Feedback paper on the European Data Protection Board's stakeholders event regarding "Consent or Pay" models

Introduction

We are grateful for the opportunity to have taken part in the EDPB stakeholder event on the forthcoming draft Guidelines concerning "Consent or Pay" (CorP) models, organised on November 18, 2024.

We thank the EDPB for having invited companies and their representatives to explain in more detail the economic and practical implications of further restrictions over the CorP models, and in particular the sustainability of some digital services and the ability for users to access diverse sets of services and content online for free. This invitation served as a reminder of the importance for the EDPB to ensure that it proceeds 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. However, we wish to point out that the workshop would have benefited from a more active involvement of EDPB members, such as the provision of additional precisions over each sub questions that were proposed under each topic in order to ensure stakeholders' ability to adequately lay out the technical and practical implications of the proposed draft Guidelines.

We expect that, in line with the recommendations of the European Commission's GDPR review and its statement on the same, the EDPB will continue to consult with the industry and other stakeholders in such a manner to produce essential guidance in the future, with continuous improvements based on feedback such as this.

Following the event, we would like to provide additional feedback and outline our key elements relevant to the topics that have been discussed. We share the view that there is a need for a harmonised European approach that takes good account of the position that has already been validated by the CJEU, and believe these insights are particularly relevant as the draft Guidelines on this subject are expected to be issued in the coming months and may have significant implications on the operations of our members.

The undersigned associations have already expressed their concerns regarding current EDPB's ongoing work on CorP models in their position paper sent in July 2024 in the context of the

Board's Opinion 08/2024 under Art.64(2) of the GDPR addressing the validity of consent in such models used by "large online platforms". We reiterate and maintain the arguments outlined in that position paper. Furthermore, we further observe that the discussions about this topic appear to have always begun under the assumption that advertising is inherently negative, overlooking its broader societal value. Advertising plays a key role in supporting innovation, ensuring users can discover better alternatives, and sustaining the availability of free content and services online. Recognising these benefits is crucial when assessing the implications of restrictions on CorP models.

Freely given consent: Key elements to assess

First, the legality of CorP has already been recognised by multiple court decisions[1] in different member states (MS), at the European Union (EU) level[2] and by DPAs[3] that provided guidelines on how to implement it in accordance with the GDPR. The assessment of freely given consent in the context of CorP models should therefore build on the interpretation that has already been issued by the CJEU, national courts and Data Protection Authorities.

Second, the wording of the questions during the workshop in relation to freely given consent suggest that the EDPB might give weight to the flawed premise that individuals suffer a detriment when they are offered options for accessing an online service involving paying a fee

[1] For instance: by the French Council of State that confirmed the CNIL was not allowed to prohibit the use of "cookie walls" in its guidelines (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.*"); By the Norwegian Privacy Appeals Board in Grindr's appeal against the Norwegian Data Protection Authority ([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."*)

[2] By the Court of Justice of the European Union (CJEU) in the judgement of 4 July 2023 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".*

[3]For instance: 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 January 2024, the AEPD (Spain) published updated guidelines on cookies that refer specifically to the possibility to provide an alternative not necessarily free of charge (https://www.aepd.es/guias/guia-cookies.pdf).

or accepting the processing of personal data for personalised advertising purposes. In reality, this premise suggests that individuals' entitlement to access online resources differs from that in the physical world, where individuals routinely pay to access services (e.g. newspapers, movie theaters, postal and telecom services).

Yet there is no fundamental right to access digital content and services for free (at most, there is a right to *request* the benefit from a service, against the conditions set by the service provider), and the fact that consumers are offered a further alternative to benefit from the service at no cost based on their consent to personalised advertisements has no impact over the fairness of the initial bargain (i.e. paying for a service or not receiving it).
Put differently: just as the fact that *paying* for a service is not a detriment but rather consideration for benefiting from the service, so can consent to personalised advertisements not be a detriment; instead, it must be seen as consideration (on the same footing as payment) for benefiting from the service. The data subject is not only free to choose between the two options presented - paying with his or her own money, or accepting that payment comes through another source of funding, namely personalised advertisements - but remains in both cases also able to choose *not* to benefit from the service and choose another one as in the online environment many alternative services exist.

It is also important to consider that while the EDPB appears to suggest publishers may set a high price to steer users toward consenting to advertising, commercial dynamics naturally incentivise publishers to apply reasonable pricing. Setting an excessively high price risks driving users willing to pay toward competitors offering a more attractive alternative, thus undermining the publisher's commercial interests. Consequently, publishers are naturally inclined to balance these interests in a way that maintains a competitive and viable offering for users.

CorP models cannot therefore be treated as involving a detriment for a data subject or perceived as a coercion, notably because users retain full freedom to choose neither option and seek alternative services instead. Indeed, it is also important to underscore that CorP models do not limit consumer ability to seek alternatives: this autonomy is a cornerstone of consumer choice and reflects the principles of a free market. In practice, depending on the digital property, 10 to 50% users leave the service without having selected any of the access options available[4]. This demonstrates users' autonomy to choose not to benefit from the service, and for instance, turn to alternative sources—such as online and offline entertainment in the case of entertainment services, or communication options like SMS or email in the case of communication services.

Importantly, end-users who choose to consent to personalised advertising do not forfeit their fundamental data protection rights, which are guaranteed under GDPR regardless of the legal basis for processing. In other words, there is no "paying" for data protection rights - data protection rights are guaranteed in any event. In that context, a key element to assess when evaluating the freely given nature of consent in CorP models should be to make sure that users

[4] Rates commonly observed by Consent Management Platforms providers in PorC installations, otherwise known as "bounce rates".

are well informed and understand the data processing purpose(s) they are consenting to, how to refuse or withdraw consent, and the various options that are offered to them for benefiting from an online service. 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[5].

Third, the effects resulting from an alleged imbalance of power in CorP models must be contextualised. Imbalances of power do not inherently negate voluntariness of consent unless they involve clear elements of coercion, intimidation, deception, or disproportionate disadvantage. The authoritative CJEU judgment in Case C-252/21[6] already recognises the legality for a company with established market power to provide users with a choice between consenting and paying a fee for accessing their services. The legislative history of the GDPR itself also reflects this understanding, as the originally proposed exclusion of valid consent in cases of "significant imbalance" was deliberately removed by the European Parliament[7]. While it is essential to address the effects of imbalance of power, it is important for the EDPB not to assume primacy over competition and consumer law. DPAs do not have a mandate, nor the necessary experience or expertise, to assess the position of a company in a market or the presence of lock-in network effects. This is the remit of competition authorities, which are specifically tasked with such evaluations. Moreover, competition authorities focus on the abuse of a dominant market position, with the market being clearly defined, not merely on the existence of such dominance.

Recital 43 of the GDPR does clarify that "consent should not provide a valid legal ground for the processing of personal data in a specific case where there is a clear imbalance between the data subject and the controller." However, as highlighted in the recital itself and in subsequent EDPB guidelines, this concern primarily applies to relationships between data subjects and public authorities or employers—contexts explicitly identified by the co-legislators.

The recently adopted DSA and DMA are legal frameworks, designed to impose higher obligations on companies of certain sizes, reach, and nature. These frameworks mitigate societal risks (DSA) and ensure fair competition (DMA) through clear and consistent criteria for determining which companies fall under their purview. They also include a formal designation process, subject to challenge, and their adoption followed impact assessments and a rigorous legislative process with distinct public policy goals.

In contrast, the GDPR does not distinguish between companies based on size or reach. It is technology- and business-model-neutral, adopting a risk-based approach that requires all companies to scale compliance in line with the risks posed by their processing activities. The

[5] 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-Li ke_April-2021.pdf
[6] Judgment of CJEU of 4 July 2023, C-252/21, *Meta Platforms and the Bundeskartellamt.*
[7] During the legislative process of the GDPR, the originally proposed Article 7(4) GDPR excluded the validity of consent in cases of "significant imbalance" but was not included in the final text.

EDPB's inconsistent sequencing of opinions—first targeting large platforms and then an attempt to extend similar obligations to the broader market—undermines this approach. If all companies ultimately face the same or nearly identical obligations, it not only contradicts the GDPR's principles but also dilutes the intended focus on larger entities while burdening smaller players disproportionately, straying from the original goal of fair competition and proportionate compliance.

Additionally the EDPB should not consider that the mere existence of a CorP model automatically means an imbalance of power exists; the balance of power would only be relevant if other factors such as market dominance, relevant market definition, essential nature of an online service, availability of alternative services, were also at play. In any case any assessment of market power involves a deep economic analysis that can only be performed in coordination with the competition authorities.

Lastly, the EDPB should refrain from creating new concepts as it happened in the EDPB's previous Opinion 08/2024 when it talked about "large online platforms", a notion that has no basis in the GDPR and is not based on any objective or measurable factors, thus creating legal uncertainties. The EDPB should not discriminate against controllers based on their size or the types of services they offer, and should instead align with the risk–based approach of the GDPR that requires a case-by-case assessment. Asking in its questions for the stakeholder event about "specific groups of controllers or types of services" implies that certain entities or service categories might be treated differently under these Guidelines. However, the criteria for defining these groups remain unclear and the GDPR does not create such a differentiation. The ambiguity in defining these groups raises concerns about transparency, fairness, and potential impacts on market competition. In a competitive economy, it's crucial to maintain a fair playing field among economic operators. 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) or to create new categories or definitions. 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. Instead of creating categories, it should be underlined to whom the Guidelines do not apply.

Freely given consent: Free alternative without behavioural advertising

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[8], local Data Protection Authorities and national courts that do not opine on the type of business models companies must use and

[8] See footnote no. 5.

do not suggest that a third, free option should be provided where CorP models are used. This is aligned with the GDPR recital 4[9] that recognises that the right to data protection is not absolute and must be balanced against other fundamental rights, such as the freedom to conduct business. This 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 which would inevitably be the case should a third, free alternative without personalised advertising be required. The notion of providing a third alternative funded by "another less privacy intrusive form of advertising" was introduced as part of European Commission's initiative for a voluntary cookie pledge in 2023 (draft principle D) - however the initiative was later withdrawn. In particular, the summary of the "cookie pledge" project published in November 2024[10] recognised that the feasibility of alternative advertising models (such as contextual advertising) required more exploration and discussion.

The approach of the EDPB additionally appears to be borrowed from the Digital Market Act (DMA) rules in connection to the offering of a less personalised alternative that should only apply to designated gatekeepers (under Recitals 36 and 37). Those rules are unconnected to data protection but aim at providing the market with improved contestability. Notwithstanding that the EDPB and national Data Protection Authorities are not empowered to oversee the application of the DMA, the extension of DMA requirements to other entities than DMA gatekeepers under data protection law would significantly undermine the EU co-legislators' intention to set out asymmetric obligations on larger companies to ensure a fairer and more competitive digital economy. Furthermore, this approach seems premature, as the EDPB has announced[11] upcoming guidelines addressing the intersection of the GDPR with digital legislation, including the DMA, DSA, and AI Act. These forthcoming guidelines could provide a more comprehensive framework and should not be preempted by isolated interpretations.

Second, it must be stressed that contextual advertising is not a realistic alternative for the majority of market players as it does not generate comparable revenue to personalised advertising. It was confirmed by the studies conducted by academics, public authorities and research conducted by the industry. The most robust study on the matter, which looks at more than 10,000 European publishers[12], shows that 90% of publishers sell ads at a lower price in the absence of cookies or advertising identifiers, with a relative price difference of -50.9% for news & information publishers whose serious news content does not lend itself to contextual

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[9] GDPR Recital 4: *"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 the respect for private and family life, home and communications, the protection of personal data, freedom of thought, conscience and religion, freedom of expression and information,* ***freedom to conduct a business****, the right to an effective remedy and to a fair trial, and cultural, religious and linguistic diversity."*

[10] https://commission.europa.eu/document/download/c96ac593-a775-4800-afd1-e8a3bb451eaa_en?filename=Cookie%20pledge%20project%20-%20summary.pdf

[11] https://www.edpb.europa.eu/news/news/2024/edpb-calls-coherence-digital-legislation-gdpr_en

[12] "Publisher" means an operator of a digital property such as a website, an app, or any other content or service delivery mechanism where digital ads are displayed.

advertising[13]. Competition and Markets Authority also confirmed in its report that contextual advertising is not a viable solution for plenty of the market players[14]. Additionally, the industry research indicates that at least 50% of publishers' advertising revenue generally comes from personalised advertising, and the survey IAB Europe carried out showed that 63% of publishers expect a significant decrease of more than 20% of their advertising revenue if they had to switch to contextual advertising[15]. This is because contextual advertising sells at a significantly lower price, usually two to three times lower than personalised advertising.

Another important factor is that contextual advertising is a lot more difficult to sell. On average, it only fills 20% of the available slots (ad placements)[16] whereas personalised advertising fills between 80 to 90% of the available slots.This is because advertisers do not want to allocate major resources to contextual as they need campaigns that deliver measurable business performance of their investments.

In that connection, the case study of the Dutch public broadcaster NPO[17] that is frequently put forward as demonstration that contextual advertising is as valuable as personalised advertising should be appropriately nuanced. NPO has a dominant position in the Dutch market as a public broadcaster, where it is considered as an essential channel by advertisers for national campaigns - and is additionally subject to many restrictions relating to online advertising (e.g. only one advertisement can be displayed per webpage and this is only allowed on twenty of the more than five hundred NPO websites[18]). Its switch to contextual advertising was in addition primarily triggered by a very low consent rate from end-users to targeted advertising (90% of their advertising inventory was already no longer eligible for personalised advertising). Last but not least, NPO's primary source of income originates from the OCW budget (National Media contribution) as opposed to advertising. In other words, this particular use case is not as strong or even as representative of how contextual advertising works.

Third, it has to be highlighted that contextual advertising requires the use of personal data and/or information originating from users' devices - likely to trigger a consent requirement based on regulatory interpretations. This means that the delivery of contextual advertising and other adjacent processing operations such as measurement and capping - operations that are needed for *any* digital advertising to be both useful (measurement) and not obnoxious (capping) - could

[13] René Laub, Klaus M. Miller, and Bernd Skiera, "The Economic Value of User-Tracking for Publishers" SSRN, October 25, 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4251233.
[14] See https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf
[15] IAB Europe conducted a survey across 51 European publishers in order to investigate this issue.
[16] See https://www.cnil.fr/sites/cnil/files/2024-09/etude_economique_sur_les_modeles_publicitaires_alternatifs_aux_solutions_dominantes_pour_le_compte_de_la_cnil.pdf
[17] See https://brave.com/blog/npo/#_ftn7.
[18] https://www.ster.nl/frequently-asked-questions-about-online-advertising-without-personal-data-at-ster/

anyway not be pursued in the absence of users' consent under the EDPB's strict position[19]. Additionally, the EDPB, in its response[20] to the draft Cookie Pledge principles, did not explain why contextual advertising should be considered less privacy-intrusive nor did it clarify the types of tracking that contextual advertising would still involve as we indicated above.

A requirement to provide a third alternative funded by contextual would therefore have a dual impact on companies' revenue: not only are the prices for contextual ads significantly lower, there is also an issue of volume because even at lower price contextual ads often do not even sell. In that respect, publishers in the news media vertical - whose content does not lend itself to contextual advertising - would suffer the most from this requirement. This is an effect that has been demonstrated by the UK Competition & Markets Authority that found that publishers earned around 70% less revenue when they were unable to sell personalised advertising[21].

As a result, a requirement to use a "free alternative without behavioural advertising" would have perverse effects, as it may no longer be feasible for businesses to maintain a free (or lower-priced) access option funded by advertising due to much lower revenues - which in turn would likely further *decrease* availability of the content by leaving end-users with only paid access options. Another consequence of such a requirement would be the increased prevalence of less relevant or lower-quality advertisements as well as higher volumes of more prominent or obtrusive ad placements in online services to compensate for the price delta between personalised ads in comparison with contextual ads, which can negatively impact users' experience. This could lead to excessive cluttering of online spaces, with the same generic ads appearing repeatedly across various platforms, diminishing the diversity of content and overwhelming users with repetitive, irrelevant advertising.

We encourage the EDPB to take a neutral approach regarding technology and business models in its Guidelines. It should provide clear criteria for identifying less privacy-intrusive advertising and clarify which elements, under the GDPR and ePrivacy Directive, still require consent, especially in light of the Article 5(3) Guidelines[22].

Freely given consent: An equivalent alternative

First, it is important to underline that CorP models may be used not only by traditional content publishers but also by platforms offering free services such as webmail (notably becoming increasingly rare), price comparison tools, digital flyer distribution, and similar services. The

[19] We refer to the strict approach presented in the EDPB Guidelines 2/2023 on Technical Scope of Art. 5(3) of ePrivacy Directive indicating that even technologies that deliver contextual ads become subject to user consent requirements.
[20] See https://www.edpb.europa.eu/system/files/2023-12/edpb_letter_out20230098_feedback_on_cookie_pledge_draft_principles_en.pdf.
[21] See https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf
[22] See footnote no. 17.

concept of "equivalent alternative" therefore cannot apply uniformly across all types of online services and intrinsically depends on the nature of the offering(s). It should also be underlined that there may be hybrid models due to online services relying on a combination of revenue sources (for example, certain services may provide a lower-priced option to access a version of their service partially funded by personalised advertising or more than two options associated with various fees).

Second, the fact that users refuse consent to personalised advertising and select the paid option as an alternative should not prevent controllers from establishing legal bases for other data processing purposes connected to other activities susceptible to be performed as part of the alternative and improve users' experience, such as audience measurement, content personalisation or the provision of AI-assistance. However, where consent or other legal bases cannot be established for certain data processing purposes in the context of a particular activity the functioning of the equivalent alternative will ultimately be impacted - including its actual usefulness for users (e.g. data processing intended at providing content recommendations). It is therefore essential to take this into consideration when assessing the equivalence of the alternative as its functioning and performance may be subject to varying users' preferences.

Third, the inclusion of premium features as part of the equivalent alternative does not undermine the freely given nature of consent, as long as users are adequately informed about the various options proposed to them and their corresponding features. This is moreover aligned with companies' entrepreneurial freedom and promotes innovation to meet legitimate business goals and consumers needs.

Finally, "equivalence" should never be seen as requiring "identical" experiences. A service with ads is inevitably different compared to the same service *without* ads; a service with personalised advertising is inevitably different compared to the same service with non-personalised advertising. As indicated above in relation to the "free alternative without behavioural advertising", a version of a service with non-personalised advertising may require *more* advertising or varying advertising formats to decrease the revenue difference; moreover, subscription-based approaches *require* some form of user management, while not ever ad-based approach does, leading to feature *disparity* as users inevitably will have to have different options at their disposal.

Freely given consent: If necessary for an appropriate fee

First, the notion of appropriate fee in CorP models is a complex exercise that entails implications in terms of data protection, consumer law and competition law and also influences business models of the companies concerned and should therefore be assessed in liaison with competition authorities and consumer protection authorities. In the context of data protection, the primary and sole criterion for assessing whether a fee undermines voluntary consent is

whether it imposes "significant economic pressure" on users[23] or “substantial extra costs”[24]. Other legal or economic factors are not directly relevant under data protection law, as the focus remains on preserving users’ autonomy over their personal data (Recital 7 GDPR).

Any evaluation of appropriateness should therefore consider the overall revenue and operating costs on a case-by-case basis to precisely determine whether a fee can be considered reasonable rather than substantial to take into account the diversity and competitiveness of digital services and products across Europe, and appropriately balance data protection rights and business freedoms. In that regard, the allegation from the civil society organisation NOYB that publishers would earn on average 1,41€ in annual ad revenue per user should be completely disregarded as it is inaccurately based on IAB Europe’s own research over advertising revenue from display programmatic across Europe. First, display programmatic is only a subset of publishers’ total advertising revenue as it excludes direct advertising sales and excludes social media publishers. Second, any attempt to apply a per capita average assumes that all publishers earn the same revenue, ignoring that high traffic or premium publishers necessarily earn far more than small websites such as niche blogs. Third, the calculation ignores significant market differences and their respective maturity: while the UK generates 35% of Europe’s advertising revenue, it only has 10% of the population. In contrast, countries like Turkey or Poland have large populations but contribute far less to advertising revenue in Europe. The potential average ad revenue per user is actually specific to each publisher, depending on the nature of their website and its audience, the number of users they attract and how long they spend using their services or consuming their contents. It also varies greatly from one country to another depending on market maturity. It is therefore not possible nor relevant to calculate an "average" across all European publishers given the diversity of the Open Web and EU member states’ varying market specificities.

Second, average consent rates in CorP should not be considered as a relevant criteria for assessing appropriateness of the fee, as affordability and willingness to pay should not be conflated. A wide majority of users prefer accessing online services for free in exchange of receiving ads, which is unconnected to their ability to pay for the alternative[25]. The provision of online services free of charge or at lower costs, due to those services being (partially or fully) funded by advertising in addition precisely guarantees the availability of a wider range of choices for users irrespective of their financial means.

Third, 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*

[23]ref Advocate General Sharpston in *Schecke*, CJEU C-92/09 (para. 82).
[24] 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.*”
[25]https://iabeurope.eu/wp-content/uploads/2021/04/IAB-Europe_What-Would-an-Internet-Without-Targeted-Ads-Look-Like_April-2021.pdf

resources available to it"[26]. 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. In that regard, the authoritative French and German versions of the CJEU judgement contains no reference to "necessity" but use the terms "le cas échéant" and "gegebenenfalls" ("where appropriate"). The decision to associate a fee to the equivalent alternative should therefore entirely be up to companies' discretion, in line with their entrepreneurial freedom.

In discussions regarding this topic, some allege that the "protection of personal data" should be given a priority over the "freedom to conduct the business" because the latter is a "freedom" - not a "right"- in the EU Charter. However, this allegation is flawed and unjustified. Indeed, both the "freedom to conduct the business" and "protection of personal data" are set out in the same chapter titled "Freedoms" of the EU Charter - without any hierarchy between the two. In addition, considering art. 51(1) EU Charter, the "freedom to conduct a business" can only be classified as a fundamental right as opposed to a principle, given it is fully judicially operational and has served as a legal foundation for judicial decisions of the CJEU several times. This has notably been underlined by Advocate General Cruz-Villalón in the *Alemo-Herron* case: "*Freedom to conduct a business is a Fundamental Right that is very much open to being used as a counterweight […] to other fundamental rights, such as the right to the protection of privacy, health, and intellectual property rights*"[27] and by the CJEU ruling in the *Scarlet Extended* case in which the freedom to conduct business and the protection of personal data were raised on equal footing by a CJEU to be counterbalanced against the right to intellectual property[28]. Moreover, Art. 54 EU Charter further illustrates the need for balancing between rights, as it prohibits the abuse of rights[29], and Recital 4 of the GDPR also explicitly recognises the lack of primacy of the right to the protection of personal data, also in relation to the fundamental freedom to conduct a business[30].

Other guidance concerning 'consent or pay' models beyond the scope of the Opinion

Against the background of the EDPB's previous Opinion 08/2024 on CorP, which portrays personalised advertising as unlawful in most instances, any future guidance should refrain from making over-generalised assumptions about this form of advertising. This baseless assertion is

[26] See CJEU, *UPC Telekabel Wien*, Judgment of 27 March 2014, C-314/12, para 49.
[27] Opinion of Advocate General Cruz-Villalón delivered on 19 February 2013, C-426/11, *Mark Alemo-Herron v. Parkwood Leisure*, C-426/11, paragraph 52.
[28] Judgment of the CJEU of 24 November 2011, *Scarlet Extended*, C-70/10, paragraph 53: the Court concluded that there had been a breach of the requirement of a fair balance *"between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other".*
[29] *"Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein."*
[30] See footnote 10.

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. The EU co-legislators have in several pieces of legislation explicitly chosen not to prohibit personalised advertising in general, opting instead to only specifically regulate certain highly specific situations. For “Very Large Online Platforms” (“VLOPs”) under the Digital Services Act (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). As a consequence, suggesting that this form of advertising is inherently irreconcilable with the GDPR principles of minimisation and fairness is contradictory to the wider policy context and does not have basis under the GDPR.

The EDPB should also take into account that there are already existing laws that recognize as lawful situations when a user receives access to certain content or services by providing personal data. For instance, Digital Content Directive 2019/770 validates the practice of providing digital content or services in exchange for personal data instead of payment[31]. That directive (which has already been transposed in national law in certain MS) 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[32].

Finally in the context of art. 9 GDPR, it should be highlighted that any guidance in this regard should be addressed separately, as consent requirements are stricter. Today, already existing industry standards that can be used to facilitate the obtention of consent (such as the Transparency and Consent Framework) already preclude the collection and processing of special categories of personal data. Additionally, the processing of special categories of personal data are already subject to dedicated rules under the DSA, which further justify the need for separate guidelines that takes good account of the interplay between the GDPR and the DSA.

The protection of minors has also been raised during the workshop and is a topic that deserves appropriate consideration and should be outside the scope of the upcoming Guidelines. We agree that minors constitute a more vulnerable group of society and should be appropriately protected on the Internet. It is why DSA prohibits online platforms from presenting personalized advertising if they are aware *“with reasonable certainty that the recipient of the service is a minor”*[33]*.* Similarly to the processing of special categories data, addressing the protection of minors requires separate guidance that takes good account of the interplay between the GDPR and the DSA.

[31] See notably Recital 24.
[32] See notably Recitals 31 and following.
[33] Art. 28 DSA.

Conclusions

In conclusion, CorP models do not coerce or force users into giving consent. They provide a fair and transparent framework that upholds user autonomy, respects GDPR principles, and balances the interests of businesses and end-users. By offering users clear, reasonable, and equivalent choices, these models ensure that consent is freely given and that data protection rights remain guaranteed. “Protection of personal data” is not an absolute right and should be balanced with the other fundamental rights and freedoms guaranteed under the EU Charter, such as freedom to conduct business or freedom of expression and information. The EDPB’s assessment of CorP models should reflect these realities, recognizing their role in fostering a diverse, accessible, and user-centric digital ecosystem that supports free access to valuable information and services. Given the significant economic implications that may result from the EDPB’s evaluation of CorP, any guidance should also be adequately based on empirical research as well as appropriate consultation with competition authorities and consumer protection authorities.

We greatly appreciate the opportunity to contribute to your ongoing work on the Consent or Pay models. We also thank you in advance for considering our remarks during the drafting of the Guidelines on this critical topic for our members. We trust that you will find our feedback valuable and constructive.

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 Finland: IAB Finland is a community of passionate and curious professionals dedicated to driving the growth of member companies' businesses through digital advertising and marketing.

As part of the international IAB family, IAB Finland connects with a global network that operates in 29 countries across Europe and nearly 70 countries worldwide.

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 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.

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.

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.