

## Public consultation

Feedback to the EPDB's Guidelines 1/2024 on the processing of personal data based on Art. 6 (1) (f) GDPR

20 November 2024

Dear Ms. Talus,

We would like to express our sincere gratitude for the opportunity to submit this feedback on behalf of our clients to the European Data Protection Board’s (“**EDPB**”) Guidelines 1/2024 on the processing of personal data based on Art. 6 (1) (f) GDPR (“**Draft Guidelines**”).

We appreciate and support the EDPB’s efforts to build upon and update the Art. 29 Data Protection Working Party’s (“**Art. 29 WP**”) Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC. Moreover, we acknowledge the complexities and challenges associated with publishing guidelines that aim to increase clarity and take into account the perspectives of many different stakeholders across the EU at the same time.

However, our clients also believe the Draft Guidelines contain certain ambiguities, misinterpretations or deficiencies that are important to address before finalising them. We have therefore provided several comments on the Draft Guidelines as a whole (under 1) and on their specific sections (under 2).

Thank you for considering our feedback. If you have any questions or would like to discuss any comments in more detail, please reach out to Nils Müller ([nilsmueller@eversheds-sutherland.com](mailto:nilsmueller@eversheds-sutherland.com)) or Constantin Herfurth ([constantinherfurth@eversheds-sutherland.com](mailto:constantinherfurth@eversheds-sutherland.com)).

We look forward to the final version of the Draft Guidelines and appreciate the opportunity to contribute to this important discussion.

Sincerely,



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Partner



**Constantin Herfurth**  
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## **General comments**

1. **General comments**

- 1.1 We appreciate the comprehensive nature of the Draft Guidelines and the valuable insights they provide into the EDPB’s current thinking about criteria for processing personal data based on legitimate interests under Art. 6 (1) (f) GDPR.
- 1.2 However, we would like to remind that while it is crucial to protect the interests, rights, and freedoms of data subjects, it is equally important to consider the legitimate interests, rights, and freedoms of controllers. Almost all provisions of the General Data Protection Regulation (“**GDPR**”) are based on the mandate to strike a fair balance between the diverging interests, namely, on the one hand, the interest of the controller in data processing and, on the other hand, the interest of the data subject in the protection of his or her personal data. The GDPR enshrines this mandate in Recital 4 GDPR: *“The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality. This Regulation respects all fundamental rights and observes the freedoms and principles recognised in the Charter as enshrined in the Treaties, in particular the respect for private and family life, home and communications, the protection of personal data, freedom of thought, conscience and religion, freedom of expression and information, freedom to conduct a business, the right to an effective remedy and to a fair trial, and cultural, religious and linguistic diversity.”*
- 1.3 The GDPR’s provisions, such as most evidently the provision of Art. 6 (1) (f) GDPR, strike a fair balance between different interests, and so should its interpretation by the EDPB. Our clients are concerned that the Draft Guidelines constitute a significant backslide in comparison to the Art. 29 WP’s previous guidelines and take an overly one-sided, restrictive, and critical view on the controllers’ perspective as further detailed in our specific comments.
- 1.4 We would like to encourage the EDPB to adopt a more balanced and constructive approach when providing guidance and to include “positive” and “negative” examples as well as real and present best practices and case studies across the EU.

## **Specific comments**

## 2. Specific comments

### 2.1 Methodology for the balancing exercise (para. 31-34)

- 2.1.1 We recommend to reconsider the proposed methodology for the balancing exercise as expressed in *“This is crucial in the balancing test, which presupposes that the controller already complies with the principles and obligations set out in the GDPR. Therefore, the following sub-sections only consider actions to limit impact or mitigating measures when they go beyond what is required of the controller under the GDPR.”*<sup>1</sup> and *“Yet, these mitigating measures should not be confused with the measures that the controller is legally required to adopt anyway to ensure compliance with the GDPR, irrespective of whether the processing is based on Article 6(1)(f) GDPR. For that reason, mitigating measures can, for instance, not consist of measures meant to ensure compliance with the controllers’ information obligations, security obligations, obligations to comply with the principle of data minimisation, or the fulfilment of data subject rights under the GDPR, and must go beyond what is already necessary to comply with these legal obligations under the GDPR. For example, introducing additional safeguards above and beyond the safeguards required under the GDPR may be seen as a mitigating measure (e.g., allowing the data subject to exercise the right to erasure even when the specific grounds listed in Article 17(1) GDPR do not apply, allowing the data subject to exercise the right to object without any of the limitations in Article 21 GDPR, allowing the data subject to exercise the right to data portability even when the processing is based on Article 6(1)(f), etc.)”*.<sup>2</sup>
- 2.1.2 It appears the EDPB wants to distinguish between three types of factors with different relevance for the impact on data subjects: (1) Factors that stem from measures to ensure compliance with the GDPR: The EDPB indicates that such factors, e.g. the introduction of pseudonymization techniques, shall not be considered as part of the balancing test. (2) Factors that stem from mitigating measures: The EDPB indicates that such factors shall only be considered as part of the balancing test if they go beyond the controllers’ obligations under the GDPR. (3) Remaining factors which do neither fall into (1) or (2): The EDPB indicates that such factors shall be considered as part of the balancing test. Our clients have highlighted this distinction feels artificial and vague without being grounded on the GDPR. In any case, our clients would expect a more solid explanation and justification for this methodology on the basis of case law or academic papers.
- 2.1.3 In addition, our clients believe the proposed methodology shifts the focus from an effective assessment to a bureaucratic exercise. In the interest of both controllers and data subjects, an effective balancing test should be outcome-driven, not process-driven.<sup>3</sup> Naturally, data subjects feel strong about how heavily or lightly they are impacted by a specific processing activity. However, we are not aware of empirical evidence suggesting data subjects are interested in whether this impact stems from a controller’s obligation under the GDPR or a non-obligatory mitigation measure. Therefore, an outcome-driven balancing test aligns more naturally with the wording, context and objective of the GDPR. It simply assesses, for example, “How heavily are data subjects impacted by this processing activity?” and then looks at positive and negative factors for each criterion. For example, for “the nature of the data to be processed”, positive factors could be inter alia “pseudonymous data” “remotely identifiable data” or “low volume of data”, whereas negative factors could be inter alia “special categories of personal data”, “criminal data” or “high volume of data”. Having considered both positive and negative factors, controllers then may conclude whether the nature of the data to be processed leads to a low, medium, or high impact for data subjects. This more natural approach to the balancing exercise is easier for controllers to conduct, easier for data subjects to understand and easier for data protection authorities to supervise.

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<sup>1</sup> EDPB, Guidelines 1/2024 on the processing of personal data based on Art. 6 (1) (f) GDPR, para. 33, [link](#).

<sup>2</sup> EDPB, Guidelines 1/2024 on the processing of personal data based on Art. 6 (1) (f) GDPR, para. 57, [link](#).

<sup>3</sup> Art. 29 WP, Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, p. 52 (footnote 111), [link](#).

## 2.2 The nature of the data to be processed (para. 40-42)

- 2.2.1 First, we recommend to introduce the processing of pseudonymous data as a positive factor in the balancing test. This is grounded on the GDPR itself as well as in previous Art. 29 WP guidelines. In particular, Recital 28 GDPR explicitly highlights that the “*application of pseudonymisation to personal data can reduce the risks to the data subjects concerned and help controllers and processors to meet their data-protection obligations*”. More specifically on balancing tests, the Art. 29 WP has pointed out “*As far as pseudonymisation [is] concerned, the Working Party would like to emphasise that if data are not directly identifiable, this does not as such affect the appreciation of the legitimacy of the processing: it should not be understood as turning an illegitimate processing into a legitimate one. At the same time, pseudonymisation [...] will play a role with regard to the evaluation of the potential impact of the processing on the data subject, and thus, may in some cases play a role in tipping the balance in favour of the controller.*”<sup>4</sup>. Our clients appreciate the more balanced view of the Art. 29 WP and see no reason why the EDPB should not adopt these considerations to assess the nature of the data to be processed.
- 2.2.2 Second, we recommend to introduce the processing of personal data which relates to only remotely identifiable data subjects as a positive factor in the balancing test. It is undisputed that the most prominent issue for data subjects is whether it is possible or virtually impossible to identify them as outlined in Recital 26 GDPR. As useful as this black-and-white view is for the material scope under Art. 2 (1) GDPR, it is insufficient to reflect the impact on data subjects as part of the balancing exercise. As with shades of grey, a higher or lower degree of identifiability means a different impact on data subjects. When personal data are processed, it matters to data subjects whether they have already been identified or whether it is merely possible to do so. And further if data subjects are only identifiable, it matters to them whether their identity can be derived directly from the relevant data or only indirectly by linking it to other data. Finally, in the case of indirect identifiability, it is important to ask whether the controller has to link a small amount of data or a large amount of data in order to identify the data subjects. In all these facets of personal data, different levels of impact on the data subjects can be identified, because the determination of their identity is somewhat more or somewhat less likely. This is also supported by the view of the Art. 29 WP: “*The use of less risky forms of personal data processing (e.g. [...] personal data that are less directly and less readily identifiable) should generally mean that the likelihood of data subjects’ interests or fundamental rights and freedoms being interfered with is reduced.*”<sup>5</sup>
- 2.2.3 Third, with regard to special categories of personal data, we recommend to reconsider the statement “*it is irrelevant whether or not the information revealed by the processing operation in question is correct and whether the controller is acting with the aim of obtaining information that falls within one of the special categories referred to in that provision.*”<sup>6</sup> in light of the EDPB’s previous guidelines. With a view on data processing through video devices, the EDPB has correctly assumed that “*Video surveillance systems usually collect massive amounts of personal data which may reveal data of a highly personal nature and even special categories of data. Indeed, apparently non-significant data originally collected through video can be used to infer other information to achieve a different purpose (e.g. to map an individual’s habits). However, video surveillance is not always considered to be processing of special categories of personal data. (Example: Video footage showing a data subject wearing glasses or using a wheel chair are not per se considered to be special categories of personal data.) However, if the video footage is processed to deduce special categories of data Article 9 applies. (Example: Political opinions could for example be deduced from images showing identifiable data subjects taking part in an event, engaging in a strike, etc. This would fall under Article 9. Example: A hospital installing a video camera*

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<sup>4</sup> Art. 29 WP, Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, p. 41, [link](#).

<sup>5</sup> Art. 29 WP, Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, p. 41, [link](#).

<sup>6</sup> EDPB, Guidelines 1/2024 on the processing of personal data based on Art. 6 (1) (f) GDPR, para. 40, [link](#).

*in order to monitor a patient’s health condition would be considered as processing of special categories of personal data (Article 9))”.*<sup>7</sup>

2.2.4 Fourth, we recommend to either remove the factor as a whole or at least the examples from “*The types of data that data subjects generally consider to be more private (e.g., financial data, location data, etc.), or rather of a more public nature (e.g., data concerning one’s professional role)*”.<sup>8</sup> Whereas our clients generally encourage examples as part of the Draft Guidelines, they believe these specific examples are potentially misleading. For example, in several Scandinavian countries, data subjects’ tax data is publicly accessible, whereas in other EU countries, it is considered as private. Further, whereas professional drivers likely consider their location data to be of a more public nature, whistleblowers may view the exact same data as highly confidential. Similarly, whereas sales agents likely consider data concerning their professional role as of a more public, specific public prosecutors may consider their role as more private. If the factor is to be retained, we encourage the EDPB to let controllers assess the private or public nature of data in light of the specific processing activity for which the balancing test is conducted.

## 2.3 The context of the processing (para. 43-44)

2.3.1 First, we recommend to merge the factors “*the status of the controller, including vis-à-vis the data subject (e.g., an employer-employee relationship will likely require an assessment that is different from the one concerning a service provider-customer relationship)*,”<sup>9</sup> “*the status of the data subject (e.g., vulnerable individuals)*”<sup>10</sup> and “*Moreover, it is apparent from the very wording of Article 6(1)(f) GDPR that it is necessary to pay particular attention to the situation where the data subject is a child.*”<sup>11</sup> into one single factor that assesses the relationship between the controller and the data subjects. While we appreciate the EDPB’s intent to offer detailed assessment points, our clients believe that treating these factors independently could lead to the repeated consideration of the same relationship, unfairly amplifying negative impacts on controllers. The recommended merged approach is grounded on Recital 38 and 43 GDPR and explicitly supported by the Art. 29 WP when conducting the balancing test: “*the status of the data controller and data subject, including the balance of power between the data subject and the data controller, or whether the data subject is a child or otherwise belongs to a more vulnerable segment of the population*”.<sup>12</sup>

2.3.2 Second, we recommend to either remove or further qualify the factor “*whether or not the personal data to be processed are combined with other data sets*”<sup>13</sup> in line with previous guidelines. Our clients believe the current wording implies that any combination of personal data inherently has a negative impact on data subjects. However, previous guidelines recognize that the impact of combining data sets depends on the context and the nature of the data involved. For example, the Art. 29 WP has identified a similar, but more nuanced factor of “*whether large amounts of personal data are processed or combined with other data (e.g. in case of profiling, for commercial, law enforcement or other purposes)*”<sup>14</sup> when conducting the balancing test. Similarly, the Art. 29 WP has only considered “*matching or combining datasets*” as a risk factor when the data originates “*from two or more data processing operations performed for different purposes and/or by different data controllers in a way that would exceed the reasonable expectations of the data subject*”.<sup>15</sup> In our view, the

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<sup>7</sup> EDPB, Guidelines 3/2019 on processing of personal data through video devices, para 62-65, [link](#).

<sup>8</sup> EDPB, Guidelines 1/2024 on the processing of personal data based on Art. 6 (1) (f) GDPR, para. 40, [link](#).

<sup>9</sup> EDPB, Guidelines 1/2024 on the processing of personal data based on Art. 6 (1) (f) GDPR, para. 43, [link](#).

<sup>10</sup> EDPB, Guidelines 1/2024 on the processing of personal data based on Art. 6 (1) (f) GDPR, para. 43, [link](#).

<sup>11</sup> EDPB, Guidelines 1/2024 on the processing of personal data based on Art. 6 (1) (f) GDPR, para. 44, [link](#).

<sup>12</sup> Art. 29 WP, Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, p. 51, [link](#).

<sup>13</sup> EDPB, Guidelines 1/2024 on the processing of personal data based on Art. 6 (1) (f) GDPR, para. 43, [link](#).

<sup>14</sup> Art. 29 WP, Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, p. 50, [link](#).

<sup>15</sup> Art. 29 WP, Guidelines on Data Protection Impact Assessment (DPIA), p. 10, [link](#).



current wording contradicts this nuanced approach by implying a blanket negative impact and should therefore be either removed or revised.

## 2.4 Further consequences of the processing (para. 45-49)

2.4.1 First, we recommend to remove or further qualify the factor “*Potential future decisions or actions by third parties that may be based on the personal data to be processed by the controller*”<sup>16</sup>. Our clients believe the Draft Guidelines should clearly delineate the scope of the controller’s responsibility. Controllers cannot reasonably predict or control the actions of third parties. Extending their responsibility to include potential future actions by third parties places an unfair burden on controllers to foresee and mitigate actions beyond their control.

2.4.2 Second, we recommend to remove or further substantiate the factor “*Defamation, or more broadly, situations where there is a risk of damaging the reputation, negotiating power or autonomy of the data subject*”<sup>17</sup>. Our clients take the view that the factor encompasses a wide range of non-related harms, many of which may be speculative or indirect. Further, the terms “defamation”, “reputation”, “negotiating power” and “autonomy” are inherently subjective and open to interpretation in this context. If the factor is to be retained, it should be further substantiated with clear criteria and examples to help controllers understand how to apply it in practice.

2.4.3 Third, we recommend to remove the statement “*the controller may need to take into account also possible broader emotional impacts resulting from a data subject losing control over personal information, or realising that it has been misused or compromised.*”<sup>18</sup>. On the one hand, our clients question the concept of data subjects’ control over their personal data as part of the balancing test. Whereas this concept is sufficiently clear in the context of Art. 6 (1) (a) GDPR (i.e. data subjects exercise control by giving, refusing or withdrawing consent)<sup>19</sup> and Art. 6 (1) (b) GDPR (i.e. data subjects exercise control by deciding to enter into a contract), the data subjects’ control in the context of Art. 6 (1) (f) GDPR and other lawful bases is less clear. We appreciate that data subjects can exercise control via their data subject rights, especially via their right to access under Art. 15 GDPR and their right to object under Art. 21 (1) GDPR<sup>20</sup>, but it remains unclear what type of control (that can be lost by data subjects) the Draft Guidelines are referring to beyond the data subjects rights. On the other hand, our clients point out that emotional impacts are highly subjective and can vary significantly from one data subject to another. In particular, the current political discussions in society illustrate that measures which feel encouraging to some, may feel frightening to others. This makes it difficult for controllers to assess and quantify objective or reasonable emotional impacts of data subjects.

2.4.1 Fourth, we recommend to remove the statement “*The impact weighed in the balancing test should therefore already be the minimum impact under the GDPR, notwithstanding the adoption of measures that go beyond the obligations set out in the GDPR which can be applied as mitigating measures, as outlined in section 4 below in this chapter.*”<sup>21</sup> for the reasons explained under 2.1.

## 2.5 Reasonable expectations of the data subject (para. 50-54)

2.5.1 First, we recommend to reconsider the statement “*In this respect, it is important to distinguish between the notion of reasonable expectations and what is considered common practice in certain sectors. The fact that certain types of personal data are commonly processed in a given sector does not necessarily mean that the data*

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<sup>16</sup> EDPB, Guidelines 1/2024 on the processing of personal data based on Art. 6 (1) (f) GDPR, para. 45, [link](#).

<sup>17</sup> EDPB, Guidelines 1/2024 on the processing of personal data based on Art. 6 (1) (f) GDPR, para. 45, [link](#).

<sup>18</sup> EDPB, Guidelines 1/2024 on the processing of personal data based on Art. 6 (1) (f) GDPR, para. 46, [link](#).

<sup>19</sup> Art. 29 WP, Opinion 15/2011 on the definition of consent, p. 8 and 9, [link](#).

<sup>20</sup> Art. 29 WP, Opinion 15/2011 on the definition of consent, p. 9, [link](#).

<sup>21</sup> EDPB, Guidelines 1/2024 on the processing of personal data based on Art. 6 (1) (f) GDPR, para. 48, [link](#).

*subject can reasonably expect such processing.”<sup>22</sup>. Whereas our clients acknowledge that common practices in certain sectors may not always be identical with data subjects’ reasonable expectations, the EDPB should clarify that common practices in a given sector are a strong factor among others to determine the data subjects’ reasonable expectations. This is also supported by the Art. 29 WP’s view on reasonable expectations: “It requires not only a review of any legal statements made but also a consideration of what would be customary and generally expected practice in the given context and the given (commercial or other) relationship.”<sup>23</sup>*

2.5.2 Second, we recommend to remove the statement “*Reasonable expectations do not necessarily depend on the information provided to data subjects. While the omission of information can contribute to the data subject being surprised of a certain processing, the mere fulfilment of the information obligations set out in Articles 12, 13 and 14 GDPR is not sufficient in itself to consider that the data subjects can reasonably expect a given processing.*”<sup>24</sup>. Our clients take the view that data subjects’ reasonable expectations should be significantly based on the information provided to them in accordance with Art. 13 and 14 GDPR when the personal data is collected. Helping data subjects to form clear expectations on how their personal data are collected, used, consulted, or otherwise processed and to what extent their personal data are or will be processed is the exact intent and purpose of the information provided under Art. 13 and 14 GDPR. Any expectations on the part of data subjects that run counter to the information provided there appear unreasonable and therefore irrelevant. This is consistent with the Art. 29 WP’s interpretation of reasonable expectations: “*In assessing the context in which data were collected and the reasonable expectations of the data subject as to their use, due attention should also be given to the transparency of the processing (including the type and content of the information initially or subsequently provided to the data subject) [...]*”<sup>25</sup>. In addition, our clients feel the indicated cause-effect relation between information under Art. 13 and 14 GDPR and reasonable expectations of data subjects is illogical. If the omission of certain information affects the reasonable expectations of data subjects, the provision of the same information must affect their reasonable expectations, as well.

2.5.3 Third, we recommend to remove the example in “*The proximity of the relationship (e.g., cases where a controller is part of a group of companies with one single brand vs. group of companies that only have economic bonds unknown to the average customer, as in the latter case the data subject is less likely to reasonably expect data sharing between group entities)*”<sup>26</sup>. It is unclear to our clients why the branding of companies should affect the data subject’s reasonable expectations. Rather, they consider it as common knowledge that many of the biggest conglomerates in the EU do not share the same brand.

2.5.4 Fourth, we recommend to reconsider the entire section on “*Characteristics of the “average” data subjects whose personal data is to be processed.*”<sup>27</sup>. Our clients have highlighted that most controllers do not necessarily have this information, i.e. they do not know the age of data subjects, the extent to which data subjects are a public figure or the (professional) position that the data subjects hold.

## 2.6 Finalising the balancing test (para. 55-60)

2.6.1 First, we recommend to introduce the nature and source of the controllers’ legitimate interests as a factor in the balancing test. Our clients take the view that the weight of their legitimate interests is not sufficiently considered in the Draft Guidelines. As a general rule, legitimate interests carry more weight if they are not only relevant to the controller but also recognised by society. The highest form of recognition is the recognition as exercising a fundamental right and freedom enshrined in the European

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<sup>22</sup> EDPB, Guidelines 1/2024 on the processing of personal data based on Art. 6 (1) (f) GDPR, para. 52, [link](#).

<sup>23</sup> Art. 29 WP, Opinion 03/2013 on purpose limitation, p. 24, [link](#).

<sup>24</sup> EDPB, Guidelines 1/2024 on the processing of personal data based on Art. 6 (1) (f) GDPR, para. 53, [link](#).

<sup>25</sup> Art. 29 WP, Opinion 03/2013 on purpose limitation, p. 25, [link](#).

<sup>26</sup> EDPB, Guidelines 1/2024 on the processing of personal data based on Art. 6 (1) (f) GDPR, para. 54, [link](#).

<sup>27</sup> EDPB, Guidelines 1/2024 on the processing of personal data based on Art. 6 (1) (f) GDPR, para. 54, [link](#).

Charter of Fundamental Rights (“**Charter**”) and the European Convention on Human Rights. This is clearly supported by Recital 4 GDPR and the Art. 29 WP’s previous guidelines.<sup>28</sup> Less important, but still to be considered very positively, is the recognition by other legal provisions. The Art. 29 WP has correctly pointed out that “*it is certainly also relevant whether EU law or the law of a Member State specifically allows (even if it does not require) controllers to take steps in pursuit of the public or private interest concerned. The existence of any duly adopted, non-binding guidance issued by authoritative bodies, for example, by regulatory agencies, encouraging controllers to process data in pursuit of the interest concerned is also relevant. [...] The more explicitly recognised it is in the law, in other regulatory instruments - be they binding or not on the controller [...], that the controllers may take action and process data in pursuit of a particular interest, the more heavily this legitimate interest weighs in the balance*”.<sup>29</sup> Furthermore, the recognition of legitimate interests by the general public can also give it greater weight. Also here, the Art. 29 WP has correctly highlighted that “*In general, the fact that a controller acts not only in its own legitimate (e.g. business) interest, but also in the interests of the wider community, can give more 'weight' to that interest. The more compelling the public interest or the interest of the wider community, and the more clearly acknowledged and expected it is in the community and by data subjects that the controller can take action and process data in pursuit of these interests, the more heavily this legitimate interest weighs in the balance.*”.<sup>30</sup>

2.6.2 Second, we recommend to introduce the impact of the processing on controllers as a factor in the balancing test. Our clients believe it is essential to consider not only the weight of their legitimate interests, but also the consequences they may face if they cannot conduct the envisaged processing activity. In their view, a balanced interpretation of Art. 6 (1) (f) GDPR considers equally the impact of an existent processing on data subjects as well as the impact of a non-existent processing on controllers.

2.6.3 Third, we recommend to remove the statement in para. 57 for the reasons explained under 2.1.

## 2.7 Introduction to data subject rights (para. 61-63)

2.7.1 We recommend to delete the statement “*While complying with the GDPR provisions on data subject rights is a legal obligation (and therefore not something that controllers can consider as a mitigating measure in a balancing exercise), some of the rights laid down in those provisions are subject to specific conditions. Going beyond what is strictly required under the GDPR may be seen as an additional safeguard that could be considered in the balancing test.*”<sup>31</sup> for the reasons explained under 2.1.

## 2.8 Transparency and information to be provided to data subjects (para. 64-68)

2.8.1 First, we recommend to delete the statement “*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,*

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<sup>28</sup> Art. 29 WP, Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, p. 34, [link](#).

<sup>29</sup> Art. 29 WP, Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, p. 36, [link](#).

<sup>30</sup> Art. 29 WP, Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, p. 35, [link](#).

<sup>31</sup> EDPB, Guidelines 1/2024 on the processing of personal data based on Art. 6 (1) (f) GDPR, para. 62, [link](#).

*including the lawfulness principle.*<sup>32</sup>. Whereas our clients acknowledge the possibility to share a balancing test with data subjects or the broader public as a voluntary measure *“to help foster trust in the controller’s processing operations”*<sup>33</sup>, they believe an obligation to do so, oversteps the wording, context and objectives of the GDPR. In particular, the legislator has made a clear decision on what information controllers must provide to data subjects proactively under Art. 13 and 14 GDPR. The legislator has evidently considered the processing on the basis of legitimate interests under Art. 6 (1) (f) GDPR and intentionally limited the required information to *“where the processing is based on point (f) of Article 6(1), the legitimate interests pursued by the controller or by a third party”* in Art. 13 (1) (d) and Art. 14 (2) (b) GDPR. Further, our clients take the view that the general accountability principle under Art. 5 (2) GDPR cannot create additional transparency obligations towards data subjects beyond the more specific obligations under Art. 13 and 14 GDPR.

- 2.8.2 Second, we recommend to remove the statement *“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.”*<sup>34</sup> for the reasons explained in **Error! Reference source not found.**2.5.2.

## 2.9 Right to object (para. 71-75)

- 2.9.1 First, we recommend to remove the statement *“However, the fact that the data subject has not elaborated much on their “particular situation” in their objection is not per se sufficient to dismiss the objection. If the controller has doubts as to the “particular situation” of the data subject, it may ask the data subject to further specify the request.”*<sup>35</sup>. Our clients feel the Draft Guidelines do not take into account the balanced obligations of both sides in Art. 21 (1) GDPR. This provision establishes a balance of obligations between the data subject and the controller. The data subject must demonstrate grounds relating to their particular situation to object to processing, while the controller must demonstrate compelling legitimate interests to continue processing. The requirement for data subjects to demonstrate grounds relating to their particular situation is a proportional measure to ensure that objections are substantive and relevant, without imposing an undue burden on data subjects. At the same time, it provides controllers with the necessary information to assess and respond to objections appropriately. Vice versa, allowing data subjects to object without providing detailed grounds and requesting controllers to invest significant resources in investigating and responding to vague or unsupported objections puts undue and unfair burden on controllers.

- 2.9.2 Second, we recommend to reconsider the statement in para 73. Our clients take the view the interplay of the balancing exercise under Art. 6 (1) (f) GDPR and the right to object under Art. 21 (1) GDPR is not reflected appropriately. If controllers conduct a balancing test, they can only perform an objective, typifying, and ex-ante assessment. Since controllers do not know the individual situation of each data subject, they must base their assessment on the typical and generally known situations of the data subjects. However, there may be atypical cases where the individual situation of a specific data subject differs from the typical situation of other data subjects. Such a situation may have existed from the outset or may have emerged subsequently in the course of data processing. This is the atypical case or “particular situation” referred to in Art. 21 (1) GDPR. In such particular situations, data subjects are given the right to object under Art. 21 (1) GDPR to present their individual situation to the controller and prompt them to review their original balancing test and, if necessary, to correct it on a case-by-case basis.<sup>36</sup> For controllers, this means that only reasons that were not already included in the

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<sup>32</sup> EDPB, Guidelines 1/2024 on the processing of personal data based on Art. 6 (1) (f) GDPR, para. 68, [link](#).

<sup>33</sup> Art. 29 WP, Guidelines on Data Protection Impact Assessment (DPIA), p. 18, [link](#).

<sup>34</sup> EDPB, Guidelines 1/2024 on the processing of personal data based on Art. 6 (1) (f) GDPR, para. 68, [link](#).

<sup>35</sup> EDPB, Guidelines 1/2024 on the processing of personal data based on Art. 6 (1) (f) GDPR, para. 71, [link](#).

<sup>36</sup> Art. 29 WP, Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, p. 45, [link](#).

original balancing test can constitute “grounds relating to his or her particular situation” under Art. 21 (1) GDPR.

## 2.10 Processing of children’s personal data (para. 91-97)

2.10.1 We recommend to delete the entire statement in para. 95. Whereas our clients recognize that children should enjoy specific protection with regard to their personal data, they particularly believe the conclusion *“However, when there is a conflict between a controller’s legitimate interests (including regarding processing of personal data for commercial purposes) and the interests or fundamental rights and freedoms of a child, the interests or fundamental rights and freedoms of the child should in general prevail.”*<sup>37</sup> is too restrictive and conflicts with Art. 6 (1) (f) GDPR. This provision states that processing is lawful if *“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.”* The wording of Art. 6 (1) (f) GDPR clearly implies it requires a balancing test to determine whether the legitimate interests of the controller are overridden by the child’s rights and freedoms, with special consideration given to the particular status of children. Whereas the legislator has explicitly referred to children as data subjects, the provision does not categorically state that their interests should generally prevail. If the legislator wanted to introduce such approach, they would have phrased Art. 6 (1) (f) GDPR differently. For example, a hypothetical provision could have read as follows: *“[...] processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data. Where the data subject is a child, the controller shall not process the personal data unless the controller demonstrates legitimate interests for the processing which override the interests, rights and freedoms of the child.”*

## 2.11 Processing for the purpose of preventing fraud (para. 100-108)

2.11.1 First, we recommend to delete the statement *“Indeed, the requirements for data processing for the purpose of fraud prevention are strict against the backdrop of the impact that such processing can have on data subjects”*<sup>38</sup>. Our clients see no justification why the requirements for data processing for fraud prevention purposes should be stricter than for other processing activities.

2.11.2 Second, we recommend to delete the statement *“The fraud the controller is trying to prevent should be of substantial importance, otherwise, the balancing of interests will most likely turn out in favour of the data subject, and the controller will not be able to rely on Article 6(1)(f) GDPR in this respect.”*<sup>39</sup>. Our clients consider this interpretation as neither consistent with the wording, context and objective of Art. 6 (1) (f) GDPR nor of Recital 47 GDPR, which does not contain such restriction to fraud of substantial importance. This restriction to fraud of substantial importance also contradicts previous guidance of the Art. 29 WP such as, for example, on *“Smart metering data mined to detect fraudulent energy use”*<sup>40</sup>. Moreover, our clients believe that forcing controllers to tolerate smaller, but still harmful, fraudulent activities may violate their freedom to conduct a business and their right to property under Art. 16 and 17 of the Charter.

2.11.3 Third, we recommend to delete the statement *“It should therefore be noted that a generic reference to the purpose of “combating fraud” to define the legitimate interest, for example in the privacy policy, is not sufficient to meet the transparency and documentation obligations under the GDPR.”*<sup>41</sup>. Similarly to the above, this

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<sup>37</sup> EDPB, Guidelines 1/2024 on the processing of personal data based on Art. 6 (1) (f) GDPR, para. 95, [link](#).

<sup>38</sup> EDPB, Guidelines 1/2024 on the processing of personal data based on Art. 6 (1) (f) GDPR, para. 101, [link](#).

<sup>39</sup> EDPB, Guidelines 1/2024 on the processing of personal data based on Art. 6 (1) (f) GDPR, para. 105, [link](#).

<sup>40</sup> Art. 29 WP, Opinion 03/2013 on purpose limitation, p. 69, [link](#).

<sup>41</sup> EDPB, Guidelines 1/2024 on the processing of personal data based on Art. 6 (1) (f) GDPR, para. 106, [link](#).

interpretation appears to be inconsistent with Recital 47 GDPR, which clearly indicates the required level of detail.

2.12 **Processing for the purpose of ensuring network and information security (para. 126-128)**

2.12.1 We recommend to reconsider the statement *“This implies that the objective of security cannot justify an excessive processing of personal data. In this regard, the WP29 stressed in previous Opinions the risks inherent in certain security solutions (including firewalls, anti-virus and anti-spam), as they may lead to the large scale deployment of deep packet inspection and other kinds of intrusive analysis of communication content and meta data, which may have a significant impact on the outcome of the balancing test.”*<sup>42</sup>. Our clients believe it is contradictory to raise doubts regarding standard technical security measures such as firewalls, anti-virus, and anti-spam if, at the same time, the EDPB suggests these measures for securing workstations, e.g. *“The following actions could be considered when securing workstations: [...] use regularly updated antivirus software and have a policy of regularly updating software”*<sup>43</sup> or for preventing personal data breaches, e.g. *“Having an appropriate, up-to-date, effective and integrated firewall and intrusion detection and prevention system.”*<sup>44</sup>. We therefore encourage the EDPB to clarify, for example, how controllers may use antivirus software appropriately and how their use would be considered as excessive. When doing so, the EDPB should also take into account the controllers’ obligations under the GDPR and other legal acts, such as NIS2, DORA or CRA.

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<sup>42</sup> EDPB, Guidelines 1/2024 on the processing of personal data based on Art. 6 (1) (f) GDPR, para. 127, [link](#).

<sup>43</sup> EDPB, Data Protection Guide For Small Business – Secure personal data, [link](#).

<sup>44</sup> EDPB, Guidelines 01/2021 on Examples regarding Personal Data Breach Notification, p. 15, [link](#).

# **Who is Eversheds Sutherland?**

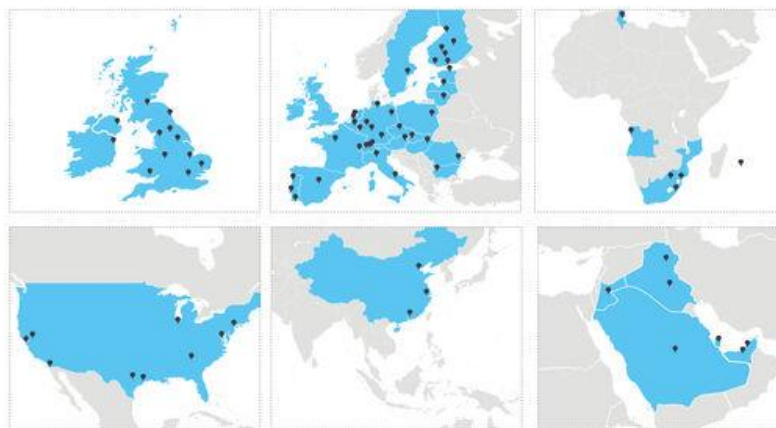
### 3. Who is Eversheds Sutherland?

As a global top 10 law practice, Eversheds Sutherland provides legal advice and solutions to an international client base which includes some of the world’s largest multinationals.

Our highly-integrated, interdisciplinary and deeply collaborative Data Privacy team provides comprehensive, business-focused and time sensitive advice in one of the most rapidly evolving areas of the law. We and our close network of partners have deep knowledge of the US, UK, EU and Chinese privacy laws, as well as in other jurisdictions around the world, including Singapore, the Middle East, South Africa, Brazil and Canada.

We shape our advice to the unique circumstances and challenges of each project, and ensure the right people are in the right places to offer insight and certainty – from the day-to-day to the most complex, multi-jurisdictional matters.

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