

# Profiling and Marketing

Data Protection Breakfast  
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# Agenda

- Introduction
- Profiling according to Swiss Law
  - Data protection principles
  - Personality Profiles
  - Duty to provide information
- Profiling in the Data Protection Law of the European Union
- Conclusions

# Processing Data for Marketing Purposes

- Targeted marketing requires a lot of information about the customer's needs and habits.
- Companies gather this information **from their customers** but also from **other sources** – for example by tracking customer's internet behaviour or by purchasing additional data and information from list brokers.
- Collecting and processing personal data for marketing purposes must comply with the data protection law.
- But is it really possible to comply with data protection principles in the age of Big Data, Google and Customer Relationship Management Systems (CRM)?

# Ten things you need to know about your customers

Who they are

What they do

Why, when and how they buy

How much money they have

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- Why do your customers need you?
- What do you know about your customers?
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## Know your customers' needs

### Ten things you need to know about your customers

- 1. Who they are**  
If you sell directly to individuals, find out your customers' gender, age and occupation. If you sell to other businesses, find out what industry they are in, their size and the kind of business they are. For example, are they a small private company or a big multinational? Knowing this can help you identify similar businesses that you could target.
- 2. What they do**  
If you sell directly to individuals, it's worth knowing their occupations and interests. If you sell to other businesses, it helps to have an understanding of what their business is trying to achieve.
- 3. Why they buy**  
If you know why customers buy a product or service, it's easier to match their needs to the benefits your business can offer.
- 4. When they buy**  
If you approach a customer just at the time they want to buy, you will massively increase your chances of success.
- 5. How they buy**  
For example, some people prefer to buy from a website, while others prefer a face-to-face meeting.
- 6. How much money they have**  
You'll be more successful if you can match what you're offering to what you know your customer can afford. Premium, higher priced products are unlikely to be successful if most of your customers are on a limited budget - unless you can identify new customers with the spending power to match.
- 7. What makes them feel good about buying**  
If you know what makes them tick, you can serve them in the way they prefer.
- 8. What they expect of you**  
For example, if your customers expect reliable delivery and you don't disappoint them, you stand to gain repeat business.
- 9. What they think about you**  
If your customers enjoy dealing with you, they're likely to buy more. And you can only tackle problems that customers have if you know what they are.
- 10. What they think about your competitors**  
If you know how your customers view your competition, you stand a much better chance of staying ahead of your rivals.

# Obtaining information on your customers

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## Know your customers' needs

### Obtaining information on your customers

Once you have identified what you need to know about your customers you can start gathering the information together.

There is a huge amount of market information available that you can tap into. Much of that information is available free of charge and is readily available. For example, your customer records will tell you which customers have purchased from you, what they purchased, when they placed their orders and how much and how often they buy. See our guide on **customer relationship management**.

If your current data doesn't provide you with the information you need, it is often worth asking customers directly. You can do this in face-to-face or telephone interviews, online surveys or group discussions.

Other sources of free customer information include:

- business contacts
- local business reference libraries
- your local district council
- Invest Northern Ireland
- the Northern Ireland Chamber of Commerce
- the internet
- UK Trade & Industry for information on export markets

Invest NI's Business Information Centre and Enterprise Europe Network provides free access business directories and market research information. **Find out about the market research services provided on the Enterprise Europe Network Northern Ireland website**.

If you can't find the information you require from these free sources, you might decide to buy the information you require. There is a huge amount of commercially published information that you can purchase direct from market information publishers. Alternatively, you might decide to employ a market research agency or freelance researcher to get the information you need. It can be more cost-effective to use the services of a professional, although you will need to ensure you draw up a clear brief and budget.

**Search for accredited research providers on the Research Buyer's Guide website**.

For guidance on gaining information on your market, see our guide on **market research and**

# Data Protection Principles (CH)

- Personal data may only be processed for the **purpose** indicated at the time of collection, that is evident from the circumstances, or that is provided for by law.
- Its processing must be carried out in good faith and must be **proportionate**.
- The collection of the data and in particular the purpose of its processing must be **evident** to the data subject.
- When processing sensitive data or personality profiles the data controller has to comply with higher duty of care! This applies in particular to the **transparency** of the collection.

# Consent

- Anyone who processes personal data must not unlawfully breach the privacy of the data subjects in doing so (Art. 12 FADP).
- A breach of privacy is unlawful unless it is justified by the **consent** of the injured party, by an overriding private or public interest or by law (Art. 13 FADP).
- If the consent of the data subject is required for the processing of personal data, such consent is valid only if given **voluntarily** on the provision of **adequate information**. Additionally, consent must be given **expressly** in the case of processing of sensitive personal data or personality profiles (Art. 4 par.5 FADP).<sup>3</sup>
- The data controller must not process personal data against the express wish without justification.

# Personality Profile (Art. 3 para.2 letter d FADP)

- A personality profile is a collection of data that permits an assessment of **essential characteristics of the personality** of a **natural person**.
- The collection of various information about a person for a longer period of time is likely to be defined as a personality profile.
- The collection of names and addresses does not qualify as a personality profile.
- Customer Relationship Management Systems are likely to be considered as personality profiles the more personal data they contain and the longer the period is for which the data is has been collected.
- The EU Directive has no similar definition.

# Examples: Hotels and Mobility-Apps

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## Beispiel 1: Hotels

Hotels unterhalten Datenbanken mit Informationen über vergangene Aufenthalte der Gäste, über die Art der gebuchten Zimmer und der in Anspruch genommenen Dienstleistungen. Dies ermöglicht es dem Hotelbetreiber, „VIP-Kunden“ zu identifizieren und diesen Kunden beim nächsten Aufenthalt einen gehobenen Service zu bieten, sei es durch ein Zimmer-Upgrade, sei es durch kleine Aufmerksamkeiten (Willkommensgeschenke), sei es durch die Bereithaltung der Lieblingszeitung am Morgen. Stammkunden, die eine Weile nicht mehr zu Gast waren, können in Werbeaktionen gezielt zu einem neuen Besuch animiert werden. Zudem können Kundenbefragungen durchgeführt werden, um Erkenntnisse über die Kundenzufriedenheit zu gewinnen. Mit intelligenter Software können die Datenbestände schließlich analysiert werden, um bei den Kunden Muster ausfindig zu machen, die Erkenntnisse für die Ausgestaltung der Räume und für die angebotenen Serviceleistungen liefern.

## Beispiel 2: Mobilitäts-Apps

Ob Car Sharing oder Taxi: Die Betreiber von Mobilitäts-Apps bewerten ihre Kunden.

- Bei den *Taxi-Apps* haben nicht nur die Fahrgäste die Möglichkeit, Taxifahrer und deren Fahrzeuge zu bewerten. Umgekehrt bewerten auch die Fahrer ihre Fahrgäste. Auf diese Weise werden „VIP-Kunden“ und „Problemkunden“ identifiziert. Bestellt ein „VIP-Kunde“ ein Taxi, wird er bei den angesprochenen Taxifahrern als „VIP-Kunde“ angezeigt und im Zweifel schneller bedient, als dies bei einem Durchschnittskunden der Fall ist.
- Bei den *Car Sharing-Apps* wird dagegen erfasst, ob Fahrzeuge nach dem Gebrauch als verschmutzt oder beschädigt gemeldet werden. Häufen sich derartige Negativbewertungen, wird der Anbieter entscheiden, ob die Kundenbeziehung fortgesetzt wird. Auch die Kundenbewertungen, die bei den Mobilitäts-Apps vorgenommen werden, lassen sich durch intelligente Software analysieren, um Muster ausfindig zu machen. Häufen sich in bestimmten Regionen beispielsweise Negativbewertungen bei den genutzten Fahrzeugen, wird der Car Sharing-Anbieter erwägen, ob er in diesen Regionen seinen Dienst einstellt.

# Duty to provide Information (Art. 14 FADP)

- 1 The controller of the data file is obliged to inform the data subject of the **collection** of sensitive personal data or **personality profiles**; this duty to provide information also applies where the data is collected from third parties.
- 2 The data subject must be notified as a minimum of the following:
  - a. the controller of the data file;
  - b. the purpose of the processing;
  - c. the categories of data recipients if a disclosure of data is planned.
- 3 If the data is not collected from the data subject, the data subject must be informed at the latest **when the data is stored** or if the data is not stored, on its **first disclosure to a third party**.
- The controller of the data file is liable to a fine (up to CHF 100'000.00) if he wilfully provides false or incomplete information (Art. 34 para. 1 letter a FADP).

## Preconditions

- The duty to provide information only applies, if the collected personal data is to be integrated in a **data file**. A data file is a collection of personal data that is structured in such a way that the data is accessible by data subject (Art. 3 letter g FADP).
- The information obligation is applicable, if data is **collected actively**. If the personal data is received without involvement or active actions of the owner of the data file (or a third party on his behalf), the information obligation does not apply – even if the personal data is integrated in a data file.

# Gathering Information about Customer

- Even if the information is collected from the customer (for example by filling out a form on the companies website) the customer must be informed.
- The obligation to inform the customer also applies, if the data collected has been made generally accessible by the customer.
- If the information is collected from a third party (list brokers, credit agencies, affiliate companies, the internet), it' remains the data controller's obligation to provide the information to the customer.

# How to provide Information

- The customer must be **actively informed** by the data controller about
  - the controller of the data file (name and adress of the data controller)
  - the purpose of the processing
  - the category of data recipients if a disclosure of data is planned.
- These are the minimum requirements!
- There are **no formal requirements** for the provision of the information. For reasons of proof it should be in writing (general terms and conditions, data privacy policy) or in another documented format.
- Customers consent is not required – it is not necessary that he accepts the GTC or the data privacy policy unless consent is required otherwise.

## Purpose of Processing and Recipients

- Customer must be informed about all purposes of the processing for which the data are intended.
- The information must include potential future purposes.
- The company must provide information about the categories of data recipients – the information about the data recipient's identity is not required by law.
- If the purpose of the processing or the data recipients change, the information must be renewed!

# When to provide Information (I)

- In general the information must be provided **when the collection of personal data qualifies as a personality profile**.
- Examples:
  - If neither the already processed nor the newly collected customer's data are personality profiles but the combined data set must be qualified as one.
  - If the collected data does not qualify as personal data, but in combination with the already processed personal data it enables the data owner to evaluate certain aspects relating to the customer (Big Data, geographical data).
- The customer must be informed before, while or directly after the collection of his personal data. This duty also applies if a third party collects the personal data on behalf of the data controller (Art. 10a DSG). The data processor should be contractually obligated to provide the information to the customer.

## When to provide Information (II)

- If the personal data is collected from a third party, the information must be provided at the latest **when the data is stored** or on its first disclosure to a third party.
- If the company “buys” personal data from a list broker or a credit agency (who is not a processor under Art. 10a DSGVO) the information must be provided **when the company stores the personal data**.
- The customer must be informed again if for example the purpose of the processing alters.
- According to Art. 34 DSGVO data controllers are liable to a fine if they wilfully fail to inform the data subject in accordance with Article 14 paragraph 1 or 2.

## Exceptions (Art. 14 para. 4 and 5 FADP)

- The duty of the controller of the data file to provide information ceases to apply if the data subject **has already been informed** or, in cases under paragraph 3, if:
  - a. the storage or the disclosure of the data is expressly provided for by law; or
  - b. the provision of information is not possible or possible only with disproportionate inconvenience or expense.
- The controller of the data file may refuse, restrict or defer the provision of information subject to the requirements of Article 9 paragraphs 1 and 4 (formal enactment, overriding interests of third parties or own overriding interests) .

## Right to information (Art. 8 – 10 FADP)

- Any person may request information from the controller of a data file as to whether data concerning them is being processed.
- The controller of a data file must notify the data subject:
  - a. of all available data concerning the subject in the data file, including the available information on the source of the data;
  - b. the purpose of and if applicable the legal basis for the processing as well as the categories of the personal data processed, the other parties involved with the file and the data recipient.
- According to Art. 34 FADP data controllers are liable to a fine if they breach their obligations under Articles 8 –10 and 14, in that they wilfully provide false or incomplete information.

# European Union

- Profiling is generally viewed as a topic similar to “automated individual decisions” as regulated in Article 15 of the 1995 EU Data Protection Directive (Directive 95/46/EC), and it is unclear if and to what extent the rules on “automated individual decisions” can be extended to profiling (Niko Härting, <http://www.cr-online.de/blog/2014/03/07/confusion-on-profiling-what-regulation-do-we-need/> ).
- “Member States shall grant the right to every person **not to be subject to a decision** which produces legal effects concerning him or significantly affects him and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him, such as his **performance at work** , **creditworthiness**, **reliability**, **conduct**, etc”.

# EU General Data Protection Regulation (Draft)

- “1. Every natural person shall have the right not to be subject **to a measure** which produces legal effects concerning this natural person or significantly affects this natural person, and which is based solely on automated processing intended to evaluate certain personal aspects relating to this natural person or to analyse or predict in particular the natural person’s **performance at work, economic situation, location, health, personal preferences, reliability or behavior.**”

(EU Comm draft of a General Data Protection Regulation, 25 January 2012, p. 54)

# Expanded Protection

- The scope of the protection shall be expanded. Individuals will not only be protected against formal **decisions** but also against **measures** producing legal effects or significantly affecting them. For instance, the targeted marketing of specific medical products against cancer based on the search made by an individual on the internet would fall under this concept of 'measure' (Viviane Reding, [http://europa.eu/rapid/press-release\\_SPEECH-14-175\\_en.htm?locale=en](http://europa.eu/rapid/press-release_SPEECH-14-175_en.htm?locale=en)).

# Conclusions

- Provision of information to data subjects on the collection of their personality profiles in due time is crucial; breach of the obligation to provide information is liable to a fine.
- Processes must be established to provide complete information in due time upon request of the data subjects about their collected and processed personal data / personality profiles.
- Listbrokers to guarantee:
  - that the personal data / personality profiles were collected in a lawful manner; and
  - that the data controller may use and process the personal data / personality profiles for the intended purpose.
- Keep the upcoming legal developments on data protection in the EU and in Switzerland on your radar.

## Q & A

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