



FEDERATION OF EUROPEAN DIRECT AND INTERACTIVE MARKETING

PUBLIC AFFAIRS & SELF-REGULATION

02 September 2011

To:

Ms. Marie-Helene Boulanger, Head of Unit
Mr. Jose Manuel De Frutos Gomez, Policy Officer
European Commission
DG Justice - Directorate C - Unit C3

Dear Ms. Boulanger,
Dear Mr. De Frutos Gomez,

Within the context of the drafting of the legislative proposal for the review of the Directive 95/46/EC on Data Protection, FEDMA would like to inform the European Commission of some of our concerns, especially regarding the criteria for making data processing legitimate.

In order for European businesses to carry out and further develop their activities, it is important that the balance between the protection of personal data and economic interests is maintained. Article 7 of the 95/46 Directive states clear grounds for the processing of personal data. Amongst them, data processing is allowed when necessary for the purposes of the legitimate interests pursued by the controller or parties to whom the data are disclosed, except when such interests are overridden by the interests for fundamental rights and freedoms of the data subject which requires protection

The balance between protecting the personal data of data subjects and guaranteeing an internal European market is found in the legitimate interest of the data controller as a ground for processing of personal data. If the organisation is relying on this ground for the processing of personal data, then it must ensure that the rights and interests of the data subject now under Directive 95/46 are respected. If the processing of personal data were only to be allowed with the unambiguous consent of the data subject this would lead to hamper every company that processes data of customers, potential customers or (potential) donors to a charity, and this is bigger than the marketing industry, while imposing a burden on the data subject who would be responsible for giving away his consent. The existing data protection principles state that data controller may not collect more data than is necessary, and provide individuals with clear information when collecting personal data. In the case of unsolicited direct marketing communications, data subjects have the right to opt-out, which is a unique strong right that organisations have to respect at all times. This opt-out right currently allows new market players access to potential clients, which favour competition and challenge large market players dominant position, while respecting data 'subject choice.

Moreover, if unambiguous consent would be the only condition to process personal data for marketing purposes by companies and charities, this would lead to a complex situation where normal, necessary and accepted or expected data processing operations, by the data subject, would be hampered. Since this principle of the legitimate interest was introduced in 1995 in the directive 95/46, the world has evolved a lot, but the principle that companies and charities inform and communicate with customers and potential customers, till they opt-out remains. In the meantime the use of certain channels, such as e-mail has been made dependent on consent. But one should not confuse consent for the use of a channel (i.e. sending a marketing communication by email) and consent for the processing of data in general for marketing or charitable purposes

The principles for legitimate processing are useful and applicable, regardless of the techniques or medium used. Till this day, the principles are used to stop non-legitimate/unfair data processing operations and non-compatible use. The processing of data on the basis of the legitimate interest of the



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controller or a third party to whom data are disclosed, takes into account the principles of subsidiary and proportionality, for the decision whether processing can be done on the legitimate interest. Thus, FEDMA considers that there is a need for keeping the existing multiple criteria for making data processing, for marketing purpose, legitimate, including the legitimate interest of the data controller.

Please do not hesitate to contact me in case you have any further questions or concerns.

Yours sincerely,

Dieter Weng
Chairman of FEDMA