



## REVIEW OF THE DATA PROTECTION DIRECTIVE: EXPLICIT CONSENT FOR DIRECT MARKETING

The industry signatories are greatly concerned by the provision existing in the circulated draft for a Regulation on Data Protection explicitly relating to Direct Marketing. While listing the legitimate grounds for personal data processing, the draft foresees a specific requirement for direct marketing users, making data processing only lawful if the data subject has given his or her consent<sup>1</sup>. This requirement would have tremendous impact for both data controller and data subject and does not respect the balance of interest between those two.

Thus we urge the Commission to consider the deletion of this specific requirement for direct marketing, and retain the current provisions: *if processing is necessary for the purposes of the legitimate interest 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 for fundamental rights and freedoms of the data subject which require protection (...)*<sup>2</sup>

### Online and offline worlds impacted

While generally appearing technological neutral, the draft regulation especially aims at addressing today's concerns regarding online data collection, however, the current proposal would primarily affect also offline communication, for example paper based communication such as addressed mail which is a communication channel based on opt-out. This provision aims to empower data subjects, yet it would drastically reduce the ability of sending direct mail, thus will inevitably result in increasing volumes of untargeted and not relevant mail to data subjects. Moreover, while giving its consent in the online world is almost instantaneous (i.e. ticking a box), a consent in the offline world requires more time, effort and cost. Moreover, one should keep in mind that consent asked for now in the online world is **not** for

<sup>1</sup> Draft proposal for a Regulation on data protection, Version 56 (29/11/2011), article 5 (2).

<sup>2</sup> Directive 95/46/EC, Article 7 (f)

the processing of personal data but is for the use of the e-mail address for the sending of commercial e-mail.

### **SMEs to be more affected**

Such an opt-in requirement would heavily impact the ability of businesses to market their products and services to new customers and this would have direct consequences on the functioning of the internal market. Indeed, it would also constitute serious entry barriers for new market players, thus affecting primarily SMEs, and hampering competition. Together with SMEs, local businesses would strongly be affected as an (explicit) consent requirement would prevent them from communicating with potential customer from the same area.

### **The data subject to anticipate his/her interests?**

The envisaged opt-in requirement would lead to a change in the economic system, reversing the principle of offer and demand. Today's offers are targeted to consumer who most likely will be interested, while not contacting uninterested consumer. From a behavioural point of view, an opt-in system would require consumers to show an interest (to opt-in) for communication on a company, a product or a service they haven't been offered/ informed about yet. For press publishers, direct marketing is the only or most important way to reach *new* customers. Up to 20 % of the subscription circulation of certain newspapers and magazines depends on direct marketing by letters sent to third-party addresses, which is permitted by national laws based on Art. 7 (f) and Art. 14 Directive 95/46/EC under the condition of comprehensive information to the addressee and his right to object. A press subscription is a product that must be explained and which has no retail outlet. Newspapers and magazines therefore inevitably depend on personal contacts with potential readers, including by direct marketing addressed to these potential readers by post.

### **'Opt-in' or 'transparency and opt-out'**

One should keep in mind the importance of consumer's choice and information. What would inform the data subject better, an opt-in or informing the consumer for what purposes data are processed (transparency) and offering the data subject an easy opt-out. So the data subject can take an informed decision and opt-out.

### **Self-regulation for Direct Marketing**

In the sensitive field of privacy, The Direct Marketing industry has developed 2 codes of conduct<sup>3</sup> for the processing of personal data for direct marketing purposes. These 2 codes, adopted by the Article 29 Working Party are based on the opt-out system, and provide data controller with guidance at European level for the processing of personal data and on the opt-out solution. FEDMA has never received, at least not over the past years, from the European Commission, the Article 29 Working Party neither from any Data Protection Commissioner, any information that the opt-out system is not valid and not in compliance with fundamental right (or current legislation).

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<sup>3</sup> The FEDMA European Code of Practice for the use of personal data in direct marketing, adopted in 2003 by the Article 29 Working Party Opinion 3/2003, and the Electronic Communications Annex adopted in 2010 by the Article 29 Working Party Opinion 4/2010.



FEDERATION OF EUROPEAN DIRECT AND  
INTERACTIVE MARKETING

### **About FEDMA**

The Federation of European Direct Marketing (FEDMA) is the cross media trade organization for the direct and interactive marketing and sales promotion industry. FEDMA represents her national members, the Direct Marketing Associations (DMAs), through which approximately 10.000 European company members, varying from postal operators, publishers, broadcasters, ad networks and charities to email service provider, call centres and online advertising agencies. All of which use personal data to send their customer advertisements based on their interests and to make sure they communicate with people who are likely to want their product or services.



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The European Publishers Council (EPC) is a high level group of Chairmen and CEOs of Europe's leading media groups representing companies with newspapers, magazines, online publishing, journals, databases, books and broadcasting. We have been communicating with Europe's legislators since 1991 on issues that affect freedom of expression, media diversity, democracy and the health and viability of media in the European Union.

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