EUROPEAN COMMISSION
DIRECTORATE-GENERAL JUSTICE and CONSUMERS

Directorate C: Fundamental rights and Rule of Law
The Director

Brussels, 06/03/2020
JUST.C3/

Mr Aleid Wolfsen
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The Netherlands

Dear Mr Wolfsen,

The Commission follows with great attention the work carried out by the data protection authorities (DPAs) as regards, inter alia, the publication of national guidelines and opinions on matters related to the General Data Protection Regulation (EU) 2016/679 (GDPR).

The Commission supports the issuance of national guidelines addressed to controllers and processors, including in particular SMEs, which contribute to enhancing the understanding of the application of the GDPR in practice. However, it is of outmost importance that the national guidelines are in line with the case law of the CJEU and with the guidelines adopted on the European Data Protection Board (EDPB) level.

In this context, we are contacting you regarding the standard explanation note issued by the Dutch DPA on the legitimate interest ground in Article 6(1)(f) GDPR. In particular, we are concerned by the strict interpretation in the explanation note stating that interests such as a pure commercial interest does not qualify as a "legitimate" interest as regards Article 6(1)(f) GDPR[1].

For the reasons spelled out below, we are of the opinion that such a strict interpretation is not in line with the GDPR, the guidelines of the Article 29 Working Party/EDPB and the case law of the European Court of Justice (CJEU):

a. The notion of 'legitimate' interests

In case C-13/16, *Rigas satiksme*, the CJEU recalled[2] that the predecessor to Article 6(1)(f) GDPR in Directive 95/46/EC (Article 7(f)) consisted of a three-part test; i) establishment of the existence of a legitimate interest behind the processing, ii) assessment of whether the processing in question is necessary, and iii) undertaking a balancing in order to establish whether the legitimate interest of the controller is overridden by the fundamental rights and freedoms of the data subject. In this regard, it is

[1] Page 3 of the standard explanation note: "*What are <u>not</u> considered legitimate interest either, would be the following examples: processing personal data for purely commercial interests, profit maximisation, monitoring employee conduct without legitimate interest or tracking the (purchasing) behaviour of (potential) customers, etc.*".

[2] Case C-13/16, *Rigas satiksme*, para 28, see also Case C-40/17 *Fashion ID*, para 95.

essential that a distinction is drawn between the different legs of the three-part test, as each individual leg consists of an assessment that differs from the other parts of the test.

The CJEU accepted that the interest of a third party in obtaining the personal information of a person who damaged their property in order to sue that person for damages[3] as a 'legitimate interest' and confirmed this approach in the mentioned *Rigas satiksme* case. Thus, the CJEU deemed the economic interest of the third party as legitimate for the purposes of the legitimate interest ground.

In addition, the predecessor of the EDPB, the Article 29 Working Party, clarified in its Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC (WP 217), that the notion of 'legitimate interests' includes a *broad* range of interests.

In this regard, it also has to be borne in mind that the freedom to conduct a business, including pursuing pure commercial interests such as profit maximisation, is a human right enshrined in Article 16 of the Charter of Fundamental Rights of the European Union (EU Charter). Recital 4 of the GDPR underlines that the right to protection of personal data is not an absolute right and it has to be balanced against other fundamental rights, such as the freedom to conduct a business. The strict interpretation of the Dutch DPA does not allow an appropriate balance to be struck between the rights at issue, as the right to data protection is given precedence by virtue of the fact that certain interests rooted in the freedom to conduct a business are categorically considered illegitimate.

Furthermore, the recitals of the GDPR also set out examples of purposes which are considered or may be regarded as a 'legitimate' interest. More specifically, Recital 47 of the GDPR stipulates that processing of personal data for *direct marketing purposes* may be regarded as carried out for a legitimate purpose. The recitals of EU legal acts constitute an integral part of the legal act and set out the reasons for the contents of the enacting terms (i.e. the articles) of an act. They also reflect the intentions of the EU legislators.

Therefore, it is difficult to reconcile the strict interpretation of the Dutch DPA of what can constitute a legitimate interest with the intended effect that the EU legislators wanted to attribute to Article 6(1)(f) GDPR. It should also be borne in mind that the fact that a pure commercial interest is 'legitimate' does not entail that the data controller can immediately rely on Article 6(1)(f) GDPR. In fact, this will depend on the outcome of the second and third leg of the three-part test

b. The second and the third leg of the test: The Google Spain and Fashion ID cases

Concerning the second and the third leg of the test, we would like to draw attention to the case law of the CJEU. The CJEU has on a number of occasions established that the legitimate interest ground foresees a concrete balancing of the legitimate interests of the controller, on the one hand, and the fundamental rights and freedoms of the data subject, on the other hand[4]. The fact that the Dutch DPA generally and categorically excludes the legitimacy of pure commercial interests amounts to the data controllers being deprived in practice of the possibility of carrying out this balancing test and, thus, basing their processing on Article 6(1)(f) GDPR. This is not in line with the case law of the CJEU[5]. The CJEU has established that Article 7(f) of Directive 95/45/EC precludes rules

[3] Case C-275/06 *Promusicae*, para 53.
[4] Joined cases C-468/10 and C-469/10, *ASNEF*; C-13/16, *Rigas satiksme*.
[5] Joined cases C-468/10 and C-469/10, *ASNEF*, and case C-582/14, *Breyer*.

excluding, categorically and in general, the possibility of allowing the opposing rights and interests at issue to be balanced against each other in a particular case.

This is confirmed in the case C-131/12, *Google Spain*, and case C-40/17, *Fashion ID*.

The CJEU established in the Google Spain-case that:

> *"This provision permits the processing of personal data where it is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject — in particular his right to privacy with respect to the processing of personal data — which require protection under Article 1(1) of the directive.* ***Application of Article 7(f) thus necessitates a balancing of the opposing rights and interests concerned, in the context of which account must be taken of the significance of the data subject's rights arising from Articles 7 and 8 of the Charter (see ASNEF and FECEMD, EU:C:2011:777, paragraphs 38 and 40)****",* cf. paragraph 74.

Thus, the CJEU explicitly stated that a concrete balancing of the opposing rights is always required as regards the legitimate interest ground in Article 7(f) (now Article 6(1)(f) GDPR). Thereby stating that no statement about the possibility to rely on the legitimate interest ground can be made without engaging in the balancing test.

The CJEU also clarified that the outcome of the balancing will depend on factors such as the nature of the information in question and its sensitivity for the data subject's private life, cf. paragraph 81. Therefore, it is not possible to generally conclude that a pure commercial interest is not capable of overriding the fundamental rights and freedoms of the data subject, as this must be assessed on the basis of a concrete balancing test.

This is furthermore confirmed in *Fashion ID*-case. One of the questions raised in this case concerned the interpretation of the legitimate interest under Article 7(f) Directive 95/46. In paragraph 80 of the case, the CJEU notes that the processing operations of both controllers were carried out for economic interests. The Court did not reject the following question, concerning the application of Article 7(f) Directive 95/46 as not moot, because of the interest in question of economic nature, but proceeded to analyse the other conditions of the legitimate interest ground. In other words, if the economic interests in the case had been illegitimate, it would not have been relevant for the CJEU to consider the legitimate interest ground at all, as in that case the conditions for the application of Article 7(f) Directive 95/46 would never have been met. The approach the CJEU followed in this case underlines again the importance and the value it attaches to the balancing test (so the second and the third leg of the test), which must be undertaken in each and every case taking into account the individual circumstances of each individual case. There is nothing in the jurisprudence of the CJEU which allows one to conclude that the CJEU is of the opinion that economic interests cannot be considered legitimate under Article 6(1)(f) GDPR.

Final remarks

In addition to the explanations outlined above, we recall that the purpose of the GDPR is not to hamper business activities but rather to allow the conduct of business while concurrently ensuring a high level of data protection. The strict interpretation laid down by the Dutch DPA severely limits businesses' possibilities of processing personal data for commercial interests, as they would have to collect consent from the data subject in every case where an economic interest is pursued, since the other relevant legal grounds in Article 6(1) GDPR have, effectively, been rendered inapplicable. In our opinion, this

cannot be said to reflect an appropriate balance between the right to data protection, on the one hand, and the freedom to conduct business, on the other hand.

Against this background, we invite the Dutch DPA to readjust the language of the standard explanation note to clearly reflect that commercial interests can be regarded as 'legitimate' interests when (subject to a concrete balancing) they are not overridden by the fundamental rights and freedoms of the data subject.

We are at your disposal for any question or clarification that may be necessary in relation to the explanations outlined above.

Yours sincerely,

(e-signed)
Emmanuel Crabit