Piltz Legal

Comment on the draft version of Guidelines 1/2024 on processing of personal data based on Article 6(1)(f) GDPR

Dear honorary EDPB members,

We, the German law firm Piltz Legal (Piltz Rechtsanwälte PartGmbB, Südwestkorso 3, 12161 Berlin, Germany), hereby submit our comments to the draft version of Guidelines 1/2024 on processing of personal data based on Article 6(1)(f) GDPR ("**Guidelines**"). We appreciate that the EDPB seeks to provide more clarity regarding its interpretation of the legitimate interest legal basis.

Under A. you may find an executive summary of key elements of our comments provided in this document. Within section B., we outline separately different aspects we ask the EDPB to take into account for the final version of the Guidelines.

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Piltz Rechtsanwälte
PartGmbB
Südwestkorso 3
12161 Berlin

Telefon: +49 30 814 53 50 00
Telefax: +49 30 814 53 50 09
E-Mail: info@piltz.legal
Web: www.piltz.legal

Partner:
Dr. Carlo Piltz,
Prof. Dr. Burghard Piltz
AG Charlottenburg,
PR-Nr.: 1593 B

Bankverbindung:
UniCredit Bank AG (HypoVereinsbank)
IBAN DE59 1002 0890 0034 3795 80
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A. Executive summary

We ask the EDPB to **make clear** in its final version that there are **processing activities which are not reasonably expected** by data subjects, but which **may nevertheless be permitted** under Art. 6 (1) f GDPR. **At least**, when there is generally a **low level of interference** in rights and freedoms of data subjects connected to a processing. In this context, we ask the EDPB to **take into account processing of data not collected from the data subject**. For example, when a data processing is done in scope of **Art. 11 GDPR** (processing not requiring the identification of a data subject) the **general level of interference** in rights and freedoms for data subjects **is very low**. If data processed in this way is **not collected from data subjects**, there is **likely a lack of reasonable expectations**. As confirmed by **Art. 11 GDPR** potentially exempting the controller from various key GDPR obligations (such as data subject's rights), a **processing in scope** of this provision comes with **very little interference in rights and freedoms of data subjects**. Such a processing could therefore be justified based on Art. 6 (1) f GDPR even if there is a lack of reasonable expectations of data subjects.

We **acknowledge the relevance** of a **potential relationship** between a data subject and controller for assessing **reasonable expectations**. At the same time, we ask the EDPB **to make clear** that even in case there is **no such relationship**, Art. 6 (1) f GDPR may **still justify a processing in an individual case**. When data is **not collected from the data subject**, there is **often not a relationship** between the data subject and the controller. Data subjects may therefore **sometimes not expect such a processing** to take place. Since it is **possible** to collect data **not directly** from the data subject and since the **GDPR does not exclude the applicability of Art. 6 (1) f GDPR** in these situations, we ask the EDPB to make **clear in its final version** that the legal basis **may also apply** if there **are no reasonable expectations because** of there **not being a relationship** between the controller and data subject.

We **disagree** with there being an **obligation** of controllers to inform data subjects **how to request information from the balancing test** and to **provide such information** upon request. We ask the EDPB to **carefully reconsider** if such a right of data subjects, **not at all explicitly enshrined in any GDPR provision**, can indeed be given and to **consider our various doubts** further outlined under B. II. below. Instead, we **suggest** the EDPB to consider providing more details from the balancing test as an **additional measure** which is not per se obligatory under the GDPR.

We **acknowledge** that a controller **cannot claim** to pursue legitimate **interests of a non-specified wide community without** there being **any connection** between the **controller's business activity** and a **specific wider community**. At the same time, it is **unclear** to us if the EDPB wants to **suggest that interests of a wider community may only be pursued** if a controller is "**tasked or required by law to preserve or pursue**

such interests". We ask the EDPB to **make clear** in the final version that some controllers' businesses are naturally connected to **serve a specific wider community** of a specific sector and that **such controllers may also rely on Art. 6 (1) f GDPR**. Among others, this could be done **by providing an example** for a business activity of a controller which is not connected to being tasked or required by law to preserve or pursue interests but **aimed at protecting actors of a specific wider community**.

We **disagree** with the EDPB's **interpretation of the meaning** of the term "**compelling**" in context of Art. 21 (1) GDPR. We are of the opinion that **interests are considered as compelling** if the outcome of the newly made balancing of interests is that all of the **controller's interests outweigh the ones of the individual data subject**. Nevertheless, this **does not mean** that **only very few exceptionally important interests are relevant** for the balancing to be made while taking into account the objection and particular situation of the data subject. We **ask** the EDPB to **carefully reconsider its interpretation** of the term and to **acknowledge** that, **in principle**, **all interest** can be considered as **compelling** if the outcome is that the controller's interests outweigh the ones of the data subject.

B. Comments on individual aspects

I. On the general role of reasonable expectations and relevance of a relationship between the controller and data subject

In the following, we elaborate the role of reasonable expectations when applying Art. 6 (1) f GDPR and ask the EDPB to add clarifications to its final version of the Guidelines (see under 1.). Additionally, we explain why even in case of there not being a relationship between the data subject and the controller and there not being reasonable expectations, Art. 6 (1) f GDPR may still apply and ask the EDPB to add clarifications to its final Guidelines (see under 2.). In general, we ask the EDPB to consider that processing of personal data not collected from the data subject is, on one hand, often less expected and, on the other hand, not excluded from being justified based on Art. 6 (1) f GDPR.

1. Role of reasonable expectations

It is unclear to us if the EDPB considers it possible that a data processing is permitted under Art. 6 (1) f GDPR in cases where data subjects do not expect the data processing. When taking into account CJEU case law, it is clear that reasonable expectations must be considered and play an important role in the third balancing step of the legitimate interest test. At the same time, the CJEU has a long tradition of additionally considering other factors when balancing opposing interests. Reasonable expectations are one factor to take

into account, but other than that at least the following aspects have to be equally[1] considered according to CJEU case law on the GDPR: the scale of the processing at issue and its impact on the data subject.[2] It also does not follow from case law that non-present reasonable expectations alone are sufficient to exclude that a data processing may nevertheless be based on Art. 6 (1) f GDPR.[3] We ask the EDPB to make it clearer that reasonable expectations may not be given while the processing is still permitted under Art. 6 (1) f GDPR because reasonable expectations are one of several relevant factors to consider within the balancing test.

We ask the EDPB to acknowledge and take into account for the final version that a processing not expected may at least still be based on Art. 6 (1) f GDPR when it is connected to a low interference in rights and freedoms of data subjects. An example for such a processing activity is one that is done in scope of Art. 11 GDPR (processing not requiring identification of data subjects). Since Art. 11 GDPR exempts the controller from various key GDPR obligations towards data subjects (such as the data subject's rights) the European Union legislator acknowledged that a processing not requiring identification is generally connected to a very minor level of interference in rights and freedoms of data subjects. The low level of interference results in potentially a wide range of GDPR obligations not being applicable. In absence of any contrary provision in the GDPR, controllers can apply Art. 11 GDPR also when collecting data not directly from data subjects.

In practice, Art. 11 GDPR applies even more frequently when data is not collected by the controller from the data subject. In such scenarios, data subjects may more often not expect a processing to take place but Art. 6 (1) f GDPR is not excluded[4] from applying. At least when the data processing is connected to a low level of interference (for example, because it is done in scope of Art. 11 GDPR) and the data is not collected from data subjects, it must be possible to apply Art. 6 (1) f GDPR even if the data subject does not expect the processing. In this context it is important that the EDPB makes it clear that non-given reasonable expectations (which are often not given when data is collected not from data subjects) do not automatically lead to a processing not being justified under Art. 6 (1) f GDPR. It is neither regulated in Art. 6 (1) f GDPR that non-given reasonable expectations exclude Art. 6 (1) f GDPR to apply nor is this regulated in Recital 47 GDPR[5] in any way.

[1] An equal consideration of different factors was, for example, made in CJEU, judgment of July 4, 2023, Case C-252/21 para. 116 and 123.
[2] As an example, CJEU, judgment of October 4, 2024, Case C-621/22 para. 54.
[3] For example, the CJEU concludes that there is a lack of reasonable expectations but does not conclude that this automatically will lead to the processing not being justified under Art. 6 (1) f GDPR in its judgment of October 4, 2024, Case C-621/22 para. 54 to 57.
[4] See also para. 84 of the Guidelines where the EDPB suggests that Art. 6 (1) f GDPR may apply where data is not collected from data subjects.
[5] "The interests and fundamental rights of the data subject **could** in particular override (...)".

In summary: we ask the EDPB to make clear in its final version that there are processing activities which are not reasonably expected by data subjects, but which may nevertheless be permitted under Art. 6 (1) f GDPR. Among others, this could be done via providing an example which shows that, at least in case of a low level of interference in rights and freedoms of data subjects (such as a processing in scope of Art. 11 GDPR), a processing may not be expected by data subjects but nevertheless permitted under Art. 6 (1) f GDPR. In this context, we additionally ask the EDPB to take into account processing of data not collected from the data subject which may naturally be less expected but still permitted under Art. 6 (1) f GDPR.

2. Relevance of a relationship between the controller and data subject

We understand that reasonable expectations may be given due to there being a relationship between the controller and the data subject and that certain circumstances of a relationship seem essential for the EDPB to assess reasonable expectations. At the same time, it is not clear to us if the EDPB considers a processing to not be justifiable based on Art. 6 (1) f GDPR because the processing is not expected since there is no relationship between the controller and data subject.

In the absence of a relationship between the controller and data subject, data is often not collected from the data subject. However, the EDPB does acknowledge already under para. 84 of the Guidelines that Art. 6 (1) f GDPR may apply also in cases where data is not collected from data subjects. The same way, it is also not excluded that data processing can be based on legitimate interests if there is no relationship between the controller and the data subject. As mentioned in more detail above under 1., Art. 11 GDPR, on one hand, often applies in case data is not collected from the data subject and, on the other hand, implies that there is a low interference in rights and freedoms of data subjects. In practice, this provision also often applies in case there is no relationship between the controller and data subjects.

In summary: we ask the EDPB to make clear in the final version that the legal basis may also apply if there are no reasonable expectations because of there not being a relationship between the controller and data subject. Among others, this could be done via providing an example which shows that, even without a relationship between the controller and data subject, Art. 6 (1) f GDPR may still apply. In this context, we ask the EDPB to consider scenarios in which personal data was not collected from the data subject.

II. Obligation to provide information on how to obtain the balancing test and providing information from the balancing test

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Within the Guidelines, the EDPB advocates that controllers have to provide information from the balancing test to data subjects and inform them how to request such information. The EDPB is of the opinion that there is a right of data subjects to request this information based on Art. 5 (2) GDPR. While we do agree that a data protection supervisory authority would be in a position to request the balancing test from the controller based on its explicitly regulated powers under Art. 58 (1) a GDPR, we disagree that a data subject would be in the same position as the supervisory authority. We ask the EDPB to carefully consider our arguments further outlined below and to advocate that providing information on the balancing test is an additional measure instead of a per se existing obligation.

We acknowledge that a controller must be able to demonstrate compliance with the lawfulness principle. At the same time, we do not agree that data subjects have a right to receive the balancing test. Neither Art. 13 (1) d GDPR nor Art. 14 (2) b GDPR require the controller to provide information from the balancing test which is going beyond naming the relevant legitimate interests. If the European Union legislator would have wanted to regulate that controllers have to provide more information from the balancing test, it would have been regulated in the aforementioned provisions foreseeing obligations to provide information to the data subject. Both of the provisions regulating which information has to be provided to data subjects already include an, compared to other legal basis, additional obligation to provide more information in case Art. 6 (1) f GDPR is applied. Nevertheless, there is no obligation regulated in Art. 13 GDPR and Art. 14 GDPR which is comparable to how the EDPB understands the GDPR. A supervisory authority could request a controller to provide the balancing test based on its explicitly regulated powers in Art. 58 (1) a GDPR and the controller's obligation under Art. 31 GDPR. Given the lack of a comparable power of data subjects, it cannot be correct that data subjects would have the same possibilities to obtain the balancing test as a supervisory authority has.

We note that the EDPB bases its understanding on Art. 5 (2) GDPR. In this context we ask the EDPB to consider that what a controller is required to do to comply with this legal provision must be clear enough and foreseeable for the controller. In accordance with CJEU case law, this requirement is part of the nulla poena sine lege certa principle.[6] When considering the general wording used in Art. 5 (2) GDPR, it is not possible that a controller would know that it is required to provide information from the balancing test. It can therefore not be correct that the aforementioned provision requires a controller to provide a balancing test to the data subject and inform about how to obtain this information.

[6] See as an example, CJEU, judgment of March 28, 2017, Case C-72/15 para. 162.

The EDPB's interpretation of Art. 5 (2) GDPR has also not been shared by any of the so many authors in German commentary literature over the past years. Not even the strictest and widest interpretation advocated for in commentary literature understands Art. 5 (2) GDPR to regulate that a controller must provide information from the balancing test to data subjects. To our knowledge, no German court has ever shared the EDPB's interpretation of Art. 5 (2) GDPR before even though there are so many judgments dealing with the GDPR's transparency obligations.

If the EDPB's understanding of Art. 5 (2) GDPR would be correct, this would give arise to the question which other documents the controller shall provide to data subjects. For example, the EDPB did acknowledge that a data protection impact assessment does not need to be published and did not advocate that it shall be provided to data subjects. The EDPB only considers publishing such assessments as an additional measure in the relevant guidelines.[7]

Kommentiert [CP1]: Evtl. noch mein Argument mit Art 30. Verzeichnis muss nur an Behörde gegeben werden. Wenn aber nach Ansicht des EDSA nach Art 5 (2) die Dokumentation an die Betroffenen gegeben werden muss, warum regelt der Gesetzgeber dann in Art 30, dass es nur an die Behörde gehen muss?

While we agree that providing information from the balancing test may sometimes increase transparency, we ask the EDPB to not establish a new right not enshrined in the GDPR and instead consider providing such information as an additional measure and not an obligation. If the EDPB would follow this approach, we recommend clarifying which exact information controllers could provide to data subjects. When doing so, the EDPB could consider that a balancing test is by nature a very legal assessment which an average data subject will not be able to understand.

In summary: we ask the EDPB to carefully reconsider its interpretation of Art. 5 (2) GDPR and to make changes to the final version of the Guidelines which reflect that providing information from the balancing test can be an additional measure but not an obligation which controllers have to fulfill in each case.

III. Wider community interests as legitimate interests

We acknowledge that a controller cannot claim to pursue legitimate interests of a non-specified wide community without there being any connection between the controller's business activity and a specific wider community. At the same time, it is unclear to us if the EDPB wants to suggest that interests of a wider community may only be pursued if a controller is "*tasked or required by law to preserve or pursue such interests*". It is unclear to us if the EDPB would agree that a controller can conduct a business which is aimed at protecting specific actors in a specific wider sector and thereby also serve wider community interests without applying Art. 6 (1) e or c GDPR but while relying on Art. 6 (1) f GDPR. We ask the EDPB to

[7] WP29, Guidelines on Data Protection Impact Assessment (DPIA) and determining whether processing is "likely to result in a high risk" for the purposes of Regulation 2016/679 page 18.

acknowledge and make clear in the final version that some controller's businesses are by their nature aimed at protecting actors in a specific sector and thereby also naturally serve wider community interests and that such controllers may also, in principle, rely on Art. 6 (1) f GDPR as legal basis.

On one hand, the EDPB does acknowledge that "*in some cases the interests pursued by a specific controller or a specific third party may also serve broader interests*". On the other hand, the EDPB writes that "*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*." We ask the EDPB to acknowledge and make clear in the final version of the Guidelines that there are scenarios where a controller is conducting a business which is in itself also aimed at protecting parties of a specific larger sector or community it is providing its services for. In these cases, it is also not per se required that there is a legal obligation or that the controller is tasked or required to preserve or pursue interests. Art. 6 (1) f GDPR could be applied in case there is a clear and direct connection between the controller's business activities and interests of a specific but wider community. Without such a clearly defined and direct connection, Art. 6 (1) f GDPR may in most cases not apply. In contrast, while there is a clearly defined and direct connection between the business activities and interests of a wider community, we would not understand which GDPR provision could in general forbid a controller to base its processing on legitimate interests.

In summary: we ask the EDPB to make clear in the final version that some controllers' businesses are naturally connected to serve a specific wider community of a specific sector and that such controllers may also rely on Art. 6 (1) f GDPR. Among others, this could be done by providing an example for a business activity of a controller which is not connected to being tasked or required by law to preserve or pursue interests but aimed at protecting actors of a specific wider community.

IV. Only very important interests as compelling interests

We understand that the EDPB is of the opinion that, in case of an objection, the controller cannot consider all interests when assessing if it is possible to continue the processing after an objection. The EDPB seems to be of the opinion that compelling interests are only those types of interests which are of very most importance to the controller. While we do acknowledge that, in case of an objection, interests of the controller need to compel, we disagree that only some interest and not all can be considered. In our opinion, interests are "compelling" if the result of the newly carried out balancing of interests is that the controller's interests still outweigh the ones of the data subject. Nevertheless, the requirement to have compelling interests does not mean that only very few most important interests are relevant for the newly to be made

balancing exercise. We ask the EDPB to reconsider its understanding of compelling and to acknowledge in the final version that any interest can, in principle, be a compelling one.

We are of the opinion that a controller of course does have to consider the objection and particular situation but can still generally consider all interests after an objection. That interests are compelling ones could be the result of the balancing test. However, it does not mean that from the beginning on only some and not all interests can be considered when balancing interests while taking into account the objection. In our opinion, the addition of "compelling" interests means that the interests of the controller put forward must also outweigh the specific individual interests of the data subject objecting on the grounds of the individual situation. However, the requirement of interests to compel does not mean that only some interests and not all relevant circumstances need to be taken into account. One difference of the newly to be made balancing exercise is that, compared to the initial balancing assessment, the controller can no longer take a generalized approach based on the average data subject. Rather, the controller must take more specific account of all the circumstances of the data subject's specific situation. In case of an objection, a new balancing of interests must be done but the controller can still rely on exactly the same interests and these may still outweigh the data subject's interests in an individual case even after an objection.

In absence of an objection, a processing may be justified if both the controller's interests and the data subject's opposing interests are in equal balance and there being a non-liquet scenario. In these cases, "*interests are [not] overridden by the interests or fundamental rights and freedoms of the data subject*".[8] Since there need to be compelling interests in case of an objection, the controller could not continue the processing in case of a non-liquet scenario. This is another difference compared to the initial balancing exercise and also why the European Union legislator seems to have decided to make it a requirement to have compelling interests and did not use the exact same wording as in Art. 6 (1) f GDPR. However, one cannot interpret Art. 21 (1) GDPR to mean that only few very most important interests can be considered.

Additionally, there have been quite a few judgments of the CJEU and Member State courts which deal with the right to object and the requirements for the processing to continue even in case of an objection. To our knowledge, the EDPB's understanding of compelling in context of Art. 21 (1) GDPR has never been shared by a court. Rather, courts took an approach of considering all relevant interests speaking for the processing to continue after an objection. In German commentary literature, only very few of the many authors may agree to some extent with the EDPB's interpretation. However, none of the authors is advocating for an understanding of Art. 21 (1) GDPR which is comparably as strict to the EDPB's interpretation.

[8] See also para. 55 of the Guidelines.

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In summary: we ask the EDPB to reconsider its interpretation of compelling and to acknowledge that controllers can consider all types of interests when carrying out the balancing exercise after an objection. We suggest the EDPB to consider interests of controllers as compelling if all relevant interests outweigh the interests of the data subject and to not limit interests worth considering to any specific types of interests.