

# TradeTracker: Preparing for GDPR



*At TradeTracker, privacy and data protection is important to us. The new General Data Protection Regulation (GDPR) is set to significantly change the data protection landscape in Europe (and beyond) once it applies from 25 May 2018. It is the first change of its kind in around 20 years.*

*The GDPR affects all businesses that process the personal data of European citizens, even if the business itself or its technology is not based in the EU.*

*TradeTracker is committed to embracing this change but, as with many aspects of affiliate marketing, collaboration between the advertiser, publisher and TradeTracker (as the performance marketing network) will be key to facilitating compliance with the GDPR.*



## **What is the GDPR?**

The GDPR will replace the EU Data Protection Directive, which was implemented in European Member States through various national laws. The GDPR is therefore set to increase the harmonisation of data protection law throughout Europe.

## **Why was the GDPR created?**

The underlying theme of the GDPR is to enhance individuals' control over their personal data. The volume of personal data shared and commercialized in most industries has experienced rapid growth since the adoption of the Directive in October 1995. With more individuals providing increasing amounts of personal data, and more companies using that data than ever before, the European Commission sought to address public concerns over how companies handle this data.



## What is considered ‘personal data’?

The definition of personal data has been broadened under GDPR to include data which, in some EU countries at least, is not currently considered personal data. Cookies, device ID's, unique identifiers and other pseudonymous data may be considered personal data, even if that information does not enable a specific person to be identified. Information which enables a person to be singled out, rather than truly identified, will be brought under the scope of data protection law.



## Data Controllers and Processors

Before we are able to consider how to treat GDPR, it is first necessary to understand the roles of data controller and data processor in the use of personal data.

A data controller is the entity which determines the purpose and manner for which data is processed, either by itself or alongside others. This means that the data controller determines ‘why’ data is processed.

The data processor, on the other hand, does not make decisions as to why the data should be processed. However, it can make some limited decisions about ‘how’ the data should be processed. This means, for example, a data processor may make decisions about the type of software used in the processing, but it may not make decisions about the essential elements of the processing. A key essential element of processing is which personal data to process. Therefore, if a data processor, while assisting the data controller in achieving its purposes, decides what data should be processed to achieve those aims, it will most likely become a data controller jointly with the first controller.

This is all relevant because, notwithstanding anything written to the contrary in agreements between data controllers and processors, data controller and processor status is determined by fact. It always depends on the actual decision making undertaken by either party. Because of this, a processor can easily become a joint data controller if it decides what data to process when delivering services to the controller.



## What kind of **data** does TradeTracker handle?

TradeTracker collects various kinds of information in order to operate effectively and provide the best products, services and experiences to both our clients and consumers.

Broadly the information TradeTracker handles fits into two categories: the information we collect from the advertisers and publishers that work with us and the information we collect from consumers in order to track transactions accurately.

Under the GDPR, controllers and processors are required to “implement appropriate technical and organisational measures” taking into account “the state of the art and the costs of implementation and the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons”. TradeTracker has implemented such measures adequately.

- Data from Advertisers and Publishers

TradeTracker only uses data collected from its clients to deliver services clients have requested. For example, to communicate with them and inform them about their account and security updates. When we sign an agreement with a client, we capture all data which has been provided voluntarily by them. This normally includes their name and contact details. Clients may also provide information when using their TradeTracker account. We use this to verify their identity to protect from malicious account usage, and to protect the efficiency and security of the TradeTracker account service.



- Tracking transactions

Primarily TradeTracker uses the data we collect to facilitate the relationship between advertisers and publishers. In particular, to make sure that there is a record when a visitor to a publisher’s website is redirected to an advertiser’s website to then make a



sale or perform a desired action. This enables TradeTracker to reward the publisher for the consumer's action on the advertiser's website. Some of the data used for tracking will be considered personal data under the GDPR.

When TradeTracker tracks individual customer journeys from publisher websites to merchant websites, including where these journeys are commenced on one device but completed on another, this requires the processing of personal data.

For this purpose, TradeTracker does not use data which is able to identify an individual by name, but does use data which is specific to that individual. It therefore uses pseudonymous personal data.

To achieve cross device tracking, TradeTracker maintains a database showing unique device identifiers, arranged around a single profile. This allows TradeTracker to infer which multiple devices relate to the same individual.

In maintaining this database, TradeTracker is the sole data controller. It is able to process this database on the basis of legitimate interest, because its interests are not outweighed by the impact of individual's fundamental rights and freedoms.

In order to ensure that the impact on individuals is minimised, TradeTracker will ensure that this database only includes pseudonymous data, is periodically refreshed and kept up to date and is properly described in its fair processing notices. An additional safeguard is to allow data subjects to enjoy greater rights to their data in respect of the database. This is notwithstanding that the database contains pseudonymous data only.

When an individual undertakes a journey from a publisher website to a merchant website, this is made via the TradeTracker domains. As part of the tracking of this journey, TradeTracker uses cookies to uniquely identify each journey. It does not use each journey to maintain a list of journeys per individual, from which may be inferred more revealing information such as website usage over time, buying intent or predictive insight into future user behaviour.

As part of this tracking, the cross-device user database is cross referenced. However, it is our view that TradeTracker, the relevant publisher and the relevant merchant are always joint controllers in respect of this specific processing (including the cross-referenced aspects of the cross-device user database). This is because we consider the merchant to have determined the term of processing ("we wish to drive traffic to our website in order to increase sales and pay for advertising on a per transaction basis"), but TradeTracker, the publisher and the merchant have all decided which data will best be processed in order

to achieve this aim. TradeTracker in particular, has determined the economic model for this type of processing. Therefore, we consider this each of those entities to take on a joint controller status for that aspect of the processing.

We consider that this processing may be undertaken on the basis of the legitimate interest of each the three joint controllers. Again, this is because the interest is not outweighed by the impact to individual's fundamental rights and freedoms.

TradeTracker makes use of device fingerprinting in order to uniquely identify devices. This is a process which involves using a number of factors specific to the device.

This type of tracking is sometimes used as a fall-back measure, where cookies are not able to be set. Device fingerprinting may not always be permitted on the basis of legitimate interest, because it is likely to be used in scenarios where the individual has deliberately disabled the tracking by cookies. Therefore, TradeTracker restricts the use of device fingerprinting accordingly when information is accessible from the user.

## Fraud prevention

TradeTracker makes use of a number of pseudonymous data points in order to prevent and mitigate fraud. TradeTracker is the sole controller in respect of this processing, which is undertaken on a network level, notwithstanding the fact that it may benefit particular merchants or publishers. This is because TradeTracker itself has determined fraud prevention as the purpose of the processing, and there are no other entities which determine which data should be processed for this purpose.

We consider that this purpose of processing can be undertaken on the basis of legitimate interest, because the interest is not outweighed by the impact on the rights of the individual's fundamental rights and freedoms. This is particularly the case because the specific purpose pursued is especially compelling.



## How does TradeTracker **protect** its information?

TradeTracker is committed to keeping all data we hold safe, by implementing appropriate technical and organisational measures to protect against unauthorised or unlawful processing and against accidental loss, destruction or damage.

Such measures include:



- Various technical measures like TradeTracker's application security layers, identity and access management (including user right system), various data encryption principles and others.
- When we share information we control with other parties, such as Advertisers or Publishers, we only do so, insofar as it is reasonably necessary for providing our services and on the basis that they do not make independent use of this information.

## Processing personal data

According to the GDPR, there are six lawful bases for processing personal data. In the case of digital marketing, the two bases that are most used are consent and legitimate interest. A third, based on a contract, is often used by certain publishers, for example registered portals, cashback sites or modules based on email registration or another type of membership. These publishers have submitted their general terms and conditions or another form of agreement to their users, who (in turn) must have accepted these terms and conditions.



## What can **Advertisers** and **Publishers** do?

1

### **Don't inadvertently share personal data**

When sharing additional data with us, for example in the "affiliate remarks" section of a transaction, make sure that they are not inadvertently sharing personal data.

2

### **Be transparent**

Privacy policies will have to be overhauled in light of the GDPR. The requirements for what information needs to be provided to consumers are more extensive than the old regime. At the same time (and slightly contradictory) the information must be provided in a concise, transparent, intelligible and easily accessible way.

3

### **Keep informed**

Since much of the tracking functionality is carried out by cookies, keeping on top of how cookies are regulated by law is important. The EU "Cookie Directive" is currently being redrafted and TradeTracker shall continue to provide information as it comes available. The final version may require some practical changes.

4

### **Collaborate**

Developing an industry best practice will be helpful to providing more certainty under this new regime. Being part of an Publisher network is useful for this because of the close and mutually beneficial relationship between publishers and advertisers.



Furthermore, publishers can make use of the “Cookie Consent solution” available from the PageTools section of the TradeTracker platform, which should be completed to provide unambiguous information to the user and can only then form an adequate solution towards consent. We advise to use a solution appropriate to your business.

## Safeguard and next steps

TradeTracker maintains a list of all processing undertaken in accordance with Article 30 and ensures that this processing is kept up to date.

TradeTracker has appointed a Data Protection Officer in accordance with the Data Protection Officer Guidance issued by the Article 29 Working Party.

TradeTracker will publish and keep up to date a fair processing notice in accordance with Articles 13 and 14 of GDPR.

TradeTracker has implemented a data retention policy, such that no data is held longer than necessary considering the purpose for which it was collected.

Where TradeTracker is operating as a joint data controller, TradeTracker will enter data processing arrangements in accordance with Article 26 of GDPR. Therefore, TradeTracker has established these arrangement by a combination of its standard terms and conditions, and other policies and notices.

The liability of joint data controllers remains several to the extent that the respective responsibility of each controller is clearly delineated. Data processing arrangements can help ensure this is the case, by setting out which controller is responsible for which processing. The arrangement therefore seeks to avoid a scenario where one joint controller may be considered jointly liable for a breach of GDPR caused by other joint controllers.

Where TradeTracker is operating as the data processor for a merchant, for example in respect of merchant analytics, TradeTracker will consider, and if appropriate, enter any data processing agreements which are submitted to it by such merchants in accordance with Article 28.

TradeTracker will not enter data processing agreements in respect of any data for which it is a joint data controller.

## Disclaimer

*This article is for information purposes only and should not be construed as legal advice. We would recommend seeking independent advice with respect to the introduction of the GDPR.*

Helpful resources may be:

- A copy of the [GDPR](#) (REGULATION (EU) 2016/679) can be found on EUR Lex.
- The [IAB transparency & consent framework](#) for GDPR

## Contact us today

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