Position Paper on the EDPB's ongoing work on ‘Consent or Pay’ Models

Table of contents

Introduction

The European Data Protection Board (EDPB) recently issued Opinion 08/2024 under Art.64(2) of the GDPR addressing the validity of consent in 'Consent or Pay' models used by "large online platforms". It has also announced its intention to publish Guidelines with a broader scope at a later stage.

The undersigned associations have grave concerns that the Opinion is at odds with the prevailing case law of the Court of Justice of the European Union (CJEU) and highly mischaracterizes both the 'Consent or Pay' model and personalised advertising. It is particularly concerning that the Opinion could extend further than "large online platforms" to a variety of online services and content providers.

As a result, the Opinion is likely to have unintended consequences, by increasing legal uncertainty for many more businesses beyond only "large online platforms", and ultimately undermining the sustainability of some digital services and the ability for users to access diverse sets of services and content online for free.

While acknowledging the EDPB's public support for a ban on targeted advertising[1], the EU's co-legislators expressly chose not to introduce sweeping restrictions in the EU legal framework and instead preserve such advertising under enhanced rules. It is therefore alarming to see the EDPB leverage its authority to impose such restrictions by means of a soft-law instrument, relying on an expansive and unprecedented interpretation of data protection law and based on a fundamentally flawed understanding of the digital advertising industry.

Finally, although consistent guidance is desirable to ensure harmonisation across the European Union, it has become evident that the EDPB's Opinion was adopted with unusual haste, without any consultation with relevant stakeholders and without sufficient consensus among EDPB members[2]. There is therefore a high risk of differing exercise of the Opinion by Data Protection

[1] See https://www.edpb.europa.eu/system/files/2021-11/edpb_statement_on_the_digital_services_package_and_data_strategy_en.pdf

[2] See https://background.tagesspiegel.de/digitalisierung-und-ki/briefing/edsa-entscheidet-zu-pay-or-consent: The Hamburg Data Protection Commissioner Thomas Fuchs has publicly distanced himself from the EDPB Opinion. He notably told the media outlet Tagesspiegel Background that "*the EDPB's opinion has undergone some exacerbations, some of which are problematic in my view*" and that "*Even the effort of the payment process is supposed to render*

Authorities which will undermine the stated aim of ensuring harmonisation across the EU, creating unequal application of the GDPR among Member States and ultimately distorting competition across jurisdictions.

Key concerns

1. The concept of "large online platforms" is ambiguous, broad and extends far beyond companies that have established market power which is at variance with the criteria laid out by the CJEU in Case C-252/21. The vague scope raises concerns about the applicability of the Opinion to such a broad range of online services and content.
2. The 'Consent or Pay' model is mischaracterized as rendering data protection rights conditional on payment, erroneously portraying personalised advertising as inherently irreconcilable with the GDPR. This ignores the intention of the EU co-legislators, the position of the CJEU and the benefit of providing end-users with a diversity of online content and services for free.
3. The Opinion ignores the need to strike the appropriate balance between the right to data protection and the freedom to conduct business.
4. The EDPB expansively interprets the GDPR to introduce an additional requirement, namely the requirement to provide a "*free alternative without behavioural advertising*". This would in effect be a quasi-mandatory condition for obtaining valid consent and is unsupported by any empirical research or other evidence to justify why companies should develop another version of their service free of charge and funded by a different form of advertising such as contextual.
5. While the EDPB considers it relevant and important to consult stakeholders on its broader Guidelines, it specifically chose not to consult stakeholders on its Opinion, which is a fundamental shortcoming given the impact the Opinion has on the market.

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the voluntary nature of consent null and void. That's a serious overstretching of the requirements for consent" [unofficial translation]
See https://www.edpb.europa.eu/system/files/2024-06/20240416-17finalminutes92dplenary_public.pdf: the minutes highlight that several DPAs took the view that the Opinion did not address the issues with sufficient clarity due to the short timespan for elaborating it, including the Italian DPA that expressed its intention to vote against in case of no postponement.

Key recommendations

We recommend the Opinion to be revised in order to take into account the following:

- The Opinion should explicitly recognise the fundamental freedom to conduct a business under Article 16 of the EU Charter of Fundamental Rights, and in particular should not seek to dictate how companies structure their business models by examining pricing practices or by requiring the provision of a "*free alternative without behavioural advertising*", which may not be commercially viable for many online services.
- The Opinion should refrain from portraying behavioural advertising as generally unlawful or misrepresenting 'Consent or Pay' models and imposing a new, more stringent interpretation of consent.
- The scope of application of the Opinion should be narrowed to companies that are in a situation of power imbalance with their users in line with the authoritative CJEU judgment in Case C-252/21, and recognise the legality of providing users with a choice between consenting and paying a fee for accessing their services in such a situation.

We also encourage the EDPB to consider the following when developing draft Guidelines with a broader scope on the 'Consent or Pay' model:

- The draft Guidelines should have regard to the significant variances between companies and avoid imposing disproportionate and unjustified restrictions on companies that have no market power.
- The draft Guidelines should build on the interpretative guidance and recommendations that have already been issued by national Data Protection Authorities, in line with the principles and risk-based approach of the GDPR, and refrain from expanding requirements stemming from other legislations under data protection law.
- The EDPB should ensure meaningful consultation with stakeholders on the topic of 'Consent or Pay' models in order to elaborate recommendations that are sustainable and provide legal certainty for companies operating in the online space.

1) The scope of application of the Opinion is overly broad and unjustified

1.1 The definition of Large Online Platform has no grounding in the GDPR

The EDPB justifies its Opinion by referring to the need to adopt a position regarding "large online platforms". Although potentially inspired by the Digital Services Act and its defined concept of "Very Large Online Platforms", as well as the Digital Markets Act's "Gatekeeper" category (to which specific data-related obligations apply), this is a novel legal concept that the EDPB explicitly recognises as different from the "Gatekeeper" and "Very Large Online Platform" definitions in the DMA and DSA respectively.

The concept of "large online platforms" as set out by the EDPB has no basis in the GDPR, and is not based on any objective and measurable factors which creates legal uncertainty as to the scope of applicability of the Opinion. It is also a clear mischaracterization of the obligations on designated 'gatekeepers' related to the processing of personal data in the Digital Markets Act, namely recitals 36 and 37, that aim at providing the market with improved contestability and not more precise data protection rules.

First, the proposed criteria are the number of users ("*large online platforms are platforms that attract a large amount of data subjects as their users*", paragraph 25 of the Opinion) and the carrying out of large-scale processing ("*Another element to consider in order to assess if a controller qualifies as a 'large online platform' is whether it conducts 'large scale' processing*", paragraph 27 of the Opinion). This is problematic as neither concept is defined in the GDPR, and the GDPR does not permit the EDPB or national Data Protection Authorities to discriminate between controllers and processors based on their size (except in very limited circumstances for SMEs). On the contrary, the GDPR sets out a risk-based approach, which already requires companies to adjust their compliance as they grow and in line with the risks their processing creates, including the scale of that processing.

Second, the Opinion also refers in paragraph 26 to "*the position of the company in the market*", despite the fact that the influence of size and market power on business practices are regulated by separate legislation than the GDPR (such as competition law and the aforementioned DSA and DMA) and overseen by other regulatory authorities. In this context, the EDPB's Opinion seeks to replace the work of competition authorities and ex-ante regulators: for instance, a company with a significant number of users but without market power could pursuant to the EDPB's Opinion still be subject to stricter rules, without any determination by an expert

competition authority (including an economic analysis) or relevant ex-ante regulator as to whether the restrictions to the company's freedom to conduct business would be justified on competition grounds. This goes against the approach of the EU co-legislators, who deliberately opted to introduce stricter rules for certain activities on the basis of specific definitions to allow markets to function more effectively. There is no grounding in the GDPR nor in any other EU legal instrument to empower Data Protection Authorities or the EDPB to make such determinations with respect to data protection law, and the practical consequence is that - without deference to the authorities with a mandate to assess market power - Data Protection Authorities could force certain companies - based on their size - to move from one revenue model to another without any economic analysis whatsoever.

1.2 The vagueness of the definition aggravates legal uncertainty for all type of online services

The Opinion expressly recognises that "*the factors highlighted in this Opinion will typically apply to large online platforms, but not exclusively. Some of the considerations expressed in this opinion may prove useful more generally for the application of the concept of consent in the context of 'Consent or Pay' models*" (paragraph 31 of the Opinion). The Opinion therefore goes beyond the scope it was initially intended to cover, as we foresaw in the letter we previously sent to the EDPB in March 2024[3]. It is unfortunate that this concern was not taken into account, as broadening the scope of the Opinion beyond cases where market power can be established only heightens confusion and uncertainty regarding which rules apply to whom.

The inherent vagueness of the concept of "large online platforms" undermines foundational principles of EU law including proportionality, objectivity, impartiality, foreseeability and non-discrimination. The concept would also have the effect of redefining 'platforms' differently from the DSA, potentially encompassing non-platform activities such as media services. The EDPB should refrain from causing such consequences and therefore narrow the scope and purpose of the Opinion or any future guidance. This is necessary to avoid stepping outside of the limits of its own powers and to ensure guidance is stable and predictable over time, particularly for services that are not in a situation of power imbalance with their users.

[3] See https://iabeurope.eu/wp-content/uploads/20240319-Letter-to-EDPB-upcoming-opinion-and-guidelines-on-the-consent-or-pay-model.pdf

2) The Opinion mischaracterizes the ‘Consent or Pay’ model and departs from the prevailing jurisprudence of the CJEU and existing case law

2.1 The Opinion wrongly portrays personalised advertising as inherently illegal

The EDPB dedicates large parts of the Opinion to making theoretical and over-generalised assumptions about the underlying functioning of personalised advertising and suggests that this form of advertising would be inherently irreconcilable with the GDPR principles of data minimisation and fairness.

For example, paragraph 59 of the Opinion states the following: “*behavioural advertising may entail gathering and compiling as much personal data as possible about individuals and their activities, potentially monitoring their entire life, on- and offline. The EDPB considers that the magnitude and intrusiveness of the processing have to be taken into account while assessing compliance with the principle of data minimisation. Excessive tracking, which includes the combination of various sources of data across different websites, is thus harder to reconcile with the principle of data minimisation than, for example a system of personalised advertising in which users themselves actively and consciously determine their own preferences*”.

The EDPB concludes from these assertions that companies engaging in personalised advertising are generally in breach of the GDPR. Notwithstanding the limits of the EDPB’s remit, the fact that many different types of personalised advertising may be leveraged by companies and that each data controller is entitled to have their specific processing practices assessed on their merits and on a case-by-case basis, such allegations are not demonstrated or substantiated in any way in the Opinion. Yet they are used to misrepresent implementation of ‘Consent or Pay’ models by any entity - not limited to “large online platforms” - as transforming data protection rights into “*a feature that data subjects have to pay to enjoy, or a premium feature reserved for the wealthy or the well-off*” (paragraph 132 of the Opinion). This reasoning cannot be followed, for various reasons.

First, this is contrary to the wider policy context in the European Union. The EU co-legislators have explicitly chosen to allow personalised advertising in general, subject to specific rules on profiling. For VLOPs under the DSA, there are additional rules such as in the case of profiling based on special categories of personal data. In the same vein, the AI Act only categorises AI-powered targeted job advertising as high-risk AI that is subject to particular compliance obligations, leaving general targeted advertising in the low-risk AI category (and only to the

extent any AI systems are involved). The blanket assertion that personalised advertising is unlawful in most instances is inconsistent with the broader EU legal framework that applies to the digital advertising ecosystem and conflicts with the case-by-case assessment required by the GDPR.

Second, if personalised advertising had been unlawful in its very essence by violating the GDPR principle of data minimisation as the EDPB appears to suggest, shifting towards a new, more stringent interpretation of consent would not make processing more compliant with GDPR. The GDPR precludes unlawful data processing irrespective of the legal basis, including consent, such that the EDPB's attempt to create a causal link between data minimisation and consent appears to be of little relevance.

Indeed, end-users who choose to consent to personalised advertising do not on the same occasion waive their fundamental right to the protection of their personal data. All provisions of the GDPR remain fully applicable regardless of the lawful purpose for which personal data is processed under the oversight of Data Protection Authorities. In other words, there is no "paying" for data protection rights. The so-called 'Consent or Pay' model simply provides options for accessing an online service, involving paying a fee, accepting the processing of personal data for targeted advertising purposes or selecting other options where the online service relies on a blended revenue model[4]. In all cases, the fundamental right to the protection of personal data and data subject rights under the GDPR have to be respected.

Third, the flexibility to provide end-users with a service free of charge or at a lower cost, due to that service being (partially or fully) funded by advertising, is precisely what guarantees the availability of a wider range of choices for end-users irrespective of their financial means and drives competition between services in the EU single market.

2.2 The Opinion is at odds with the existing case law and guidelines across the European Union and European Economic Area

We would like to reiterate that there are currently significant disparities between Data Protection Authorities on how data protection law should apply to a 'Consent or Pay' approach. Some have initiated investigations and already anticipated their contrary position, while others have issued

[4] For example, online services that rely on a combination of revenue sources may provide a lower-priced option to access a version of their service partially funded by targeted advertising.

dedicated guidance and recommendations[5] (and companies have made significant investments to comply with them). All of this is unacceptable in a single market and contrary to the principles of consistency at the foundation of EU data protection law.

Additionally, the validity of 'Consent or Pay' models has been recognised in case law and court decisions - without any of the additional conditions that the EDPB proposes to create in its Opinion.

- By the Norwegian Privacy Appeals Board in Grindr's appeal against the Norwegian Data Protection Authority[6]
- By the French Council of State that confirmed the CNIL was not allowed to prohibit the use of "cookie walls" in its guidelines[7]
- By the Court of Justice of the European Union (CJEU) in the case C-252/21 between Meta Platforms and the Bundeskartellamt, which recognises that "*(...) users must be free to refuse individually, in the context of the contractual process, to give their consent to particular data processing operations not necessary for the performance of the contract, without being obliged to refrain entirely from using the service offered by the online social network operator, which means that those users are to be offered, if necessary for an appropriate fee, an equivalent alternative not accompanied by such data processing operations*"[8]

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[5] In May 2022, the CNIL (France) published their first list of assessment criteria: https://www.cnil.fr/fr/cookie-walls-la-cnil-publie-des-premiers-criteres-devaluation
In February 2023, the Datatilsynet (Denmark) published dedicated guidelines: https://www.datatilsynet.dk/hvad-siger-reglerne/vejledning/cookies/cookie-walls
In March 2023, the DSK (Germany) published an evaluation of their legality: https://www.datenschutzkonferenz-online.de/media/pm/DSK_Beschluss_Bewertung_von_Pur-Abo-Modellen_auf_Websites.pdf
In March 2023, the DSB (Austria) published dedicated FAQs on their assessment criteria: https://www.dsb.gv.at/download-links/FAQ-zum-Thema-Cookies-und-Datenschutz.html#Frage_9
In January 2024, the AEPD (Spain) published updated guidelines on cookies that refer specifically to the possibility to provide a paid alternative to consent: https://www.aepd.es/guias/guia-cookies.pdf

[6] See https://www.personvernnemnda.no/pvn-2022-22 [unofficial translation] "*The Tribunal agrees with Grindr that they do not have an obligation to offer a free dating app, and the Tribunal recognizes that a key feature of the business model for social media and applications is that data subjects "pay" for the use of social media and applications by accepting that their personal data is used commercially, for example by being disclosed to advertising partners. If the user had been given the choice between using the free version of the app or purchasing one of the two paid versions of the app before the registration process was completed, this would have meant that the requirement of voluntariness was met. The user would then have had a real choice as to whether they wanted to pay money to use the application, or whether they would rather "pay" with their personal data."*

[7] See https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-06-19/434684 [unofficial translation] "*By deducing such a general and absolute ban from the sole requirement of free consent, established by the regulation of April 27, 2016, the CNIL has exceeded what it can legally do, within the framework of a soft law instrument, enacted on the basis of 2°of I of article 8 of the law of January 6, 1978 cited in point 3. It follows that the contested deliberation is, to this extent, tainted with illegality.*"

[8] See the authoritative French version of the judgment that contains no reference to "necessity": https://curia.europa.eu/juris/document/document.jsf?text=&docid=275125&pageIndex=0&doclang=FR&mode=req&dir=&occ=first&part=1 "*(...) ces utilisateurs doivent disposer de la liberté de refuser individuellement, dans le cadre du processus contractuel, de donner leur consentement à des opérations particulières de traitement de données non nécessaires à l'exécution du contrat sans qu'ils soient pour autant tenus de renoncer intégralement à l'utilisation du service offert par l'opérateur du réseau social en ligne,* ***ce qui implique que lesdits utilisateurs se voient***

- By the German Regional Court of Regensburg[9], which ruled that Meta's dominant position on the market for online social networks did not in itself preclude users from effectively consenting to the processing of their personal data. In line with the CJEU judgment in Case C-252/21, the Regional Court of Regensburg held that users' freedom was safeguarded as Meta provided an equivalent ad-free paid subscription.
- By the Austrian Federal Administrative Court ruling[10], which confirmed the legality of "cookie walls" and considered the publisher was entitled to determine the conditions for accessing its content, including by requiring consent for digital advertising purposes. The Court further considered that the CJEU judgment in Case C-252/21 did not apply as the publisher was not in a dominant position on its market. However, the Court recalled that a company's dominant position may limit its private autonomy - in which case the introduction of an appropriate alternative is required to resolve any imbalance of power and ensure voluntary consent.

The EDPB's Opinion deviates from this case law and does not fully recognise the validity of 'Consent or Pay' models by stating instead that they are "*not prohibited in principle*" (paragraph 117 of the Opinion). Instead of aligning its reasoning to the authoritative CJEU judgment in Case C-252/21, the EDPB appears to ignore certain parts of the ruling to infer that implementations of 'Consent or Pay' models are almost always systematically unlawful and to impose additional criteria for assessing their legality. Although the EDPB has previously shown aspiration to ban such models in the context of the proposal for an ePrivacy regulation[11], such a far-reaching prohibition should be for the EU co-legislators to make and not the EDPB.

The EDPB also assumes authority over competition law and suggests that imbalances of power or detriment may occur in almost all cases when 'Consent or Pay' models are deployed by online platforms and therefore precludes consent from being freely given. Although Recital 43 of the GDPR provides considerations that consent may not be freely given where there is a "*clear imbalance*" between the individual and the controller, any assertion that such an imbalance

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proposer, le cas échéant contre une rémunération appropriée, une alternative équivalente non accompagnée de telles opérations de traitement de données."

[9] See https://www.gesetze-bayern.de/Content/Document/Y-300-Z-GRURRS-B-2024-N-11690?hl=true

[10] See https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bvwg&Entscheidungsart=Undefined&SucheNachRechtssatz=True&SucheNachText=True&GZ=&VonDatum=01.04.2024&BisDatum=05.06.2024&Norm=&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=Undefined&ResultPageSize=100&Suchworte=cookie&Position=1&SkipToDocumentPage=true&ResultFunctionToken=b899db76-596e-4f84-bf6e-0d6723c17417&Dokumentnummer=BVWGT_20240426_W211_2281997_1_00

[11] See https://www.edpb.europa.eu/sites/default/files/files/file1/edpb_statement_on_eprivacy_en.pdf

generally arises in the context of 'Consent or Pay' models when the online service is sufficiently popular or deemed useful (and not even where there is market power) is completely unjustified, as popularity or use does not in any way imply a clear imbalance. Absent a determination of market power by a competent authority, a very high threshold needs to be reached for consent to be invalid on such grounds, such as deception, intimidation, coercion or substantial extra costs[12]. As a result, 'Consent or Pay' models must be assumed to not reach such very high thresholds if they are offered for an appropriate price.

3) The Opinion undermines the balance between data protection and business freedoms and disregards the regulatory, technical and commercial realities of the digital advertising industry

3.1 The EDPB position on the notion of reasonable price is unfounded

Each company is entitled to the freedom to conduct business. Article 16 of the EU Charter of Fundamental Rights explicitly recognises the fundamental freedom to conduct a business, and Recital 4 of the GDPR explicitly states the following: "*The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality. This Regulation respects all fundamental rights and observes the freedoms and principles recognised in the Charter as enshrined in the Treaties, in particular [...] freedom to conduct a business [...]*".

The freedom to conduct a business includes the right for any business "*to be able to freely use, within the limits of its liability for its own acts, the economic, technical and financial resources available to it*"[13]. This freedom includes the right to choose which business model a company wishes to apply, and as a result which model(s) of remuneration it wishes to put in place. Moreover, an appropriate fee cannot be treated as a detriment for a data subject if the CJEU

[12] See https://www.edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_en.pdf "*Imbalances of power are not limited to public authorities and employers, they may also occur in other situations. As highlighted by the WP29 in several Opinions, consent can only be valid if the data subject is able to exercise a real choice, and there is no risk of deception, intimidation, coercion or significant negative consequences (e.g. substantial extra costs) if he/she does not consent.*"

[13] See https://curia.europa.eu/juris/document/document.jsf?text=&docid=149924&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2699152, para 49

itself proposed such an approach as an alternative[14]. The fundamental right to the protection of personal data cannot override the freedom to conduct business and does not create a new consumer right to use a commercial service for free or to assert control over the provider's business model: the fundamental rights and freedoms of both consumers and businesses co-exist.

It is also important to recall the Digital Content Directive 2019/770, which validates the practice of providing digital content or services in exchange for personal data instead of payment. That directive (which has already been transposed in national law in certain Member States) confirms that personal data can be made available by individuals for the purpose of receiving a service in accordance with the law, at a reasonable and fair price. In the same way, the EU Consumer rights Omnibus Directive 2019/2161 expressly recognises that a service can be provided in exchange of the use of personal data rather than a monetary consideration[15]. Paragraph 130 of the Opinion which states that "*personal data cannot be considered as a tradeable commodity*", appears to be in conflict with other relevant and applicable European legislation. In line with the goals of the EU Data Strategy that encourage data sharing and data-driven innovation, the more recent Data Governance Act also establishes a framework for individuals to share their personal data.

In that context, the Opinion provides extremely vague assessment criteria for the determination of the price of the paid alternative that disregards and seeks to override companies' freedom to conduct a business and ability to select their preferred revenue model, requiring them to "*ensure that the fee does not hinder data subjects to withhold consent, nor make them feel compelled to consent*" (paragraph 134 of the Opinion). This presupposes market power and also suggests that Data Protection Authorities are empowered to in effect judge, and even set, a price for the paid alternative, either by considering it too high, or by considering it too low ("*does not hinder data subjects to withhold consent*"). This is clearly not part of the legal mandate of such authorities, as the assessment of a price is a complex exercise requiring expertise in consumer law and competition law.

The EDPB should therefore reconsider its position that Data Protection Authorities "*are competent to review or evaluate the assessment of appropriateness carried out by controllers*" (paragraph 137 of the Opinion) and only "*may benefit from consulting authorities in other fields*

[14] See footnote n°8
[15] See Recital 31: "*Given their similarities and the interchangeability of paid digital services and digital services provided in exchange for personal data, they should be subject to the same rules under that Directive.*"

of law, including in particular consumer protection and competition authorities" (paragraph 138 of the Opinion). The Opinion and subsequent Guidelines should make explicit that the notion of reasonable price cannot be assessed independently by Data Protection Authorities, and should always be determined by expert competition authorities and consumer protection authorities.

3.2 The introduction of a quasi-obligation to provide an option funded by contextual advertising interferes with companies' business models

The EDPB Opinion introduces in section 4.2.1.1 the provision of a further option, "*Free Alternative Without Behavioural Advertising*", as a means to enhance users' freedom of choice. The existence of this supplementary alternative is presented as "*a particularly important factor to consider when assessing whether data subjects can exercise a real choice and therefore whether consent is valid*.' (paragraph 77 of the Opinion).

First, neither the GDPR nor the ePrivacy Directive are intended to interfere with or influence the business models chosen by companies or to promote particular business models. This is supported by the established positions issued by the CJEU, local Data Protection Authorities, national courts and appeal bodies (see above) that do not opine on the type of business models companies must use. By imposing a quasi-obligation to provide an option funded by contextual advertising, the EDPB is attempting to reshape the operation of the market and companies' individual business model choices and decisions in a manner that goes well beyond their mandate of ensuring consistent and effective data protection compliance.

Second, it must be stressed that contextual advertising is not a realistic alternative for many market players. As referenced above, the fundamental right to the protection of personal data cannot negate the fundamental freedom to conduct a business. The latter means that there is no obligation for businesses to provide their services for free, nor is there any obligation for businesses to provide their services at a loss.

Contextual advertising may be suitable as a source of funding for some services, for example it can arguably work for eCommerce platforms, search engines, and single-topic or 'niche' services that lend themselves to such advertising because consumer intent or interest can be inferred from the content or service accessed. However, other types of services such as serious news content or webmail are more general in nature and cannot enable such inference. They

are therefore not suitable for contextual advertising as advertisers will not pay a premium for these untailored impressions. Asserting that contextual advertising is a substitute for targeted advertising for all digital services - both in terms of revenue and scalability - is misleading as it would not be sustainable for the majority of businesses that rely on higher yield advertising today. The Opinion falls short by not taking any of these concerns into account nor does it acknowledge that the "*Free Alternative Without Behavioural Advertising*" would not be viable for many businesses.

In addition, the Opinion misrepresents contextual advertising, stating in paragraph 75 of the Opinion that "*This alternative must entail no processing for behavioural advertising purposes and may for example be a version of the service with a different form of advertising* ***involving the processing of less (or no) personal data****, e.g. contextual or general advertising or advertising based on topics the data subject selected from a list of topics of interests*".

At the very least, contextual advertising requires the use of information originating from users' devices, which is likely to trigger the application of Article 5(3) of the ePrivacy Directive and/or the GDPR. For example, ensuring that the same ad does not get shown too often and too many times to the same user (frequency capping) requires storage of information on the user's device that is generally not considered as strictly necessary by Data Protection Authorities. This is further attested by the EDPB's strict position in its draft Guidelines on Article 5(3) of the ePrivacy Directive, which proposes that consent should be required for the mere delivery of contextual advertising. Service providers also need to verify ad delivery in order to accurately invoice their advertiser clients for ad impressions - which may equally be subject to consent under the EDPB's proposed interpretation.

This means that even for digital content or services that may be in theory well-suited for contextual advertising, the selling of non-personalised ad placements especially in the absence of users' consent cannot generate comparable revenue to personalised advertising, as evidenced by several studies. In environments where the possibility to personalise advertisement is mechanically blocked (e.g. due to the absence of cookies or advertising identifiers), those ad placements are sold at a significantly lower price, leading to significant revenue losses for digital advertising players:

- The UK Competition & Markets Authority, in its 2020 final report of its market study into online platforms and digital advertising[16] found that UK publishers earned around 70% less revenue when they were unable to sell personalised advertising.
- The post-IDFA dashboard insights from Remerge[17], based on an analysis of ad requests from iOS devices monitors that ad placements without the presence of an Identifier for Advertisers (IDFA) in the iOS environment - i.e. without the possibility for personalisation - go for a price 53% lower on average than ad placements with the presence of an IDFA.
- An academic study published in April 2024 and based on the analysis of 218 million ad impressions from 10,526 publishers found that 90% of publishers sell ads at lower price in the absence of cookies or advertising identifiers, with a relative price difference of -50.9% for news & information publishers[18].

Notwithstanding the fact that the EDPB should not seek to dictate how companies structure their business models, its position and guidance should be founded on an accurate understanding of how online advertising works, the value of digital advertising in the economy, and should recognise that commercially-run digital services need to be viable in the EU. This is an important prior step in order to protect the ability for businesses to maintain a free (or lower-priced) option to access their online content and services that is funded by targeted advertising - otherwise end-users would have only paid-access options.

4) Recommendations to the EDPB in the context of their assessment of 'Consent or Pay' models

4.1 Revision of the EDPB Opinion

Although the Opinion originates from a request from the Dutch, Norwegian, and German (Hamburg) Data Protection Authorities that asked for an Opinion to be elaborated pursuant to Article 64(2) GDPR, and although the EDPB's own rules of procedure do not specifically plan for public consultation in such a case, the EDPB could have used its discretion to ensure sufficient consultation on this structuring topic. It is also worth noting that the timeframe imposed by the GDPR for the adoption of an EDPB opinion does not preclude a consultation: based on the

[16] See https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf
[17] See https://post-idfa-dashboard.remerge.io/
[18] See "The Economic Value of User Tracking for Publishers" by Laub, Rene and Miller, Klaus and Skiera, Bernd (April 14, 2024). Available at SSRN: https://ssrn.com/abstract=4251233

EDPB's own practice regarding consultations (that usually provides around 6 weeks to respond), the deadlines set out in the GDPR do leave some time for a consultation. Moreover, Article 70(4) of the GDPR specifically states that the EDPB "*shall, where appropriate, consult interested parties and give them the opportunity to comment within a reasonable period*." The lack of structured consultation and the disregarding of input from stakeholders has resulted in an Opinion that is based on a fundamentally flawed understanding of the digital advertising industry and will increase legal uncertainty for many providers of online services and content that rely on advertising for monetisation. We therefore recommend the Opinion be revised in order to take into account the following:

1) The Opinion should acknowledge that the right to protection of personal data is not an absolute right and must be counterbalanced with other fundamental rights, such as the freedom to conduct business. Companies cannot be required by data protection law to offer their services for free or at a loss and the EDPB should not seek to dictate how companies structure their business models. In particular, the Opinion should be revised to recognise that the implementation of a free alternative without behavioural advertising may not be commercially viable for many businesses, in which case the provision of such an alternative should not be factored in the assessment of consent validity by Data Protection Authorities. Moreover, this consideration departs greatly from the ruling of the CJEU, for example in the case between Meta Platforms and the Bundeskartellamt that expressly recognises the legality of providing users with a choice between consenting and paying a fee for accessing the service.

2) The Opinion should refrain from making over-generalised assumptions about the digital advertising ecosystem and from portraying behavioural advertising as generally unlawful, which is contrary to the principles of the GDPR, as they require Data Protection Authorities to perform a case-by-case assessment of a company's data processing practices. The EU co-legislators have already enacted a number of legal instruments[19] to notably regulate targeted advertising, in addition to existing obligations under the GDPR. None of them prohibits this advertising model; instead, each provides for additional safeguards and restrictions. Further, the EU co-legislators have explicitly recognised that personal data can be a reasonable value exchange for a service.

[19] See the Digital Services Act: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R2065, the Digital Markets Act: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R1925 and the AI Act: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L_202401689

3) The scope of application of the Opinion should be narrowed to companies that are in a situation of power imbalance with their users in the meaning of recital 43 of the GDPR. Although the prevailing jurisprudence of the CJEU considers market power as a relevant factor to assess the existence of imbalance, the Opinion should make clear that Data Protection Authorities are not competent to establish market power or to examine pricing practices of any paid alternative. The EDPB must clarify that Data Protection Authorities are required to engage other competent authorities on such matters rather than assert discretion to independently do so themselves, in line with the principles of cooperation highlighted by the CJEU.

4.2 Considerations for the EDPB upcoming Guidelines

We have taken note of the fact that the EDPB intends to develop Guidelines with a broader scope on the 'Consent or Pay' model. These Guidelines come at a time where many companies of all types and origins are increasingly relying on such a business model as a means of sustaining their business and maintaining the option to provide end-users with a free and open access to their online content and services without using traditional paywalls (i.e. where no alternative means to access is made available, alongside a payment requirement). In that context, we encourage the EDPB to consider the following when developing dedicated Guidelines:

1) It is essential that any draft Guidelines issued by the EDPB on the 'Consent or Pay' models carefully consider scope in advance, in particular the likely collateral effects of extending guidance beyond companies that are in a situation of power imbalance with their users. The EDPB should have regard to the significant variances between companies that have market power and those that do not. Overly broad guidance will have detrimental effects on providers of online services and content outside these categories as well as end-users. In particular, the financing of certain online services by means of personalised advertising ultimately sustains the diversity and competitiveness of digital services and products across Europe in line with the EU Data Strategy, whereas contextual advertising is often not a commercially viable substitute for such financing given the nature of an online service and characteristics of its audience.

Notwithstanding the fact that companies' freedom to conduct business must be respected, undermining the economic support of all services that currently rely on non-contextual digital advertising for financing their services would mean significantly impacting many other rights,

including the freedom to be informed, which is essential for the democratic process, as well as the ability to access services that are currently free - and therefore accessible to everyone - thanks to targeted advertising, such as webmail, price comparison tools, and vertical search engines (e.g., for transportation ticket searches, etc.). Impacting the accessibility of these non-platform services risks making them exclusive and beyond the reach of many ordinary consumers, whereas they are currently supported by the advertising ecosystem which cannot be as effective only with contextual advertising. This is further supported by the fact 85% of Europeans want to decide which online services they pay for and which they don't have to pay for because they are funded by advertising[20].

2) The draft Guidelines should build on the existing regulatory guidance that have been issued at national level, in order for the EDPB position to reflect Data Protection Authorities' common position and understanding across Europe. Dedicated guidance has already been issued by a number of national Data Protection Authorities[21], and companies have made significant investments to comply with. Any departure from the considerations set out in national guidance will aggravate legal uncertainty and economic disparities for organisations operating in different jurisdictions. It is also important for the draft Guidelines not to conflate data protection principles with concepts borrowed from other EU legal instruments that have been established to ensure a fair and competitive digital economy. In particular, the DMA rules in connection to the offering of a less personalised alternative only apply to designated gatekeepers (under Recitals 36 and 37), and the EDPB and national Data Protection Authorities are not empowered to oversee the application of the DMA nor extend these requirements to other entities under data protection law.

3) Finally, we welcome the EDPB's intention to seek input from stakeholders at the start of the work on Guidelines now that the mandate for Guidelines has been approved. We recommend that the EDPB organise such consultation in a way that effectively allows meaningful exchange with the industry, consistently with the principles of "*independence and impartiality*" and of "*good governance, integrity and good administrative behaviour*" referred to in Article 3 of the EDPB Rules of Procedure.

[20] See the study conducted by an independent third-party research agency Savanta, with a total sample size of 2,439 surveyed individuals: https://iabeurope.eu/wp-content/uploads/2021/04/IAB-Europe_What-Would-an-Internet-Without-Targeted-Ads-Look-Like_April-2021.pdf

[21] See footnote n°5

List of signatories

IAB Europe: IAB Europe is the European-level association for the digital marketing and advertising ecosystem. Through its membership of national IABs and media, technology and marketing companies, its mission is to lead political representation and promote industry collaboration to deliver frameworks, standards and industry programmes that enable business to thrive in the European market

Alliance Digitale: Alliance Digitale is dedicated to representing all professions and professionals related to data and print and digital marketing in France, with the aim of promoting their development, defending their interests and actively contributing to national, European and international discussions on societal issues, the creation of new work standards and the consideration of specific constraints. Digital Alliance's mission is to represent the interests of all its 300 members, regardless of their size or position in the value chain.
Digital Alliance is a privileged interlocutor of public authorities and regulators at French and European levels. The association is also an important partner of the media and other professional associations in the digital ecosystem. Digital Alliance is the representative in France of three emblematic international networks of print and digital marketing and data professions: IAB, FEDMA, GDMA.

BVDW: The German Association for the Digital Economy (BVDW) is the advocacy group for companies that operate digital business models or whose value creation is based on the use of digital technologies. With its members from the entire digital economy, the BVDW is already shaping the future today through creative solutions and state-of-the-art technologies. As a catalyst, guide, and accelerator for digital business models, the association relies on fair and clear rules and advocates for innovation-friendly framework conditions. BVDW always keeps an eye on the economy, society, and the environment. In addition to DMEXCO, the leading trade fair for digital marketing and technologies, and the German Digital Award, the BVDW also organizes the CDR Award, the first award ceremony in the DACH region for digital sustainability and responsibility, as well as a variety of specialized events.

IAB Ireland: IAB Ireland is the trade organisation for digital advertising in Ireland and part of the global IAB network. Our remit is to prove, promote and protect the Irish digital advertising industry. Our remit is delivered through the development of standards, commissioning research,

sharing knowledge through annual conferences and webinars as well as engaging with national and EU policy makers on behalf of our members across advertisers, agencies, adtech, platforms and publishers.

IAB Italia: IAB Italia is the Italian chapter of the Interactive Advertising Bureau, the leading association of digital marketing and advertising. Since 25 years it has significantly contributed to the diffusion of digital culture and to the acceleration of market growth in Italy through the development of ethical and sustainable communication.
IAB Italia pursues its mission through the realisation of vertical events, special projects, training activities and with IAB Forum, the largest Italian event dedicated to marketing and digital innovation on the most relevant issues for the industry, involving top national and international speakers. The Association has more than two hundred members, among the main Italian and international operators active in the interactive advertising market.

IAB Spain: IAB Spain undertakes a comprehensive mission as a forum for meeting and representing the digital advertising industry in Spain. Since its inception in 2001, IAB Spain has played a crucial role in the promotion and development of digital advertising. IAB Spain's mission unfolds on various strategic fronts: With the aim of contributing to the proper regulation of the sector, by contributing, assisting, and fostering conversations with public administrations. Furthermore, IAB Spain proactively works on creating industry standards, with the goal of establishing guidelines and best practices that promotes the sustainable and ethical growth of digital marketing, advertising and therefore promoting innovation and positivities for the society. Members of IAB Spain encompass a wide range of stakeholders in the digital advertising ecosystem, including digital and audiovisual publishers, platforms, media agencies, marketing and advertising agencies, advertisers, consulting firms, technology providers, advertising networks, and others, such as eCommerce and research institutes.

IAB Polska: IAB Polska is a Polish advertising industry organisation that unites and represents entities of the interactive industry. IAB Poland members include more than 230 companies, including the biggest web portals, global media groups, interactive agencies, media houses and technology providers. In 2012 the organisation received the MIXX Awards Europe, honouring the best IAB bureau in Europe.

The mission of IAB Poland is to support development of the Internet industry and take regulatory actions to enhance the competitiveness of the market, conducting research projects, leading educational programs and providing legal protection.

IAB Sweden: IAB Sweden is the leading association for interactive advertising and digital marketing in Sweden. By gathering stakeholders throughout the nations digital marketing ecosystem, IAB Sweden advances the progression of a well-functioning and sustainable industry. The fundamental mission of IAB Sweden is to unite, educate and promote the market for digital and interactive advertising in Sweden.

SPIR: For over 20 years, the Association for Internet Progress (SPIR) represents the most important players of the Czech Internet economy from among media publishers, media agencies and technology companies with an annual turnover of more than 37 billion Czech crowns (1,5 billion EUR). The services offered by SPIR members are used by over 90% of the population of the Czech Republic. Member companies pay 3 billion Czech crowns (120 million EUR) a year in taxes and other fees to the state budget and employ 7,500 people throughout the Czech Republic. SPIR operates the only official measurement of Czech Internet traffic NetMonitor, monitoring of Internet advertising AdMonitoring and provides expert analyses of the development of the Czech Internet market.