



FEDMA position paper on transparency under article 14 of the GDPR

The President of the Personal Data Protection Office in Poland (UODO) imposed its first fine for the amount of PLN 943 000 (around €220 000) for what it considered was a failure to fulfil the information obligation under article 14 of the GDPR. FEDMA would like to seize this opportunity to provide context and clarification on how the industry is accountable and puts the customer first.

The big picture

As provided in recital 4 of the GDPR, “the processing of personal data should be designed to serve mankind. The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality”. The balance provided for in recital 4 of the GDPR, and quoted hereabove, must be reflected in article 13 and 14 and their exceptions. This is why, FEDMA publishes this position paper to contribute to the discussion on information requirements and reach a balanced approach within the spirit of the GDPR.

When you start a business, and you have no existing clients, or when you are trying to get new customers with whom you obviously do not have any contact with, companies use marketing files to reach out to them. In this way, it has been helping business grow, employment and overall a vibrant economy.

Business growth and data protection must go hand in hand and should not be mutually exclusive. This is why the GDPR upholds proportionality and accountability; for example, when a controller proceeds with a legitimate interest assessment by weighing the interests of the processing of personal data with the data subject interests and fundamental rights or when the controller collects consent which should not be “unnecessarily disruptive to the use of the service” (Recital 32 GDPR).

Our GDMA’s report finds that across all countries control, trust and transparency form the foundational basis for healthy data economy. Indeed, half of consumers (51%) across all the markets surveyed said trust was key in their decision to share information with a company. The research also highlights that consumers want more transparency (86%) and control (83%) when it comes to their data in order to build these levels of trust.

Despite 74% of people having some degree of concern about their online privacy, more than half (51%) of global consumers are still happy to exchange their data with businesses, as long as there is a clear benefit for doing so. Many people (41%) also understand that sharing data is an essential part of the smooth running of modern society.

The application of the right to information in the context of legitimate interest

Article 13 applies to the list owner who must provide the data subject with information required under article 13 of the GDPR, including any recipient or category of recipients of the personal data.

If relying on the legal basis of legitimate interest, the list owner may indicate a category of organisations or sector (e.g. retailer, media, automobile) rather than naming the recipients



individually. A category of recipient can be more relevant for the data subject, especially if the data subject does not know the names of the organisations.

In addition to this information, the list owner must provide the possibility for data subjects to opt-out of their personal data being used for marketing purposes. A best practice is for the list owner to manage two lists. This is the case in England for the electoral roll and in Sweden with [SPAR](#). The Swedish law encourages the use of this database and provides opt-out solutions. The list owner then manages one open list with data subjects who have not opt out and one closed list with data subjects who opted out to their data being shared for marketing purposes.

The privacy notice of the list owner is relevant to the controller falling under article 14. For example, the controller using the publicly available data will often rely on its legitimate interest to process the personal data for marketing purposes (as per recital 47 of the GDPR). To do so, this second controller has to proceed with its legitimate assessment test which needs to consider the reasonable expectations of the data subject and the information provided to the data subject by the list owner. The list owner can help manage the reasonable expectations of the data subject for example by specifying that the list may be used by a sector (e.g. data service providers, automobile, retail).

The controller who receives and processes the publicly available data for marketing purposes (e.g. a data service provider), falls under article 14 of the GDPR. As a new controller, it may be impossible to provide information requirements under article 14 or it will be seen as disproportionate. In such cases, applicable safeguards to protect the data subject's rights and freedoms and legitimate interests are:

- The controller can inform the data subject (article 14(3)), as far as data for communication purpose are concerned (name, address, contact data) at the latest at the time of the first communication to that data subject. This solution provided in article 14(3) is in line with the obligation under article 14(2)(f) to inform the data subject on the source of the data. For example, the addressee of the direct mail would be informed of the source of the data (e.g. data service provider) in the communication material provided in the direct mail by an advertiser (e.g. brand, retailer). This is currently a best practice or a legal requirement in several EU countries.
- Publication of privacy notice on the controller website (as provided in the guidelines WP260 rev 1 on transparency para. 64).
- Advertising in national newspapers (as provided in the guidelines WP260 rev 1 on transparency para. 64): business publish advertisement in the national newspapers on their activities.

Unforeseen technology developments may provide further solutions in the future. We see the solutions mentioned hereabove as potentially cumulative. The cumulative effect should be taken into account. For example, if a controller, publishes a privacy notice and also publishes advertisings in national newspaper on their activities with links to their privacy notice, then the controller is effectively layering the information for the individual. This avoids the risk of consumer fatigue while providing data subjects with information on their rights. Another example; the list owner provides an opt-out system, the controller has a privacy notice online and the source of the data is provided in the printed advertisement sent to the addressee.

Legitimate interest assessment and reasonable expectations

The guidelines of the EDPB considers that exceptions to article 14 should “be interpreted and applied narrowly” and not “routinely relied upon.” EDPB interprets article 14(5)(b) as benefiting only



processing for archiving purposes, scientific or historical research purposes and statistical purposes. FEDMA believes that it would be an utter failure if the article is to be interpreted in such a way that it will stifle the possibilities for new services and products to reach its potential customers and markets by not allowing the processing of data for direct marketing in the case of prospecting new clients, as the interpretation would not be workable for the development of society. The interpretation would therefore not be proportionate. FEDMA believes that the function of the processing of personal data within society (in reference to recital 4 of the GDPR) should be balanced with the data subject rights. This is reflected in the requirement for the controller to take appropriate measures and, when relying on disproportionate efforts to provide the information, to carry out an assessment¹. Indeed, as provided in article 12 of the GDPR, the controller shall take appropriate measures to provide any information referred to in Articles 13 and 14 (...)" . In the Guidelines on Transparency, the WP29 states that: "The GDPR does not prescribe the format or modality by which such information should be provided to the data subject but does make it clear that it is the data controller's responsibility to take "appropriate measures" in relation to the provision of the required information for transparency purposes. This means that the data controller should take into account all of the circumstances of the data collection and processing when deciding upon the appropriate modality and format of the information provision."

Article 14.5(b) specifies that the controller must take appropriate measures to protect the data subject's rights, freedoms and legitimate interests. The controller's safeguards such as pseudonymization of the personal data should be considered as an appropriate measure. Indeed, recital 62 of the GDPR states that the number of data subjects, the age of the data and any appropriate safeguards adopted are aspects that should be taken into consideration where one relies on this exception.

In this particular case, it is not only the data subject right to information per se that is at stake, but the application of this right in a context where the personal data is publicly available and the data subjects themselves wish to promote their professional activities through this public database. The following elements should be weighed with the data subject right to information:

- The data is publicly available.
- The data regards data subjects with commercial activities (e.g. professionals, entrepreneurs). Commercial activities are by nature meant to be shared widely. Professionals by nature aim to promote broadly their commercial activities to consumers and other professionals.
- When the database concerns individuals acting in the professional capacity, the reasonable expectations of the data subject are more easily met than when the list concerns individuals in their private capacity. Name and personal contact details (whether professional or personal) are personal data. However, a professional expects to receive marketing material for products or services relevant to its profession (e.g. for a lawyer, marketing material on law journals).

¹ Guidance on Transparency WP260rev1 WP29 states that (section 64): Where a data controller seeks to rely on the exception in Article 14.5(b) on the basis that provision of the information would involve a disproportionate effort, it should carry out a balancing exercise to assess the effort involved for the data controller to provide the information to the data subject against the impact and effects on the data subject if he or she was not provided with the information".



- The costs of the solutions to inform the data subject should not be the equivalent of a fine or disproportionate to the annual income of the controller.

Exceptions under article 14 to ensure a balanced approach

To help data subjects be in control of the processing which they want to be in control off, we suggest that the following processing also benefit from the exception under article 14 (5)(b):

- **Publicly available data:** it may be impossible where the contact details of the data subject are not included or disproportionate if the contact details are only the postal address.
- **Where processing of Personal Data does not require the identification of the data subject.** For pseudonymised data, the Controller may not have to inform the Data Subject if this obliges it to maintain, acquire, or process additional information in order to identify the Data Subject for the sole purposes of the GDPR². In this case, the privacy notice on the website of the Controller is appropriate.
- **Personal Data is processed for the purposes of marking for future processing** (creation of internal suppression list based on the absence of reactions of recipients), **blocking or address verification.** Marking for future processing, blocking or address verification often relies on data not provided directly by the Data Subject to the Controller (for example national suppression lists), even though it is to the benefit of the Data Subject and ensures data accuracy. Moreover, the provision of the information would nullify the objectives of the processing which is precisely to avoid communicating with Data Subjects who would not be interested by the marketing campaign. Where Personal Data are suppressed by application of an in-house or national suppression List, suppression, often relies on data not provided directly by the Data Subject to the Controller, even though it is to the benefit of the data subject³. In this case, the privacy notice on the website of the Controller is appropriate.
- **Where a direct marketer removes or suppresses the Personal Data of those on the marketing list which do not match the required profile.** The provision of the information would nullify the objectives of the processing which is precisely to avoid communicating with Data Subjects who not be interested by the marketing campaign. In this case, the privacy notice on the website of the Controller is appropriate.

² Guidance on Transparency WP260rev1 para 64 and also article 11.1 of the GDPR

³ Idem footnote 13