

The right to erasure, the right to object and marketing: finding the balance

Under the General Data Protection Regulation (Regulation (EU) 2016/679) ('GDPR'), data subjects are granted a right to erasure and a right to object under Articles 17 and 21 respectively. Dr Carlo Piltz, Attorney-at-Law at Reusch Rechtsanwalts-gesellschaft, discusses the correlation between the two provisions with a particular reference to processing for marketing purposes and whether it should be considered lawful to retain such personal data for blacklisting.

The GDPR establishes a right for data subjects to object to data processing operations, but foresees different requirements for making use of this right and also different consequences (especially for the controller). The 'normal' right to object (Article 21(1) of the GDPR) can only be exercised by a natural person on 'grounds relating to his or her particular situation.' So the data subject, at least to some extent, must prove that the processing affects his/her situation. Furthermore, the data subject has a slightly modified right to object to data processing for direct marketing purposes according to Article 21(2) of the GDPR, without the need to fulfill any additional requirements. In addition, Article 21(3) of the GDPR prohibits the controller from processing the personal data concerned for direct marketing purposes after the objection.

With regard to the second type of the right to object (or the 'marketing objection'), one has to recognise that Article 21(2) of the GDPR explicitly only mentions direct marketing purposes. Other forms of marketing purposes, e.g. internal processing operations to analyse the behaviour of customers or other general purposes, such as processing for the fulfillment of a contract, are not affected by this right to object.

This system of a 'normal' right to object and a specific right to object to direct marketing is also mirrored in Article 17(1) of the GDPR and the obligations of the controller to erase personal data. In the case of processing for purposes other than direct marketing and the corresponding objection by the data subject, the controller must conduct a balancing of interests under Article 17(1) (c) of the GDPR. The personal data must

be erased if there are no overriding legitimate grounds for the processing.

This possibility to balance different interests and perhaps come to the conclusion not to erase personal data, is excluded in the case of processing for direct marketing purposes and an objection according to Article 21(2) of the GDPR. The German data protection authorities also emphasised this difference in Article 17(1)(c) of the GDPR in a short paper on the right to erasure¹.

The problem in practice arises with regard to the question of the lawfulness of retaining personal data (and not erasing it) in order to create a blacklist with the contact details of persons who objected to the processing for direct marketing purposes. The GDPR does not explicitly refer to this problem in Articles 17 or 21 of the GDPR. One could, adopting a strict interpretation, be of the opinion that Article 17(1)(c) of the GDPR obliges the controller to erase data, with no possibility of weighing the interests or saving the data only for the purpose of creating a blacklist.

In my opinion, the creation of a blacklist with contact details of persons who objected to direct marketing is permissible. Firstly, one could refer to Article 17(3)(b) of the GDPR, where an exception to the obligation to erase data is established in the case of a legal obligation which requires the controller to process the personal data. Since the controller, in the case of a marketing objection according to Article 21(2) of the GDPR, is legally obliged to ensure that personal data shall not be processed for such purposes (Article 21(3) of the GDPR), one could argue that the fulfillment of this obligation is only possible if the

controller retains the data in a specific blacklist. Another argument in favour of the lawfulness of such a blacklist is the fact that the storage of personal data (like contact details) of concerned persons in a blacklist is not done for direct marketing purposes as they are mentioned in Article 21(2) and (3) of the GDPR. This creation of the blacklist is, to the contrary, necessary to fulfil legal obligations and to prevent any future processing for direct marketing purposes. Such processing is lawful on the basis of Article 6(1)(f) of the GDPR, because there exist legitimate interests of the controller and no overriding interests of the data subject. Rather, the interests of the data subject are respected.

In the past and under the still valid German data protection legislation, the German data protection authorities clarified that the creation of such a blacklist and the processing of personal data for this purpose is lawful on the basis of the weighing of interests (like the future Article 6(1)(f) of the GDPR)². The German Federal Court of Justice ('BGH') also held, in a judgement issued on 14 March 2017, that even where the data subject has objected to any further processing of personal data for marketing via email, the controller may still be allowed to transfer the personal data to third parties in order to provide them with the possibility to erase the personal data of the person concerned. This transfer is also lawful based on the weighing of interests and the BGH decided that there exists a legitimate interest of the controller to pass that data to third parties for the purpose of erasing the data saved by the third parties.