

DPA fines social media platform for data processing during referral programme

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The Belgian Protection Authority (DPA) recently fined a social media platform €50,000 for processing personal data during the scope of a referral programme without an appropriate legal basis.

This decision is particularly relevant because:

- it was rendered on the basis of the one-stop-shop mechanism and all of the national authorities concerned validated the DPA's reasoning;
- the DPA has confirmed that the 'refer/invite a friend' function used by social media platforms cannot fall within the scope of the household exemption;
- following the European Data Protection Board's opinion, the DPA confirmed that a subset of data processing (in this case sending marketing emails) which falls within the scope of the EU e-Privacy Directive (2002/58/EC) does not affect the DPA's competence under the EU General Data Protection Regulation (GDPR); and
- an extended review by the DPA concerning the possible legal basis for referral programmes on social media platforms shows that consent from users cannot serve as a legal basis.

Concerning this last point, the facts were as follows. The social media platform requested the consent of its users to import their address books (from other social media platforms or software). Having received consent for the import, the social media platform sent invitations on behalf of its users to their contacts (a 'connect' request for contacts who were already members of the social media platform and a 'join' request for non-members).

The social media platform based the import and sending of these invitations on the consent of its users. However, under the GDPR, only a data subject whose personal data is being processed can give valid consent, unless an exception is provided (eg, parental consent). Therefore, the DPA concluded that the data processing had been performed without an appropriate legal basis.

In this case, a possible legal basis (for the import of address books and the sending of invitations) could be a legitimate interest if all conditions (ie, the proportionality test inherent to the legitimate interest legal basis and the data minimisation principle) are fulfilled. More specifically, the DPA stated in substance that, in this case, the processing would have been considered lawful if:

- only personal data that was strictly necessary for the purposes of 'inviting' had been processed; and
- this personal data had been processed with the aim of comparing and forgetting in order to select, among contact details, the existing members of the social media platform, which would have made it possible to send invitations to only members on the condition that they previously consented to this.

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