



WHITE PAPER

GDPR

THE USE AND PROTECTION OF DATA FOR
MARKETING IN A DATA RELATED SOCIETY:
DATA AS THE NEW RAW MATERIAL





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1 Introduction

On May 25th, 2018, Directive 95/46/EC will be repealed by the General Data Protection Regulation (GDPR). With this GDPR we are in the third generation of law in the field of the protection of data, or in other words, the protection of the fundamental right of privacy. And since we are talking about a fundamental right, one can expect legislation, just like in the field of anti-discrimination. The use and protection of data (including personal data and under certain circumstances also data of legal persons in the context of their relationship to natural persons) is not only regulated in the Directive 95/46/EC and GDPR but also in the E-Privacy Directive.

2 Digital privacy

The E-Privacy Directive and the General Data Protection Regulation provide the legal framework to ensure digital privacy for EU citizens. When using the internet, one often entrusts their Internet Service Provider and the websites one is visiting, with vital personal information, such as name, address, and credit card number. What happens to this information? Could it fall into the wrong hands? What rights does one have with regard to this personal information? Common EU rules have been established to ensure that personal data enjoy a high standard of protection, everywhere in the EU. Currently, the two main pillars of the data protection legal framework in the EU are the E-Privacy Directive (Directive on Privacy and Electronic communications), and the General Data Protection Regulation (GDPR).

The EU General Data Protection Regulation (GDPR) ensures that personal data can only be gathered under strict conditions and for legitimate purposes. Organisations that collect and manage personal information must also protect it from misuse and respect certain rights of data subjects. This means the GDPR is not about prohibiting the processing of personal data, but about creating the terms and conditions to ensure data can be 'used'.

The E-Privacy Directive builds on the EU Telecommunications and Data Protection frameworks to ensure that all communications over public networks respect fundamental rights, in particular a high level of data protection and of privacy for the data subject, regardless of the technology used. In this E-Privacy Directive we will also find the rules for the use of an e-mail address or a telephone number for commercial purposes. On January 10th, 2017, the European Commission adopted a proposal for a Regulation on Privacy and Electronic Communications to replace the 2009 Directive. Unfortunately, the Regulation on Privacy and Electronic Communication (RPEC)



is still a draft when this white paper is being written. Based on this proposal, the provisions on e-mail, outbound telephone calls, etc. will probably not lead to major changes in the existing processes. Nevertheless, we shall have to wait for the final version, which is expected at the beginning of 2018.

In this white paper, we will describe the expected impact of the GDPR regarding the processing of personal data and the impact of the RPEC on the use data for communication purposes.

SHORT HISTORY

On February 28th, 1981, the Council of Europe adopted her Convention 108 on the processing of data. In the following years the individual member states, voluntarily made individual laws, based on this Convention 108 of the Council of Europe. In 1990, the EU started drafting her own data protection directive, which was published in 1995. Member states were bound to transform the Data Protection Directive on the protection of individuals with regard to the processing of personal data, and on the free movement of such data, into common member state law. This resulted in differences and sometimes the free flow of data on the single market was under threat. So, to make sure that all member states of the EU had the same applicable law, the EU came up with a third generation of legislation, a Regulation for the protection of personal data and repealing all the laws on the national level. Over time, the central influence has increased. The same development can be observed for the E-privacy directive, which is expected to be converted from a directive to a regulation in due time.

3 Natural/legal persons

A first step is to study the the processing of personal data.

GDPR: The GDPR is very clear on the fact (recital 14) that it does not cover the processing of personal data which concerns legal persons.

However, if one collects information of a contact person which goes beyond the contact details of the legal person, and which includes the name of a contact person, this could be considered as data on a natural person. One can think about registered hobbies, age and/or other personal preferences.

Data may be only be considered as personal data, if the person involved can be identified directly or indirectly, eg. by leaving a tracking cookie on the business computer of a natural person. This way, every time that tracking cookie is read, the collected data is considered as personal data, although a identification on the level of name, etc. is not possible. This, however, has no consequences for rental of lists.

RPEC: The RPEC regulates inter alia how other different electronic communication channels may be used for natural persons and legal persons. This means that for some electronic communication channels, consent (opt-in) or opt-out will apply. For example, for the use of e-mail/sms/mms containing a direct marketing message (a communication for commercial purposes), prior consent will be required from both natural and legal persons, exactly similar to the situation at present. Regarding voice communication with a direct marketing message to natural persons, member states may choose for an opt-in or opt-out mechanism. However, this opt-in or opt-out mechanism does not apply to legal persons.

4 Consent: definition and conditions

So what does this mean? The GDPR is not applicable on legal persons, whereas the RPEC is applicable to natural and legal persons, and consent is still the consent as defined in the GDPR. Consent is defined as: “any freely given, specific, informed and unambiguous indication of the data subject’s wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her”.

In GDPR article 7.2 (the conditions for consent), it is explicitly drafted that

“If the data subject’s consent is given in the context of a written declaration which also concerns other matters, the request for consent shall be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language. Any part of such a declaration which constitutes an infringement of this Regulation shall not be binding.”

When asking opt-in for the use of the e-mail address for commercial purposes, one should take the formal requirements for opt-in into account. Also, the consent must comply with the requirements defined in the GDPR, where ‘consent’ of the data subject is: any freely given, specific, informed and unambiguous indication of the data subject’s wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.

If the data subject’s consent is granted in a written declaration which also concerns other matters, the request for consent shall be presented in a manner which is clearly distinguishable from other matters and in an intelligible and easily accessible form. So, if the consent is collected in a written declaration, this generates some extra requirements.

If the consent is obtained in a different way, such as by telephone, there is no obligation to obtain consent in writing. As long as consent is obtained, in writing (according to the terms of article 7), in a different way verbally (no special form requirements), it is valid. It is only a matter of proof: an original signed consent paper is the best proof (however, in real life this will be impractical), the time stamp of ticking a box or date at which it was verbally obtained, shall also apply as proof. And obviously, the GDPR and the RPEC do not exclude the normal civil code principles such as authorisation and representation.

5 GDPR and processing of personal data

Where the RPEC allows the use of an address (e.g. e-mail address) under certain conditions, the processing of data for direct marketing and CRM is not within the scope of the RPEC, but within the scope of the GDPR. Always keep in mind that the GDPR relates to the processing of personal data of natural persons; the processing of a legal person’s name and contact person (without additional information) shall not be considered as processing of personal data. However if CRM

systems contains a link between a legal person, the contact person and the contact person's activity on the internet (cookies/metadata), that CRM information will be considered personal data. And again, for the RPEC this is not relevant since prior consent should be given to the natural or legal person before the e-mail address can be used for communication purposes.

DIRECT MARKETING IS ALLOWED

The end of recital 47 makes very clear that direct marketing is not forbidden under the GDPR:

‘... The processing of personal data strictly necessary for the purposes of preventing fraud also constitutes a legitimate interest of the data controller concerned. The processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest.’ (underscore added by author)

But do keep in mind that according to the GDPR, a natural person always has the right to block his data against processing for direct marketing purposes. A legal person does not have that right: a legal person can only withdraw his consent for e-mail. The end solution is the same, only different roadblocks have been constructed.

PROFILING WITHOUT LEGAL EFFECT OR NOT SIGNIFICANTLY AFFECTING THE SUBJECT IS ALLOWED

Direct marketers use profiling techniques for segmentation purposes or to select the relevant target group. Is this still allowed? For direct marketing, it is allowed: “the data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.” The purpose of marketing is not creating legal effect, nor is it significantly affecting the subject. If the purpose is creating a legal effect, it is no longer marketing. If there are serious legal effects or significant consequences, it is only allowed if it is necessary for the execution of a contract, based on the data subject's consent, or authorised by law. The data subject should have the right to express his or her point of view and to contest a decision. Nevertheless, segmentation or selection from a file is permitted for marketing purposes.

PRINCIPLES: INCLUDING NEW ACCOUNTABILITY

Under the Directive 95/46/EC we already worked with the principles for processing.

These principles continue to be in effect, and relate to:

- Lawfulness, fairness and transparency;
- Purpose limitation and compatible use for statistical research;

- Data minimisation;
- Accuracy;
- Storage limitation;
- Integrity and confidentiality.

And a new principle is added:

- Accountability (the controller shall be responsible for, and be able to demonstrate compliance).

**DATA PORTABILITY: NEVER COLLECT DATA WITH CONSENT,
USE LEGITIMATE INTEREST**

This white paper only treats a selection of items. Of course, one still has to secure the entire data processing process, including the secured communication lines. Because this paper is drafted for direct marketers, it is good practice to warn the direct marketers for article 22 (data portability): some will also see this as an opportunity. A data subject involved has the right to transmit his/her data from the database of controller “A” to another controller “B” without hindrance from the controller to which the personal data have been provided. Regarding data portability to “B”, all personal data which have been processed by “A” with the unambiguous consent of the data subject or the ground of an agreement between the data subject and “A”, will qualify. The data subject has the right to data portability, where technically feasible. This can be a real threat to CRM systems where a new company on the market can easily ‘buy’ the data of the data subjects through data portability. The initial controller loses the data and has no lawful processing ground. So be careful and do not use consent light-hearted as a legitimate ground for processing personal data as a one-size-fits-all solution.

6 RPEC and the future of telemarketing

In the RPEC, telemarketing is regulated as direct marketing voice-to-voice calls to end users. It leaves it up to the member states if they want to have an opt-in or opt-out system, where consumers can block the number. In the current draft regulation, the regulation is only applicable for natural persons.

However, no derogations (in the area of processing personal data of employees, statistic research and the designation of a mandatory data protection officer for specific data controllers and data processors) with major consequences for direct marketing processes are expected. So far, there

seems to be little change in this area for legal persons, but further treatment in the European Parliament will have to be awaited.

When calling a natural person, a new obligation arises because the caller should in each telephone call:

1. present the identity of a line on which they (the advertiser) can be contacted; or
2. present a specific code/or prefix identifying the fact that the call is a marketing call.

The European Commission will determine the specific code or prefix for the entire European Union.

7 Derogations and GDPR/RPEC

If one expected that all the rules concerning Data Protection and Privacy and Electronic communications will be in two Regulations, one will be disappointed. All member states plus the EU have drafted about 60 derogations possibilities in the GDPR and in the RPEC. Therefore, the final text has to be awaited. However, no derogations are expected with major consequences for the direct marketing processes. Derogations are in the area of processing personal data of employees, statistical research and appointing a mandatory DPO for certain data controllers and processors. This will, however, only be clear in the final text of the RPEC.

8 Conclusion

Just like today, a distinction must be made between the processing of personal data and the use of data for electronic communications services for direct marketing communications.

The processing of data of natural persons (person of flesh and blood) is regulated in the GDPR (General Data Protection Regulation), and GDPR only relates to natural persons. Legal persons according to the law of the member states are excluded. For the processing of data of legal persons no consent is needed, since there is no obligation for legal ground for processing the data of legal persons. For the processing of personal data of natural persons, a legal ground for processing is needed. Keep in mind that consent is only one of the legal grounds and the most difficult one to 'prove'.



Parallel to the GDPR, the EU is working on a replacement of the E-privacy directive. This directive will contain the provisions on how someone can use data as a communication channel, such as an address, and also some technical aspects of analytics. In January 2017, the EU started the revision of the E-Privacy Directive into the RPEC. This means that this Regulation will be applicable in all EU member states, and applicable to natural and legal persons.

Just like under the Directive, the Regulation also stipulates the conditions that end user should give his/her prior consent before the e-mail address can be used for direct marketing (natural persons and legal persons). Strictly speaking nothing is changed, but the formal requirements will be more stringent. As an example, the consent for e-mail is the same consent as defined in the GDPR, which is described earlier in this white paper. This consent shall not be applicable for unsolicited telephone calls (because they are unsolicited), but the above does not apply for calling telephone numbers where the end user is a legal person.

The GDPR and the present proposal of RPEC will still allow the Data Controller to pursue his legitimate interest or the legitimate interest of a third party to whom data are disclosed (such as in direct marketing) provided that he/she has the consent of the end users of the e-mail address, in order to do direct marketing by e-mail, until the end user unsubscribes.

It is not certain if the E-Privacy Regulation will also come into effect at the same time as the GDPR on May 25th, 2018, although this would make life much easier, with one Regulation on the processing of data and one Regulation on the use of data for direct marketing.

EMIG

The European Market Intelligence Group (EMIG) is a joint venture of leading European database builders supplying IT and Telecoms end user data in the business-to-business market across Western Europe and offering one-stop shop solutions for targeted marketing and lead generation. In addition, EMIG specialises in supporting business clients on a wide range of topics from data protection to specific consultancy and advice, tailored to the client's needs.

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