



FEDERATION OF EUROPEAN DIRECT AND INTERACTIVE MARKETING

PUBLIC AFFAIRS & SELF-REGULATION

12 February, 2013

FEDMA Draft Amendments General Data Protection Regulation

1. Lawfulness of processing

Article 6 – paragraph 1 – point f	
<i>Text proposed by the Commission</i>	<i>Amendment</i>
<p>1. Processing of personal data shall be lawful only if and to the extent that at least one of the following applies:</p> <p>(f) processing is necessary for the purposes of the legitimate interests pursued by a controller, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child. This shall not apply to processing carried out by public authorities in the performance of their tasks.</p>	<p>1. Processing of personal data shall be lawful only if and to the extent that at least one of the following applies:</p> <p>(f) processing is necessary for the purposes of the legitimate interests pursued by a controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child. This shall not apply to processing carried out by public authorities in the performance of their tasks.</p>

Justification

This amendment, taken from the text of the Directive 95/46/EC, recognises the legitimate interest of third parties to process data, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject. This legitimate interest is balanced with the right to object which is reinforced in Article 19 of this Regulation.

The principle of transparency is key to the processing of personal data. The obligation to inform the data subject of this processing is an intertwined part of this principle. It is important to set up clear grounds for the processing of personal data. As defined in the 95/46 Directive, consent is one of the criteria for making data processing legitimate. Data processing is also allowed when it is necessary for the purposes of the legitimate interests pursued by the controller. This is a legitimate ground for data processing, provided that the data subject is well informed. Making consent obligatory for all data processing and profiling would be a disproportionate burden for organisations. Furthermore it will not benefit the consumer, because it will reduce the competitiveness of the Internal Market. If new organisations



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cannot get in contact with their potential clients, this will strengthen the hegemony of the existing large market players.

Article 6 – paragraph 4	
<i>Text proposed by the Commission</i>	<i>Amendment</i>
4. Where the purpose of further processing is not compatible with the one for which the personal data have been collected, the processing must have a legal basis at least in one of the grounds referred to in points (a) to (e) of paragraph 1. This shall in particular apply to any change of terms and general conditions of a contract.	4. Where the purpose of further processing is not compatible with the one for which the personal data have been collected, the processing must have a legal basis at least in one of the grounds referred to in paragraph 1 . This shall in particular apply to any change of terms and general conditions of a contract.

Justification

It is crucial that the Regulation recognises the controller’s legitimate interest as a legal ground for processing data when the purposes for data processing are incompatible with the one for which the personal data have been collected, except where the controller’s interests are overridden by the interests or fundamental rights and freedoms of the data subject. In the case of a change in the purpose of processing, such change will be accompanied by proper information to the data subject on this change of purposes in the processing of data relating to him or her, and a reaffirmation of the rights to object to such processing, as specified in Articles 14, 15 and 19.

2. Definition of data subject

Article 4 – paragraph 1	
<i>Text proposed by the Commission</i>	<i>Amendment</i>
(1) 'data subject' means an identified natural person or a natural person who can be identified, directly or indirectly, by means reasonably likely to be used by the controller or by any other natural or legal person , in particular by reference to an identification number, location data, online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that person;	(1) 'data subject' means an identified natural person or natural person who can be identified, directly or indirectly, by means reasonably likely to be used by the controller, in particular by reference to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that person; if identification requires a disproportionate amount of time, effort or material resources the natural living person shall not be considered identifiable

Justification

Leaving “or by any other natural or legal person” in the text creates a situation where the controller could never be sure whether the processed data are personal or not. Furthermore, to prevent legal



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uncertainty the definition of personal data should recognize that not all data are personal as such, but that this is determined by the context in which they are processed. Finally it is important that the definition of a data subject only relates to an identifiable person, in order to ensure the possibility for the controller to provide the data subject with the rights he or she is entitled to receive according to the Regulation.

3. Measures based on profiling

A definition of profiling, in this Regulation, should be very general and not reflect the activity of profiling for crime prevention/pursuing criminals which has a completely different scope and purpose. In a direct marketing context, profiling allows the marketer to assess the potential interest of a group/segment of consumers in a particular product or service, based on a series of characteristics which apply to that segment. While some safeguards should be in place, the benefits and value generated by profiling for marketing purposes for both the controller and data subjects should be taken into account when determining any restrictions. FEDMA believes that a definition of profiling to be included in the General Data Protection Regulation should reflect the reality of business.

Article 20 – paragraph 1	
<i>Text proposed by the Commission</i>	<i>Amendment</i>
<p>Measures based on profiling</p> <p>1. Every natural person shall have the right not to be subject to a measure which produces legal effects concerning this natural person or significantly affects this natural person, and which is based solely on automated processing intended to evaluate certain personal aspects relating to this natural person or to analyse or predict in particular the natural person's performance at work, economic situation, location, health, personal preferences, reliability or behaviour.</p>	<p>Measures based on automated decisions</p> <p>1. Every Data subject shall have the right not to be subject to a measure which produces negative adverse legal effects concerning this data subject or significantly affect this natural person, and which is based solely on automated processing intended to evaluate certain personal aspects relating to this data subject or to analyse or predict in particular the data subject's performance at work, economic situation, location, health, personal preferences, reliability or behaviour.</p>

Justification

Adequate safeguards should be in place against decisions taken solely by automated means that produce negative legal effects or significantly affect a data subject. This applies without exception to decisions taken solely by automated means made on the basis of a profile. However, FEDMA also understands the benefits and value of profiling for marketing purposes for both the controller and the data subject. On this point, it is not obvious whether profiling carried out for direct marketing purposes, falls within the scope of this Article. The amendment provides clarity and a clear distinction between normal/ expected profiling, and profiling with negative legal effects.



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Article 20 – paragraph 2 – point d (new)	
<i>Text proposed by the Commission</i>	<i>Amendment</i>
2. Subject to the other provisions of this Regulation, a person may be subjected to a measure of the kind referred to in paragraph 1 only if the processing:	2. Subject to other provisions of this Regulation, a data subject may be subjected to a measure of the kind referred in paragraph 1 only if the processing: <i>(d) new: 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 which require</i>

Justification

Legitimate profiling is not a harmful activity, but a method used by organisations in every industry sector, including the commercial and not for profit sectors, in pursuit of a legitimate business interest. Commercial, industrial and charitable organisations identify target audiences to make sure they communicate with data subjects that are likely to be interested in their products or services. This helps prevent environmental waste (paper) and consumer irritation.

Furthermore, this Article focuses on the general scope of profiling, excluding the activity of profiling for crime prevention/pursuing criminals which has a completely different scope and purpose. In a direct marketing context, profiling allows the marketer to assess the potential interest of a group/segment of consumers in a particular product/service, based on a series of characteristics which apply to that segment. While some safeguards should be in place, the benefits and value generated by profiling for marketing purposes for both the controller and data subjects should be taken into account when determining any restrictions.

Recital 21 – new	
<i>Text proposed by the Commission</i>	<i>Amendment</i>
	<i>(21) new: Considering that profiling for marketing purposes only aims at determining a category of individual rather than identifying one individual, and serving offers only to the interested category of individual, profiling may be in the legitimate interests of both the person who uses it and the person to whom it is applied, such as by leading to better market segmentation, permitting an analysis of risks and fraud, or adapting offers to meet demand by the provision of better services; and considering</i>



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	<i>that profiling may thus provide benefits for users, the economy and society at large,</i>
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Justification

It is important to also highlight the benefits and value of profiling for marketing purposes for both the controller and the data subject, as well as provide a clear explanation as to the purposes of profiling which only determines general categories of individuals, for example interested in cooking, as opposed to identifying one individual.

4. Right to object and Right to be forgotten and to erasure

Article 19 – paragraph 3	
<i>Text proposed by the Commission</i>	<i>Amendment</i>
3. Where an objection is upheld pursuant to paragraphs 1 and 2, the controller shall no longer use or otherwise process the personal data concerned.	3. <i>Where an objection is upheld pursuant to paragraphs 1 and 2, the controller shall no longer use or otherwise process the personal data concerned for that specific purpose.</i>

Justification

It is important to clarify the obligation of the controller pursuant to the data subject’s right to object to have his or her personal data processed. It is also important the controller knows in detail the scope of the right to object and his obligation.

Article 17 – paragraph 3 – point d (new)	
<i>Text proposed by the Commission</i>	<i>Amendment</i>
3.The controller shall carry out the erasure without delay, except to the extent that the retention of the personal data is necessary:	3. The controller shall carry out the erasure without delay, except to the extent that the retention of the personal data is necessary: <i>(d)(new) to respect the data subject’s right to object to the processing of his data for commercial communications</i>

Justification

With these two amendments, FEDMA would like to highlight the obligations of the direct marketing industry to continue to store personal data in suppression files when a data subject has objected to receive commercial communication or objected to the processing of his or her data for this purpose so that the industry can respect the right to object..



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In the specific context of direct marketing, right to object obliging the data controller to erase the personal data (as suggested in the draft report of the LIBE Committee Jan 2013) would deprive the data subject from his or her legitimate and absolute right to object to the receiving of further commercial communications. In direct marketing, the controller needs to store personal data in a suppression file to ensure that it respects the right of the data subject not to be contacted again. The purpose of the suppression files is to ensure that the controller does not send in the future any further commercial communications to the data subject who objected to receive it or to the processing of his/her data. Following an objection to the processing of personal data or a request for a data subject’s right to be forgotten, the controller should erase the personal data from the active direct marketing data base, but should be allowed to store the data on a separate suppression file. It is important that this business reality which is for the benefit of the data subject is reflected in Articles 17 and 19 of the proposed Regulation.

5. Procedures and mechanisms for exercising the rights of the data subject

Article 12 – paragraph 1	
<i>Text proposed by the Commission</i>	<i>Amendment</i>
1. The controller shall establish procedures for providing the information referred to in Article 14 and for the exercise of the rights of data subjects referred to in Article 13 and Articles 15 to 19. The controller shall provide in particular mechanisms for facilitating the request for the actions referred to in Article 13 and Articles 15 to 19. Where personal data are processed by automated means, the controller shall also provide means for requests to be made electronically.	1. The controller shall establish procedures for providing the information referred to in Article 14 and for the exercise of the rights of data subjects referred to in Article 13 and Articles 15 to 19. <i>The data subject can exercise his right to access and rectification at reasonable intervals.</i> The controller shall provide in particular mechanisms for facilitating the request for the actions referred to in Article 13 and Articles 15 to 19. Where personal data are processed by automated means, the controller shall also provide means for requests to be made electronically.

Justification

The data subjects’ right of access is fundamental so that the data subject can obtain a copy of the personal data held by a data controller at any time.. But FEDMA fears that misuse or abuse of this right would create a unfair situation for the controller which is required to react and to do so in a limited period of time. FEDMA therefore would like to ensure that a data controller does not have to respond to frequent requests from the same data subject where there has been no change in the personal data being processed. In this way the principle of equity or natural justice for data controllers would be respected.

Article 12 – paragraph 2	
<i>Text proposed by the Commission</i>	<i>Amendment</i>
2. The controller shall inform the data subject	2. The controller shall inform the data subject



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<p>without delay and, at the latest within one month of receipt of the request, whether or not any action has been taken pursuant to Article 13 and Articles 15 to 19 and shall provide the requested information. This period may be prolonged for a further month, if several data subjects exercise their rights and their cooperation is necessary to a reasonable extent to prevent an unnecessary and disproportionate effort on the part of the controller. The information shall be given in writing . Where the data subject makes the request in electronic form, the information shall be provided in electronic form, unless otherwise requested by the data subject.</p>	<p>without delay and, at the latest within one month of receipt of the request, whether or not any action has been taken pursuant to Article 13 and Articles 15 to 19 and shall provide the requested information. This period may be prolonged for a further month, if several data subjects exercise their rights and their cooperation is necessary to a reasonable extent to prevent an unnecessary and disproportionate effort on the part of the controller. The information shall be given in writing or in electronic form if the data subject agrees. Where the data subject makes the request in electronic form, the information shall be provided in electronic form, unless otherwise requested by the data subject.</p>
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Justification

Responding to a request using an electronic format, if the data subject agrees to it, regardless of the format in which the request was originally made allows for a faster exchange of information with the data subject, less cost for the data controller and less environmental (paper) waste.

<p>Article 12 – paragraph 4</p>	
<p><i>Text proposed by the Commission</i></p>	<p><i>Amendment</i></p>
<p>4. The information and the actions taken on requests referred to in paragraph 1 shall be free of charge. Where requests are manifestly excessive, in particular because of their repetitive character, the controller may charge a fee for providing the information or taking the action requested, or the controller may not take the action requested. In that case, the controller shall bear the burden of proving the manifestly excessive character of the request.</p>	<p>4. The information and the actions taken on requests referred to in paragraph 1 shall be provided without excessive costs. Where requests are manifestly excessive, in particular because of their repetitive character, the controller may charge a fee for providing the information or taking the action requested, or the controller may not take the action requested. In that case, the controller shall bear the burden of proving the manifestly excessive character of the request.</p>

Justification

The data subjects' right of access is fundamental so that the data subject can obtain a copy of the personal information held by a controller at any time. But FEDMA fears that misuse or abuse of this right would create a unfair situation for the controller which is required to react and to do so in a limited period of time. FEDMA therefore would like to ensure that controllers do not have to respond to such a request where the costs of providing a copy of the personal data are excessive. In this way the principle of equity or natural justice for data controllers would be respected.



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6. Information to the data subject

Article 14 – paragraph 1 – point b	
<i>Text proposed by the Commission</i>	<i>Amendment</i>
1. Where personal data relating to a data subject are collected, the controller shall provide the data subject with at least the following information: (b) the purposes of the processing for which the personal data are intended, including the contract terms and general conditions where the processing is based on point (b) of Article 6(1) and the legitimate interests pursued by the controller where the processing is based on point (f) of Article 6(1);	1. Where personal data relating to a data subject are collected, the controller shall provide the data subject with at least the following information: (b) the purposes of the processing for which the personal data are intended, including the contract terms and general conditions where the processing is based on point (b) of Article 6(1)

Justification

It is necessary to consider space limitation in the offline world, when information is provided on paper (printed media), or in the online world, for space limited media (i.e. SMS). For these reasons, FEDMA considers that the information given to the data subject should only cover the purpose of the processing, and refer to other sources of information, such as a website, for more specific details, or be provided on request by the data subject.

Article 14 – paragraph 1 – point c	
<i>Text proposed by the Commission</i>	<i>Amendment</i>
(c) the period for which the personal data will be stored;	(c) the period for which the personal data will be stored or the way this period will be determined by the controller;

Justification

It is necessary to consider space limitation in the offline world, when information is provided on paper (printed media), or in the online world, for space limited media (i.e. SMS). For these reasons, FEDMA considers that the information given to the data subject should only cover the purpose of the processing, and refer to other sources of information, such as a website, for more specific details, or be provided on request by the data subject.

Article 14 – paragraph 1 – point f	
<i>Text proposed by the Commission</i>	<i>Amendment</i>
(f) the recipient or categories of recipients of the personal data;	(f) the recipient or categories of recipients of the personal data;

Justification

FEDMA would like to highlight the importance of keeping the European Commission's proposal as originally drafted and, opposes the amendment suggested by the LIBE Committee in its draft report (Jan



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2013) to only refer to “recipients”. Indeed, informing the data subjects of the categories of recipients allows for a better flexibility while not preventing the data subject’s right to access such information on request as detailed in Article 15.

Article 14 – paragraph 3	
<i>Text proposed by the Commission</i>	<i>Amendment</i>
3. Where the personal data are not collected from the data subject, the controller shall inform the data subject, in addition to the information referred to in paragraph 1, from which source the personal data originate.	3. <i>Where the personal data are not collected from the data subject, the controller shall inform the data subject, in addition to the information referred to in paragraph 1, from which source or which category of sources the personal data originate.</i>

Justification

It is necessary to consider space limitation in the offline world, when information is provided on paper (printed media), or in the online world, for space limited media (i.e. SMS). For these reasons, FEDMA considers that the information given to the data subject should only cover the purpose of the processing, and refer to other sources of information, such as a website, for more specific details, or be provided on request by the data subject.