

Draft Regulation on Electronic Privacy: 'Legitimate interest' examples under the General Data Protection Regulation (GDPR)

Legitimate interest is among the grounds that justifies data processing under the GDPR and helps prevent misuse of, and over-reliance on, other legal grounds. In short, a correct implementation of the legitimate interest ground ensures that commercial interests of companies are not in conflict with the interests and fundamental rights and freedoms of the user. Furthermore, including legitimate interest as a legal basis for processing communication data would ease the pressure to have to specify all the possible exceptions that may be needed while ensuring a high level of protection for the user. This in itself is important for the current environment in which we all operate but more importantly to ensure that the Regulation is future proof.

The legitimate interest ground requires service providers conduct a rigorous legal analysis and to provide safeguards around the processing of personal data. In order to rely on legitimate interest, a service provider must first perform a detailed balancing test: what is considered necessary for his legitimate interests must be balanced against the interests or fundamental rights and freedoms of data subjects.¹ How service providers should perform this balancing test is set out in specific guidance from Data Protection Authorities (DPAs).² Service providers are required to go through several steps, considering whether (a) its interest is in fact legitimate, (b) there is any impact on data subjects – and if that is the case: (c), whether it can tip the balancing scale in its favour by implementing additional safeguards or mitigating measures in order to prevent or mitigate such impact on data subjects. Relying on legitimate interest thus requires careful analysis from service providers, not in the least because the use of this legal basis is known to be scrutinised by DPAs and courts in administrative and legal proceedings.³

In sum, legitimate interest compliments and provides a valid and necessary, alternative to other legal grounds for processing. In this context, it is disappointing that the legitimate interest ground for processing is currently absent in the e-privacy regulation.

In the next page you can find a list of circumstances where service providers might need to legitimately access communications. While these circumstances may not be strictly necessary to provide the service, they are in the legitimate interest of the service provider and do not necessarily have an undue impact on data subjects. Moreover, it is also in their benefit to ensure the service functions properly and remains competitive. All the mentioned activities will require consent contributing to consent fatigue. Worse yet, people will be asked to consent on things they do not understand, which in itself goes against the definition of consent.

¹ Article 6(1)(f) GDPR

² Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, Adopted on 9 April 2014.

³ For a recent example, see Case C-13/16 Valsts policijas Rīgas reģiona pārvaldes Kārtības policijas pārvalde v Rīgas pašvaldības SIA "Rīgas satiksme".

Examples of data from or about a user's terminal equipment that a service provider might process using the legitimate interest ground:

- **Information security:** In order to fight certain forms of abuse of their networks, where appropriate service providers should be able to scan, filter and ultimately process both communication content and metadata for malware, phishing and spam detection.
- **Filtering out illegal / unacceptable content:** Illegal content such as images of child sexual exploitation are often filtered out by means of automated tools that scan such communication.
- **Analytics:** A service provider will need to collect information from a user's device in order to assess how the app or service is performing and ensure, for instance, that it performs properly and remains competitive. If at a certain stage of a service the number of users decreases, the service provider can presume that this is a weak point of a service that must be improved.
- **Product features:** Translators, bot functionalities and assistive technologies that automatically copy hotel reservations and travel itineraries in the user's calendar, while not strictly necessary for the proper functions of a service, are often expected by individuals.
- **Testing of innovative features:** Service providers need to test any new feature to ensure users will enjoy it and, in some cases, whether it functions correctly in line with the proposed Digital Content Directive. This may require using the processing capabilities of the users' devices. Again, this may not be strictly necessary to provide the service, but it will be in the legitimate interests of the service provider and for the individual's benefit. The data collected for these purposes is only useful when aggregated and made anonymous, as it will be under GDPR. User privacy will be equally protected whether their data is processed under legitimate interest or consent.