

Public Consultation

Comments to the guidelines 8/2020 on the targeting of social media users

Swedish Trade Federation

Swedish Trade Federation is a trade and retail organization that represent 9,000 small, medium and large companies with approximately 300,000 employees. Below you will find our contribution to the consultation.

Summary

The Swedish Trade Federation welcomes the EDBP draft Guidelines 8/2020 on the targeting of social media users (the “**Guidelines**”) and its efforts to clarify data protection issues related to the targeting on social media where there is a lack of guidance. It is important that we find a common interpretation among the member states within the EU. It is also central that the implementation is harmonized, and we welcome cross-border co-operation between the data protection supervisory authorities.¹

We have identified great challenges for retail companies today within the advertising online environment. The clarifications on the responsibility and liability of each party involved in the processing of personal data in connection with the use of these services is most welcome. However, it is important to emphasize that the advertising services by social media platforms are offered to companies on a “take it or leave it” basis. Although, the Swedish Trade Federation acknowledge that this fact cannot exempt retail companies from its obligations under the GDPR, there is clearly an imbalance in the relationship between the social media provider and the retail company where the social media provider has the factual influence and decision-making power over its services. This reality must be duly reflected

¹ CJEU have acknowledged that this balancing exercise may result in variations between countries, depending on the weight afforded to each applicable right, including the right to privacy and the right to freedom of expression. (**GOOGLE LLC V CNIL (N 1), PARA 60**).

when determining the level of responsibility, and especially liability, between the parties.²

Our five main messages for the EDBP:

1. The actual influence on the social media services should be a determining factor when deciding controllership, responsibility and liability under the GDPR. Since the targeters have no influence over the development of the services, it is reasonable that the controllership, responsibility, and liability for the social media services lies with the social media provider.³
2. There is a clear imbalance in the relationship between the parties. Since the social media services are offered on a “take it or leave it” basis, it is essential to have clear guidance on the obligations that the targeter needs to fulfill in order to comply with the GDPR.
3. The loyalty programs of retail companies are an important and essential way for them to provide a personalized and relevant experience and to stay competitive on a global and national market. By providing members with clear information about the retail company’s commitments (i.e. the benefits that the retail company shall provide under the agreement) before a customer decides to join the loyalty program, Article 6(1)(b) can serve as an appropriate legal basis for processing that is necessary to deliver the benefits set out in the terms and conditions for the loyalty program provided that the processing otherwise complies with the GDPR. The Swedish Trade Federations asks the EDPB to change the wording in paragraph 53 to the following:

the Swedish Trade Federation wants the wording in paragraph 53 to also include the following:

Finally, the EDPB is of the opinion that the processing of personal data described in Example 1 cannot be justified on the basis of Article 6(1)(b) by neither the social media platform nor the targeter. Notwithstanding the foregoing, there may be situations where the targeter may rely on Article 6(1)(b) for the processing (e.g. a loyalty program) provided that the

² See paragraph 129 of the Guidelines.

³ Guidelines 07/2020 on the concepts of controller and processor in the GDPR.

processing is necessary for fulfilling commitments under the terms and conditions of the loyalty program.

4. The use of legitimate interest in the social media context does not necessarily lead to worse data protection for data subjects' fundamental rights. Together with clear guidance on which measures are needed to ensure that data subjects' rights are not overridden by the legitimate interests of the targeter, legitimate interest can serve as an appropriate legal basis for the processing of personal data in the social media context. This is especially true given the fact that consumers demonstrate "consent fatigue" when using online services. Instead of empowering data subjects, the consent requirements have become an annoyance for the data subjects resulting in "click and accept" without taking the time to understand the meaning of their consent.
5. The Swedish Trade Federation is of the opinion that enforcement actions can have the most positive effect on data protection and data subjects' rights when directed towards the party who has the actual influence over the development of the services, i.e. the social media provider.

General remarks

Social media services and competitiveness on the global and national market

The digitalization has led to a significant change in customer behavior where more and more customers choose to visit online stores to do their purchases. In addition, covid-19 has also led customers to not visit physical stores to the same extent as before. Moreover, government authorities' regulations and recommendations have a direct effect on the ability for some customer groups to visit physical stores.

In light of the above, access to online platforms and advertising is essential for retail companies to interact and communicate with their customers. Indeed, online interaction, communication and advertising all serve as a substitute to the physical meeting between a customer and a salesperson. Therefore, to be able to compete in a global and national context, the use of social media platforms for customer interaction, communication and advertising purposes is essential. For example, social media platforms are often a way to find

a certain retail company, product, services, brand or webpage and inspiration related to a retail company's products or services.

Considering the above, the retail sector is dependent on social media platforms when it comes to customer interaction, communication and advertising. The foregoing is used as an important means to build a customer relationship and strengthen customer loyalty. By using social media services, the retail sector can ensure that relevant customer interaction services, communication, and advertising are presented to a customized target audience. Although some personal data is transferred to the social media platform, it is important to acknowledge that the specific retail company has no information of the identity of the data subjects included in the target audience.

Factors to consider when determining controllership and the parties' responsibility and liability

Even though both retail companies and social media providers have active roles in the online advertisement environment, it is important to understand the online advertising ecosystem. When reviewing the online advertising ecosystem, it becomes apparent that targeters have little to no influence over the development of the services. This is central to consider when developing guidelines regarding the involved parties' responsibility and liability. The Swedish Trade Federation welcomes further clarifications on the responsibility and liability for "other actors" such as communication agencies, PR agencies, creative agencies etc., as they are an important part in the use and purchase of social media services. Indeed, these actors are often hired by a retail company for their expertise regarding the use of social media services for strengthening the retail company's customer interaction services, communication, and advertising.

We believe in competition and fair rules. Ideally, free competition would serve to regulate the market to the benefit of consumers. However, as stated above, targeters are dependent on using certain social media platforms to stay competitive in a global and national context. The services are also offered on a "take it or leave it" basis, which leaves the targeter with no option than to accept the terms under which the social media service is offered. Hence, there is an imbalance in the parties' relationship which has a direct impact on the development of the services provided. This must be reflected in any guideline published in this subject. The Swedish Trade Federation is also of the opinion that enforcement actions can have the most positive effect on data protection and data subjects' rights when directed

towards the party who has the actual influence over the development of the services, i.e. the social media provider.

The Swedish Trade Federation also requests a clear and harmonized application of the GDPR. Up until today, we have seen different application of the GDPR from member state DPAs, which naturally create uncertainties for companies on how to act in order to comply with the requirements of the GDPR. We are convinced that a common interpretation and clear guidelines will lead to an enhanced data protection in the online environment.

Comments on the guidelines 8/2020 on the targeting of social media users

In this section we are giving our feedback on the different paragraphs in the Guidelines.

Paragraph 5. Even though recent CJEU judgments state that the interactions between social media providers and other actors may give rise to joint responsibilities under EU data protection law, the Swedish Trade Federation is of the opinion that the protection of data subjects' rights is not strengthened by introducing joint controllership. On the contrary, given the lack of factual influence and the lack of ability to exercise decision-making power, the Swedish Trade Federation strongly believes that controllership must be placed with the social media provider who solely determines how the service is provided to advertisers.

The Swedish Trade Federation also wants to draw EDPB's attention to the fact that the "Essential means" of the processing are exclusively reserved for the social media provider to determine. For example, the targeters choose their custom target audience on the basis of the data categories offered by the social media platform. However, the targeters cannot request that the social media provider create new categories better suited for the retail company's needs nor can they give instructions regarding the personal data that are to be included in the categories. Thus, the targeters have no factual influence or decision-making power over which data subjects that are included in the target audience.

In light of the above, the conclusion to place the controllership with the social media provider is thus in line with the statements set forth in paragraphs 19-20 and 38 of the EDPB draft Guidelines 07/2020 on the concepts of controller and processor in the GDPR.

Paragraph 6. With reference to our other comments regarding the proper allocation of controllership, the Swedish Trade Federation does not believe that the parties' responsibility and liability for the social media services are adequately described in the guidelines. This is especially true with regard to the examples set out in the guidelines when considering the CJEU's statement in *Fashion ID* and the guidelines provided in EDPB draft Guidelines 07/2020 on the concepts of controller and processor in the GDPR.

Paragraph 8. There is a concern that "[t]he mechanisms that can be used to target social media users, as well as the underlying processing activities that enable targeting, may pose significant risks". The Swedish Trade Federation wants to emphasize that the interpretation of what is considered a significant risk will differ between data subjects depending on *inter alia* their knowledge of the service, personal interests and their willingness to understand the services they use. The Swedish Trade Federation is worried that an extensive interpretation of "significant risk" will hinder the development of online services.

Moreover, there is clear evidence that the younger generation shows a more positive attitude towards sharing their data as they have a greater understanding of the benefits directly linked to such data sharing.⁴ Therefore, profiling performed to personalize their user experience is not something they consider to be a "significant risk". Therefore, it is important to clarify that targeting cannot be considered a significant risk *per se*.

Paragraph 9. The Swedish Trade Federation wants to emphasize that the data subjects' reasonable expectations may vary depending on, *inter alia*, their age, sex, what website the data subject is operating on or if you are a member of a company's loyalty program. Moreover, The information about the service provided to the data subject in connection with e.g. a registration process to a loyalty program, can also affect data subjects' reasonable expectations.

There is also a general concern that the extensive information requirements set out in various consumer protection legislation has led to an information overload causing consumers to ignore their responsibility to read the information presented to them before using online services. Although many retail companies (i.e. targeters) invest large amounts in solutions to make the information more available to

4

https://assets.publishing.service.gov.uk/media/5dfa0580ed915d0933009761/Interim_report.pdf

data subjects, it is a great challenge for retail companies to get data subjects to take part of the information given. The lack of willingness to read the information will naturally affect data subjects' perception of the output (i.e. the advertisements) of the use of the social media services. The Swedish Trade Federation welcomes further clarifications and initiatives from the EDPB regarding best information practices, but also initiatives on how to educate data subjects concerning their responsibilities when using a social media platform and online services in general.

Lastly, the Swedish Trade Federation agrees with that there is a lack of transparency regarding the role of the different actors and the processing obligation. Clarifications regarding the roles are welcomed, but, again, we want to emphasize that the provision of the services by the social media platform is offered on a "take it or leave it" basis. Given the fact that it is necessary to be present on the social media platforms to be competitive on the market, it is crucial that this is reflected when determining the responsibilities and liabilities of the parties.

Paragraph 11. The Swedish Trade Federation wants to emphasize that the retail sector does not use social media services to specifically target vulnerable individuals with specific messages and at specific moments. The retail companies do not have these types of insights nor do they wish to gain such insights. Moreover, the Swedish Trade Federation does not endorse this type of processing of personal data. However, the Swedish Trade Federation welcomes clarifying guidelines on how to best protect vulnerable data subjects from targeting in an unethical manner and what solutions that need to be implemented in the services provided by social media platforms to ensure a level of data protection compliant with the GDPR.

Paragraph 13. The Swedish Trade Federation wants to highlight that there are situations where the data subjects may want to be exposed to "more of the same" information. One example can be derived from the food industry where most data subjects appreciate when a company predicts your preferences and facilitates your grocery shopping experience. The Swedish Trade Federation wants to draw the EDPB's attention to the fact that the risk for unwanted filter bubbles within the retail sector is low.

Paragraph 14. The Swedish Trade Federation agrees with EDPB's statement that there is indeed a risk that individuals may feel that their behavior is systematically being monitored when using online services. However, we strongly believe that this feeling can be reduced by

educating the users on how the services work, how they can control access to their data (e.g. by using privacy tools in the service or by logging out of their account with the social media platform) and when the users are accepting targeting. Indeed, most of the targeting practices are performed after the data subjects' acceptance of a service provider's terms of use or the data subjects' consent. Great need of education.⁵

Paragraph 15. Targeting practices involving children is not common within the retail sector. Children over 16 are, according to Swedish law, legally in charge of their money they have earned from work. Therefore, deals and extra prices can be very useful for them. Hence, it should be carefully examined to prohibit deals to people over 16 years because they might be one of the consumer categories that need the extra prices the most.

Paragraph 18. As a general comment, we find it reasonable, and balanced, that data subjects who are members of a loyalty program or interact with a specific website, also receive better deals and services. In these cases, the data subjects share their data through a voluntary action, e.g. giving consent, entering into a contract, adding products to their wish list, which means that the data processing falls within their reasonable expectations. Consequently, individuals who decide to share data should also get an advantage from doing this.

Nonetheless, the Swedish Trade Federation welcomes further guidelines regarding the tools offered to a data subject allowing them to exercise their rights such as limiting the processing of their personal data and the possibility to control when the collection of data or other processing of data will occur.

Paragraphs 22, 32, 33 and 34. The Swedish Trade Federation agrees with the statement that the social media provider can gather large amounts of data. It is especially important to consider that a targeter never accesses the data about the social media providers' users. When using the social media services, the targeter depending on the service can customize the target audience within the service. However, it is important to consider that the targeter has no factual influence and cannot exercise any decision-making power over the

⁵ <https://svenskarnaochinternet.se/app/uploads/2019/10/svenskarna-och-internet-2019-a4.pdf>

data processing other than the collection and transfer of personal data⁶ to the social media provider.

As set out in **paragraphs 32 and 34**, controllers may be involved at different stages and to different degrees which makes it necessary to assess the level of responsibility, *and liability*, with regard to these facts. Indeed, it is important to carefully consider the various stages of processing of personal data before determining the involved parties' responsibility and liability. However, defining the controllership between the involved parties is one of the most challenging parts of data protection. The social media platforms often describe their view on the roles of the parties involved in the processing. 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 that follows from joint controllership. Consequently, targeters can only refer data subjects to the data controls already offered within the social media services as the "arrangement" regarding joint controllership is not up for discussion.

Paragraph 33 describes the EDPB's statements in *Fashion ID*. The statements in this case are key when determining the responsibilities and liability of the parties in a way that properly reflects the parties' factual influence over the purposes and means of the processing of personal data. In practice, the targeter's control and decision-making power are limited to the collection and transfer of personal data from a tracking script implemented on the targeter's website to the social media provider. Indeed, when the personal data has been collected and transferred, the actual influence and decision-making power regarding the following processing of personal data is exclusively reserved for the social media provider.

As set forth in our comments to paragraphs 5 and 8, the targeter lacks factual influence and decision-making power and the services are offered on a "take it or leave it" basis. As a result, the targeter has no insight in the actual processing of the data which is necessary to be able to show an advertisement to the target audience. The lack of transparency naturally affects the targeter's possibility to provide the data subject with clear and concise information.

There is a great need of additional guidance for targeters regarding their obligations when using social media services. The Swedish Trade

⁶ *Fashion ID* (C-40/20), paragraphs 76 and 107.

Federation especially welcomes clarifications on necessary changes to the social media platforms' terms of use, and requirements on the services that the targeter needs to examine before using the services.

Comments on the examples in the guidelines 8/2020 on the targeting of social media users

The interpretation of the actors' roles in each example is too broad

The Swedish Trade Federation is positive to including examples in the guidelines to efficiently describe the actors' respective responsibility and liability. However, the examples in the guidelines do not comply with the CJEU's statements in *Fashion ID*. When deciding the controllership for the processing of personal data, the processing must distinguish between the collection and transfer, and further processing of the personal data. For example, considering the requirements of factual influence and decision-making power in Guidelines 07/2020 on the concepts of controller and processor in the GDPR when determining the controllership, the controllership for the processing of personal data for statistical purposes should not be joint as the targeter does not have any insight in this part of the processing.

In the examples, the description of the roles for each example is too broadly interpreted. The Swedish Trade Federation urges the EDPB to adjust the descriptions to comply with the statements of the CJEU in the *Fashion ID* case.

Further guidance is needed on the role of "other relevant actors"

Although the guidelines describe the various roles, the examples do not include "other relevant actors", which are an important part of the use of social media services.⁷ To provide efficient and truly helpful guidelines in this subject, the guidelines must be complemented with examples including "other relevant actors". The Swedish Trade Federation welcomes further guidance and clarifications in this matter.

The terms and conditions of the loyalty program can be an appropriate legal basis for the processing of personal data

⁷ See section 4.4. of the guidelines.

Paragraph 53. Considering the EDPB statement in paragraph 53, i.e. that the processing of personal data in Example 1 cannot be justified on the basis of Article 6(1)(b) by neither the social platform nor the targeter, the Swedish Trade Federation wants to clarify the following. Many retail companies offer their customers to join their loyalty programs. The loyalty programs are designed to reward loyal customers with various benefits. The benefits could consist of e.g. discounts on products that the member previously has purchased, communication on the company's own website and third-party websites (e.g. a social platform) regarding offers based on the members interests and interactions with the retail company, or bonus on the member's purchases.

The loyalty programs are an important and essential way for retail companies to provide a personalized and relevant experience and for them to stay competitive on a global and national market. By providing members with clear information about the retail company's commitments (i.e. the benefits that the retail company shall provide under the agreement) before a customer decides to join the loyalty program, Article 6(1)(b) can serve as an appropriate legal basis for processing that is necessary to deliver the benefits set out in the terms and conditions for the loyalty program. 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). The Swedish Trade Federation also wants to clarify (1) that Article 6(1)(b) may only be used as a legal basis provided that the processing is necessary to fulfill the commitments set out in the loyalty program contract, (2) that communication on the retail company's own website and third party websites (e.g. a social media platform) is necessary to fulfil the commitment of providing the member with a relevant and personalized experience, and (3) that the retail company otherwise complies with the GDPR, such as the fundamental principles set out in Article 5. which legal basis that is appropriate for the processing in the different examples. In several examples, the EDPB has stated that Article 6(1)(b) cannot be used. As set forth above, we are of the opinion that this legal basis may be used in some situations. In addition, the Swedish Trade Federation is of the strong opinion that the legal basis "legitimate interest" is an appropriate legal basis to use for the processing of personal data related to the targeting on social media platforms.

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. Thus, we believe that Article 6(1)(f) can serve as an appropriate legal basis for the processing of personal data in the social media context provided that certain measures are fulfilled. Indeed, the use of Article 6(1)(f) as a legal basis requires companies to implement measures to ensure that the data subjects’ rights are protected. For example, it is central that data subjects have control over their personal data and that the processing complies with the data subjects’ reasonable expectations. In light of this, we are of the opinion that layered information is one measure that avoids information overload for the user in the online environment. The Swedish Trade Federation welcomes further guidance and clarifications on measures, such as best practices 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.

Paragraph 60. In the light of this paragraph in the guidelines we would like to raise the fact there is a right to oppose social media marketing. The right to oppose marketing is stated in both the GDPR (Article 21) and the Swedish Marketing Act, article 19, which is based on Article 13 of Directive 2002/58 / EU (the ePrivacy Directive).

In example 3, and in point 60 in that guidelines it appears that companies can rely on legitimate interests when marketing on social media, if the customer has been given the opportunity to say no in connection with the information being collected.

Against this background we would like to see a clearer writing about this right and opportunity to use legitimate interest when marketing in the guidelines. EDPB should clarify whether it is enough that the processor offers the data subject the opportunity to object to marketing in social media by changing their account settings or by for example contacting customer service. Or, should it instead be interpreted as a requirement; that this functionality must be present in connection with the collection of information.

Further guidance is needed on best practices for obtaining consent

The EDPB is of the opinion that consent is the appropriate legal basis for most targeting activities on social platforms. In light of our previous statement regarding “consent fatigue”, it would be beneficial to have practical and real-life examples on how consent should be formulated when placing cookies on a website. The Swedish Trade Federation welcomes further initiatives from EDPB in this matter as clear guidance, and harmonized solutions would result in a greater data protection.

This opinion has been decided by the Head of Public Affairs, Mats Hedenström. The rapporteur has been policy expert and lawyer Sofia Stigmar. Linda Leffler Olsson and Jolanda Girzl, policy experts and lawyers, have also participated in the final proceedings.

SWEDISH TRADE FEDERATION



Mats Hedenström



Sofia Stigmar