

VZBV COMMENTS ON THE EDPB GUIDELINES 8/2020 ON THE TARGETING OF SOCIAL MEDIA USERS

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The Federation of German Consumer Organisations (vzbv) welcomes the efforts of the European Data Protection Board (EDPB) to provide more clarity regarding the targeting of social media users. vzbv understands that, following the rulings of the European Court of Justice in the cases “Wirtschaftsakademie”, “Jehovah’s Witnesses” and “FashionID”, there is a need for guidance with regard to joint control-ship according to Article 26 of the General Data Protection Regulation (GDPR). In this respect, the guidelines on the roles and responsibilities of social media providers and “targeters”¹ can be helpful and vzbv supports the explanations of the EDPB. vzbv is grateful for the opportunity to comment and would be pleased if its comments and suggestions will be taken into account in further negotiations.

JOINT CONTROLLERSHIP

Although vzbv welcomes the Guidelines in general, it is regrettable that some parts of the Guidelines only consider clear and ideal situations. Especially in the field of online advertising, a complex market with a large number of participants has emerged which has been criticised for several years due to a lack of transparency and a large number of violations of data protection regulations. One of the problems is that tracking and targeting for advertising purposes is not carried out solely via the respective platforms, but that personal data is collected by various companies across information society services and devices, while the line between “online” and “offline” is becoming increasingly blurred. For example, it is not uncommon in practice that a large number of companies is involved in tracking and targeting. In this context, the situation where only two companies are responsible for data processing is more likely to be an exception.

By focusing merely on the relationship between social media provider and targeters, the guidelines miss the opportunity to address the broader issues of joint responsibility in the online advertising market. The problem is exacerbated by the fact that data subjects have little means of exercising control over their personal data that is processed as part of these processes. Such control is made more difficult, among other things, by the fact that some companies do not adequately identify and determine their respective roles and responsibilities. This contributes to the

¹ Accordingly to the EDPB guidelines 08/2020, vzbv understands the term “targeters” as natural or legal persons that communicate specific messages to the users of social media in order to advance commercial, political, or other interests.

fact that these practices pose a major threat to the right to the protection of personal data of the data subjects.

Also, problems such as the collection of personal data of data subjects who do not have a relationship with the social media provider are briefly touched in the guidelines but are not further discussed later. The same applies to the problematic targeting and tracking on mobile devices via APIs and SDKs, as well as the targeting and tracking via other devices, such as smart TVs or car entertainment systems. Also for these cases the necessity of an appropriate distribution of roles and responsibility should be emphasized and taken up accordingly in the examples.

LEGAL BASIS FOR TARGETING SOCIAL MEDIA USERS

It's vzbv's general view, that if it is possible to carry out data processing on a legal basis other than consent, while strictly respecting all related requirements and safeguards, then this other legal basis should be chosen. Obtaining consent should be a kind of alarm signal for data subjects that the data processing in question interferes so deeply with their rights that they have to be asked for their consent. This alarm function is lost, however, if consent is used even when another legal basis could actually be chosen in strict compliance with all requirements and safeguards. However, with regard to the data processing described in these guidelines, vzbv sees only very little room for any other legal basis than consent.²

Yes, as example 1 is presented, vzbv would consider the legal basis of legitimate interest to be appropriate – however, in vzbv's view this example is purely theoretical. In practice it is highly unlikely that social network providers will clearly distinguish between data collected in different ways and uses only data provided by the consumer for targeting.

Furthermore, vzbv is very sceptical about the assessment in paragraph 60 that with regard to the third example the legal basis of legitimate interest is conceivable for the data processing. Mr. Lopez was informed that "his e-mail address would be used for advertising" but not that his e-mail address may be used for targeting via social media. He was also told that his e-mail may be „used for advertising of offers linked to the bank services that he is already using", but he has actually received advertising for "the full range of financial services [the bank] has on offer", which could include, for example, offers for insurance - which is not linked to the bank services that he is already using.

Also, the selection of examples in chapter 5.4 could be improved. It is not clear why the ePrivacy Directive is applicable in example 7. It is possible to link the photos on the social media page of the Art Gallery without accessing information on the consumer's device. And besides example 8, vzbv would be interested in an example in which profiling is carried out that is not covered by Article 22. In other words: in this chapter vzbv would welcome a general assessment of the legal basis under which it is even possible to use inferred data for targeting. On the one hand, it is unlikely that such processing meets the reasonable expectations of the

² Especially, vzbv welcomes the clarification of the EDPB that Article 6(1)(b) GDPR can generally not be considered as a suitable legal basis in the constellations mentioned in these guidelines

data subjects, which excludes the legitimate interest as a legal basis. On the other hand, however, it is unclear how informed consent can be obtained in this case. After all, it is not known in advance what conclusions can be drawn from the data and whether the data subject agrees to this.

In summary, vzbv is of the opinion that further clarification is required with regard to the determination of the appropriate legal basis for targeting social media users. Further examples could also be helpful to illustrate in which situations and under which conditions one legal basis is preferable to another.

In addition, these questions show that, independently of these guidelines, updated guidelines regarding the legal basis of legitimate interest would be desirable.

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