

Guidelines 08/2020 on the targeting of social media users

FEDMA welcomes the opportunity to be consulted by the EDPB on the guidelines 08/2020 on the targeting of social media users for public consultation. Please find below FEDMA's submission.

The guidelines are meant to address the issue of targeting of social media user. However, the content of the guidelines goes way beyond its intended scope directed at social media platform.

In particular, the guidelines provide requirements and clarifications of the concept of joint controllership, which could be directly applicable to most targeting practices in advertising, whether digital advertising, or through other channels.

This does not seem to be EDPB's intention, and it can be questioned whether the effects of this have been taken into account by EDPB.

Main comments on the scope of the guidelines:

1. Limiting the scope of the guidelines to social media

Targeted advertising takes place through a lot of channels, with various mechanisms. In many situations, advertisers and marketers will define a type of customer they want to engage with and share selection instructions with a service provider to display advertisement or send commercial communication to the corresponding target group because they know from their experience that their product/service offer is more interesting for certain groups of consumer than for others. These guidelines consider that such selection instructions make the advertiser/marketer jointly responsible for the related processing of data.

The recent ECJ judgments *Wirtschaftsakademie* (C-210/16) and *Fashion ID* (C-40/17) on the concept of *joint controllership* did not concern targeted advertising generally, whether online or offline, but focused on a specific service offered by the social media providers. FEDMA is concerned that the EDPB is deriving a generalisation from these court decisions to be applied to a broad industry sector, without considering specificities of each practice. FEDMA believes that the act of providing selection criteria for the placement of advertising does not automatically trigger a joint controllership, as many other criteria should also be taken into consideration. In particular, whether the targeter can input its own targeting selections on the social media database itself via an automated process, or whether the targeter is choosing and combining different targeting criteria provided by the social media platform with no direct manipulation of data should be considered. Ensuring that advertising reaches only individuals who are likely to be interested is a logical approach in the interest of both the targeted and the user. Such attempt should not automatically trigger the notion of joint controllership.

FEDMA calls on the EDPB to further clarify that the concept of joint controllership as presented in these guidelines is intended for targeting activities on social media platform only. In addition, these guidelines should provide greater details on how to determine the existence of joint controllerships when engaging with a social media platform.

If the scope of the guidelines is indeed social media platforms, this should be more explicitly set out to avoid unclarity. If the scope of the guidelines is wider than social media platforms, and is attempting at clarifying the concept of joint controllership, the guidelines should be sent out for public consultation one more time, in order to ensure that all affected industries get the chance to comment.

2. Taking better into account the imbalance of power between social media platform and targetter

FEDMA welcomes the inclusion of section 9.2 on the levels of responsibility. As these guidelines provide details on the responsibilities of targetters and social media platform, FEDMA believes that the concept of level and responsibility, and more specifically of primary controller, should be more prominent throughout the guidelines. In addition, the implication of a primary controller on the shared responsibilities of the joint controllers should be further detailed. Often, social media platforms are in a prominent position, able to impose “take it or leave it” conditions (paragraph 129). Targetter are in the difficult position to agree to those conditions or take the risk to alienate a significant and trending communication channel from their marketing strategy. In practice, it can be incredibly hard for a targetter to get in touch with the right people at social media companies to even broach the subject of negotiating a bespoke deal.

Concretely, Social Media can be seen as playing the role of a gatekeeper to reach an audience, forcefully imposing rules on the rest of the advertising ecosystem. The EDPB guidelines should further acknowledge this reality and provide reassurance for targetters on their level of responsibilities in order to protect them through legal certainty as to their responsibilities. IN addition, the EDPB could encourage social media to have a more open and flexible approach with the targetters using their services, thus facilitating the possibility for targetters to set boundaries on the use of their data.

FEDMA calls on the EDPB to recognise, at the forefront of these guidelines, the existing imbalance of powers between a social media platforms and a targetters which is unique, and to further integrate throughout the document, the practical implication such imbalance on the role and responsibilities of each parties. In addition, further work should be done with regard to the allocation of responsibilities between the primary controllers and the second controller in order to protect both joint with legal certainty as to their responsibilities.

3. Focusing more on the impact of social media on democracy

FEDMA welcomes the assessment of the risks to the rights and freedom posed by the processing of personal data for the targeting of social media users. In particular, the risks of undue influence and its potential undermining of the democratic electoral process, as well as its impact on access to information, with consequences for the pluralism of public

debate and increased political and ideological polarisation. Considering the seriousness of these issues identified by the EDPB and their consequences on the European society, FEDMA is surprised that the guideline focus solely on advertising issues (mostly commercial advertising, and to a limited part, political advertising).

FEDMA would encourage the EDPB to look beyond the advertising issues, and address the other risks related to the targeting of social media users.

Considering the broad scope of the guidelines, and the impact they may have on the advertising industry beyond the use of social media platforms, **FEDMA would like to make the following additional comments:**

1. Legitimate interest and reasonable expectations:

FEDMA welcomes the recognition in paragraph 5.2.1.B of the absence of hierarchy between the different legal basis recognised by the GDPR. In particular, example 3 which clearly recognise the validity of the legitimate interest of the targetter to process its customer's data for commercial communication, providing clarity on the use of that legal basis to process data.

The use of legitimate interest to process personal data is subject to the criteria of reasonable expectation of the data subject. However, such criteria are of subjective nature thus requires case by case assessments. The existence of a commercial relation between a user and a targetter would meet such requirement but should not be interpreted as the sole way to justify a reasonable expectation from the user. Similarly, the criteria of reasonable expectation should not be interpreted as requiring that the content of commercial communications be solely about similar products and services.

Finally, FEDMA would like to highlight that the criteria of reasonable expectation of the users should not necessarily be met (is not mandatory- when data is being processed on the basis of the legitimate interest of a third party, as foreseen in GDPR 6.1(f).

For example, the targeting of prospects, or a non-profit doing a win-back campaign to former benefactors could meet the requirement of the law for the use of legitimate interest as long as the targetter, at the time of collection, made sure that users were perfectly:

- informed of the fact that the e-mail address may be used for purposes of advertising via social media, and
- were given the ability to object prior to the processing, and during the whole time the data was processed by the advertiser.

FEDMA suggest adding the following example to the guidelines to further illustrate the different ways legitimate interest can apply in the context of targeting social media users, and would encourage the EDPB to look at additional use cases to be considered:

Ms. Jones contacts Solarpanelstoday to get an information brochure for solar panels on her house. After a free first consultation she concluded that solar panels are currently too expensive for her. Ms. Jones was also informed by Solarpanelstoday, at the moment of collection, that: (a) her e-mail address would be used for advertising of relevant offers from Solarpanelstoday; and (b) she may object to this processing at any time. Ms. Jones decides not to become a customer of Solarpanelstoday. The company has nevertheless added the e-mail address of Ms. Jones to its prospect e-mail database. Then, Solarpanelstoday uses its e-mail database, by allowing the social media provider to 'match' the list of e-mail addresses it holds with those held by the social media platform, in order to target the individuals concerned with a promotion of solar panels. Ms. Jones can benefit from this promotion to purchase solar panels while remaining within her budget.

2. Consent and GDPR principles

With the exception of example 2, and areas where the ePrivacy Directive applies, that these guidelines tend to over rely on the user's consent as the only possible legal basis to process data, effectively limiting the ability of targetters to fully consider all the options provided by the GDPR and run a thorough data protection impact assessment.

In these guidelines, the EDPB comments on the relationship between the concept of consent and the principles relating to processing of personal data (GDPR 5). Paragraph 52 says "*obtaining consent also does not negate or in any way diminish the controller's obligations to observe the principles of processing enshrined in the GDPR, especially Article 5 with regard to fairness, necessity and proportionality, as well as data quality. Even if the processing of personal data is based on consent of the data subject, this would not legitimize targeting which is disproportionate or unfair*". This quote is taken almost verbatim from the EDPB revised guideline on consent 05/2020, which is then taken from the WP opinion 15/2011. Consent is the only legal basis to process data which is not subject to a necessity requirement. It allows users to be presented with data processing opportunity which they can consent to.

While the principles of data processing must be respected, it is important that the scope of data processing which can be carried on the basis of the user's consent be not limited beyond the requirement of the law. Such limitations would risk limiting innovation based on data processing, and consequently reduce opportunities and meaningful choice for the data subject. The relations between the different legal basis to process data, especially consent, and the principles relating to processing of personal data should be further assessed.