

“GUIDELINES 3/2025 ON THE INTERPLAY BETWEEN THE DSA AND THE GDPR”
Contribution of the company Valiuz to the public consultation
31st of October 2025

The company Valiuz, operates as an advertising sales house specializing in the "retail media" market. Its role is to market, to advertisers, the advertising spaces and audiences held by mass-market retail companies (which may operate in physical stores and/or online).

The retail media sector has been expanding rapidly in recent years¹. In France, it is dominated by a pure player, Amazon (which holds an estimated market share of nearly 70%)..

Valiuz's client companies are present both online and in stores, in France and internationally (ALINÉA, AUCHAN, BOULANGER, BZB, CHRONODRIVE, DECATHLON, ELECTRO DEPOT, FLUNCH, JULES, KIABI, LEROY MERLIN, NORAUTO, ROUGE GORGE, SAINT MACLOU, TAPE A L'OEIL...).

Valiuz supports the EDPB's initiative to clarify the interaction between the Digital Services Act (DSA) and the GDPR. These guidelines are essential for providing a stable and harmonized legal framework for stakeholders, and they largely confirm the interpretation we already apply.

However, the draft guidelines seem to require clarification on one crucial aspect to account for the specific practices of the retail media market and to provide a clear legal framework for the merchants and operators concerned.

The points detailed below aim to draw the EDPB's attention to the need to distinguish customer segmentation based on a purchase history ("offline" or CRM data) from prohibited profiling using special categories of data within the meaning of Article 9 of the GDPR, as referred to in Article 26(3) of the DSA.

¹ The retail media market represents more than one billion euros in France according to Xerfi's estimates. https://www.xerfi.com/presentationetude/Le-marche-du-retail-media_COM39

1. On the scope of Article 26(3) DSA: the necessary distinction between segmentation and profiling

Article 26(3) of the DSA prohibits online platforms from presenting targeted advertising "based on profiling [...] using special categories of personal data referred to in Article 9(1) of the GDPR". We fully support the objective of this provision. However, the guidelines would benefit from clarifying what constitutes "profiling using" this data.

We make a fundamental distinction.

On the one hand, there is inferential profiling (covered by the ban) which is the act of collecting various data (browsing, clicks, etc.) to deduce or infer a religious belief, political opinion, or health status, and creating a specific segment ("people of X faith," "people with Y condition") to target them with advertising.

On the other hand, there is factual segmentation (not covered, in our view) which is the act of using a purchase history, based on valid GDPR consent, to offer similar products. This is segmentation based on a fact ("people who bought product X") and not on an inference about the person themselves.

An overly broad interpretation of Article 26(3) would equate the second situation with the first, which would have disproportionate consequences.

This distinction is all the more relevant given that recent case law from the Court of Justice of the European Union has tended to interpret the notion of data revealing special category data very broadly. Rulings such as *Lindenapotheker* (regarding the ordering of medicines), *Bundeskartellamt* (on incidental collection), or *OT v Vyriausioji* (on indirect disclosure) create major legal uncertainty for operators. An extensive application of these rulings to targeted advertising could paralyze legitimate processing operations that have no intention of deducing sensitive data.

This is why, in our view, it is relevant for the EDPB to clarify in its guidelines that triggering Article 9(1) of the GDPR (and thus Article 26(3) of the DSA) requires objective elements, notably a demonstrable intent on the part of the data controller to reveal the special category data and an actual inference thereof. This would also align with example 2 (paragraph 75) of the EDPB's own guidelines, which uses the term "inferred" ("*uses inferred religious beliefs*") to characterize the prohibited profiling.

2. The "Retail Media" example: purchase history and specific products

The business of our retail partners consists of selling everyday consumer products. Some of these products may, by their nature, be linked to an Article 9 category (e.g., Halal, Kosher, gluten-free, low-fat food products, shampoo for hair loss, alcohol, etc.).

A concrete example : A customer, as part of their loyalty account, regularly buys gluten-free products from a food retail brand. They have also given their consent to the use of their purchase history to receive targeted promotions. The brand (directly or via its advertising sales house) shows them an advertisement to discover a new brand of gluten-free pasta sold on its shelves.

According to our analysis:

- The purpose of the processing is not to deduce a health status (celiac disease or an allergy, for example).
- The purpose is commercial: to offer a relevant product to a consumer who has already shown an interest for this product category.
- There is neither inference nor cross-referencing aimed at establishing a health profile. The processing is limited to a fact: "buyer of gluten-free".

Equating this use with profiling based on health or sensitive data would be an error. The data processed is "the purchase of product X," not "the health status Y of the person."

3. The impacts of an extensive interpretation: competitive risks and discrimination against specialized brands

If the EDPB does not clarify this point, a broad interpretation of Article 26(3) could prohibit the example above.

The consequences would be damaging and paradoxical.

On the one hand, this prohibition could lead to a distortion of competition. In fact, only generalist brands could conduct targeted advertising. Specialized brands (organic, dietary, community-specific, etc.) would be *de facto* excluded from digital advertising based on the most relevant segments for them: their own consumers.

On the other hand, it could also lead to inequity for the consumer: A consumer who has consented to receive offers on the products they buy could no longer receive

offers on their gluten-free products, but would continue to receive offers on standard sodas or cookies.

This would amount to prohibiting companies from addressing their existing or potential customers on the sole ground that their products are specific.

4. The importance of the risk-based approach and GDPR safeguards

The analysis of a processing must be assessed according to the real risks for the data subject.

In this regard, we wish to insist that the presentation of an advertisement, even targeted, does not constitute a "decision based solely on automated processing" which produces "legal effects" or "similarly significantly affects" the person, within the meaning of Article 22 of the GDPR, which is moreover recalled in the Article 29 Working Party guidelines from 2018 (WP251). The ad is only an invitation, a factor in the consumer's thought process; it does not change their legal situation and does not make any subsequent action inevitable.

Equating advertising with decisions that have significant effects (like credit scoring, denial of employment, or access to education) is a mistake. Furthermore, advertising actors, in accordance with the minimization principle, often process pseudonymized data and do not seek to profile individuals based on a presumed vulnerability, of which they are generally unaware. We therefore ask the EDPB to clarify that the selection and presentation of advertising do not fall within the scope of Article 22(1) of the GDPR, or, at the very least, to define the exceptional and specific circumstances (for example, in connection with the "high-risk" classification of the AI Act for certain advertising) that would justify such an application.

Also, we wish to reiterate that outside of cases of automated decisions having a legal or similar impact (Article 22 GDPR), the act of a merchant offering its customers advertisements for products they are likely to buy, given their consumption habits at that merchant, is not intended to discriminate or have a significant impact on the private lives of these individuals. This is a common commercial practice both for merchants, whose objective remains to build customer loyalty by continuing to offer them products likely to interest them, and also for customers, who expect this use of their data when it is knowingly transmitted to the merchant.

The risk is all the more controlled as it is framed by the GDPR safeguards, which the DSA does not call into question:

1. The legal basis: This type of segmentation is based on the legitimate interest of merchants to offer relevant products to their customers, who can object (Article 21, Recital 47 of the GDPR), or on the consent of individuals when it is required in specific cases (Article 22 GDPR, e-Privacy Directive).
2. Transparency: Individuals must be clearly informed of the use made of their data.
3. User control: The customer has the possibility, at any time, to object (or, where applicable, withdraw their consent) to this specific use of their consumption habits.

Offering individuals relevant advertisements based on their purchase history poses no risk to them under these conditions.

5. Proposal for clarification

To guarantee legal certainty for retail media actors and to preserve a competitive market, we propose that the EDPB include an explicit clarification in its guidelines:

The prohibition in Article 26(3) of the DSA does not target advertising segmentation based on a factual purchase history, including when the purchased products may be linked to a data category under Article 9 of the GDPR. This practice remains lawful provided that:

1. The processing does not involve inference or cross-referencing of data aimed at actively deducing and profiling the special category (health status, religion, etc.) of the person; AND
2. The processing relies on a valid legal basis within the meaning of the GDPR and respects transparency requirements towards individuals

We thank you for organizing this public consultation and are available to collaborate with your services on the various points raised in this contribution.

Very respectfully,

Legal & Compliance Leader of Valiuz