

**EUROPEAN DATA PROTECTION BOARD GUIDELINES 2/2023 ON TECHNICAL
SCOPE OF ART. 5(3) OF EPRIVACY DIRECTIVE**

PUBLIC CONSULTATION REFERENCE: 2/2023

CONSULTATION RESPONSE ON BEHALF OF AWIN AG

1. INTRODUCTION

1.1 We write on behalf of Awin AG, in response to the consultation ("**Consultation**") of the European Data Protection Board ("**EDPB**") draft Guidelines 2/2023 on Technical Scope of art. 5(3) of ePrivacy Directive (the "**Guidelines**").

1.2 In particular, we seek to address:

1.2.1 the interpretation of Criterion D of the Guidelines, in respect of 'storage', as such term is used in article 5(3) of the ePrivacy Directive¹;

1.2.2 the apparent inconsistencies of such an interpretation, when considered in the context of other guidance issued by the EDPB and the findings of the Court of Justice of the European Union ("**CJEU**");

1.2.3 the natural and inevitable consequences of such an interpretation being adopted;

1.2.4 the absence of any meaningful discussion in the Guidance regarding exemptions under the ePrivacy Directive; and

1.2.5 the apparent approach of the EDBP in reaching this interpretation.

2. 'STORAGE' AS INTERPRETATED IN THE GUIDELINES

2.1 Pursuant to the Guidelines, key aspects of the EDPB position in respect of storage are extracted below:

"...less typical scenarios involving a medium such as magnetic tape or central processing unit (CPU) cache are not excluded from the scope of application."²

"Under the condition that said pixel or tracked URL have been distributed over a public communication network, it is clear that it constitutes storage on the communication network user's terminal equipment, at the very least through the caching mechanism of the client-side software. As such, Article 5(3) ePD is applicable."³

2.2 We question this position on a number of legal and practical grounds, as set out below.

2.2.1 Caching is an extremely longstanding practice and a de facto building block in the operation of the internet and effectively all websites and online services. We are not aware of any instance since the coming into force of the ePrivacy Directive in which dynamic and transient caching by a central processing unit, for the purposes of software processing, has been considered a form of storage for the purposes of the application of the ePrivacy Directive.

¹ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, as amended by Directive 2009/136/EC

² Guidelines, para 37

³ Guidelines, para 50

- 2.2.2 In particular, we note that none of the data points listed in the Article 29 Data Protection Working Party Opinion 9/2014 on the application of Directive 2002/58/EC to device fingerprinting⁴, would appear to be stored solely as part of a local cache.
 - 2.2.3 Under this interpretation, a natural and inevitable consequence of the position of the EDPB is that effectively all processing undertaken by the central processing unit of a subscriber device will fall within scope, subject to any exemptions that may be applicable, wherever this information has been distributed over a public communication network.
 - 2.2.4 While the Guidance applies this to pixels and tracked URLs, we do not see how all websites and online services are not also caught by this interpretation, given the longstanding prevalence of caching as a means of improving user experience, and in particular the effectiveness with which remotely served information is experienced and interacted with by internet users.
- 2.3 The Guidance would therefore apparently expand the scope of the ePrivacy Directive massively and represents a paradigm shift in the potential application of the ePrivacy Directive.

3. EXEMPTIONS

- 3.1 The Guidelines state that:

"These Guidelines do not intend to address the circumstances under which a processing operation may fall within the exemptions from the consent requirement provided for by the [ePrivacy Directive]."

- 3.2 In the absence of any consideration of the exemptions from the consent requirement, it is impossible to assess the true practical impact of the position of the EDPB as set out in the Guidance, and the resulting implications for subscribers and information society services in the Union.
- 3.3 We take the view that the Guidance, by failing to address such exemptions, creates huge uncertainty within the Union as to the extent of obligations under the ePrivacy Directive.
- 3.4 Operators of information society services are therefore left to make assumptions based on other guidance issued by the EDPB or its predecessor the Article 29 Working Group, in order understand how to reflect the Guidance in their practice.
- 3.5 Where, for example, a subscriber accesses a website, we anticipate the following:
- 3.5.1 the entire website and its content will be distributed over a public communication network, and then cached by the terminal equipment of the subscriber;
 - 3.5.2 the entire website and its content would then fall with the purported scope of the ePrivacy Directive, subject to the exemptions;
 - 3.5.3 pursuant to the EDPB's Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects (the "**PoC Guidelines**"), which examine the necessity of processing activity under GDPR, a narrow interpretation is applied to the term 'necessary'.

⁴ Para 3,

3.5.4 We therefore consider an even narrower interpretation would be applied to the terminology of the exemption from the consent requirement:

"as strictly necessary in order for the provider of an information society service explicitly requested by the subscriber or user to provide the service."

3.5.5 Pursuant to the PoC Guidelines, advertising content, whether or not personalised, could not be served without consent under the ePrivacy Directive. This is on the basis that the EDPB takes the view that advertising is not an element of a website that is "*necessary for the contract at issue*", or in other words, the delivery of the website to the subscriber.

3.5.6 The effect is that practically all online advertising, and indeed all content appearing on a website that isn't requested by the subscriber, would fall outside the exemption and require consent.

3.5.7 This outcome appears incompatible with the position of the CJEU in its judgment C-252/21 - Meta Platforms and Others, which makes clear that, where personalisation (and therefore data processing) is not necessary in order to offer a service, that service should be offered by other means not requiring data processing.⁵ Following the Guidance would effectively prevent, in the absence of consent, any offering of non-personalised services on the basis that the service would still be required to be distributed over a public communication network and then subsequently cached.

4. APPROACH OF THE EDPB

4.1 Under the Guidelines, the EDPB states that:

"further guidance is needed with respect to the tracking techniques currently observed. The technical landscape has been evolving during the last decade, with the increasing use of identifiers embedded in operating systems, as well as the creation of new tools allowing the storage of information in terminals".⁶

4.2 We would like to note that the ePrivacy Directive is not concerned with tracking technologies, or identifiers, per se. Pursuant to the recitals of the ePrivacy Directive, it concerns privacy in electronic communications more generally, and the protection of rights to respect for private and family life⁷ and protection of personal data⁸ under the Charter of Fundamental Rights of the European Union⁹.

4.3 Equally, the amendments to Directive 2002/58/EC pursuant to Directive 2009/136/EC amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws ("**ePrivacy Amendment Directive**"), concern the protection of the private sphere in general.¹⁰

⁵ Para 102

⁶ Guidelines, para 2

⁷ Charter of Fundamental Rights of the European Union, Article 7

⁸ Charter of Fundamental Rights of the European Union, Article 8

⁹ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002, Recital 2

¹⁰ ePrivacy Amendment Directive, Recital 66

- 4.4 We question the need for further guidance in respect of tracking technologies and identifiers, in light of the protections subsequently offered under GDPR¹¹ in the period since the ePrivacy Amendment Directive and the prospective ePrivacy Regulation¹².
- 4.5 The EDPB goes on to state:
- "The ambiguities regarding the scope of application of Article 5(3) ePD have created incentives to implement alternative solutions for tracking internet users and lead to a tendency to circumvent the legal obligations provided by Article 5(3) ePD."¹³*
- 4.6 We would like to make clear that, where legislation is applied to a particular scope, acting beyond that scope is not a circumvention of legal obligations. It is simply the absence of legal obligations under that legislation in respect of matters out of scope.
- 4.7 Furthermore, where a particular practice is out of scope of any legislation, it is incumbent on legislators only to extend the legislative framework to include such practice, should such extension be agreed under the legislative framework.

SHERIDANS

ABOUT THE AWIN GROUP

- a) Since 2000, the Awin group has pioneered affiliate marketing partnerships. The Awin group has played a pivotal role in setting industry standards over the past 23 years, by developing innovative technology, cultivating excellent service, and introducing world-leading brands to the affiliate marketing channel.
- b) Part of the Axel Springer and United Internet Groups, with ShareASale and Commission Factory, the Awin group forms the largest global affiliate network powered by 17 offices worldwide. Our team of over 1,400 employees collaborates with a vast network of 1 million+ contributing publishers and 25,000 advertisers.
- c) The Awin group connects businesses with customers across most sectors, including retail, telecommunications, travel, and finance. In the last financial year Awin generated £14 billion (€17b) in revenue for our advertisers and £1.1 billion (€1.2) for our publishers.

¹¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

¹² Proposal for a regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications)

¹³ Guidelines, para 3