FEDMA’s comments to the Article 29 Working Party Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC

FEDMA welcomes the opportunity given by the Article 29 Working Party (WP 29) to stakeholders to provide comments on Opinion 06/2014, which was adopted at their April 2014 meeting, as announced in the press release following the meeting.

This consultation is an important step forward to attain the involvement of all stakeholders (European regulators, organisation processing personal information and citizens) in finding practical and adequate solutions as to how the legitimate interests of organisations to process personal information should be balanced with the rights of citizens under the 95/46/EC data protection legislative framework. FEDMA has participated in the consultations of the WP 29 in the past. We urge the WP 29 to continue to exchange its views with stakeholders in the future, if possible before adopting Opinions on future issues.

I. Comments on Opinion 06/2014:
FEDMA agrees with the WP 29 that the controller’s legitimate interest to process data is a legal ground of equal importance as the other grounds mentioned in Article 7 for fair data processing.

In our view, a company/organisation having as its core business the processing of personal data should be able to rely on the legitimate interest ground to process such data following the balancing test described in the 95/46 Directive. An organisation relying on this ground for the processing of personal data must ensure that the rights and interests of the data subject under Directive 95/46 (or the draft General Data Protection Regulation (GDPR) are respected. The data protection principles state that a data controller may not collect more personal data than is necessary, and provide individuals with clear information about why it is collecting their personal information and their data protection rights.

In the case of unsolicited direct marketing communications, data subjects have the right to unsubscribe/opt-out from receiving such communications, which is a unique right that organisations have to respect at all times. This has been changed to a subscribe/opt-in requirement in the case such communications via electronic communications under the Privacy And Electronic Communications Regulations Directive. An unsubscribe/opt-out regime, as currently exists for unsolicited post and telephone marketing (depending on national member states law) allows a balance to be struck between the interests of organisations and consumers. An unsubscribe/ opt-out regime allows new market players to contact potential clients, both business to consumer and business to business while respecting individual choice to unsubscribe/opt-out.
The "legitimate interest" ground should remain a key legal ground for the processing of personal data for organisations alongside the other legal grounds, such as consent and where the processing is necessary for the performance of a contract with the data subject. In our view, the legitimate interests balancing act that needs to be performed before Article 7(f) becomes applicable is at the very heart of ensuring that there is a balance between the interests of organisations and data subjects.

FEDMA calls upon WP 29 and the other stakeholders, such as the Council of Ministers, European Parliament and the European Commission, to develop a concept of the legitimate interest ground for processing personal data that is easily understandable for any organisations, especially SME’s who may not have access to high quality internal legal/compliance advisers. Therefore we are happy with the efforts of WP 29, but we also have reasons for concern.

Interpretation of the 95/46/EC Directive and debate on the review of the legal framework

- In the context of the review of the 95/46/EC Directive the work of the legislators should focus on achieving a clear and adequate legal framework that balances the interests of business and consumers, especially with regard to the legitimate interest processing ground. Undoubtedly, the future General Data Protection Regulation (GDPR) will require adjustments. However, FEDMA is very concerned by several aspects of this Opinion which actually refer to the current discussions taking place in the context of the future GDPR. Considering the important role opinions of the WP 29 play in the enforcement of the legislation by national Data Protection Authorities when they are acting in a quasi-judicial manner, integrating into this Opinion comments on the draft GDPR does not in our view do justice to the separation of powers. It is the European law makers (the European Commission, the European Parliament and the Council of the European Union) that are responsible for making the legal rules. Whilst FEDMA accepts that the WP29 can make comments on the draft GDPR, it should not use Opinions on important legal issues in the 95/46 Directive to make such comments.

- In this Opinion, the WP 29 provides guidance for data controllers in developing a balancing test for assessing their legitimate interest to process personal data. This Opinion rightfully reflects the importance of harmonising the interpretation and the enforcement of the data protection rules across the European Union. FEDMA sees such guidance as potentially a powerful tool to help organisations to ensure that they are always making correct use of the legitimate interest ground for processing of personal data as well as complying with other data protection rules. Interpretation of the legitimate interest balancing test should focus on harmonisation and accountability and not on narrowing the scope of Article 7(f), which might be an (unwanted) consequence of the very prescriptive nature of the examples provided in the WP 29’s opinion. At the same time there should be a balance between the interests of the data controller and the data subject.

The case of Direct Marketing in Opinion 06/2014

- As the Working Party indicates, the use of Article 7(f) requires a careful case-by-case assessment by companies/organisation of their data processing activities. Such an assessment should be based on a solid framework of rules and safeguards in order to ensure legitimacy and flexibility. If a data controller wishes to rely on the legitimate interest ground for processing personal information then they must make an assessment based on proportionality, subsidiarity, compatible use and the information it gives to the data subject about why it is processing personal information. The notion of flexibility and the importance of a case by case assessment
is particularly essential considering the prescriptive nature of the examples in the Opinion 06/2014, especially those in part III.3.6 (pages 31 and 32).

- FEDMA is concerned that the examples used in this Opinion in relation to direct marketing activities are not balanced, in particular scenario 2 of the example provided on page 32 of the Opinion. FEDMA would like to make a series of comments:
  - The example used in scenario 2 is not balanced and represents an extreme case scenario, at the expense of the direct marketing’s industry’s efforts and good practices to comply with the legislation.
  - While FEDMA understands that the example has been tailored to illustrate the WP 29’s arguments on the importance of a proper balancing test, we fear that scenario 1 and 2 will lead a reader to conclude that any processing of personal data in the online world can never fall within the legitimate interest ground for processing personal information whereas the processing of the same personal data in the offline world can fall within the legitimate interest ground.
  - Furthermore, Scenario 2 also presents the contradiction of an individual considering it equally annoying to at first receive special discounts via direct marketing and then not to receive these offers anymore.
  - FEDMA strongly believes that the aspect of price discrimination presented in scenario 2 must relate to the European commercial practices legislation. This is not a privacy/data protection issue and therefore falls outside the remit of the WP29. Furthermore the example is confusing, because it does not differentiate between price discrimination and the principle of “dynamic pricing”. The latter is used to reward (through vouchers, coupons or specific offers) the loyalty of customers.
  - Finally, the example refers to an industry initiative on behavioural advertising and considers it as a compliance tool for the e-privacy Directive. This is not the case. The European Interactive Digital Advertising Alliance (EDAA), which is in charge of this OBA programme, has stated many times that the framework is an education programme offering transparency to the consumer. The differences in implementation in 28 European member states currently prevent the possibility of a blanket compliance solution.

- FEDMA objects to the conclusions of the part of the Opinion dedicated to direct marketing “Illustration: the evolution of the approach to direct marketing” (pages 45, 46 and 47). While acknowledging the evolution of direct marketing practices parallel to technological evolution, the Opinion also recalls the high number of already existing legal instruments covering the “less traditional” direct marketing techniques. These specific rules aim at providing individuals with control and choice in the commercial communications they receive, addressing the specific technology developments of our industry. The severe conclusions of this section provides an unbalanced representation of our industry.

- FEDMA is surprised that the WP 29 y does not mention the FEDMA European Code of Practice for the Use of Personal Data in Direct Marketing and the FEDMA European Code of Practice for the Use of Personal Data in Direct Marketing - Electronic Communications Annex (the On-line Annex). Both documents, approved by the WP 29 (Opinion 03/2003 and Opinion 04/2010) in the context of Article 17 of the 95/46/EC Directive, recognise and explain the principle of the legitimate interest ground as it applies to the direct marketing industry.
Running the balancing test

- In its explanation of the balancing test required by Article 7(f) of the 95/46/EC Directive (page 29), the Opinion appears to introduce a novel reading of the Article. Having established that the data subjects’ “interests” as well as fundamental rights and freedoms need to be taken account of (rather than interests for fundamental rights, as the English-language version incorrectly reads), the Opinion neglects to integrate into the analysis an important qualification of those interests that is laid down in the ensuing wording in the Article. In so doing, it arrives at a potentially wide and undefined scope for the term “interests”. The actual text of Article 7 (f) refers to processing that is necessary for the legitimate interests of the controller “except where such interests are overridden by the interests [f]or fundamental rights and freedoms of the data subject which require protection under Article 1(1) [emphasis added]”. Article 1 (1) refers only to “fundamental rights and freedoms”, including the right to privacy. So a more faithful reading of the language in Article 7 (f) would require a balancing test that weighs the legitimate interests of the controller against the fundamental rights and freedoms of the data subject, or at least against interests that can be assimilated to fundamental rights and freedoms, not against an undefined and potentially wide range of interests.

- Because undefined “interests” of the data subject are now in scope, it is further suggested that the controller needs to show “compelling” interests in order for data processing to be legitimate. Having widened the set of interests on the data subject side that may be put into the balance in the assessment, the Opinion appears to introduce a new criterion or qualifier to the requirement that the controller’s interests be legitimate, by repeated references to “compelling” legitimate interests. Again, the structure of the language in Article 7 (f) is that the controller’s legitimate interests need to be balanced against the fundamental rights and freedoms of the data subject (which of course prevail if there is a conflict). There is no reference in 7(f) to “compelling” interests, and indeed the need to consider different degrees of “interests” seems only to arise because of the novel construction put on Article 7 (f) by the Working Party, pursuant to which not only fundamental rights and freedoms of the data subject need to be considered (cf. Article 1(1) as above), but also “interests”, which may be trivial or compelling.

- Moreover, the Opinion seems to introduce a new legal standard, by referring in multiple instances to the need for controller’s interests to override those of the data subject in order for processing to be legal under Article 7 (f), rather than simply not being over-ridden by the interests or fundamental rights of the data subject, or indeed being delicately balanced. This is a clear and surprising departure from the structure of Article 7 (f); were it to be reproduced in the forthcoming general data protection regulation, as the WP 29 seems to envisage, this would be a cause for concern.

- The Opinion points in some of the examples to the increased “influence” an organisation may have over a data subject as a result of the collection, combination and processing of personal data. In a similar way, references are made to the “informational power” imbalance and the need for the controller/processor to consider the potential “impact”, emotional or otherwise that the processing might have on a data subject. Such assumptions should be verified on a case-by-case basis in order to ensure that the use of this legal ground is not restricted for reasons linked rather to the unlawful use of other legal grounds such as consent or contract. Furthermore, FEDMA would like to reassert that direct marketing is not about an organisation exercising “informational” power over a consumer but about an organisation to be able to better serve clients and prospects and to provide relevant commercial or non-commercial information to them.
- FEDMA urges the WP 29 to consider amending its Opinion to include a comparative analysis of the legal grounds for processing with regard to their potential for protecting the privacy of the data subject. In particular, the fact that the processing is necessary for a contract legal ground requires full identification of the data subject, and that the (especially explicit) consent ground either requires or incentivises the same, the “legitimate interests” ground would appear to have value in that it does not require or incentivise identification. This fact should be taken into account when organisations carry out the balancing test.

II. Recommendations:

- FEDMA would like to call for easily understandable guidance in the implementation of the rules.
- It is important to restate the legitimate interest ground is of equal importance to the other legal grounds for processing personal data, and is the only ground limited by the principles of proportionality, subsidiarity, compatible use and the requirement to provide information about why the personal information is being processed and data protection rights to the data subject.
- Finally, FEDMA would like to take advantage of this opportunity to clarify an important aspect of the rules governing the direct marketing industry. There is a distinction between the general legal requirements under the Privacy and Electronic Communications Directive for individuals to subscribe/opt-in to receive unsolicited direct marketing via electronic communication channels and the legal grounds under Directive 95/46 on which personal data can be processed for direct marketing purposes. The first situation refers to a provision of the Privacy and Electronic Communications Directive for the sending of commercial/charitable/unsolicited direct marketing communication through electronic channels. This legal requirement for individuals to subscribe/opt-in is separate from the grounds for the processing of personal data, covered by Directive 95/46, but complementary. Under Directive 95/46 a marketer has the possibility to rely on a number of grounds for processing personal data including, necessary in connection with a contract to which the data subject is a party, consent, or its legitimate interest, depending of the situation. The confusion of the rules for the sending of unsolicited direct marketing messages via electronic communication and the rules on the legal grounds for the processing of personal data needs to be avoided.