



FEDERATION OF EUROPEAN DIRECT AND INTERACTIVE MARKETING

Public Seminar - Data Protection on the Internet
(Google-DoubleClick and other Case Studies)

Since commerce began, merchants have been expected to collect data on their customers so as to serve them better. As technical and communication systems have developed we have moved from the village to the 'global village'.

Likewise the consumer/citizen has become accustomed to receiving information and entertainment in exchange for seeing/listening to commercials. The cover price of newspapers and periodicals are much less than the cost of production; most television and all radio broadcasting is free to the consumer in exchange for commercial messages.

The Internet provides vast resources of information, entertainment, education, etc. It would be extremely difficult to imagine any financing model for content which did not rely almost entirely on advertising revenues. Certainly at this point in time no one envisages alternative funding systems of any relevance that differ from the present advertising-fuelled resource, or would expect users to pay significant amounts for Internet content.

That being said, the amounts of advertising investments dedicated to the Internet are in the region of 7,299€ million. Comparing this with other media in Europe, the total amounts of advertising investments in the printed press are 46,320€ million; for television 30,736€ million, for radio 5,157€ million; for outdoor 5,813€ million and for cinema 748€ million.¹ Advertising investments in the Internet should therefore be seen in the context of the total market. About 4 million EU citizens work directly in advertising and marketing, or 1.84% of the total working population. Marketing is the fuel which drives the EU economy!

Direct marketing has developed over the past century in Europe. Originally concentrated on catalogues (mail order), it also includes direct response (coupons in the printed press, a telephone number to call, direct-response television), and e-Commerce. Direct and interactive marketing covers any activity in which the consumer is invited to interact with the marketer. It is also called "dialogue marketing" or "one-to-one marketing". The key element of this form of marketing has always been the database. Sophisticated databases today obviously achieve much greater effectiveness than the old card-index held by merchants years ago, but the objective is the same – to provide the most appropriate message to the consumer at the right time; to remind the consumer of the product (advertise it), and to retain their interest and custom. Its mixture of sales and advertising is highly effective and can be delivered by a wide range of communications – a posted letter, catalogue, email, phone call, text message, or via the Internet...

The marketing "discipline" which results is also, of course, also highly effective for non-commercial purposes – for charities seeking donations; for political parties; for government information systems, etc. In recent elections, political parties have used direct and interactive marketing techniques with great success to ensure their support.

Marketing databases (which also include customer relations management) are extremely expensive to create and maintain. They have an important part of the brand valuation.

¹ [Source for advertising expenditure: *The European Advertising and Media Forecast Vol. 22, October 2007*].



During the 1970's and 80's a number of EU Member States adopted national data protection laws, which led to an EU general directive in 1995 (95/46/EC). This directive covers the collecting and processing of all personal data, whether by governments, business or for any other purposes. It is centred on the independence of national data protection authorities (DPAs), which apply their national laws and regulations. Inevitably, in the transposition of the 1995 Directive, and 2002 e-Communications and Privacy Directive (02/58/EC), different interpretations exist which could, potentially, create barriers to trade. However, the 1995 Directive ensures that the controller of a database has to apply only his/her own national law. Any company from outside the EU which collects/processes data on citizens living in the EU must designate a controller responsible for ensuring the national law of an EU Member State applies to its data. There are also specific rules and guidances for transfers of data outside the EU.

In order to encourage commonality between the data protection regimes in the Member States, the '95 Directive set up a Working Party, organised by the European Commission, consisting of the national data protection authorities (DPAs). This "Art 29 WP" is also invited to negotiate codes of conduct with stakeholders (Art 27 of the Directive) at national and at European level (many DPAs negotiate codes at their national level – particularly with the direct marketing sector). FEDMA therefore asked the Art 29 WP to negotiate a code on data protection and direct marketing, which was adopted at the end of 2003 (following reference to other stakeholders). Codes of conduct, particularly when covering complex legalistic issues, such as data protection, are intended to help guide business by providing the rules in clear, non-legalistic language. It is always a challenge for some industry participants to meet the requirements of codes. In the case of FEDMA's code, it reflects what business is required to do in any case under the law.

In the course of the lengthy examination of the state of data collection when negotiating the code, the Article 29 Committee, Commission and FEDMA all concluded that the principles embodied in the Directive should be applied to the Internet and the emerging technologies, and these are expressed and incorporated in an Annex to our code, which we are presently negotiating with the Article 29 WP. So we are reviewing old territory now: territory and questions we have visited and answered.

Data protection in the EU is based on what has been termed "fair processing practices". In other words it has always been recognized that there is an essential balance of interests between the citizen and the user/collector of his/her personal data (whether that is a business, a government or any other user)².

This balance of interests for business is based on a number of factors; including transparency, the right to opt-out of commercial messages, and the right to access/rectify data. How these are applied depends entirely on the means of communication. For example, privacy policy

² Recital 30 of Directive 95/46/EC:

[...] "in order to maintain a balance between the interests involved while guaranteeing effective competition, Member States may determine the circumstances in which personal data may be used or disclosed to a third party in the context of the legitimate ordinary business activities of companies and other bodies [and] specify the conditions under which personal data may be disclosed to a third party for the purposes of marketing whether carried out commercially or by a charitable organization or by any other association or foundation, of a political nature for example, subject to the provisions allowing a data subject to object to the processing of data regarding him, at no cost and without having to state his reasons"



statements provide a website user with details of how that website will deal with any data collected; in a catalogue, on the other hand, the equivalent information is provided under the terms and conditions at the end of the catalogue, etc. The Commission last year issued a recommendation of Privacy Enhancing Technologies (PETs) to help website operators. The Art 29 WP has also issued non-binding guidelines on various aspects of data protection for direct and interactive marketing and Internet advertising³.

The requirements on transparency on the collection/processing of personal data exist. Are they well known by consumers? This question came up in the recent US FTC Hearing, and in the EU at national level. There is always more that can be done to ensure that consumers know where to find information about their rights and how their data may be used. All the stakeholders need to continue to be active in encouraging greater publicity.

The second “balance” between the citizen and the data collector is the right, at any time, to opt-out free of charge. [Fax and e-Communications media, such as email, require “opt-in” under the 02/58/EC Directive, but even after a consumer has consented, for example to receive an email, the right to opt-out at any time remains].

For traditional direct marketing communications the consumer either replies to the marketer directly and/or registers on a general “do not mail”, “do not call” list (so called Preference or Robinson lists). In the case of the Internet at present the consumer may of course opt out by not using the website whose marketing she/he dislikes. But even more importantly, the consumer can easily restrict the ability of advertisers to present pop-up ads or to set cookies that enable browsing tracking within a Website by use of the privacy tools within any of the commonly used Internet browsers. While this is by no means justification for not doing more, it is also true that it is extraordinarily simple for Internet users to become extremely adept at creating anonymity for themselves through the use of free anonymization tools, intermediary URLs, and third-party websites. In effect, the “power of control of data collection and tracking” is for most advertising and data protection purposes within the control of the consumer

Direct marketers have discovered over many years that consumer trust and confidence is the basis on which the industry depends. For example, we can see this in the concerns expressed by consumers and the press whenever there is a major breach of database security; and direct marketing companies have learnt that their customers not only expect, but also require them to treat the personal data carefully and with great respect. Thus a mutual benefit is created – the customer benefits from fair processing and the balance of interests between giving his/her data and receiving information, targeted marketing, education, etc., and business, by respecting consumers’ personal data, benefits from the trust and confidence of the consumer which results in loyalty to a brand and sale of products, etc.

³ Relevant Documents of the Article 29 Group:

Opinion 4/2007 (WP 136) on the concept of personal data; Opinion 2/2006 (WP 118) on privacy issues related to the provision of email screening services; Opinion 5/2004 (WP 90) on unsolicited communications for marketing purposes under Article 13 of Directive 2002/58/EC (E-Privacy Directive); Working document (2093/05/EN WP 114) on a common interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995 on the transfer of personal data to third countries; Opinion (11987/04/EN WP 100) on More Harmonised Information Provisions; Working Document (10054/03/EN WP 68) regarding on-line authentication systems; Recommendation 2/2001 (WP 43) on certain minimum requirements for collecting personal data on-line in the European Union.



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As the FTC stated in the introduction to their recent staff paper on behavioural advertising “business and consumer groups alike cherish the values of transparency and consumer autonomy, and view them as critical to the development and maintenance of consumer trust in the on-line marketplace”. That paper goes on to list a number of points for action: transparency and consumer control; reasonable security and limited data retention of consumer data; affirmative express consent for material changes to existing privacy promises; affirmative express consent to (or prohibition against) using sensitive data for behavioural advertising; additional information, using tracking data for purposes other than behavioural advertising.

Expressed in different ways, these are all issues which are covered by the 1995 Data Protection Directive, and which exist in Art 29 WP opinions, or in codes negotiated between the national DPAs and business. All the basic tools are there: requirements of notices upon collection of data, consent when it involves sensitive information, security of storage, non-disclosure, right of access, limits on use and thus the period of retention. There is no new territory here, only a faster technology. Given the global aspects of the Internet, we believe strongly that this is no time for everyone to “re-invent the wheel”! The Europeanization of best practices in clear (non-legalistic) language would benefit both consumers (our customers) and business’.

FEDMA

January 2008

About FEDMA

FEDMA, the Federation of European Direct & Interactive Marketing, represents the sector in all its forms. FEDMA’s objective is to protect and promote the European direct and interactive marketing sector by creating, through representation, self-regulation and information, acceptance of and confidence in direct and interactive marketing within a healthy commercial and legislative environment in which the sector can profitably operate and develop. In addition to its direct Corporate, Corporate Associate and Company Members, FEDMA represents nearly 20,000 companies through its national DMA members.