

Open letter from Bisnode to the authorities

Commercialisation of personal data and legitimate interest

“don’t throw the baby out with the bath water”

Personal data can only be processed in the cases listed in the GDPR.

For the commercialisation of personal data, only two legal grounds qualify: “consent” (art. 6a) and “legitimate interest” (art. 6f).

Even though these two legal grounds should be considered equal, we see a strong tendency in the market to suggest that consent is the only valid legal ground for the commercialisation of data.

This tendency is additionally reinforced by the media, which persistently talks of consent without stating the possibility of legitimate interest as alternative legal ground.

We would like to underline here that we, together with other companies in our sector, will not be able to continue our activities if we are required to have consent to trade personal data. From experience we must, after all, conclude that - even with an interesting offer for the consumer - at most 10% of the persons grant consent (simply because an active operation must be undertaken, e.g. by “clicking”).

Our company, Bisnode, does not offer the consumer any product or service in a direct way and will thus only be able to collect a negligible percentage of consents. This will, in concrete terms, result in a significant drop in the amount of data available on the market for direct marketing. Companies will no longer have, except via the GAFAs, sufficient data available for performing segmented prospect campaigns, nor for the correct cleaning up and adjusting of their databases. Regarding the latter, we should not forget that maintaining data stored in databases correct and up-to-date is an obligation that is imposed by the GDPR (principle of the “accuracy” of the data, stated in art. 5.1d).

Economic impact

Direct marketing has been making a contribution to the Belgian economy for more than 40 years. For more than a generation it has been a fixed part of the daily activities of enterprises and persons to enable companies to advertise in a more efficient way. At the same time, direct marketing contributes to consumers receiving offers that more closely reflect their needs or interests. In this way, irritation about the needless receipt of irrelevant advertising is avoided.

In 2016, Direct Mail in Belgium was good for an amount of €271,000,000, being 7% of the total advertising market. Since the turnover per employee in the information and communications sector annually runs at as much as €270,000, this means that the sector is responsible for a direct contribution to society of around 1,000 jobs. This is only the tip of the iceberg.

According to a DMA study in 2012, integrated into an analysis by Deloitte concerning the economic impact of the GDPR¹, each euro invested in direct marketing generates between €8 and €21 additional turnover, so that the effect of direct marketing on the economy is to be multiplied considerably. According to the aforementioned study by Deloitte, the reduction of “data driven” activities to “data driven” activities based on consent, would have an impact of 1.34% on GDP and 1.30% on unemployment. In other words, it would cost the Belgian economy €5,858,000,000 in BBP and nearly 60,000 jobs. It is a considerable price to pay...

Advertisers will always invest in ways to harvest new customers. It is their legitimate interest to find economic ways to do so. Direct Marketing is in fact the “grease” that helps the economy in offering the means of finding and attracting new customers in an effective way.

Legitimate interest of the commercialisation of personal data

Bisnode’s legitimate interest is in its freedom to do business (art. II.3 of the Code of Economic Law). The freedom to do business is a basic principle of Belgian commercial law. It allows the free choice of economic activities, subject to legal restrictions. This same freedom to do business is also reflected as the freedom to do business as included in art. 16 of the Charter of Fundamental Rights of the European Union (incidentally stated in the same chapter as the right to protection of personal data). This right is consequently considered a fundamental right at European level as well.

The performance of the activity of broker in data (“data brokerage”) is in itself not subject to restrictions. There is thus no reason whatsoever to assume that data brokerage as such would not be a legitimate purpose of the processing of personal data.

Data brokerage was always one of the purposes stated in the form for reporting the data processing arising from art. 17 of the Law of 8 December 1992 for the protection of privacy and is again included as purpose in the recommendation of the Belgian regulatory Authority with regard to the register of the processing activities.

To be perfectly clear, we want to emphasise here that we only want to demonstrate with the current paragraph the legality of the interest, which does not automatically have as consequence that the legitimate interest can withstand the stipulated assessment test.

It is clear that Bisnode (and all other companies active in this sector) have a legitimate interest in performing this specific processing of personal data.

Furthermore, Bisnode can also appeal to the legitimate interest of third parties (art. 6.1.f GDPR: “... *the legitimate interests of those responsible for processing or of a third party ...*”). The clients of Bisnode, third parties, also have such a legitimate interest with regard to direct marketing. The legitimate interests are sufficiently specific, real and present.

Answers to opponents of commercialisation of personal data

The commercialisation of personal data is often placed in a negative light, as if it is a practice that shows no respect with regards to the individuals.

Please allow us to respond to this.

¹ <https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/about-deloitte/deloitte-uk-european-data-protection-tmt.pdf>

“Money is earned at my expense by selling my personal data”

Bisnode invests in the creation of an exhaustive file by finding data from several sources. These data can then be analysed, cleaned up and improved in order to achieve eventually a file of the highest possible quality. Our profession is thus not about earning money at the expense of the consumer, but rather about making investments in order to be able to offer companies a high quality database.

The quality level is also a guarantee that organisations using Bisnode data avoid targeting deceased people or minors with inappropriate communications.

This service is also to the benefit of the consumer: by correcting incorrect data we make it possible for the client to receive communications from the organisations where he is a client.

By sending targeted advertising, we avoid consumers receiving a surplus of advertising in which they have no interest (e.g. advertising for a lawnmower addressed to persons living in an apartment).

And even when a certain service appears to the consumer to be ‘free of charge’, it is in reality paid by advertising present on the majority of websites. As Marion Debruyne proposes in her article “Make your own privacy calculation: *‘If you don’t pay, you are no longer the client but “the product”...’*²

Commercialisation of personal data does not meet the reasonable expectations of the person involved

The GDPR calls for transparency concerning the use of the data in order to meet the reasonable expectations of the persons. Bisnode deals with this as follows:

- We ask all our data sources to mention explicitly Bisnode as recipient of the data;
- This statement also makes reference to our website, specifically provided for the benefit of the consumer, where we explain in as simple and understandable a way as possible what the data will be used for and how the consumers can exercise their rights concerning the processing of their personal data;
- Furthermore, our clients state that Bisnode is the source of the data, in compliance with the provisions of the GDPR.

In this way, we ensure the greatest possible transparency throughout the entire “chain” and we do not keep any information whatsoever from the consumer.

Nobody reads the privacy statements

This is not correct. The GDPR does, after all, impose the obligation to provide some important information in the privacy statement, in order to protect the consumer from unexpected or abusive use. It is thus in fact by this very privacy statement that transparency is ensured. Every consumer who wants to know how their personal data are used, is assumed to have read through this information.

Consent protects more than legitimate interest

This too is incorrect. Consent offers no solution for all problems. Everybody has by now understood that when an organisation such as Facebook asks users to agree to its new user conditions, it is hardly possible to talk of a genuine “choice”. Anyone who wants to continue to make use of the services has no option but to accept the user conditions. It is of course always possible to move to a competitor who offers these same services. But then to which “competitor”?

² De Tijd, Make your own privacy calculation, 09/05/2018, Marion Debruyne
<https://www.tijd.be/opinie/column/Maak-eens-je-eigen-privacy-calculus/10009997>

The conditions that are imposed so that the consent is deemed valid are less strict than the conditions linked to invoking legitimate interest as a legal ground. In addition to a high transparency towards the consumer, for whom the intended processing of the personal data must meet their “reasonable expectations”, the GDPR also imposes the obligation to perform a so-called “legitimate interest assessment”.

In this assessment, the rights of those involved must be assessed against the interests of the company that processes the personal data. This way of working involves an important analysis of the pros and cons connected to the relevant processing for each of the parties. Such an analysis is not stipulated in the event of consent.

The commercialisation of personal data is intrusive. Segmentation (based on marketing profiles) can cause the consumer damage.

Again we must contradict this. The data are commercialised for marketing purposes, in other words for advertising. A particular person can indeed receive a different offer than someone else, but when the latter asks the advertiser concerned for the same offer, this will not be refused. The damage suffered by the consumer for this - if, indeed, there is any damage - is thus by any means minimal.

Furthermore, the segmentation for marketing purposes never takes place using sensitive personal details and it should also be stressed that companies such as Bisnode have no information concerning the income of people.

Finally, we want to point out that personal details have been commercialised for many years and are used by a broad range of organisations, both in a b2c (for communication to consumers) and a b2b (for communication to businesses) context.

Until now, no appreciable “incidents” have arisen whereby respect for personal privacy has been breached by these business activities. Ultimately it is the emergence of the digital world and more specifically the growing impact of the ‘GAFAs’ on the processing of personal data which is at the root of the need for clear guidelines and regulation. This in order to guard the consumer from losing control of their personal data. It is obvious that the tightening of European and local rules can be justified in this context.

Our conclusion

The commercialisation of personal data is a fully-fledged economic activity. This activity is prescribed legally and has moreover worked for many years with its own deontological code, and the sector’s compliance with this is strictly monitored by the Belgian Association of Marketing, and with specific tools which allow the consumer to express their preference concerning the use of certain communication channels (e.g. the Do NOT Call Me list, Robinson list).

It is our desire to be able to continue to perform our activity based on our legitimate interest in a way that is respectful towards the consumers.

We are prepared to take further measures to increase our transparency towards the consumer if you should deem necessary, but we ask you not to ‘throw out the baby with the bath water’. Do not impose any rules on us which the GDPR itself does not introduce.

We would therefore ask you in your discussions to emphasise the legitimate interest as alternative legal ground, as provided in the GDPR.

We would also ask you to support indirectly our sector but also the advertisers and all local parties who are active within direct marketing (advertising agencies, intermediaries, printers, etc.), since all these parties are undergoing a strong economic impact from this evolution.

As part of the international Bisnode AB Group, we would also point out that in certain other European countries, there is clearer communication about legitimate interest as a legal ground for data commercialisation. We would therefore ask ourselves whether the competitive position of the actors from our sector who are located in Belgium will not be disadvantaged compared to that of companies located in other European member states who adopt a different interpretation.
