

Response to consultation on guideline 8/2020 on the targeting of social media users

EuroCommerce

EuroCommerce is the voice for over 5 million retail, wholesale, and other trading companies. Our members include national federations in 31 countries, Europe's 35 leading retail and wholesale companies, and federations representing specific retail and wholesale sectors.

Introduction

EuroCommerce welcomes the opportunity to provide a contribution to the public consultation on guideline 8/2020 on the targeting of social media users. Covid-19 and the restrictions resulting from it have accelerated the digital transformation at unprecedented pace. Consumers are increasingly turning to online purchases, and this trend is likely to be permanent and growing. Retailers and social media platforms play a complimentary role, with social media providing visibility of products to consumers and pointers to where to buy. In turn, retailers use social media platforms to reach out to relevant consumers, but in most cases, retailers do not gain access by this means to information on the identity of the data subjects. Even though both retail companies and social media providers have active roles in the online advertisement environment, targeters have little or no influence over the development of the services and this aspect should be clearly reflected when developing guidelines on involved parties' responsibility and liability.

Below we summarise our key recommendations and detailed comments which we hope will be helpful.

Our key recommendations

- **Accountability for data processing should be based with the degree of control over the purpose and means of data processing.** Market players who have no control or influence over the processing of data should not be held accountable for how such data is processed. Currently there is a clear imbalance between the parties.
- **Clear and specific differentiation between the responsibility and liability of the social media platform provider and the targeter.** Currently, the definition of the roles of the social media platform and the targeter is unclear. There is an urgent need for further clarification of the roles and relationship between the social media platform and targeter take and their respective responsibilities and liability.
- **The use of legitimate interest in the social media context does not necessarily lead to worse protection of data subjects' fundamental rights.**
- **Stronger cooperation between national DPAs.** Divergent national interpretation of the CJEU judgment will lead to confusion and legal uncertainty to market players. More harmonisation and cooperation between different DPA's is necessary to avoid this. Publication of the final EDPB guidelines and guidance to complement the CJEU judgment will provide such clarity, and DPAs should await these rather than take national decisions.

SCOPE

- **On paragraph 5:** EuroCommerce believes that shared controllership between social media providers and other actors provided for in the CJEU ruling will not provide data subjects with strengthened or additional protection. Imposing joint controllership could lead to additional confusion and lack of clarity. Retailers (who fall under the definition of ‘other actors’) do not normally have control, influence, or power of decision over data processing. This instead lies with the social media provider, as do decisions on the provision of services to advertisers. Targeters rely on the data categories offered by social media providers and have no freedom or access to choose in these data sets. They get what they are given on a take it or leave it basis. For these reasons, we believe clearly that **controllership and data processing responsibility should lie solely with the social media platform operator.**
- **On paragraph 6:** There is a lot of unclarity and open questions regarding the liability and the responsibility of social medial platform, as well as which roles and responsibilities they take. It would be welcomed to have more clarity on different responsibilities and liability of social media service providers.

RISKS TO THE RIGHTS AND FREEDOMS OF USERS POSED BY THE PROCESSING OF PERSONAL DATA

- **On paragraph 8:** The introduction of the concept of ‘significant risk’ in paragraph 8 of the current draft Guidelines opens wide scope for varying interpretation. The level of risk for data subjects can vary significantly, depending on the data subject’s knowledge and overall understanding of what the data processing involves. A wrong interpretation by a national DPA or others could have a negative impact on the future development of online services. We would therefore ask for more detailed criteria for defining a significant risk to leave no room for misuse or misinterpretation.
- **On paragraph 9:** We understand the concerns set out in the draft guidance regarding personal data uses that could go beyond individuals’ reasonable expectations. However, the guidance needs to take into consideration the wide variation in individual expectations of data subjects, depending on their age and gender. It also depends on the type of webpage, and its purpose of its use by the data subject. This can be particularly true for companies’ loyalty programmes: a data subject’s reasonable expectations can depend on the information they were provided with when registering in the programme. A data subject’s reasonable expectations can change quite quickly, and this can often happen while using a webpage. It can therefore be hard to define reasonable expectations ahead of time. Additionally, the call for more transparency in the guideline should take full account of existing or recently adopted consumer protection rules under e.g. the Omnibus Directive (New Deal for Consumers) that already require more transparent provision of information to consumers (data subjects). Transparency and sharing information can be useful if the right information is shared; unfortunately, as things stand data subjects risk being overloaded with information that they do not have time to process and make use of, thus negating the purpose of such transparency. We would welcome guidelines on best practice in consistent and practical sharing of information. Retailers and wholesalers devote significant resource to making the consumer experience more enjoyable, and provide consumers with the necessary information. We believe that there is the need for more clarity and means to address the lack of transparency between different actors regarding the processing obligation.

ACTORS AND ROLES

- **On paragraph 22, 32, 33:** We agree with the draft Guidelines on data gathering powers of social media providers. Social media providers have the power to generate a large amount of data, and importantly, targets do not have access to this data nor to data about social media users. The targeter have no decision powers and do not conduct any data processing of their own, other than the collection and transfer of personal data to the social media provider. **An evaluation of the different stages of data processing could be a potential starting point for defining where the liability and responsibility of one actor ends and the**

other starts.

- **On paragraph 32 and 34 (in particular):** This paragraph of the Guidelines introduces joint controllership for data processing and causes us particular difficulty. As explained above, the roles of different actors and their degree of control differ widely. To impose an assumption of joint controllership would be unreasonable where actors' roles are not equal, which is the case currently. A social media provider has full decision-making powers, full access to, and ability to gather and process personal data. In contrast, the targeter has no decision power and no access to data being processed by the social media provider, thus rendering its ability to comply with the rules impossible. This lack of requested information required by GDPR and ePrivacy Directive when processing data, and the lack of scope to negotiate the provisions of social media platforms' standard contracts leave the targeter the option only of taking it or leaving it. Joint controllership is unreasonable to impose on an actor with no access to or control of all data processing steps. Controllers may be involved at different stages and to different degrees and it is important to carefully consider the various stages of processing of personal data before determining the involved parties' responsibility and liability. This can be a challenge. Because the social media services are offered on a "take it or leave it" basis, the targeter has no possibility to offer transparency to data subjects regarding the parties' responsibilities arising from joint controllership. Consequently, targeters can only refer data subjects to the data controls already offered within the social media services.

ANALYSIS OF DIFFERENT TARGETING MECHANISMS

- **On paragraph 45:** In the case of legitimate interest, transparency duties in terms of the data subject's opportunity to object before the processing is initiated will raise major challenges to retailers and wholesalers. We can always put information on a web page or in the mobile app, but we also know that users only read these provisions and react - if at all - when he or she receives a message, i.e. after the processing is done, and therefore too late to object.
- **On paragraph 53:** Many retail companies offer their customers a loyalty programme with various benefits. These are essential way for retailers to provide a relevant experience and for them to stay competitive on a global and national market. In providing members with clear information about the benefits offered before a customer decides to join the loyalty programme, Article 6(1)(b) can serve as an appropriate legal basis for the processing necessary to deliver the benefits set out in the terms and conditions. For example, communication regarding relevant offers and discounts on products that the member likes, both on the retail company's own website or third-party websites (e.g. a social media platform). In several examples, the EDPB has stated that Article 6(1)(b) cannot be used, yet this would seem to negate the possible use of legitimate interest as an appropriate legal basis for the processing of personal data related to the targeting on social media platforms. We would welcome clarification that Article 6(1)(b) may be used as a legal basis provided that the processing is necessary to fulfill the commitments set out in the loyalty program contract, and that communication on the retailer's own website and third party websites (e.g. a social media platform) is necessary to providing the member with a relevant service, and that the retailer in this instance complies with the GDPR fundamental principles e.g. as set out in Article 5. Once again, we want to stress the importance of not creating an online environment where consumers are overwhelmed with the information presented to them. It is common knowledge that data subjects are starting to experience "consent fatigue" when using online services. This results in data subjects submitting their consent without understanding the implications of their consent. We would welcome further guidance and clarifications on measures, such as best practice regarding information, data controls, and controls for exercising data subjects' rights, in general and especially measures that need to be implemented to be able to rely on "legitimate interest" as a legal basis.
- **On paragraph 68:** In the case of joint controllers, it is clear elsewhere that each must ensure that they have a legal basis for the processing. Yet this paragraph contradicts this by stating that one of the controllers can be in charge of collecting consent.

JOINT CONTROLLERSHIP AND RESPONSIBILITY

- **On paragraph 126:** These guidelines and recent judgments put targeters in a very difficult position, and we are concerned that the guidelines alone will not achieve what they intend. We need the guidelines to reflect the reality of targeters' position and help them to adequately protect their customers' personal data in an unequal bargaining position in which media platforms hold all the cards.

Additional calls for clarification

1. EuroCommerce members would very much appreciate the opportunity to receive a clarification of the interaction between the upcoming Guidance on the targeting of social media users and the ePrivacy Directive, in particular, Article 13 of the latter.
2. While the guidance provides a good description of the groups of actors, we miss any examples of the role and responsibilities of "other relevant actors" (agencies, ad networks, brokers, etc), and would welcome these to be properly defined and examples given in the upcoming EDPB's Guideline. If the further upcoming Guidelines what to be useful and used in practice they need to provide examples were the "other relevant actors" are included.
3. We would welcome further guidance on best practices how to obtain consent. It would be very important to have examples that reflect everyday situations and real-life experience, for example when placing cookies on website.

Contact:
Ena Salihovic - +32 2 737 05 83 - salihovic@eurocommerce.eu

Transparency Register ID: 84973761187-60