

## **Audience Measurement Coalition**

Response to the European Data Protection Board Consultation Guidelines 2/2023 on Technical Scope of Art. 5(3) of the ePrivacy Directive.

AMC - Audience Measurement Coalition sector coalition of like-minded research companies & Joint Industry Committees (JICs) including Nationaal Media Onderzoek, NMO (NL), Romanian Association for Audience Measurement, ARMA (RO), Mediamätning i Skandinavien MMS (SE), FINNPANEL (FIN), IVW (DE), Médiamétrie (FR), Mediapulse (CH), Nielsen, Kantar, GfK, Comscore.

The purpose of this paper is to respond to the EDPB's consultation on article 5.3 and its technical scope. Even though the aim of the consultation is not to address specific exceptions from the consent requirement, the following statements are submitted to remind the EDPB of exceptions provided for certain purposes, which exist in principle, and should not be conditioned by the utilization or not of specific technology or methodologies. One of these exceptions are provided for audience measurement, which is an institutionalized system set up by the market to ensure transparency and a level playing field. Official audience measurement is also utilized by governments to evaluate the services of public service broadcasters, support the implementation of policies and monitor elections. We are also taking the opportunity of this response to ask the EDPB to clarify issues that could arise in relation to the Board's ability to issue guidelines on this legislation.

We note that the importance of ensuring accurate and impartial audience measurement, conducted to industry-agreed standards within the European Union, is further supported in provisions under the forthcoming European Media Freedom Act which will be governed by National-level Boards and assisted by the Commission in the future.

### **Interpretation of article 5.3**

Under Article 5.3, Member states are required to ensure that "*the storing of information, or the gaining of access to information already stored, in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned has given his or her consent...*". While the guidelines on the application of the ePrivacy Directive have varied in the different Member States and also have to be read together with the GDPR, it is established that audience measurement is exempted from consent in the ePrivacy directive following the indication in Recital 25 that "*'cookies', can be a legitimate and useful tool, for example, in analysing the effectiveness of website design and advertising*" and that it should be allowed on the condition that the end-user has been provided with clear and precise information. The EDPB should support the spirit of this principle in the current context where the digital environment is in dire need of transparency, fairness and thus independent and reliable audience measurement provided independently and chosen by the market.

Audience Measurement establishes the size and general composition of audiences for a given market on a very broad scale (age, gender, geographical area). These figures are often provided

through independent Joint Industry Committees and specialised audience measurement companies, which the key market players have designated to provide such numbers to the market, which constitute a “currency”. Independent Audience Measurement provides the market with important and impartial data on the use, effectiveness and reach of media platforms, websites, and apps amongst a national population. This data is critical for matters such as fair-competition assessments, proportionate technical sizing of servers, advertisement investment decisions, transaction reconciliation and activities such as corporate investment mergers and acquisitions.

Measurement providers then publish the results through reports of aggregated data derived from both Internet users’ data and panel data (users who agreed to participate in a research sample). The purpose, granularity and structure of measurement data are completely distinct from the data used for data-driven targeted advertising and represent an entirely different risk concern for the very vast majority of internet users

Specifically, user information collected from a website is pseudonymised during processing and then aggregated when made public to prevent any possible identification of the individuals. Measurement providers deploy best practice privacy safeguards as standard, such as pseudonymisation, anonymisation, minimisation and limitation of the data retention period, as well as the right to opt out of measurement. Any collected data is strictly and only used for the audience measurement purpose.

Considering audience measurement’s low impact on privacy as the “data” published to the market are actually aggregated statistical reports, the European Data Protection Board itself acknowledged in its assessment of the draft ePrivacy legislation that the “proposed legislation creates several new exceptions that were proposed by the WP29, such as for (...) audience measurement. Those exceptions are related to specific types of processing with very limited privacy risks for the users.” (statement from 25 May 2018 on the ePrivacy Regulation).

Indeed, it has been acknowledged that the Joint Industry Committees and measurement companies are not merely providers of a service to the market and its various players, they play a role that serves the public interest. EU policymakers have recently confirmed this important role in the Digital Markets Act: audience measurement providers have received the right to access Gatekeeper platforms’ non-aggregated data as a key measure to verify the audiences and to enhance transparency for publishers and advertisers. Additionally, in the future “European Media Freedom Act” independent measurement is considered to be the highest standard and an essential building block in the digital media sphere. Considering these policy developments, it is important that Data Protection Authorities recognise the specificity of this role for the market and public authorities and confirm the legal precedent set by the ePrivacy Directive in relation to audience measurement.

Although national Data Protection Authorities are outlining specific exceptions for the use of technical cookies, they should consider the exception that has been provided for audience measurement in the pending draft of the ePrivacy Regulation. Both the European Parliament and

the Council of the EU have recognised that an exception should be given for the purpose of independent third-party audience measurement. As a due diligence, the state of policy discussions regarding competition and privacy regulation should be taken into account before issuing guidelines that would affect and possibly hamper the provision of audience measurement to the market.

## **Background and legality of EDPB guidelines**

It is essential for organisations to know which authorities are competent to guide companies in the interpretation of EU legislation. This can be increasingly complex with the co-existence of the ePrivacy Directive and the GDPR that have scopes related to the circulation of personal data that overlap. It is in that context also important to note that it is the Regulators for Electronic Communications that is competent regulator in relation to the ePrivacy Directive. Therefore, we would like to raise the following open questions in relation to the scope of competences of the EDPB to adopt guidelines on article 5.3.

Pre-GDPR, the article 29 Working Party, predecessor of EDPB, did not have the power to adopt guidelines, nevertheless it did have the power to "make recommendations on all matters relating to the protection of persons with regard to the processing of personal data in the EU (Article 30(3) of Directive 95/46/EC), that is to say all matters related to data protection in broad terms. This was confirmed in Opinion 04/2012 on Cookie Consent Exemption in which referred to that legal justification as a basis for its authority to make recommendations on the specific topic.

On the other hand, the EDPB's powers to adopt opinions, guidelines and recommendations under Article 70 GDPR, all directly refer only to the GDPR itself, with the exception of article 70(1)(b) which provides that out of its own initiative, or where requested by the Commission, the EDPB can "advise the Commission on any issue related to the protection of personal data in the Union". Other than that, the GDPR does not reference any competency of the EDPB to issue recommendations or adopt guidelines on broader matters, in a manner that is equivalent to Article 30(3) of Directive 95/46/EC.

Article 70(1)(e) GDPR, to which the EDPB itself refers to in its proposed ePrivacy guidelines, states that the EDPB shall "examine, on its own initiative, on request of one of its members or on request of the Commission, any question covering the application of [the GDPR] and issue guidelines, recommendations and best practices in order to encourage consistent application of [the GDPR]." This raises the question whether the EDPB considers that it can interpret Article 70(1)(e) GDPR to also include "the ePrivacy Directive" as well as "the GDPR", on the basis of Article 15(3) ePrivacy Directive even though the latter does not explicitly refer to the EDPB. Or should it be considered that the proposed guidelines are there to encourage consistent application of the GDPR which in turn still raises the question of the delimitation of the ePrivacy Directive and the GDPR in scope.