

IAB Europe, Rond-point Schuman 11, 1040 Brussels



Ms. Justyna Romanowska
Permanent Representation of Poland to the EU
Rue Stevin 139, 1000 Brussels

Brussels, 28 February 2020

Dear Ms. Justyna Romanowska,

We are writing to respectfully voice our views in the light of the latest ePrivacy compromise text, dated 21 February 2020.

IAB Europe represents the broad digital advertising and marketing ecosystem, with 27 national associations whose members comprise advertisers, agencies, publishers and technology companies. We have followed the Council discussions on the proposed ePrivacy regulation with great interest, and are hopeful that the final outcome will be a law that enables advertising to continue to provide a revenue stream for publishers and the creators of other valuable online content and services.

We welcome the introduction of *legitimate interests* as an available legal basis for the use of the processing and storage capabilities of terminal equipment and the collection of information from end-users' terminal equipment, as this development shows that there is room for fully aligning Article 8(1) with the principles-based approach of the GDPR on lawful processing. However, we note with regret that the practical utility of the new wording will be exceedingly limited, given the fact that access to this legal basis is to be conditional on data not being shared with any third party. Since many small publishers depend on third-party data controllers for the delivery and measurement of digital advertising, and the GDPR anyway requires that they be explicitly disclosed to the user at the time that data are first collected, it is not clear why such a condition should be introduced. We also observe that the practical utility of the legal basis would be severely restricted by the prohibition for publishers to determine characteristics of their users under *legitimate interests* in Article 8.1(g) and Recital 21b.

Importantly, we are alarmed by the removal of the recital language on *conditionality* of access to ad-funded services on consent in Recital 20. We maintain our strong support for a clear unqualified endorsement of the right of publishers and other ad-funded online services to make access to their content and services conditional on consent for storing and/or accessing information on user devices for advertising purposes. The rigorous application of the GDPR by supervisory authorities who may rely on arbitrary EDPB's interpretation of *consent* as a legal basis, reveals that industry needs strong, unambiguous legal presumptions, beyond the recital language, in favour of allowing private actors to obtain such consent in a seamless manner.

Given the fact that the future of the ad-funded internet would be imperilled by this exclusion, our hope is that the Council will reaffirm its previous position on the matter of *conditionality* in legal language of the text.

We are attaching for your consideration proposed amendments to Recitals 21b and 21c, as well as Article 8.1(g), 8.1(g)(1a), and 8.2a, that we believe would address these two serious concerns.

In conclusion, once more, we commend the Croatian Presidency and the Member State delegations alike for the serious reflection that is evident in the latest text. We would welcome the opportunity to discuss our concerns and our proposed amendments at your convenience.

Kind regards,

A handwritten signature in black ink, appearing to read 'T.P. Feehan'.

Townsend Feehan, Chief Executive Officer, Interactive Advertising Bureau Europe

RECITAL 21B

(21b) The legitimate interests of a service provider could provide a legal basis to use processing and storage capabilities of terminal equipment or to collect information from an end-user’s terminal equipment, provided that such interests are not overridden by the interests or the fundamental rights and freedoms of the end-user, taking into consideration the reasonable expectations of end-user based on her or his relationship with the provider. The demonstration of a legitimate interest requires careful assessment, in particular whether an end-user can reasonably expect that the use of processing and storage capabilities of her or his terminal equipment or the collection of information from it, may take place. Only if the results of the balancing test undertaken by the service provider demonstrate that its legitimate interest is not overridden by the interests and the fundamental rights and freedoms of the end-user, can the service provider rely on that legal basis.

A legitimate interest could be relied upon where the end-user could reasonably expect such storage, processing or collection of information in or from her or his terminal equipment in the context of an existing customer relationship with the service provider. For instance, maintaining or restoring the security of information society services or of the end-user’s terminal equipment, or preventing fraud or detecting technical faults might constitute a legitimate interest of the service provider.

Similarly, using the processing storage capabilities of terminal equipment is to fix security vulnerabilities and other security bugs, provided that such updates do not in any way change the functionality of the hardware or software or the privacy settings chosen by the end-user and the end-user has the possibility to postpone or turn off the automatic installation of such updates. Software updates that do not exclusively have a security purpose, for example those intended to add new features to an application or improve its performance, should not be considered as a legitimate interest.

A legitimate interest could also be relied upon by a service provider whose website content or services are accessible without direct monetary payment and wholly or mainly financed by advertising, provided that these services safeguard the freedom of expression and information including for journalistic purposes, such as online newspaper or other press publications as defined in Article 2(4) of Directive (EU) 2019/790, or audiovisual media services as defined in Article 1(1)(a)(i) of Directive 2010/13/EU¹ and the end-user has been provided with clear, precise and user-friendly information about the purposes of the cookies or similar techniques used and ~~has been given the right to object to~~ ~~accepted~~ such use.

Conversely, a provider should not be able to rely upon legitimate interests if the storage or processing of information in the end-user’s terminal equipment or the information collected from it were to be used ~~to determine the nature or characteristics on an end-user or~~ to build an individual profile of an end-user. ~~In such cases, the end-user’s interests and fundamental rights and freedoms override~~

¹ As amended by Directive (EU) 2018/1808

Commented [GM(E1): For avoidance of doubt of what is meant as well as to ensure alignment with the GDPR and Recital 21c of the current 21 February ePR text, we suggest to amend the wording in the proposed way.

Commented [GM(E2): In the digital advertising context, addressability of right audiences is key. Information about users’ online behaviour is to assign them to large segments – or “audiences” – that all share common interests, and because of those common interests, may be interested in a specific good or service. The aim here is to create narrower segments, rather than reveal identity of a specific individual consumer.

In the process of addressing the right audience, one does in fact aim at ‘determining the nature or characteristics on an end user’. This attempt to understand the audience better does not however need to lead to building an individual profile of an end-user, and it is worthwhile clarifying this in the text.

The practical utility of the legal basis would be severely restricted by the prohibition for publishers to determine characteristics of their users under *legitimate interests* in Article 8.1(g) and Recital 21b.

~~the interest of the service provider, as such processing operations can seriously interfere with one's private life, for instance when used for segmentation purposes, to monitor the behaviour of a specific end-user or to draw conclusions concerning his or her private life.~~ A legitimate interest should not exist if the information stored or processed in, or collected from, an end-user's terminal equipment includes special categories of personal data, as referred to in Article 9 (1) of Regulation (EU) 2016/679.

~~Consent should not be necessary either when the purpose of using the processing storage capabilities of terminal equipment is to fix security vulnerabilities and other security bugs, provided that such updates do not in any way change the functionality of the hardware or software or the privacy settings chosen by the end user and the end user has the possibility to postpone or turn off the automatic installation of such updates. Software updates that do not exclusively have a security purpose, for example those intended to add new features to an application or improve its performance, should not fall under this exception.~~

Commented [GM(E3)]: The very characterisation of a legitimate business activity such as *segmentation* is unjustified and should not be used. The reading of the recital is clear without it.

In the digital advertising context, addressability of right audiences is key. Information about users' online behaviour is to assign them to large segments – or “audiences” – that all share common interests, and because of those common interests, may be interested in a specific good or service. The aim here is to create narrower segments, rather than reveal identity of a specific individual consumer. Consequently, the claim about ‘*serious interference with one's private life*’ cannot be warranted.

RECITAL 21C

(21c) Where a service provider invokes a legitimate interest, certain additional conditions should be met and safeguards should be respected, including an impact assessment and where appropriate the consultation of the supervisory authority by the service provider. ~~In addition, the service provider should not share the information with third parties other than its processors, in accordance with Article 28 of Regulation (EU) 2016/679, unless it has been previously anonymised.~~ The service provider should, where necessary, implement appropriate security measures, such as encryption and pseudonymisation to ensure privacy of the end-users. Moreover, the end-user should be provided with information about these processing operations taking place and be given the right to object to such operations.

Commented [GM(E4): Since many small publishers depend on third-party data controllers for the delivery and measurement of digital advertising, and the GDPR anyway requires that they be explicitly disclosed to the user at the time that data are first collected, it is not clear why such a condition should be introduced.

The prohibition of sharing the information with any third party appears to be in fundamental conflict with open ecosystem where 1st and 3rd parties benefit from business partnership, and Real-Time-Bidding in particular. It may make *legitimate interest* unworkable also for other ad-related purposes, different to *profiling* which is already explicitly prohibited in the latest ePR text.

This recital language is directly related to Article 8.1(g)(1a), which we also recommend amending accordingly.

ARTICLE 8

Article 8

Protection of end-users' terminal equipment information stored in and related to end-users' terminal equipment

1. The use of processing and storage capabilities of terminal equipment and the collection of information from end-users' terminal equipment, including about its software and hardware, other than by the end-user concerned shall be prohibited, except on the following grounds:
 - (a) it is necessary for the sole purpose of carrying out the transmission of an electronic communication over an electronic communications network; or
 - (b) the end-user has given his or her consent; or
 - (c) it is necessary for providing an information society service requested by the end-user; or
 - (d) ~~if~~ it is necessary for web-audience measuring, provided that such measurement is carried out by the provider of the information society service requested by the end-user **or by a third party, or by third parties jointly, on behalf of the one or more providers of the information society service provided that conditions laid down in Article 28, or where applicable Article 26, of Regulation (EU) 2016/679 are met; or**
 - ~~(da) it is necessary to maintain or restore the security of information society services or terminal equipment of the end-user, prevent fraud or detect technical faults for the duration necessary for that purpose; or~~
 - ~~(e) it is necessary for a software update provided that:~~
 - ~~(i) such update is necessary for security reasons and does not in any way change the privacy settings chosen by the end-user are not changed in any way;~~
 - ~~(ii) the end-user is informed in advance each time an update is being installed, and~~
 - ~~(iii) the end-user is given the possibility to postpone or turn off the automatic installation of these updates; or~~

- (f) it is necessary to locate terminal equipment when an end-user makes an emergency communication either to the single European emergency number '112' or a national emergency number, in accordance with Article 13(3).
- (g) it is necessary for the purpose of the legitimate interests pursued by a service provider to use processing and storage capabilities of terminal equipment or to collect information from an end-user's terminal equipment, except when such interest is overridden by the interests or fundamental rights and freedoms of the end-user.
The end-user's interests shall be deemed to override the interests of the service provider where the end-user is a child or where the service provider processes, stores or collects the information to determine the nature and characteristics of the end-user or to build an individual profile of the end-user or the processing, storage or collection of the information by the service provider contains special categories of personal data as referred to in Article 9(1) of Regulation (EU) 2016/679.
- 1a. Service providers using processing and storage capabilities of the end-user's terminal equipment or collecting information from the end-user's terminal equipment pursuant to paragraph 1(g) shall not share the information with any third party other than its processors, acting in accordance with Article 28 of Regulation (EU) 2016/679 mutatis mutandis, unless it has been made anonymous.
Prior to any use of processing or storage facilities in, or collection of information from the end-user's terminal equipment, the service provider shall:
- (a) carry out an assessment of the impact of the use of the processing and storage capabilities or the collection of information from the end-users' terminal equipment and of the envisaged processing on the confidentiality of communications and the privacy of end-users in accordance with Article 35 of Regulation (EU) 2016/679, which may result in the prior consultation of the supervisory authority in accordance with Article 36(1) to (3) of Regulation (EU) 2016/679;
- (b) inform the end-user of the envisaged processing operations based on paragraph 1(g) and of the end-user's right to object to such processing, free of charge, at any time, and in an easy and effective manner; and
- (c) implement appropriate technical and organisational measures, such as pseudonymisation and encryption.
2. The collection of information emitted by terminal equipment of the end-user to enable it to connect to another device and, or to network equipment shall be prohibited, except if on the following grounds:
- (a) it is done exclusively in order to, for the time necessary for, and for the purpose of establishing or maintaining a connection; or
- (b) the end-user has given his or her consent; or
- (c) it is necessary for the purpose of statistical counting that is limited in time and space to the extent necessary for this purpose and the data is made anonymous or erased as soon as it is no longer needed for this purpose,
- (d) it is necessary for providing a service requested by the end-user.
- (b)2a. For the purpose of paragraph 1 point (b), consent shall be considered to be freely given in situations where access to an information society service is made conditional on consent for the storage of information or access to information already stored on the terminal equipment of an end-user.

Commented [GM(E5)]: In the digital advertising context, addressability of right audiences is key. Information about users' online behaviour is to assign them to large segments – or "audiences" – that all share common interests, and because of those common interests, may be interested in a specific good or service. The aim here is to create narrower segments, rather than reveal identity of a specific individual consumer.

In the process of addressing the right audience, one does in fact aim at 'determining the nature or characteristics on an end user'. This attempt to understand the audience better does not however need to lead to building an individual profile of an end-user, and it is worthwhile clarifying this in the text.

The practical utility of the legal basis would be severely restricted by the prohibition for publishers to determine characteristics of their users under *legitimate interests* in Article 8.1(g) and Recital 21b.

Commented [GM(E6)]: Since many small publishers depend on third-party data controllers for the delivery and measurement of digital advertising, and the GDPR anyway requires that they be explicitly disclosed to the user at the time that data are first collected, it is not clear why such a condition should be introduced.

The prohibition of sharing the information with any third party appears to be in fundamental conflict with open ecosystem where 1st and 3rd parties benefit from business partnership, and Real-Time-Bidding in particular. It may make *legitimate interest* unworkable also for other ad-related purposes, different to *profiling* which is already explicitly prohibited in the latest ePR text.

This legal language is directly related to Recital 21c, which we also recommend amending accordingly.

Commented [GM(E7)]: While several proposed amendments to Recitals 20 and 21 under the Finnish Presidency should be regarded as improvements that showed a willingness to listen to the needs of the media and advertising industry, the Recital 20 deletion of the conditionality language puts at stake the utility of consent as a valid legal basis for various purposes related to the delivery and measurement of advertisements or the personalisation of content.

We maintain our strong support for a clear unqualified endorsement of the right of publishers and other ad-funded online services to make access to their content and services conditional on consent for storing and/or accessing information on user devices for advertising purposes. The rigorous application of the GDPR by supervisory authorities who may rely on arbitrary EDPB's interpretation of consent as a legal basis, reveals that industry needs strong, unambiguous legal presumptions, beyond the recital language, in favor of allowing private actors to obtain such consent in a seamless manner.

Given the fact that the future of the ad-funded internet would be imperiled by this exclusion, our hope is that the ...

- ~~(b)~~ **2a2b.** For the purpose of paragraph 2 points (b) and (c), a clear and prominent notice ~~is~~ **shall be** displayed informing of, at least, the modalities of the collection, its purpose, the person responsible for it and the other information required under Article 13 of Regulation (EU) 2016/679 where personal data are collected, as well as any measure the end-user of the terminal equipment can take to stop or minimise the collection.
- ~~2b~~ **2c.** For the purpose of paragraph 2 points (b) and (c), ~~the~~ collection of such information shall be conditional on the application of appropriate technical and organisational measures to ensure a level of security appropriate to the risks, as set out in Article 32 of Regulation (EU) 2016/679, have been applied.
3. The information to be provided pursuant to ~~point (b)~~ of paragraph 2a may be provided in combination with standardized icons in order to give a meaningful overview of the collection in an easily visible, intelligible and clearly legible manner.
 4. The Commission shall be empowered to adopt delegated acts in accordance with Article ~~257~~ determining the information to be presented by the standardized icon and the procedures for providing standardized icons.