristics of each of these interests.

11. Point 40 of the draft Guidelines:

“*In qualifying the nature of the data to be processed, the controller should pay special attention to, among other things:*

- *The fact that special categories of personal data enjoy additional protection under Article 9 GDPR and, that the processing of special categories of personal data ("sensitive data") is only allowed under specific additional conditions set out in Article 9(2) GDPR.[47] In this regard, it should be kept in mind that a set of data that contains at least one sensitive data item is deemed sensitive data in its entirety, in particular if it is collected en bloc without it being possible to separate the data items from each other at the time of collection.[48] Further, it should be recalled that data are deemed sensitive if such data allow information falling within one of the categories referred to in Article 9(1) GDPR to be revealed.[49] It is irrelevant whether or not the information revealed by the processing operation in question is correct and whether the controller is acting with the aim of obtaining information that falls within one of the special categories referred to in that provision.[50] Hence, according to the jurisprudence of the CJEU, the relevant question is whether it is* ***objectively possible*** *to infer sensitive information from the data processed, irrespective of any intention of actually doing so.*

- *The fact that personal data relating to criminal convictions and offences enjoy additional protection under Article 10 GDPR.*

- *The types of data that data subjects generally consider to be more private (e.g., financial data, location data, etc.), or rather of a more public nature (e.g., data concerning one's professional role)."*

Comment 1: We underwrite the importance of controllers to carefully assess the nature of the personal data they process. Specifically, regarding the protection of sensitive data ex article 9 GDPR and criminal convictions and offences ex article 10 GDPR. However, we stress the importance and necessity that the interpretation of the GDPR needs to align with the legal text of the GDPR and – where applicable – with the interpretation of the European Court of Justice.

Regarding what is to be understood under sensitive data ex article 9 GDPR, we refer to recital 90 of the judgment of the European Court of Justice in the ND vs DR case (Case C-21/23; ECLI-code: ECLI:EU:C:2024:846)

> (90) Consequently, the information which customers of an operator of a pharmacy enter when ordering online pharmacy-only medicinal products the sale of which does not require a prescription constitutes data concerning health, within the meaning of Article 8(1) of Directive 95/46 and Article 9(1) of the GDPR, even where it is only with a certain degree of probability, and not with absolute certainty, that those medicinal products are intended for those customers.

We suggest: to replace the wording '*whether it is objectively possible to infer sensitive information from the data processed,*' with '*whether with a certain degree of probability, and not with absolute certainty, sensitive information can be inferred from the data processed*'.

The text would read as follows:

Hence, according to the jurisprudence of the CJEU, the relevant question is whether with a certain degree of probability, and not with absolute certainty, sensitive information can be inferred from the data processed, irrespective of any intention of actually doing so.

As the Advocate General in C-21/23 notes:

"*[u]nless the bulk of the processing of data relating to online commerce is to be subjected to the regime provided for in Article 9(2) of the GDPR, it therefore seems necessary to me to further refine the interpretation of the concept of 'data concerning health' as meaning that the conclusions that may be drawn from the data relating to an order must not be merely potential*".

12. Point 47 of the draft Guidelines:

    "The impact that the processing may have on the rights, freedoms and interests of the data subject should be taken into account by way of an objective assessment. When it is clear that a large number of data subjects share the same interests, a combined assessment of such interests may suffice (e.g. in the area of video surveillance). However, the more intrusive a processing operation is, the more specific circumstances should be factored into the assessment. In addition, the controller should not base its assessment of the interests at stake on an assumption that all of the affected data subjects share the same interests when it has – or should have – concrete indications of the existence of particular individual interests or when, from an objective perspective, it is simply not likely that all data subjects will have the same interest(s) the controller has assumed. This is especially true in the context of an employer-employee relationship."

    <u>Comment</u>: the balancing of interest of article 6(1)(f) GDPR needs to be interpreted in the light of article 21 GDPR. Article 21 is meant to personalize the balancing of interest. The controller is, therefore, allowed to generalize - to some extent - the interests of the data subjects as the personal situation of each relevant data subject is not (yet) known (prior to an objection ex article 21 GDPR).

    <u>We suggest</u>: to take article 21 GDPR into consideration and make clear that generalization to some extent is allowed/necessary. The controller does not need to make itself acquainted with the personal situation of its data subjects. General assumptions are allowed.

13. Point 68 of the draft Guidelines:

    "*In any case, information to the data subjects should make it clear that they can obtain information on the balancing test upon request.*"

    <u>Comment 1</u>: the EDPB recommends that controllers share the "information on the balancing test" upon a data subject's request. While sharing this information can indeed be considered best practice to demonstrate accountability and can be encouraged, it is <u>not</u> a measure prescribed by the GDPR and, as such, cannot be seen as an obligatory requirement.

    We <u>suggest:</u> to replace 'should' with 'could'

    <u>Comment 2</u>: Providing information on the balancing test might be required in the event of an objection by the data subject ex article 21 GDPR, if a controller is to continue its processing activities.

    <u>We suggest</u>: this could be clarified in the wording of point 68.

14. Point 71 (and further) of the draft Guidelines, 'Processing for the purpose of preventing fraud':

CONCEPT

Comment: The purpose of fraud investigation is to determine whether a person is guilty of suspected fraud. With this knowledge, the individual can be pressed with charges and be held liable for its conduct. The findings of the investigation, however, can also be used to file a report with an investigative agency. Such investigation can lead to insights into effective preventive measures to be taken for the future.

We suggest: It would be much appreciated if this example of 'fraude prevention' is elaborated on to include conducting investigations in response to fraud that has occurred.

15. Point 82 of the draft Guidelines:

"*Not all profiling activities lead to automated decision-making that falls under Article 22 GDPR. However, regardless of whether the controller intends to engage in profiling that would lead to automated decision-making that falls under Article 22 GDPR, the following elements are particularly relevant when performing the balancing exercise before invoking Article 6(1)(f) GDPR as a legal basis:*

- *the level of detail of the profile (a data subject profiled within a broadly described cohort such as "people with an interest in English literature", or segmented and targeted on a granular level);*
- *the comprehensiveness of the profile (whether the profile only describes a small aspect of the data subject, or paints a more comprehensive picture);*
- *the impact of the profiling (the effects on the data subject);*
- *the possible future combination of profiles; and*
- *the safeguards ensuring fairness, non-discrimination and accuracy in the profiling process.* [102] "

Comment: We support including this clarification.

CONCEPT

16. Point 101 of the draft Guidelines:

"*Before engaging in the processing of personal data for direct marketing purposes, controllers should consider specific European, as well as national, legislation which may require consent for certain operations in the context of direct marketing or prohibit some kinds of direct marketing.*"

Comment: It would be welcomed if together with the relevant competent authorities regarding the ePrivacy directive and subsequent national implementing acts, clarification could be given about the interplay between the GDPR and the ePrivacy Directive.

17. We are of the opinion that Opinion WP 217 was one of the best opinions written by the Art. 29 Working Party.

    We suggest: We would specifically like to maintain from the current WP29 Guidelines on legitimate interest[2] (off course updating the references to the applicable clauses of the GDPR):

[2] Guideline on Legitimate interest WP217, page 24

a. Guideline on Legitimate interest WP217, page 24:
"In the view of the Working Party, the notion of legitimate interest could include a broad range of interests, whether trivial or very compelling, straightforward or more controversial. It will then be in a second step, when it comes to balancing these interests against the interests and fundamental rights of the data subjects, that a more restricted approach and more substantive analysis should be taken."

b. Guideline on Legitimate interest WP217, page 25:
"The fact that the controller has such a legitimate interest in the processing of certain data does not mean that it can necessarily rely on Article 7(f) as a legal ground for the processing. The legitimacy of the data controller's interest is just a starting point, one of the elements that need to be analysed under Article 7(f). Whether Article 7(f) can be relied on will depend on the outcome of the balancing test that follows.

To illustrate: controllers may have a legitimate interest in getting to know their customers' preferences so as to enable them to better personalise their offers, and ultimately, offer products and services that better meet the needs and desires of the customers. In light of this, Article 7(f) may be an appropriate legal ground to be used for some types of marketing activities, on-line and off-line, provided that appropriate safeguards are in place (including, among others, a workable mechanism to allow objecting to such a processing under Article 14(b), as will be shown in Section III.3.6 The right to object and beyond)."

c. Guideline on Legitimate interest WP217, page 26:
"*As will be shown later, if the interest pursued by the controller is not compelling, the interests and rights of the data subject are more likely to override the legitimate - but less significant - interests of the controller. At the same time, this does not mean that less compelling interests of the controller cannot sometimes override the interests and rights of the data subjects: this typically happens when the impact of the processing on the data subjects is also less significant."*

d. Guideline on Legitimate interest WP217, page 30:

"It is useful to imagine both the legitimate interests of the controller and the impact on the interests and rights of the data subject on a spectrum. Legitimate interests can range from insignificant through somewhat important to compelling. Similarly, the impact on the interests and rights of the data subjects may be more or may be less significant and may range from trivial to very serious.

Legitimate interests of the controller, when minor and not very compelling may, in general, only override the interests and rights of data subjects in cases where the impact on these rights and interests are even more trivial. On the other hand, important and compelling legitimate interests may in some cases and subject to safeguards and measures justify even significant intrusion into privacy or other significant impact on the interests or rights of the data subjects.[66]

Here it is important to highlight the special role that safeguards may play[67] in reducing the undue impact on the data subjects, and thereby changing the balance of rights and interests to the extent that the data controller's legitimate interests will not be overridden. The use of safeguards alone is of course not sufficient to justify any kind of processing in all contexts. Further, the safeguards in question must be adequate and sufficient, and must unquestionably and significantly reduce the impacts on data subjects."

e. Guideline on Legitimate interest WP217, page 35:

"*In general, the fact that a controller acts not only in its own legitimate (e.g. business) interest, but also in the interests of the wider community, can give more 'weight' to that interest.*

CONCEPT

The more compelling the public interest or the interest of the wider community, and the more clearly acknowledged and expected it is in the community and by data subjects that the controller can take action and process data in pursuit of these interests, the more heavily this legitimate interest weighs in the balance.”

f. Guideline on Legitimate interest WP217, page 30:

Appropriate use of Article 7(f), in the right circumstances and subject to adequate safeguards, may help prevent misuse of, and over-reliance on, other legal grounds. An appropriate assessment of the balance under Article 7(f), often with an opportunity to opt-out of the processing, may in some cases be a valid alternative to inappropriate use of, for instance, the ground of 'consent' or ‘necessary for the performance of a contract'. Considered in this way, Article 7(f) presents complementary safeguards compared to the other pre-determined grounds. It should thus not be considered as 'the weakest link' or an open door to legitimise all data processing activities which do not fall under any of the other legal grounds.”

18. We recommend the guidelines to address the following specific themes, in relation to Art 6(1)(f) as a legal ground for processing:

    a. Processing for the purpose of measuring marketing effectiveness
    b. Processing for the purpose of transparency of marketing investments
    c. Processing for improving customer satisfaction (what kind of tenant/customer is it, what kind of person or tone of voice is needed from company’s side to match)
    d. The anonymization of personal data
    e. The use of personal data for AI purposes (training and deployment). We refer to the whitepaper of the European Commission for the importance of AI for our European economy[3].
    f. It would be logical if the EDPB Opinion would also have a chapter on art. 6(4) since the balancing test is almost the same as in art. 6(1)(f). Considering that the application of art. 6(1) is only relevant for the **collection** and **primary use** of the personal data. Any **secondary use** per art. 5(1)(b) is governed by art. 6(4) and does not also need a legal basis in art. 6(1), according to recital 50. Therefore, almost all of the original items mentioned in Question 2 are covered by art. 6(4), not by art. 6(1)(f).

Kind regards,

Mrs. Mr. Irvette Tempelman

[3] https://ec.europa.eu/info/publications/white-paper-artificial-intelligence-european-approach-excellence-and-trust_en