PERSONAL DATA PROCESSING BASED ON LEGITIMATE INTEREST:
EUROPEAN UNION PERSONAL DATA PROTECTION LAW
PERSPECTIVE

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INTRODUCTION

Pursuant to the Charter of Fundamental Rights of the European Union ("Charter")\(^1\), personal data must be processed fairly for specified purposes and on the basis of a legitimate basis laid down by law. The General Data Protection Regulation ("GDPR")\(^2\) specifies that processing shall be lawful only on the basis of one of six conditions set out in article 6 of GDPR.

According to the article 6 of GDPR one of the allowed legal grounds for processing of personal data is legitimate interest of the controller or a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject. Certain conditions must be taken into account when personal data processing is fond on legitimate interest – the requirement for higher care over one’s personal data and balancing test being one of them.

However, legitimate interest may seem the most flexible legal ground. One may argue that there are challenges and considerable risks to abuse the use of legitimate interest and there is not much legal certainty about the preconditions for this lawful ground for processing to be applicable. One of the most essential problems to address is the actual application of this ground, given the possibility to have other grounds for processing present.

This legal analysis has been divided into two chapters to address the following questions: a) how to identify correct legal ground and analyse interplay of legitimate interest with other legal grounds for processing; and b) which would be the steps necessary to take when processing is based on legitimate interest.

GDPR has been applicable since 25 May 2018, however, there still seems to exist uncertainty in applying this legal ground in consistent and harmonised way across the Member States. The Court of Justice of the European Union ("CJEU") has provided several judgments related to the topic of this research paper and those will be analysed throughout the paper. Building on this analysis, the authors formulate recommendations to be considered when applying legitimate interest as lawful ground for processing personal data.

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1. Legitimate interest and its relationship with other legal grounds

Legitimate interest is not a new concept introduced by the GDPR. This legal ground existed already in the Directive 95/46/EC ("Directive").\(^3\) The purpose in GDPR was to detail the accountability and transparency requirement when applying legitimate interest as legal ground to build up personal data processing and to harmonize the practice.

GDPR article 6 states that processing shall be lawful only if and to the extent that at least one of the legal grounds listed in the named article exists.\(^4\) The legal grounds listed in article 6 are consent of data subject, performance of a contract, legal obligation, vital interest of the data subject or another natural person, public interest and exercise of official authority and legitimate interest.

GDPR poses to the controller an obligation to assign legal ground to each processing activity. The exercise of assigning appropriate legal ground to processing activity must be completed before the processing can start as otherwise it is not possible to provide fair and complete information to the data subject, which may lead to the situation where the processing cannot be considered fair nor transparent towards the data subject. GDPR is very much risk-based set of rules that requires the controller to perform various risk-based assignments. The controller should take time and complete proper analysis to be confident that the assigned legal ground is the most suitable basis for the processing before the processing of personal data starts. If it appears in a later stage that the selected legal ground was inappropriate, it is difficult to retrospectively swap to a different basis that was not initially identified as this would lead to breaches of the accountability and transparency provisions towards the data subjects.

Although GDPR is considered the strictest data protection regulation in current world, the aim of the regulation is also to secure free flow of personal data. The GDPR is not necessarily restricting data processing, rather aiming to regulate the exercises done with the personal data in more consistent way via establishing set of secure rules and requirements that data controller must follow. GDPR provides various set of rights to data subjects enabling them to have some what of control over the activities performed with their personal

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\(^3\) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, article 7(f).

\(^4\) GDPR, article 6(1).
data. GDPR talks a lot about the rights of data subjects and obligations of data controllers and processors and less about the rights of the latter ones. However, the first right of the controller is to make a decision whether they process personal data or not and to what extent when designing their services. The right to choose legal ground for processing is also something that grants the controller some flexibility.

Below the authors compare the correct application between each legal ground in relation to legitimate interest from the data controllers’ point of view. The aim is to find out which is a proper situation to apply legitimate interest and are there any alternatives. The question remains that how to decide processing ground when theoretically more than one could be used, taking into consideration that GDPR allows situation where more than one legal grounds may exists in combination with the requirement to be fair and transparent towards the data subject.

Article 6 of GDPR gives us a list of legal grounds starting with consent and continuing with the row of other legal grounds. Legitimate interest is listed as the last legal ground in this list. Sometimes this list is interpreted by its order taking consent as most favourable legal ground. The list of legal grounds has remained unchanged compared to the Directive and therefore we can draw parallel with the Article 29 Data Protection Working Party (“WP29”) opinion on the definition of consent where the question was discussed and concluded that the notion of the text of the Directive does not make a legal distinction between the six grounds and does not suggest a hierarchy among them.\(^5\) Consent was frequently perceived as the main criterion for legitimate processing during the debates and drafts of the GDPR.\(^6\) However, the text of the GDPR gives no indication that one legal ground should be placed higher in the hierarchy among the rest of the legal grounds. There is also no indication that one legal ground should only be applied in exceptional cases and the text also does not otherwise suggest that the specific order of the six legal grounds would have any legally relevant effect.\(^7\) At the same time, the WP29 also admits that the precise meaning of legitimate interest and its relation with other grounds for lawfulness is rather unclear.\(^8\)

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\(^5\) WP29 Opinion 15/2011, p 7.
\(^8\) WP29 Opinion 06/2014 on legitimate interest, p 10.
Neither the repelled Directive nor GDPR define what is meant by “legitimate” so the ordinary meaning of the word should be used. The Directive and GDPR also defines no closed list of factors that should be taken into account when deciding whether a legitimate interest is appropriate legal ground for processing purpose a controller seeks to achieve. As mentioned above, on one side the controller must set the importance to protect the rights and freedoms of the natural person as highest priority, on the other side achieving its own legitimate business purposes at the same time. Therefore, the authors discuss in this research paper which are the factors that a controller must take into consideration when assigning a legal ground for processing purposes.

When controllers set out to identify the appropriate legal basis in line with the fairness principle, this will be difficult to achieve when they have not first clearly identified the purposes of processing, or if processing personal data goes beyond what is necessary for the specified purposes. In line with their transparency obligations, controllers should make sure to avoid any confusion as to what the applicable legal basis is.

1.1. Legitimate interest compared to consent

Consent is legal ground that may raise most conflicts in relation to legitimate interest. In this section of the research paper both legal grounds are compared to each other to discuss in more details which way to go and which one to choose when legitimate interest and consent are overlapping and situation “at least one applies” appears.

When a controller wants to relay on consent as a legal ground for processing, then the controller must secure that the consent is freely given, informed, specific and unambiguous indication of wishes. It could be argued that consent is a legal ground that gives the data subject the most control over individual’s personal data. The control mechanism is also supported by the right of the data subject to withdraw the consent at any time. This on another hand places data controller in unstable situation as the long-term processing is uncertain.

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10 European Data Protection Board (EDPB) Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects. Version 2. 08.October 2019, Footnote 13.
13 GDPR, article 7(3).
When to decide whenever consent is freely given or not one has to take into account various factors, specific situation and the relationship between the data subject and the controller. The similar factors must be paid attention to when assessing the grounds for legitimate interest.

Consent is freely given when the data subject has real choice. The consent is not freely given (nor valid) when the data subject feels compelled to consent or will endure negative consequences if not consenting.\(^{14}\) Consent cannot be freely given also in a relationship between data subject and a controller where there is a clear imbalance between the data subject and the controller.\(^{15}\) Employment relationship being one of the example and it is specifically mentioned in the recital 43 of GDPR that the imbalance exists in particular in the situation where the controller is a public authority. It should also be mentioned that public authority cannot rely on legitimate interest while carrying out their official tasks.\(^{16}\) The personal data processing by public authority is going to be discussed further in section 1.5 below when taking a closer look at the processing carried out in the exercise of official authority.

Another crucial factor of the consent to be valid is the information provided to the data subject prior to consenting. The data subject must be at least provided with information regarding the identity of the controller and the purpose of processing\(^{17}\) to enable the data subject to make informed decision. However, providing only those two pieces of information would not be enough in real life situation to enable a data subject to make free and informed decision. The requirement for transparent information is relevant regardless to legal ground chosen. When the personal data is collected from a data subject, then the controller, at the time of obtaining personal data must inform the data subject regarding the identity and contact details of the controller and data protection officer (where applicable), the purpose of processing, legal basis of processing, the identity of recipient in case the controller intends to transfer the data and whenever the controller intends to transfer the data to third country or international organisation.\(^{18}\) Additionally, the controller must provide information about intended retention period of the data, the information regarding the rights of the data subjects and how they can exercise those rights or complain to supervisory authority.\(^{19}\)

\(^{14}\) WP29 Opinion 15/2011, p 12.
\(^{15}\) GDPR, recital 43.
\(^{16}\) GDPR, article 6(1).
\(^{17}\) GDPR, recital 42.
\(^{18}\) GDPR, article 13(1).
\(^{19}\) GDPR, article 13(2).
It is also crucial to inform the data subject how he or she can withdraw the consent. Consent will not be considered freely given if the data subject is unable to refuse or withdraw his or her consent without detriment.20 If the data subject is not informed in clear and plain language how they possibly can withdraw the consent, this might be the factor that nulls the validity of the consent. However, the data subject has a right to object to processing to his or her personal data in certain cases when the data is processed based on the legitimate interest of the controller.

As previously analysed, consent is probably legal ground that gives the data subject the most control over his or her data that is processed. At the same time being a legal ground that gives controller the least long-term stability. It is therefore suggested from the controllers’ point of view to find other legal grounds when the processing seek to be stable and there is expected to be long lasting relationship with the data subject because as discussed above when the consent is withdrawn then the processing must be stopped. When the processing is objected by the data subject in case of legitimate interest and controller can prove that all the necessary exercises prior to the processing were done as discussed below in chapter 2. The controller must be able to demonstrate that the interests and fundamental rights and freedoms of the data subject were taken into account and are in balance and thus the controller may be able to continue the personal data processing.

It is important to pay attention to the type of a relationship existing between controller and data subject or existence of a relationship as such at all when determining legal ground for processing. When there is no connection between data subject and the controller and the stability of processing is not crucial, then the consent is a legal ground should be considered as more suitable. However, controller cannot base processing on consent in certain situations as mentioned above (e.g. controller being an employer or a public authority). Legitimate interest may be more likely to apply when there is already existing relationship between controller and the data subject because then the controller is more likely to have an evident legitimate purpose for using the data in question, and because of the nature of the relationship the processing is less likely to be unexpected or unwanted, so the balancing test is likely to be easier.21 Authors look the requirements and conditions for balance test in next chapter of this research paper more closely. Controller should avoid using legitimate interests when the personal data is used in ways data subject potentially do not understand and would not

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reasonably expect such processing, or even when it may be expected it is likely that the data subject would object such processing when explained to him or her.

Based on above it is suggested to first determine the relationship between the parties, check if there is any exception applying and then decide the most suitable legal ground based on the nature of processing taking into account the expectations of the data subject and the aims of the controller.

1.2. Legitimate interest compared to the performance of a contract

Performance of a contract is applicable legal ground for legitimate processing whenever the processing in question is objectively necessary for the performance of a contract with a data subject, or the processing is objectively necessary in order to take pre-contractual steps at the request of a data subject.\(^{22}\) However, there may still be some overlap with personal data processed on the basis of performance of a contract with personal data processed on the basis of legitimate interest because when deciding performance of a contract to be legitimate ground for processing, the necessity criterion must be strongly taken into account.

Where controllers cannot demonstrate that (a) a contract exists, (b) the contract is valid pursuant to applicable national contract laws, and (c) that the processing is objectively necessary for the performance of the contract, the controller should consider another legal basis for processing.\(^{23}\) Therefore, it is the obligation of the controller to prove that the contract is valid and the purpose of the contract could not be achieved without processing such personal data. Where the processing may be connected to the contract or purpose of the contract but is not necessary for the performance of a contract, i.e. when a requested service can be provided without the specific processing taking place,\(^{24}\) other legal grounds should be considered. In such cases legitimate interest may be more appropriate lawful basis for the processing. The fact that there is contractual relationship between data controller and data subject does not automatically make all contract related data processing legitimate on the basis of the contract. There may be situations where the data processing is related to the contractual relationship between the parties, but is not necessary for the performance of the contract.

\(^{22}\) EDPB 2017, p 22.
contract per se. For example, a situation where there is a contractual relationship between the parties, but one side does not fulfil its obligations and the other side engages third party to claim debt. One may argue that debt collection is not strictly necessary for the performance of a contract, however, it is the legitimate interest of the injured party of the contract to claim what was agreed under the contract. Another common situation where contractual relationship and processing based on the legitimate interest may be combined is employment relationship. The basis for an employment relationship is an employment contract. However, once the contract is concluded, the employer is imposed multiple obligations by the employment law and other regulations that must be fulfilled beside the employment contract and some tasks may be also based on legitimate interest.

Therefore, performance of a contract and legitimate interest both may appear closely in same relationship and attention must be paid to clearly defined based on the purpose of the processing and the necessity of the processing in order to assign correct legal ground to processing to fulfil the transparency obligation towards data subjects.

1.3. Legitimate interest compared to legal obligation

Legal obligation may be seen as most firm legal ground for data processing – when a law requires some acts to be performed, there is usually not much room for the dispute. However, it is important to pay attention that legal obligation as legitimate ground for processing under GDPR applies only in situations where the obligation is derived from the laws of the European Union or of a Member State.25 The situation where there is a need to comply with legislation of a third countries in order to do business is not uncommon in now-days’ global environment and such situation may represent the legitimate interest of a controller and therefore legitimate interest may be appropriate legal ground for processing when the obligations is set by third country legislation.26

Legitimate interest may also come in play when the law does not specifically require personal data processing. There are clear cases such as employment relationship and tax law – law requires employer to submit employee tax related information to tax authorities, i.e. requires the employer to transfer certain personal data of an employee to certain authorities for certain

25 WP29 Opinion 06/2014 on legitimate interest, p 19.
26 For example, in cases where the local tax regulation outside the European Union requires the controller to disclose its customers’ personal data to the local authorities.
purposes. This clear requirement is not always the case and sometimes data controller is put under less specific obligation by the legislator. A case where regulatory authority would only provide general policy guidelines and conditions under which it might consider using its enforcement powers (e.g. regulatory guidance to financial institutions on certain standards of due diligence) for example. In such cases, the processing activities could be assessed under requirements of legitimate interest.\(^{27}\)

GDPR requires the controller (e.g. employer in employment relationship where there already exist contractual relationship and certain legal obligations) to apply technological and organizational security measures to guarantee secure data processing without specifying how the controller should precisely do that. Now when, for example, an employer decides to apply employee monitoring to prevent unauthorized access or data leakage, this is not necessary for the performance of the employment contract nor it is precisely required by legislation, however it does not mean that the employer has no legitimate interest to do so (once the controller has detected that there is no less intrusive way to secure data confidentiality). Such situation including certain specific data processing may be legitimately covered by legitimate interest, while at the same time the rest of the processing of personal data is still legitimate under employment contract and some of the processing activities are specifically required by the law. Therefore, it is again crucial for the data controller to establish appropriate legal ground for each processing activity and to take into account that there may be different legal grounds covering different processing activities even if the relationship between the data controller and the data subject is covered by one “umbrella”.

1.4. Legitimate interest compared to vital interest

Vital interest is a legitimate ground that could be considered the most limited out of those 6 legal grounds provided by the article 6 of GDPR. The word “vital” refers to a question of life and death of the data subject or another natural person. However, it is not stated precisely whether the threat must be immediate.\(^{28}\) Another important aspect to pay attention to is the fact that vital interest being applicable legal ground assumes that the natural person whose vital interest the controller is processing, is not able to give consent – e.g. the data subject must be unconscious or other ways unable to communicate. Authors are not discussing this legal ground in more detail related to legitimate interest because as mentioned in the very

\(^{27}\) WP29 Opinion 06/2014 on legitimate interest, p 19.
\(^{28}\) WP29 Opinion 06/2014 on legitimate interest, p 20.
beginning of the section – vital interest of data subject or another person is very limited
ground and can be relied only when it is matter of life and death and one may argue that there
can be hardly a case where legitimate interest of controller comes in play when someone
else’s life is at stake.

1.5. Legitimate interest compared to public interests and exercise of
official authority

Legitimate interest shall not apply to processing carried out by public authorities in the
performance of their task.29 This said, there are situations where public authority must still
perform data processing not related to their official tasks – for example public authority being
employer or a commercial contracting party. The general requirements to legitimate interest
also apply on public authority when it processes personal data in any other context than
performance of their task.

1.6. Conclusion

Legitimate interest is probably the most flexible legal ground for legitimate personal data
processing and could in principle apply to many types of processing for any reasonable and
legitimate purpose.30 However, at the same time legitimate interest being the most flexible
legal ground for processing, it should be used with high care. Even being most flexible, it is
not suitable for every processing as discussed above and needs justification and balance test
(discussed in details in chapter II). One cannot rely on legitimate interests if there is another
reasonable and less intrusive way to achieve the same result.31 There is nowhere listed the
hierarchy of legal grounds for processing, yet we are confident to say, that legitimate interest
could be used in cases where other legal grounds listed in article 6 of GDPR are not
applicable or do not meet the purpose or quality of processing, provide that criteria discussed
in the next chapter are met.

Based on the above comparisons of legal grounds, the authors find that it is more difficult to
relay on legitimate interest in case of primary processing purpose taking into account the
other legal grounds and possible relationships between the data controller and data subject.

29 GDPR, article 6(1).
30 ICO, p 13.
31 ICO, p 4.
Therefore it is more secure to relay on legitimate interest as processing ground when the purpose is secondary – there is already existing relationship between the controller and the data subject or the processing carries secondary purpose next to the primary processing that is already being carried out based on one of the other legal grounds.
2. Criteria for legitimate interest to be applicable as a lawful ground for processing

Having a closer look at legal framework\textsuperscript{32}, one can observe that there are three elements for lawful ground according to the article 6(1)(f) of GDPR to be applicable, namely, the existence of a legitimate interest, necessity and the balance between the legitimate interest of the controller or a third party at one side and the interests and fundamental rights and freedoms of the data subject on the other side. In this second chapter of the research paper the authors analyse aforementioned steps to enhance legal certainty in relation to criteria for this lawful ground to be applicable for the processing and to provide practical approach on how to use legitimate interest as legal ground for processing in the light of the current law, including the case law of CJEU.

2.1. Existence of a legitimate interest

Under European Union law, the possible existence of legitimate interest is not restricted to data subject.\textsuperscript{33} According to the article 6(1)(f) of the GDPR, this lawful ground is applicable when there are “the legitimate interests pursued by the controller or by a third party”, i.e. in order to be able to process personal data on the basis of article 6(1)(f), it is essential that the purpose pursued for that processing activity is for an interest of the controller or even a third party. It is crucial to pay attention that not any interest is good enough and the interest must be legitimate. The legitimate interest condition is somewhat ambiguous and controversial and the starting point here is the existence of a legitimate interest\textsuperscript{34} and in this section the authors discuss which interest may be considered as legitimate. From the CJEU case law one can find examples of the situations where the legitimate interest may be pursued by the controller, and one can find also some examples of the situations where the legitimate interest of a third party is justified.

The existence of a legitimate interest must be carefully assessed in each specific case.\textsuperscript{35} In the CJEU Case C-212/13 \textit{Ryneš} concerning home video surveillance system which covered partially a public space, the Court found that the homeowner has legitimate interest to protect

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{32}] GDPR, article 6(1)(f); CJEU case C-13/16 \textit{Valsts policijas Rīgas regiona pārvaldes Kār̆t̆bas policijas pārvalde v Rīgas pašvaldības SIA Rīgas satiks}, 4 May 2017.
\item[\textsuperscript{33}] Handbook 2018, p 155.
\item[\textsuperscript{34}] P. Carey, p 57.
\item[\textsuperscript{35}] GDPR, recital 47.
\end{itemize}
\end{footnotesize}
his property, health and life of his family and himself.\(^{36}\) Recitals 47, 48 and 49 of the GDPR offer some examples of situations where legitimate interest could exist: fraud prevention, direct marketing, transmitting personal data within the group of undertakings for internal administrative purposes, including the processing of clients’ or employees’ personal data, ensuring network and information security, including preventing unauthorised access to electronic communications networks and malicious code distribution and stopping “denial of service” attacks and damage to computer and electronic communications systems. However, these are just examples and thus, any kind of legitimate interest in any context can be taken into account as long as it meets all the three criteria stated in the beginning of this chapter.

WP29 notes in its opinion that the concept of “interest” is closely related to, but distinct from, the concept of “purpose” and continues that as purpose is specific reason why the data are processed, it is aim or intention of the data processing; and an interest, on the other hand, is the broader stake that one may have in the processing, or the benefit that one derives from the processing.\(^{37}\) According to this opinion an interest must be real and present, something that corresponds with current activities or benefits that are expected in the very near future and it must be sufficiently clearly articulated to allow a balancing test to be carried out.\(^{38}\) WP29 also provides the following example list of some of the most common contexts in which the issue of legitimate interest may rise: exercise of the right to freedom of expression or information, including in the media and the arts; conventional direct marketing and other forms of marketing or advertisement; unsolicited non-commercial messages, including for political campaigns or charitable fundraising; enforcement of legal claims including debt collection via out-of-court procedures; prevention of fraud, misuse of services, or money laundering; employee monitoring for safety or management purposes; whistle-blowing schemes; physical security, IT and network security; processing for historical, scientific or statistical purposes; and processing for research purposes (including marketing research)\(^{39}\).

Examples provided in the recitals of GDPR and in the WP29 Opinion, make it clear that business purposes can be legitimate interests. However, the Court has found in Google Spain case that merely the economic interest cannot justify the interference to one’s fundamental

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\(^{36}\) CJEU case C-212/13 Frantisek Ryneš v. Úrad pro ochranu osobních údajů, 11 December 2014, para. 34.

\(^{37}\) WP29 Opinion 06/2014 on legitimate interest, p 24.

\(^{38}\) WP29 Opinion 06/2014 on legitimate interest, pp 24-25.

\(^{39}\) WP29 Opinion 06/2014 on legitimate interest, p 25.
It may be argued that reliance on business purposes would justify more limited types of processing.

The legitimate interests of third parties can be relevant in different ways and WP29 provides some examples, such as situations where controller goes beyond its specific legal obligations to assist law enforcement or private stakeholders in their efforts to combat illegal activities, such as money laundering, child grooming, illegal file sharing online, and the situations where it is particularly important to ensure that the limits of this legal ground for processing are fully respected. Another example, that can be found from the WP29 opinion, is the publication of data for the purpose of transparency and accountability, in more detail for example disclosing the salaries of the top management in a company primarily not in the interests of the controller who publishes the data, but rather, in the interest of other stakeholders, such as employees or journalists, or general public, to whom the data are disclosed. In the CJEU Case C-13/16 Rigas concerning access to identification and contact details of a person that was involved in an accident that resulted in a damaged tram, the Court found that “there is no doubt that the interest of a third party in obtaining personal information of a person who damaged their property in order to sue that person for damages can be qualified as a legitimate interest”, thus it recognised the establishment of legal claims as a legitimate interest. In the CJEU Case C-398/15 Manni concerning rejection of request to erase data from Public Registry of Companies, the Court found that there was the legitimate interest pursued by the third party to whom the data was disclosed which was to protect, in particular, the interest in relation to joint stock companies and limited liability companies, since the only safeguards they offer to third parties are their assets and disclosure is legitimate to be able to ascertain information concerning the company, especially particulars of the persons who are authorised to bind the company. In relation to the CJEU Case C-131/12 Google Spain, the Court recognised that internet users may have legitimate interest to have access to information processed by internet search engine operator.

One may argue that the threshold for criterion of interest to be legitimate in general is relatively easy to fulfil and any kind of legitimate interest in any context can be taken into account. Thus, this may rise a concerns that legitimate interest as a lawful ground for

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40 CJEU case C-131/12 Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja Gonzalez, 13 May 2014, para. 81.
41 WP29 Opinion 06/2014 on legitimate interest, p 28-29.
42 WP29 Opinion 06/2014 on legitimate interest, p 27.
43 CJEU case C-13/16 Rigas, para. 29.
45 CJEU case C-131/12 Google Spain, para. 80-81.
processing can be too easily (mis)used as being the most flexible legal ground as discussed throughout the first chapter of this paper. However, this criteria of existence of the legitimate interest serves important part as it forces the controllers, who are responsible for identifying and documenting the lawful ground for processing, to stop and think about the situation at hand and the nature and purpose of processing – analysing whether there are other legal ground more appropriate and discuss deeper over the source of the legitimate interest i.e. of their or the third party interest present. If the interest is illegitimate, the other criteria will not come into play as this initial threshold for the use for this lawful ground will not have been reached.

2.2. Strict necessity

The second criterion for article 6(1)(f) of GDPR to be applicable is that the processing must be necessary for the legitimate interest. According to the article 6 of the GDPR the processing shall be lawful only if and to the extent that at least one of the legal ground applies and to the extent that “is necessary for” the specific purpose in the established context. According to that, the personal data being processed must be necessary for the legitimate interest (pursued either by the controller or by the third Party) to be achieved. Necessity criterion is recurrent condition in almost all the requirements on the lawfulness of the processing of personal data\(^\text{46}\) stemming from EU data protection secondary law, however there is also a link between article 8(2) of the Charter and the secondary law, as article 8(2) refers to the legitimate basis for processing “laid down by law”.

In the Case C-524/06 Huber the Court states the meaning of the concept of necessity in the European Union law as follows: “what is at issue is a concept [necessity] which has its own independent meaning in Community law and which must be interpreted in a manner which fully reflects the objectives of the that Directive, as laid down in Article 1(1) hereof”.\(^\text{47}\) The meaning of the concept of necessity in the European Union law must reflect the objectives of data protection law.\(^\text{48}\) The purpose of Directive was stated as follows: “Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.”\(^\text{49}\) In the GDPR the objectives are a

\(^{46}\) See also the subchapter under the first chapter for the short analysis of what necessity means in relation to contract versus legitimate interest.
\(^{47}\) CJEU case C-524/06 Heinz Huber v Bundesrepublik Deutschland, 16 December 2008, para 52.
\(^{48}\) EDPB 2/2019, p 7.
\(^{49}\) Directive 95/46/EC; article 1(1).
bit reworded, however the purpose is similar – to protect fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data. Therefore, it is clear that it also involves consideration of the fundamental rights to privacy and protection of personal data. In addition, the requirements of data protection principles at all times shall be followed, including fairness principle, which is stipulated in the GDPR article 5(1)(a) with lawfulness and transparency principles which requires the data processing being lawful, fair and transparent in relation to the data subject. When purposes of processing are identified, those shall be clearly specified and communicated to the data subject.

Assessing what is “necessary” involves a combined, fact-based assessment of the processing “for the objective pursued and of whether it is less intrusive compared to other options for achieving the same goal”. The case law of the CJEU applies a strict necessity test for any limitations of the exercise of the rights to personal data protection and respect for private life with regard to the processing personal data. In Case C-13/16 Rīgas, the Court recalled that “derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary”. Thus, the criterion of strict necessity was analysed and the Court recognised that there must be present the need to process personal data for the purposes of the legitimate interests pursued. Processing must be necessary for the purposes(s) intended.

Article 6(1)(f) could be read also as “necessary for the purposes of (any kind of) legitimate interest pursued by the controller or by a third party (in any context).” However, as in case of other legal grounds (except consent), it should be considered whether other less invasive means are available to serve the same end. This second criterion forces the controller to analyse whether the data processing in necessary to satisfy the identified legal interest. And as can be conclude based on the relevant case law of the Court and the guidelines provided by data protection authorities, the necessity criterion is critical and should be evaluated by the data controller with appropriate care.

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50 GDPR, article 1(2).
51 Charter of Fundamental Rights, articles 7 and 8.
52 European Data Protection Supervisor (EDPS), Assessing the necessity of measures that limit the fundamental right to the protection of personal data: A Toolkit, 11. April 2017, p 5.
53 EDPS 2017 toolkit for assessing the necessity, p 7.
54 CJEU case C-13/16 Rīgas, para. 30.
55 WP29 Opinion 06/2014 on legitimate interest, p 29: see also the first chapter’s subchapter 1.3 of this paper in regards necessity criterion in relation to legitimate interest compared to legal obligations.
2.3. Balancing factors

The existence of legitimate interest and fulfilling the condition of necessity is not enough for applying legitimate interest as the legal ground for processing - the last prerequisite for application of aforementioned legal ground is the balance test, which must be conducted between those legitimate interest of the controller or a third party and the interests and fundamental rights and freedoms of the individuals whose data will be processed.

The practical guidance on how to conduct balancing test was provided by the WP29 on 4 April 2014, including many practical examples to illustrate the application of the balancing test, thus in this section the authors elaborate mainly on the judgments made after WP29 guidance was published to provide additional value and practical guidance in the light of current legal framework.

On 13 May 2014 the Court found in the judgment in Case C-131/12 Google Spain “the outcome of the weighting of the interests at issue to be carried out under article 7(f) of the Directive (now under GDPR article 6(1)(f)) may differ according the processing carried out by the operator of a search engine or that carried out by the publisher of the web page is at issue, given that, first, the legitimate interests justifying the processing may be different and, second, the consequences of the processing for the data subject, and in particular for his private life, are not necessarily the same”. Thus, the Court was stressing the importance of case-by-case decision-making.

In the case C-398/15 Manni, made on 9 March 2017, the assessment made by the Court highlights the importance of the details of a certain processing activity when dealing with balancing of the interests and rights of the parties and the Court stresses out that all circumstances matter such as purpose of the processing, the category of data subject and the types of data processed and the interest involved.

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56 WP29 Opinion 06/2014 on legitimate interest.
57 CJEU case C-131/12 Google Spain, para. 86.
58 CJEU case C-398/15 Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v. Salvatore Manni, 9 March 2017, para. 55. The Court considered the wide range of possible scenarios and the considerable heterogeneity in the limitation periods provided for by the various national laws and decided that it was “impossible…to identify a single time limit, as from the dissolution of a company, at the end of which the inclusion of such data in the register and their disclosure would no longer be necessary”.
59 CJEU case C-398/15 Manni para. 58. The Court noted that the publication in the Public Registry of Companies require “disclosure only for a limited number of personal data items, namely the identity and the representative functions” that the person in question held.
60 CJEU case C-398/15 Manni, para. 60. As discussed in the second subsection of this second chapter, the Court pointed out that in the weighting to be carried out, the need to protect the interests of third parties in relation to joint-companies and limited liability companies and to ensure legal certainty, fair trading and thus the proper functioning of the internal market had to be considered.
In the Case C-13/16 *Rigas*, made on 4 May 2017, in relation to balancing the opposing rights and interests at issue, the CJEU noted that this depended “on the specific circumstances of the particular case” and it suggested the two relevant factors: the possibility of accessing the data at issue in public sources or not and the age of the data subject in question.\(^{61}\) Regarding the balance of opposing rights and interests at issue, the Court carried up the analysis until the last point but did not make an exact finding and left it to the national court to decide, however, the Court did highlight the dependence of the balancing on specific circumstances of the particular case and that it is possible to take into consideration that the seriousness of the infringement of the data subject’s fundamental rights resulting from that processing can vary depending on the possibility of accessing the data at issue in public sources.

One may argue that the test requires full consideration of a number of balancing factors, to ensure that the interests and fundamental rights and freedoms of data subject are duly taken into account, the analysis on named balancing elements is provided in the subsection below.

2.3.1. Interests or fundamental rights and freedoms of the individuals

Controller needs to identify which are these interests or fundamental rights and freedoms of the data subject (taking into account all relevant interests of a data subject while keeping in mind that this goes beyond individual’s right to privacy\(^{62}\)), that could be impacted, and controller has to consider the likelihood and impact of adverse effects on data subject. This may include, for example, an evaluation whether there is a disproportionate impact on individual’s privacy or are there less invasive means to reach the identified purpose of the processing that serve the legitimate interest of the data controller. According to WP29 even individuals engaged in illegal activities should not be subject to disproportionate interference with their rights and interests.\(^{63}\) For example, an individual who may have perpetrated theft in a supermarket could still see his interests prevailing against the publication of his picture and private address on the walls of the supermarket and/or on the internet by the owner of the shop.\(^{64}\)

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\(^{61}\) CJEU case C-398/15 *Manni*, para. 31.

\(^{62}\) WP29 Opinion 06/2014 on legitimate interest, p 29: “‘Interests’ and “rights” should be given a broad interpretation.”… “It (reference to interests or fundamental rights and freedoms) provides more protection for the data subject, namely it requires the data subjects’ “interests” to be also taken into account, not only his or her fundamental rights and freedoms.”

\(^{63}\) WP29 Opinion 06/2014 on legitimate interest, p 30.

\(^{64}\) WP29 Opinion 06/2014 on legitimate interest, p 30.
In principle, the rights and interests of individuals enjoy greater protection than those of the controller\textsuperscript{65} and if the data subject’s rights override the controller’s legitimate interests, then the controller can take measures and implement safeguards to ensure that the impact on the data subject’s rights is minimised, and invert the balance before starting the data processing based on legitimate interest.

2.3.2. Reasonable expectations of the data subject

According to the recital 47 of GDPR, the existence of a legitimate interest needs careful assessment “taking into consideration the reasonable expectations of the data subjects based on their relationship with the controller”.\textsuperscript{66} This means that the fundamental rights and freedoms on one hand and the legitimate interests on the other hand, have to be evaluated and balanced carefully, case-by-case. The controller must be able to provide reasoning why would individuals expect this processing to take place, especially with regard to the use and disclosure of the data in the relevant context and how the processing in line with people’s reasonable expectations.

The legitimate interests must not override the interests or fundamental rights and freedoms of the data subject – a proportionality assessment is thus brought into play in which the legitimate interests are to be weighed against the rights, freedoms, and legitimate interests of the relevant individual whose data are being processed, in order to assess if the latter override the former.\textsuperscript{67} The reference to “interests or fundamental right and freedoms” has a direct impact on the scope of application of the provision and there is nothing that suggests otherwise than to take all the relevant interests of the data subject into account. Here it must be taken into consideration that the data protection legislation in principal is aimed at protecting the privacy of the individual and in the light of the intended supremacy of human rights legislation over other legal provisions it seems clear that where the interests of the controller and those of the data subject are perceived to be equal, national legislators and the courts will determine the interests of the data subject to be the most important.\textsuperscript{68}

\textsuperscript{66} GDPR, recital 47.
\textsuperscript{67} P. Carey, pp 57-58.
\textsuperscript{68} P. Carey, p 58.
According to recital 47 of the GDPR the assessment needs to take into consideration “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.” and continues “The interests and fundamental rights of the data subject could in particular override the interests of the data controller where personal data are processed in circumstances where data subjects do not reasonably expect further processing.”

European Data Protection Board (“EDPB”) gives some practical examples in its guidelines (public consultation version) on processing of personal data through video devices. EDPB stands on a position that an employee in his or her workplace is in most cases not likely expecting to be monitored by the employer. Furthermore, monitoring is not to be expected in one’s private garden, in living areas, or in examination and treatment rooms. In the same vein, it is not reasonable to expect monitoring in sanitary or sauna facilities – monitoring such areas is an intense intrusion into the rights of the data subject. The reasonable expectations of data subjects are that no video surveillance will take place in those areas. On the other hand, the customer of a bank might expect that he or she is monitored inside the bank or by the ATM. Data subjects can also expect to be free of monitoring within public areas especially if those public areas are typically used for recovery, regeneration, and leisure activities as well as in places where individuals stay and/or communicate, such as sitting areas, tables in restaurants, parks, cinemas and fitness facilities. Here the legitimate interests or rights and freedoms of the data subject will often override the controller’s legitimate interests.

2.3.3. Nature of data, processing activity and status and relationship of parties

In the evaluation the controller must take into consideration also the following i) the nature of the data; ii) the processing activity; iii) the status of the data subject and of controller and what is the relationship between them; and iv) proportionality of the impact on the data subjects.

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69 GDPR, recital 47.
75 EDPB 3/2019, p 11.
76 See WP29 Opinion 06/2014 on legitimate interest, p 38-41.
There are two relatively recent Court cases giving some guidance on these elements of the balancing test. First, the Case C-398/15 Manni from 9 March 2017, where the Court highlights how important are the details of a certain processing activity when dealing with balancing of the interests and rights and that all circumstances matter. Secondly, in the Case C-13/16 Rigas from 4 May 2017, in relation to balancing the opposing rights and interests at issue, the CJEU noted that this depended “on the specific circumstances of the particular case” and it suggested the two relevant factors: the possibility of accessing the data at issue in public sources and the age of the data subject in question. Regarding the balance of opposing rights and interests at issue, the Court did highlight that it is possible to take into consideration the seriousness, of the infringement of the data subject’s fundamental rights resulting from the processing, can vary depending on the possibility of accessing the data at issue in public sources.

On the nature of personal data, it is clear that the impact assessment depends on the nature of the date at hand. That means taking into account whether there is special categories of personal data involved or is there information that is sensitive in other way and can reveal a great deal about matters that individual would expect to remain private. In general, the more sensitive the information involved is, the more impact there may be for the data subject. However, this does not mean that less sensitive data can be freely or more easily processed based on the article 6(1)(f) of the GDPR, as depending on the way it is processed can have significant impact on individuals. Also the status and relationship is relevant when concluding the assessment of impact. Article 6(1)(f) of the GDPR mentions children in particular. Thus, if the data subject belongs to a more vulnerable group of data subjects, it should be taken into consideration. This may also include for example vulnerable segments of the population such as the mentally ill, asylum seekers, or the elderly. GDPR recital 49 mentions that “where there is a relevant and appropriate relationship” between the data controller and the data subject, for example “where the data subject is a client or in the service of the controller”. Thus, the question of relationship i.e. whether the data subject is an employee, a client, a student, is relevant. Especially important is to assess the effect on individuals in situation of imbalanced relationship between the controller and the data subject. During the evaluation the controller must take into consideration also the nature of

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77 CJEU case C-398/15 Manni, para. 55.
78 CJEU case C-131/12 Google Spain, para 31.
79 WP29 Opinion 06/2014 on legitimate interest, p 38-39.
80 See on relationship of data subject and the controller also the analysis in the chapter 1 subchapters 1.2 and 1.4.
81 WP29 Opinion 06/2014 on legitimate interest, p 40-41.
processing. For example, whether the data are publicly disclosed or otherwise made accessible to a large number of people; or whether large amounts of data is processed and for example combined with other data in case of profiling; the extent and manner of profiling whether it suggests a high level of intrusiveness. Controller shall identify the fundamental rights and interest of the data subject and considers likelihood and impact of adverse effects on data subjects at one hand and the nature of the interests of the controller or third party on the other hand, to evaluate the possible prejudice suffered by the controller or third parties, or broader community, if the data processing does not take place.82

2.3.4. Establishing the final balance

In the cases, where based on preliminary analysis it is not clear which way the balance should be stuck, it is important to carry out a further assessment in the balancing exercise.83 If the data subject’s rights override the controller’s legitimate interests, then the controller can take measures and implement safeguards to ensure that the impact on the data subject’s rights is minimised, and invert the ‘balance’ before being able to lawfully rely on this legitimate basis for processing.84 WP29 provides in its opinion guidance on these additional safeguards that the controller can apply and underlines the crucial role of accountability and transparency, at the same time stressing out the importance of the right of the data subject to object to the processing of their data, or to the way it is processed (accessed, modified, deleted or transferred), when balancing the legitimate interests of the controller and the interests of the data subject’s fundamental rights.85

In practice additional safeguards to prevent undue impact on the data subjects mean using privacy enhancing technologies and approaches that can tip the balance in favour of the data controller and provide protection to individuals. Such approaches include privacy by design and privacy by default principles, increased transparency, strict limitation of data and empowering data subjects for example with general and unconditional right to object (opt-out).86 It is clear that irrespective of the lawful ground of processing that a controller relies on to initiate a personal data processing operation, the controller must apply the safeguards provided for in the general data protection law regime.87 This topic is somewhat technical

82 WP29 Opinion 06/2014 on legitimate interest, p 39-40.
83 WP29 Opinion 06/2014 on legitimate interest, p 41.
84 Handboook 2018, p 155.
86 WP29 Opinion 06/2014 on legitimate interest, p 51.
87 Handbook 2018, p 142
without specific legal guidance on its practical implementation, therefore the section will be concluded based on the short analysis above. The authors find that the controllers have an opportunity to regulate the impact by considering additional measures to help reduce the undue impact of the processing to the data subjects by paying attention to and applying potential measures and additional safeguards that could enhance individuals’ privacy.

2.4. Conclusion

When a controller has carefully considered all the possible legal grounds discussed in the chapter I and identified the legitimate interest as most suitable legal basis for its processing activity, then the controller must be ready to take additional steps to ensure the protection of the rights and freedoms of the data subject as analysed in chapter.

The Court has spelled out the three-tiered test that allows a processing to be grounded on the necessity for a legitimate interest – existence of a legitimate interest, necessity of the processing of that data for the purpose of the legitimate interest pursued and the balancing of the rights and interests at stake.\(^{88}\) The authors analysed these three criteria and provided their view on how to use legitimate interest as legal ground for processing in the light of the current European Union law. Despite the first impression that the threshold for the first criterion in general is relatively easy to fulfil and any kind of legitimate interest in any context can be taken into account, the authors make the following conclusions: first criterion of existence of the legitimate interest serves important part as it forces the controllers to identify and analyse the legitimate interest at hand; second criterion of strict necessity forces the controller to analyse whether the data processing is necessary and the necessity criterion is critical and thus shall be evaluated by the data controller with appropriate care; and third criterion, the balancing test to evaluate that the processing does not have disproportionate impact on the individuals requires full consideration of a number of balancing factors and in addition, the controllers have an opportunity to regulate the impact by considering additional measures to help to reduce the undue impact of the processing of the data subjects.

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\(^{88}\) CJEU case C-13/16 Rīgas, paras. 30-32.
SUMMARY

Legitimate interest is controversial legal ground for processing of personal data for cases where more conventional grounds for processing are not present. Legitimate interest is a legal ground that should be used with high care to avoid challenges and considerable risks to abuse this legal ground. The relation between legitimate interest and other legal grounds provided in article 6 of GDPR is not particularly clear. In addition, there is not much legal certainty about the preconditions for this lawful ground for processing to be applicable.

One may argue that legitimate interest is the most flexible legal ground for personal data processing but even being flexible, one has to keep in mind that legitimate interest is not suitable for every processing purpose and needs justification and three step assessment. One cannot rely on legitimate interests if there is another reasonable and less intrusive way to achieve the same result. In current European Union legal framework there is nowhere listed the hierarchy of legal grounds for processing. However the attention must be paid to the processing purpose and the nature of the relationship between the controller and the data subject. Legitimate interest as legal ground in case of primary processing purpose is difficult to justify and therefore can be considered on the lower level of hierarchy and worth considering when no other legal ground is applicable. However, it may be secure to relay on legitimate interest as secondary processing ground when there is already existing relationship between the controller and the data subject or the processing is somewhat “side processing” carried out next to a processing purpose that is already established based on one of the other legal grounds – in such a case the legitimate interest is as equal ground for side processing as any other.

When a controller has considered all the factors and possible legal grounds discussed in the chapter 1 and identified the legitimate interest as the most suitable legal basis for processing, then the controller must exercise high care over the data processed and apply additional safeguards discussed in chapter 2 to ensure the balance of the processing – the legitimate interest of the data controller should not override the interests and rights and freedoms of the data subject.

Relaying on legitimate interest as legal ground makes personal data processing legitimate only if the processing is necessary for the purpose of the legitimate interest pursued by the
controller or parties to whom the data are disclosed. Proportionality (does the processing match the purpose of the processing) and subsidiarity (the purpose of the processing could not reasonably be fulfilled by other means) are essential when determining the necessity. It is possible to relay on legitimate interest when the processing is proportionate, has minimal privacy impact, and people would not be surprised by the fact of the processing, or where there is a compelling justification for the processing. Therefore, based on above the authors are confident to conclude that a three step approach should precede when applying legitimate interest as legal ground for processing: a) purpose test (defining the legitimate interest of the controller and the most suitable legal ground for processing); b) necessity test (analysing the necessity of personal data processing to achieve the defined purpose); c) balancing test (assessing the balance and whether the individual’s interests override the legitimate interest of the controller).

The legal ground that may be seen as most flexible has several aspects to be assessed and sets several obligations to the controller before it is possible to fully relay on legitimate interest as legal ground to base the personal data processing on.
Overview of the contribution of each group member to this legal research

The research is a result of cooperation of all three authors, Information Technology Law master-programme students Airi Ilves, Laura Saks and Urmas Tross.

Introduction and the structure were discussed and agreed in the physical meeting shortly after choosing the topic in Tartu. Online folder with sources, materials and drafts, and messenger group chat was established to facilitate the cooperation and ideas sharing between the authors.

Urmas provided his ideas throughout the research and, however due to the limited skills in producing academic text in English, Laura took the main charge of producing the text for the first chapter and Airi for the second chapter of the work. Urmas was contributing by providing his comments, reviews and ideas. Airi was mainly drafting text until 18.11.2019 and thereafter provided the master copy of the thesis to Laura who did intense writing from 18.11 until 7.12.2019. Airi and Laura did several proof readings and editing the final text. We are happy to confirm that every member of the team contributed accordingly.

In the last week the two parts were combined and Urmas took charge on ensuring that the work is in accordance with the university guidelines for formatting written works, especially footnotes and literature and provided his final comments on the introduction and conclusions on 9.12.2019. Laura was in charge of ensuring that the work, license and this overview will be submitted on time.

The authors would like to thank the representatives of consulting entity of Intellectual Property and IT Law Commission of the Bar Association Anneli Aab and Karmen Turk for instructions provided to the authors of this thesis.
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