Lubberger Lehment

Legitimate interest in the age of AI and analytics

Practical guidance on the balancing test and decision-making

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Legitimate interests in the age of AI and analytics

THE CONTEXT

- New technology allows companies to process personal data in new and more intensive ways.

01 More data sets and combined data sources

02 Additional data analysis and profiling

03 Stronger effects – scaling and speed

WHY LEGITIMATE INTERESTS?

- AI and analytics often support business purposes that are not strictly required by contract or law.
- Valid consent may be difficult to obtain or unsuitable in the specific context.

THE CHALLENGE

- The balancing test creates room for judgement – but needs a reliable justification.

➢ ***Legitimate interests are flexible, but they are not a shortcut.***



Objectives of the workshop

PRACTICAL GUIDANCE ON THE BALANCING TEST AND DECISION-MAKING

01 Refresh the balancing test.

02 Apply the test to data-intensive use cases.

03 Identify safeguards and limits.

04 Address uncertainty in the balancing test.

OBJECTIVE

- Together, we will discuss relevant use cases to explore the scope and limits of legitimate interests for data-intensive processing.

➢ ***The balancing test does not always provide absolute legal certainty.***

➢ ***The aim is to develop a well-reasoned and defensible position.***



Refresh the balancing test.

The three-step test

01

LEGITIMATE INTEREST

What specific interest does the company or a third party pursue?

02

NECESSITY

Why is this processing needed for that interest?

03

BALANCING

Do the interests, rights or freedoms of individuals override the legitimate interest?

- ***All three conditions must be met for each relevant processing activity.***
- ***The assessment must reflect its specific design, limits and safeguards.***

Interest

FIRST STEP – IDENTIFY THE INTEREST

INTEREST **The broader stake or benefit pursued through the processing.**

Example: Improve customer service and reduce response times.

WHOSE? **The interest may be pursued by the controller, a specific third party, or both.**

TO QUALIFY AS LEGITIMATE

- **A wide range of interests may qualify. There is no exhaustive list.**

01 **Lawful**

02 **Clearly and precisely articulated**

03 **Real and present**

➢ ***AI development, innovation or future benefits alone are not sufficiently specific.***



Necessity

SECOND STEP – ANALYSE THE NECESSITY

- **The processing must be necessary to pursue the legitimate interests.**
- **Being useful is not sufficient.**

ALTERNATIVE TEST

- **Could the legitimate interest be achieved just as effectively by a less intrusive option?**
  If yes, the processing is not necessary under Article 6(1)(f).
- **Assess necessity together with data minimisation.**

THE COMPANY SHOULD EXPLAIN WHY IT NEEDS

01 **this amount of data**

02 **this processing method**

03 **this group of individuals**

04 **this retention period**



Balancing in context

THIRD STEP – BALANCING OF OPPOSING INTERESTS OR RIGHTS AND FREEDOMS

- **The assessment must consider all relevant circumstances of the specific processing.**

BALANCING FACTORS

01 **INTERESTS AND RIGHTS OF INDIVIDUALS**

Identify the affected interests, fundamental rights and freedoms.

02 **IMPACT OF THE PROCESSING**

Consider
- the nature of the data,
- the processing context and
- any further consequences.

03 **REASONABLE EXPECTATIONS**

Assess objectively what individuals may expect in the specific context.

04 **MITIGATING MEASURES**

Consider the measures implemented to reduce the identified impact.

A defensible decision

ACCOUNTABILITY

- The documentation must provide evidence on how and why the decision was reached.

THE ASSESSMENT SHOULD RECORD

01 The interest and the specific purpose

02 The processing and the alternatives considered

03 The expected benefits and the effects on individuals

04 The safeguards and their implementation

05 The decision, conditions and review triggers

Digital Omnibus: AI clarification still under negotiation

01

COMMISSION PROPOSAL

NOVEMBER 2025

New Article 88c GDPR

- **Explicit reference to legitimate interests** for AI development and operation.
- **Specific safeguards**: data minimisation, enhanced transparency and an unconditional right to object.

02

EDPB–EDPS JOINT OPINION

FEBRUARY 2026

Current GDPR already allows legitimate interests for AI in some cases

If Article 88c is retained:

- The full three-step test must continue to apply.
- Existing legal duties are not additional safeguards.
- An unconditional objection should be available before processing starts.

03

PRESIDENCY COMPROMISE

October 2026

AI clarification moved – then reintroduced

- April: Article 88c dropped; clarification moved to a recital.
- September: operative rule returns as Article 88 bis.
- New text is narrower and tied expressly to Article 6(1)(f).
- Detailed safeguards – including the unconditional right to object – are removed from the article.

DISCUSSION

- **Does an AI-specific legitimate-interest rule change the balancing test – or mainly add legal certainty?**

Use Cases.

Personalisation.

Personalised marketing

THE CASE

An online store uses each customer’s purchase history to send personalised product offers by email.

PURPOSE	Show customers more relevant products.
DATA	Purchase history.
PROCESSING	Purchase history is analysed to infer likely product interests.
SCOPE & SAFEGUARDS	Easy opt-out in every email.

THE DECISION

Can the company rely on legitimate interests?

DISCUSSION POINTS

01 Can the interest be considered as legitimate?

02 Would customers reasonably expect their purchase history to be used for personalised offers?



Variation 1: Adding browsing activities

WHAT CHANGES

The online store now also uses customers' clicks, searches and product views within its online shop.

PURPOSE	Show customers more relevant products.
DATA	Purchase history, product views, searches and clicks.
PROCESSING	The data are combined to identify broad product interests.
SCOPE & SAFEGUARDS	The existing safeguards remain unchanged.

THE DECISION

Can the company rely on legitimate interests?

DISCUSSION POINTS

01 Is the additional data necessary for the stated purpose?

02 Would customers reasonably expect these data sources to be combined?

03 Which additional safeguards are needed?



AI-supported customer service.

AI-supported customer service

THE CASE

A company uses an AI-supported tool to answer customer service requests received by email.

PURPOSE	Respond to customer requests more efficiently.
DATA	Customer emails.
PROCESSING	The tool analyses each request and sends an automated response without prior human review.
SCOPE & SAFEGUARDS	Customers are informed about the use of AI and can easily contact a human agent.

THE DECISION

Can the company rely on legitimate interests?

DISCUSSION POINTS

01 Does automated answering change the purpose – or mainly the method and intensity of the processing?

02 Is fully automated answering necessary, or would human review be equally effective?

03 Which safeguards are needed?

Variation 1: Emotion recognition

WHAT CHANGES

The company uses AI to infer customers' emotions from recorded service calls.

PURPOSE	Identify recurring points of frustration and improve customer service processes.
DATA	Recorded customer calls.
PROCESSING	The AI analyses customers' voices and classifies emotions.
SCOPE & SAFEGUARDS	Only aggregated trends are retained. Individual emotion scores are deleted and are not used to make decisions about customers.

THE DECISION

Can the company rely on legitimate interests?

DISCUSSION POINTS

01 Does classification as a high-risk AI system affect the legitimate-interest assessment?

02 Would customers reasonably expect their voice to be used to infer emotions?

03 What safeguards would be needed to address the additional impact?



How to deal with uncertainty in the balancing test.

Where judgement ends and legality begins

The Business Judgement Rule protects informed business choices. It does not protect unlawful processing.

LEGAL BOUNDARY

BUSINESS DISCRETION

Choice between legally defensible options

Adequate information

Company interest

Good faith and no conflicts

UNSETTLED LAW

Diligence standard for unresolved legal questions

Qualified and independent advice

Complete facts and documents

Plausibility check

CLEAR PROHIBITION

No management discretion

The legal duty sets the boundary

Commercial benefit cannot override it

THE PRACTICAL LINE

Legal advises on the boundary. Management decides within it.

Sources: § 93(1) sentence 2 AktG; § 43(1) GmbHG; BGH, 20 September 2011, II ZR 234/09 (ISION).

Thank you!



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