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## MEMORANDUM OF LAW

### on Market Republic's compliance with the EU General Data Protection Regulation and ePrivacy Directive when providing its services related to business-to-business direct marketing

Market Republic has retained us to produce a legal opinion on the level of Market Republic's compliance with EU General Data Protection Regulation 2016/679 ("**GDPR**") and ePrivacy Directive 2002/58/EC when providing its services related to business-to-business ("**B2B**") direct marketing which include processing of personal data.

#### I BACKGROUND

1. Market Republic is a Serbia-based company which provides services related to B2B direct marketing to its clients from all over the world ("**Client/Clients**"). By using publicly available information (e.g. data available on LinkedIn, Facebook, etc.), Market Republic is searching for companies that might be potential buyers of products and services that Market Republic's Clients offer ("**Company/Companies**"). (Sometimes the Client already has the information about the Company they consider a good prospective customer.)
2. In the next step Market Republic identifies the responsible person which decides about the purchase within the Company ("**Responsible Person**"). Market Republic provides the following data about the Responsible Person to the Client: (i) name and surname; (ii) business e-mail address; (iii) office address; and (iv) work position of the Responsible Person (jointly, "**Data**").

3. The data under (i), (iii), and (iv) are usually publicly available – on the Company website, LinkedIn, Facebook, etc.
4. In relation to business e-mail address Market Republic uses its own software that creates around 45 different potential e-mail addresses of the Responsible Person based on different permutations of the Responsible Person's name and surname and initials. Market Republic identifies and verifies one e-mail address as the right one.
5. Usually, the scope of Market Republic's service includes providing the Data to the Client. The Client would further reach out to the Responsible Person within the Company with a B2B direct marketing e-mail.
6. However, there are situations when Market Republic is providing an additional layer of service by contacting the Responsible Person within the Company on behalf of the Client. Specifically, when Market Republic is sending a B2B direct marketing e-mail to the Responsible Person, the Client is signed as the sender of the email (not Market Republic) and if the Responsible Person sent a reply to the email, the Client (not Market Republic) would receive the response.
7. As communicated by Market Republic representatives to BDK Advokati at a meeting held on 9 May 2018, in an overwhelming majority of cases Market Republic collects and further processes personal data about Responsible Persons located in the European Union, primarily United Kingdom and Germany. The purpose is to have the Clients (or Market Republic itself, on behalf of the Clients) contact the Responsible Persons.
8. The GDPR applies to the above activities of Market Republic if the Client will offer its goods or services to Responsible Persons in the Companies located in the EU (GDPR, Art. 3.2(a)). We understand that that is the case, so GDPR does apply. For applicability of GDPR in that situation, it is not relevant where the Client is located – in the Union, or elsewhere.
9. To the extent Market Republic now or in the future collects and further processes personal data about Responsible Persons located *outside* the European Union, GDPR might nevertheless apply if Market Republic acts upon a request of (that is, acts as a data processor for) a Client located in the European Union, in the context of the Client's activities in the Union (GDPR, Art. 3.1).

## II EXECUTIVE SUMMARY

10. The ePrivacy Directive, and not the GDPR, is the most relevant legal instrument at the EU level for assessment of whether a particular mode of carrying out direct marketing is lawful or not.
11. Market Republic may collect the Data about the Responsible Persons without such Persons' prior consent. However, the Client should subsequently notify the Responsible Persons about the collection of their Data and about their right to object to the processing.
12. There has been no uniform approach within the EU to the issue of whether sending marketing emails to corporate email addresses which are assigned to natural persons (the Responsible Persons)

requires the recipient's prior consent. In a majority of EU Member States, the Client would have to obtain the Responsible Persons' prior consent for the use of data for direct marketing purposes. In other major Member States, prior consent of the recipient is not required.

13. Market Republic's Clients should consult the laws regulating direct marketing of the Member State where the target Companies are located, in order to determine whether obtaining prior consent of the recipient is a condition for lawful use of electronic mail to send an unsolicited communication for the purpose of direct marketing.

### III OBLIGATIONS CONCERNING COLLECTION OF THE DATA

14. Market Republic collects the Data before the Client itself, or Market Republic on behalf of the Client, sends a direct marketing e-mail to the Responsible Person. There is no obligation on the part of the Client (as the data controller) to *obtain* from the Responsible Persons (as the data subjects) their *consent* for the initial collection of the Data. However, the Client should subsequently *notify* the Responsible Persons (as the data subjects) about the collection of their Data and about the right to object to the processing.
15. When providing its service to the Client, Market Republic is acting in the capacity of data processor for the Client who is the data controller. Market Republic is the data processor since it "processes personal data on behalf of the controller" (GDPR, Art. 4, point 8), while the Client is the controller because it "determines the purposes and means of the processing of personal data" (GDPR, Art. 4, point 7).
16. Article 29 Working Party, a body made up of representatives from the data protection authorities of all EU Member States., in its *Opinion 1/2010 on the concepts of "controller" and "processor"* explicitly qualified a company outsourcing marketing campaigns to third parties as the controller of the processing of the personal data relating to the recipients of such marketing communications, taking into account that the third parties in question (Market Republic, in the case at hand) were given specific instructions.
17. There is no obligation on the part of the Clients, as the data controllers, to obtain data subject's consent for the initial collection of the Data by Market Republic. This follows from the various pronouncements of Article 29 Working Party on the issues concerning unsolicited communications for marketing purposes.
18. The Working Party explained on multiple occasions that collection of email addresses would be unlawful if such addresses were picked up from *non-business related* websites, such as news groups in which the person (data subject) participates. (Article 29 Working Party, *Recommendation 2/2001 on certain minimum requirements for collecting personal data on-line in the European Union* (17 May 2001), para. 28; also, *Opinion 1/2000 on certain data protection aspects of electronic commerce*, 3 February 2000, pp. 4-5). The defining feature of such websites is that "persons publish their email address for a specific purpose, e.g. to participate in a newsgroup, this purpose being quite different to that of commercial e-mailing" (Article 29 Working Party, *Working Document:*

*Privacy on the Internet - An integrated EU Approach to On-line Data Protection* (21 November 2000), p. 77).

19. It would follow, *a contrario*, that if the data subject made his email address public for reasons *related to business*, it is permissible to collect the data about that email address.
20. Article 29 Working Party is aware that some persons "are interested in receiving commercial communications by e-mail on specific topics and willing to give their consent for that purpose" (*Opinion 7/2000 On the European Commission Proposal for a Directive of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector* (2 Nov 2000), p. 10). In relation to such users, as Article 29 Working Party notes, "the Internet offers ample opportunities to collect [their] e-mail addresses" (*ibid.*, p. 10).
21. The collection of data for direct marketing purposes is arguably based on the data controller's legitimate interest, in line with the last sentence in Recital 47 of the GDPR.
22. The Client, as the data controller, has an obligation under GDPR (Art. 14) to notify the Responsible Persons (the data subjects) about the initial collection of the Data from third sources and about their right to object to such collection. The notice should inform the data subjects about a number of relevant aspects of the processing, as prescribed in Art. 14, paragraphs 1 and 2, of the GDPR (*Information to be provided where personal data have not been obtained from the data subject*).
23. Under the GDPR, if the personal data are to be used for communication with the data subject (which is the case here), the data controller must provide the required information "at the latest at the time of the first communication to that data subject" (Art. 14, para. 3). For practical reasons, then, it seems convenient that the Client provides the necessary notice to the Responsible Persons on the same occasion at which the Client asks the Responsible Persons for their consent to receiving an email for direct marketing purposes (see paras. 30 and 33, below), or on the occasion at which the Client sends an email for direct marketing purposes without *seeking* the recipient's prior consent (in those jurisdictions in which the law does not require prior consent – see para. 33, below).

## **IV B2B DIRECT MARKETING**

### **IV.1 Notification about direct marketing**

24. There is an obligation on the part of the Client (as the data controller) to inform the Responsible Persons (as the data subjects) about the processing of the Data for the purpose of B2B direct marketing and about the right to object at any time to processing for direct marketing purposes.

### **IV.2 Prior consent for direct marketing**

25. In a majority of the EU Member States the Client (as the data controller) should obtain data subject's (i.e. Responsible Person's) prior consent for direct marketing. In some countries, however, that is not the case.

26. There has been no uniform approach within the EU to the issue of whether sending unsolicited marketing emails requires the recipient's prior consent. GDPR in recital 47 states that "the processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest", but the full scope of this rule, and its practical ramifications, are not clear from the short wording.
27. In the absence of a clear guidance on the meaning of the cursory reference to direct marketing in the GDPR, the ePrivacy Directive remains the most relevant legal instrument at the EU level for assessment of whether a particular mode of carrying out direct marketing is lawful, or not. The Directive contains an elaborate provision (Art. 13) on direct marketing, but the Member States have implemented the provision in somewhat different ways.
28. Art. 13 (Unsolicited communications) of the ePrivacy Directive is worded, in the relevant part, as follows:
- 1. The use of automated calling and communication systems without human intervention (automatic calling machines), facsimile machines (fax) or electronic mail for the purposes of direct marketing may be allowed only in respect of subscribers or users who have given their prior consent.*
- ...
- 5. Paragraphs 1 and 3 shall apply to subscribers who are natural persons. Member States shall also ensure, in the framework of Community law and applicable national legislation, that the legitimate interests of subscribers other than natural persons with regard to unsolicited communications are sufficiently protected.*
29. An unsolicited marketing e-mail is usually sent to Responsible Person (i.e. to his/her business e-mail address such as [name.surname@companyname.com](mailto:name.surname@companyname.com)) within the Company.
30. It would appear from the wording of Art. 13, para. 1, of the ePrivacy Directive that prior consent of the Responsible Person to receiving marketing emails is required, because the Responsible Person is a natural person and the use of his corporate email address for marketing emails amounts to processing of personal data (corporate e-mail address containing name and surname of a natural person is uniformly considered in the EU as personal data about that person). (On the other hand, if Market Republic's Client sent the e-mail to a general business address (e.g. [info@companyname.com](mailto:info@companyname.com) or [office@companyname.com](mailto:office@companyname.com)), prior consent would not be required since general business address is not personal data and there would be no personal data processing involved.)
31. However, in spite of the seeming simplicity and clarity of the rules contained in Art. 13 (paragraphs 1 and 5) of the ePrivacy Directive, different countries apply it differently. Some countries do not consider the sending (to individual's corporate email address) of marketing emails which relate solely to the recipient's commercial or official activity as falling within the concept of "the use of ... electronic mail for the purposes of direct marketing", from Art. 13, para. 1, of the ePrivacy Directive. As a result, the prior consent requirement from Art. 13, para. 1, does not apply in such countries to the sending of the business-related emails.

32. Detailed examination of national laws falls outside the scope of our work, so we may only refer to third-party sources which have made a comparative analysis of the direct marketing rules in various EU Member States. Market Republic's Clients should consult the laws regulating direct marketing of the Member State where the target Company is located.
33. According to third-party sources,
  - a. the United Kingdom does not require prior consent when a direct marketing e-mail is sent to a specific person within the company, to his/her corporate email address. In that case, the processing of the data is based on the sender's legitimate interest.
  - b. In France, Finland, Ireland, and Sweden, prior consent is also not required if the email is sent to corporate email address belonging to a particular individual, with the proviso that the content of the email must relate solely to the type of commercial activity of the recipient (otherwise prior consent would be required).
  - c. In countries such as Germany, Austria, Spain, and Italy prior consent for direct marketing is required when an e-mail is sent to a natural person within the company. In Germany, Spain, and Italy consent is required even if a direct marketing e-mail is sent to a generic business address (e.g. [info@companyname.com](mailto:info@companyname.com)), while in Austria in that situation consent is not necessary.
34. In January 2017 the European Commission published a draft ePrivacy Regulation which will replace the ePrivacy Directive. The text of the Regulation is still negotiated. The Regulation will probably be adopted in the course of 2019 and will be directly applicable in all Member States, like the GDPR and unlike the ePrivacy Directive.