

Legitimate interests



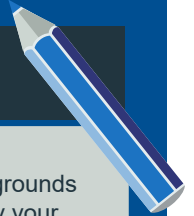
At a glance



- Other than in the case of public authorities, “*legitimate interests*”, as a basis for lawful processing, is not substantially changed by the GDPR.
- Public authorities will be unable to rely on “*legitimate interests*” to legitimise data processing carried out in the discharge of their functions.
- Controllers that rely on “*legitimate interests*” should maintain a record of the assessment they have made, so that they can demonstrate that they have given proper consideration to the rights and freedoms of data subjects.
- Controllers should be aware that data processed on the basis of legitimate interests is subject to a right to object - which can only be rejected where there are “*compelling*” reasons.



To do list



Ensure you are clear about the grounds for lawful processing relied on by your organisation and check these grounds will still be applicable under the GDPR (see section on [lawfulness of processing and further processing](#)).



If your organisation is a public authority that currently relies on “*legitimate interests*” when processing personal data in connection with the discharge of its functions, seek to identify another legal basis for the processing of this data (e.g. processing necessary in the public interest or in the exercise of official authority).



Where relying on “*legitimate interests*”, ensure that decision-making in relation to the balance between the interests of the controller (or relevant third party) and the rights of data subjects is documented, particularly where this affects children. Ensure also that data subjects would reasonably expect their data to be processed on the basis of the legitimate interests of the controller or relevant third party.



Where “*legitimate interests*” are relied on, ensure this is included in the information that must be supplied to data subjects pursuant to Articles 13 and 14. (See section on [information notices](#)).



Degree of change

Commentary

Article 6(1) of the GDPR states that data processing shall be lawful only where at least one of the provisions at Article 6(1) (a)-(f) applies.

Article 6(1)(f) applies where:

“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.”

Article 6(1) makes clear that subsection (f) shall not apply to “processing carried out by public authorities in the performance of their tasks.”

This broadly reproduces an equivalent provision in the Data Protection Directive, except that:

- the need to specifically consider the interests and rights of children is new (see section on [children](#)). In practice, this insertion is likely to require controllers to ensure that any decision to process data relating to children on the basis of “legitimate interests” is carefully documented and a risk assessment conducted; and
- “legitimate interests” can no longer be relied upon by public authorities in relation to data processed by them when discharging their functions.

What are legitimate interests?

The recitals give examples of processing that could be necessary for the legitimate interest of a data controller. These include:

- Recital 47: processing for direct marketing purposes or preventing fraud;
- Recital 48: transmission of personal data within a group of undertakings for internal administrative purposes, including client and employee data (note international transfer requirements will still apply – (see section on [transfers of personal data](#));
- Recital 49: processing for the purposes of ensuring network and information security, including preventing unauthorised access to electronic communications networks and stopping damage to computer and electronic communication systems; and
- Recital 50: reporting possible criminal acts or threats to public security to a competent authority.

Recital 47 also states that controllers should consider the expectations of data subjects when assessing whether their legitimate interests are outweighed by the interests of data subjects. The interests and fundamental rights of data subjects “could in particular override” that of the controller where data subjects “do not reasonably expect further processing.”

Information notices must now set out legitimate interests

Where “legitimate interests” are relied on in relation to specific processing operations, this will now need to be set out in relevant information notices, by virtue of Article 13 (1)(d) and 14 (2)(b).

Specific and enhanced right to object

Individuals are able to object to processing based on legitimate interests. The burden now lies on data controllers to prove they have compelling grounds to continue processing the data. This can lead to the exercise of rights to restrict and erase data. (See the section on rights to object for more information).

Watch out for Codes of Conduct

Article 40 requires Member States, supervisory authorities, the European Data Protection Board and the Commission to encourage the creation of codes of conduct in relation to a wide range of subjects including the legitimate interests pursued by data controllers in specific contexts. Members of trade associations or similar sector specific bodies should watch for the creation of such codes, which might impose particular additional requirements.

Data transfers - a new ground, but unlikely to ever be of use in practice.

A final outing for legitimate interests comes in Article 49(1), which states that transfers can be made based on “compelling legitimate interests” where they are not repetitive, relate to only a limited number of data subjects and where the controller has assessed and ensured adequacy. However, this ground can only be used where the controller cannot rely on any other method of ensuring adequacy, including model clauses, BCRs, approved contracts and all derogations from Article 49(1)(a)-(f). The controller would then need to notify the supervisory authority that it was relying on this ground for transfer. It seems unlikely that an organisation will be able to demonstrate that it was unable to rely on any other grounds for transfer. (See section on [transfers of personal data](#) for more information).



Where can I find this?

Legitimate Interests
Articles 6(1)(f), 13(1)(d), 14(2)(b) and 49(1)
Recitals 47, 48, 49, 50