FEDMA

Positions on Data Protection and Privacy issues

- Glossary
Access – Right to

FEDMA agrees with the Commission that it is fundamental that the data subject can use his rights at any time of, especially his right to access (article 12). But we fear that misuse or abuse of this right would create a delicate situation for the controller which is required to react and to do so in a limited period of time. FEDMA therefore would like ensure the principle of equity or natural justice for data controllers.

In today’s world, information spreads at high speed and interest from a large number of citizens can be raised in less than a day, potentially leading to a huge number of access requests in a short period of time. Such a sudden and rapid increase of demand can lead businesses, and in particular SMEs, to shut down their main activities in order to be compliant with the rules by providing each single data subject with the information requested. In these extraordinary situations, the efforts of the controller should be recognised while not hampering its core activities.

Administrative burden

One of the objectives of the review of the Data Protection Framework in Europe is to reduce the administrative burdens. This is a worthy ambition and one which harmonisation and deletion of the notification system go some way towards achieving, as noted in the Impact Assessment accompanying the Regulation. Care needs to be taken, however, to ensure that compliance with new provisions and concepts in the Regulation do not simply replace one set of burdens with another, which may be even weightier than the original provisions.
Code of conduct

The FEDMA codes of conduct are to-date, the only two which have formally been approved under Article 27 of the 95/46/EC Directive. Codes of conduct are vital for the purpose of enhancing data protection and privacy standards in the digital world. At their best, they are dynamic, inclusive, accountable and increasingly sophisticated policy tools designed to complement legislation.

In light of the speed of change across the digital landscape, it is important that the approval process can be done in a smooth and fast way, or creates the risk of delaying the introduction of solutions and making any approved code obsolete at the point of approval. A rapid approval process promotes one of the core strengths of codes of conduct; their ability to react quickly to address concerns as they evolve.

The proposed wording of Article 38, on the drawing up of codes of conduct, in the General Data Protection Regulation is heavily based on the 95 Directive. As such, this Article in its current form might not incentive further the development of codes of conduct.

Therefore FEDMA encourages the inclusion in article 38 of the following points:

- Explicitly acknowledge the significance of codes of conduct and the full range of purposes they can serve
- Specify the obligations of all actors to ensure legal certainty
- Provide proportionate incentives for industry to embrace codes of conduct
- Ensure the full integration of codes of conduct across relevant chapters of the Regulation

Consent

Within the context of the future review of the ePrivacy Directive, FEDMA would like to encourage the European Commission to reopen discussions around the notion of consent. Considering the rapid evolution of technologies in the past years, and the evolution of the notion of privacy, FEDMA believes that a strict opt-in regime might not offer the individual enough transparency and choice, as opposed to a well-informed opt-out model. In FEDMA’s view, relying on a strict opt-in regime, in today's internet, does not necessarily create an incentive for companies to provide transparency to the individual.
Consumer

The EU legislative framework provides for effective consumer protection against unfair commercial practices (2005/29 Directive).

Moreover, individual citizens of the EU have the right to unsubscribe/ opt from receiving unsolicited direct marketing communications across all marketing channels. An unsubscribe /opt-out regime allows a balance to be struck between the interest of organisations, particularly SMEs and new entrants to the market to contact interested consumers about their new and existing products and services, while at the same time respecting individual consumer choices to say no to direct marketing. In the case of unsolicited email and SMS marketing, the general rule under the Privacy and Electronic Communications Directive 2002/58 is that consumers must subscribe/opt-in to receiving such communications.

This Directive was further amended in 2010 to introduce new rules on cookies. The data-driven marketing Industry joined in the European Interactive Digital Advertising Alliance (is the organisation responsible for enacting key aspects of the self-regulatory initiative for Online Behavioural Advertising (OBA) across Europe http://www.edaa.eu/) which aims at educating and empowering the consumer with choice and control over their cookies (www.youronlinechoices.eu). This Online Behavioural Advertising (OBA) programme provides for best practices regarding OBA including limitations on sensitive segmentation.

Cookies

Within the context of the review of the ePrivacy Directive, FEDMA believes that the current rules on consent for access to cookies has led to a patchwork of different legal interpretations and transpositions which limit the ability to develop a true digital single market.

While the current provisions may have increased individuals' awareness on the presence of cookies on websites, FEDMA believes that the effort required for the implementation of this provisions have been disproportionate to the benefits to individual’s information and privacy in many countries.

FEDMA believes that, considering the above discussion on the added value of a well-informed opt out mechanism, coupled with the rapid evolution of the state of the art of the technologies providing privacy solutions (including the Pan European self-regulatory programme on OBA), the review of the ePrivacy Directive represent an opportunity for the European legislator to consider a different approach to this provision.
Data Subject

FEDMA understands the importance of reviewing the Data Protection legislation and the necessity to have a framework able to adapt to future technological development. However, FEDMA is concerned that the draft Regulation focuses too much on the online world and the text does not take account of the impact of the changes on the offline world. Privacy legislation must be workable in both the online and offline worlds. Certain proposed provisions, which are tailor-made for the online world, would be difficult to implement in the offline world, while not providing additional rights the data subject or benefits to data controllers.

The definition of personal data in Article 4.3, illustrates this dichotomy well, by including types of data which only occur in the only world. Article 4.3 of the draft Regulation defines the data subject by providing a list of data that are considered personal under all circumstances, such as online identifiers, location data and identification numbers. Furthermore, Recital 24, recognises that online identifiers such as IP address and cookies combined with other information can identify a data subject, but clearly states that ‘identification numbers, (...) need not necessarily be considered as personal data in all circumstances’.

The same concerns apply to location data, as these have a different meaning in the online (i.e.: related to mobile services and mobile terminal equipment) and the offline world. Location data in the offline world includes data such as postal codes and other location based mechanisms developed by postal operators. These mechanisms allow for better decision making. For example, offline location data can be used to determine the best place to locate a new gardening shop, by analysing if houses with garden are located nearby. Such data, i.e. postal codes, when used at the high level, do not allow the identification of an individual. Thus, location data should not be considered as personal data under all circumstances, but instead, a contextual approach should be taken.

In the light of this situation, FEDMA would like to call on decision makers, to consider the impact that the draft Regulation would have on the online and offline worlds and urge them to carefully consider the dangers of moving away from the technology neutral based approach established under the 95/46/EC directive, to deal with current issues of the online world due to the development of social media.
Delegated Acts

The delegated act is a tool that provides the European Commission with “the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.” None the less, FEDMA believes that the 26 provisions for delegated acts and numerous implementing acts in the concept Regulation will give the European Commission a direct power to fundamentally change the rules, without being bound to the framework of the European legislative process.

Delegated acts are foreseen in all sections of the proposal, including the section stating the principles of the Regulation, for example granting the Commission the right to adopt a delegated act on article 6 that provides grounds for the lawfulness of data processing, which can jeopardise both profit seeking and non-profit organisations. FEDMA is very concerned that the use of the delegated act in creating secondary law, will inevitably lead to a serious lack of transparency within the democratic decision-making process of the European Union, since delegated acts are adopted by the European Commission on its own, with only an ex-post control by the legislators. Both of whom can only oppose the act in a block. Furthermore, in drafting a delegated act, the European Commission would have no mandatory obligation to consult any stakeholders. We believe that the tool of the delegated act strongly lacks checks and balances, whilst it has the potential to fundamentally change the future legal framework on data protection.

This situation will lead to great legal uncertainty for data controllers operating within the European Union. If the regulation fails to offer legal certainty, this will have strong economic impacts, limiting long term investment and affecting technological developments. Therefore, FEDMA is aligned with the comments of the European Data Protection Supervisor at paragraphs 71-76 in his opinion on the data protection reform package dated 7 March 2012.

FEDMA believes that an alternative solution should be promoted, entailing the use of industry self-regulation or co-regulation to clarify legislative acts. The Commission should identify the issues that need any further regulation, which can be the 26 issues already identified, and ask relevant stakeholders to develop their own self-regulatory or co-regulatory solutions. The Commission should only produce delegated acts in cases where the relevant stakeholders do not develop their own self-regulatory or co-regulatory measures within a reasonable timescale and after consulting with industry stakeholders and legislators.
D

Direct Marketing

The communication by whatever means (including but not limited to mail, fax, telephone, online services etc...) of any advertising or marketing material, which is carried out by the Direct Marketer itself or on its behalf and which is directed to particular individuals.

E

ePrivacy Directive - review

FEDMA would like to emphasise that the General Data Protection Regulation aims at providing the horizontal rules for the processing of personal data. However, specific rules for privacy in the electronic sector should be specifically dealt with in the ePrivacy Directive.

FEDMA would like to encourage the European Commission to reopen discussions around the notion of consent. Considering the rapid evolution of technologies in the past years, and the evolution of the notion of privacy, FEDMA believes that a strict opt-in regime might not offer the individual enough transparency and choice, as opposed to a well-informed opt-out model. In FEDMA’s view, relying on a strict opt-in regime, in today’s internet, does not necessarily create an incentive for companies to provide transparency to the individual.
Forgotten – right to be

Article 17 of the proposal for a Regulation establishes a right to be forgotten and to erasure. FEDMA understands the importance of empowering the data subject over data related to him or her, and supports the development of such a right in certain legitimate context. However, a unilateral application of this right raises concern. In the specific context of direct marketing, this right would deprive the data subject from his or her legitimate and absolute right to object to the processing of their personal data for marketing purposes. Under the 95/46/EC Directive, an organisation is required to maintain an in-house suppression file of data subjects who have indicated that they do not want to receive further direct marketing communication from that particular organisation. These suppression lists are necessary for ensuring the respect of the data subject’s choice and right not to have his data processed for further marketing purposes.

As a general position, FEDMA considers that a right to be forgotten would provide added value to the data subject, but only when applied to data that he voluntarily made available. FEDMA does believe that the right to be forgotten should be opposed to the data controller’s right to intellectual property. Meaning that the data subject has the right to erase his or her data, but the intellectual property (statistical information etc.) remains in the ownership of the controller. Furthermore providing a data subject with all data stored would not only cause information overload, but would also be partially incomprehensible to the data subject, as this would include operational data base variables with internal references.

Further processing

Refer to Incompatible purpose
Information to the data subject

FEDMA fully supports the principle of transparency and the data subject’s right to be given all necessary information relating to the processing of his or her data, detailed in article 14. In order to be relevant, the information given should be easily understandable and focus on aspects of the processing that the data subject can relate to. 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 for more specific details.

International Data Transfer

There is a clear consensus on the importance of data transfers to 21st century trade and the need to ensure smooth and predictable data transfers. To meet this need, compliance requirements to enable legitimate flows of data should be less burdensome. By simplifying certain existing instruments, ensuring the applicability of mutual recognition of decisions, as well as legal certainty around them, these instruments could be made available to a broader range of stakeholders than is the case today while fully maintaining the rights of citizens at all times regardless of where data is processed.
Legitimate interest

The data driven marketing industry needs to have an alternative legal basis for processing personal data other than consent. This need is even bigger taking into account the rippling effects and increased value that Data-Driven marketing has on the wider European economy. In some cases it is impossible or not practicable to gain the consent of the individual to the processing of their personal data. The legitimate interest ground provides this alternative legal basis and in accordance with article 8 (2) of the Charter of Fundamental Rights of the European Union. This legal basis defined in article 6.1(f) of the draft Regulation gives the Data-Driven Marketing industry a balanced access to personal data, enabling the sector to promote and communicate relevant goods and services to interested recipients, especially in the context of prospection, informing individuals who are not yet customers, of goods and services which might be relevant for them.

The legitimate interest legal basis under the 1995 Data Protection Directive allows a controller or a third party to process personal data provided it respects the fundamental rights and freedoms of individuals. This requires a controller and/or a third party to carry out a balancing exercise. The burden of proof is on the controller and/or third party to show that it has carried out the balancing exercise. The legitimate interest of the controller must be weighed against the (privacy) interests of the data subject and has to be assessed under the criteria of proportionality, subsidiarity and compatible use. Furthermore, the data subject has to be unambiguously informed about this use of his data, and can exercise his rights over the processing of his data.

FEDMA believes that it is crucial that the balance of interest clause provided for in article 6.1(f) in the Presidency text of the 19th December 2014 is kept. The 19th December 2014 text reflects the position under the 1995 Directive

Recital 39 – creating legal certainty

FEDMA welcomes the addition to recital 39 in the Presidency text of the 19th December 2014 that clarifies that the processing of personal data for direct marketing purposes can be regarded as carried out for a legitimate interest. This recital provides clarity and legal certainty regarding the data – driven marketing industry that the legitimate interest ground is valid for processing personal data for direct marketing purposes.
Object - Right to

Article 19 of the proposed Regulation, concerning the right to object to data processing, proposes a fundamental change to the current practice, by placing the burden of proof on the controller or third party to demonstrate compelling reasons why they should be allowed to continue processing when a data subject objects (that is, bearing the burden of demonstrating an overriding interest), rather than being required to accede to a request to stop data processing once an objection has been upheld, or found to satisfy the standard of “compelling legitimate grounds” laid down in 95/46/EC (Article 14).

Furthermore, the proposed Regulation would appear to dramatically lower the legal standard that needs to be met by the data subject, allowing processing to be called into question by the mere fact of a data subject’s objection, which may or may not then be upheld.

Under the proposed new language, the data subject is no longer obliged to justify an objection in order for the processing to be suspended. Instead, controllers will be obliged to stop data processing in the first instance and only resume once they have been able to satisfactorily demonstrate that their interest in the processing in question overrides those interests adduced by the data subject. Frivolous, capricious or ill-informed objections would be given automatic standing which — because of the subjective nature of the assessment of the data controller’s compelling legitimate grounds — a controller may not be able to overturn, or which will anyway have required the processing to be suspended while the position is clarified. This would drastically reduce the legal certainty and increase the potential for business disruption for anyone relying on this legal basis.

Such a fundamental change in the balancing test would seriously undermine the practical utility and relevance of the legitimate interest clause, with no concomitant benefits for data subjects since there is always a possibility to object to processing that is otherwise deemed lawful and fair.

And since the legitimate interest legal basis requires a determination by the controller of the legitimacy of its interest based on societal norms, subjecting this to an unlimited objection right would run counter to the basic privacy value proposition. Such approach confuses the possibility to contest the legitimate interest of the data controller (on compelling grounds) with the question of withdrawal of consent.
Therefore, FEDMA strongly believes that the current model should be preserved, according to which the data subjects have the right to object on the basis of compelling legitimate grounds relating to a particular process and it is incumbent on the data subject to demonstrate those grounds. Where such objections are justified, the legitimate interest legal basis is no longer valid for that particular processing.

**One Stop Shop mechanism**

A real one-stop-shop mechanism allows companies to deal with only a single privacy regulator no matter how many Member States they operate within. We would like to stress that it is essential that a One Stop Shop for organizations and individuals means one decision, one outcome. This is one of the key improvements that the proposed Regulation was intended to offer all stakeholders by providing legal certainty and greater efficiency for industry, citizens, and regulators alike.

**Online/offline**

FEDMA understands the importance of reviewing the Data Protection legislation and the necessity to have a framework able to adapt to future technological development. However, FEDMA is concerned that the draft Regulation focuses too much on the online world and the text does not take account of the impact of the changes on the offline world. Privacy legislation must be workable in both the online and offline worlds. Certain proposed provisions, which are tailor-made for the online world, would be difficult to implement in the offline world, while not providing additional rights the data subject or benefits to data controllers.
Profiling

In the current information society, profiling is a fundamental part of commercial, ideal and charitable business processes and is essential for the functioning of the internal market. Legitimate profiling is not a harmful activity, but an instrument used by organizations in every market segment, profit or not for profit, in pursuit of a legitimate business interest. Commercial, ideal 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 waste and consumer irritation. Profiling is also used to identify loyal customers and provide them with relevant information, special promotions and discounts (loyalty programmes). Governments also profile citizens to encourage certain behaviour. For example, by providing tax advantages for the use of electric cars. This form of profiling, aimed at matching supply to the relevant audience while not contacting less-likely-to-be-interested people, will have no legal effects or severely affect a data subject.

FEDMA also understands the benefits and value of profiling for marketing purposes for both the controller and the data subject. On this matter, it is important to strengthen the clear distinction between normal and expected profiling, and profiling that severely affect the data subject in order to have protection proportionated to the risks. In line with this argument, FEDMA would like to suggest the introduction of a recital clarifying that profiling for direct marketing purposes does not create legal effect or severely affect the data subject.

Pseudonymous data

FEDMA understand the concept of pseudonymous data as a privacy enhancing technique, a technological tool enabling the controller to create safeguards for the data subject when his or her personal data are processed. Personal data allows for a direct identification of the data subject by the controller. Once being pseudonymised, processing pseudonymous data prevent the identification of the data subject, while enabling the controller to still benefit from the value of the data. Pseudonymous data allows the controller to single out an individual, and provide him or her with a different treatment without identifying the individual.

FEDMA considers the introduction of the notion of pseudonymous data in the General data Protection Regulation as part of the risk-based approach. The use of pseudonymous data is a safeguards that controller can use in order to significantly lower the privacy risks related to the processing.
However, it is important to realise that the use of pseudonymous data cannot replace the processing of personal data allowing identification of the data subject for direct marketing activities. The direct marketing industry represents numerous channels for contacting individuals, for promoting goods and services, for informing individuals about charities or political activities. These channels vary from the most traditional, such as direct mail, to the most technology advanced, including emails and online behavioural advertising. While some channels could rely predominantly on pseudonymous data, other channels need to be able to identify data subjects, thus are dependent on the processing of personal data. Even with the use of strong privacy enhancing technics, a company launching a direct mail campaign will always need a name and address to send the piece of mail to its recipient. Similarly for a telemarketing campaign.

While supporting the use of pseudonymous data as a safeguard, FEDMA would like to stress that this cannot be a one size fits all solution. The introduction of the concept of pseudonymous data in the legislation should not lead to an imbalance between the protection of individual’s privacy and the free flow of data through the strengthening of the rules for the processing of personal data in the legislation.
Sanctions

We recognize that reasonable administrative fines are an essential part of any meaningful data protection regime.

However, the complexity of today’s globalized environment (with the increasing importance of the digital world), the fact that the upcoming Regulation will be directly enforceable in all EU Member States and by all industry and potentially public sector actors requires a nuanced and balanced approach.

The proposed “one-size-fits-all” approach of the Regulation applies the same sanctions for deliberate, flagrant violations of the rules that could result in significant adverse effects to data subjects’ rights as to the circumstances of unfortunate negligence that results in no harm to the data subject. This is disproportionate and inappropriate, especially when the already very significant fines may not even be clearly defined by the Regulation. Legitimate players invest significant resources in not only complying with legal obligations, but often in putting in place data management practices, technologies and security measures that go beyond these requirements to ensure customer data of all types is treated with the respect and earnest that it deserves. It is important to reinforce a risk-based and proportionate approach in Chapter VIII. Further improvements are needed to ensure not only dissuasive, but also fair penalties.
Third Parties

FEDMA welcomes that the Presidency text of the 19th December 2014 recognizes that the legitimate interest ground is valid for both the controller and third parties. In many situations, marketers partner with trustworthy and selected third parties in accordance with the draft regulation, for the development of marketing campaign, the use of Robinson Lists, selection, or for other services such as list validation. It is important that these third parties can also use the legitimate interest ground.

For a proper functioning of the internal market and the free flow of data within member states of the European Union, it is of the utmost importance that third parties, such as subsidiaries of data controller, and other businesses have access to the data held by the data controller, on the grounds of the legitimate interest pursued by these parties, and supported by the principle of transparency and information given to the data subject. Companies entering a new market or organisation developing a new product should have access to personal data (to process on legitimate grounds) in order to prospect and market their products and services, while consumers have an interest in being informed of new products and services which can be offered to them.
Unsolicited communication

Within the context of the review of the ePrivacy Directive, FEDMA would like to highlight that unsolicited communication is not similar to unwanted communication, and remain one of the main possibilities for new companies, or companies promoting new product/services to inform individuals. Considering the rules in article 13, in FEDMA’s point of view, it remain crucial to keep the opportunity for marketers to contact a prospect, at least once per communication channel, when legally possible, and being able to register the individual’s choice to continue being contacted through that communication channel or not.

FEDMA would like to recall the efforts made by the DMAs and other organisation to develop codes of conduct and best practices, such as TPS, to provide tools for the individual to express his or her choice, especially relating to telemarketing. FEDMA supports the ability for Member States to decide between “opt-in” or “opt-out” for telemarketing as provided in article 13.3, thus taking into consideration different cultures. FEDMA would not support a harmonisation of the rules on Telemarketing with an opt-in.