

Bitkom views on EDPB Guidelines 1/2024

on processing of personal data based on Article 6
(1) (f) GDPR

1 Introduction

Bitkom welcomes the opportunity to comment on the European Data Protection Board (EDPB) guidelines regarding data processing based on legitimate interest under Article 6 (1) (f) GDPR. In the interest of our members, we aim to uphold the significance and practical value of this concept in daily practice. The guidelines serve as a key point of reference, especially for companies seeking to meet data protection requirements in a legally compliant manner while simultaneously addressing legitimate business interests.

This position paper is based on feedback from our member companies and aims to contribute to a fair balance between data protection and business interests in accordance with Recital 4 (3) GDPR.

2 Key Concerns and Remarks

Scope of Article 6 (1) (f) GDPR

The EDPB interprets Article 6 (1) (f) GDPR in a restrictive way to avoid legitimate interests being seen as a catch-all legal basis (cf. Introduction 9.) However, this does not fully reflect the potential of legitimate interest as a legal basis. The scope of Art. 6 (1) (f) GDPR is already restricted by the criterion of necessity and the interpretation of this criterion in accordance with European law. Bitkom believes that this article should encompass a broader range of legitimate interests. We therefore recommend that the EDPB adopt a more expansive approach and recognize a broader interpretation of the article, flexible application. Legitimate interest is intentionally defined broadly in the GDPR. In principle, all economic, legal or non-material interests are legitimate within the meaning of the GDPR as long as they are clearly defined in advance. In particular, the wording of Article 6 (1) GDPR underlines the legislators intent to broadly apply this legal basis ("except where (...)").

Need for situational Assessments

Bitkom emphasizes that the Guidelines should more clearly address the need for a flexible, situation-related assessment. The granularity required to assess and document legitimate interests is challenging in practice, especially for a wide range of business applications. In order to give companies more room for maneuver, the EDPB should promote an approach that takes into account both the legal requirements and the specific safeguards that companies implement to ensure fair and secure data

processing. Moreover, considering the involved challenges from a practical perspective, the EDPB should apply a more practical approach as regards the controllers' accountability obligations in context of Article 6 (1)(f) GDPR.

Transparency Requirements and Reasonable Expectations

The Guidelines should more strongly recognize that transparency about data processing significantly shapes the expectations of data subjects. The information provided to data subjects as part of their rights under Articles 12 to 14 of the GDPR contain a variety of information about the specific data processing. Hence, this information builds and shapes the data subjects' expectations, and thus influences the assessment of the adequacy of processing. Transparent handling of data processing procedures builds trust and supports the assessment of legitimate interests of data controllers. Furthermore, precise and clear articulation of pursued interests is not a feature of the legitimacy of the interests but a separate requirement under Art. 5 GDPR. The fact that the purposes of processing must not be speculative is also an effect of Art. 5 and has nothing directly to do with the legitimacy of interests. On this point, the guideline does not distinguish clearly enough between Art. 5 and Art. 6 GDPR.

Consideration of the Right to Object in the Context of Legitimate Interest

The GDPR balances the Controller's legitimate interest assessment with the data subject's right to object. As detailed in Art. 21 (1) GDPR, each individual has the right to object to a data processing operation on grounds of their personal situation. This is a corrective right given to the data subject to account for the difficulty that a Controller faces when assessing the interests of groups of individuals. The EDPB should acknowledge that the GDPR already intended to provide the data subject with corrective measures if specific interests applying only to individual members of a group were not considered during the legitimate interest assessment. It is disproportionate to require the Controller to anticipate such interests during the legitimate interest assessment (marginal number 47.).

Interplay with the EU data strategy

It should be noted that companies must also comply with other EU regulations in addition to the GDPR. Including, but not limited to the objectives of the AI-Act, the Data Act and/or the Data Governance Act must be brought into line with one another. A narrow interpretation of the legitimate interests makes it almost impossible for companies to comply with the aforementioned regulations.

3 Recommendations for Practical Implementation

Positive Examples and Clarifications to Support Companies

Bitkom suggests that the Guidelines include more positive examples and specific guidance on measures to safeguard legitimate interests, such as fraud prevention, improving customer service, product improvement, protecting information security or AI-Models. The GDPR emphasizes the principle of proportionality (Recital 4 (2) GDPR) and that the protection of natural persons is not intended to restrict the free movement of personal data (Article 1 (3) GDPR). Such examples could thus help companies to better understand and effectively implement the EDPB's legitimate interest requirements in order to comply with the aforementioned objectives of the GDPR. Clear guidance on safeguards and concrete requirements in specific use cases would increase legal certainty in practice.

Consideration of Controller and Data Subject Alignment

Bitkom recommends that the EDPB points out situations where the interests of controllers and data subjects are aligned rather than in conflict. The Guidelines could currently imply that the interests of controllers are inherently in conflict with the interests of data subjects, which is not always the case.

Consideration of Existing Safeguards in the Balancing Process

The guidance should recognize that many of the measures required by the GDPR - such as the right to object, data minimization and security measures - already significantly reduce the potential impact of data processing on data subjects. The requirement that measures must mandatorily go "beyond the legal minimum" in order to be considered in the balancing process does not seem practical, justified nor proportional. The EDPB should empathize that companies can also include existing measures in the legitimate interest assessment and give them appropriate recognition (cf. marginal number 57).

Sensitivity of Data and Balancing Test Flexibility

The Guidelines suggest that higher data sensitivity always implies a higher risk for data subjects. Bitkom points out that this assumption does not necessarily apply in all cases and that sensitivity should be assessed on a situational basis (cf. marginal number 41).

Intent to evaluate in the context of Article 9 GDPR

Bitkom recognizes the need for a high level of protection for special categories of personal data under Article 9 GDPR, but views marginal number 40 as challenging for practical application. Specifically, the approach of classifying entire data sets as sensitive if they contain at least one sensitive data point—even when the sensitive information may not be explicitly processed or evaluated—creates significant practical hurdles for businesses.

A teleological reduction of Article 9 GDPR, which would apply only in cases where there is a concrete intent to evaluate, would enable a more practical balance between data protection requirements and legitimate interests. Bitkom advocates that the EDPB consider this aspect in its guidelines to allow companies a targeted and proportionate handling of sensitive data, while also respecting the rights and interests of data subjects.

4 Final Remarks and Outlook

Bitkom appeals to the EDPB to recognize the importance of legitimate interest as a legal basis for data processing in the daily practice of numerous companies across the EU/EEA and to promote a balanced consideration between data protection and economic interests. This is not just a key consideration of the GDPR (see Recital 4 GDPR), but also essential to provide companies with the necessary legal certainty while protecting the rights and freedoms of data subjects.

Bitkom represents more than 2,200 companies from the digital economy. They generate an annual turnover of 200 billion euros in Germany and employ more than 2 million people. Among the members are 1,000 small and medium-sized businesses, over 500 start-ups and almost all global players. These companies provide services in software, IT, telecommunications or the internet, produce hardware and consumer electronics, work in digital media, create content, operate platforms or are in other ways affiliated with the digital economy. 82 percent of the members' headquarters are in Germany, 8 percent in the rest of the EU and 7 percent in the US. 3 percent are from other regions of the world. Bitkom promotes and drives the digital transformation of the German economy and advocates for citizens to participate in and benefit from digitalisation. At the heart of Bitkom's concerns are ensuring a strong European digital policy and a fully integrated digital single market, as well as making Germany a key driver of digital change in Europe and the world.

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