Feedback given about the Guidelines 1/2024 on processing of personal data based on Article 6(1)(f) GDPR - Adopted on 8 October 2024

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A. General remarks

1. Clarification of definitions:

o Define more precisely what a "legitimate interest" is: Although the Guidelines mention that legitimate interest should not be used as a last resort, it would be useful to include concrete examples of what constitutes a legitimate interest in different contexts (commercial, non-profit, etc.).

2. Assessment of necessity and balancing of interests:

o Provide a detailed methodology for assessing the necessity of processing: The Guidelines could include a framework or checklist to help controllers assess whether processing is necessary to pursue the identified legitimate interest.

o Specify the balancing criteria: Detail the specific criteria to be considered when balancing interests, such as the nature of the data, the context of the processing, and the reasonable expectations of the data subjects.

It would be interesting to formally establish a methodology for establishing the possible presence of legitimate interest, as has been done for example by the English supervisory authority.

B. Remarks concerning children (p26-28) :

These draft guidelines may seem to invite not to use the legal basis of legitimate interest for children. However, it does not really provide any means of limiting the risks concerning them.

Concerning children, it could initially be considered that the protection of children must always prevail, and that the legal basis of the legitimate interest of the data controller is unusable, or very little usable. This is not the case for two reasons. The first reason is a practical reason: such a prohibition could not be respected in all cases (for example at school). The second is a legal reason. Indeed, the letter of the text allows the use of this legal basis except if the interests of minors prevail. This obligation requires the implementation of particularly important measures and reinforced protection to protect minors.La prise en compte des intérêts des enfants doit d'abord passer par une information adaptée en plus d'une vérification de leur âge autant que possible (G29, Opinion 15/2011 on the definition of consent, 13 july 2011).

This draft guideline may seem to suggest not using the legal basis of legitimate interest for children. However, it does not really provide any means of limiting the risks concerning them. The information can then be provided through drawings and icons allowing a better understanding of the processing and the issues for children. Indeed, it is important that information on the processing and the risks involved is given in a way that takes into account the fact that the person concerned is a child https://ico.org.uk/for organisations/guide-to-data-protection/key-data-protection-themes/children/).

The Canadian Data Protection Supervisory Authority has also provided guidance on this topic. According to it, the data controller may also uphold the interests of children by explicitly encouraging them to seek advice from the holders of parental authority in order to obtain maximum information and to fully understand the processing in question. This authority also recommends deleting inactive children's accounts after a certain period of time, so as not to process children's data simply because they have forgotten to do so. (Commissariat à la protection de la vie privée du Canada, Enquête sur les pratiques de traitement des renseignements personnels de Ganz Inc., Rapport de conclusions en vertu de la LPRPDE no 2014-011 – 7 octobre https://www.priv.gc.ca/fr/mesures-et-decisions-prises-par-le-commissariat/enquetes/enquetes-visant-les-entreprises/2014/lprpde-2014-011/?wbdisable=true)

The promotion of children's interests and their information can also be carried out through an educational policy carried out both by data controllers (in the context of the processing in question, where they can regularly explain their actions) and within the framework of the national education policy. It is also relevant to protect children by limiting the number of people who can access their personal information (both internally and concerning profiles on social networks, for example by not indexing them on the Internet) and by minimizing the number of data collected (for example geolocation). If this proposal were included in the guidelines, the protection of children's interests would be considered more.

C. Remarks on transparency

Page 21, point 28, it is written: « *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. 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. »

This idea is however problematic:

- If balancing tests are done differently depending on the controllers, the different methods will cause confusion for the data subjects. Without a harmonization proposal from the EDPB, the idea of providing information on balancing tests to data subjects is more likely to create confusion, instead of improving transparency.

- It may have the effect of establishing a method for improving balancing tests in the light of possible sanctions. However, the work on the method for carrying out this test should be established upstream by the EDPB. Otherwise, there will be disparities between Member States, until the CJEU harmonizes them.

- Balancing tests are carried out by data protection experts, in conjunction with operational staff. They may be clear for experts, but they will be less so for “lay people”. Communicating information that is in fact unclear is more likely to increase consent fatigue and is unlikely to improve transparency.

- In practice, and not communicating this information to the data subjects cannot surprise them. Indeed, most data subjects are not aware of this regulation. Conversely, providing them with this legal information will not help them better understand the processing. It could also encourage data controllers targeted by requests for access rights to drown the data subjects in information, so that these people are not able to understand, but cannot complain about a lack of information. - This calls for extremely significant documentary work, including on processing where it is obvious that the legal basis of legitimate interest is the right one (for example B2B marketing). This is not the most protective action for data subjects. It is therefore relevant to encourage data controllers to work on subjects that will truly provide protection for the rights and freedoms of data subjects.

In conclusion, these guidelines are a good step towards harmonizing the use of the legal basis of legitimate interest, but some improvements can be made.