

The Consumer Voice in Europe

## BEUC COMMENTS ON EDPB GUIDELINES ON THE PROCESSING OF DATA UNDER ARTICLE 6(1)(B) GDPR IN THE CONTEXT OF THE PROVISION OF ONLINE SERVICES



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## **BEUC Comments on EDPB Guidelines 2/2019 on the processing of data under Article 6(1)(b) GDPR in the context of the provision of online services**

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**BEUC supports the interpretations and guidance given by the EDPB regarding the use of Article 6(1)(b) GDPR as a legal basis for the processing of personal data in the context of the provision of online services. In particular, a strict interpretation of the ‘necessity’ requirement is absolutely fundamental to guarantee compliance with the principles of fairness, transparency, purpose limitation and data minimisation and to ensure that data subjects’ rights are respected.**

Article 6(1)(b) constitutes one of the six legal bases enabling the lawful processing of personal data under the GDPR. It allows for the processing of personal data to the extent that is “necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract”.

Millions of consumers use a myriad of online services every day (search engines, social networks, email services, booking and travel services, music and video streaming services, etc.). These services often process consumers’ personal data for purposes that are beyond what is strictly necessary for the provision of the core service that they are delivering to consumers (e.g. personal data is often processed for behavioural advertising purposes).

Generally speaking, online services can be prone to considering these additional purposes as necessary for the provision of the service they are giving to consumers, to ensure access to as much data as possible for a wide range of purposes, as opposed for example to depending on whether the consumer gives consent to the use of his/her data or not for a given purpose. In some cases, these processing purposes directly relate to how the service is funded (e.g. advertising in the case of a company that relies on an ad-supported revenue model), giving the company an even stronger incentive to ensure the data for that purpose.

If companies misuse Article 6(1)(b) this can result in consumers being forced to sacrifice their privacy and have their personal data used in ways they are not aware or have control of in exchange for using online services, something which would go against the GDPR and the fundamental rights to privacy and data protection.

In addition to supporting the EDPB’s strict interpretation of the ‘necessity’ requirement, we would like to particularly underline and support the following points made in the Guidelines:

- Online services are also subject to the requirements laid down in other fields of law, such as consumer law and competition law. Consumer contracts must comply with the requirements imposed by consumer protection law for processing based on those terms to be considered fair and lawful. Therefore, in order to use Article 6(1)(b) as a legal basis for processing, the data controller must be able demonstrate that a contract exists, that the contract is valid pursuant to applicable law and that the processing is objectively necessary for the performance of the contract.
- The purpose limitation and data minimisation principles are particularly relevant in this context. Purposes of processing must be clearly and specifically identified. Vague or general purposes, such as ‘improving users’ experience’ or ‘marketing purposes’ without more detail, would not meet the legal requirements.

- The legal basis for processing must be identified at the outset of processing and data subjects must be informed specifically about what legal basis applies for each specific purpose for processing, in line with Articles 13 and 14 GDPR.
- It is very important to distinguish between entering into a contract and giving consent in the sense of Article 6(1)(a). If processing the data is necessary for the performance of a contract, consent cannot be the legal basis for processing. Companies should make sure to avoid any confusion for consumers regarding what the applicable legal basis is as this has implications for their rights and expectations. The signature of a contract or acceptance of terms of service does not correspond to giving consent under Article 6(1)(a).
- Article 9(2) GDPR does not include 'necessary for the performance of a contract' as a legal basis for processing special categories of data. Online services processing data that fall under a special category (e.g. health related data) must use one of the legal bases in Article 9(2), notably, explicit consent.
- Assessing what is 'necessary' for the performance of a contract or taking pre-contractual steps at the request of the data subject involves a combined, fact-based assessment. If there are realistic, less intrusive alternatives to achieve the identified purpose, then the processing is not 'necessary'. Processing which is useful for the online service but not objectively necessary for the performance of the contract or taking the relevant pre-contractual steps cannot be covered by Article 6(1)(b), even if such processing is necessary for other business purposes of the company.
- To use Article 6(1)(b) the controller must be able to demonstrate how the main object of the specific contract with the consumer cannot be performed if the specific processing of the personal data in question does not take place. The fact that some processing is covered by a contract does not automatically mean that the processing is necessary for its performance. A contract cannot artificially expand the categories of personal data or processing operations needed by the controller to perform the contract, for example by adding express terms to allow the use of data for advertising purposes in the contract.
- It is important to consider the perspective and expectations of the consumer regarding the contractual purpose when assessing whether the data processing in question is necessary for such purpose.
- In case of bundling into one contract several separate services or elements of a service that can be performed independently, the applicability of Article 6(1)(b) should be assessed in the context of each service separately. Also, if the controller relies on consent for certain data processing operations, consent will not be valid if the performance of the contract is made conditional on the consumer's consent to the processing of personal data that is not necessary for the performance of the contract, as per Article 7(4) GDPR.
- Regarding pre-contractual steps, Article 6(1)(b) would not cover unsolicited marketing or other processing which is carried out solely on the initiative of the data controller, or at the request of a third party.
- Article 6(1)(b) is not an appropriate lawful basis for processing for the purposes of improving a service or developing new functions within an existing service.
- Article 6(1)(b) is not an appropriate lawful basis for processing data for behavioural advertising purposes. Behavioural advertising does not constitute a necessary element of online services. Although processing of personal data for behavioural advertising purposes may support the delivery of a service, this is separate from the objective purpose of the contract between the user and the service provider, and therefore not necessary for the performance of such contract. Consent is required for the processing of personal data for behavioural advertising purposes.

- The personalisation of content could sometimes be regarded as necessary for the performance of a contract with the service user. This would depend on the nature of the service, how the service is presented to the user, the users' expectations and whether the service can be provided without personalisation. When personalised content delivery is intended to increase user engagement but is not an integral part of the service, Article 6(1)(b) does not constitute the appropriate legal ground for processing.

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