



FEDMA position paper on AI White Paper

FEDMA strongly encourages the European Commission to support trusted artificial intelligence across the EU. FEDMA is a member of the EU AI Alliance and the GDPR implementation expert group, and we wish to provide some suggestions, which in our view, will contribute to boosting AI.

Section II Question 1: In your opinion, how important are the following concerns about AI?

Artificial intelligence is transforming every economic sector and impacting society overall. Technologies based on artificial intelligence can lead to valuable innovations and positive performance for companies.

AI in marketing is the process of using data models, mathematics and algorithms to generate insights that can be used by marketers. Artificial intelligence systems, such as chatbots, recommendation systems, real-time bidding and vocal assistants, represent new opportunities for data-driven marketing. Yet, AI may raise ethical and legal challenges for marketers.

It is an important concern that AI may create safety risks and breach fundamental rights. This is why, we support a **principles-based approach to AI** as put forward by the European Tech Alliance; notably legislative consistency, avoiding overregulation of low risk AI self-regulation, to mitigate negative bias and future proof regulatory sandboxes. ([European Tech Alliance AI principles](#)).

Moreover, it is very important to distinguish between:

- a **bias** which can be the result of unrepresentative data inputs (or even biased system design); and,
- **unbalanced results**, can seem biased, but are actually objective because the data inputs are genuinely representative of the reality. (e.g. if a user only orders sports books from an online marketplace, the algorithm will tend to exacerbate the initial bias expressed by the user by suggesting books matching the user's interests).

Finally, specifically to data marketing, article 16 of the Charter for Fundamental Rights defends the freedom to conduct a business. A business needs to advertise, whichever the sector, whoever the product or service. **Algorithms and personal data must be distinguished**. Personal data can be aggregated and then processed in a manner to help build formulas, which, once applied to a situation or individual, produce an automated-decision. GDPR protects personal data and its article 22 is relevant for formulas. Further EU law also applies to formulas.

Do you think that the concerns expressed above can be addressed by applicable EU legislation?

The development and application of artificial intelligence are key to promote for economic growth as it can increase EU's competitiveness. Nevertheless, it should be noted that AI delivers value thanks to large amounts of data and high-quality algorithms. Current legislation should therefore be properly implemented and assessed before putting any new legislation forward. Any new legislation must be balanced to avoid hindering the development and use of this technology.



Regarding personal data protection, FEDMA is equally part of the European Commission stakeholder expert group on the implementation of the GDPR. We advised the Commission that the **GDPR ensures adequate protection to personal data in the context of AI** (see for example the response of the EDPB to MEP Sophie Int' Veld question on unfair algorithms) and that its principle-based approach will provide sufficient flexibility for the GDPR principles to apply to unforeseen forms of AI (e.g. legitimate interest and pseudonymization). It is therefore of **the utmost importance that the GDPR be implemented in a fair and balanced manner**. Indeed, **legitimate interest and pseudonymization are key GDPR tools for companies to use AI** (e.g. cleaning a contact list with a Robinson list). When the industry relies on legitimate interest for processing of personal data, the controller must do a legitimate interest assessment test in 3 steps: (a) is the purpose of the processing legitimate? (b) is the processing necessary? (c) do the interests of the controller override the rights and freedoms of the individual? This LIA must be updated regularly. This LIA puts the responsibility on the controller to assess and document that its processing will not override the data subjects' rights and freedoms. In turn, this increases the quality of the data and reduces the risk of biased or discriminatory outcomes. Currently, legitimate interest is a legal basis which is under growing pressure¹ and the EDPB will soon start the discussions on guidelines for LI. **If the right balance is not met between consent and LI, then many industry sectors, such as data marketing, will disappear or will not be able to use AI**, leaving behind a less competitive market dominant by large tech intermediaries. For further information, please refer to [FEDMA call for industry support to defend LI](#). Personal data used for advertising may be **special category of data** in which case the data subject must provide consent for the processing of the data to be valid. Machine learning tools for advertising which rely on special category of data under the GDPR may be high risk. However, some risks may be mitigated by pseudonymization. This GDPR tool requires for the identifying information (e.g. my name) to be kept totally separate from the value information (eg. Female who enjoys yoga). In addition, the key to link the data again must be kept separately. Pseudonymization also benefits AI: it reduces the risk in case of data breach for example. Moreover, many international companies have ethic boards in-house which help them use data and AI ethically.

Also, it should be noted that GDPR strengthened and raised awareness around the data subject rights enshrined in the regulation. For example, data subjects can object if they do not want their data processed for direct marketing purposes.

If you think that new rules are necessary for AI system, do you agree that the introduction of new compulsory requirements should be limited to high-risk applications?

Yes. Regulating Low risk applications could have a high risk for slowing innovative progress due to unnecessary procedures.

Do you agree with the approach to determine "high-risk" AI applications proposed in Section 5.B of the White Paper?

Other. The approach, with its exceptions, leaves quite some room for legal uncertainty. It would be wise to change the criteria to a system with no or barely any exceptions. The sector-specific approach could also be troublesome as it might be harder to distinguish sectors in practice. A better set of criteria might be: 1. If the AI use has possible risks and 2. if this will have a legal or similar impact on 'large' audience.

¹ Tennis association case



How important are the following mandatory requirements of a possible future regulatory framework for AI?

The quality of training data sets and the keeping of records and data is very important.

Information on the purpose and the nature of AI systems is important. The purpose of the AI is more important than the nature of the AI which may be quite technical.

Human oversight is important.

Robustness and accuracy of AI systems and clear liability and safety rules are important.

In addition to the existing EU legislation, in particular the data protection framework, including the General Data Protection Regulation and the Law Enforcement Directive, or, where relevant, the new possibly mandatory requirements foreseen above (see question above), do you think that the use of remote biometric identification systems (e.g. face recognition) and other technologies which may be used in public spaces need to be subject to further EU-level guidelines or regulation?

No. A priori Article 9 of the GDPR covers this type of data. If considered as necessary, EDPB guidance may further specify how the GDPR applies to remote biometric identification systems in a balanced way [which does not hamper innovation while continuing to protect data protection](#). **Do you believe that a voluntary labelling system (Section 5.G of the WhitePaper) would be useful for AI systems that are not considered high-risk in addition to existing legislation?**

Rather not. A voluntary labelling scheme should be considered but the risks of such a system should not be overlooked, e.g. an advantage for undertakings that can comply easier to conditions for labelling, even though the advantage for customers might be minimal.

What is the best way to ensure that AI is trustworthy, secure and in respect of European values and rules?

Proper enforcement of current rules is crucial. There are no high risks involved by the use of machine learning for data marketing purposes. Indeed, AI is used by data service providers to help other business identify prospects or understand better who their clients are. **The artificial intelligence relied upon for advertising is generally machine learning to target a group or an individual.** So, it's a machine learning technology which will take an automated decision to choose the most relevant ad for a group or an individual. Deep learning is currently not used in advertising. Moreover, as confirmed by the EDPB, **most advertising does not have a legal effect or similarly significant effect** (see EDPB guideline on profiling²). In terms of transparency, article 12-14 of the GDPR and consumer law provide for essential transparency requirements. For example, the Consumer Rights Directive provides for information on price discrimination³.

² In many typical cases the decision to present targeted advertising based on profiling will not have a similarly significant effect on individuals, for example an advertisement for a mainstream online fashion outlet based on a simple demographic profile: 'women in the Brussels region aged between 25 and 35 who are likely to be interested in fashion and certain clothing items'. However it is possible that it may do, depending upon the particular characteristics of the case, including: • the intrusiveness of the profiling process, including the tracking of individuals across different websites, devices and services; • the expectations and wishes of the individuals concerned; • the way the advert is delivered; or • using knowledge of the vulnerabilities of the data subjects targeted.

³ Price discrimination recital 45 and Article 6(1) ea in Consumer Rights Directive.



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Consumers are provided with information regarding targeted advertising online via the transparency program of Your online choices. An individual can find information about how behavioural advertising works, further information about cookies and the steps they can take to protect their privacy on the internet. This website is written and funded by the internet advertising industry and supports a pan-European industry initiative to enhance transparency and control for online behavioural advertising. It also helps the consumer understand why he/she is served a particular ad.

FEDMA and its DMAs remain open to further discussing this topic and provide support to policy makers and enforcers.