

Operators of websites with Facebook Like button are considered as joint controllers with Facebook



The Court of Justice of the European Union (“CJEU”) gave an interesting ruling in Case C-40/17 (Fashion ID GmbH & Co. v Verbraucherzentrale NRW eV). The judgment dealt with the website operator’s responsibility when embedding third party plugins on its website.

In this particular case, a German online clothing retailer, Fashion ID GmbH & Co. KG, had a Facebook Like button embedded on its website. Because of the plugin, when a person visited the website, the information about the visitor’s IP address and browser string were transferred to Facebook without the visitor being aware. The transfer happened regardless of whether the visitor had clicked the Like button, and regardless of whether the visitor had a Facebook account.

When making the decision, The CJEU applied the Directive 95/46/EC. The directive is now replaced by The General Data Protection Regulation (EU) 2016/679 (GDPR), but the definition of a joint controller, and the basis for lawful processing of personal data, are identical in both of the regulations. The decision is therefore still relevant.

In the judgement, the CJEU ruled that an operator of a website embedding the Like button can be considered to be a controller jointly with Facebook. Furthermore, The CJEU noted that embedding the Like button to its website allowed Fashion ID to optimize the publicity for its goods, by making them more visible on Facebook. This happened when the visitor to the website clicked the Like button. Accordingly, embedding the Like button to the website gave Fashion ID a commercial advantage.

Therefore, based on the CJEU’s interpretation, a joint controllership can occur regardless of an agreement, and simply as a result of the de facto situation. However, as Fashion ID was only involved in the collection and disclosure of personal data to Facebook, the CJEU held that Fashion ID’s role as a controller and its liability was limited to such phrase and furthermore, that Fashion ID could not be considered a controller in respect of the operations involving data processing carried out by Facebook Ireland, after the data had been transmitted to Facebook Ireland.

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The CJEU made it clear that the operator of a website, such as Fashion ID, as a (joint) controller, must at the time of the collection provide a privacy information notice concerning the collection and disclosure of personal data to Facebook. Furthermore, the CJEU ruled that an operator of a website, such as Fashion ID, must obtain a prior consent in respect of operations in which it is a (joint) controller, i.e. the collection and transmission of the data.

CJEU also ruled that if the processing of the data is necessary for the purposes of a legitimate interest, each of the (joint) processors must pursue a legitimate interest through the collection and transmission of personal data, in order for the operations to be justified in respect of each of the (joint) controllers.

Implications of the Ruling

Even though the ruling only relates to Facebook's Like button, the decision may also be applicable to other social media plugins, and in general, to any third party cookies that operate in similar fashion. Accordingly, any operator with a social media plugin, operating in similar fashion as Facebook's Like button, should make sure that they either obtain a prior consent, or that there is a legitimate interest for the collection and transmission of the personal data. They should also make sure that the privacy information notice contains information about the social media plugin.

Despite the fact that the CJEU ruling limits the website operators' obligations regarding the collection and transmission of data, the obligations listed by the CJEU may require changes to such website operators' privacy policies. They may also require the website operators to ask for prior consent from the visitors before the processing takes place.

