

Feedback from Data and Marketing Association of Finland (ASML)

Recommendations 2/2025 on the legal basis for requiring the creation of user accounts on e-commerce websites

We thank the EDPB for the opportunity to provide feedback. DMA Finland represents Finland's data-driven business and marketing ecosystem. Our member companies include Finland's leading data driven businesses and service providers of data economy.

Freedom to conduct a business and freedom of contract

The EU Charter Article 16 recognises the freedom to conduct a business as a fundamental right. As a distinct element under freedom to conduct a business is the freedom of contract (Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17). In *Alemo-Herron*, the CJEU expressly reaffirmed freedom of contract as a core component of the freedom to conduct a business. Article 16 protects commercial strategy and contractual structuring. It safeguards business decisions on whether, how, and on what terms to contract with customers. The draft recommendation interferes with core elements of the freedom to conduct a business and the freedom of contract.

Article 16, as the right to data protection, are not absolute and may be subject to limitations. In accordance with Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms must be provided for by law and respect the essence of those rights and freedoms and in compliance with the principle of proportionality, must be necessary and meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others (C-283/11, *Sky Österreich*, paragraph 46, repeated in e.g. C 477/14 *Pillbox UK Ltd*, paragraph 160). Recital 4 of the GDPR explicitly recognizes that the right to data protection must be balanced against other fundamental rights in accordance with the principle of proportionality.

"The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality." (Recital 4, the GDPR) That recital lists freedom to conduct a business specifically as one of those fundamental rights of the Charter.

According to the EDPB itself *"Within the boundaries of contractual law, and if applicable, consumer law, **controllers are free to design their business, services and contracts.** In some cases, a controller may wish to bundle several separate services or elements of a service with different*

fundamental purposes, features or rationale into one contract. This may create a ‘take it or leave it’ situation for data subjects who may only be interested in one of the services.” (EDPB Guidelines 2/2019, paragraph 36).

Under the freedom to conduct a business companies operating across the EU are entitled to design and structure their business models in accordance with lawful commercial objectives. **In numerous sectors, both online and offline, businesses have legitimately built models based on registration or subscription mechanisms.** These include, for example, hotels, car wash services, digital content platforms, and shopping club concepts that are accessible exclusively to registered customers. In such models, access to services is conditional upon a voluntary contractual relationship entered into by the customer. This basic approach reflects established market practice and forms a lawful and proportionate exercise of entrepreneurial freedom within the internal market.

Flawed or expansive interpretations

Furthermore, the draft presents an overly broad and expansive interpretation of the concept of “deceptive design”. **The draft appears to rest on a strange and distorted premise that the processing of personal data as such inherently exposes individuals to risks. The draft does not recognise the risk-based approach embedded in the GDPR.**

The draft further advances a subjective and flawed interpretation of loyalty programmes and customer accounts. **Loyalty programmes are a legitimate expression of the freedom to conduct a business** and constitute an essential technical and contractual mechanism for implementing loyalty programme terms, including personalised benefits, discounts, purchase history, and customer-specific conditions. **When properly designed, customer accounts support compliance with Article 25 GDPR.** They facilitate the effective exercise of data subject rights, in particular the right of access, rectification, and management of preferences. Customer accounts also contribute to the realisation of data subjects’ informational self-determination and support the principle of continuous transparency. Customer accounts serve important operational and consumer protection functions, such as product recalls, warranty management, order history retrieval, fraud prevention, delivery issue resolution, and customer support. Certain references in the document (for example hyperlink in paragraph 40) are outdated and disconnected from modern commercial practices and do not represent the realities of e-commerce in the 2020s.

From a practical perspective, the absence of first-party customer accounts frequently results in users authenticating via large third-party platforms to complete transactions, due to identification and payment requirements. This may increase data flows to such platforms, concentrate personal data in

fewer ecosystems, and introduce additional layers of processing over which EU-companies have limited control. If these recommendations were interpreted in this manner, they may lead to increased traffic and processing by large, mostly to US-based platforms, thereby as a side product weakening the competitive position of EU-based companies. These effects raise their own data protection and competition concerns.

The draft recommendation materially interferes with core aspects of the freedom to conduct a business and the freedom of contract and departs from the EDPB's own declaration on controllers' freedom to design their services and contracts. A blanket negative assessment of customer accounts and loyalty-based models is neither proportionate nor consistent with the GDPR's risk-based approach. It should also be questioned whether guidance of this kind is necessary at all?

Respectfully,

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