



To whom it may concern,

Ever since GDPR superseded the Data Protection Directive, FEDMA has been working in order to ensure that the Regulation would be interpreted in the same way in all Member States. We have during the last year noticed a few worrying tendencies at Member State level when it comes to the interpretation.

One of these tendencies is, worryingly enough, a **reinterpretation of the applicable legal grounds within the GDPR**. There are six legal grounds outlined in article 6.1 of the GDPR, all legal grounds are equal. There is, however, a development in some member states trying to rule out the use of certain grounds as for instance the use of legitimate interest (Article 6.1 f) for the purpose of direct marketing.

FEDMA urges the relevant European and national authorities to ensure a harmonized and consistent interpretation of the GDPR in accordance with the wording in the articles and recitals of the GDPR as adopted by the EU institutions, notably for the six equal legal grounds for processing personal data.

FEDMA is very concerned by the development which allows national interpretations of the GDPR. FEDMA would like to point out that this tendency (a) makes a further obstacle to the fundamental rights of free movement of goods and services laid out in the Lisbon Treaty¹ (b) obstructs a common legal framework and harmonization which was the major purposes for the adoption of the GDPR.

The definition of legitimate interest (LI) is unchanged:

GDPR follows the understanding of Legitimate Interest in Art. 7 f) of the Data Protection Directive (95/46/eg). The Data Protection Authorities referred in their Guidelines on GDPR to the Working paper 217, which elaborates on LI under the Directive. Also, in the Closing statement of the Fashion ID case (ECJ C-40/17), the General Counsel stated that the main Definitions from the Directive are still valid if GDPR does not expressly form a new Definition (Rec 87). Comparing Art. 7 f) of the directive with the definition in the GDPR shows clearly that the Law does not differentiate².

The opt-out principle to Direct Marketing in the GDPR remains:

It is clear under Article 21 that processing of personal data for the purpose of direct marketing may be based on legitimate interest until the data subject objects to this. This is also supported in Recital 47 in which is stated that "The processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest". Overall, the GDPR clearly decided to maintain the opt-out principle on the use of personal data for the purpose of Direct Marketing, for example gathering, selection and dispatch.

¹C-518/07 Commission vs Germany; the CJEU emphasizes that the essence of the DPA task consists of 'establishing a fair balance between the right to private life and free movement of personal data'.

² Legitimate interest is defined in the law as "processing [that] is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child".



Primary law includes Freedom to conduct a business:

The law forms a co-existence of the protection of the data subject and the free movement of data spelled out in Art. 1 Par. 2 and 3. With this concept, the GDPR tries to balance the fundamental rights to protect personal data (Art. 8) and the Freedom to conduct a business (Art. 16)³ protected in the European Charter and mentioned in Rec. 1 of GDPR. This co-existence of rights builds the basis of the European Single Market and the fundamental rights of free movement of goods and services laid out in the Lisbon Treaty.

GDPR must respect primary law

Every interpretation of the GDPR, especially for legitimate interest (LI), has to ensure that this Primary Law is being respected. The LI assessment mirrors the legal framework, provided through the fundamental rights and the core elements of the European Single Market.

Legitimate interest can serve the purpose of direct marketing (freedom to conduct a business)

Certain member states insist that consent (Article 6.1 a) is the only legal ground that is valid for the purpose of direct marketing. This is neither supported through the wording of the GDPR, nor by the history of the clause. It ignores the legal framework built through fundamental right and the goals spelled out in the GDPR itself. The legitimate interest legal ground can be used in a wide variety of circumstances, which fall outside the other legal grounds. Most of the other legal grounds have quite narrow and precise instances where they can be used (e.g. necessity for the performance of a contract).

National GDPR interpretations must not obstruct the fundamental freedom of movement of goods and services

The free movement of goods and services may be limited by EU-legislation such as directives or regulations. However, the passing of all this legislation may not be in breach with the Treaty and must respect fundamental principles such as proportionality. As adopted by the EU-institutions, the GDPR is deemed to be in accordance with these principles. A stricter interpretation made by a member state that deviates from the wording in the GDPR ends up in an interpretation in breach of the Treaty since they are going further and thereby limiting the free movement of goods and services.

European supportive case law

This view is supported by the German Constitutional Court which recently overturned its “Solange” precedent⁴. The German Constitutional court has, in this case, not taken the definitions from German constitution but instead used the definitions of the European Fundamental Charter. The Court argued that definitions are independent from Member State laws, which in turn means that the interpretation

³ C-131/12 Google Spain the CJEU balanced the rights of privacy with the interests of the controller including the freedom to conduct a business from the Charter.

⁴ The Case (1 BvR 276/17), known as “Solange II” dealt with the conflict between the [German constitutional law](#) and [European Union law](#) case.



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of GDPR is independent from the national law of Member states, even from their individual Constitution.

It is worth considering the extension of this interpretation to legitimate interest too. Indeed, if each Member State's interpretation of the legal ground for the processing of personal data for the purpose of direct marketing is based on national legislation rather than from the principles of the Charters, it will lead to legal fragmentation and inconsistency.

We would like to remind that already in the case C-468/10, C-469/10, (ASNEF + FECEMD./ Administración del Estado) which was decided based on the Data Protection Directive, the European Union Court of Justice refused any room for national deviances.

Therefore, and for the reasons mentioned, FEDMA urges the European Commission, the European Data Protection Board, the National Data Protection Authorities to ensure a harmonized and consistent interpretation in accordance with the wording in the articles and recitals of the GDPR as adopted by the EU institutions.

As specified previously, FEDMA encourages the EDPB to organize workshops in the future and we look very much forward to receiving an invitation to the **potential workshop on legitimate interest**. The EDPB has an opportunity when drafting its guidelines on legitimate interests to include a **principle-based checklist or framework, in line with its previous opinion, for organisations** wanting to use this legal ground for processing personal data under the GDPR. A highlevel framework for legitimate interest assessments (LIA) could **reassure on the use of legitimate interest**, which can be used to process personal data by many different sectors. A principle-based checklist or framework will be future proof against technological developments and will also leave sufficient grounds for other GDPR tools- e.g. Codes of Conduct with industry best practices and specificities.

About FEDMA

FEDMA is the Federation of European Direct and Interactive Marketing and represents the interests of data-driven marketers from across Europe in Brussels. It operates mainly through the participation of European DMAs and significant companies. FEDMA's industry code is the only one approved and endorsed by the Article 29 working party.

Data-driven marketing is a vital part of the European economy annually contributing billions of Euros across the 28 member states. Businesses use data-driven marketing to talk directly to existing and potential customers to promote products or services. It allows them to target people with a personalized message and is a cost-effective way to generate sales, build long-lasting relationships with customers and raise brand awareness.

It's a data-driven industry that relies on data to deliver targeted, relevant, timely messages and enhance the customer's experience. The industry has a large presence offline and online, in the form of advertising mail, mobile, email, social media, online and telemarketing.