BUSINESSEUROPE

COMMENTS

20 November 2024

High-level Feedback to the European Data Protection Board's Public Consultation on Guidelines on processing of personal data based on Article 6(1)(f) GDPR

BusinessEurope appreciates the opportunity to react to the European Data Protection Board's (EDPB) Guidelines 1/2024 on processing of personal data based on Article 6(1)(f) GDPR. We support the EDPB's efforts to provide clarity on this critical aspect of the General Data Protection Regulation (GDPR), and we would like to highlight several horizontal shortcomings that require more consideration, for the Guidelines to be useful across sectors and business models (existing and future):

1. **Positive examples necessary**: The Guidelines predominantly focus on negative examples where legitimate interest cannot be relied upon. While this clarifies potential limitations of legitimate interest as a legal base, the Guidelines must also provide an innovation conducive outlook with situations where legitimate interest can be relied upon.
    - We invite the EDPB to include more positive examples, and especially to introduce the CJEU judgement C-621/22 in the main text, where a commercial interest can be a legitimate interest.

2. **Scope of the Guidelines**: The draft guidelines appear to extend requirements beyond the provisions of the GDPR. We urge the EDPB to ensure that the guidelines remain within the remits of the main legal act.

    - **Combating fraud:** Recital 47 of GDPR confirms that preventing fraud constitutes a legitimate interest, whereas Point 109 contradicts this by disagreeing with such "generic reference" in the privacy policy.

    - **Information obligations** are outlined in the GDPR. Following the accountability principle of GDPR and data protection authorities' prerogative to inspect documents, the Guidelines must show that the information on the balancing test should be provided to data protection authorities and not data subjects, thus ensuring the balance with the right to (intellectual) property, and protection of trade secrets. It must be taken into consideration that data subjects are engaged with multiple controllers and processors across various economic sectors and the Guidelines must, generally, avoid setting the ground for information overload to data subjects without clear legal basis.

    - **Role of Data Protection Officers (DPOs)**: The guidelines suggest a permanent involvement of DPOs in the assessment of the applicability of Article 6(1)(f), which is beyond the GDPR's risk-based approach, where DPOs could even refuse to advise on issues which bear low risk.

3. **Principle of Proportionality:** The principle is not sufficiently represented in the Guidelines. Mentions of proportionality could be added throughout the document, for example with regards to documenting the impact assessments, or the depth of the balancing exercise to be proportionate to the risk of the data processing.

We hope that these comments will be taken into account to ensure that the guidelines provide clear, balanced, and practical guidance within the framework of the GDPR.

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