

Data protection

Facebook's "Like" button and the need to update the communication policy on the processing of personal data

Summary

In a decision of 29 July 2019,¹ the European Court of Justice (ECJ) ruled that a company that operates a website to sell its products and inserts Facebook's «like» button to improve its visibility on the social network is responsible for the collection and transmission to Facebook.

This responsibility requires the company to inform website visitors of this processing by publishing the processing policy agreed with the social media and to **obtain the prior consent of website users**.

These obligations, which derive from European data protection law, **apply to Swiss companies**, even if they have no registered office in the European Union, **if their website is visited by people in the EU** and goods or services are offered to them.

The facts

Fashion ID is a German online clothing company, which inserts Facebook's «Like» button on its website. Thanks to the button, Facebook collects personal data from visitors of Fashion ID's website although they do not click on the «Like» button or neither even belong to the community of Facebook. However, the visitors are not informed about their personal data being processed by Facebook. The *Verbraucherzentrale NRW*, a German consumers protection association, criticises Fashion ID for transmitting these data to Facebook without obtaining the prior consent of the visitors of the website. The association claimed that this data collection is made in breach of the duty to inform provided by data protection law (Art. 2 let. h of the former EU Directive 95/46/EC, now replaced by Art. 7 ch. 11 GDPR).² The association brought an action for an injunction against Fashion ID before the *Landgericht* of Düsseldorf, which accepted the association's request.

In the case of an appeal by Fashion ID, the referring court asks the ECJ to clarify whether the manager of a website, which inserts a social module allowing the collection of personal data, is co-responsible with Facebook for the processing of visitors' data and whether, if so, the manager must first inform them and obtain their consent.

The law

The ECJ recalls that the notion of «controller» must be interpreted broadly. Under Article 2(d) of Directive 95/46/EC³ (now Article 4(7) of the GDPR), any natural or legal person or body which, alone or jointly with others, determines the purposes and means of processing personal data shall be responsible for the processing for each stage of the processing operation concerning him.

In this case, inserting on the Fashion ID website the Facebook's «Like» social module (plug-in) allows the browser of the visitors of Fashion ID website to request personal data and transmit them to Facebook. In return, Fashion ID benefits from a better visibility on the social media. The processing of data of Fashion ID's website visitors is therefore intended to be of commercial benefit to both entities.

Consequently, the ECJ holds that it is the responsibility of the website manager to inform website visitors of the processing of the data and to seek their consent, failing which their rights would not be effectively protected, after a transfer of data to the social media.

¹ ECJ, judgment C-40/17 of 29 July 2019 (Fashion ID GmbH & Co. KG v. Verbraucherzentrale NRW eV).

² Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation).

³ Directive 95/46/EC (repealed) of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

Commentary

This ECJ ruling confirms the very broad definition of “controller” required by the GDPR. It is in line with its recent case law in which it considered the author of a page hosted by Facebook to be co-responsible with it for processing the data on that page.⁴ Also, although Fashion ID and Facebook do not process data for the same purpose, the fact that the ECJ recognises commercial advantage as a common purpose broadens the scope of data protection.

The company operating a website must therefore conclude an agreement with the social media (e. g. Facebook) defining in a transparent manner their respective obligations in order to comply with the requirements of the GDPR (Art. 26 GDPR) before inserting social media modules on its website.

In addition, a company operating a website must communicate to the users of its website the processing of personal data relating to the social module for which it determines the purposes and means, by making public its processing policy for the users of the website. A simple «Disclaimer» section on the latter is not sufficient if the data are collected as soon as the website is accessed. In this case, a warning message presenting the website’s data processing policy, which the user can accept and access the website or refuse and not access the website, is required.

This ruling is of great practical significance for any company, including Swiss companies, wishing to use social networks to increase the visit of their products or services for European consumers.

Our specialist lawyers are at your disposal to answer any special questions you may have in relation to this Newsletter.

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⁴ ECJ, judgment C-210/16 of 5 June 2018 (Wirtschaftsakademie Schleswig-Holstein).