

Shining a light on the meaning of “necessity” under GDPR

Our eight point summary of the EDPB’s draft guidance



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The European Data Protection Board (EDPB) has published a set of draft guidelines for public consultation on Article 6(1)(b) GDPR, specifically the processing of personal data in the context of the provision of ‘online services’ to data subjects. These will be absolutely key to providers of online services, such as social media, e-commerce, internet search engines, communication and travel services. The guidelines specifically mention online behavioural advertising and personalisation of content (amongst others).

Our full briefing on the consultation can be found [here](#).

Please find below our eight point summary of the key messages to take away from the guidelines.

Our eight point summary

What are the key points to digest from the draft guidelines?

1. The GDPR **fairness and transparency** principle is specifically mentioned. A controller cannot lawfully process personal data (based on contract) without also being fair and transparent, which includes inter alia recognising the reasonable expectations of data subjects.
2. The EDPB is particularly concerned about controllers including general processing terms in contracts to justify their processing for inadequately specified purposes and without considering other GDPR core principles. The ‘**purpose limitation**’ principle is key to online services. Personal data must be collected for specific, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes. As is ‘**data minimisation**’. Controllers must process as little data as possible to achieve the purpose. A purpose that is vague or general, such as ‘for improving users’ experience of the website’ or ‘for marketing purposes’ or ‘IT security purposes’ or ‘future research’, is not specific enough.
3. **The Article 6(1)(b) basis of contract is to be interpreted narrowly.** In a nutshell, if objectively the controller can provide the requested online service (i.e. fulfil its obligations under the contract with the user) without some ‘extra’ processing taking place, an Article 6 lawful basis other than contract should be considered for it. Legitimate interests, consent, or legal obligations might better match the objective of the processing.
4. **‘Necessity’ is a strict test:**
 - a. a controller’s processing is not ‘necessary for the performance of (or for entering into) a contract’ simply because the contract provides it will happen. There is a practice of incorporating into contracts for digital services express terms that impose additional obligations about advertising, payments or cookies. This, according to the EDPB, artificially expands the types of processing operations that the controller ‘needs’ to carry out to perform the contact.
 - b. the processing must be objectively necessary for a purpose that is integral to the delivery of the contractual service to the data subject.
 - c. a fact-based assessment should be carried out. The EDPB is clear that Article 6(1)(b) will **not** cover processing which is useful, or necessary as part of the controller’s business purposes, but not objectively necessary for performing the contractual online service or for taking the relevant pre-contractual steps at the request of the data subject. For

- instance, processing personal data for unsolicited marketing cannot be said to be necessary at the request of the data subject before the contract can be entered into.
- d. the data subject’s perspective is relevant. The controller may consider the processing necessary for the contract but it should examine carefully the perspective of the average data subject. Demographics such as age (and many others) might be relevant. For some websites it will be more difficult than for others to determine the ‘average data subject’. The guidelines (as yet) do not tackle this issue.
5. **Online service users should not be given the impression that they are giving their consent for use of personal data by simply accepting terms of service.** Agreeing to enter a contract is not the same thing as giving a GDPR consent. Controllers will know this from previously guidelines about GDPR consent but the point is important (and is therefore restated) for online services.
 6. There must be **a valid contract with the data subject himself** (which the controller can prove – in accordance with GDPR accountability – exists under applicable national contract laws) **and** the processing must be objectively necessary to perform **that particular contract**.
 7. **What happens when a contract is terminated?** It is generally unfair to swap to a new legal basis when the original basis ceases to exist. In some instances this can be fair – eg where continue processing of some personal data is necessary for compliance with legal obligations or for the establishment, exercise or defence of legal rights. Of course, these bases must be notified to the data subject, from the outset, in the privacy notice.
 8. The EDPB suggests four points to consider when assessing whether Article 6(1)(b) justifies any particular processing:
 - a. **the nature of the (online) service;**
 - b. **the rationale for the contract** (ie its fundamental object);
 - c. **the essential elements of the contract** without which it simply cannot be performed. For instance **whether a child can enter into the contract** is a matter of contract law and this is fundamental to reliance on contract as the processing ground under Article 6(1)(b); consider also laws relevant to unfair terms in consumer contracts; and
 - d. the **perspective of the average data subject**. Would an ordinary user of the service reasonably expect the ‘extra’ or envisaged processing will take place in order to perform the contract?

To see the full guidelines and consultation information click [here](#)

Contact us:



Paula Barrett

Co-Lead of Global Cybersecurity and Data Privacy

T: +44 20 7919 4634

M: +44 777 575 7958

E: paulabarrett@eversheds-sutherland.com



Lorna Doggett

Principal Associate

T: +44 20 7919 4698

M: +44 791 789 2825

E: lornadoggett@eversheds-sutherland.com

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