

PUBLIC CONSULTATION ON GUIDELINES 08/2020

VALIUZ FEEDBACK (www.valiuz.com)

Our observations are focused on the cases highlighted in article 5.2 “Targeting on the basis of provided data”, in particular the **legal basis** of the processing of personal data described in those cases.

1. Regarding article “5.2 Targeting on the basis of provided data”

1.1 Regarding article 5.2.1 “Data provided by the user to the social media provider”

First of all, in article 5.2.1, example 1, we understand that when company X asks a social media to display an advertising campaign to a targeted audience consisting of users of the social media, the processing may rely on two possible legal basis:

- legitimate interest (where possible)
- consent (in particular for processing involving tracking individuals across multiple websites).

In any case, the individuals that are targeted through the social media platform must be informed in respect of the GDPR.

As long as the guidelines state that company X and the social media platform are joint controllers, we understand that company X, as well as the social media platform, must:

- use the consent as the legal basis if the processing involves tracking (e-privacy directive)
- inform the individuals which are targeted, in the conditions set forth in the GDPR.

However, we would like to underline that the company X:

- has no relation with the users: it does not have access and does not know the users that are targeted by the social media, and never had a prior contact with them.
- does not use any tracking technology for the processing. Only the social media platform probably uses tracking technology, which requires the consent of the users.
- it is impossible in practice for company X to inform the social media users, nor to collect their consent.

As a consequence, we believe that company X and the social media platform are not in the same situations, even if they are joint controllers, and thus that they cannot have the same obligations and cannot rely on the same legal basis.

We believe that company X can rely on legitimate interest as a legal basis for the processing described in example 1, even if the social media platform must rely on the consent because it uses a tracking technology.

We would like to remind that according to GDPR (recital 47) states that:

*“The legitimate interests of a controller, **including those of a controller to which the personal data may be disclosed**, or of a third party, may provide a legal basis for processing, provided that the interests or the fundamental rights and freedoms of the data subject are not overriding, **taking into consideration the reasonable expectations of data***

subjects based on their relationship with the controller. Such legitimate interest could exist for example where there is a relevant and appropriate relationship between the data subject and the controller in situations such as where the data subject is a client or in the service of the controller. At any rate the existence of a legitimate interest would need careful assessment including whether a data subject can reasonably expect at the time and in the context of the collection of the personal data that processing for that purpose may take place. [...] ***The processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest.***

In the light of recital 47 of the GDPR, we consider that company X, because it has no relation with the social media users and because it only solicits the social media platform for direct marketing purposes:

- can rely on legitimate interest, and
- cannot be responsible for providing information to the social media users as long that it has no relation with them.

1.2 Regarding article 5.2.2 “Data provided by the user of the social media platform to the targeter”

In article 5.2.2, example 2, we understand that when Bank X decides to use the email of Ms. Jones, who is not a customer of the Bank but only a prospect, in order to match this email with the list of emails hold by the social media platform and targeted Ms. Jones on the social media platform.

The guidelines states that it is not possible for the Bank X to rely on the legitimate interest as a legal basis to target Mrs. Jones through social media platform as long as “one can consider that there is no reasonable expectation by Mrs. Jones that her personal data shall be used for targeting purposes” (point 59).

We do not agree on this point. We believe, on the contrary, that as long as Mrs. Jones is not yet a customer, but a prospect, it is legitimate for the company to retarget Mrs. Jones and that Mrs Jones can reasonably expect Bank X to do this. Prospection is the essence of business.

Moreover, we would like to remind that recital 47 of the GDPR states that “***The processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest.***”

However, we totally agree on the fact that if Mrs. Jones is not informed, at the moment of collection of her email address, that this address will be used for advertising of offers linked to the bank services, thus the Bank will be in breach of GDPR.

As a conclusion, we believe that the EPBD must revise its position relating the impossibility to rely on legitimate interest in example 2: providing that the individual is well informed, at the moment of collection of its email, that it could be used for targeting/marketing purposes, it is possible for the controller to rely on legitimate interest, even if the individual does not become a customer of the controller.

