

Joint industry letter



Brussels, April 2020

To the attention of Executive Vice-President Mrs. Vestager for A Europe Fit for the Digital Age,

To the attention of Commissioner Mr. Reynders for Justice,

We write to you on behalf of the associations **FEDMA** (Federation of European Direct and Interactive Marketing), **EMMA** (European Magazine Media Association), **ENPA** (European Newspaper Publishers' Association), **EPC** (European Publishers' Council), **FEPE** (European Federation of Envelope Manufacturers), **Intergraf** (European federation for print and digital communication) and **NME** (News Media Europe), which together represent an entire value chain of the European data driven marketing, concerning the implementation of the GDPR, and in particular legal grounds for processing personal data.

A tendency concerns us:

We draw your attention to developments, which in our view, undermine the agreement reached on the General Data Protection Regulation. We are reaching out to the highest level of the Commission, as guardian of the EU law, to prevent irreversible damage to the European data marketing industry, and the ecosystem of publishers, while reinforcing a handful of dominant Big Tech firms which hold a large part of the world's data¹.

The GDPR was adopted in 2017 with the purpose to provide Europe with a consistent legal framework which ensures the protection of individual's personal data while ensuring the free movement of such data². However, the interpretation of certain provisions of the GDPR, raises concerns. In particular, we have observed a tendency in member states, to restrict beyond the requirements of the GDPR, or to simply rule out in practice the legitimate interest of the controller as a legal basis to process personal data. These practices reduce the number of legal basis to process data allowed by law to five

¹ As indicated in the recently adopted European strategy for data COM (2020) 66 p.3

² E.g. Article 1 of the GDPR

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instead of six, thus going beyond the GDPR and limiting the ability to process personal data, with rippling effects on EU competitiveness and ability to innovate.

This tendency is particularly concerning for the following reasons:

- Loss of legitimacy for data marketing industry

Data marketing is a legitimate industry which provides effective forms of advertising, for example for retailers and publishers. Data marketing covers all channels of communication, including the more traditional ones (e.g. Direct Mail, Telemarketing, ...) which are at the core of this letter. The Data marketing industry relies heavily on the legitimate interest clause to process personal data, while ensuring the respect of user's right. LI does not give an unconditional right to process personal data. A Legitimate Interest Assessment is required, shifting the burden of the lawfulness of the processing to the processor³. GDPR supports Codes of Conduct and they are a way to provide for consistency across the EU, particularly for European SMEs. FEDMA is currently updating its Code of Conduct on processing of personal data for marketing purposes (our Code was the only Code approved under the previous Directive by the data protection authorities). For that reason, recital 47 of the GDPR provides that direct (or data) marketing may be a legitimate interest (LI).

- European business will not have access to data they need to enter new markets or scale up

Legitimate interest is essential for the development of new business and product entering the market. The more the product or service is specific, the more data marketing is relevant to reach out to prospects. This selective approach also cuts down on waste and allows brands to allocate resources efficiently because they can choose the better channel to attract customers. This selective approach can be done conscientiously, also on the basis of legitimate interest⁴, by all industry sectors.

- Unnecessary legal uncertainty for European business

The wording around Legitimate interest has remained the same from the 1995 Directive on Data Protection to the GDPR. Yet, inconsistency and newly conservative reinterpretations of this provision of the GDPR drive legal uncertainty and increases cost for legal advice. The uncertainty around the opportunity to use legitimate interest also prevent the development of new business and services and may also impact data-based innovation.

- Free movement of goods and services could be jeopardized

A stricter reinterpretation of the GDPR which challenges the risk-based approach and deviates from the wording in the GDPR, ends up putting the effective free movement of goods and services at risk.

- Restricting LI as a legal basis disrupts markets and favours dominant digital players

Having various interpretations risk de facto to set up barriers within the EU to the free flow of personal data for prospective purposes, thus dramatically increasing the cost for Data Marketing, and thereby forcing SMEs to look for alternatives. These alternatives are generally (a) mass communication through mass media (e.g. billboards) or (b) targeted online communication through « walled gardens »

³ We kindly refer you to our Annex for legal information.

⁴ There is a clear distinction between the GDPR, which addresses the collection and processing of personal data for direct marketing purposes (data protection), and the ePrivacy Directive, which details the condition for a marketer to send a commercial communication to an individual (privacy). This letter focuses on the collection and processing of personal data under the GDPR.

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operated by large digital intermediaries, strengthening their dominance on the market, and increasing the dependency of the European marketing economy.

- Publisher's revenues dwindle, jeopardizing Freedom of Press and battle against Fake News

Advertising is the single most important source of income for media companies. They finance their independent and quality journalism through this source of income. Direct marketing techniques, especially telephone marketing is and continues to be an instrument of utmost importance for publishers to provide relevant offers to consumers in order to gain new readers and sustain subscriptions in a business model that sees natural fluctuation of their readership every year (on average in Europe telephone marketing is operational in maintaining 30 % of the subscribership). In certain countries, telephone marketing is even more relevant than other forms of direct marketing due to specific geographic conditions and cannot be substituted.

In light of these concerns and their impact on the European economy, we would like to call on the European Commission:

- We call for a balanced interpretation of the GDPR to enable European business to have access to data, to benefit from conscientious profiling and reach out to prospects.
- We call for a consistent implementation of this balanced interpretation of the GDPR and encourages the Commission to take necessary measures.
- We call for legislative coherence between GDPR and future proposals to maintain a healthy competition on the EU markets.

We thank you for your consideration and remain available to further discuss, in person or virtually.

Kind regards



Annex to letter

Legitimate interest is a longstanding concept allowed for by the GDPR that reconciles the needs of the direct marketing industry with the legitimate interests of consumers.

- GDPR aims to **balance data protection with other fundamental rights and freedoms**, notably freedom to conduct a business, free movement of goods and services in the EU ([see previous FEDMA paper](#)) and freedom of speech (referred to in recital 4 GDPR and A29WP opinion on LI).
- GDPR adopts a **risk-based approach**. Also, the definition of LI has not changed since the 1995 Directive. In the case **C-468/10, C-469/10**, (ASNEF + FECEMD./ Administraci3n del Estado) which was decided based on the Data Protection Directive (i.e. same definition to LI as in GDPR), the European Union Court of Justice “made it clear that member states are not allowed to impose additional unilateral restrictions and requirements regarding the legal grounds for lawful data processing in their national laws.” (Source: Article 29 Working Party Opinion 2014 on LI).
- The A29WP Opinion calls for a **European approach “without either unduly restricting or unduly broadening the scope” of LI. It equally provides direct marketing as an example of LI.** LI must be used in an accountable manner, with a legitimate interest assessment, hence the careful wording of recital 47, which provides “as an example” that reasonable expectations of the data subject can be “relevant or appropriate relationship” such as “client”. However, a blanket exclusion of prospects is contrary to the GDPR. Reasonable expectations of the data subject must not refer exclusively to a contractual relationship. Moreover, article 14 of the GDPR requires for information to be provided to the data subject when data is not collected directly from the data subject. This means that legitimate interest may exist even if there is no contractual relationship between the controller and data subject. Some EU member states process data subjects’ tax information on the basis of legitimate interest.
- The A29WP Opinion refers to the need for the controller to take into account national law to know if the processing is “legitimate”. This **reference to the law is in a broad sense**, meaning “the purpose is not ruled out by national law”, but not as “check if the purpose needs consent under ePrivacy or other law”. Therefore, **processing of personal data under the GDPR may rely on LI as a lawful ground, even if to reach out to the recipient, consent is required under the ePrivacy law**. For example, email addresses are often used as identification in loyalty programs even though no emails are sent.
- **LI is in many cases a better safeguard for consumers’ privacy than consent.** LI requires a balancing test every time the data is processed, and as such shifts the responsibility to the processor from the single moment of collection towards the multiple instances of application of the data. As the individual still receives complete information about the processing he/she can immediately decide whether the processing might continue or not making, LI in fact as “effective” as consent. LI does not give an unconditional right to process personal data.
- Principle-based checklist or framework, in line with EDPB previous opinion on legitimate interest, could reassure and help organisations using this legal ground, which can be used to process personal data by many different sectors. This approach will take better account of **future technological developments** and will also leave sufficient grounds for other sectoral GDPR tools- e.g. **Codes of Conduct**.