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WP 174**

Opinion 4/2010 on the European code of conduct of FEDMA for the use of personal data in direct marketing

Adopted on 13 July 2010

This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

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Website: http://ec.europa.eu/justice/policies/privacy/index_en.htm

THE WORKING PARTY ON THE PROTECTION OF INDIVIDUALS WITH REGARD TO THE PROCESSING OF PERSONAL DATA

set up by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995¹,

having regard to Articles 29 and 30 paragraphs 1 (d) of that Directive,

having regard to its Rules of Procedure and in particular to articles 12 and 14 thereof,

has adopted the present Opinion:

1. INTRODUCTION

Article 27, paragraph 3, of the Directive deals with Community codes of conduct in the following terms: *Draft Community codes, and amendments or extensions to existing Community codes, may be submitted to the Working Party referred to in Article 29. This Working Party shall determine, among other things, whether the drafts submitted to it are in accordance with the national provisions adopted pursuant to this Directive. If it sees fit, the authority shall seek the views of data subjects or their representatives. The Commission may ensure appropriate publicity for the codes which have been approved by the Working Party.*

In order to facilitate the application of this provision, the Working Party adopted in September 1998 a document clarifying the procedure to be followed by interested parties for the submission of Community Codes of Conduct, and for the subsequent evaluation by the Working Party in accordance with Articles 27 and 29 of Directive 95/46/EC². This document summarises the basic procedural steps to be followed in this context.

In June 2003 the Working Party has adopted an opinion on the European Code of conduct of FEDMA for the use of personal data in direct marketing; the Code is in accordance with Article 27 of the data protection directive and provides sufficient added value to the directive by being sufficiently focussed on the specific data protection questions and problems in the direct marketing sector and offering sufficiently clear solutions for the questions and problems at stake³. The Working Party has considered that it therefore fulfilled the requirements laid down in Article 27 of the Directive.

The Working Party however underlined the fact that a general code like this can by definition not solve all specific problems inherent to the on-line world and therefore invites FEDMA to produce an annex to the code dealing with these issues. This annex should in particular address the protection of children, which are especially vulnerable in the on-line context, as emphasised in the contribution of BEUC (the European Consumers' Organisation) that was consulted by the Working Party.

By letter of 16 December 2005, FEDMA submitted to the Article 29 Working Party a document containing an "Annex to the Data protection and Direct Marketing Code"

¹ Official Journal no. L 281 of 23/11/1995, p. 31, available at:

http://europa.eu.int/comm/internal_market/privacy/law_en.htm

² Future work on codes of conduct: Working Document on the procedure for the consideration by the Working Party of Community codes of conduct, adopted on 10 September 1998, WP 13.

³ Opinion 3/2003, Document WP 77, available at:

http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2003/wp77_en.pdf -

(hereafter "the Annex"). According to FEDMA, the Annex is designed to cover specific concerns created by on-line marketing. As with the FEDMA Code, the intention is neither to supersede nor interfere in any way with national regulation, nor to venture into areas which are not presently covered by EU legislation. The Annex aims at providing cross-border marketers with guidelines on how to behave when engaged in on-line marketing.

By letter of 8 June 2006 the Chairman of the Article 29 Working Party wrote to FEDMA and informed of the comments of the Article 29 Working Party to the Draft of an on-line marketing Annex. Several comments were made in respect of different sections of the document. The Article 29 Working Party invited FEDMA to take account of the comments attached in order to ensure that this Annex better reflects the data protection standards set out in Directive 95/46/EC and 2002/58/EC and the national provisions implementing them.

On 7 June 2007, the Director General of FEDMA submitted to the Article 29 Working Party a revised version of the on-line marketing Annex code of conduct. The new text was an entirely revised document which follows the structure of the 2003 General FEDMA Code, approved by the Article 29 Working Party (WP 77).

The ad hoc subgroup of the Article 29 Working Party responsible for the code of conduct met several times in order to examine the documents presented by FEDMA. It has also met FEDMA to discuss the on-line marketing Annex in order to obtain clarification about several topics and questions addressed by the code.

After these meetings a new version of the on-line marketing Annex has been submitted by FEDMA in February 2010. The Chairman of the Article 29 Working Party invited FEDMA on 25 May 2010 to address a final issue relating to the rules of member-get-member campaigns in order to enable the Article 29 Working Party to take a final decision on the compliance of the on line Annex Code with Directive 95/46/EC and the currently applicable Directive 2002/58/EC⁴.

FEDMA has sent a final version of the on-line marketing Annex in June 2010 that is finally in accordance with the Directive 95/46/EC and provides sufficient added value.

2. STRUCTURE AND CONTENT OF THE ON-LINE MARKETING ANNEX

With regard to the specific issue of e-mail marketing, which is the subject matter of this the on-line marketing Annex, it may respond to the two main criteria required by the Article 29 Working Party for European Codes of Conduct in its working document WP 13:

- A code submitted under Article 27 of Directive 95/46/EC must be in accordance with the Directive and the national provisions implementing it at national level;
- A submitted code must be of sufficient quality and internal consistency and must provide sufficient added-value, in terms of being sufficiently focussed on the

⁴ Directive 2002/58/EC was amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009. The amended Directive 2002/58 has to be implemented by 25 May 2011 (OJ L 337, 18.12.2009, page 11).

specific data protection questions and problems in the organisation or sector to which it is intended to apply and offers sufficiently clear solutions for those questions and problems.

Since the on-line marketing code is an Annex to the European Code of Practice for the use of personal data in direct marketing, to be seen as complementary the FEDMA Code, the Article 29 Working Party understands that the provisions of the general FEDMA Code also apply to this Annex *mutatis mutandis*.

The **structure of the Annex** closely follows the structure of the General FEDMA Code to which it refers and adds the Code in this respect in a sufficient manner.

- General: Definitions
- Section 1: Law applicable
- Section 2: Obtaining personal data directly from the data subject
- Section 3: Obtaining personal data from other sources than the data subject
- Section 4: Preference service systems
- Section 5: Privacy policy and use of cookies
- Section 6: Specific provision for the protection of children
- Section 7: Specific provisions on forbidden practices
- Annex: Examples of best practices and not acceptable practices of on line advertising

The **content of Annex** improves the quality of the document and clarifies the different issues it addresses. The following can illustrate the added-value of the Annex:

Definitions

The list of definitions has been thoroughly revised and expanded; included are for example definitions of "unsolicited commercial communications", "processing of personal data" and "consent". The list complements the definitions already contained in the general Code.

Section 2: Obtaining personal data directly from the data subject

Section 2 lays down general principles for fair processing of data and the requirements for the data controller in accordance with Directive 95/46/EC. It contains specific provisions on the collection of personal data from consumers (including information to be provided in the case of use by the controller itself as well as information in the case of disclosure of data subjects' personal data to third parties), and of personal data of legal persons related to business products or services. The Article 29 Working Party welcomes the explicit requirement on commercial electronic mail to contain the necessary information in order to clearly identify the commercial object of the communication as well as the introduction of a section relating to unsubscribe facilities in order to offer a recipient of commercial communications messages a simple effective, free of charge, direct and easily accessible method of unsubscribing from receiving electronic commercial communications. The recipient should be able to unsubscribe without stating a reason.

Section 3: Obtaining personal data from other sources than the data subject

Section 3 contains the requirements for the controller to provide information, in particular the informed consent of the data subject. The need for the marketer to obtain the consent of the data subject is also explicitly mentioned in regard to Host Mailings. The Article 29 Working Party is also satisfied with the rules regarding member-get-

members campaigns after a clarification of the text in order to avoid legal misinterpretations (3.2.1.).

Section 4: Preference Service Systems

The Article 29 Working Party particularly welcomes the introduction of Section 4 relating to preference service systems.

Section 5: Privacy policy and use of cookies

The section contains provisions on, among others, the accessibility of privacy policies that should include clear and comprehensive information about any cookie. The legal framework of Directive 2002/58/EC as amended by Directive 2009/136/EC which will be applicable as from 25 May 2011 may require that this section is adapted in order to bring into line with the Directive.

Section 6: Protection of children

The provisions refer to a regime set out in the general FEDMA code in order to protect children against new and specific dangers in the on-line sector. The Article 29 Working Party welcomes for example the provision according to which it is unlawful without the prior consent of the legal representative to ask for the provision of sensitive data, revealing the racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, or the processing of data concerning health or sex life of the child or financial situation about themselves, or any third party, such as their parents or friends.

Section 7: Forbidden practices

The section addresses explicitly the forbidden practices regarding the automatic collection of data and spyware. The Article 29 Working Party notes that section 5 and 7 of the Annex are covered by Directive 2002/58, in particular by Article 5.3, as amended by Directive 2009/136/EC. Both sections should be interpreted in the light of the recent guidance given by Article 29 Working Party in its Opinion on online behavioural advertising⁵.

Annex: Best and not acceptable practices

Finally the inclusion of an annex containing examples of best and not acceptable practices of on-line advertising is of added value for the practical implementation of the rules.

3. CONCLUSION

The Working Party is satisfied that the on-line marketing Annex to the European Code of Conduct of FEDMA for the use of personal data in direct marketing is in accordance with Directives 95/46/EC and the currently applicable 2002/58/EC and the national legislation in place⁶. The Annex deals with a good number of significant matters in the particular field of the on-line sector (e.g. member-get-members campaigns, the protection of children, unsubscribe facility) and therefore provides sufficient added value to the Directives by offering clear solutions for the questions posed in the on line marketing sector. It fulfils therefore the requirements laid down in Article 27 of Directive 95/46/CE.

⁵ Opinion 2/2010 on online behavioural advertising, adopted on 22 June 2010; document WP 171, available at: http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2010/wp171_en.pdf

⁶ National legislation may impose additional requirements

However, the implementation of Directive 2002/58/EC, as amended by Directive 2009/136/EC, into Member States' legislation may require the amendment of the Annex, particularly as far as cookies and spyware are concerned to be in line with the new provisions. The Working Party recommends FEDMA to assess the adaptations that the Annex Code of Conduct will require as of 25 May 2011 in order to be in line with the legal framework resulting from Directive 2002/58/EC as amended by Directive 2009/136/EC and the national provisions implementing it.

In order to make sure that the national Data Protection Authorities are properly informed about the working of this code in practice, the FEDMA Data Protection Committee will report annually to the Working Party about the application of the code. Should this report give rise to questions the Working Party will contact FEDMA in order to discuss the issues at stake.

The Working Party encourages FEDMA to promote this on line marketing Annex Code of Conduct within the direct marketing sector in a proactive way, in order to ensure that data subjects are sufficiently informed about its existence and content and to continue working in this field in order to continue increasing the standard of protection offered to individuals. The Working Party will pay special attention to the annual reports about the application of the code to be provided by the FEDMA Data Protection Committee.

Annex: text of the Annex on direct marketing electronic communications to the European Code of Practice for the use of personal data in direct marketing (On line direct marketing Annex).

Done at Brussels, on 13 July 2010

*For the Working Party
The Chairman
Jacob KOHNSTAMM*