

LEGAL BASES FOR THE PROCESSING OF PERSONAL DATA

LEGITIMATE INTEREST

The National Data Protection Authority (ANPD) has published **guidelines** providing clarification on the application of the legal basis of legitimate interest.



Goals

ANPD developed the guidelines with the aim of providing **orientations** on the application of the legal basis of legitimate interest and:

reinforce the importance of compliance with necessity and transparency principles

inform about the need to perform a balancing test to rely on this legal basis

support the ANPD in decision-making processes on the topic

explain how to identify the "interest" that justifies the data processing relied on this legal basis by the controller or third party

Key points addressed in the guidelines

1

Categories of personal data

The ANPD mentions that it will be the responsibility of the data controller to preliminarily assess the nature of the personal data that will be the subject of processing. **This legal basis is not applicable to the processing of sensitive data.**

2

Children and adolescents' data and legitimate interest

As previously mentioned by the ANPD in Statement No. 01/2023, the processing of children and adolescents' personal data can be relied on the legitimate interest, **provided that their best interests are observed and prioritized**, which should be evaluated in the specific case.



If **the best interest** of the child and adolescent is not met, the processing of their personal data must be supported by another legal basis.



The controller must prepare a balancing test and maintain a record of the justification for the processing, which must be able to demonstrate:

- what was considered to be the best interest of the child or adolescent;
- on the basis of which criteria their rights have been weighed against the legitimate interest of the controller or third party; and
- that the processing does not generate disproportionate and excessive risks or impacts, considering the condition of the child and adolescent



ANPD concludes that the processing of children and adolescents' personal data based on legitimate interest might be more appropriate where:

- there is a **prior and direct relationship between the controller and the data subjects**; and
- the **processing aims to ensure the protection of their rights and interests or to enable the provision of services that benefit them.**

3

Identification of the legitimate interest

According to the guidelines, the interest will be considered legitimate when it meets three conditions:



Compatibility with the legal framework

The interest must be compatible with principles, legal norms, and fundamental rights.



Be grounded in concrete situations

Situations must be real and present, excluding future hypotheses.



Legitimate, specific, and explicit purposes

The processing must be bounded to the legitimate, specific, and explicit purposes of the concrete situations.

4

Fundamental rights and freedoms

The data controller must always take into account the legitimate interest **balancing test**. Controllers shall assess whether **the impacts caused are proportional and compatible with the rights of the data subjects, and what safeguards should be adopted in the specific case.**



What to consider?

- Informational self-determination:** aims to ensure that data subjects are aware of and actively participate in decisions regarding the processing of their data, including the effective possibility to object to such data processing.

5

Legitimate expectation of the data subject

The analysis of legitimate expectation can be based on several factors, including:



the existence of a prior relationship between the controller and the data subject;



the source and method of data collection, i.e., whether the collection was carried out directly by the controller, if the data was shared by third parties, or collected from public sources;



the context and period of data collection; and



the intended purpose of data collection and its compatibility with the processing relied on legitimate interest.



In order to ensure effective respect for the data subject's legitimate expectations, it is imperative that the controller provides **means for the data subject to exercise their rights.**

6

Legal basis to ensure prevention of fraud and the balancing test

ANPD mentions that the application of the "ensuring fraud prevention and the security of the data subject" legal basis should observe a **similar approach to that provided for legitimate interest**, regarding the prevalence of the data subject's fundamental rights and freedoms, assessed through a balancing test.



The activity with the purpose of "preventing fraud and ensuring the security of the data subject in the processes of identification and authentication of registration in electronic systems" must be interpreted restrictively and described in an objective and detailed manner.

Balancing Test

The processing of personal data relied on the legitimate interest must be preceded by a balancing test

On one side, the interests of the controller or third parties



On the other side, the fundamental rights and freedoms of the data subjects

The test must take into consideration:

- the legitimacy of the interest
- the necessity of the data processing
- the impacts on the rights of the data subjects
- the legitimate expectations of the data subjects compared with the interests involved

In **Annex I** of the guidelines, ANPD included a synthesis on the legitimate interest, indicating its requirements and the corresponding identification parameters, along with general recommendations.

In **Annex II**, there is a **simplified test template** provided by the ANPD, aiming to assist data processing agents in the development of their balancing tests.



Is it mandatory to follow the ANPD's template?

No. Each organization can conduct its own assessment, following the method most compatible with its reality. In some circumstances, the test may be brief or simplified. The proposed template is not binding.



Is it necessary to record and document the balancing test developed for data processing activities?

Documenting the balancing test conducted is crucial to demonstrate the compliance of personal data processing, aligning with accountability and transparency principles as outlined in the LGPD.

What should be taken into account in the balancing test, if you do not want to use the ANPD template?



1. Purpose

- analyze the benefits generated and the purposes intended with the data processing;
- verify whether the nature of the personal data allows processing based on legitimate interest;
- identify the legitimacy of the interest justifying the data processing.



2. Necessity

- identify whether data processing is necessary to achieve the intended purposes;
- establish measures to minimize the use of data to achieve the intended purposes.



3. Balancing and Safeguards

- consider the interests of the controller or third party in relation to the fundamental rights and freedoms of the data subject;
- assess the potential risks and impacts on data subjects;
- in cases where the processed personal data pertains to children or adolescents, evaluate the prevalence of their best interests.

Insights b/luz

The publication of the guidelines reinforces ANPD's commitment to enhancing the regulation and interpretation of key aspects of the LGPD. By providing guidance on the application of legitimate interest, addressing its elements and parameters of interpretation, ANPD adds more predictability and legal certainty for entities undertaking processing activities under this legal basis.