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Mr Emmanuel Crabit
European Commission
Directorate-General Justice and Consumers
Directorate C: Fundamental Rights and Rule of Law,
The Director

Date
31 August 2020

Our reference
2020-37-AWO-BHO

Your letter
6 March 2020

Contact

Your reference

Subject
Reply to the European Commission's letter on legitimate interest

Dear Mr Crabit,

I hope that this letter finds you well and in good health, taking into account that we are currently experiencing an unprecedented situation throughout the European Union due to the Covid-19 virus.

Thank you for the European Commission's (hereinafter: Commission) letter concerning the explanatory note of the *Autoriteit Persoonsgegevens* - the Dutch Supervisory Authority (SA) - on the notion of legitimate interest. I have read this letter with great interest and would like to express my appreciation for reaching out to me and for sharing the Commission's views on the guidance issued by my Office on this important subject.

As I will set out in this letter, the current interpretation and application of legitimate interest is a cause of great concern for me. Considering the importance of this subject matter as well as my appreciation for the valuable input of the Commission, I would like to invite you – or your representatives – for a meeting in order to discuss the notion of legitimate interest in person. Taking into account the measures to counter the Covid-19 virus, we could organise this meeting by way of a conference call or a video conference. In this regard, I would like to propose that the details of this meeting will be discussed at staff level.[1]

In preparation of such an exchange of views this response letter aims to give more insight into my concerns regarding the current interpretation of the notion of legitimate interest, and aims to address the main points raised by the Commission. However, before that, please allow me to make some preliminary remarks.

[1] In this regard you are kindly referred to the contact details in the heading of this letter.

Date
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Preliminary remarks
As mentioned before, I would like to express my appreciation for reaching out to me in order to share the Commission's views on the guidance issued by my Office on this important subject. The Commission is a valuable partner to the European Data Protection Board (EDPB) and the views expressed by the Commission within the EDPB are highly regarded. Naturally, my Office will take due account of the views of the Commission, as we do with views expressed by our European colleagues in the context of the EDPB.

Having said that, I think that it is important to highlight – by means of a preliminary remark – the importance of the independent status of the individual European SAs, supplemented by the cooperation and consistency mechanism as laid down in Chapter VII of the General Data Protection Regulation (GDPR).

The independent status of SAs is one of the cornerstones of the GDPR. Article 51(1) GDPR reiterates that each Member State should create one or more *independent* public authorities to monitor the application of the Regulation. By virtue of this independence, the Autoriteit Persoonsgegevens is competent – indeed – to independently monitor the application of the GDPR and to formulate its own views on its application in that respect. However, the independence of European SAs cannot be viewed in isolation from another, equally important cornerstone of the GDPR: the task of all European SAs to ensure the consistent interpretation and application of the GDPR throughout the European Union, as outlined in Article 51(2) GDPR. This is a task the Autoriteit Persoonsgegevens takes very seriously, and which my Office fulfills by participating in meetings of the EDPB, by applying the one-stop-shop mechanism and by adhering to Opinions and Decisions of the EDPB. In this regard, it is also worth mentioning that my Office will be acting as one of the rapporteurs on the new EDPB guidelines on legitimate interest. Naturally it is in the end however up to the (national) courts and, ultimately, the Court of Justice of the European Union (CJEU) to establish the final interpretation of the law.

The guidance on the interpretation of legitimate interest drafted by my Office was issued in the light of the independent carrying-out of the tasks entrusted to supervisory authorities under the GDPR. In line with Article 57(1) GDPR, the Autoriteit Persoonsgegevens has explicated the obligations of controllers and processors under the Regulation concerning a topic that has not yet been exhaustively discussed on an EDPB-level. Neither does the case law of the CJEU provide us with a clear interpretation of whether a purely economic interest can constitute a legitimate interest. By issuing guidance, my Office creates awareness amongst controllers and processors and informs the public about the risks, rules, safeguards and rights when personal data are processed in pursuance of the legitimate interests of a controller.

The Autoriteit Persoonsgegevens' viewpoint is, of course, subjected to further discussion and development in the application of the cooperation- and consistency mechanisms of the GDPR as well as to scrutiny by national courts and, ultimately, by the CJEU. In the meantime, however, my Office feels that it is in the interest of data subjects, controllers and processors alike to communicate its own interpretation, thus giving expression to its independent status as supervisory authority, while respecting future developments on an EU-level.

Speaking of these future developments, the Autoriteit Persoonsgegevens firmly believes that the matters raised in the Commission's letter are best resolved by way of handling concrete cases in close cooperation with our European counterparts. Trough handling concrete cases we will ultimately be able to establish

more clarity at European level, either via the one-stop-shop mechanism, by issuing EDPB guidance or by eliciting case law at national or EU level. I therefore fully trust that we can resolve the issues raised by way of the mechanisms provided for in the GDPR and EU law.

Concerns regarding the interpretation and application of legitimate interest

Following my preliminary remarks, please allow me to provide some background regarding the interpretation and application of legitimate interest. With the entry into force of the Charter of Fundamental Rights of the European Union (the Charter), the right to the protection of personal data has become its own independent fundamental right within the EU, on par with - yet distinct from - the fundamental right to respect for private life and the other fundamental rights. Thereupon, the CJEU confirmed that any processing of personal data constitutes an interference with this fundamental right. This conclusion may be drawn irrespective of the answer to the question whether such an interference (also) constitutes an interference with the fundamental right to respect for private life or any other (fundamental) right(s). As such, the protection of personal data is guaranteed at the 'highest' level, as a fundamental right.[2] This also means that any processing, as it constitutes an interference, is in principle also unlawful.

As the Commission rightly states in its letter – like all other fundamental rights – the right to the protection of personal data is not absolute. An interference can be lawful. However, any fundamental right of free and equal European citizens can only be limited by those citizens themselves or by democratically legitimised law. Hence, Article 8 of the Charter should be read in conjunction with Article 52 of the Charter, which clearly states that fundamental rights can be restricted, but also that '[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.' This is reiterated in recital 4 of the GDPR which reads that '[t]he right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality.' In other words: the importance of the protection of personal data may 'clash' with other general interests recognised by law or with the (fundamental) rights of others. Therefore, the possibility of involuntary interference is not excluded, but that involuntary action must be provided for by law. Where the involuntary interference is not provided for by law, there is no such 'clash' and everyone has the legal obligation to refrain from unlawful behaviour towards others – an obligation that is always incumbent on everyone - including companies. And as such, one must refrain from engaging in the involuntary interference of the (fundamental) right.

The Union legislator has made the aforementioned explicit with regard to the processing of personal data by enacting the limited grounds for processing enumerated in Article 6(1) GDPR which may be considered legitimate interferences.[3] Either the processing is voluntary (Article 6(1)(a) & (b) GDPR), which makes it a lawful processing of personal data or it constitutes an involuntary interference but is nevertheless lawful, because such processing is necessary in order to protect the vital interests of an individual (Article 6(1)(d)

[2] I shall restrict myself to the Charter, and not discuss the protection of personal data within the context of Article 8 of the European Convention on Human Rights, which has been interpreted by the European Court of Human Rights as to encompass the protection of personal data as well. As we are talking about the interpretation of the GDPR I will only discuss the Charter.
[3] Whether the processing as a whole is legitimate of course has to be assessed in light of all the other requirements in the GDPR.

GDPR) or is provided for by law directly (Article 6(1)(c) GDPR) or indirectly (Article 6(1)(e)GDPR). All of these lawful bases fit perfectly in the balancing test required by Article 52 of the Charter because there is a 'clash' of the fundamental right to the protection of personal data with the (fundamental) rights of others. The interpretation of the final lawful basis for processing - for the purposes of the legitimate interests pursued by the controller or by a third party[4]- should in my opinion follow suit and be interpreted in light of Article 8 and 52 of the Charter. This means that only those interests which can be traced back to the law, be it written or unwritten, a rule or a legal principle, can amount to interests which are capable of lawfully interfering with the fundamental right to the protection of personal data. If not, the protection of the fundamental right to the protection of personal data would be crucially different from the protection of any other legally protected (fundamental) right. This would directly contradict the fact that, by enshrining the fundamental right to the protection of personal data in the Charter, it has become its own independent fundamental right within the EU, on par with the other fundamental rights of European citizens.

Response to specific concerns raised in the Commission's letter

Concerning the content of the application of the notion of *legitimate* interests, please allow me to expand on our difference of opinion on the law and case law in particular. In order, I have added remarks concerning the *Rīgas satiksme*-case (i), the broad range of interests considered under the notion of legitimate interest (ii), the fundamental freedom to conduct a business (iii), direct marketing as a legitimate interest (iv), the *ASNEF* and *Breyer*-cases (v), the *Google Spain* case (vi) and the CJEU's ruling in *Fashion ID* (vii). In addition, I have attached a more extensive explanation of our reading of Article 6(1)(f) GDPR.

i) First of all, the Commission's letter refers to case C-13/16, *Rīgas satiksme*, where the CJEU recalled the three-part test of Article 6(1)(f) GDPR.[5] The first step being the establishment of the existence of a *legitimate* interest for the processing.[6] I agree that it is indeed essential to draw a distinction between the different legs of the three-part test, whereby each part requires its own assessment that differs from the other parts of the test. However, I respectfully disagree with the further assessment of the case.

The Commission's letter states that the CJEU deemed the economic interest of the third party legitimate, and could therefore pass the first part of the three-part test of Article 6(1)(f) GDPR. I do not interpret the CJEU's ruling that way. The interest put forth in that case was - as stated in the Commission's letter - the processing of personal data in order for the third party to be able to sue for compensation in relation to their damaged property. This is in part an economic interest, but it is by no means the *only* interest for processing the personal data in this case. In the event of damage to (for example) property - as had happened in the case - is caused by a wrongful act, the tortfeasor is in principle legally obliged to compensate the injured party. This is a hallmark of civil liability law. Should the tortfeasor fail to compensate the injured party voluntarily, the latter may seek a court order to compel the tortfeasor. The injured party in this case, Rīgas satiksme, wanted exactly this; personal data of the tortfeasor in order to exercise a legal claim against the tortfeasor. Thus, the interests by the controller were not solely economic but concerned a legally protected interest. The CJEU even

[4] Article 6(1)(f) GDPR.
[5] At the time Article 7(f) Directive 95/46/EC.
[6] The others being the assessment of whether the processing in question is necessary and the balancing of the legitimate interest of the controller or third party and the fundamental rights and freedoms of the data subject.

specifically refers to the legitimacy of processing of personal data necessary for the establishment, exercise or the defence of legal claims.[7] The CJEU does not refer to the specific content of the legal claim, i.e. monetary compensation. I therefore do not share the conclusion that the CJEU has accepted economic interests to be sufficient to independently amount to a legitimate interest.

ii) Secondly, the Commission's letter refers to the Article 29 Working Party and its clarification that the notion of 'legitimate interests' includes a *broad* range of interests. My Office does not argue otherwise. I fully agree that the interests that can be considered legitimate under Article 6(1)(f) GDPR can be far, wide and inbetween. However, even a broad range has limits. I consider these limits to overlap with the interests the law considers worthy of protection and therefore can - in principle - justify an infringement of the fundamental right to data protection.

iii) Thirdly, the Commission's letter refers to the fundamental freedom to conduct a business which, according to the letter, includes the 'pursuing of pure commercial interests such as profit maximisation'. While I agree that running a business by all means is legitimate and might include those interests, I do not agree with the assessment that profit maximisation is then also an interest that flows from Article 16 of the EU Charter. As I understand Article 16 of the EU Charter, it does not extend to that scope. The freedom to conduct a business is a fundamental right which recognises the freedom to pursue an economic or commercial activity and a recognition of contractual freedom and free competition. It follows, inter alia, that entrepreneurs are, in principle, free to set up a business and determine with whom they do business and with whom they do not, as well as their ability to set their own prices. This fundamental freedom is not absolute, but requires an explanation in accordance with Union law and national laws and practices. However, it does not follow from the general fundamental right to freedom to conduct a business that the right also protects in itself the interest of making (as much) profit as possible.[8] Therefore, I respectfully disagree with the Commission's conclusion that the Autoriteit Persoonsgegevens does not allow for an appropriate balance to be struck between the two fundamental rights accorded under the EU Charter. The purely economic interest in making as much profit as possible, I argue, does not fall within the scope of Article 16 EU Charter and therefore does not require a balancing against the rights of the data subject as protected under Article 8 EU Charter. In the same spirit, it should be noted that neither can the purely economic interest in making as much profit as possible be used to infringe upon other fundamental rights as enshrined in the EU Charter, such as the right to property. Naturally, I welcome any reference to case law from which it becomes clear that the protection of Article 16 EU Charter should be interpreted differently.

iv) Fourthly, the Commission's letter refers to legitimate interest in relation to direct marketing. This is, in my view, a legal-technical matter. I believe we need to read the selected sentence from Recital 47 of the GDPR that direct marketing may be regarded as carried out for a legitimate interest, in the light of existing legal direct marketing provisions, such as present in Directive 2002/58/EG. This Directive principally restricts the grounds for collecting personal data to *consent*, with an important exception:

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[7] CJEU 4 May 2017, C-13/16 *Rīgas satiksme*, ECLI:EU:C:2017:336, para 7.

[8] In this regard also consider the CJEU's assessment of what would later become Article 16 EU Charter in Court of Justice 14 May 1974, C-4/73, *Nold KG v. Commission*, in 1973 which has been referenced in the explanation to Article 16 EU Charter as one of the cases which led to Article 16 EU Charter.[8] While generalisations should not necessarily flow from this ruling, it is noteworthy in this context that the CJEU considered that the guarantees accorded to a particular undertaking under this right can 'in no respect be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity'.

personal data already obtained from a customer in the context of the sale of a product or a service may, in accordance with the GDPR, be used for direct marketing purposes concerning similar products or services from the same supplier.
In essence, this makes explicit that this type of *further* processing of the personal data for direct marketing purposes is possible. There is no equivalent provision in the GDPR for direct marketing covered by the Regulation. However, nothing from the provisions in the GDPR suggests that a different approach should be taken because of the medium by which the direct marketing takes place. In our view this sentence thus only serves to make clear, that, for instance in the event of direct marketing for similar products or services based on personal data already validly obtained, the controller may have a legitimate interest in taking advantage of the possibilities explicitly granted by EU legislation. Open for debate as this may be, I certainly do not think that the sentence can or should be read as essentially meaning that a purely economic interest is an interest that qualifies, in principle, as legitimate.

v) Fifthly, the Commission's letter refers to the *ASNEF* and *Breyer* cases of the CJEU to support the claim that my Office's interpretation amounts to a categorical and general exclusion incompatible with the GDPR.[9] In both the *Breyer* and *ASNEF* case, national legislation restricted the scope of what is now Article 6(1)(f) GDPR. In *ASNEF* by specifically excluding a category of *personal data* from the scope of application of the provision. In *Breyer* by limiting the processing to those instances exhaustively written down in national law, i.e. allowing only *legal interests* and not the broader *legitimate* interests. My Office's interpretation of what constitutes a legitimate interest imposes no such restrictions. Rather, our interpretation seeks to clarify the notion of a legitimate interest. As such, my Office does not cross the line, but rather shows controllers and data subjects where the line is.

vi) Sixthly, the Commission's letter cites the CJEU in *Google Spain*, that "*the CJEU* [in the citation] *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.*" If this were the case, then I would like to pose the question what the point is of having the first question – as referred to earlier, as a *distinct* question – part of the legitimate interest test under Article 6(1)(f) GDPR? If *any* interest suffices - bar unlawful interests - why the need to make this first step explicit at all and refer to *legitimate* interests? My Office's interpretation of the CJEU's conclusion is therefore different. The CJEU reiterates the necessity to explicitly balance the opposing rights and interests that have passed the first two questions of the test that the CJEU had laid down in the *ASNEF* case. The CJEU does not consider that *all* interests should be balanced, but all *legitimate* interests. After all, the paragraph cited in the Commission's letter explicitly states "This provision permits the processing of personal data where it is necessary for the purposes of the legitimate interests pursued by the controller".

[9] Summarised as follows in the *Breyer* case: "*The Court has held that 'Article 7 of Directive 95/46 sets out an exhaustive and restrictive list of cases in which the processing of personal data can be regarded as being lawful and that the Member States cannot add new principles relating to the lawfulness of the processing of personal data or impose additional requirements that have the effect of amending the scope of one of the six principles provided for in that article (see, to that effect, judgment of 24 November 2011, ASNEF and FECEMD, C-468/10 and C-469/10, EU:C:2011:777, paragraphs 30 and 32)*', CJEU 19 October 2016, C-582/14, *Breyer*, ECLI:EU:C:2016:779, para. 57.

vii) Lastly, the Commission's letter refers to the CJEU's ruling in *Fashion ID*. In response to that, I would like to firstly reiterate that my Office does not consider having an economic interest to be an impediment to satisfying the legitimate interest ground of Article 6(1)(f) GDPR. However, *only* pursuing the interest of making a profit out of someone else's' data is insufficient to merit advancement to the balancing test required by Article 6(1)(f) GDPR.

Secondly, I must admit I cannot follow the Commission's explanation of the *Fashion ID* case. In reference to the fourth question addressed by the CJEU, the Court does not rule on whether either controller *has* a legitimate interest, but rather discusses whether both of the controllers need to have a legitimate interest or if it would suffice that one of the joint controllers has a legitimate interest. The CJEU refers to the second question not because it was supposedly established there that Facebook Ireland and Fashion ID have an economic motive for the processing and as such have a legitimate interest, but because the joint controllership of the two parties became clear from the answer to that question. In its answer to the fourth question, the CJEU did not have to assess the presence nor validity of any legitimate interest that either Facebook Ireland or Fashion ID may have, because the question did not concern the *presence* of a legitimate interest, rather the question of who requires one. In this regard, I agree that the CJEU has not explicitly rejected economic interests as a legitimate interest in this particular case, but I would also like to put forth that neither has the CJEU explicitly accepted an economic interest as being sufficient to amount to a legitimate interest either.

Final remarks

Taking all of the above into consideration, I do not subscribe to the Commission's final remarks that my Office's interpretation of the notion of legitimate interest limits businesses' possibilities of processing personal data for commercial interest, as in the Commission's words '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'. Often economic interests are pursued in conjunction with legitimate interests and as such would have no problem advancing to the 'balancing test'. Examples of such an overlap between economic interests and legitimate interests are numerous, such as the processing of personal data for the legitimate interest of combatting fraud, the processing of personal data by employers for the legitimate interest of ensuring a safe working environment and the processing of personal data for the legitimate interest to protect property against burglary, theft or vandalism (i.e. video surveillance).

However, where (purely) economic interests are not pursued in conjunction with legitimate interests, the consent of the data subject – if the business cannot show that the processing is necessary for the performance of a contract or any of the other legal grounds enumerated in Article 6(1) GDPR – is required if the business wishes to process personal data.

Accepting otherwise would mean that a mere financial interest in processing personal data of a data subject - even without their consent - would be an interest that merits in and of itself the weighing against the fundamental rights of the data subject, and could thus in theory also outweigh the fundamental right to data protection. Could this then not also lead to the situation that the higher the value of the personal data, the less protection is offered? I firmly believe that this cannot be the case, neither in relation to the fundamental right to the protection of personal data, nor in relation to any other fundamental right as

enshrined in the EU Charter. Naturally, I would very much appreciate the opportunity to discuss this matter with you in more detail in a meeting as referenced earlier.

In conclusion, I would like to reiterate my appreciation for you reaching out to me in order to share the Commission's views on the guidance on legitimate interest issued by my Office. I am pleased to know that the Commission also takes an active interest in this important subject and I fully share the point of view that a consistent approach at EU level is needed. It is my belief that we will be able to achieve this by way of the various legal instruments provided to us in the GDPR and I am pleased to inform you that my Office will actively contribute to this by deploying the various instruments at our disposal. This will of course be done in close collaboration with our European counterparts.

Naturally, I remain at your disposal for any question or clarification that may be necessary in relation to the explanations outlined above.

Yours sincerely, on behalf of the board of the Dutch Supervisory Authority,

Aleid Wolfsen,
Chair of the Autoriteit Persoonsgegevens

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6.d 61f-brief Bestuur aan Europese Commissie	Het bestuur neemt kennis van de brief. <u>Toelichting:</u> Eerder dit jaar heeft de AP een brief van de Europese Commissie (verder: Commissie) ontvangen, waarin de AP wordt opgeroepen haar interpretatie en toepassing van gerechtvaardigd belang ("61f") aan te passen. In de brief worden drie punten naar voren gebracht: - Ten eerste wordt ingegaan op de inhoudelijke argumenten van de Commissie. Deze worden aan de hand van jurisprudentie van het Hof weerlegd; - Ten tweede wordt het standpunt van de AP ingebed in een bredere/meer fundamentele context: het fundamentele recht op de bescherming van persoonsgegevens kan niet zomaar rechtstreeks worden afgewogen tegen het "gewone" belang om zoveel mogelijk geld te verdienen; - ARTIKEL 11, EERSTE LID, WOB Wél wordt de Commissie uitgenodigd om verder over dit onderwerp in gesprek te gaan met de AP. Er is voor gekozen de brief in de week van 31 augustus te versturen, omdat de EDPB zich tijdens de plenaire vergadering van 2 september zal buigen over de guidelines van de social media subgroup. In deze guidelines speelt de uitleg van 61f ook een rol. De AP zal van deze gelegenheid gebruik maken om tijdens de vergadering kort haar 61f standpunt toe te lichten, waarbij dan kan worden verwezen naar de brief aan de COM.