Liberty Global's comments on EDPB Guidelines 2/2023 on Technical Scope of Art. 5(3) of ePrivacy Directive

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Liberty Global would like to express its general concern that EDPB's recommendation to extend the cookie regulation to new data technologies may result in a heavier consent burden of users of any connected device.

The European Commission has already raised concerns about the current 'cookie fatigue': users are so tired of cookie banners that they end up accepting any consent button without even reading it, just to get rid of it and access the web content. If the technologies covered by these consent buttons increase, this fatigue effect will keep increasing. Liberty Global believes that instead of extending and reinforcing it, it is the time to reconsider the application of article 5.3 of the ePrivacy Directive, and reflect on new ways to empower consumers to make effective choices regarding tracking-based advertisements.

The Recommendation's broad interpretation of article 5(3) leads to some artificial constructs that would be unrealistic to implement in practice, like requesting consent for URL tracking or pixel tracking, which are often used just to count impressions, but do not contain any other information. If consent is required for these techniques, it might result in companies going back to using cookies, which often store more information and are less privacy preserving.

In addition, the broad interpretation extends also to the concept of 'gaining access', including some examples that could be considered as essential for the provision of the services.

Furthermore, the wording in EDPB's Recommendation contains a definition or terminal equipment which is still unclear, for example for cases where a connected TV is also connected to a set top box.

These examples show that it would be more appropriate to thoroughly reassess whether the e-Privacy rules remain an adequate framework for the EU's innovation and data economy, rather than extending their application to new technologies.