

Insurance Europe comments on draft EDPB guidelines on legitimate interest

Our reference:	COB-DAT-24-021	Date:	20 November 2024
Referring to:	EDPB Guidelines 1/2024 on processing of personal data based on Article 6(1)(f) GDPR		
Contact person:	Danilo Gattullo Senior Policy Advisor	E-mail:	gattullo@insuranceeurope.eu
Pages:	2	Transparency Register ID	33213703459-54

Insurance Europe welcomes the opportunity to comment on the European Data Protection Board's (EDPB) [draft guidelines](#) on the processing of personal data based on Article 6(1)(f) of the General Data Protection Regulation (GDPR).

Insurance Europe appreciates that the EDPB strives to align its guidelines with the most recent jurisprudence from the Court of Justice of the European Union (CJEU), including the recent judgment on the case C-621/22 (KNLT v. AP). In this ruling, the CJEU has finally clarified that a **commercial interest** of a controller may be regarded as necessary for the purposes of the legitimate interests pursued by that controller.

The guidelines also rightfully recognise that **fraud detection and prevention** can qualify as legitimate interests under Article 6(1)(f) GDPR. In order to qualify as legitimate interest, the data controller must also ascertain that:

- The processing is necessary, namely that the legitimate data processing interests pursued cannot reasonably be achieved just as effectively by other means less restrictive of the fundamental rights and freedoms of data subjects; and
- The rights and freedoms of data subjects do not override the controller's interest, taking into account:
 - The reasonable expectations of the data subjects;
 - The scale of the processing at issue; and
 - The impact of the processing on the data subjects.

However, the draft guidelines contain a number of statements which, in the industry's opinion, go beyond the wording of the GDPR and the case law of the CJEU. In particular:

- Paragraph 9 mentions, among other things, that "*The open-ended nature of Article 6(1)(f) GDPR does not necessarily mean that this legal basis should be seen as one that can only be used as a 'last resort' in rare and unforeseen situations.*" We believe that the word '**necessarily**' has been wrongly included here and we suggest removing it. The final sentence of paragraph 1 correctly states, "*In this regard, it should be recalled that the GDPR does not establish any hierarchy between the different legal bases laid down in Article 6(1).*" By including the word 'necessarily', the EDPB inadvertently implies that such a hierarchy may in principle exist.

- Paragraph 12 mentions that “*the [legitimate interest] assessment should be made at the outset of the processing, with the involvement of the Data Protection Officer (DPO) (if designated).*” Insurance Europe believes that it would be better to add that the DPO should be involved **'if designated and needed'** in the assessment. In fact, while the involvement of a DPO is advisable, it is not obligatory under the GDPR. The EDPB's guidelines for DPOs ([WP 243 rev.01](#)) also mention in paragraph 4.4 that DPOs should carry out their work by following a **risk-based approach**. This contradicts the assumption that the DPO should be involved in every legitimate interest assessment. Furthermore, the DPO is already involved in high-risk processing activities through the Data Protection Impact Assessment (DPIA) process. If the EDPB were to consider all processing based on legitimate interest as high-risk processing, which we believe would be incorrect, this would require further clarification – as it would imply that a DPIA would need to be conducted for every legitimate interest processing activity.
- More far-reaching requirements are set for transparency obligations in the balancing of interests pursuant to Article 6(1)(f) GDPR:
 - In paragraph 67, it is now required that the “specific” legitimate interests must be “precisely identified and communicated”. This interpretation of the EDPB is not reflected in the jurisprudence and is likely to lead to noticeable additional documentation work in practice.
 - Paragraph 68 mentions: “In any case, information to the data subjects should make it clear that they can obtain information on the balancing test upon request.” We suggest rewording this sentence to make it clear that sharing information about the balancing test is optional. The requirement to provide information from the balancing test is not listed in the GDPR and goes beyond the text of the Regulation. Articles 13(1(d)) and 14(2(b)) of the GDPR require that the data controller inform the data subject of the legitimate interests, without any reference to information/result of the balancing test. Only in the context of the right to object under Article 21 GDPR is there an obligation to share the balancing test, and even then, only if the data controller wishes to continue the processing after an objection, and then only at the specific, individual level of the data subject.
- In addition, the stricter language used by the EDPB in the guidelines would lead to a de facto restriction of the scope of application of Article 6(1)(f) GDPR. Although the EDPB's wording appears to go only slightly beyond the legal wording, it is likely to lead to noticeably stricter admissibility requirements overall. For example, this includes the necessity of the processing in a narrow sense (see paragraph 13: processing must be “*strictly necessary*” to pursue a legitimate interest – an interpretation not reflected in the CJEU jurisprudence) or the processing of data to prevent fraud (see paragraph 105: the controller should be specific about the “*nature of the fraud*”, and the prevention of fraud must be “*of substantial importance*”).

Insurance Europe is the European insurance and reinsurance federation. Through its 37 member bodies – the national insurance associations – it represents all types and sizes of insurance and reinsurance undertakings. Insurance Europe, which is based in Brussels, represents undertakings that account for around 95% of total European premium income. Insurance makes a major contribution to Europe's economic growth and development. European insurers pay out over €1 000bn annually – or €2.8bn a day – in claims, directly employ more than 920 000 people and invest over €10.6trn in the economy.