

Privacy rules for targeted advertising in the UK/EU

Recent decisions and pending new legislation have caused some confusion over the privacy rules for targeted advertising. Of particular complexity is the issue of what viable lawful basis can be relied upon for the processing of personal data involved in such activities. We have put together this snapshot table setting out how each of the key relevant pieces of legislation in the UK and EU deals with the issue.


The table is up to date as of 18 August.

| Legislation | What does the legislation say about targeted advertising? | Is consent needed and when? | Who does it apply to? | Potential fines for non-compliance |
|----------------------------|---|---|---|--|
| Digital Services Act (DSA) | <p>The DSA states that online platforms must not present advertisements based on profiling (as per the UK and EU GDPR—for definitions, see below) using:</p> <ul style="list-style-type: none">• special categories of personal data (such as health, religion, sexuality or ethnicity); or• the personal data of those aged under 18. | <p>This is a strict prohibition and targeted advertising by those subject to the DSA as online platforms are prohibited in these circumstances, even with the end user's consent.</p> | <p>Online platforms offering their services in the EU – under the DSA, this is a specific type of intermediary service that, at the request of a recipient of the service, stores and disseminates information to the public.</p> | <p>Up to 6% of global annual turnover.</p> |

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| Digital Markets Act (DMA) | <p>The DMA places a ban on tracking end users outside of a gatekeeper's core platform service for the purpose of targeted advertising, without effective consent having been given.</p> <p>In addition, the DMA requires that gatekeepers perform an independent audit covering all of the profiling methods (as per the GDPR definition, see below) used across core platform services and send this to the European Commission. Gatekeepers must also make an overview of the report publicly available.</p> | Yes. Gatekeepers must collect consent from end users to combine personal data from other or third-party services with data from their own core platform service for targeted advertising purposes. | Specific organisations, designated as "gatekeepers", that operate a "core platform service" and meet specific criteria related to having a significant impact on the EU market (based on annual turnover or market valuation), if the organisation acts as a gateway for business users to reach end users (based on the number of active users), and if it enjoys an entrenched and durable position in the EU market (based on meeting certain thresholds in the last 3 financial years). | Up to 10% of global annual turnover (20% for repeat offenders). |

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| ePrivacy Directive (ePD) | The ePD does not specifically regulate targeted advertising; however it does regulate its key vehicles – cookies and certain electronic direct marketing (including email and SMS). | Yes. The ePD states that non-essential cookies (and other similar technologies, such as pixels, beacons and tags) must be installed on a user's device only with their consent, and similarly, direct marketing may only be carried out with a user's consent (note that in some jurisdictions, such as the UK, an alternative "soft opt-in" approach is permitted, whereby customers can be asked to opt out of receiving such communications rather than opting in – the scope of this is limited, however). Cookies for targeted advertising are always non-essential, so consent would be required. | Any information society services using/ instigating the use of non-essential cookies to carry out targeted advertising and/or direct marketing. | Whilst the fines available under the ePD are relatively low (for example, £500,000 in the UK), regulators in the EU commonly take enforcement action against rule breakers using the GDPR's set of enforcement methods, including much higher fines (see below). |
| ICO's Age Appropriate Design Code (AADC) | Profiling – including for behavioural advertising – must be switched off by default for children under 18, unless a service can demonstrate a compelling reason for the profiling to be on by default, taking into account the best interests of the child. Any profiling must ensure that adequate safeguards are in place to prevent harm to the child, such as "effective consent". | Yes. The AADC is clear that children must elect to enable targeted advertising to be provided as part of an online service. | Any information society service "likely to be accessed by children" in the UK. | See UK GDPR penalties. |

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| EU General Data Protection Regulation (EU GDPR) | Targeted advertising is not specifically mentioned in the GDPR; however profiling is. Profiling is defined as “any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person’s performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements”. | <p>Unclear. The GDPR does not state that consent is required for profiling (only in some circumstances where this reaches the threshold of automated decision making which advertising usually won’t). However recent decisions coming out of the EU suggest that consent may be the only appropriate lawful basis to carry out profiling for the purposes of targeted advertising in certain circumstances.</p> <p>In early 2023, the Irish Data Protection Commissioner (DPC) declared that targeted advertising and profiling of individuals based on contractual necessity is not lawful despite how integral such targeting is to the service in question. Accordingly, many online services pivoted from relying upon contractual necessity to legitimate interests for non-cookie related targeting activities. Note that this decision only dealt with the issue of contractual necessity, and did not consider what other potentially appropriate lawful basis there might be for targeted advertising.</p> | Any data controller subject to the GDPR, i.e., offering goods or services in the EU, or monitoring the behaviour of data subjects in the EU. | Up to 4% of global annual turnover or €20 million (whichever is higher). |



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| | | <p>Further to this, in July 2023, the Court of Justice of the European Union (CJEU) handed down a decision on the processing of personal data collected by third party websites, apps, and ancillary services on behalf of an online platform. The judgment seems to suggest that neither legitimate interests nor performance of a contract would be appropriate for processing of personal data captured and processed across services and then used for personalised services and targeted advertising. It suggests that consent would be the only applicable legal basis available to rely on. The important thing to note here is that this case was not a data protection case at its heart and specifically related to third-party/cross-platform data, which was a key reason for the court to consider that the processing was not within the user's reasonable expectations.</p> | | |

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| | | <p>A decision by Norway's data protection authority (Datatilsynet) also suggests that behavioural advertising is only allowed with a user's consent. But, crucially, out of scope of the order (i.e., no consent needed) was information that users willingly shared, such as profile information (including age, gender, and location).</p> <p>In combination, these decisions have caused confusion amongst many given that EU supervisory authorities previously suggested that legitimate interests may be an appropriate lawful basis outside of the use of cookies and similar technologies and direct marketing if the law specifies consent.</p> | | |
| UK General Data Protection Regulation (UK GDPR) | As above with the EU GDPR. | <p>As above with the EU GDPR.</p> <p>It is worth noting that whilst the recent findings by the CJEU and DPC referred to above are not directly applicable to the UK, the Information Commissioner's Office has said that it is reviewing what these decisions mean in terms of the UK GDPR position.</p> | Any data controller subject to the UK/EU GDPR, i.e., offering goods or services in the UK, or monitoring the behaviour of data subjects in the UK. | Up to 4% of global annual turnover or £17.5 million (whichever is higher). |

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