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To: the European Data Protection Board

Subject: ***noyb observations on EDPB Guidelines 2/2023 on Technical Scope of Art. 5(3) of ePrivacy Directive.***

To whom it may concern,

First of all, *noyb* welcomes the opportunity to submit comments on Guidelines 2/2023 on Technical Scope of Art. 5(3) of ePrivacy Directive *("the Guidelines")*. We submit the following observations for the consideration of the EDPB.

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We appreciate the introduction of clearer definitions of all relevant aspects for the applicability of Article 5(3) ePrivacy Directive and recognize their usefulness. *noyb* also welcomes the inclusion of use cases for further clarification.

The only comment we would like to raise is the lack of reference to operating systems throughout the Guidelines. Whilst the *Introduction* briefly mentions "*the increasing use of identifiers embedded in operating systems*" (§ 2), no specific mention to operating systems is made in the rest of the document.

For instance, in defining the notion of "*gaining access*" under Article 5(3), Section 2.5 of the Guidelines focusses on the fact that, in the case of cookies, the "*accessing entity*" sends instructions to the terminal equipment of a user or subscriber *"in order to receive back the targeted information"* (§31). In the next paragraph, the EDPB makes a (welcomed) comparison with the scenario in which the "*accessing entity*" distributing "*software on the terminal of the user that will then proactively call an API (application programming interface) endpoint over the network*" (§ 32). The reasoning behind this is rather clear. The software developer of, say, a mobile application, distributes a product that, on the basis of the source code, will then automatically share certain information ("*proactively*") with the developer itself (who then becomes an "*accessing entity*"). Such a process, however, is not exclusive of mobile apps but also and most importantly it is typical of operating systems. Yet, the EDPB does not include any reference to this type of software.

Section 2.6 of the Guidelines offers a valid analysis of the concepts of "*Stored information*" and "*Storage*". In particular, we appreciate the clarifications on the irrelevance of (i) the length of time of storage (§36) and (ii) the type of medium on which information is stored (§§ 37-38). However, what is partially unclear is the mechanism or criterion used to

assign the action of "*storing*" to a certain party (§§ 35 and 39). The EDPB states that "*typically*" storage operations are conducted by the "*instructing software*" and that such operations, which are relevant within the meaning of Article 5(3) of ePrivacy Directive, are considered to be "*initiated directly by the other party*" (§ 35). In our view, reference to such "*other party*" may generate some confusion.[1] It would be helpful if the EDPB could clarify that the party responsible for storage within the meaning of Article 5(3) ePrivacy Directive should be the one who set up the "*instructing software*" or the "*instructions*" on which it operates, including the operating systems developer.

Along the same lines, we consider that under Section 3, it would also be worth mentioning unique device identifiers, including advertising identifiers generated by operating systems, as they are also "*widely used*".

We consider that the issues set out above cause some uncertainty as to the role played by operating systems in the context of Article 5(3) of ePrivacy Directive. In our view, sections 2.5 *"Notion of gaining access"*, 2.6 "*Notion of stored information and storage"* and 3. *"Use cases"* should also refer to operating systems, as these, too, may grant access to and store information on the terminal equipment of a user or subscriber in the ways described in the Guidelines.

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We hope these comments are useful for your work on the Guidelines and want to congratulate the authors once again on the general approach taken in these Guidelines. We are at your disposal should you have further questions or require additional clarifications.

Vienna, 17.01.2024

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noyb's Legal Team

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[1] Notably, given the fact that in §39 the EDPB introduces a further element which does not help clarify the overall picture of the issue: "*Finally, 'stored information' may not just result from information storage in the sense of Article 5(3) ePD as described above (either by the same party that would later gain access or by another third party). It may also be stored by the user or subscriber, or by a hardware manufacturer, or any other entity; be the result of sensors integrated into the terminal; or be produced through processes and programs executed on the terminal equipment, which may or may not produce information that is dependent on or derived from stored information.*"