

Audicom Srl (**Audicom**) is the Italian company resulting from the merger by incorporation of Audiweb Srl and Audipress Srl, effective as of March 1st, 2023. Audicom's corporate purpose is carrying out and offering to the market an integrated audience measurement service for multimedia, editorial and/or advertising content through both the Internet and paper press. For the sake of completeness, **audience measurement** is ***“the activity of collecting, interpreting or otherwise processing data about the number and characteristics of users of media services or users of content on online platforms for the purposes of decisions regarding advertising allocation or pricing or [...] planning, production or distribution of content”***¹.

Audicom's quotaholders are Fedoweb (24.87%), FIEG - Federazione Italiana Editori Giornali (24.87%), UPA - Utenti Pubblicità Associati (24.87%), AssAp Servizi Srl, i.e. the service company of UNA – Aziende della Comunicazione Unite (24.87%), and Auditel (0.5%); such quotaholders represent the media sector in Italy on both the demand and supply side.

Audicom is therefore a **“Joint Industry Committee”** or **JIC** and is subject to the regulatory oversight of the *Autorità per le Garanzie nelle Comunicazioni* or **AGCOM**, i.e. the Italian Communications Authority. Indeed, AGCOM is empowered to *“ensure, also in light of the processes of multimedia convergence, that the measurement of audience and readership indices of the various media, on any distribution and broadcasting platform, conform to criteria of methodological correctness, transparency, verifiability, and certification by independent subjects, and are carried out by bodies endowed with the utmost representativeness of the entire reference sector. The Authority issues the necessary directives to ensure compliance with the above criteria and principles and supervises their implementation [...]”*².

Audicom welcomes the opportunity to contribute to the public consultation on the draft European Data Protection Board's (**EDPB**) *“Guidelines 2/2023 on Technical Scope of Art. 5(3) of ePrivacy Directive”* (**Guidelines**), and intends to highlight to Data Protection Authorities (i) the peculiarities of the activities of the JICs (which represent the various components of the media market), and (ii) the consequent need to provide for clear exceptions to the consent requirement under Art. 5(3) of Directive 2002/58/EC (**ePD**), **to ensure that the preeminent public and systemic function recognized to the JICs is properly preserved** in the interest of the pluralism of the information ecosystem.

Indeed, *“audience measurement has a direct impact on the allocation and the prices of advertising, which represents a key revenue source for the media sector. It is a crucial tool to evaluate the performance of media content and understand the preferences of audiences in order to plan the future production of content”*³.

¹ This is the definition of “audience measurement” provided by the latest version of the “Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU”, available at <https://www.consilium.europa.eu/en/press/press-releases/2023/06/21/european-media-freedom-act-council-secures-mandate-for-negotiations/> .

² Article 1, paragraph 6, letter b, point 11 of Italian Law 249/1997.

³ See recital 45 of the “Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU”, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0457> .

1. THE ESSENTIAL FEATURES OF AUDIENCE MEASUREMENT.

As noted above, audience measurement is subject – in Italy - to the oversight of AGCOM. Such oversight is aimed at ensuring the truthfulness, transparency and verifiability of the methodology used for the measurement as well as of the relating results.

AGCOM has, indeed, recently confirmed that *“These powers attributed by law have been exercised over time through supervision over the activities of the audience measurement companies, with particular regard to their internal governance structure and the methodologies used for the audience measurement, as well as in terms of **monitoring the truthfulness and transparency of the data communicated to the market as a result of the audience measurement**”*⁴.

The importance of ensuring and enhancing the transparency and objectivity of audience measurement systems, which have an impact on media advertising prices (in particular online and, indirectly, on the survival of the media sector), has recently been confirmed by the European Institution with the **“Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU” (European Media Freedom Act)**⁵:

- *“Audience measurement has a direct impact on the allocation and the prices of advertising, which represents a key revenue source for the media sector. It is a crucial tool to evaluate the performance of media content and understand the preferences of audiences in order to plan the future production of content. Accordingly, media market players, in particular media service providers and advertisers, should be able to rely on objective audience data stemming from transparent, unbiased and verifiable audience measurement solutions. However, certain new players that have emerged in the media ecosystem, such as online platforms, [...] do not abide by the industry standards or best practices agreed within the relevant self-regulatory bodies and provide their own measurement services without making available information on their methodologies. This could result in non-comparable measurement systems, information asymmetries among media market players and in potential market distortions, to the detriment of equality of opportunities for media service providers in the market”;*
- *“comparability of audience measurement results is key for achieving a level playing field among media market players as it enables media service providers and advertisers to better gauge the success of their offer, which users increasingly consume across different devices and platforms”.*

To reach such aims, AGCOM noted (in particular) the following⁶:

- *“The extreme variability and changeability of the technological components used by the consumer **requires profiling through broader samples than traditional ones**, and the evolution of detection systems appears to be inevitably focused on consumer-centric convergence processes. The communication channels no longer coincide exclusively with traditional media - to which the audience*

⁴ See AGCOM’s resolution 194/21/CONS, available only in Italian at <https://www.agcom.it/documents/10179/23188308/Delibera+194-21-CONS/17f765b1-71e9-4a2f-91c4-542ae790a1e9?version=1.0>.

⁵ The latest version of the proposal of the European Media Freedom Act is available at <https://www.consilium.europa.eu/en/press/press-releases/2023/06/21/european-media-freedom-act-council-secures-mandate-for-negotiations/>.

⁶ AGCOM’s resolution 194/21/CONS.

measurement companies belong - and are increasingly becoming "media content aggregators" (video, audio and text). Traditional systems are still organized vertically, by medium, in some cases by device, leading to the production of metrics that are not comparable one with the other";

- "Audience measurement activities focused on the consumer as a user of different communication media (so-called "consumer-centric" approach) lead to **the urgent need of identifying, from a methodological point of view, unambiguous metrics to be used to make comparable the consumption data referring to the various media**, taking into account that the metrics used to date for the measurement of single communication means are characterized by parameters that are not easily standardized. It is, therefore, necessary to start a shared path among the various market players that leads the various components of the multimedia system to define, within the scope of their respective autonomy decision-making prerogatives, methodologies (at all stages of activity, from basic research to the actual measurement of media consumption), technologies (both active and passive) and metrics (unambiguous and shared) that can provide information about the engagement of the consumer with respect to the content and advertising disseminated on the various platforms of communication, in a convergent environment".

2. THE EXISTING LEGAL FRAMEWORK ON COOKIES AND TRACKERS. THE CONSEQUENCES OF A BROAD INTERPRETATION OF ARTICLE 5(3) EPD AND OF ITS CONSENT REQUIREMENT.

To understand "*the number and characteristics of users of media services or users of content on online platforms*"⁷, it is undoubtedly necessary to collect data on how many data subjects used a given content or service and, to that end, for the online world it is fundamental and unavoidable to rely on cookies and trackers.

However, as noted by AGCOM, the existing data protection legal framework is so restrictive that third-party cookies will soon be dismissed by browser owning companies, with severe consequences for audience measurement⁸. More in particular: "**While the discontinuation of third-party cookies will have very limited effects on OTTs that will still have the possibility to rely on first-party cookies, the impacts on digital audience measurement systems are likely to be severe. Indeed cookies, by enabling the measurement of navigation between different sites, provide crucial information for defining matrices of overlap in the use of different devices. As a result, there is a need to update measurement methodologies: to ensure the reliability and granularity of the measurement, it will**

⁷ See the definition of "audience measurement" provided in the European Media Freedom Act: "*the activity of collecting, interpreting or otherwise processing data about the number and characteristics of users of media services or users of content on online platforms for the purposes of decisions regarding advertising allocation or pricing or [...] planning, production or distribution of content*".

⁸ See AGCOM's resolution 194/21/CONS, available only in Italian at <https://www.agcom.it/documents/10179/23188308/Delibera+194-21-CONS/17f765b1-71e9-4a2f-91c4-542ae790a1e9?version=1.0>: "*In this cross platform, cross device, and cross media scenario, in the wake of the growing and progressive focus on online data protection and the **resulting regulatory restrictions on the possibility of using personal data** (GDPR and e-Privacy in Europe), browser-owning companies have been forced to give up tracking options based on third-party cookies. As of 2022, this type of tracking will also be abandoned by Chrome (Google), which has a significant market share. The impossibility to use third-party cookies will affect the entire supply chain of online advertising by causing the extinction of a number of features that had ensured their effectiveness*".

*be recommendable to use Single Source Panels of extended size, but also - and most importantly - **enrich census data with first-party data provided directly from the measured entities***".

It seems, therefore, that **the Italian oversight Authority on audience measurement acknowledged that (i) the existing data protection legal framework – with particular regard to the rules on cookies and other tracking technologies - is damaging the audience measurement systems and that (ii) one possible solution is to collect more data.**

Despite the preeminent public and systemic function of audience measurement, by proposing an extensive interpretation of the scope of application of Art. 5(3) ePD and of its consent requirements with no explicit exclusions, the EDPB may jeopardize audience measurement systems.

The Guidelines, in their current version, will indeed end up reducing the data collected by the JICs for the purpose of audience measurement, as **the Guidelines basically require collection of data subjects' consent for almost all trackers – even those carrying little to no risks for individuals and regardless of the entity collecting and processing the data, the purpose for processing and the security measures implemented** – and the need to collect the prior consent is notoriously one of the main reasons for the reduction of the volume of data available for a given processing.

Fewer data to be processed for audience measurement will lead to a less transparent and a less objective audience measurement, which in turn will lead to non-reliable and non-comparable data. These are all consequences that are in opposite direction to the essential features of correctness, transparency and verifiability to be met by audience measurement according to Italian law, as well as – in the near future – to the European Media Freedom Act⁹.

3. THE ACKNOWLEDGED INEFFECTIVENESS OF ART. 5(3) ePD AND THE SUBSTANTIAL USELESSNESS OF EXPANDING THE SCOPE OF APPLICATION OF ART. 5(3) ePD.

Besides, the European Institutions, as well as the Article 29 Data Protection Working Party (**WP29**, i.e. the predecessor of the EPBD), acknowledged that Art. 5(3) ePD *"causes an **unnecessarily high burden for businesses, while the usefulness for citizens is not optimal**", and that *"The efficiency of Article 5(3) is not fully ensured. This is due to the fact that this provision tends to be the main cost factor associated by businesses with the ePD, while not all the costs appear to be justified and the benefits for citizens have been questioned. In particular, [...] based on the fact that Article 5(3) does not make a distinction between different types of cookies, **businesses that only use non-privacy invasive cookies also need to obtain consent**. At the same time, **users feel annoyed by the consent mechanism, which often does not provide a real choice**"*¹⁰.*

Such awareness led to the European Commission's proposal for a "Regulation of the European Parliament and the Council concerning the respect for private life and the protection of personal

⁹ According to Article 23 of the European Media Freedom Act, *"Providers of audience measurement systems and methodologies shall ensure that their systems and methodologies comply with the principles of transparency, impartiality, inclusiveness, proportionality, non-discrimination and verifiability"* (<https://data.consilium.europa.eu/doc/document/ST-10954-2023-INIT/en/pdf>).

¹⁰ See the final report "Evaluation and review of Directive 2002/58 on privacy and the electronic communication sector", available at <https://digital-strategy.ec.europa.eu/en/library/evaluation-and-review-directive-200258-privacy-and-electronic-communication-sector>. This report confirms the findings of the European Commission's study on study on the "ePrivacy Directive: assessment of transposition, effectiveness and compatibility with proposed Data Protection Regulation", available at <https://digital-strategy.ec.europa.eu/en/library/eprivacy-directive-assessment-transposition-effectiveness-and-compatibility-proposed-data>.

data in electronic communications and **repealing Directive 2002/58/EC** (Regulation on Privacy and Electronic Communications)” (**ePrivacy Regulation**) that was aimed at substituting the ePD to, among others, **simplify rules on cookies**: *“the cookie provision, which has resulted in an overload of consent requests for internet users, will be streamlined. The new rule will be more user-friendly as browser settings will provide an easy way to accept or refuse tracking cookies and other identifiers. The proposal also clarifies that no consent is needed for non-privacy intrusive cookies that improve internet experience, such as cookies to remember shopping-cart history or to count the number of website visitors”*¹¹.

The **ePrivacy Regulation** - and, in particular, its latest available draft dated 10th February 2021¹² - proposed also to modernize Article 5(3) by including more exceptions to the consent requirement provided by the ePD. The importance of widening the list of explicit exceptions to the consent requirement had indeed been recognized by the European Institutions in the study on the "ePrivacy Directive: assessment of transposition, effectiveness and compatibility with proposed Data Protection Regulation"¹³, where the European Commission recommended maintaining the current opt-in approach to cookies, but **limiting it only to situations where there is an interference with users' privacy (including websites serving third party cookies for behavioural advertising purposes, excluding analytics cookies)** and noted that this result may be achieved, for example, by broadening the exceptions to the consent requirement under Art. 5(3) ePD.

It is very significant that **one exception to the consent requirement proposed in the ePrivacy Regulation concerned audience measurement systems: “The use of processing and storage capabilities of terminal equipment and the collection of information from end-users’ terminal equipment, including about its software and hardware, other than by the end-user concerned shall be prohibited, except on the following grounds: [...] it is necessary for the sole purpose of audience measuring, provided that such measurement is carried out by the provider of the service requested by the end user, or by a third party, or by third parties jointly on behalf of or jointly with provider of the service requested provided that, where applicable, the conditions laid down in Articles 26 or 28 of Regulation (EU) 2016/679 are met”**¹⁴.

We believe that the European Privacy Authorities now have the opportunity to set shared and common solutions capable of ensuring that both collective and individual needs are equally and properly protected and, in doing so, they will be consistent with what they had recommended in the WP29’s **“Opinion 3/2016 on the evaluation and review of the ePrivacy Directive (2002/58/EC)”** adopted on 19 July 2016: *“while clarifying the broad scope of the consent requirement, the EC should also create more specific exceptions, to allow for the processing of data that causes little or no impact on the rights of users to secrecy of communications and private life”*.

¹¹ Ref. <https://digital-strategy.ec.europa.eu/en/policies/eprivacy-regulation> .

¹² Published at <https://data.consilium.europa.eu/doc/document/ST-6087-2021-INIT/en/pdf> .

¹³ This study is available at <https://digital-strategy.ec.europa.eu/en/library/eprivacy-directive-assessment-transposition-effectiveness-and-compatibility-proposed-data> .

¹⁴ See the latest available draft of the ePrivacy Regulation dated 10th February 2021, published at <https://data.consilium.europa.eu/doc/document/ST-6087-2021-INIT/en/pdf>

Local Privacy Authorities have issued their guidelines on cookies and other tracking technologies, providing for cases where analytical cookies can be considered as technical cookies and, consequently, for cases where the data subjects' consent shall not be collected. Such cases do not consider the purpose for which the trackers are used despite **the purpose for collecting personal data shall be of paramount importance in determining whether the data subjects' consent is needed.**

This is even more true for audience measurement systems managed by providers that, like Audicom, ensure the processing of pseudonymized data that cannot identify the data subjects and avoid any processing different from a mere audience measurement activity carried out in the public interest. Additionally, it should of course also be stressed that Audicom is providing a fundamental systemic service subject to the oversight of AGCOM: this could be more than enough to grant an explicit exception from the consent requirement under Art. 5(3) ePD.