

Copenhagen 18 January 2024

To:  
**European Data Protection Board**

### **Public hearing EDPB Guidelines 2/2023 on Technical Scope of Art. 5(3) of the ePrivacy Directive**

Thank you for giving Cookie Information/Piwik PRO the possibility to be at part of the public consultation on EDPB guidelines 2/2023 (hereafter “the Guidelines”).

Cookie Information/Piwik PRO welcomes EDPB’s new guidelines and EDPB’s attempt to clarify the technologies covered by Article 5(3) in the ePrivacy directive in the light of 2024’s more complex digital landscape.

Since Cookie Information and Piwik PRO merged in October 2024 and are now a part of the same group this consultation response has been prepared on behalf of both companies.

#### **Technologies covered in the Guidelines**

The wording of article 5(3) in the ePrivacy directive is technology neutral and does not refer to any specific technologies. Traditionally the provision has been referred to as ‘the cookie provision’ because the main technology covered by the provision originally was cookies. According to the introduction to the Guidelines (Section 1) the WP 29 Party back in 2012 stated (WP194) that Article 5(3) in the ePrivacy directive does not exclusively applies to cookies but also similar technologies (e.g., device fingerprinting as later stated in WP224). The introduction to the Guidelines also states that there currently is no comprehensive list of the technical operations covered by the provision. We suggest, that EDPB makes it even more clear in the Guidelines that the list of technologies is not comprehensive and that the provision is technology neutral.

According to the Guidelines the evolving of the technology landscape during the last decade (increasing embedding of identifiers in operation systems as well as creation of new tools allowing storage of information in terminals) has created incentives to implement alternative solutions for tracking of internet users and lead to a tendency to circumvent the legal obligations provided by Article 5(3).

Though it is very positive that the EDPB now makes it clear that Article 5(3) in the ePrivacy directive also cover a number of ‘new’ technologies, the list of technologies/use cases in the Guidelines at the same time implies a risk that focus is on the technologies listed in the Guidelines instead of an assessment of if a new technology (incl. functionality) falls under the wording of Article 5(3). This can lead to continued circumvention of the legal obligations in the provision in relation to existing and future technologies not listed in the Guidelines. More importantly though, the examples provided by the EDPB are overreaching, e.g., leading to stigma of some of the technologies that are benign or not

impactful on individual’s privacy suggesting that the scope of application of the guidelines is broader than intended.

The legal challenges will in many cases increase when the listed technologies are combined either with each other or with other technologies that – depending on the actual assessment – may or may not be covered by Article 5(3).

Add to that that a number of technologies are not and will not be covered by the wording in Article 5(3) of the ePrivacy Directive (e.g., because they ‘only’ have a function on a web page but not gain access to stored information or store information on terminal equipment of a subscriber or user) but still erroneously covered by the requirements in the provision.

**Potential limited practical implication of guidelines**

The practical implications of EDPB’s Guidelines on the technical scope of Art. 5(3) in the ePrivacy Directive will be further limited because the responsible authorities in the Member States interpret the exemptions in the ePrivacy directive differently. Since 2020 the French Data Protection Authority has allowed use of cookies and similar technologies for the purpose to produce anonymous statistical data without consent under a number of prerequisites. The approach from CNIL was followed by the responsible Spanish authority, AEPD, in January 2024. This approach is good because it at the same time gives high business value and involves a low risk for the individuals.

Another example comes from the responsible Danish authority, Agency for Digital Government, it seems like that the Danish authority introduces the term, simple statistic cookies, in their last round of audits (autumn 2023) replacing the authority’s 2018 guidance. Though it is still unclear if the Danish authority finds that simple statistic cookies are covered by the exemption in Article 5(3) in the ePrivacy directive or if the Danish authority “just” have decided not to focus on these types of cookies in relation to their latest audits.

As long as the exemption from the consent requirement in Article 5(3) in the ePrivacy directive is interpreted differently by the relevant national authorities in EU users of the technologies covered by the provision (Cookies, fingerprints, the technologies listed in the Guidelines and other technologies covered by Article 5(3)) will most probably try to include the actual use of a technology under an exemption. We suggest that EDPB follow the line from the authorities in France, Spain and Denmark.

**URL and pixel tracking**

Section 3.1 relates to URL and pixel tracking. We recommend that EDPB clarifies the URL tracking in more detail, so that it relates to a concept where the URL contains an online identifier (short- or long-term lived). In its current shape the broader web analytics industry believes that a simple link decoration with ad campaign parameters could be interpreted as URL tracking, where clearly it is not.

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