Ahead of the trilogue meetings which will take place for the adoption of a General Data Protection Regulation, FEDMA would like to share the following comments and supports to different wordings of the text.

Chapter I – General provisions

Article 4: Definitions

- 4.1: Personal data
  FEDMA supports the definition of personal data which has been developed by the Council. This definition, in relation with recital 23 takes into consideration the context in which the data are processed. ‘Principles of protection should apply to any information concerning an identified or identifiable person’, however, certain data do not necessarily permit to identify a data subject. FEDMA would like to suggest the inclusion of “by means reasonably likely to be used by the controller” within the definition, to re-enforce the importance of the context of processing for the identification of the data.

  FEDMA’s position: support the wording proposed by the Council of the European Union and suggest to include “by means reasonably likely to be used by the controller” in the definition”.

- 4.8: consent
  FEDMA strongly support the text supported by the Council, which provides a definition of consent similar to the one from the Directive 95/46. The Council text, which includes no reference to an explicit consent, provides for a balance solution.

  FEDMA’s position: support the wording proposed by the Council of the European Union

Chapter II - Principles

Article 6: Lawfulness of processing

- 6.1 (f): Controller’s legitimate interest
  FEDMA strongly supports the wording suggested by the Council as it provides an adequate balance between the interests of organisations who are involved in the processing of personal information and the interests of individuals in protecting their data protection rights. The wording in the Council text is very similar to the wording in the current Data Protection Directive 95/46 which allows organisations to process personal information while at the same time protecting individuals’ data protection rights
The legitimate interest ground for processing personal information allows new entrants to the market to be able to promote their goods and services by post (and telephone in some Member States) provided individuals have not opted out of direct marketing via these channels either by informing the organisation directly or by registering on the appropriate preference service/Robinson List. If organisations could only promote their goods and services on the basis of consent then this would only benefit existing organisations as they would be the only ones with access to a database of subscribe/opted-in customers. New entrants to the market would not be able to promote their goods and services since they would not have access to a database of subscribe/opted-in customers. This would only increase the hegemony of existing market players.

FEDMA’s position: support the wording proposed by the Council of the European Union

- 6.4: further processing
Since 1995, with the 95/46/EC Directive, FEDMA supports the principle purpose limitation and the balance of interest between controllers and data subjects. Since 1995 FEDMA has also seen that these principles are implemented in various way in national legislation. In the past 20 years, Member States have developed many ways of implementing the purpose limitation principle, with interpretation of compatibility and incompatibility with the purpose for which the data were collected for further processing. Member States also provided exceptions where there is per se always a form of compatible use, regardless of the purpose for which the data were collected. In all these approaches, the balance of interest has always been respected.

It is important that article 6.4, as well as the suggested article 6.3(a) both together provide a balanced approach on compatible and incompatible use, and which encompass all existing and future situations. A balanced approach should take into consideration the fundamental rights and freedoms of the data subject, allowing further incompatible processing using the legitimate interest legal ground for processing personal data when there no negative impact on the fundamental rights and freedoms of the data subject.

Chapter III – Rights of the Data Subjects

Article 12: Procedures and mechanisms for exercising the rights of the data subject
In FEDMA’s point of view, data controllers have more flexibility in the procedures and mechanisms they will need to set up in order to respond to data subjects who are exercising their rights. The Council text is clear on the obligations of data controllers.

FEDMA’s position: support the wording proposed by the Council of the European Union

Article 14: Information to the data subject
FEDMA believes that the wording suggested by the European Parliament in article 14 provides more clarity on how information should be provided to the data subject, in particular, regarding the delivery of the information to the data subject. FEDMA supports the wording found by the European Parliament in paragraph 4, which takes into consideration the context in which the information can be delivered (“without undue delay where the above is not feasible”).

However, FEDMA is strongly concerned by the following issues:

- Information on automated decision: FEDMA is concerned by the references, in both the Council and the European Parliament text to ‘the logic involved’ in automated processing [EP: 14.1(gb), Council: 14.1a(h) and 14a.2(h)]. It is likely that such information requirement, while only complementing information on the purpose of
the processing and information on the existence of profiling for the data subject, will create issues of intellectual property rights for the controller. It is important that providing the necessary information to the data subject, controllers are also in a position to preserve their intellectual property rights.

- **14.a.1g) source of origin of personal data**: FEDMA, is concerned by the obligation for controller to disclose the source of the data [suggested in the Council text: 14a.2(g)]. While in some cases it is for the controller to provide the source of the data, in many cases, data originates from various databases, themselves containing multiple files. In such cases it is usually materially impossible for the controller to provide the exact source of the data, as it may originates from different data bases. Furthermore, it is important to further clarify that revealing such information not adversely affect trade secrets or intellectual property and in particular the copyright protecting the software, as mentioned in recital 41.

**FEDMA’s position**: support the wording proposed by the European Parliament but is concerned by the issue of disclosing “the logic involved” and the source of the data.

**Article 15: right of access for the data subject**
FEDMA believes that the wording supported by the European Parliament provide more clarity than the other versions of the text by specifying that the data subject can access certain information on request, as spelled out in the article. However, similarly to some of our concerns around article 14, FEDMA, is concerned by the obligation for controller to disclose the source of the data. While in some cases it is for the controller to provide the source of the data, in many cases, data originates from aggregated databases. In such cases it is usually materially impossible for the controller to provide the exact source of the data, as it may originates from different data bases. Taking this into consideration, FEDMA would like to suggest that controller provides the source of the data when the data subject requests it, and if the source of the data can be found without excessive or disproportionate efforts from the controller.

Specifically for article 15.1 paragraph (c), FEDMA Would like to support the wording proposed by the Council which refers to information related to recipients or categories of recipients to whom the personal data have been disclosed. In some occasion, controllers may not know in advance the exact recipients of the data, but has the possibilities to inform the data subject about the categories of recipients of the data. The wording supported by the Council reflect this reality.

**FEDMA’s position**: support the wording proposed by the European Parliament, except for paragraph 14.1(c) where FEDMA supports the wording proposed by the Council.

**Article 17: right to be forgotten and to erasure**
In principle, FEDMA believes that the wording suggested by the Council in article 17 provides more clarity and flexibility to the right to erasure and to “be forgotten”, in particular, for its application in the online world, where the data have been made public.

The issue of whether an organisation can retain personal information about a individual who has said that they no longer wish to receive direct marketing from that particular organisation where that individual has also asked for their personal information to be erased from that organisation’s records is unclear under all three versions of Article 17. It may be covered off by the reference to Union law or the national law of a Member State. However this issue needs to be dealt with clearly so that a small business owner can understand his/her obligations.
If an organisation erases all record of that individual’s personal information in response to a request for erasure and that individual has asked not to receive direct marketing from that organisation, then there is a risk that the individual could receive direct marketing from that organisation if the organisations were to buy that individuals details in from a third party as a result of a list rental. This is not what the individual wants.

**FEDMA’s position:** FEDMA would like this issue clarified so there is a clear legal basis for organisations to keep an individual’s personal information on file for suppression purposes even if they have asked for that organisation to erase their personal information.

**Article 19: Right to object**
FEDMA strongly support the wording proposed by the Council in article 19, as the unconditional right to object should be limited to the processing of data for direct marketing purposes. For other legitimate business purposes it is conceivable that the legitimate interest of processing personal data overrides the data subject’s legitimate interest.

**FEDMA’s position:** support the wording proposed by the Council of the European Union.

**Article 20: automated individual decision making**
FEDMA strongly support the wording proposed by the Council in article 20, which focuses on automated decision making, and not solely on profiling. Furthermore, the definition of profiling in article 4 provides more clarity as to the scope of the article. The wording proposed by the Council allows for legitimate and expected profiling and automated decision to take place while ensuring that individuals receive the adequate level of protection when such decision have a legal effect or significantly affect the data subject.

**FEDMA’s position:** support the wording proposed by the Council of the European Union.

**Chapter VIII – Remedies, Liabilities and Sanctions**

**Article 76: Common rules for court proceedings**
FEDMA believes that the wording proposed by the European Parliament allow for a better representation of the data subject in court proceedings, as anybody or organisation must be mandated by such data subject. It is crucial that organisations may only be able to act when clearly mandated by a data subject in order to ensure their representation.

**FEDMA’s position:** support the wording proposed by the European Parliament.