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**BRE-JBZ**

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**From:** Kaai, Geran  
**Sent:** vrijdag 3 april 2015 15:54  
**To:** Verweij, Ellen  
**Subject:** FW: ENPA-EMMA concerns ahead of DAPIX meetings – Threat to Economic Basis of Press Publishing  
**Attachments:** 15 01 12 ENPA-EMMA Letter to DAPIX (Article 6, 7, 20).pdf  
**Importance:** High  
**Follow Up Flag:** Follow up  
**Flag Status:** Completed

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**From:** BRE-JUS  
**Sent:** donderdag 15 januari 2015 17:01  
**To:** Grave, Martijn-de; Ruiter, Mileneke-de; Alink, Marnix; Kaai, Geran; Sorel, Alexander; Luijsterburg, Sander; Zwart, Jan; Kroner, Laetitia; Leenders, Sophie; Rip, Jet  
**Subject:** FW: ENPA-EMMA concerns ahead of DAPIX meetings – Threat to Economic Basis of Press Publishing  
**Importance:** High

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**Van:** [REDACTED]  
**Verzonden:** donderdag 15 januari 2015 17:00:25 (UTC+01:00) Brussels, Copenhagen, Madrid, Paris [REDACTED]  
**Aan:** ENPA  
**CC:** [REDACTED]  
**Onderwerp:** FW: ENPA-EMMA concerns ahead of DAPIX meetings – Threat to Economic Basis of Press Publishing

Dear Members of DAPIX,

Following our previous e-mail and attached letter, we would like to make an additional remark as regards the latest Council's text version of 23 December 2014 (17072/14):

- We are concerned that Recital 38 now includes a new sentence indicating that the “**Legitimate interest could exist for example where there is a relevant and appropriate connection between the data subject and the controller in situations such as the data subject being a client or in the service of the controller.**” In our views, this new sentence could be interpreted in a way that narrows down the scope of the legitimate interests to one specific area (when a client/customer relationship already exists). It presents a risk that the legitimate interest would not cover other commercial practices where this customer relationship does not yet exist, such as in the field of direct marketing. **It is important to underline that many delegations have already accepted the principle that data processing for direct marketing purposes is part of the legitimate interest of the controller and a third party on the basis of Article 6§1f).**
- Considering that Recital 39 explicitly recognises that “**The processing of personal data for direct marketing purposes can be regarded as carried out for a legitimate interest**”, it would therefore be indispensable to ensure that Recital 38 which refers to the legitimate interest also includes **an explicit reference to data processing for direct marketing purposes.** Such a change is necessary to ensure that the legitimate interest also applies to other non-contractual situations. We

therefore suggest the following wording: **Recital 38: "... Legitimate interest could exist for example where there is a relevant and appropriate connection between the data subject and the controller in situations such as the data subject being a client or in the service of the controller and where the data are processed for direct marketing purposes by a controller or by a third party. ...."**

We remain at your disposal for any further information you may need,

Yours sincerely,

[REDACTED] (ENPA)

[REDACTED] (EMMA)



[REDACTED]  
Deputy Executive  
Director

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**From:** [REDACTED]

**Sent:** 12 January 2015 13:55

**To:** ENPA

**Subject:** ENPA-EMMA concerns ahead of DAPIX meetings – Threat to Economic Basis of Press Publishing

To the Members of the Council Working Party on Information Exchange and Data Protection (DAPIX)

Dear Members of DAPIX,

In light of the ongoing discussions in the Council, and ahead of the DAPIX meeting on 15–16 January 2015 regarding Chapter II of the Proposed General Data Protection Regulation (GDPR), ENPA, the European Newspaper Publishers' Association and EMMA, the European Magazine Media Association, would like to reiterate European press publishers' main concerns. We are particularly concerned that "opt out" direct marketing necessary to sustain readership are under threat.

Press publishers need to be able to reach out to both current and potential readers to inform about new offers or services that may be of interest to them. This is essential to compensate circulation decline due to subscriber fluctuations. The cooperation with third parties in getting new subscribers is essential to the future of the press and its readers. In some Member States **up to 40% of new subscribers result from opt-out direct marketing**. For the B2B press, controlled circulation based on the use of special address lists accounts for up to 90% of some business titles' readership in some Member States.

**In order to maintain subscription readership and safeguard successful press distribution in Europe, further changes are indispensable to Articles 6(1)(f), 6(4) and 20 and the respective Recitals.**



You will find here attached a paper which presents in more details ENPA-EMMA comments on these provisions.

We remain at your disposal for any further information you may need on these issues.

Yours sincerely,

[REDACTED] (ENPA)



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You will find that attached a paper which presents in more detail EPA-EHMA comments on these

provisions.

We remain at your disposal for any further information you may need on these issues.

Very respectfully,

[Redacted Signature]

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**To: Members of the Council Working Party on Information Exchange and Data Protection (DAPIX)**

Brussels, 12 January 2015

**Re: Concerns ahead of DAPIX meetings – Threat to Economic Basis of Press Publishing**

In light of the ongoing discussions in the Council, and ahead of the DAPIX meeting on 15–16 January 2015 regarding Chapter II of the Proposed General Data Protection Regulation (GDPR), we would like to reiterate our main concerns. We are particularly concerned that “opt out” direct marketing necessary to sustain readership are under threat.

Press publishers need to be able to reach out to both current and potential readers to inform about new offers or services that may be of interest to them. This is essential to compensate circulation decline due to subscriber fluctuations. The cooperation with third parties in getting new subscribers is essential to the future of the press and its readers. In some Member States **up to 40% of new subscribers result from opt-out direct marketing**. For the B2B press, controlled circulation based on the use of special address lists accounts for up to 90% of some business titles' readership in some Member States.

**In order to maintain subscription readership and safeguard successful press distribution in Europe, further changes are indispensable to Articles 6(1)(f), 6(4) and 20 and the respective Recitals.**

**Executive summary:**

- To maintain the current legal basis of direct marketing and controlled circulation models of press publishers, Article 6(4) must allow “*further processing*” *on the grounds of legitimate interest*” (Article 6(1)(f)) as suggested by many Member States.
- Clarification in Recital 39 that *the processing of personal data for direct marketing purposes can be regarded as carried out for a legitimate interest*” is indispensable and should also be included in the body of Article 6(1)(f).
- Should legal presumptions for the legitimate interest of the controller or a third party be included in Article 6(1)(f) (e.g. for pseudonymisation) the inclusion of a legal presumption for direct marketing becomes imperative.
- Requirements for profiling must not apply to opt-out direct marketing. Article 20 should only apply to decisions that produce legal effects or similarly significantly affect the data subject concerned.
- Moreover, any profiling rules going beyond the current Article 20 by further specifying requirements will put opt-out direct marketing in danger. Any such rule would need to be discussed in depth, because they would create a whole new level of regulation, not taking into account effects on the data subject.
- ***German Note on Pseudonymisation:*** We welcome the objective of the Note to legalise pseudonymised processing of personal data. However, Article 6(1)(f) of the Note has to be amended: In cases **of pseudonymisation and direct marketing** there is a refutable presumption that the data subject's interests and fundamental rights and freedoms do not override the controller's or third party's interests.

- We acknowledge and welcome that the Presidency text of 19 December 2014 takes into account the legitimate interests of both the controller and a third party in Article 6(1)(f). This is consistent with the current Article 7(1)(f) of Directive 95/46/EC.
- **German Note on Consent:** The requirements for a lawful consent must not be extended to a degree that makes everyday data processing impossible. The Note on Consent introduces new and extensive barriers to processing data based on the consent of the data subject.

### 1. *"Further processing" for new purposes (Article 6(4))*

To maintain the current legal basis of direct marketing and controlled circulation models of press publishers, Article 6(4) must allow *"further processing" on the grounds of **"legitimate interest"*** (Article 6(1)(f)). Several Member States have therefore asked for this inclusion. **Article 6(4) must allow "further processing" for "the grounds referred to in points (a) to (f)" of Article 6(1).**

This amendment is indispensable to safeguard direct marketing. There is high legal uncertainty as to whether the processing of personal data for direct marketing purposes would be regarded as a new purpose according to the Article 6(4) or would fall under the original purpose. The narrow purpose definition in Article 5(1)(b) might lead to an interpretation of direct marketing as processing for a new purpose, which might moreover be interpreted as incompatible with the original purpose.

It is essential to safeguard a clear legal basis for direct marketing. It must, for example, remain possible for press publishers to send addressed direct marketing letters to current or former readers regardless of the original purposes for which the publisher has collected the data.

Otherwise, this will lead to the anomaly that for personal data, which has been previously collected or processed, including with consent for the original purpose, stricter rules would apply than for personal data that has not yet been collected.

Any new purpose would of course still need to be in line with the requirements of a legitimate interest and the balancing with the data subject's rights, in line with Article 6(1)(f).

### 2. *Clarification that Direct Marketing is Covered by Legitimate Interest*

To safeguard press distribution, the GDPR needs to clarify that data processing for direct marketing purposes is in the legitimate interest of the controller or a third party. We welcome the respective clarification in Recital 39. This clarification is vital and indispensable in order to maintain direct marketing on an opt-out basis. While we welcome this clause in the Recitals (in fact, we consider Recital 38 to be the most appropriate place), we support its **inclusion in the body of Article 6(1)(f)** in order to strengthen the clarification.

Should, however, presumptions be included in Article 6(1)(f) that in certain cases the subject's interests and fundamental rights do not override the controller's interests (e.g. as proposed for the case of pseudonymisation by the German delegation's respective Note of 24 October 2014, 14705/14), a corresponding **inclusion of direct marketing in this Article becomes imperative**. Mentioning one specific presumptive example in the Article puts unreferenced cases inevitably into question.



### **3. Article 20 Must not Apply to Direct Marketing**

There is a risk that opt-out direct marketing, B2B controlled press distribution and certain forms of e-commerce applications fall under the broad profiling definition of Article 4(12a) and (12b). It is therefore necessary to apply this rule **only to decisions that produce legal effects or similarly significantly affect** the data subject concerned. Otherwise, forms of data processing without any such impact will be further restricted regardless of their lawfulness under Article 6(1)(f).

Furthermore, it is essential that the respective Recital 58 clarifies that individual negative legal effects – or similar actual effects – do not cover measures relating to commercial communication like for example in the field of customer acquisition or customer relationship, including direct marketing.

Moreover, any profiling rules going beyond the current Article 20 by further specifying requirements will put opt-out direct marketing in danger. Such additional rules **would need to be discussed in depth** because they would create a whole new level of regulation. All suggestions we have seen to date would have damaged essential ways of data processing to an unforeseeable extent. This applies especially to additional restrictions that do not take effects on the data subject into account.

### **4. German Note on Pseudonymisation of 24 October 2014 (14705/14)**

Pseudonymised processing of data has to be legal under the GDPR. In this regard, we welcome the general objective of the German Note on Pseudonymisation. However, as stated above, should presumptions be included in Article 6(1)(f) that in certain cases the subject's interests and fundamental rights do not override the controller's interests, the corresponding **inclusion of direct marketing in this Article becomes imperative**. Mentioning one specific presumptive example in the Article puts unreferenced cases inevitably into question.

Article 6(1)(f) of the German Note therefore has to be adapted: **in cases of pseudonymisation and direct marketing there is a refutable presumption that the data subject's interests and fundamental rights and freedoms do not override the controller's or third party's interests.**

### **5. Legitimate interests of third parties**

We acknowledge and welcome that the Presidency text of 19 December 2014 takes into account the legitimate interests of both the controller and a third party in Article 6(1)(f). This is consistent with the current Article 7(1)(f) of Directive 95/46/EC. In many cases of direct marketing or controlled circulation, publishers partner with third parties in order to reach new customers.

### **6. German Note on Consent of 27 October 2014 (14707/14)**

The requirements for lawful consent **must not be extended to** a degree that makes everyday data processing impossible. Consent is an important basis of data processing for the cases not covered by legal stipulations. The German Note on Consent introduces new and extensive barriers to data processing based on the consent of the data subject.

Contrary to the Commission proposal, the Note foresees in its Article 7(1)(1b) – as a principle – a mandatory written or electronic form of the consent. Combined with the form requirement, the controller has far-reaching additional obligations.

Article 7(2a) introduces new and burdensome information requirements for the use of standard declarations as regards the validity of "consent". Article 7(2b)(a – e) foresees unacceptable legal presumptions of unreasonable disadvantage of the data subject resulting from the consent itself. Article 7(2c) takes this concept even further by declaring any consent given to a controller in any relationship of "permanent dependency" as principally not freely given and thereby invalid.

All amendments introduced by the German Note create unacceptable legal uncertainty and unpredictable risks for European companies acquiring and depending on consent of the data subject. These amendments targeted at risks arising from data processing conducted by large international log-in giants create far-reaching and unbearable burdens on small and medium sized businesses in Europe.

### **7. Competitive Advantage for Global Log-In Giants**

Without the crucial amendments outlined in this paper, press publishers' ways of reaching out to their readers – essential for survival on a competitive market – would be drastically restricted or even made impossible. Opt-in models as the only way to reach out to clients will end the businesses of European small and medium sized enterprises and will distort competition to the benefit of log-in giants who have the infrastructure to gather encompassing opt-ins for connected services (e.g. Google, facebook, amazon, etc.).

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