

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

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1. Preliminary Remarks

VAUNET – German Association of Private Media would like to thank you for the opportunity to comment on the draft EDPB guidelines 1/2024 on processing of personal data based on Art. 6(1)(f) GDPR and asks you to reflect the following considerations during the ongoing drafting process.

VAUNET is the German umbrella organisation for private media providers. It represents over 160 companies that organise private journalistic and editorial radio, television, streaming and online offerings. Its members enrich Europe's media landscape through diversity, creativity and innovation.

VAUNET supports the EDPB concern to contribute to a clear and harmonised interpretation of Art. 6(1)(f) GDPR through the draft guidelines.

At the same time, VAUNET shares the ambition to protect users' privacy. Private media companies have been investing significantly for years in designing and further developing their offerings and business models in compliance with data protection regulations.

2. General considerations concerning the draft guidelines

Art. 6(1)(f) GDPR represents a crucial legal basis for the processing of personal data by data-based business models of private media.

The legal basis is applied on a case-by-case basis, for example, in direct marketing, combating online piracy, providing recommendation systems, or optimizing billing systems, such as for subscription-based services (e.g., Pay TV or VoD).

These examples illustrate that the ability to leverage data-driven technologies is crucial for the viability of business models and the refinancing of free and innovative media, thereby safeguarding media diversity and freedom. When interpreting Art. 6(1)(f) GDPR, it is essential to strike a balance between the interests of data utilization and protection, duly considering the unique societal importance of private media.

The draft guidelines do not yet reflect this to a sufficient extent:

First, the guidelines promote a restrictive interpretation of the term "legitimate interests" and caution against the broad application of Art. 6(1)(f) GDPR as a legal basis. However, such a restrictive interpretation fails to address the practical demands of rapidly evolving sectors like the media industry, where flexibility is essential. Insisting on a narrow application, risks making compliance with the legal basis overly burdensome, thereby hindering innovation. Moreover, this approach runs counter to the GDPR's dual purpose of protecting natural persons while facilitating the processing of personal data. A more flexible interpretation could, in fact, serve as an effective measure to mitigate the overuse of cookie banners and the resulting user fatigue.

Second, the draft seems to be primarily tailored to the business models of very large online platforms and gatekeepers, which, in contrast to broadcasters, generally engage in much more extensive data processing and thus pose a completely different level of risk to users' privacy.

Third, the draft sets very high hurdles for the "legitimate interests" of the data controller to prevail in the balancing test to be carried out under Art. 6(1)(f) GDPR. This is because it is not explicitly stated that the strength and social or democratic relevance of the controllers "legitimate interests" can also be a relevant factor in the balancing test. Nor should measures taken by the controller to protect users (e.g. transparency) be considered (see paragraph 34), even if they mitigate the impact of the processing on the data subjects.

As a result, the guidelines run the risk of disproportionately restricting the legitimate interests of private media providers. VAUNET therefore recommends that the guidelines explicitly reflect the democratic importance of private media and give it greater weight in the balancing of interests.

3. Further Considerations

a) Three-step test and determination of "legitimate interest"

VAUNET supports the EDPB's clarifications of the "three-step test" for assessing Art. 6(1)(f) GDPR (para. 12 ff.). The draft guidelines comprehensively reflect the case law of the ECJ, thereby offering a welcome contribution to greater legal clarity in practice.

In this context, VAUNET expressly supports the fact that the guidelines consider the latest case law of the ECJ when examining the existence of a "legitimate interest", according to which economic interests can also be considered as "legitimate interests" (see para. 16).¹

At the same time, we support the conclusion that preventing the misuse of services can constitute a "legitimate interest" of the data controller (para. 103). Private broadcasters frequently face the unlawful reproduction and redistribution of exclusive broadcasting content (piracy). In such instances, it may be necessary to process personal data to identify and address such behaviour by third parties. However, we recommend revising the wording of para. 103 to better reflect this example.

¹ see CJEU, judgment of 4 October 2024, Case C-621/22, KNLT v. AP)

However, VAUNET considers example 3 of the guidelines (p. 9) to be problematic with regard to private Pay-TV and VoD services. For such services, the customer relationship and its maintenance with previous users is essential, e.g. to win back users with adjusted tariffs or new, possibly ad-free product packages. Unfortunately, the example does not recognise this legitimate interest on the part of providers, and in fact negates it. VAUNET therefore recommends deleting the example.

b) Inclusion of the "reasonable expectation" in the balancing of interests

The third part of the assessment of Art. 6 (1) f) GDPR requires data controllers to weigh the legitimate interests pursued against the rights, freedoms and interests of data subjects.

The draft guidelines emphasise that this requires a case-by-case assessment in which a number of factors must be taken into account. These include the impact of the data processing on the data subjects and the "reasonable expectations" of the users. The question is therefore whether and to what extent the user could reasonably foresee data processing.

This should correctly be determined primarily based on the characteristics of the respective service (para. 52). However, VAUNET recommends that, to determine the "reasonable expectations" of the data subjects, the information that the controller makes public in implementing the transparency information under data protection law should also be included. In practice, not only the respective features of a service, but also corresponding information are relevant factors for the formation of users' expectations.

This also applies, of course, to information that is made public by the controller in addition to legal obligations.

Contrary to the draft guidelines, VAUNET believes that the determination of the "reasonable expectations" of the data subjects should also be based on existing standards or practices (see para. 52). From VAUNET's point of view, a purely subjective standard would otherwise apply, which cannot be established with legal certainty by the controller in practice. Sentences 4 and 5 in recital 47 also speaks in favour of this:

*"At any rate the existence of a legitimate interest would need careful assessment including whether a data subject can reasonably expect at the time and **in the context of the collection** of the personal data that processing for that purpose may take place. The interests and fundamental rights of the data subject could in particular override the interest of the data controller where personal data are processed **in circumstances** where data subjects do not reasonably expect further processing."*

By explicitly referring to the context of the collection and the circumstances, the GDPR thus refers to an objective assessment. Paragraph 52 of the draft Guidelines should be revised accordingly.

4. Concluding Remarks

In interpreting Art. 6(1)(f) GDPR, proper consideration must be given to entrepreneurial freedom, particularly regarding the distribution of private media and journalistic editorial content. Any barriers to the use of advertising technologies and content distribution arising from an interpretation can have a direct and negative impact on the diversity of opinions and media.

This is even more relevant as the refinancing of private media faces significant challenges due to changing user habits and unequal competition to globally operating Big-Tech platforms. An interpretation of data protection regulations that, in this context, creates additional obstacles for the distribution of digital media rather than supporting it should be critically reviewed.

VAUNET therefore calls for the draft guidelines to be assessed for their compatibility with the media sector.