Doctrine

Consultation on Guidelines 1/2024 on processing of personal data based on Article 6(1)(f) GDPR - Doctrine

1. General comments

➢ While clear interpretations and guidelines are expected on the topic of legitimate interest, **Doctrine notes that the EDPB does not address artificial intelligence models and systems nor publicly available data (open data) in its draft**. National data protection authorities, such as the French data protection authority (CNIL), have published, or are in the process of publishing, recommendations on these issues:

- French DPA (CNIL): Opening and re-use of data published on the Internet and Using the legal basis of legitimate interest to develop an AI system
- German DPAs published a number of guidance documents and position papers: Flyer and Checklist on GDPR-compliant Artificial Intelligence (Bavarian DPA) ; Legal bases in Data Protection for the use of Artificial Intelligence (DPA of Baden Wuerttemberg).
- ICO: How do we ensure lawfulness in AI?

➢ Doctrine also notes that EDPB adopts a strict stance regarding the processing of personal data, **with guidelines that will dramaticaly increase the data controller's accountability workload**.

➢ It seems to Doctrine that this new position might have been influenced by the Meta case (**CJEU - C-251/21 Meta Platforms and Others v Bundeskartellamt)** and therefore by social network business models, which cannot be generalized to all actors processing personal data.

As a general comment, Doctrine suggests that EDPB addresses both topics of **AI models & systems** as well as **data available to the public** in its draft. Doctrine also suggests that EDPB takes into account the feasibility of the measures it recommends and the fundamental differences between actors processing personal data.

2. Specific comments

2.1. The notion of interest

➢ The guidelines drastically **reduce** the scope of interests required to apply Article 6(1)(f). While G29 used to link them, **EDPB draws a clear line between the interests of third parties and the interests of society at large**, emphasizing that third-party interests differ from community interests, although they can sometimes align.

G29	EDPB
*An interest, on the other hand, is the broader stake that a controller may have in the processing, or the benefit that the controller derives - **or that society might derive** - from the processing.*	*An "interest", on the other hand, is the broader stake or benefit that a controller or third party may have in engaging in a specific processing activity.*

Doctrine considers that taking into account the broader interests of society **legitimates the more specific interests of the controller and third parties**. For instance, Doctrine is developing technological innovations that revolutionize the search for legal information. Doctrine considers that it is pursuing several interests:

- The public's interest in being able to consult all legal information. This interest extends from legal professionals to litigants, and more generally, any citizen that wants to learn more about the law. This interest responds to a fundamental right for the benefit of society in general.
- The interest of all re-users in re-using public information for commercial or non-commercial purposes, as guaranteed by Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information.

In this case, the distinction between "third-party interests" and "company interests" is irrelevant.

➢ In the same vein, it seems to Doctrine that EDPB considers that ***general public interest* can only be invoked as a legal basis for processing by public authorities, or by other organization when they are tasked or required by law to pursue such interests**, and concludes that ***legitimate interest* does not, *a priori*, qualify for addressing *general public interest***.

> 25. *General public interest or third party's interest*. Interests of third parties, as mentioned in Article 6(1)(f) GDPR, are not to be confused with interests of the wider community (general public interests), although in some cases the interests pursued by a specific controller or a specific third party may also serve broader interests.[37] The interests of the wider community are mainly subject to the justifications provided for in Article 6(1)(e) or (c), if controllers are tasked or required by law to preserve or pursue such interests. This is the case, for instance, when private operators are obliged to assist law enforcement authorities in their efforts to combat certain illegal activities. Where a controller carries out further activities which do not fall within such specific legal obligations set out in laws and regulations, it needs to demonstrate, that this is done in pursuit of the controller's own legitimate interests or those of specific third parties.[38] In any event, a legitimate interest may not be invoked with the aim or effect of circumventing legal requirements.

Doctrine strongly disagrees with this analysis.

In the case MAGYAR HELSINKI BIZOTTSÁG v. HUNGARY[1], the ECHR considers that the question of "*whether the person seeking access to the information in question does so with a view to informing the public in the capacity of a public "watchdog""* is an important consideration. This role is not only played by NGOs and the press, but also by "*the Internet in enhancing the public's access to news and facilitating the dissemination of information*". A private company can pursue interests of the wider community.

For example, a newspaper is a commercial company that is necessary to the free circulation of news and information. **This is especially the case for reusers of public information which constitutes a further processing.**

In fact, in the context of open data, several stakeholders process data: the provider of public data and the reuser of public data. If the first processing operation is based on article 6(1)(c) or 6(1)(e), the second can only be based on article 6(1)(f).

The stated aim of open data is to promote serendipity, and to allow uses to flourish in the hope that some of them will produce spin-offs for the community.

Recitals no. 8 and 9 of the Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information clarifies that:

> *(8)* [...] *Documents produced by public sector bodies of the executive, legislature or judiciary constitute* ***a vast, diverse and valuable pool of resources that can benefit society****. Providing that information, which includes dynamic data, in a commonly used electronic format allows citizens and legal entities to find new ways* ***to use them and create new, innovative products and services.*** [...].
>
> *(9) Public sector information represents an extraordinary source of data that can contribute to improving the internal market and to the development of new applications for consumers and legal entities.* ***Intelligent data usage, including their processing through artificial intelligence applications, can have a transformative effect on all sectors of the economy****.*

➢ Finally, based on the CJEU judgment in *Meta v. Bundeskartellamt*, EDPB specifies that "*as a general rule, the interest pursued by the controller should be related to the actual activities of the controller."* (paragraph 19). **Does this mean that a data controller pursuing an economic activity cannot rely on a non-economic interest?**

Doctrine requests that EDPB nuances this opposition between interests of third parties and general public interests, as they can often align.

2.2. Three-pronged test implementation

[1] CEDH, Cour (Grande Chambre), 8 nov. 2016, n° 18030/11: https://www.doctrine.fr/d/CEDH/HFJUD/GRANDCHAMBER/2016/CEDH001-168716 (in english: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-167828%22]})

➤ Doctrine is surprised that EDPB makes the **assumption** that it is more difficult for the controller to establish the basis for legitimate interests pursued by third parties, in the context of the three-pronged test.

> 30. It should be noted that, in practice, it is generally easier for a controller to demonstrate the necessity of the processing to pursue its own legitimate interests than to pursue the interests of a third party, and that the latter kind of processing is generally less expected by the data subjects.

Doctrine suggests that EDPB removes this paragraph.

2.3. Rights

➤ **Transparency**: EDPB recommends that data controllers produce new information documentation specifically concerning the balance of interests. Doctrine considers that this additional measure should only be recommended in consideration of the scope and risks associated with the processing.

> 68. It should be noted that the controller can also provide the data subject with information from the balancing test in advance of any collection of personal data. To avoid information fatigue, this can be included within a layered privacy statement/notice. In any case, information to the data subjects should make it clear that they can obtain information on the balancing test upon request. This is essential to ensure effective transparency and to allow data subjects to dispel possible doubts as to whether the balancing test has been carried out fairly by the controller or assess whether they might have grounds to file a complaint with a supervisory authority.[75] Such transparency obligation also follows from the accountability principle in Article 5(2) GDPR, which requires the controller to be able to demonstrate compliance with each of the principles set out in Article 5(1) GDPR, including the lawfulness principle. Furthermore, as described above (see paras. 51-53), the reasonable expectations of data subjects should be considered in the balancing test. While a failure to provide information can contribute to the data subjects being surprised, the mere fulfilment of information duties according to Articles 12, 13 and 14 GDPR is not sufficient in itself to consider that the data subjects can reasonably expect a given processing.

Reading Articles 13 and 14 of the GDPR, the controller must only inform data subjects of the legitimate interests as such. Even according to Article 15 of the GDPR, the regulation does not impose any obligation to provide this kind of documentation.

The accountability principle under Article 5(2) of the GDPR requires controllers to demonstrate to the Data Protection Authority their compliance with the principles outlined in Article 5(1). It does not grant data subjects an enforceable right to request the three-prong test from the controller.

Also, it should be noted that the full three-pronged test might integrate sensible business information, which might compromise trade secrets.

Doctrine suggests that EDPB clearly states what is a recommendation and what is legal obligation.

In the case of producing new information documentation specifically concerning the balance of interests, **Doctrine notes that this only constitutes a best practice that cannot be inferred from the law**.

➢ **Right to object**: The EDPB interprets the conditions of Article 21 GDPR in favor of the data subjects.

> her under Article 21(1) GDPR.[81] However, the fact that the data subject has not elaborated much on their "particular situation" in their objection is not *per se* sufficient to dismiss the objection. If the controller has doubts as to the "particular situation" of the data subject, it may ask the data subject to further specify the request.

Doctrine finds that the sentence "*not elaborated much on their "particular situation" in their objection*" is confusing and suggests further clarification of this notion.

Also, the clarifications issued by the French Conseil d'Etat and the ECJ should be highlighted: the right to object is **subjected to the existence of legitimate reasons that predominantly relate to one's particular concrete[2] situation** as opposed to a *general fears*[3].

In other words, the fact that the data subjects base their objection on *general fears* only is **sufficient** to dismiss the objection.

Doctrine suggests that EDPB clarifies its interpretation of Article 21 GDPR and clearly states that the data subject must provide information on their "particular situation" in their objection.

➢ **The articulation between the right to object and the right to erasure**:

> 78. Furthermore, it should be stressed that, in general, the criteria to determine whether an objection or an erasure request should be granted are essentially the same under Article 21 and Article 17 (i.e., the request should be granted unless one can demonstrate "overriding legitimate grounds"). This implies that, as a rule, if an objection under Article 21(1) GDPR is granted, a related erasure request under Article 17(1)(c) GDPR should also be granted.[96]

In the domain of public information re-use, particular attention should be dedicated to the articulation between the right to erasure and the right to object.

Exceptions to the right to erasure are listed in article 17.3). This includes: **when the processing is necessary for exercising the right of freedom of expression and information**.

Doctrine suggests that EDPB removes this paragraph.

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[2] CJUE, Cour, 9 mars 2017, C-398/15: https://www.doctrine.fr/d/CJUE/2017/CJUE62015CJ0398 (in english: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62015CJ0398) : *The balancing to be carried out under subparagraph (a) of the first paragraph of Article 14 thus enables account to be taken in a more specific manner of all the circumstances surrounding the data subject's particular situation.*

[3] Conseil d'Etat, 10e - 9e ch. réunies, 18 mars 2019, n° 406313

3. Suggested additions

➢ Doctrine requests that EDPB takes into account that the pursuit of a fundamental right necessarily constitutes the pursuit of a legitimate interest and, therefore, a benefit for third parties both in the reuse of publicly available data and in the use of AI.

➢ Doctrine requests that EDPB integrates that the processing of public data containing personal data can be reasonably expected by the data subjects.

> *"The data made available to the public is done so under open data legislation, which is specifically aimed at enabling their free reuse due to the potential interest they may hold for third parties. In this case, if the purpose pursued by the reuser is itself lawful, the processing will almost always be based on a legitimate interest."* [4]

➢ Doctrine requests that EDPB adds that the processing of data in IA systems can rely on the basis of legitimate interests[5], not only for the controller but also for third parties. Although Doctrine acknowledges that it requires a case-by-case assessment in view of specific process circumstances, AI constraints must not be increased. Otherwise, this would considerably slow down innovation and economy.

About Doctrine

Doctrine, the leading legal AI platform, uses artificial intelligence to centralize all available legal information and make it accessible and relevant for legal professionals (lawyers, in-house counsel, judges). Founded in 2016, Doctrine now serves over 14,000 paying clients, with nearly one million French citizens accessing its site monthly for free legal information. Profitable since 2021, Doctrine employs 170 people and has begun international expansion in Italy.

Doctrine leverages AI to:

- **Pseudonymize court decisions** before publication to ensure privacy.
- **Identify legal references in long texts**, saving professionals valuable time.
- **Enhance its legal search engine** for natural language use, promoting access to law.
- **Contextualize and cross-reference legal information**, adding relevant references such as parliamentary discussions.

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[4] French DPA (CNIL) : https://www.cnil.fr/sites/cnil/files/2024-06/recommandations_reutilisateurs_donnees_publiees_sur_internet.pdf#page=8

[5] A position shared by several authorities (The DPA of Baden-Wuerttemberg ; The French DPA (CNIL) ; The United Kingdom's DPA (ICO).

- **Automate low-value tasks** using generative AI, such as administrative duties, archiving, and classification.