

Anu Talus

Chair of the European Data Protection Board

Personal Information Protection Commission
209, Sejong-daero, Jongno-gu
Seoul, 03171
Republic of Korea

Brussels, 20 June 2023

by e-mail only

Ref: OUT2023-0044

Dear Mr. Ko,

Thank you very much for your letter of 16 May 2023, addressed to Andrea Jelinek as Chair of the EDPB, to which I am replying after being elected as new Chair of the EDPB on 25 May 2023.

I take note of your two questions linked to recent decisions of the Personal Information Protection Commission.

As a preliminary remark, I must underline that it goes beyond the EDPB's remit to provide any kind of legal advice and/or opinion with regard to individual cases or the practices of individual controllers in non-EU countries. Within its mission of ensuring the consistent application of the GDPR, the EDPB has however issued guidance that can be relevant to your questions, bearing in mind that they refer specifically to the interpretation and application of the GDPR itself.

In your first question you request the EDPB's views as to which party (i.e. the website operator, or the plugin provider) is obliged to obtain consent under the GDPR regarding the collection of users' online behavioural data using cookies and online identifiers.

In this context, you refer to the Judgement of the Court of Justice of the European Union (CJEU) regarding *Fashion ID vs Verbraucherzentrale NRW e.V.*¹ In this ruling, the CJEU concluded that a website operator which embeds a social media plugin on its website causing the browser of a visitor to that website to request content from the provider of that plugin and, to that end, to transmit to that provider personal data of the visitor, can be considered a controller, jointly with the social media

¹ *Fashion ID GmbH & Co. KG vs Verbraucherzentrale NRW e.V.* (Case C-40/17), ECLI:EU:C:2019:629 (hereafter: Case C-40/17)

plugin provider, in respect of operations for which it determines the purposes and means of the processing, i.e. the collection and disclosure by transmission of the personal data of that visitor.² The CJEU further stated that consent must be given prior to the collection and disclosure by transmission of the data subject's data to the social media plugin provider³. In such circumstances, it is for the operator of the website, rather than for the provider of the social plugin, to obtain that consent, since it is the fact that the visitor consults that website that triggers the processing of the personal data in that case⁴. However, the consent that must be given to the operator relates only to the operation or set of operations involving the processing of personal data in respect of which the operator actually determines the purposes and means.⁵

A first important point to be borne in mind is that the judgment of the CJEU in *Fashion ID* is anchored in the concept of joint controllership, which refers to the situation where two or more entities jointly determine the purposes and means of processing⁶. The EDPB has issued guidance on the concept of (joint) controllership in its Guidelines 7/2020 on the concepts of controller and processor, clarifying that the qualification as controller has to be assessed with regard to each specific data processing activity⁷. With reference, specifically, to joint controllership and the element of jointly determining the means of processing, the EDPB clarified that joint controllers can be such when they process the data for the same purposes but also when they pursue purposes which are closely linked or complementary, e.g. when a mutual benefit arises from the same processing operation and each of the entities involved participates in the determination of the purposes and means of processing.⁸ With respect to the joint controllers' decision on the means for processing, the EDPB built upon the judgment in *Fashion ID* to note that "the choice made by an entity to use for its own purposes a tool or other system developed by another entity, allowing the processing of personal data, will likely amount to a joint decision on the means of that processing by those entities"⁹, but clarified that "the use of a common data processing system or infrastructure will not in all cases lead to qualify the parties involved as joint controllers"¹⁰.

Additionally, in its Guidelines 8/2020 on the targeting of social media users, which you have referenced in your letter, the EDPB has underlined that, where (joint) controllers seek to rely on consent, valid consent must be obtained prior to the processing, and that it is the responsibility of the (joint) controllers to assess when and how information on the processing of personal data should be provided, and consent obtained. The question of which joint controller is in charge of collecting this

² Case C-40/17, paragraphs 99-101.

³ Case C-40/17, paragraph 102.

⁴ Case C-40/17, paragraph 102.

⁵ Case C-40/17, paragraph 102.

⁶ Regulation 2016/679 (hereafter: GDPR), Article 4(7) and Article 26.

⁷ EDPB Guidelines 7/2020 on the concepts of controller and processor, paragraph 26.

⁸ EDPB Guidelines 7/2020 on the concepts of controller and processor, paragraph 59-60.

⁹ EDPB Guidelines 7/2020 on the concepts of controller and processor, paragraph 67. The EDPB also noted that the CJEU concluded "that by embedding on its website the Facebook Like button made available by Facebook to website operators, FashionID has exerted a decisive influence in respect of the operations involving the collection and transmission of the personal data of the visitors of its website to Facebook and had thus jointly determined with Facebook the means of that processing" (referring to Case 40/17, paragraphs 77-79).

¹⁰ EDPB Guidelines 7/2020 on the concepts of controller and processor, paragraph 68.

consent comes down to determining which of them is involved first with the data subject.¹¹ In practice, therefore, the EDPB's view is that this question will depend on the circumstances of the specific case at hand.

As to example 6 of these guidelines, as the placement of cookies and processing of personal data occurred at the moment of account creation, the EDPB considers that the social media provider had to collect her valid consent before the placement of advertisement cookies¹². However, another point that was highlighted by the EDPB is that where consent is relied upon by multiple (joint) controllers or if the data is to be transferred to or processed by other controllers who wish to rely on the original consent, these organisations should all be named, and insofar as not all joint controllers are known at the moment when the social media provider seeks the consent, the latter will necessarily need to be complemented by further information and consent collected by the website operator embedding the social media plugin¹³. This was illustrated in example 6 of the Guidelines, where the website operator sought consent to transmit the personal data to the social media provider and undertook technical measures so that no personal data is transferred to the social media platform until she gives her consent.¹⁴

It is also to be emphasised that the consent that may have to be collected by the website operator relates only to the operation or set of operations involving the processing of personal data in respect of which the operator actually determines the purposes and means¹⁵. Consequently, the EDPB underlined that the collection of consent by a website operator does not negate or in any way diminish the obligation of the social media provider to ensure the data subject has provided a valid consent for the processing for which it is responsible, either as a joint controller or as a sole controller.

As regards your second request to provide EDPB's views on the data processing practices of large technology companies and claims that are made by these companies, including concerns over potential data protection and privacy infringements, as mentioned above, the EDPB cannot provide legal advice on specific cases outside of its remit, nor make general statements about any category of controllers and their practices in third countries.

As regards the three national decisions you have referenced, I would like to underline that as all national decisions, these were taken based on the circumstances of those specific cases, and do not cover the practices of controllers in third countries' jurisdictions.

¹¹ EDPB Guidelines 8/2020 on the targeting of social media users, paragraph 74.

¹² EDPB Guidelines 8/2020 on the targeting of social media users, paragraph 74.

¹³ EDPB Guidelines 8/2020 on the targeting of social media users, paragraph 75; EDPB Guidelines 5/2020 on consent under Regulation 2016/679, paragraph 65. According to the EDPB, insofar as not all joint controllers are known at the moment when the social media provider seeks the consent, the latter will necessarily need to be complemented by further information and consent collected by the website operator embedding the social media plugin. EDPB Guidelines 8/2020 on the targeting of social media users, paragraph 75.

¹⁴ EDPB Guidelines 8/2020 on the targeting of social media users, paragraph 74, and example 6 on p. 21.

¹⁵ EDPB Guidelines 8/2020 on the targeting of social media users, paragraph 76, referring to Case 40/17 paragraphs 100-101.



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I trust that these explanations and the documents we refer to may be helpful and clarify the work carried out by the EDPB with a view of ensuring a consistent application of the GDPR in respect of the issues mentioned in your letter.

Yours sincerely

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