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Opinion 3/2003 on the European code of conduct of FEDMA for the use of personal data in direct marketing

Adopted on 13 June 2003

The Working Party has been established by Article 29 of Directive 95/46/EC. It is the independent EU Advisory Body on Data Protection and Privacy. Its tasks are laid down in Article 30 of Directive 95/46/EC and in Article 14 of Directive 97/66/EC. The Secretariat is provided by:

Directorate E (Services, Intellectual and Industrial Property, Media and Data Protection) of the European Commission, Internal Market Directorate-General, B-1049 Brussels, Belgium, Office No C100-6/136.
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Opinion on the European Code of conduct of FEDMA for the use of personal data in direct marketing

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 (a) and 3 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. PROCEDURAL ISSUES

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 summarised the basic procedural steps to be followed in this context.

The European Federation of Direct Marketing (FEDMA) submitted a first draft code for consideration of the Working Party in 1998. After its formal acceptance by the Working Party and following the procedure as laid down in the above-mentioned document³, the

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 Point 3.2 of the procedure as laid down in WP 13.

Secretariat called for the establishment of a specific working group. This group consisted of three delegates of the Working Party⁴ and was supported by the secretariat.

Several rounds of discussions have taken place between this subgroup of the Working Party and FEDMA on the basis of the subsequent drafts produced by FEDMA, after consultation with its national members. The subgroup has regularly reported to the Working Party, that has adopted several internal reports concerning the progress of this project.

The Working Party considered appropriate to seek the views of the representatives of the data subjects and therefore consulted BEUC (the European Consumers' Organisation) about the content of the code. The views expressed by BEUC will be considered in the following paragraphs of this opinion.

2. CONTENT OF THE CODE

When discussing the draft versions of the code, the Working Party has concentrated in two kind of questions:

1. Whether the proposed code was in accordance with the Directive and the national provisions implementing it at national level;
2. Whether the code provided sufficient added-value, in terms of 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 stake.

2.1. Accordance with the Directive and the national legislation

The Working Party is satisfied that the code as presently drafted is in accordance with the Directive and the national legislation in place. Also BEUC in its written comments agreed that the code complies with the requirements of the Directive.

The Working Party notes that the last sentence of the note following the definition of personal data in the code could be misinterpreted and viewed as a restriction of the definition of personal data in the Directive and in particular of the wording of recital 26 of its preamble. In order to avoid any possible misunderstanding on that respect the last four words of this sentence should be deleted in the final version of the code to be published⁵.

2.2. Added-value

The second question is more difficult to measure. The Working Party considers that the code as a whole is sufficiently focused and deals with a good number of significant matters in the direct marketing sector. A number of examples can illustrate the added-value of the code:

⁴ Representatives from the Dutch, French and UK Data Protection Authorities.

⁵ The sentence will therefore read as follows: "This could be the case, for example in regard to postal addresses, telephone numbers, faxes or e-mail addresses, or job title, if the person to whom these data relate can reasonably be identifiable."

- The code includes a number of definitions of terms used in the direct marketing sector and uses all through it terminology adapted to this sector.
- An extensive part of the code is dedicated to one of the crucial topics in the direct marketing sector: the collection of data for direct marketing purposes, explaining in detail the different possible situations.
- It deals with specific direct marketing issues such as host mailings, disclosure of lists, the source of the data and so forth.
- It includes specific provisions on the protection of children, dealing in particular with the cases in which data are provided by children in order to participate in a game, to obtain a prize or a similar promotional activity.
- In the chapter on the rights of the data subjects, the code pays special attention to the right to object to the processing for direct marketing purposes.
- It contains a chapter on the issue of preference services systems and in-house suppression lists.
- The last chapter of the code deals with compliance and monitoring, explaining the role that the national Direct Marketing Associations (DMAs) have to play concerning the application of the code and the resolution of complaints.
- A Data Protection Committee is created within FEDMA in order to monitor the application of this code. This committee reports to the FEDMA board. The committee has among other functions the obligation to report annually to the Working Party on the functioning of the code at national level and in cross-border activities.
- According to the section on contravention of the principles of the code, FEDMA can consider the possibility of initiating actions not only against members but also against non-members in order to safeguard the ethics of the profession. This is an important element as those who act in contravention of the data protection principles are often non-members of FEDMA.

The code could of course be improved in the future in the light of the experience in the Member States and should certainly be revisited if new legislation or other relevant developments in the field take place.

The Working Party is in particular convinced that given the specific issues at stake in the on-line marketing sector and the existence of distinct data protection rules in the field of electronic communications⁶, it would be useful to have separate provisions dealing with these questions. FEDMA shares this view and has repeatedly declared its intention to address these matters in a separate annex, to be prepared shortly after the adoption of the code.

⁶ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201/37, 31.7.2002.

2.3. An issue raised by BEUC: the protection of children and minors

In its submission BEUC has raised the issue of the protection of minors and children, that is an area of particular importance from the consumer protection viewpoint. Contrary to the Directive, the FEDMA code includes in its section 2.6 certain provisions for the protection of children. In its letter of December 2002 BEUC considered that the provisions of the code regarding this matter, as drafted at that time⁷, did not offer a sufficiently high standard in the opinion of BEUC, which refers in particular to the protection offered by the US COPPA Act. In the meantime, at the request of the Working Party, these provisions have been amended in order to emphasise the need to obtain the consent of the parent.

The subgroup has discussed this question in numerous occasions with FEDMA and fully agrees with BEUC that the protection of children is an important issue and therefore the inclusion of specific provisions in a matter not separately regulated by the Directive in a sector such as direct marketing should be welcomed. It is the opinion of the Working Party that the provisions presently included, in its new drafting, offer sufficient added-value in the context of a general code as this one but should be more detailed and further developed in the context of the on-line collection of data, a field in which the protection of children is critical. This is actually the field that the American COPPA Act regulates.

3. CONSEQUENCES OF THE APPROVAL OF THE CODE: ENFORCEMENT, COMPLAINT HANDLING AND COMPLIANCE

In its submission BEUC has also raised a number of questions regarding issues such as compliance with the code, enforcement and complaint-handling.

The Working Party would like to stress the fact that the FEDMA code should be evaluated within the context of the existing enforcement and compliance mechanisms put in place in the framework of the European data protection directive. The code contains in its section 7 provisions dealing with the responsibility of the national DMAs, the resolution of complaints, the contravention of the principles and the FEDMA data protection committee but these measures should not be seen as isolated mechanisms but as additional steps taken to reinforce the protection already existing within Europe.

Further to the possibility to complain to the national DMAs, individuals can always address their complaints to the data protection authorities. From the moment of adoption of this opinion on, the national Data Protection Authorities will take into account the provisions of this code besides those of their national legislation when dealing with complaints and cases in the direct marketing sector. It is therefore not only up to FEDMA to ensure the enforcement of the code, the Data Protection Authorities will play an important role as well.

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 code⁸. Should this

⁷ The comments of BEUC, communicated to the European Commission by letter of 20 December 2002, were based on the draft code of September 2002.

⁸ As stated in section 7.4.3 of the code.

report give rise to questions the Working Party will contact FEDMA in order to discuss the issues at stake.

4. CONCLUSION

The Working Party considers that the FEDMA code of conduct (which is published as annex to this opinion) is in accordance with 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 stake. It fulfils therefore the requirements laid down in article 27 of the Directive.

The Working Party would however like to underline 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 Working Party encourages FEDMA to promote this code 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 to this opinion: the text of the FEDMA code.

Done at Brussels, on 13 June 2003
For the Working Party
The Chairman
Stefano RODOTÀ