FEDMA input

January 2017

FEDMA input to EDPS on the proposal for the supply of digital content

FEDMA, the Federation of European data-driven marketing, represents the industry which helps suppliers of digital content and services reach out to potential customers and improve their services. We also make it easier for consumers to find the right suppliers. FEDMA has been active to share the marketing industry's hands-on experience and expertise, gained through active involvement with the GDPR.

The supply of digital content in exchange for the consumer supplying their personal information is an extremely complex topic. The text is in a way contractual law heavily merged into data privacy law. FEDMA considers this legislative proposal to be premature since we are still in the implementation phase of the GDPR. Still, FEDMA applauds the effort of the institutions to stay in tune with the way consumers are interacting with brands.

FEDMA believes that consumers can exchange their personal data for goods and services. This is a reality for which contractual and data protection laws must adapt. Yet, a balance must be found to sustain data protection principles, contractual principles and EU competitiveness.

FEDMA looks forward to an opinion of the EDPS which we are convinced will sustain the benefits of the GDPR and ensure coherence of its principles.

I Scope of the proposal

The Digital Content Directive's scope includes not only **personal data** but also this category of data called "any other data". This could be very confusing and the notion of "any other data" should be removed from the proposal.

If the proposal applies to all personal data supplied in the context of supply of digital content/services, then the scope of this proposal will be very broad and will likely heavily impact the way consumers interact with the internet of today. The cost of supply of digital content might actually increase for consumers, as suppliers may prefer to have consumers pay with money. We also depart from contractual logic, where it is clear what is exchanged on both sides of the contract.

LIBE opinion suggests that the supplier should indicate explicitly which personal data are to be exchanged for the content/service supplied. FEDMA agrees with this approach to the extent that the **supplier should have to indicate the *categories* of *actively provided personal* data which constitute the counter performance**. The supplier should have the choice to qualify the categories of actively provided personal data which constitute the counter performance. Thus, the consumer would be clearly informed of the counter performance to receiving the digital content/service. As a result of this, it will have been absolutely clear before the user concludes the contract that in case of "free services" the user is "paying" with these data, and that this is the users' conditional contractual counterpart (please refer to Bayerisches Landesamt für Datenschutzaufsicht document and informal translation at end of this document). The data which is necessary for the performance of the contract (and not used for any other purpose) is excluded

from the scope of the proposal, because the consumer does not have the choice. The choice of the controller of the legal bases for the lawful processing of data should remain unaffected; the controller can use article 6 1 (a) (consent), (b) (necessity) or (f) (legitimate interest) to process the data based on the principle of accountability under the GDPR.

From an economic and contractual view, if the consumer withdraws his/her consent for the processing of his/her data, or does not provide the data, the supplier should be able to terminate the contract as there would be no counter performance for the supply of the free digital content. At the minimum, it should be clarified that, the prior processing of data remains legal.

II Termination of the contract

The **right to retrieval and data portability under the GDPR** are very closely worded, yet there are important differences. The right for consumers to ask for their data as provided in the text goes very much beyond that which consumers can retrieve under the right of data portability under the GDPR.

According to the data portability guidance of the article 29 Working party published in December, if the data does not fall within the GDPR definition of personal data, there is no right to data portability. The right to data portability does not apply to personal data, which is not provided by the data subject. FEDMA agrees and supports the fact that the controller can refuse a request of a data subject if it is processing personal data for a purpose that does not require the identification of a data subject and it can demonstrate that it is not able to identify the data subject.

FEDMA has suggested the following wording: *"The supplier shall provide the consumer with technical means to retrieve all or any content consciously or actively provided by the consumer, with respect to the intellectual property rights and trade secrets of the supplier to the extent this data has been retained by the supplier. The consumer shall be entitled to retrieve the data without significant inconvenience, in reasonable time and in a commonly used data format; in any case, regarding portability of personal data, the supplier must apply the rules already provided for in the General Data Protection Regulation." (FEDMA suggestion in the context of the Digital Content Directive).*

This wording provides the consumer with a contractual right to retrieval regarding data provided by the consumer as required in the context of the supply of digital content. This corresponds to the categories of data that the supplier will have informed the consumer of. The data should be retrievable at the request of the consumer. The personal data which is provided by the consumer on the basis of necessity of the contract falls in any case under the article of data portability of the GDPR. Observed data, analytical data and aggregated data should not be retrievable by the consumer in line with the principles of the GDPR, intellectual property rights and trade secrets.

FEDMA does not consider that data "related to an identified or identifiable" consumer is personal data simply because it can be "related to" an individual who uploaded it. It's not because a photography or excel table is uploaded in the cloud by a consumer that this data or digital content becomes automatically personal data. FEDMA would like to further add that the retrieval of this data/digital content which is not personal data depends on the contractual terms and conditions, notably intellectual property rights.

Suppliers, upon termination of the contract, are required to **refrain from using the counter performance** defined in the contract (i.e. delete or make it anonymous). FEDMA considers that

suppliers should be able to use pseudonymised data even after the contractual relationship has terminated, unless the consumer makes a request to the supplier to cease using this pseudonymised data (as suggested in LIBE opinion). Such data can help suppliers gain important insight in how to improve their product.

III Other issues:

Regarding amendment 43 of the draft report of IMCO/JURI on the **invalidity of terms and conditions which violate any right of the data subject under the GDPR**, FEDMA considers that enforcement is very important. However, in any case, the principle of subsidiarity must be respected. Historically, sanctions are the competence of Member States. We also recommend that a decision be taken by court or that there be reference to national procedural laws.

The LIBE opinion makes reference in amendment 6 to icons. We remind the EDPS that the GDPR does not provide mandatory icons. We recommended aligning on the wording of the GDPR.

About FEDMA

FEDMA stands for 22 national Direct Marketing Associations, directly representing more than 5 000 organisations, it also has more than 50 organisations as members, representing all parts of the value chain in the data-driven marketing industry. Through its many activities, FEDMA is dedicated to building the business of cross-border data-driven marketing, both through its vast network of contacts and businesses within and beyond Europe and by representation within the institutions of the European Union.

The data-driven marketing industry uses personal information and data to effectively match customers' needs with relevant brand offers. The industry aims to create and maintain an individual and interactive relationship between organisations, institutions and their customers (both prospective and existing). The industry allows organisations to target customers with a personalised message, to generate sales both online and in store in a cost effective way to build long-lasting relationships with customers and raise brand awareness. It is an essential driving force of the EU economy and the EU Digital Single Market.

Annex: Informal English translation of the Bayerisches Landesamt für Datenschutzaufsicht communication

Prohibition to "link" consent in connection with promotion

The already existing prohibition to link consent in connection with the use for promotional purpose is also included in the GDPR. In connection with the evaluation if consent was freely given the circumstances have to be taken into account if amongst others the performance of a contract including the provision of a service is dependent on the consent to process personal data.

As a result of this it has to be made absolutely clear before the user concludes the contract that in case of "free services" the user is "paying" with his data, (e. g. free email-account against consent to get a newsletter as a kind of counterfinancing) and that this is the users' conditional contractual counterpart. In this case there is no more room or need to provide consent.