WIRTSCHAFTSKAMMER ÖSTERREICH

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

The Austrian Federal Economic Chamber provides the following comments:

Introduction:

Overall, we observe the draft Guidelines appear to transfer responsibility for compliance with the obligations of the GDPR from the social media providers to the targeters, in accordance with the judgements of the Court of Justice of the European Union to which the text refers.

The Bank and Insurance Division comments as follows: "While we understand the risks identified by the EDPB, we think the current approach of the draft Guidance does not take into consideration that the GDPR already contains all the guarantees that allow this type of treatment to be properly managed, without it being necessary to establish a regime of co-responsibility between, for example, banks and a Social Media Provider, for carrying out a segmentation and sending commercial communications that the Social Media Provider carries out in the name and on behalf of the bank.

It is important to highlight that the Court of Justice has limited co-responsibility to two very specific cases and the EDPB has extended this practice to any commercial activity that involves the processing of the data of the users of social networks in order to offer them products or services from third parties. In addition, the draft Guidelines appear to ignore many other actors that participate in this advertising ecosystem (data brokers, ad exchange, etc.) and we would welcome an explanation for this omission.

Specifically, in the cases contemplated by the EDPB, when the Social Media Provider collects data from users, there is no joint determination of the purposes of processing by the beneficiaries of the advertising (for example, a bank). It is the Social Media Provider that determines, according to its criteria, the target audience at which the communication is directed and the bank does not determine who wants to receive this type of communication or the processing carried out by the social network to send advertising from third parties." There is an imbalance regarding the negotiating power of the targeters on one hand, and the social media providers on the other.

Introduction and No. 15:

Special risks for teenagers and children are mentioned, but the EDPB does not draw any further conclusions. This is a very interesting subject, which is why we would like to ask for examples and assistance.

Actors and roles:

4.5 Roles and responsibilities

No. 34 notes that "*In case of joint controllership, pursuant to Article 26(1) GDPR, controllers are required to put in place an arrangement which, in a transparent manner, determines their respective responsibilities for compliance with the GDPR…*". However, social media providers often impose unilateral terms of service on targeters.

This imbalance is important to note for many of the elements put forward in the draft Guidelines, and we would recommend for the EDPB to take this into consideration (e.g. No. 49, 88, 101,128).

We highly question that any “targeting”, “retargeting”, “pixel”, etc. should lead to a shared responsibility. Differences between targeting-models should be made. There is no help or clarification in undifferentiated transcripts of the ECJ´s previous jurisdiction.

Analysis of different targeting mechanisms:

5.2 Targeting on the basis of provided data

The Bank and Insurance Division comments as follows: “Regarding the paragraphs on respective roles (pp. 38-42), even if the Social Media Provider and the Targeter have joint responsibility, it should be clarified that the Social Media Provider is solely responsible for obtaining a solid legal basis from its users. In this regard, the responsibility of the Targeter should be contractually excluded or limited in those cases where the Social Media Provider targets its users and ensures conditions for that processing of personal information.

For example, in cases where a bank simply defines the target audience in a given campaign and the social network processes data which has been obtained directly from its own users to send them a commercial communication from a third party, co-responsibility must be limited contractually, so that the entity that requests a commercial action from a social network is not liable for a breach of GDPR attributable exclusively to the absence of an appropriate legal basis that should have been obtained by the social network.”

No. 43 (Legal Basis): This is interesting insofar as the EDPB again refers to the fact that both a basis according to the ePrivacy Directive and a basis according to the GDPR is necessary. The ePD would have to be checked for the data collection act itself, but the GDPR for the further use of the data. This is extremely complex, which is why in practice consent will ultimately come into play. So the question might arise, why this complex construction? We need the EDPB to release a clear and comprehensible distinction and classification when GDPR and when ePD is applicable.

Special categories of data:

8.1.2. Inferred and combined special categories of data

No. 116 – 118 (marketing classifications): These passages manifest an Austrian first instance decision, namely: Classifications that may lead to the classification of data as sensitive are themselves considered sensitive data acc. to Art 9 para 1 GDPR. We truly understand the sensitivity of data procession when it comes to political influences and manipulation. BUT: extrapolation alone cannot be considered as personal or even sensitive data if there is no link to a specific natural person. E.g. if targeters process data of a large group of natural persons or even a specific geolocation it cannot generally be considered personal data. The EDPB should make a distinction that is applicable to legitimate business models in practice.

Best regards

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