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

FEDMA is pleased to provide its input to the European Data Protection Board's (EDPB) draft Guidelines 1/2024 on processing of personal data based on Article 6(1)(f) GDPR. For data-driven marketers, the GDPR's legitimate interest legal basis is essential to drive effective and responsible marketing. It offers a balanced framework that supports data-driven strategies while respecting user privacy, especially with advancements on Privacy Enhancing Technologies (PETs). By relying on legitimate interest, marketers can personalize experiences, reach target audiences more effectively, and innovate within the bounds of the law. This approach not only enables marketers to better serve consumer needs but also fosters trust and transparency, benefiting both businesses and customers in a dynamic digital landscape. The final guidelines should preserve a balanced approach enabling marketers to build trustworthy relationships with existing and new customers.

Specifically, the EDPB should explicitly incorporate the GDPR's proportionality principle into its guidelines. Recital 4 of the GDPR underscores the need to reconcile fundamental rights, including the right to privacy and the freedom to conduct a business, recognizing that these rights are not absolute but must coexist within a balanced regulatory environment. Embedding this principle in the EDPB's guidance would provide much-needed clarity and legal certainty for businesses, enabling them to rely on legitimate interest responsibly for activities such as customer acquisition and data-driven innovation. This approach would also safeguard individuals' rights by ensuring that legitimate interest is subject to rigorous assessments and transparency obligations, fostering trust and accountability in data processing practices while supporting economic growth and competitiveness.

In this context, FEDMA urges the EDPB to take into account the following considerations:

<u>Preliminary considerations</u>

1. Setting all GDPR legal grounds on equal footing
2. Future-proofing processing activities' reliance on legitimate interest
3. Making the guidelines more actionable
4. Future-Proofing Legitimate Interest in AI and Data

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Technical considerations

1. The weight of 'reasonable expectations' as determining factor to rely on legitimate interest
2. The Role of Transparency in Shaping Reasonable Expectations
3. The Role of Privacy Enhancing Technologies (PETs) as Mitigating Measures
4. Legitimate interest and new customer acquisition
5. The assessment of the level of risk to the rights and freedoms of the data subject
6. The 'objective possibility' to identify sensitive data
7. Status of data from publicly accessible sources
8. Legitimate Interest and AI Models Training

Preliminary considerations

1. Setting all GDPR legal grounds on equal footing

FEDMA agrees with the EDPB that legitimate interest cannot be considered as a blank check legitimising any type of processing. However, though paragraph 1 recalls that *the GDPR does not establish any hierarchy between the different legal bases laid down in Article 6(1)*, the draft guidelines do not seem place them on equal footing. **The EDPB seems to implicitly qualifies the legitimate interest legal basis as more restrictive, requiring the controller to see if there are less intrusive alternatives, thus indirectly pointing to the consent legal basis.** Further discussed below, the draft guidelines add stricter requirements on the use of legitimate interest compared to what is covered under the GDPR. Paragraph 68, for instance, requires balancing tests to be made available to data subjects whereas this information requirement is not covered under Articles 12, 13, 14 GDPR. Not only this requirement risks making information notices significantly heavier for the average data subjects, especially for children, but **carving an additional 'transparency obligation' out of the accountability principle under Article 5(2) GDPR exclusively for the use of the legitimate interest results in a stricter and unfair treatment compared to other legal bases** where the GDPR existing transparency requirements are sufficient. This seems to overlook that the legitimate interest legal basis may even be more protective than other legal bases since it requires full responsibility of the data controller. While the consent ground puts all the responsibility and onus on the data subjects who are expected to endlessly conduct a balancing test themselves, the legitimate interest legal basis shifts the responsibility on data controllers to make the balancing test, provide data subjects with the necessary information, the indisputable right to opt-out, and comply with all other applicable GDPR provisions (register, DPO appointment, data subject rights, security, DPIA, contractual safeguards, etc…).

2. Future-proofing processing activities' reliance on legitimate interest

The EDPB should not consider that by default some marketing or advertising data processing activities cannot rely on the legitimate interest legal basis. Such assessment and the balancing of interest always depend on the context of the particular processing activity with all the factors to be properly weighted. Therefore, the

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assumption that "*the balancing test would hardly yield positive results for intrusive profiling and tracking practices […] for example those that involve tracking individuals across multiple websites, location, devices or services*" should be removed from the draft guidelines. First, this statement is a clear reference to the CJEU META Case where the use of legitimate interest was assessed in the specific context of a global social media platform, designated as a Very Large Online Platform (VLOP) under the Digital Services Act (DSA) and a Gatekeeper under the Digital Markets Act (DMA). Our concern is that Meta's processing operations for targeted advertising can hardly be compared with actors other than other VLOPs and gatekeepers. As such, it is dangerous and unfair to assume that all digital advertising and data-driven marketing organisations can perform similar processing operations or rely on the same type of personal data, thus extending the interpretation of legitimate interest in the context of advertising to all actors in this ecosystem and to the broader data-driven marketing sector. Second, as mentioned above, where pseudonymisation is used in the context of advertising, the data cannot be reidentified (or only with significant costs and techniques), thus changing the results of the balancing test that may actually ultimately yield positive results. Thirdly, online tracking is not the only way of doing 'profiling'. Traditionally, statistic non-real time off the shelf information, built mostly based on market research and extrapolated using statistical techniques have been, and are also currently used. As such, to ensure the guidelines are truly future proof, **it is essential not to preclude all data processing activities in the entire data-driven marketing industry from the legitimate interest legal basis by default based on the processing activities of large social media organisations.** This approach allows effective pseudonymisation and emerging privacy-enhancing technologies to contribute meaningfully to the balancing test, reducing risks to data subjects while supporting the legitimate interests of data controllers. By remaining adaptable to technological advancements, the guidelines can foster innovation in data protection practices and maintain their relevance as privacy-enhancing tools evolve.

3. Making the guidelines more actionable

As underlined in the European Commission's Second Report on the Application of the GDPR, while stakeholders find the EDPB's guidelines useful, there is an increasing need to make these documents more concise and easier to apply in practice. The report also states that "Guidelines should also be easy to understand for individuals without legal training, for example in SMEs and voluntary organisations". In the context of the present guidelines, we therefore recommend:

- including a **list of activities** ("whitelist") that benefit from a presumption of being legitimate from the EDPB's perspective (until the balancing of interests proves otherwise).
- providing a **template for the legitimate interest balancing test –** that would help harmonize better the different interpretation of the DPAs in terms of what the legitimate interest impact requires

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- drafting the guidelines as an actionable **toolbox** accessible outside of the DPO or the legal team.

4. Future-Proofing Legitimate Interest in AI and Data

The EDPB should take into account of the evolution of both the post-GDPR legal landscape and technology in order to interpret the provisions on the legitimate interest legal basis in a future proof way and in synergy with other EU priorities. This is reflected in the EU Data Strategy launched in 2020, followed by several legislative initiatives to enable the sharing of data and the development of data driven products and services such as the Data Governance Act, Data Act, Artificial Intelligence Act, Data Spaces. At the core of this strategy is the **development of a modern framework enabling fair, practical and clear access and use of data in line with privacy, data protection and competition laws.** In parallel, the technology has drastically evolved since the adoption of the GDPR in 2018, and the EDPB must also consider the benefits that it can bring to our economies and society. This is also pointed out in the Draghi report which calls for overcoming current "limitations on data storing and processing" which puts constraints on innovation to support broader policy objectives and revitalize the European economy for the benefit of the society at large.

To fully address these policy objectives, the EDPB must adopt a balanced and future-proof approach that avoids an overly restrictive or prescriptive interpretation of the law. Taking such a stance will prevent data controllers from feeling pressured to exceed legal requirements unnecessarily. **Recognizing the legitimate interest legal basis as especially suitable in the data economy** context would provide the necessary flexibility for data and AI-driven processing activities that drive societal progress. Furthermore, the EDPB should consider evolving from previous guidelines—some of which, issued by the WP29, may now be outdated—instead of relying on them to justify restrictive interpretations. Embracing this balanced approach will ensure the guidelines remain adaptable, fostering innovation and delivering wider benefits to society.

Technical considerations

1. The weight of 'reasonable expectations' as determining factor to rely on legitimate interest

Recital 47 of the GDPR does not categorically prohibit processing under legitimate interest in situations where data subjects may not reasonably expect it; rather, it states that individuals *could* override the controller's interest in such cases. This choice of wording allows for nuance, indicating that reasonable expectations are an important consideration, but not an absolute bar to processing. The EDPB's guidelines, however, place a heavy emphasis on expectations, often interpreting them as determinative, which may unnecessarily restrict companies from relying on legitimate interest. A more balanced approach, in line with the GDPR's risk-based

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assessment principle, would involve evaluating the potential risks of processing to the data subject. This would ensure a fair balance between the controller's interests and the protection of individual rights, as originally envisioned by the GDPR. As mentioned earlier, this flexibility would also be a reflection of the balancing of fundamental rights mentioned in Recital 4 GDPR.

Recommendations

- **Recognise that Recital 47 GDPR does not categorically prohibit processing under legitimate interest in situations where data subjects may not reasonably expect it.**

2. The Role of Transparency in Shaping Reasonable Expectations

Paragraph 53 argues that *reasonable expectations do not necessarily depend on the information provided to data subjects*. In other words, the EDPB seems to state that the reasonable expectations of the data subject have been escalated to an independent element, regardless of the transparency information provided by the controller. As such, FEDMA strongly disagrees with this approach. The information obligations set out in Articles 12, 13 and 14 GDPR are crucial for empowering data subjects by ensuring they have clear, accessible information about how their personal data is collected, processed, and used, reinforcing the principles of fairness and lawfulness in data processing. As a core principle of the GDPR, transparency directly contributes to shaping the data subject's reasonable expectations. **The GDPR emphasizes that transparency empowers data subjects to make informed choices, and their expectations should evolve based on the quality of the information provided.** If controllers comply with transparency obligations, data subjects' expectations should align with the information they receive, making it inappropriate to dismiss the value of transparency. Not only the EDPB does not explain why the GDPR transparency obligations are not relevant or sufficient, but diminishing the role of transparency could also undermine the goal of the accountability mechanisms embedded within the GDPR. **A well-informed data subject can adjust their expectations to reflect the actual practices of the controller, especially when they are explicitly informed of the processing activities in question**. As mentioned in the draft guidelines, the CJEU also stated that information regarding personal data may have a bearing on the reasonable expectations of data subjects. As such, while it cannot be considered the only factor, we recommend recognising the role of the information obligations in Articles 12, 13 and 14 GDPR in contributing to shaping data subjects' reasonable expectations.

The EDPB's position also raises the question on whether enhanced transparency measures beyond the GDPR requirements could qualify as contributing factors on data subjects' reasonable expectations. Paragraph 68 clearly states that the controller's provision to the data subjects of the information regarding the balancing

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test, which is not provided by the GDPR, ensures effective transparency and allows data subjects to dispel possible doubts as to whether the balancing test has been carried out fairly. This statement seems thus to recognise that the provision of this information can have a direct impact on the data subject's expectations as well as on the trust towards the controller. FEDMA calls on the EDPB to clarify whether and how enhanced transparency measures beyond the information obligations in Articles 12, 13 and 14 GDPR can be considered when assessing a data subject's reasonable expectations.

The EDPB also argues that simply because processing is common practice does not mean that it aligns with a data subject's reasonable expectations. However, we believe that while it is true that common practices do not automatically justify data processing, the pervasiveness of certain processing activities can inform reasonable expectations. **If a particular type of processing is widely known and accepted across an industry, it stands to reason that the 'average' data subject would be familiar with these practices, thus influencing their expectations.** While common practices should not be the sole determinant of reasonableness, as in the case of an online social network (Example 5), they cannot be entirely separated from what individuals expect when interacting with digital services. Furthermore, as underlined in the draft guidelines, the concept of "reasonable expectations" should be contextual, considering, among others, the place and context of data collection, as well as the nature and characteristics of the service. As such, we want to reiterate that as long as a controller provides clear information about these practices, transparency should also be taken into account to manage and adjust reasonable expectations.

In the absence of further clarifications in national and EU case law, the EDPB could define the 'average data subject' as a natural person who reasonably understands the information presented to them, provided it is clear, accessible, and tailored to the audience. If the controller has followed the GDPR's transparency requirements, the average data subject should have an adequate understanding of the data processing activities. Though we are aware that this approach based on the concept of the "average data subject" only serves to establish a proportional and practical standard for assessing compliance, it balances the need to protect individuals with the realities of everyday interaction with digital services. While no standard can perfectly account for the diversity of human behaviour, the notion of the "average" serves as a pragmatic benchmark to guide controllers in meeting reasonable expectations.

Recommendations

- **Recognise the role of the information obligations in Articles 12, 13 and 14 GDPR in contributing to shaping data subjects' reasonable expectations, or**

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- **Clarify whether enhanced transparency measures beyond the GDPR requirements could qualify as contributing factors on data subjects' reasonable expectations.**
- **Add that the 'average data subject' is also a natural person who reasonably understands the information presented to them, provided it is clear, accessible, and tailored to the audience.**

3. The Role of Privacy Enhancing Technologies (PETs) as Mitigating Measures

FEDMA supports the use of Privacy Enhancing Technologies (PETs) in data-driven marketing to enable the aggregation of data in a way that protects individual privacy while still providing insights into user behaviour and preferences. As such, without becoming a condition *sine qua non* for the data controller in determining the results of the balancing test, we welcome the EDPB's acknowledgement that that the adoption of PETs as mitigating measures can *limit the impact of the processing on data subjects, in view of achieving a fair balance between the rights, freedoms and interests involved.*

However, paragraph 57 of the draft guidelines also points out that these mitigating measures, be it technical and organisational, within the meaning of Article 6(1)(f) of GDPR must go beyond existing principles and obligations set out in the GDPR. This point raises the question on whether the EDPB considers 'pseudonymisation' as a mitigating measure falling within this category. The GDPR contains more than ten provisions recognising pseudonymisation as an appropriate safeguard to implement data protection principles such data minimisation and security, while also facilitating compliance with obligations like the principle of "privacy by design." Even for low-risk data processing like direct marketing, **pseudonymisation is increasingly used to reduce the impact of data processing on the data subject by minimizing the risk of re-identification, as personal identifiers are replaced with pseudonyms, making it harder to link the data back to a specific individual.** This method enhances privacy while still allowing for data analysis, and it can mitigate risks in case of a data breach or unauthorized access, since the direct identifiers are removed. Additionally, several EU laws also emphasize the value of pseudonymisation, including the ePrivacy Directive, Digital Services Act, Data Governance Act, Data Act, Cybersecurity Act , and AI Act. We therefore recommend that the EDPB's guidelines explicitly include pseudonymisation as an appropriate mitigating measure in the balancing test. Furthermore, while paragraphs 58 and 59 recall that the balancing test is a matter for assessment on a case-by-case basis, we call on the EDPB to provide examples of the weight to be given to the additional mitigating measures which could be put in place.

Finally, though outside the scope of these guidelines, we stress the need for common tools, criteria, and methodologies for processing pseudonymised and anonymised

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data developed in collaboration with relevant stakeholders as part of the future guidance announced by the EDPB in its work programme 2024-2025.

Recommendations

- **Recognise that pseudonymisation can qualify as a mitigating measure in the balancing test.**
- **Provide examples of the weight to be given to the additional mitigating measures which could be put in place.**
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4. Legitimate interest and new customer acquisition

Direct marketing is essentially the activity of attracting and retaining customers for a business or attracting and retaining donors for a charity. Relying on GDPR's legitimate interest for new customer acquisition is therefore fundamental for businesses aiming to expand their reach when no prior relationship exists with potential customers. Referring once more to the balancing of fundamental rights as per Recital 4 GDPR, as a business cannot exist without customers, the legitimate interest of attracting and retaining customers is a prerequisite to the freedom to conduct a business. Excessive restrictions on the reliance on Article 6(1)f GDPR for the purpose of delivering direct marketing communications to prospects would constitute an illegitimate interference on this freedom. Legitimate interest allows companies to process personal data, including from third-party marketing data providers, in a way that balances business needs with individuals' privacy rights. **This legal basis enables organizations to license data from reputable sources, effectively targeting potential customers and promoting their goods or services** without requiring prior consent, which can be challenging to obtain where they still miss a customer base. Of course, this use case does not shield companies from conducting a legitimate interest assessment, thus ensuring they adequately protect consumers' privacy and provide clear opt-out options. While this application of legitimate interest was sufficiently clear in the wording of Article 7(f) of the 1995 Data Protection Directive, the draft guidelines do not address the reliance on legitimate interest for new customer acquisition. We therefore call on the EDPB to provide examples on this specific use case.

Recommendation

- **Enable the reliance on legitimate interest in the context of new customer acquisition.**

5. The assessment of the level of risk to the rights and freedoms of the data subject

The EDPB's guidelines on legitimate interest impose a very high threshold, making it challenging for companies to use this legal basis for data processing. Paragraph 39

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stipulates that businesses must evaluate how their processing could affect individuals *positively, or negatively, actually or potentially*. However, this excessively broad approach, especially combined with other factors to account under paragraphs 43 and 45, contrast with traditional definitions of "risk," which consider both the severity of harm and the likelihood of its occurrence. In standard risk assessment frameworks, if the probability of harm is negligible—even if the harm itself could be severe—then the overall risk remains low. By requiring organizations to weigh all potential negative impacts without fully accounting for the likelihood of their occurrence, the EDPB's approach may deter companies from using legitimate interest, even where actual risks to data subjects are minimal. This high threshold could limit the practical application of legitimate interest for new customer acquisition and other essential business activities.

Recommendation

- **Prioritize the severity of harm and the likelihood of its occurrence as determining factors in assessing the level of risk.**

6. The 'objective possibility' to identify sensitive data

FEDMA agrees with the EDPB's approach that, among others, the nature of the data must be carefully considered when assessing the impact of the processing on the data subject as this position aligns with the GDPR's risk-based approach. However, we call on the **EDPB to clarify the extent of what would constitute 'an objective possibility' to infer sensitive information from the data processed as mentioned in paragraph 40.** To that end, we suggest mirroring the GDPR's threshold for re-identification under Recital 26. Accordingly, the potential to infer sensitive data from non-sensitive information should take into account all the means reasonably likely to be used and objective factors such as the costs of and the amount of time required for inference. This approach is in line with the purpose of the balancing exercise, as enunciated in paragraph 33, to avoid a disproportionate (rather than any) impact on interests and rights of the data subjects altogether. In assessing the risk of identifying sensitive data from non-sensitive information, data controllers should not be required to eliminate all risks of identification, especially where such risk is only theoretical. We would also like to recall that, in the context of online advertising, a prohibition to process sensitive data under Art.9(1) GDPR already exists (Art.26(3) DSA), and the data processed is often pseudonymised. As such, we therefore recommend the EDPB to maintain a risk-based approach in clarifying the situation where it is objectively possible to identify sensitive information from the data processed.

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Recommendation

- **Enable the assessment over the risk of identification of sensitive data from non-sensitive information on the basis of all the means reasonably likely to be used and objective factors such as the costs of and the amount of time required for inference**.

7. Status of data from publicly accessible sources

The EDPB should provide **clearer guidance affirming that legitimate interest can be used to process data from publicly accessible sources**, which are generally considered low-risk. This clarification is especially needed given the EDPB's current work on AI training data, which raises concerns about overly restrictive interpretations. By emphasizing the "reasonable expectations" of data subjects, the EDPB appears to suggest that data from public sources cannot be processed under legitimate interest, even where this data falls outside the scope of Article 9(1) GDPR. This perspective contradicts the traditional view that public-domain data carries inherently lower risk. For example, if publicly available data is involved in a breach, the associated data protection risk is usually assessed as low due to its availability in the public domain. Additionally, GDPR transparency mechanisms, such as Article 14(2)(f) and Article 15(1)(g), allow data subjects to understand where their information is publicly accessible. When data is publicly available, it is reasonable to expect it might be used for various purposes, from academic research to businesses accessing contact details. While all personal data must be handled responsibly under the GDPR, the exclusion of public-domain data from legitimate interest processing appears overly restrictive and counterproductive. We therefore call on the EDPB to clarify the reliance on the legitimate interest legal basis in the context of data from publicly accessible sources.

Recommendation

- **Enable the reliance on legitimate interest in the context of data from publicly accessible sources.**

8. Legitimate Interest and AI model training

Though we are aware that the EDPB is preparing a consistency opinion on AI models, we believe that the guidelines should also address the use of the legitimate interest legal basis to enable **AI model training**. Given the rapid advancement of AI and its transformative potential for society and the economy, it is urgent that clear guidance be provided on the use of the GDPR's legitimate interest legal basis for AI model training. The flexibility of this legal basis is especially relevant in the AI field, as its broad language supports innovation by permitting a wider scope of data processing activities. To foster responsible AI development, it should be recognized that the

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legitimate interests of data controllers—such as enhancing products, preventing fraud, and enabling targeted marketing—justify data processing for model training. Additionally, the EDPB should acknowledge that AI models pose minimal privacy risks to individuals, as they are composed of mathematical representations rather than personal data. This understanding should help tip the balance in favor of data controllers. Finally, the EDPB must provide explicit guidelines for performing the legitimate interest balancing test, enabling companies to innovate with confidence and compliance.

Recommendation

- **Clarify and enable the use of the Legitimate Interest legal basis in the context of AI model training under Chapter IV of the Guidelines.**

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