

FEDMA publishes European marketing code

European direct marketers now have a self-regulatory tool to help them comply with EU data protection laws. The creation of FEDMA's 'approved' code of practice is a result of give and take between the marketing community and national data protection authorities. By **Laura Linkomies**.

The European Code of Practice for the use of Personal Data in Direct Marketing was finally adopted in June after five years of negotiations. The code, published by the Federation of European Direct Marketing (FEDMA), aims to clarify the EU Data Protection Directive's provisions on direct marketing for practitioners in the field. It is also significant as being the first European level code approved by the EU Article 29 Data Protection Working Party.

Alastair Tempest, general manager of public affairs at FEDMA, explained at *Privacy Laws & Business*' 16th International Conference, held in Cambridge in July, how the code was drafted and what it means to direct marketers. "The code was drafted on behalf of the direct marketing industry, not any specific companies," he said. "As it became clear that the EU Data Protection Directive lacked clarity in some parts, it was seen necessary to write a code that would be understood by people who were not lawyers, but worked in direct marketing," he continued. "FEDMA made the first contact with the EU Data Protection Working Party, which consists of national data protection authorities and approves the codes, as early as 1996. Time was not ripe then, and we returned to the issue two years later", he continued.

CODE TRANSLATES PRINCIPLES INTO PRACTICAL ADVICE

FEDMA benefited from the fact that some national direct marketing associations had already negotiated marketing codes with their data protection authorities. In the Netherlands, for example, the law actually requires codes of practice to be established.

"The first questions that we had to

tackle were what the code should be like, and who would be the main players in the negotiations," Tempest explained. "We took the view that the code should bring limited, but solid added value, and aim at explaining what the directive's provisions mean to direct marketers at the national and the European level."

Tempest pointed out that the directive is about privacy principles, whereas the code illustrates best practice by means of examples.

The code includes a useful definition of direct marketing. It says that direct marketing is "the communication

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by whatever means (including but not limited to mail, fax, telephone, online services etc.) of any advertising or marketing material, which is carried out by the direct marketer itself, or on its behalf, and which is directed to particular individuals."

Tempest said the code is not media-specific. "It applies from direct mail to telephone marketing and electronic communications. However, we intend to draft a separate annex on e-communications later this year, and hopefully have that approved by the EU Data Protection Working Party."

FIVE-YEAR TIME FRAME

Better planning and communication could have shortened the five-year negotiation process, said Tempest. "We should have done our homework better and done a lot more research on how each country was dealing with self-regulation. Much *ad hoc* work was carried out. On the other hand, as we were the first to publish a European code, we had to break the ice. Also, communication with the EU Data Protection Working Party was not always as good as it could have been. We should have been talking with the whole group, not just with the Task Force [a sub group of the Working Party]. In the end we received many comments from the Working Party that had not previously come through the Task Force, and that made the process even longer."

Although the Working Party published guidelines on drafting European codes of conduct back in 1998, Tempest was of the view that it would now be useful to revise those guidelines.

Peter Hustinx, Commissioner of the Dutch DPA and former chairman of the Working Party, conceded that the five-year negotiation period was far too long. "We took a long time because of the complexities and the novelty of the issue. Communication might have been better. However, as other groups approach us with their draft codes, it has to be said that organisations need to be prepared to negotiate at two or three different stages."

SPECIFIC ADDED VALUE

Tempest said that the code will define best practice at European level. "The code will be used to solve questions about direct marketing across borders. It is not intended to suppress national laws and regulations, but will be used when the national law does not regulate. The code also brings specific added value in the issue of marketing to chil-

dren. Neither the Data Protection Directive, nor the E-communications Directive mention children.”

The code states that when collecting data from children, marketers have to make a reasonable effort to inform the parent or child of how their details will be used. The information has to be presented in a form that is understandable to children. By children, the code means “any individual aged up to 14-years old unless otherwise defined in national legislation /self-regulation.

The code also attempts to clarify the question of applicable law; a controversial element of the EU directive which has caused problems for businesses operating across different countries. The code presents different scenarios where data controllers, data processors and direct marketers are in different countries. An easy-to-read table shows clearly which is the applicable law in each case.

Asked whether FEDMA could approve codes of conduct drafted by individual companies, Tempest said it was an extremely interesting idea, and he would welcome such a possibility if staff resources were available. Another question from the audience raised the issue of whether a company involved in direct marketing can assume to be compliant with European data protection law if it is applying the FEDMA code. Tempest said that there would be a strong presumption that this would be the case.

OVERSIGHT

Various parties will monitor the working of the code in practice. A FEDMA committee will conduct an annual review, and the Working Party will also monitor its progress. In addition, national data protection authorities are encouraged to monitor compliance. All other parties are also encouraged to send comments directly to FEDMA or their national direct marketing associations.



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FURTHER INFORMATION: For additional details on the FEDMA marketing code: www.fedma.org

The FEDMA marketing code: A summary

The FEDMA code is a self-regulatory tool, with the aim of translating the Data Protection Directive's provisions into language that can be more easily interpreted by marketers. In addition, it deals with problems that are specifically related to the direct marketing sector. The main aspects addressing the directive's provisions are as follows:

APPLICABLE LAW

Marketers established outside the EU/EEA territory (and do not provide adequate protection for personal data) have to process personal data under the data protection legislation of that EU/EEA country where it uses equipment. If a direct marketer is located in different EU/EEA member states and each of them acts as a 'data controller', each establishment should respect the national laws of the country in which they are established.

COLLECTING PERSONAL DATA

An opportunity to opt-out from an organisation's own direct marketing has to be offered at the time of data collection. If this is not possible (small space ads or telemarketing), the information has to be provided in the first written communication sent out to consumers. When data is not collected from consumers themselves, but through rented lists or questionnaires, marketers have to ensure that consumers nevertheless receive the same information as if contact had been made directly. When businesses include marketing materials from third parties in their own mailings, consumers need to be able to identify who the 'data controller' is. There are also specific provisions on collecting data from children.

RESPONSIBILITIES OF MARKETERS

In addition to complying with all other data protection principles, controllers have to ensure that data is accurate and kept up-to-date. This can be achieved with the help of suppression lists. Data controllers who disclose their customer/prospect lists to other organisations should take reasonable steps (eg. request an example of the material) to investigate how the data will be used. Before disclosing data, list brokers and other marketers should enter into a written agreement with any third party by which the user undertakes to follow the rules of the FEDMA code of conduct.

DEALING WITH CONSUMERS' REQUESTS

FEDMA recommends that marketers supply information requested by consumers within 20 working days. They are not obliged to respond to requests made at unreasonable intervals (as defined in national data protection laws or codes of conduct).

PREFERENCE SERVICE SYSTEMS

Marketers should operate a suppression system to prevent the use of names or other personal data of consumers who do not wish to receive direct marketing. Marketers should act on these requests within four weeks of receiving them. Details of suppression requests should be kept in preference service systems for at least a period of three years. Specific e-mail suppression lists have to be updated more often. Marketers should also observe the rules and regulations of any nationally operated marketing preference systems (eg. do-not-call/mail lists).

TRANSFERS TO NON-EU COUNTRIES

The same rules apply as per national data protection laws defining sufficient safeguards for transfers (contracts, consent etc.).