

Dublin, 19 October 2020

IAB Ireland submission to the EDPB public consultation on draft Guidelines 08/2020 on the targeting of social media users

IAB Ireland

IAB Ireland (www.iabireland.ie) is the trade association for the Irish online advertising industry. As a not-for-profit organisation IAB Ireland works with members to ensure marketers can identify the best role for online in building their brands. IAB Ireland is licensed by IAB US and is a member of the IAB Europe network. The IAB network shares three core objectives, namely to; prove, promote and protect the online advertising industry. These objectives are fulfilled through the dissemination of authoritative research, the organisation of educational events and by promoting industry-wide best practice. IAB Ireland's members include advertisers, adtech companies, digital advertising agencies, platforms, publishers, research companies and vendors.

As a member of IAB Europe and a contributor to IAB Europe's Policy Committee, IAB Ireland is aligned with IAB Europe's submission to the EDPB consultation on draft Guidelines 08/2020 on the targeting of social media users. Consequently IAB Ireland is sharing IAB Europe's comments and observations in its submission.

IAB Europe welcomes...

1. The recognition of targeted advertising as a legitimate business activity

We take a positive view of the EDPB's inherent acknowledgment of the ad-supported business model and recognition of the fact that personal data can be processed legally for its purposes in line with the rules established by the General Data Protection Regulation (GDPR). The GDPR should not be interpreted as prohibiting specific business models but is precisely about creating a safe space for users, giving them extensive rights and ensuring they can make choices about how their data is processed. This puts them in a better position to elect to have their data processed in exchange for valuable services, and this value exchange should be preserved provided that the user's rights and interests are protected.

2. Acknowledgement of the ecosystem's complexity

We welcome the acknowledgement by the EDPB that the digital advertising ecosystem is “complex and evolving” (para. 26) and that it comprises multiple actors with varying functions. In particular, we view positively efforts by the EDPB to provide harmonised EU-level guidance that clarifies the roles and responsibilities of the various actors, minimises reliance on potentially divergent national guidance impacting digital advertising, and improves legal certainty through uniform interpretations that enable the GDPR to fully deliver on its promise of creating a unified privacy and data protection regime.

IAB Europe is concerned about...

1. The EDPB's negative discourse on targeted advertising and lack of transparency

We are concerned by the pervasiveness, throughout the Guidelines, of some general themes and conclusions about the negative effects of targeted advertising on transparency, fundamental rights as well as its apparently inherent manipulative effect on users. These appear to be driven by a number of very general and unsubstantiated statements as well as self-serving examples (see for instance, paragraph 4 on lack of transparency and control, example 8 on page 23 and example 14 on page 32), that enable the EDPB to draw fundamentally biased conclusions of a political nature, and generate apparent obligations better suited for the remit of legislative action, rather than that of a guidance document published by the Board. As an independent body, the EDPB needs to take a more balanced approach which also acknowledges the benefits of targeting more clearly to avoid a risk of bias or undue influence.

In particular, we would urge the EDPB to be cautious with generalisations about targeted advertising related to transparency and control and would like to draw the Board's attention to prominent industry-driven approaches to legal compliance, designed to provide full user transparency and control over the collection and processing of their personal data for targeted advertising purposes.

An important example of this is IAB Europe's Transparency & Consent Framework (TCF)¹, which ensures through standardisation, that consumers as well as industry actors, benefit from transparency and control where personal data is processed in connection with the delivery and measurement of advertisements or the personalisation of editorial content. This is *inter alia* achieved through the provision of all relevant information directly on the screen interactively and, where appropriate, through layered notices as advocated by EDPB in the Guidelines (para. 84).

¹ For more information on IAB Europe's Transparency & Consent Framework (TCF), see www.iabeurope.eu/tcf.

Instruments such as TCF offer a better way of informing users through notices and messaging that efficiently deliver relevant information within the meaning of articles 12-14 GDPR (such as on types of data processed, processing purposes and identity of third parties), including on how to access more detailed information, rather than exhaustively describing all underlying and subsequent processing from the outset as suggested by EDPB in paragraphs 4 and 87 of the Guidelines.

2. The EDPB's failure to acknowledge the benefits of targeted advertising

It is unfortunate that the EDPB fails to explicitly recognize the benefits of targeting and targeted advertising, while persistently articulating a negative discourse and drawing conclusions of a political nature regarding the alleged negative effects of such practices throughout the Guidelines (e.g., paras. 4, 12, 13, 14). In particular, the EDPB should recognise that while these Guidelines only refer to social media targeting, there is an inherently larger (and more localised) industry that benefits from targeted advertising, to which the EDPB's considerations may apply by analogy and affect disproportionately.

Targeted advertising data has been shown to make users over five times more likely to click on an advertisement in comparison with run-of-network advertising or contextual targeting², which increases the value of advertising space on websites. This allows media companies to build more sustainable digital business models in light of an already challenging time for traditional print businesses. It can also prove instrumental to the survival of smaller publishers and those with quality content that draws visitors but not many advertisers, including by reducing the overall cost of advertising. Providing quality news, content and services for free is a significant challenge, as European internet users generally are unwilling to pay for online news, content and services.³ In addition, providing relevant ads means that people don't need to see as many ads to discover products and services they may be interested in.

3. The EDPB's position on legal bases

While we welcome the Board's underlining of the robustness of legitimate interests as a legal basis, recalling that it requires careful assessment of the risks at hand, we disagree with the EDPB's exclusion of the opportunity for organisations to demonstrate the existence of a legitimate interest by applying the very conditions that the Board itself sets out.

² 'The Economic Value of Behavioural Targeting in Digital Advertising', IHS Markit, 2017. Available at: https://datadrivenadvertising.eu/wp-content/uploads/2017/09/BehaviouralTargeting_FINAL.pdf.

³ 'Europe Online: An Experience Driven by Advertising', GfK, 2017. Available at: https://datadrivenadvertising.eu/wp-content/uploads/2017/09/EuropeOnline_FINAL.pdf.

We contend that the choice of legal basis should not be dictated *a priori* but should instead, as indicated by the EDPB itself and reiterated many times by the CJEU⁴, depend on an assessment of the specific situation at hand. The latter could be supplemented by clear guidance that informs the process in detail without diminishing the flexibility of the GDPR in terms of legal bases offered, and without arbitrarily and disproportionately restricting digital businesses. In particular, the ability to claim a legitimate interest should not be excluded for all case scenarios of targeting or personalisation within a service, notably where adequate transparency, case-specific balancing tests and the availability of a right to object have been adequately implemented, for instance through instruments such as TCF.

4. The EDPB's discourse on the potential for unfair discrimination

We are concerned about the speculative conclusions regarding the use of the capabilities of ad targeting tools to unfairly discriminate on the basis of special categories of personal data. For example, Section 3 of the Guidelines suggests that targeted advertising related to job offers, housing or credit can systematically discriminate against certain groups of people (para. 10). This view does not take into account whether or not a job posting, or credit provider is available and publicly accessible. It would not be in the interest of those targeters to exclude access to any social media users that may be interested in the services or job postings they are offering. To be clear, IAB Europe and its members do not support the use of targeted advertising in a way that leads to unfair discrimination. Our concern is that the way some examples are highlighted in the Guidelines creates the false impression that these are commonly accepted practices in the targeted advertising industry.

Further, paragraph 11 insinuates that the mere act of targeting content or advertising undermines a social media user's individual autonomy and freedom by influencing their thought process, emotions and behaviour. This is extremely speculative and has no place in official guidance documentation of the EDPB.

Paragraph 14 is similarly speculative and biased in suggesting that if an individual gets the "feeling" that their behaviour is being systematically monitored, it may have a chilling effect on their freedom of expression, as a result of targeted advertising or other (online) messaging. These statements demonstrate a very one-sided, unbalanced view that fails to recognise the extent to which digital advertising has pioneered the better addressability of audiences in a benign way that, far from harming users' fundamental rights, often benefits them. For example, instead of relying just on broad demographic segments, digital advertising can use information about users' online behaviour to assign them to large segments, or "audiences", that all share common interests, and because of those common interests, may be interested in a specific good or service.

⁴ See CJEU, cases C-131/12, *Google Spain*, para. 74, C-13/16, *Rigas*, C-708/18, *Asociata M5A-ScaraA*.

5. The EDPB's broad view on the scope of article 22 GDPR

We are concerned about the suggestion in paragraphs 80-81 that profiling by social media providers for targeting can trigger the application of article 22 GDPR. This is not helpful guidance because it implies that the mere targeting of ads about online betting sites is *de facto* 'dangerous' and therefore must be subject to restrictions, beyond those already applicable to what is typically a heavily regulated sector at Member State level. Without the use of technologies such as ad targeting, there is no method with which a social media provider can actually ensure that those advertisements are shown only to persons for which the ads are appropriate, for example those above a certain age.

The extension of the application of article 22 to recommended content is even more problematic. In order to present users with new content they may find useful or relevant, many services rely on a variety of signals – e.g., viewing history, subscriptions, followers – to recommend content. This practice is fundamentally different from advertising and brings into question the fundamental design of nearly every social media platform.

Similar to the issue highlighted above regarding paragraph 10 of the Guidelines, IAB Europe doesn't consider that the problem is one of legal interpretation – rather, the issue is the type of advertisement that the EDPB subjectively considers to be appropriate or not appropriate, which is a matter that goes beyond the scope of its remit.

6. The EDPB's stance on joint controllership

Generally, we are concerned with the Board's expansive view on the criteria for joint controllership and related requirements. The EDPB should adopt a stance on joint controllership that aligns with (and does not go beyond) the obligations stipulated in the GDPR and established case-law on the topic⁵ and leaves adequate space for controller / processor relationships (also embodied in the Regulation) to develop. In particular, joint controllership should not be considered as established *a priori* where tools are merely put at the disposal and choice of the targeter and should clearly be delimited solely to the joint purposes pursued and assessed on a case-by-case basis. It should also be recognised that one of the entities involved can pursue additional purposes where an appropriate separate legal basis has been established in a way that does not necessarily extend joint controllership "until deletion of the data" as suggested in paragraph 57.

⁵ See e.g., CJEU, case C-210/16, *Wirtschaftsakademie Schleswig-Holstein* and CJEU, case C-40/17, *Fashion ID*.

In addition, the approach suggested in these Guidelines with regard to the level of arrangements on the respective responsibilities of joint controllers (paras. 124, 127) and the extent to which such arrangements must be made available to the user (para. 87, 91) should be aligned with requirements under GDPR. The Regulation indeed only requires that the “essence of the arrangement” be made available (article 26) and already contains extensive obligations with regard to information, security of processing, DPIA and privacy-by-design, which apply to each of the controllers individually.