

## POSITION PAPER

*The use of legitimate interest as processing ground for the processing of personal data for direct marketing purposes of the marketing eco-system*

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### Why this document?

The General Data Protection Regulation (“GDPR”) is a complex legislation with many factors to take into account and yet some opening to interpretation. One aspect that may sound technical and negligible is **the lawfulness in the context of direct marketing activities, but its impact shouldn’t be underestimated.**

A restrictive interpretation by Privacy Authorities of the usage of Legitimate Interest in the context of direct marketing in favor of a more open interpretation of the Consent as the applicable legal ground **will have very negative effects on the Belgian Economy, as well as on the Belgian consumers.**

Is understood by “direct marketing” : The communication by whatever means (including but not limited to mail, fax, telephone, on-line services etc...) of any advertising or marketing material, which is carried out by the Direct Marketer itself or on its behalf and which is directed to particular individuals. This definition covers direct marketing to prospects (acquisition), existing clients (retention) and the commercialization of data for direct marketing purposes.

The aim of this position paper is twofold:

- To raise awareness of the authorities on these huge economic impacts
- To ask the relevant authorities for a clear and pragmatic interpretation of how best to use the legitimate interest as the legal ground for direct marketing activities

## Introduction

### Marketing eco-system today

Direct Marketing has been feeding the economy for more than forty years in Belgium. It has been in business and people's daily life for more than a generation enabling businesses to advertise more efficiently and consumers to receive offers deemed to better fit their needs or desires, while reducing their irritation<sup>1</sup>.

In Belgium, Direct Mail represented a **direct value of 271M€ in 2016, i.e. 7% of total advertising market<sup>2</sup>**. As the turnover per employee in the information & communication sector amounts 270K€<sup>3</sup>, it means that the direct contribution of the sector to the society is around **1.000 jobs**, but that's only the tip of the iceberg.

According to a 2012 DMA study integrated by Deloitte in their analysis on the Economic Impact of GDPR<sup>4</sup>, each euro invested in direct marketing **generates between 8€ and 21€ of additional sales and thereby multiplying by that much the impact of Direct Marketing on the Economy.**

According to the above-mentioned Deloitte study, the impact of limiting data-driven activities to a consent based basis would be of **1,34% of the GDP and 1,30% of the employment base**. In other words, **it would cost Belgium 561M€ GDP and close to 60.000 jobs**.

### What about the future?

Today, technological evolutions and the raise of new media have led to the extension of the opportunities of direct marketing from traditional postal mail to many other media that are able to offer data-driven marketing to an increasing number of communication channels, both locally and internationally.

The European Commission itself recognizes the importance of a data-driven economy<sup>5</sup>, stating "Digital data is an essential resource for economic growth, competitiveness, innovation, job creation and societal progress in general."

The future of advertising is data-driven and global. There should be an equal and honest level playing field in the advertising market, allowing all players (local, European and overseas) to get access to consumers, be able to offer targeting possibilities to their advertisers, benefit from the growth on the advertising market<sup>6</sup> and contribute to economy by creating new jobs. This has well been understood by the European Commission who sees the potential of data for the European economy "If **favourable policy and legislative conditions are put in place**"<sup>7</sup>.

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<sup>1</sup> UBA Study 2016, biggest source of irritation from advertising is Volume

<sup>2</sup> Source : Nielsen, via <https://www.ubabelgium.be/fr/news-insights/detail/2017/04/20/UBA-Media-Key-Facts-2016>

<sup>3</sup> Source :

[http://statbel.fgov.be/fr/statistiques/chiffres/economie/entreprises/Statistiques\\_structurelles\\_entreprises/services/](http://statbel.fgov.be/fr/statistiques/chiffres/economie/entreprises/Statistiques_structurelles_entreprises/services/)

<sup>4</sup> <https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/about-deloitte/deloitte-uk-european-data-protection-tmt.pdf>

<sup>5</sup> "Digital data is an essential resource for economic growth, competitiveness, innovation, job creation and societal progress in general." on <https://ec.europa.eu/digital-single-market/en/policies/building-european-data-economy>

<sup>7</sup> "If favourable policy and legislative conditions are put in place in time and investments in ICT are encouraged, the value of the European data economy may increase to €739 billion by 2020, representing 4% of the overall EU GDP." on <https://ec.europa.eu/digital-single-market/en/policies/building-european-data-economy>

It is not only about economy, but also about democracy and information: as stated by 30 European news publishers in an open letter to the European Parliament<sup>8</sup>, if local media were unable to serve relevant advertising to their audience, this would reduce their ability to compete with the capabilities of dominant digital platforms for advertising revenues, ultimately undermining their ability to invest in high quality journalism across Europe.

## Legitimate Interest

To be allowed to process personal data, the processing must be lawful based on one of the processing grounds listed in GDPR . For processing of personal data for direct marketing purposes, the two most appropriate processing grounds are consent and legitimate interest.

If consent is relatively easy to obtain when a relationship exists between controller and data subject, it is more difficult to obtain it in case of direct marketing when there is no relation yet with the data subject. This explains why marketers tend to rely on legitimate interest as processing ground for direct marketing activities.

The concept of legitimate interest has been foreseen in the GDPR Article 6.1 (f) which sets forth that processing of personal data shall be lawful where the "*Processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, (...).*"

There is currently a "tendency", in the authorities' approach **to present or impose consent as single available processing ground for all direct marketing processing, and especially when the processing is directed to prospecting new customers** . This approach is legally not correct and has a huge economic impact.

Working Party 29 already confirmed that there is no hierarchy between the different processing grounds and that all available processing grounds have equal value. Hence, although the use of consent is widespread and recommended by many authorities as the preferred way to processing personal data, consent is not the only possible processing ground, nor has it priority over other processing grounds<sup>9</sup>.

In addition, the **economic impact** of a restrictive interpretation on the conditions for the use of legitimate interest as processing ground, **is huge**. If consent were to be the single processing ground for the processing of personal data for direct marketing purposes, the majority of advertisers will be deprived of the possibility to pursue their advertising activities, resulting in the end of the Belgian (and possibly EU) advertising market.

## Legitimate interest as valid processing ground for direct marketing

Recital 47 of the preamble to GDPR expressly states that legitimate interest may be considered as a valid processing ground for direct marketing: "*the processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest.*"

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<sup>8</sup> <http://epceurope.eu/wp-content/uploads/2017/05/FNL-ePrivacy-letter-1.pdf>

<sup>9</sup> WP29, 844/14/EN WP217, Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, p. 10. This opinion was rendered under the EC Data Protection Directive but since the theory of lawfulness and the available processing grounds did not change under GDPR, the opinion remains relevant.

Members states cannot prohibit the use of legitimate interest as processing ground, nor can they restrict it or impose conditions that are not available in GDPR. The European Court of Justice already ruled that Member States cannot add additional conditions to those applicable to legitimate interest<sup>10</sup>.

Finally, if the European legislator had wanted to impose consent as sole processing ground for the processing of personal data for direct marketing purposes, it would have done so expressly, as he did in the context of the processing of special categories of data (eg data relating to race, religion, health etc.) or regarding specific circumstances (eg in the context of the use of electronic mail for advertising purposes).

**On this basis, legitimate interest must be available as valid processing ground for direct marketing purposes.**

Of course, the use of legitimate interest must take **place by strictly observing the conditions set out by the GDPR**, namely by carrying out a balancing test, which weighs the legitimate interests of the controller (or those of a third party) against those of the data subject. It must be assessed on a case-by-case basis, taking into account the context and specific circumstances of the case. In particular, the reasonable expectations of the data subject are a fundamental indicator of the balance between the interests of each party.

To meet these reasonable expectations, **the sector is aware that transparency through the information given to the data subject is key**. The data subject must clearly understand that his/her data can be commercialized and used for direct marketing purposes. He/she must also be able to exercise his/her rights, especially the rights to object or to be forgotten.

In order to ensure a consistent a clear practical application of these conditions, BAM will take the initiative to draft a code of conduct for its members. BAM can only ensure a good application of the conditions applying to legitimate interest if there is some guidance and hence legal security.

## Conclusion

The refusal or restrictive interpretation by privacy authorities of legitimate interest as processing ground for direct marketing purposes is not justified in light of the text of the GDPR, nor in light of the case law of the European court of justice. In addition, it could have very negative effects on the Belgian Economy, as well as on the Belgian consumers:

- A direct impact on 271 M€ advertising budget and 1.000 jobs;
- An indirect impact on 561 M€ GDP and 60.000 jobs;
- Decrease in relevancy of advertising leading to increasing consumer's irritation;
- A strengthening of the major overseas internet companies' market position through limitation of local media and actors' opportunities;
- Less growth and well-being in the Belgian Economy;
- Less tax revenue for the Belgian State.

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<sup>10</sup> ECJ, 24 November 2011, joined cases C-468/10 and C-469/10, points 38 and 39.

Therefore, we ask the relevant authorities to recognize explicitly that legitimate interest can be used as processing ground when processing personal data for direct marketing purposes, striking the right balance between the interests of the data subject and those of controllers and/or of third parties, and respecting the deontology and guidelines that will be drafted by the bodies representing the advertising industry.

We are obviously ready to discuss how to improve transparency towards the data subject in the future in view to ensure a balance between the interests of data controllers and data subjects.

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