February, 2024

Legitimate Interests for an AI World – Project Background Brief for Legitimate Interests Project

IAF Understanding of the Problem:

There is uncertainty, at both the regulatory and business level, as to the use and application of legitimate interests as a basis for the legal processing of personal data. Core to this uncertainty is:

- how to conduct an assessment
- what and whose interests to reflect
- how to weigh and mitigate risks
- how to demonstrate a fair and just determination of a decision
- how to demonstrate the conduct and to whom to demonstrate the required balancing and assessment process

Regulators report that they do not observe a high level of competency from the business community with respect to demonstrating effective assessments that would support the use of legitimate interests as a determinant of lawful processing.

Businesses report that they are uncertain how to meet the regulators' expectations regarding a legitimate interests assessment. The core question is how to meet the explicit and implicit requirements of the GDPR.

The project solution set will include a better understanding of the challenges business face, further exploration of regulatory expectations. This will serv as input to the development of a normative framework consisting of process and procedures though a multi-stakeholder engagement model.

IAF Point of View:

Today, the type of multi-dimensional assessment inferred by a legitimate interests determination shares similarities with certain elements of a Data Protection Impact Assessment (DPIA) required by the GDPR under certain circumstances. Those assessments are considered part of a strategic risk and governance framework used by business.

These governance and demonstrable capabilities need to become normative to better support the use of legitimate interests and as they become required by new laws and regulations on AI arriving soon in the EU. Building capability in the business community that creates greater confidence by regulators in the use of legitimate interests will be a fore-runner to what will be required in terms of demonstrable accountability in the regulated AI arena. It also may be adapted into future strategic frameworks to demonstrate accountability beyond the EU.

The legitimate interests solution generated by this project can be used to socialize more broadly throughout other EU economies. Concurrently, portions can be used to build confidence in business and regulators in developing AI regulatory guidance throughout the EU.

These multiple paths create additional multi-stakeholder convening opportunities. For example, the legitimate interests and companion AI solution set envisioned can be socialized in a multi-stakeholder format in Canada by addressing emerging requirements in both the privacy and AI portions of Bill C-27. In parallel, the same learnings will be applied as part of the IAF Demonstrable Accountability project which will focus on the U.S. State Law rules and regulations for algorithmic decision-making and AI.

Potential Solution Outputs and Benefits:

IAF's "Assessing in Three-Dimensions" methodology will be combined with the IAF's extensive track record of developing frameworks and assessments that include associated and requisite governance and controls. The result will serve as a vehicle to weigh the interests, benefits and risks to multiple stakeholders and to demonstrate the assessment and resulting decisions and actions. That result then will be refined through a multi-stakeholder process which would include how and to whom and to what extent this balancing process should be demonstrable.

Through the multi-stakeholder convening process, the project will deliver a draft normative framework of assessments and governance controls as well as a demonstrability framework that would:
- expand business governance capability and sustainability
- increase regulator confidence
- enable further guidance to business by regulators

The resulting templates and process will benefit business and regulators who, with confidence from the multi-stakeholder process, business could incorporate them into horizontal governance strategies, processes and procedures within their organizations.

Project Process:

1. The IAF will develop a draft legitimate interests solution framework addressing key problem areas, using a range of use cases to demonstrate the prototype.
   - The IAF would incorporate relevant EUCOJ rulings and other developing models as part of a draft solution model.
   - This stage would be supported by individual dialogue with select business participants and regulatory authorities.
2. The draft legitimate interests framework would be reviewed first through a convening meeting with participating business organizations (Dublin and London).
   - Based on feedback, subsequent evolvement and review by the business community will be facilitated through virtual meetings
   - Virtual follow-ups with the business community likely would be with the larger group of participants.
3. Once the business engagement and an evolved legitimate interests solution framework is finalized, the IAF will convene a multi-stakeholder process engaging the business community, the regulatory community (Irish DPC + ICO) and the NGO community. The framework will be presented and debated with a conclusion reached.
4. A report and recommendations would be made publicly available at the conclusion of the effort. Potential additional socialization tactics would be developed and reviewed, in consultation with the DPC (and ICO). This could include the potential of a further multi-stakeholder meeting at the Fall GPA.

Timing

Stage 1 – Draft Solution Framework development - March-April
Stage 2 – Business participant convening meetings – May – June
Stage 3 – Multi-Stakeholder sessions Sept - October

Project Dependencies:

- The number of participating businesses would be capped to between 15 and 20. We can accommodate two separate sessions at this number (Dublin and London).
- Non IAF participating business organizations will be asked to contribute funding to the project to offset costs. (IAF costs and potential travel costs for NGO participants).
- Consultation with the DPC to understand the impending EDPB opinion on legitimate interests.
- Participation by regulatory authorities at the multi-stakeholder event (Location TBD) (possibility of combining with two regulatory agencies).
    - **OPTION** – hold a Dublin and London multi-stakeholder event.
- In consultation with and support from the DPC, development of a strategy to socialize this approach with other EU based regulators.
- While the resulting model and report publication will consider feedback from all stakeholders, the output will be an independent report and supporting templates and governance materials prepared by IAF staff.

Background

- GDPR Article 6(1)(f) provides that processing is lawful when it is necessary for the purposes of the legitimate interests pursed 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.
- Even though Article 7(f) of the Directive is the same as Article 6(1)(f) of the GDPR, legitimate interests is not often used as the legal basis for processing, mostly because there is uncertainty about how to conduct the balancing test required by Article 6(1)(f).
- Since 2013, IAF has been developing assessments that balance the benefits and risks of all stakeholders:
    - 2023 – [Colorado Data Protection Impact Assessment](#)
    - 2021 – [Evolving AI Impact Assessments](#)
    - 2019 – [Model Ethical Data Impact Assessment](#)
    - 2018 – [Hong Kong Ethical Data Impact Assessment](#)
    - 2017 – [EU Legitimate Interests and Integrated Risks and Benefits Assessments](#)
    - 2017 – [Canadian Assessment Framework for Big Data Assessments](#)
    - 2016 – [Comprehensive Data Impact Assessment Framework](#)
    - 2015 – [Big Data Ethics Initiative (Part B): Assessment Framework](#)
    - 2013 – [Self-Assessment of a Comprehensive Privacy Program (M.Abrams @ CIPL)](#)
- IAF started with assessing the risks and benefits to all stakeholders of big data and evolved to complex data analytics, including artificial intelligence (AI), machine learning and generative AI. As the technology evolved, IAF's balancing test matured into an impact analysis which considers all the stakeholders and weighs the benefits/interests against the risks/harms using a 1-3-5 scale and shows the results in two different ways: math determined and visual depiction.
- Article 29 Working Party Opinion 217, adopted April 9, 2014, analyzed the legitimate interests legal basis for processing under the Directive and concluded that Article 7(f) in effect requires balancing the legitimate interests of the controller, or any third parties to whom the data are disclosed, against the interests or fundamental rights of the data subject.