



FEDMA, the Federation of European Direct and Interactive Marketing, draws your attention to tendencies, which in our view, undermine the agreement reached on the General Data Protection Regulation. FEDMA defends a thriving environment for marketers powered by user's trust.

FEDMA is reaching out to prevent irreversible damage to the data marketing industry, to the ecosystem of publishers and reinforcement of small number of dominant Big Tech firms which hold a large part of the world's data, as indicated in the recently adopted European strategy for data.

- We call for a balanced interpretation of the GDPR to enable European business to have access to household data, to benefit from conscientious profiling and reach out to prospects.
- We call for a consistent implementation of this balanced interpretation of the GDPR.
- We call for legislative coherence between GDPR and future proposals to maintain a healthy competition on the EU markets.

Tendencies which threaten the benefits of the GDPR:

- Inconsistent interpretation of a common framework
- Conservative reinterpretation of a common legal framework

There are six legal grounds outlined in 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 for the purpose of direct marketing.

Key risks for the EU competitiveness on a global scale:

- Loss of legitimacy for data marketing industry

Data marketing is a legitimate industry which provides effective forms of advertising. Recital 47 of the GDPR provides that direct marketing may be a legitimate interest (LI). Moreover, sharing of personal data among business/controllers may also be lawful on the grounds of legitimate interest which provides for the consideration of the interests of third parties. Legitimate interest (LI) does not give an unconditional right to process data and is not an easier legal basis than consent; it requires a demonstrable Legitimate Interest Assessment (LIA). Consumer trust can be sustained through accountable use of legitimate interest. Legitimate interest also reduces the risk of overloading consumers with multitude of consent requests. These requests can generate irritation and can even deteriorate the relationship between a company and its customers.

- European business will not have access to data they need to enter new markets or scale up

Data Marketing allows for selective advertisements that are relevant to individuals and households ; people see marketing that relates to them and about products in which they have an interest. The more the product or service is specific, the more data marketing is relevant to reach out to prospects. Investments in start-ups would slow down if these start-ups could not promote themselves. This selective approach also cuts down on waste and allows brands to allocate resources efficiently because they can choose the better channel to attract customers. This selective approach can be done conscientiously. Most brands and organisations use "household" selection criteria. The majority of European business do not need personal data on all the characteristics of an individual, but only on some specific household demographics (e.g. does this household



have an interest in Japan?). To know their potential customers, business need access to personal data and sharing of personal data (e.g. between the Japanese furniture store and a list broker).

- Legal uncertainty and increased costs of legal advice impact European business

GDPR expertise is becoming achievable and affordable mostly to major multinationals. The data marketing industry is working hard to implement the GDPR. For example, FEDMA is currently working on updating its Code of Conduct on processing of personal data for marketing purposes (our Code was the only Code approved under the previous Directive by the data protection authorities and the Commission). Codes of Conduct are a way to provide for further consistency across the EU, particularly for European SMEs. Our efforts to support SMEs and the better implementation of the GDPR are vain if member states reinterpret the GDPR.

- Free movement of goods and services could be jeopardized

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 EU Treaties thereby putting the effective free movement of goods and services at risk.

- Restricting LI as a legal basis disrupts the market

Companies across all industries constantly need to acquire new customers and Data Marketing facilitates efficient customer acquisition. Setting up barriers to process personal data for prospective purposes, dramatically increases the cost for Data Marketing, thereby forcing them to look for alternatives. These alternatives are generally: (a) mass communication through mass media (e.g. billboards) or (b) targeted communication through « walled gardens » operated by dominant digital intermediaries.

- Dominant positions in tech are strengthened, and publisher's revenues dwindle

If these tendencies continue, an EU start-up or local business may not be able to reach out to prospective clients, even by offline traditional media, and their choice of data sources will be strongly limited. The direct effects are multiple; notably increased cost per new acquired customer for the advertisers, absence of level playing field with countries which allow LI for prospects and strengthening the position on EU market of non-EU tech giants. The way forward left for European businesses to promote themselves to prospective clients (a part from mass advertising (e.g. billboards) will be online targeted communication through "walled gardens" operated by dominant digital intermediaries. These solutions imply increasing the risk of "walled gardens" by consolidating existing market dominance through network effects, increasing their access to data and reducing the possibility of a competitor entering a market or of disruptive innovation (innovators invest less in concentrated markets)¹. European business should not have to rely on selection criteria established by technological giants.

¹ « Measuring market power. The assessment of market power has to be case-specific, and it must take into account insights drawn from behavioural economics about the strength of consumers' biases towards default options and short-term gratification. The assessment should also factor in all the ways in which incumbents are protected (and can protect themselves) from competition. We stress two aspects in particular. First, even in an apparently fragmented marketplace, there can be market power. This kind of market power is linked to the concept of "unavoidable trading partner" and has sometimes been called "intermediation power" in the area of platforms. Second, if data that is not available to market entrants provides a strong competitive advantage, its possession may lead to market dominance. Therefore, any discussion of market power should analyse, case by case, the access to data available to the presumed dominant firm but not to competitors, and the sustainability of any such differential access to data ». [Extract from Commission study](#) June 2019



- Freedom of Press and battle against Fake News

Advertising is the single most important source of income for media companies. They finance their independent and quality journalism through this source of income.

Legal evidence that Direct Marketing can be a legitimate interest (LI)

Legitimate interest is a longstanding concept allowed for by the GDPR that reconciles the needs of the direct marketing industry with the legitimate interests of consumers.

- GDPR aims to **balance data protection with other fundamental rights and freedoms**, notably freedom to conduct a business, free movement of goods and services in the EU ([see previous FEDMA paper](#)) and freedom of speech (referred to in recital 4 GDPR and A29WP opinion on LI).
- GDPR adopts a **risk-based approach**. Also, the definition of LI has not changed since the 1995 Directive. In the case **C-468/10, C-469/10**, (ASNEF + FECEMD./ . Administración del Estado) which was decided based on the Data Protection Directive (i.e. same definition to LI as in GDPR), the European Union Court of Justice “made it clear that member states are not allowed to impose additional unilateral restrictions and requirements regarding the legal grounds for lawful data processing in their national laws.” (Source: Article 29 Working Party Opinion 2014 on LI).
- The A29WP Opinion calls for a **European approach “without either unduly restricting or unduly broadening the scope” of LI**. It equally provides direct marketing as an example of LI. LI must be used in an accountable manner, with a legitimate interest assessment, hence the careful wording of recital 47, which provides “as an example” that reasonable expectations of the data subject can be “relevant or appropriate relationship” such as “client”. However, a blanket exclusion of prospects is contrary to the GDPR. Reasonable expectations of the data subject must not refer exclusively to a contractual relationship. Moreover, article 14 of the GDPR requires for information to be provided to the data subject when data is not collected directly from the data subject. This means that legitimate interest may exist even if there is no contractual relationship between the controller and data subject. Some EU member states process data subjects’ tax information on the basis of legitimate interest.
- The A29WP Opinion refers to the need for the controller to take into account national law to know if the processing is “legitimate”. This **reference to the law is in a broad sense**, meaning “the purpose is not ruled out by national law”, but not as “check if the purpose needs consent under ePrivacy or other law”. Therefore, processing of personal data under the GDPR may rely on LI as a lawful ground, even if to reach out to the recipient, consent is required under the ePrivacy law. For example, email addresses are often used as identification in loyalty programs even though no emails are sent.
- **LI is in many cases a better safeguard for consumers’ privacy than consent**. LI requires a balancing test every time the data is processed, and as such shifts the responsibility for the processor from the single moment of collection towards the multiple instances of application of the data. As the individual still receives complete information about the processing he/she can immediately decide whether the processing might continue or not making, LI in fact as “effective” as consent. LI does not give an unconditional right to process personal data.
- Principle-based checklist or framework, in line with EDPB previous opinion on legitimate interest, could reassure and help organisations using this legal ground, which can be used to process personal data by many different sectors. This approach will take better account of future technological developments and will also leave sufficient grounds for other sectoral GDPR tools- e.g. **Codes of Conduct**.

i related individuals at a physical place