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Australia's 'COVIDSafe' law for a voluntary contact tracing app

Can other countries learn from Australia's app law? By **Professor Graham Greenleaf** and **Dr. Katharine Kemp**, UNSW Australia.

On 12 May 2020, the Privacy Amendment (Public Health Contact Information) Bill 2020 ("the COVIDSafe Bill")[1] was introduced into the Australian Federal Parliament, and was enacted unamended two days later, without the normal Committee deliberations. Two weeks earlier, on 26 April, Australia's federal government, in cooperation with state and territory governments, released a coronavirus contact tracing app for public download, marketed as "COVIDSafe". By

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What is the future for marketing and legitimate interest?

As the Netherlands tennis association is fined €525,000 for sharing the personal data of its members with sponsors, **Géraldine Proust** of FEDMA reflects on the DPA's new interpretation.

Businesses need advertising, especially small and medium sized enterprises selling niche products to reach out to prospects and retain customers. Yet, there is a tendency at national level to challenge data marketing and legitimate interest (LI), a necessary legal ground for all sectors. Indeed, some Data Protection Authorities (DPAs) are encouraging the use of consent over legitimate interest (e.g. through

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comment

GDPR turns two at the time of the coronavirus privacy dilemma

The EU DPAs made it clear early on that the general GDPR principles of effectiveness, necessity, and proportionality must guide any measures adopted by Member States when processing personal data relating to the coronavirus epidemic. They are keen to enable governments' responses to the pandemic and subsequent recovery whilst continuing to protect citizens' personal data and privacy. At this toddler birthday, it can be said that the GDPR has had a huge impact but clearly much work remains to be done. Data breaches are still far too common, and the SME community has not fully embraced the regulation.

Slovenia has yet to bring the provisions into national legislation and is the last EU Member State to do so. Given the COVID-19 related priorities on parliamentary time, it is not known when the Bill will be debated. For other countries, much of the discussion now centres around fines – or the lack of large ones. This is partly due to the hoops that DPAs sometimes have to go through due to national legislation, as is the case in Ireland. It remains to be seen whether the fining procedure will be addressed in the EU's GDPR review, which has been delayed and is now promised for 24 June.

Covid-19 has caused delays not just in Slovenia, but also in Thailand (p.29), Brazil (p.30) and South Africa (p.29). All of these countries have postponed the coming into force of their data protection laws.

In this issue, we bring you a summary of contact tracing app developments in some EU countries (p.10), and an in-depth analysis of the law behind Australia's CovidSAFE app (p.1).

In the EU, there is not much progress regarding the e-Privacy proposal. There were mixed reactions from Member States on revised aspects on legitimate interests, and this, together with delays caused by the pandemic, means that the current presidency of the EU Council, Croatia, will roll over many unresolved issues to the next presidency, Germany, starting on 1 July.

Other noteworthy EU developments are a controversial fining decision from Belgium on DPOs (p.14), and another much debated decision, from the Netherlands DPA, on marketing and legitimate interests (p.1).

Laura Linkomies, Editor
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Legitimate Interest... from p.1

guidelines) while some are excluding the use of LI. This article focuses on the first GDPR fine imposed in the Netherlands which concerns KNLTB, the Dutch national tennis association, responsible for all professional and leisure tennis in the Netherlands. Although the facts of the case seem simple and straightforward, the Dutch authority[1] pronounced a heavy fine for two GDPR violations: incompatible processing and processing with lack of a legal ground. The decision clearly excludes the use of LI for monetizing data by making it available to third parties for advertising, jeopardizing the future of data marketing.

A classical data marketing situation

A not-for-profit organisation processes personal data for data marketing purposes. The KNLTB Association saw declining number of members and decided to seek alternative income to keep membership affordable and tennis accessible. It forwarded their members' personal data to a selected sponsor so that the sponsor may promote its products or services to the members (some were tennis related, others not) by postal direct mail. A telemarketing campaign was cancelled following complaints. On 3 March, the Dutch DPA published their decision to fine the KNLTB €525,000.

> The decision clearly excludes the use of Legitimate Interest for monetizing data by making it available to third parties for advertising.

Regarding the lawfulness and transparency of the processing, the original statutes (by-laws) of the association, defining their grounds for processing of personal data, did not provide for processing of personal data for direct marketing purposes. Therefore, two situations must be distinguished:

- the members prior to the change of statutes which took place in 2007 where the authority considered the further processing of data incompatible with (article 5(1)b), and
- the members who joined after 2007 where the authority considered that the processing was done without a valid lawful ground (article 5(1) and 6(1). In 2007, a decision taken by the Member Council (representing all tennis clubs and individual members) enabled a new processing purpose to be added to the statutes of the organisation. The name and address of adult members could be shared for Direct Mail campaigns. Members were informed each time of the decisions. Since 2015, members receive welcome emails, which include, since 2018, privacy information, notably a provision to opt-out.

With a couple of Direct Mail campaigns per year, to a relatively small number of data subjects, the case focuses mostly on the postal Direct Mail campaigns. Direct mail is an opt-out channel in the Netherlands, with a Robinson (opt-out) list. Being an opt-out channel means that the controller can choose to:

1. Process data (cleaned with Robinsons lists) for selecting the data subjects on the basis of legitimate interest, and
2. Send out the direct mail to the data subjects selected without requiring a consent from them. However, the data subject maintains control of his/her data at all times by having the possibility to opt-out. Hence, there is added value of the Robinsons lists, which the industry must use to remove from their contact lists any person who does not wish to receive any addressed mail. The agreement between the sponsor and KNLTB provided for this requirement. Moreover, the association capped the frequency to two direct mail campaigns per year, which cannot qualify as excessive or unfair. Finally, the campaigns required prior approval by the KNLTB.

Although this case seems to be "much ado about nothing", the Dutch DPA disagreed. Let's take a closer look at their analysis.

Further processing and legitimate interest at stake

What happens in case of incompatible further processing? Article 5(1)(b) establishes the main rule of compatible purpose and specifies two exceptions:

(a) archiving purposes, or
(b) a provision under EU or national law to supply personal data.

If the controller cannot benefit from exception (a) or (b), then the controller must determine, whether or not, there is compatible use between the purpose of the intended processing and the purpose that was communicated at the time of the collection of data. This compatibility between purposes is tested on the basis of five grounds mentioned in Article 6(4)a up to and including 6(4)e. GDPR.

The assessment of compatible use by the KNLTB must therefore take place on the basis of five grounds mentioned in Article 6 (4) (a) up to and including (e). For compatible purposes, no further legal ground for the further processing is needed. In cases of incompatible further processing, the use of data is possible if the new processing could be based on a new legal ground. The balancing test for purposes for compatible use is separate from the test for a lawful ground. Indeed, there is no reason why an organisation should be at a disadvantage to use data it already has in its files, if it were allowed to process that data lawfully, and if it acquired the data again for the new purpose.

However, for members prior to the change of statutes which took place in 2007, the DPA considered that the further processing of data for data marketing purposes on the ground of LI was incompatible with the purpose of fulfilling the membership agreement (based on necessity of data) and they did not accept the possibility for KNLTB to process the data (share the data with third party) on the basis of a new legal ground.

Legitimate interest and commercial purposes: For the members who joined after 2007, the authority considered that the processing took place without a valid lawful ground (article 5(1) and 6(1). Since processing data for

marketing purposes or transfer to third parties for those purposes is stated in the privacy information and statutes, the processing is considered a separate purpose from the fulfilment of the agreement, requiring a separate legal basis. KNLTB relied on LI, referring to recital (47) GDPR2 which states that direct marketing can be considered an LI. The Dutch authority considered that the interest of the KNLTB to share the membership data with a sponsor in order for them to lead a data marketing campaign, is not legitimate. The DPA considers every processing as an interference with the data subject's right to data protection. Therefore, according to the DPA, only interests protected by a fundamental right or legal principle can be considered to be legitimate.

If an organisation wishes to interfere with a data subject's fundamental right to data protection, the interest to do so must be protected by a fundamental right as well. Moreover, the DPA specifies that these interests should at all times be real, concrete and direct, not speculative, in the future or derived, and that the sole interest to generate money or profit with personal data in itself does not qualify as a legitimate interest. The Dutch DPA has new guidelines excluding commercial interests as legitimate and the KNLTB association has filed an appeal against the fine.

However, it is important not to lose sight of the fact that 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 and freedom of speech[3]. Also, the definition of LI in the GDPR has not changed since the 1995 Data Protection Directive. Moreover, the European Union Court of Justice[4] "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."[5]. In an opinion[6], the DPAs called for a European approach "without either unduly restricting or unduly broadening the scope" of LI. Finally, they also provided in that opinion that direct marketing is an example of LI.

Pressure on data marketing will hurt European business

The impact on fair competition: Companies across all industries constantly need to acquire new customers and data marketing facilitates efficient customer acquisition. If such barriers to the use of LI for sharing data or data marketing continue, an EU business may not be able to reach out to prospective clients, even by offline traditional media, and their choice of data sources will be strongly limited. The direct effects are multiple;

- notably increased cost per newly acquired customer for advertisers;
- absence of a level playing field with countries which allow LI for prospects and strengthening the position of non-EU tech giants in EU markets.

The way forward left for European businesses to promote themselves to prospective clients, apart from mass advertising (e.g. billboards), will be online targeted communication through "walled gardens" operated by dominant digital intermediaries. These solutions imply increasing the risk of "walled gardens" by consolidating existing market dominance through network effects, increasing their access to data and reducing the possibility of a competitor entering a market or of disruptive innovation (innovators tend to invest less in concentrated markets).

The future of data marketing is at stake: Unfortunately, the KNLTB case is part of a general trend which reduces the potential of data marketing. Indeed, LI faces other interpretative challenges; for example, information requirements in the context of the use of publicly available data to be posted to data subjects, the push for the data subject to have a contractual relation with the controller or application of the e-Privacy Directive to the processing of personal data, so that LI could only be relied upon for opt-out channels[7]. The European Data Protection Board working group has started its discussions on the guidelines for LI, under the presidency of the Dutch DPA. Moreover, the data marketing industry is currently engaged in many discussions; not least, on the cookie wall and consent for all automated calls in the context of the e-Privacy discussion. The direct consequence is that European businesses across all sectors have even fewer ways to reach out to prospects and retain customers, raising the competition issues mentioned here above.

Lawyers and marketers from all sectors are left with two questions: "how can I lawfully promote my goods and services?" and "which interests are still legitimate"? More than ever, constant trusted dialogue between industry, legislators and authorities remains essential. The Federation of European Direct and Interactive Marketing (FEDMA) calls on policy makers and regulators to ensure that data can be leveraged to its full potential to support Europe's economy, while respecting existing laws and consumers' expectations.

FEDMA and its Direct Marketing Association members remain available to contribute to this discussion.

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2 Recital 47 GDPR «The processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest».
3 Referred to in recital 4 GDPR and A29WP opinion on LI.
4 In the case C-468/10, C-469/10, (*ASNEF + FECEMD./. Administración del Estado*) which was decided based on the Data Protection Directive (i.e. same definition to LI as in GDPR)
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