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BRE-JBZ

From: Kaai, Geran
Sent: vrijdag 3 april 2015 15:54
To: Verweij, Ellen
Subject: FW: Data protection -ENPA/EMMA request for a meeting
Attachments: 150204 EMMA_ENPA updated letter to DAPIX (Article 6 7 20)_final.pdf

Importance: High

Follow Up Flag: Follow up
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From: BRE-JUS
Sent: maandag 9 februari 2015 10:50
To: Grave, Martijn-de; Ruiter, Mieneke-de; Alink, Marnix; Kaai, Geran; Sorel, Alexander; Luijsterburg, Sander; Zwart, Jan; Kroner, Laetitia; Leenders, Sophie; Rip, Jet; Kellij, Nanda
Subject: FW: Data protection -ENPA/EMMA request for a meeting
Importance: High

Van:
Verzonden: maandag 9 februari 2015 10:49:11 (UTC+01:00) Brussels, Copenhagen, Madrid, Paris
Aan: 'bre-jus@minbuza.nl'
CC:
Onderwerp: Data protection -ENPA/EMMA request for a meeting

Dear Mr. Kai,

Following the DAPIX meeting which took place last week, we would like to know whether you would be available for a meeting this week in order to discuss about the issues that have addressed recently in the Latvian Presidency text, in particular:

- **Article 6.4** on the legal grounds for further processing
- **Recital (38)** on the notion of the "legitimate interest"
- **Article 6.1 (f)** on the legal grounds for data processing in the light of the German note on pseudonymization

In annex, we enclose the ENPA and EMMA letter including our comments on these provisions which have a direct impact on the sustainability of the press sector in Europe (press distribution, press subscriptions, publishers' digital business models)

We would be grateful if you could let us know whether a meeting with us would be possible this week,

Yours sincerely,

(ENPA) (EMMA)

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EUROPEAN MAGAZINE MEDIA ASSOCIATION

ENPA
EUROPEAN NEWSPAPER PUBLISHERS' ASSOCIATION

Brussels, 4 February 2015

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

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 5 and 6 February 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, a considerate wording of Articles 6(1)(f), 6(4) and the respective Recitals is indispensable.

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).

- In case Recital 38 mentions examples of legitimate interests, it is indispensable that direct marketing is among these examples.

- 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.

- ***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. *No Additional Regulatory Level of Further Processing (Article 6(4))*

We are concerned that a new wording has been proposed to be added to Article 6(4). It foresees that "*Further processing for incompatible purposes on grounds of legitimate interests of the controller or a third party shall be lawful if these interests override the interests of the data subject.*" This wording represents a shift in the burden of proof compared to the wording in Article 6(1)(f). The legitimate interest alone would not enable the controller to process the data. Beyond the legitimate interest the controller would also have to prove that his interest overrides the interests of the data subject. This is an assumption turning the approach of Article 6(1)(f) upside down and declaring – as a rule – direct marketing to be illegal unless the controller can prove for every step of his data processing that his interests override those of the data subject.

Any additional wording beyond the mere reference to Article 6(1)(f) needs to be taken out of Article 6(4) for the sake of consistency, legal certainty and the preservation of direct marketing under the future Data Protection Regulation.

3. *Clarification that Direct Marketing is Covered by Legitimate Interest*

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 view, 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 and does not put them into question by not mentioning them.

We therefore would 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 or where the data are processed for direct marketing purposes by a controller or by a third party***. ...."

Moreover, 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 (e.g. as proposed for the case of pseudonymisation by the German delegation's respective Note), 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.

4. German Note on Pseudonymisation

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, 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.

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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