FEDMA position paper

April 2017

# FEDMA input to the Commission consultation on the Building of the European Data Economy

**FEDMA supports the objective of the Digital Single Market to give better access to goods and services across Europe.** In line with President Juncker's statement "By creating a connected Digital Single Market, we can generate up to € 250 billion of additional growth in Europe in the course of the mandate of the next Commission, thereby creating hundreds of thousands of new jobs, notably for younger job-seekers, and a vibrant knowledge-based society", we believe that the European Union can strongly benefit from the development of the digital economy.

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.

**A strong European data economy is vital to European organisations.** Big Data is essential to create, personalise, adapt services/products and generate investment. The more complex products, services and markets are, the more organisations, especially SMEs, need data to understand trends and react accordingly. Data-driven marketing is fueled by personal data (regulated by the General Data Protection Regulation) and non-personal data (regulated by some specific laws such as Directive on trade secrets but mostly governed by contractual relationships).

**Reaching the right balance between trade secrets and data flow is crucial.** FEDMA wishes to minimise the creation of dominant powers, to limit the risk of abuse of dominant position, to ensure as much as possible that data is available on the market while at the same time respecting trade secrets, intellectual property and database rights.

**The current contractual basis for exchange of data B2B is efficient.** FEDMA encourages the Commission to continue discussions around industry practices. FEDMA also encourages the Commission to assess the existing rules (in particular the GDPR and the Trade Secret Directive) according to various situations in which data can be accessed and used.

**Federation of European Direct and Interactive Marketing**
Av. Des Arts 43, 5th Floor, 1040 Brussels
+32 2 779 4268 www.fedma.org

## A strong European data economy is vital to European organisations

**Consumers expect personalised services and products.** They also understand more and more that we live in a data-driven world. In the UK, 52% now view their personal information as an asset to be used to negotiate better deals with brands, up from 40% in 2012. What's more, an entrepreneurial data mindset is apparent across the majority of consumers, with 80% claiming that personal data is their property and they should be able to trade it as they see fit1. In Holland, 67% of respondents think sharing personal data is part of modern life[2]. Therefore, data is vital to the data-driven marketing industry.

**Our industry depends to a significant extent on data.** The more complex products, product development and segmented markets are, the more organisations need very detailed and granular data to understand trends and react accordingly. In the B2C area, consumers expect a very individualized approach. The issue is to get data so as to be able to provide new customers – even if we do not know anything about them – with the right products at the right time through the right channel.

**Data can be acquired directly or indirectly, from the public sector, other commercial or technical sources.** Data-driven marketing organisations collect consumer information from a variety of sources both first party and third party. The increasing use of digital channels (internet, email and mobile) by consumers has meant that organisations can collect information about consumers, through various sources. The internet of things provides another way for organisations to collect information about consumers. Organisations collecting consumer data may sell/licence it to third parties. They must have collected the appropriate permission from the consumer under data protection legislation depending on the marketing channel to pass the customer information on to third parties. In the IoT context, the data-driven marketing industry expects essentially to purchase or rent data through third parties. Moreover, in the IoT context and M2M communication, most of the data is observed. The data observed in the IoT sector will essentially be non-personal. Furthermore, the personal data may be anonymized. Data may be derived from the observed data. Moreover, statistics may be further inferred.

**The data can be personal and non-personal.** Data-driven marketing is fueled by personal data (regulated by the General Data Protection Regulation) and non-personal data (regulated by some specific laws such as Directive on trade secrets but mostly governed by contractual relationships). Machine generated data may be personal or non-personal. If the data is personal, it may be anonymised or processed in a pseudonymous manner. Anonymisation and pseudonymisation can facilitate the use of the personal data in other circumstances. Individualised marketing might not necessarily be on the basis of individualized personal data. Organisations are still able to build certain market clusters so that they are able to recognize how to adapt their behavior/approach to the market cluster they are dealing with. However, in order to create these clusters and in order to understand their needs and habits, organisations need data access on a wide range which

[1] UK DMA Study "What the Consumer really thinks", June 2015 https://dma.org.uk/uploads/ckeditor/Data-privacy-2015-what-consumers-really-thinks_final.pdf

[2] DDMA study, Data in Commerce, February 2017 https://ddma.nl/onderzoek-en-publicaties/

allows them to build these clusters and to justify significant connections within these non-personal data.

**Data-driven marketing organisations are part of the data-driven economy because they exchange and use data in the following ways**:

- in a B2C context: the information comes directly from the consumer (e.g. through an order or through information requests or the visit of a website).

- in a B2B context: the information comes through purchase or rent of data. Data can also be collected directly in B2B context (through order, through visit of website, through registration, etc.).

The first objective could be to enhance relevance of promotion, to make sure the right advertising reaches the right consumer at the right moment. E.g. Real time biding (RTB), Retargeting, Cross promotions among two companies. In this case, most of the data is pseudonymised.

The second objective is to improve products or services (e.g. improved algorithm for RTB, more practical guidebooks). In this case, the data can be anonymous without affecting the end objective of improving products and services. The objective is also to identify societal trends to be able to foresee what consumer preferences and need will be two years later to develop the right product and service at the right time. The data collected by the Oyster Card in the London tube is anonymised and processed for the purpose of identifying peak hours. Travelers can be informed in real time of peaks of passengers. Car industry manufacturers can also identify potential traffic jams and inform travelers on the bases of anonymised data.

The third objective can be lean production and lean logistics in the future. The data can be anonymous. In the logistics area, if you have detailed data on traffic and/or trucks driving so to ensure that trucks are used to their full capacity. If a car has an accident on slippery road, the manufacturer can collect this information, make it anonymous and then share it with all other cars so that when a car is driven on the slippery road, the car will inform the driver to be cautious.

### Reaching the right balance for access to data

FEDMA is pleased that the Commission uses the term “access to data” rather than “ownership” of data which we find misleading.

**It is important to understand that data in itself is not necessarily valuable and its added value can expire quite quickly**. The value of the data comes from analytics and from aggregation of data.

**The question of who has access to raw data is very delicate**. Unlike the GDPR, it is not data protection as a fundamental right which is discussed here but data flow and protection from an economic perspective in B2B scenario.

### Respecting the diversity of commercial interests

**Overall the key challenge is to reach the right balance between flow of data and respecting trade secrets.** Indeed, there is the data that is generated and the data that is collected and then used. FEDMA would like to highlight that it is very important to reach the right balance between the investor in IoT (e.g. manufacturers), looking to make profit on data generated, and the rest of the data value chain, notably the retail and advertising industry using data to target consumers and sell. The data-driven marketing industry encourages the EU, within the IoT and M2M context, to facilitate free flow of non-personal or anonymised observed, derived and statistical data, especially with a public interest characteristic, taking into account trade secrets, pre-investment costs and intellectual property.

**FEDMA advices to deal distinctly with legal clarity regarding access to data and effective competition**. Terms of contract can provide further legal clarity regarding access to data. Effective competition should be dealt with under competition law. How to avoid information asymmetry in the market is a question of legal transparency which could be dealt with within the context of terms of contracts. Concentration of data is a competition question which should be dealt with under competition law. Further legal clarity may, if the contractual balance between the contractors is met, decrease the risk of concentration of data and the risk of market failure. But still, at this stage, we prefer to deal separately with the question of legal clarity regarding data access and effective competition to avoid market failures.

**The advertising market is very competitive. European SMEs struggle to remain competitive and enter market. As highlighted earlier, Big Data is vital.** Certain market players facilitate the access to market by unlocking the value of data and are beneficial to the markets**.** FEDMA encourages the Commission to have an open and positive approach regarding data providers focusing on their economic contribution and their capacity to unleash the benefits of the data driven economy, particularly for SMEs, in cross border situations. Data providers guarantee that data is matched confidentially, in line with data protection framework and in a way respecting trade secrets. They are a neutral ground enabling to enrich and sharpen data.

### The interface with the GDPR

**All data is not personal data.** The vast majority of data (e.g. M2M data) is non personal. Personal data can be anonymized. Anonymization is a process used to prevent a person's identity from being connected with information. Once data is anonymized, it can be analysed without connection to an individual. Experts have developed techniques that allow data to be anonymized in ways that can maximize both privacy and data quality. According to experts if de-identification is done properly, the risk of re-identifying individuals from anonymized data is less than 1% in most cases[3]. If the data following processing enables re-identification of the individual, then the data becomes personal and the controller will have to respect the GDPR rules.

[3] BSA report What's the Big Deal with Data?

**Talking of portability of non-personal data is confusing.** The GDPR already provides for a data portability right for the personal data of the data subject to provide him/her with more control over his/her personal data. However, in this context, portability refers to non-personal data (e.g. raw data) in a B2B context. The portability of data is a contractual issue to be dealt with in a contractual environment.

Competition law should be better enforced to protect business against abuse of dominant positions.

### The way forward

Europe must remain competitive in an increasingly digital and globalized world. Currently, exchange of data B2B is managed on a contractual basis. These legal arrangements are efficient. They provide organisations with the flexibility they need. These contractual arrangements to exchange data must naturally respect the law. They also rely on trust between the partners and their reputation in processing the data ethically (e.g. data hygiene and anonymization) and securely (e.g. avoiding data leaks). Reputational damages for organisations may be terrible and therefore, contractual trust in the data accountability (privacy and security aspects) of the organisations is key.

FEDMA encourages the Commission to continue discussions around industry practices. FEDMA also encourages the Commission to assess the existing rules (in particular the GDPR and the Trade Secret Directive) according to various situations in which data can be accessed and used.

Self-regulation can play a key role and should be further promoted.

Moreover, FEDMA encourages the following complementary steps:

- Development of data analysis and digital skills in the EU;
- Access and re-use of research data that is generated by public budgets. More information campaigns are necessary (e.g. on PSI Directive).
- Events focused on:
    - Increasing industry knowledge of new sources of data (e.g. public data) and industry best practices (e.g. sector standards, personal data/collective data spaces).
    - Increasing industry knowledge around contractual negotiations on contracts for exchange of data (especially when multiple parties are involved): e.g. specific legal oriented workshop targeted to help SMEs understand the basics to negotiate purchase or licensing of data.