

Stockholm November 20, 2024

Comments to the European Data Protection Authority

Comments on the draft guidelines on processing personal data under Article 6(1)(f) of the GDPR, adopted on October 8, 2024.

The European Data Protection Board (EDPB) has issued draft guidelines on processing personal data under Article 6(1)(f) (legitimate interest) of the General Data Protection Regulation (GDPR). While the Confederation of Swedish Enterprise acknowledges and values the EDPB's intent to provide clarity, it is vital that these guidelines do not impose additional obligations or constraints beyond the original intent of the GDPR. This is particularly pertinent in areas such as examples, documentation, accountability, the interpretation of necessity, balancing organisational interests with data subject rights, and the principle of proportionality. Moreover, we stress the importance of utilising legitimate interest to develop applications and models of artificial intelligence (AI).

Need for Positive Examples

We believe that a risk-based decision-making process is a critical component of GDPR compliance. Overly extensive examples of illegal processing could significantly limit the ability to make independent assessments, even when circumstances differ. However, examples of customary processing that fall within a legitimate interest framework are beneficial. We recommend that the EDPB include more positive examples and incorporate the CJEU judgment C-621/22 into the main text, which recognizes that a commercial interest can constitute a legitimate interest.

Stringent Documentation Requirements

The guidelines call for detailed documentation for each processing activity based on legitimate interests, including comprehensive assessments and records of the balancing test between the controller's interests and the data subject's rights. While the GDPR mandates accountability, the level of detail suggested in the guidelines could be perceived as exceeding the requirements directly stated in the legal text.

Restrictive Interpretation of 'Necessity'

The guidelines adopt a stringent interpretation of 'necessity' for processing under legitimate interests, requiring controllers to demonstrate that processing is indispensable and that no less intrusive means are available. This restrictive view may limit the flexibility intended by the GDPR, particularly where processing serves legitimate business purposes without infringing on data subjects' rights.

Overemphasis on Data Subject Expectations

The GDPR, particularly Recital 47, acknowledges that data subjects' reasonable expectations should be considered. However, the guidelines place disproportionate weight on this factor. It is crucial that the guidelines do not unduly restrict legitimate processing activities that may not be anticipated by data subjects, as the risk-based approach should not be disregarded.

The risk-based approach

The GDPR promotes a risk-based approach to data protection, allowing organisations to tailor compliance efforts based on the nature and scope of processing activities. The guidelines' detailed requirements for legitimate interests processing may undermine this approach, leading to a more rigid methodology that does not account for varying levels of risk.

Information and transparency obligations

Information obligations are specified in the GDPR. Consistent with the accountability principle and the prerogative of data protection authorities to inspect documents, the guidelines should clarify that information on the balancing test should be provided to data protection authorities rather than data subjects. This will maintain the balance between the right to protect intellectual property and trade secrets and avoid information overload for data subjects without a clear legal basis. Also, providing a copy of the legitimate interest assessment to the data subject would lead to no additional privacy protections for data subjects but would lead to significant additional operational burdens for controllers.

Principle of Proportionality

The principle of proportionality is not adequately represented in the guidelines. Proportionality should be mentioned throughout the document, particularly regarding the documentation of impact assessments and the depth of the balancing exercise, to ensure they are proportionate to the risk of the data processing.

Role of Data Protection Officers (DPOs)

The guidelines propose a permanent involvement of DPOs in assessing the applicability of Article 6(1)(f), which exceeds the GDPR's risk-based approach. DPOs should have the discretion to opt out of advising on low-risk issues.

Innovation, Competitiveness and AI Usage

A significant portion of industry innovation is linked to the processing of large data sets to create AI models and applications. Developing AI often requires large amounts of data for machine learning, such as training algorithms for self-driving vehicles or safety systems. Additionally, large data sets can provide new insights, such as discovering unknown correlations between phenomena.

For businesses to remain innovative, competitive, and promote AI usage, they must be able to extract aggregated knowledge at the group level. Consent-based processing is often impractical, and it is frequently uncertain whether legitimate interest can be appropriately applied. Although legal assessments must be performed for each project, the current legal framework appears overly restrictive and uncertain for fostering innovation.

The right to the protection of personal data should be understood in its societal context and balanced against other fundamental rights, in line with the principle of proportionality. It is important that the guidelines do not unduly restrict processing activities that are legitimate but not anticipated by data subjects. The risk-based approach is particularly crucial for AI use cases. Given the rapid pace of technological development, AI systems complicate the extent to which data usage can be explained as suggested by the EDPB. While transparency is critical for AI use cases, the complexity of AI makes achieving full transparency challenging. This complexity should not preclude the use of legitimate interest as a legal basis.

Legitimate interest is the most important and probably the most used legal ground. This legal ground is crucial to keep competitiveness and innovation but also to help against consent fatigue and lost datasets representation from citizens and consumers.

To promote innovation, competitiveness, and AI usage, it is essential to be able to use innovation-friendly processing grounds. Legitimate interest is a key legal basis, crucial for competitiveness and innovation, but also to help against consent fatigue and lost datasets representation from citizens and consumers.

A survey by Demoskop in January 2022 among 1,410 Swedes revealed that seven out of ten respondents preferred companies to use legitimate interest over consent.

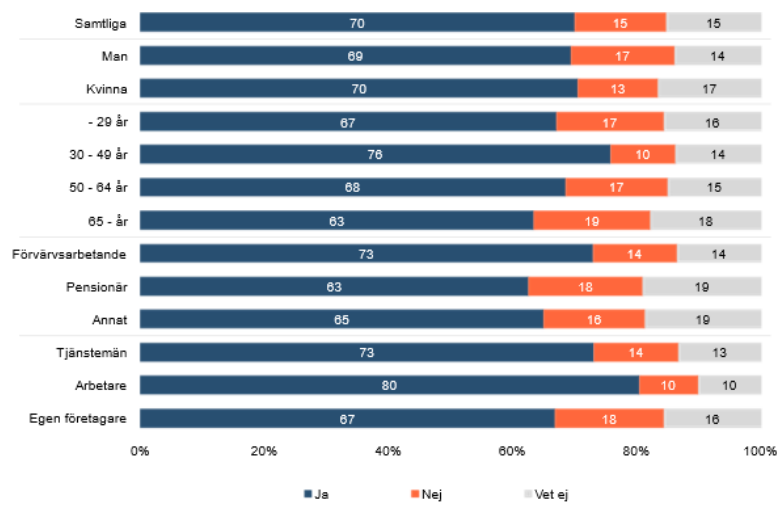
Viktigt att lämna samtycke

Sju av tio är positiva till att samtycket istället byts ut mot att företagen tar ansvar för att följa lagar och regler. En klar majoritet alla grupper är för en sådan lösning.

Fråga: Borde ditt samtycke, till exempel vid cookieförfrågan, bytas ut mot att företagen tar ansvar för att de följer lagar och regler (innehar sk berättigat intresse att använda dina uppgifter enligt GDPR)?

Bas: Samtliga, 1410 intervjuer

demoskop



Question: Should your consent, for example in the case of a cookie request, be replaced by companies taking responsibility for complying with laws and regulations (having a so-called legitimate interest in using your data according to the GDPR)?

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