

**Questions about the *Guidelines 08/2020 on the targeting of social media users* of the European
Data Protection Board**

1. Concept of “social media”.

For the purposes of these guidelines, social media are understood as online platforms that enable the development of networks and communities of users, among which information and content is shared.¹ Key characteristics of social media include the ability for individuals to register in order to create “accounts” or “profiles” for themselves, to interact with one another by sharing user-generated or other content and to develop connections and networks with other users.

According to this definition of "social media", would a website that sells products and allows users to register, create a profile and send public comments on the products purchased, which can be replicated by other users, be considered "social media"? For example, Amazon. Along the same lines, could a newspaper that also allows comments and replicas from registered users be considered "social media"?

On the other hand, can these guidelines be applied to entities that are not considered "social media"?

2. Consent.

In Fashion ID, the CJEU decided that a website operator can be considered a controller when it embeds a Facebook social plugin on its website that causes the browser of a visitor to transmit personal data of the visitor to Facebook. The qualification of the website operator as controller is, however, limited to the operation or set of operations in respect of which it actually determines the purposes and means. In this particular case, the CJEU considered that the website operator is only capable of determining, jointly with Facebook, the purposes and means of the collection and disclosure by transmission of the personal data of visitors to its website.

Does the owner of the site have to ask for consent to transmit data to Facebook? How should they do this? Is the mention of "social network plugins" in the cookie pop-up notice sufficient with more specification in the cookie policy? Can consent be grouped so that plugins are integrated into the analytical cookie category? In that case, since the e-privacy regulation could end the consent for analytical cookies, would the Plugins still be subject to consent? Is it technically feasible for a web publisher to prevent the transmission of data to Facebook or the mere inclusion of the Plugins to share the data processing for practical purposes?

Example 6: Mrs. Ghorbani creates an account on a social media platform. During the process of registration she is asked if she consents to the processing of her personal data to see targeted advertisement on her social media page, on the basis of data she directly provides to the social media provider (such as her age, sex and location), as well as on the basis of her activity on other websites outside of the social media platform using cookies. She is informed that this data will be collected via social media plug-ins or tracking pixels, the processes are clearly described to her, as well as the fact that targeting involves other entities who are jointly responsible for ensuring compliance with the GDPR. It is also explained to her that she can withdraw her consent at any time, and she is provided with a link to the privacy policy. Because Mrs. Ghorbani is interested in seeing targeted advertisement on her social media page, she gives her consent. No advertising cookies are placed or collected until Mrs. Ghorbani expresses her consent.

What happens if the user has given their consent to the advertiser to show them advertising on the social network but has not accepted it on the social network itself? What manifestation of will prevails?

3. Targeting with data provided by the user.

Targeting individuals on the basis of provided data – “Provided data” refers to information actively provided by the data subject to the social media provider and/or the targeter.

Does "provided data" only mean the data that the user enters in their profile description and the strictly necessary data to open it (name, e-mail) or also the data contained in publications within the social website (a text, a song, a comment, a photo)?

4. Legal basis for targeting with data provided.

Generally speaking, there are two legal bases which could theoretically justify the processing that supports the targeting of social media users: data subject’s consent (Article 6(1)(a) GDPR) or legitimate interests (Article 6(1)(f) GDPR). (...) With regard to Example 1, the targeter might consider its legitimate interest to be the economic interest of having an increased publicity for its goods through social media targeting. The social media provider could consider that its legitimate interest consists of making the social media service profitable by selling advertising space.

Can visible advertisements on a private social network profile be considered an electronic commercial communication?

On the other hand, should the categorization of a user according to two simple data provided by them (age and marital status) be considered "profiling" according to the RGPD? If so, could consent to receive electronic commercial communications (e.g., in the form of a banner in the social network profile) be the same as for profiling or should profiling be given in a differentiated manner? Or otherwise, can it be understood that once the user has consented to receive electronic commercial communications the controller has a legitimate interest in sending such communications after basic profiling?

Example 3 : Mr. Lopez has been a customer at Bank X for almost a year. When he became a customer, he provided an e-mail address and was informed by Bank X, at the moment of collection, that: (a) his e-mail address would be used for advertising of offers linked to the bank services that he is already using; and (b) he may object to this processing at any time. The bank has added his e-mail address to its customer e-mail database. Afterwards, the bank uses its e-mail database to target its customers on the social media platform with the full range of financial services it has on offer. (...) n Example 3, the targeter might be able to rely on legitimate interest to justify the processing, taking into account inter alia that Mr. Lopez was: (a) informed of the fact that his e-mail address may be used for purposes of advertising via social media for services linked to the one used by the data subject (...)

The advertising thus configured implies a transfer of data by the advertiser to the social network, which will compare its databases with the data provided by the advertiser to verify whether the user is registered. Can this transfer of data be based on legitimate interest?

Inferred data refers to data which is created by the controller on the basis of the data provided by the data subject (regardless of whether these data were observed or actively provided by the data subject, or a combination thereof)

Does the advertising sent after combining two pieces of information provided, place us in the targeting with inferred information? For example, a user indicates on his social network that he lives in Barcelona and is 18 years old and, based on this, receives advertising to study at the University of Barcelona. Example 1 on "data provided" includes advertising based on age, gender and marital status.

5. Targeting with observed data.

Example 5: Geo-targeting Mrs. Michu has installed the application of a social media provider on her smartphone. She is walking around Paris during her holidays. The social media provider collects information regarding Mrs. Michu's whereabouts via the GPS functionalities of her smartphone on an ongoing basis⁶², using the permissions that have been granted to the social media provider when the application was installed. Mrs. Michu is staying at a hotel that is located next to a pizzeria. The pizzeria uses the geo-targeting functionality offered by the social media provider to target individuals who are within 1km of its premises for the first time in the last 6 months. When opening the social media provider's application on her smartphone, Mrs. Michu sees an advertisement from the pizzeria, decides that she is hungry and buys a pizza via its website.

Paragraph 31 of the guide names geographic information as data provided. It would be useful to distinguish between two cases. It may be that the user actively indicates where he or she is (as in the case of runner applications), in which case we could be faced with a piece of information that has been provided. However, if the user were located by default geolocation options that the user cannot manage, we would be faced with an observed piece of data. The subsequent use of this information should have a different regime.

6. Targeting with derived data and profiling.

Targeting of social media users on the basis of inferred data for advertising purposes typically involves profiling.

Can there be a supposed targeting with derived data that does not involve profiling? Is there not profiling according to the RGPD in every targeting action? Along the lines of question 4, can you clearly delimit when there is profiling and when there is not?

For what concerns Example 8, the EDPB recalls that in the case of automated decision-making which produces legal effects or similarly significantly affects the data subject, as set out in Article 22 GDPR data controllers may rely on the following exceptions: (...)

In example 8 there is profiling, but does it produce legal or similar effects according to the RGPD? Can you clarify when it is one profiling case and another?