

EDPB Guidelines 08/2020 on the targeting of social media users

A contribution by Zalando SE to the EDPB's public consultation

With this note, Zalando wishes to provide feedback to the public consultation on the EDPB Guidelines 08/2020 on the targeting of social media users.

1. Introduction - About Zalando

Zalando is a European online platform for fashion. We sell fashion (clothing, shoes, accessories), as well as beauty products to 34 million consumers in 17 European countries. We complement our retail activity with a platform element (our "Partner Program"), which gives brands and retailers the possibility to sell directly to Zalando customers.

In 12 years of e-commerce, Zalando has developed cutting-edge digital capabilities. We want to share these capabilities with brands through our Partner Services. Beyond our Partner Program ("our platform"), other Partner Services include Zalando Marketing Services (ZMS, for brands that wish to advertise on Zalando), Zalando Fulfillment Solutions (ZFS), and Connected Retail (to connect brick-and-mortar stores in Germany, the Netherlands, Poland, Spain, Sweden to the Zalando platform). All aim at helping our partners overcome challenges in their digital value chain by leveraging our technology, marketing or convenience strengths.

2. Joint Controllership

According to the EDPB draft, it would be sufficient for Joint Controllership, if the Targeter selects only abstract targeting criteria from a predefined selection provided under the sole control of the Social Network Provider (Section 5.2.1.).

Such position, however, would exceed the principles laid down by the CJEU in the *Wirtschaftsakademie* and *Fashion ID* decisions. Assuming Joint Controllership in such cases, in our opinion, clearly overstretches the concept of Joint Controllership.

In the cases in question, the Provider offers an advertising product on its own responsibility. Solely the Provider, and not the Targeter, is able to match its members against targeting criteria, and consequently solely the Provider can be responsible for the classification of its members to certain targeting segments. The data provided by the members which is used by the Provider to conduct this classification is subject to a legal relationship between the Provider and its members exclusively, leaving the Targeter with no influence on neither the data selection, nor its processing, nor the resulting bucketing of individuals (members) into targeting segments. The Targeter does not control any means of the data processing.

Moreover, using an independent stand-alone service offered by a third party does not yet per se automatically create joint economic activities for a mutual purpose. It is much rather the basis of any (digital) economy, in which different controllers pursue synallagmatic economic activities, which can be either opposing or independent or joint activities. Only in the latter case the underlying data processing should be considered a matter of Joint Controllership. By the targeting in question, the Targeter does not only not control the means, but also not the purpose of the data processing.

Placing an advertising order for certain audience segments should not be seen as sufficient for Joint Controllership. The advertising order (by the Targeter) for particular audience segments only sets the occasion for the data processing (by the Provider), but it does not determine its purpose in the sense of Joint Controllership.

Example: If an employee of Company A calls the switchboard of Company B and requests to speak to the corporate data protection officer, then Company A would not "jointly control" the processing of personal data by the switchboard operator of Company B (i.e. determining who the requested person is and what their extension number is). Here too, only the occasion for data processing by Company B under its own control is given by Company A. Even though Company B would not have performed the particular data processing if Company A hadn't asked for it, Company A has not set any purpose; but the purpose was pre-determined by Company B (i.e. switchboard operations) - just similar to a Social Network Provider that has pre-determined the purpose for the data processing by operating a segmented advertising service. Consequently, neither calling a switchboard nor using a segmented advertising service should constitute Joint Controllership.

As the example shows, setting the occasion for data processing cannot be sufficient to determine the purposes of the data processing. The purpose determined by the responsible Social Network Provider is the provision of a segmented advertising service, and this should be regarded as the sole purpose of the data processing. The advertising purpose of the Targeter is only aimed at the provision of the advertising service by the Social Network Provider, and not at any particular data processing.

3. Secondary Use of Custom Audience Data

For Custom Audiences (Section 5.2.2.), it should be recognized that the sheer fact that a person (data subject) is a member of a custom audience list uploaded by the Targeter is personal data; the information that the Targeter sees the person as a potential target of their advertising includes the information that the person is (likely) interested in the type of products that the Targeter sells. It should be ensured that the Social Network Provider must not process this data for other purposes.

Example: a custom list audience is uploaded to a Social Network by an automobile manufacturer. It can be assumed that the members of such an audience list are interested in purchasing cars or car accessories. However, it should be impermissible for the Social Network Provider to make this information its own and monetize it by assigning the audience

members to a targeting segment that allows other Targeters (than the uploader) to target them with advertisements for cars or car accessories.

According to the principle of purpose limitation and according to the weighting of interest laid down in Recital 47, sentence 7 GDPR, companies other than the Targeter that holds the primary customer relationship should not be able to make secondary use of the information that the Targeter targeted a particular person.

4. Annex - Contact details

For further information, please contact:

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