

Comments on Guidelines 2/2023 on Technical Scope of Art. 5(3) of ePrivacy Directive

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The European press publishers' associations EMMA and ENPA appreciate the opportunity to respond to the European Data Protection Board's (EDPB) Guidelines 2/2023 on Technical Scope of Art. 5(3) of ePrivacy Directive adopted in November 2023. Please see some comments below.

1. Recommendation

We recommend that the broad interpretation of the terms "gaining access" and "stored information" in points 2.5 and 2.6 of the Guidelines 2/2023 on the technical scope of Art. 5(3) of the ePrivacy Directive ("the Guidelines") should be narrowed and clarified with examples.

2. Legal assessment

The broad interpretation of the terms "gaining access" and "stored information" is not only inconsistent with the wording, meaning, purpose and structure of Art. 5 (3) of the ePrivacy Directive (ePD), but also with national interpretations such as the German Guidelines of the supervisory authorities for telemedia providers of 1 December 2021 ("OH Telemedien 2021"). It is not clear whether the EDPB has considered its competence properly to issue such guidelines, especially when EDPB members may not have direct jurisdiction over the local implementation of the ePD.

a. Wording/purpose

The broad interpretation of "gaining access" and "stored information" contradicts the wording of Art. 5(3) ePD. According to common usage, "access to" requires an active action on the part of the accessing person or device. Access implies active reception. If the passive reception of information were to be covered by the term "access to", this would have to be reflected linguistically in the passive reception. Moreover, the term "stored information" presupposes that the information is already stored on the terminal and is not only temporarily transmitted as a result of an unavoidable technical transmission process.

The meaning and purpose of Art. 5(3) ePD also contradicts a broad interpretation. Recital 24 of the ePD makes it clear that user information stored on terminal equipment should be protected against the intrusion of so-called "spyware", "web bugs", "hidden identifiers" and similar tools without the user's knowledge. However, this does not cover the transmission of information, particularly in the case of unavoidable technical communication processes.

Furthermore, Art. 5(1) and (2) of the ePD expressly and conclusively regulate the confidentiality of communications transmitted over public communications networks and publicly available communications services and the related traffic data. Traffic data are not mentioned in Art. 5(3) ePD, which indicates that pure traffic data is neither covered by the content of the regulation nor should it be regulated in Art. 5(1) and (2) ePD. There is also agreement that Art. 5(3) ePD does not cover session cookies. Against this background, the idea must also apply to other traffic data.

Furthermore, it is not understandable why non-personal data and personal data should be subject to the same requirements in Art. 5(3) ePD. The GDPR shows that only personal data enjoy a particularly high level of protection, which cannot be applied in the same way to non-personal data.

b. National guidelines (OH Telemedien 2021)

The OH Telemedien 2021 stipulates that access requires the targeted transmission of browser information that is not initiated by the end user. If only information is processed, such as browser or header information, which is transmitted inevitably or due to (browser) settings of the terminal device when a telemedia service is called up, this is not to be regarded as "access to information already stored in the terminal device". As examples, OH Telemedien 2021 cites the public IP address of the terminal, the address of the website accessed (URL), the user agent string with browser and operating system version and the language set. According to the interpretation of the directive, access already occurs when information is sent or technically transmitted from a terminal device to an external recipient. This means that any electronic communication is covered by the term "access", regardless of who initiates the transmission, i.e. even if it is an unavoidable technical transmission of, for example, browser information.

3. Technical Assessment

The EDPB is basing itself on a situation that does not reflect technical reality. The consequence of the draft guidelines extending the ePrivacy Directive beyond active access to the terminal (e.g. via cookies) to, for example, URLs, IP addresses and the memory and processor of the user's device (RAM, CPU) would be that website operators would initially be allowed to display only empty pages when a user visits their website and would then have to obtain the user's consent for all content, services and advertising. And even this would not be legally possible, because even a completely empty website without a single character of source code would still reserve some memory (RAM) due to the nature of the browser (tab). An empty page also saves (reserves) space in the device's RAM, which, according to the new interpretation, should be a process requiring consent, but for which it is simply not possible to obtain the user's prior consent. The consent layer can also only be displayed to the user if space can be reserved in the user's RAM and processed in the CPU. From a purely technical point of view, it is simply not possible to obtain the user's consent in advance.

The website visited by the user would also first have to obtain permission to store or use the URL information (URL of the page visited). The loading of content, services and advertising would require consent, as any server request that technically establishes a connection to the desired content would be covered by the ePrivacy Directive and require consent, according to the EDPB.

The use of the user agent string, which is passively transmitted with the IP address (neither actively initiated by the user nor by the website operator) for the technical purpose of displaying content, and which is also absolutely necessary for this process, would also be recorded and subject to consent. In particular, the user agent string tells the website operator what screen size the user wants to use to access the content, so that the website operator can display the content in an appropriate and optimised size for the user. Without this information, it is not known whether the user will be presented with a website size optimised for small mobile phone screens or large desktop screens. As a result, the content the user is looking for would be completely distorted and unusable.

An overly broad notion of "access" is regulatory activism that mixes the active notion of "access" with passive reception, and mixes individual input into a terminal with general protocol-based instructions that are not specific to a particular website/app etc., but are built into a computer before it is even operational.

4. Consequences of this interpretation

a. Inconsistent approach to consent requests and “cookie fatigue”

Many are familiar with the concept of "cookie fatigue" - a state stemming from having to continuously consent or refuse data processing when landing on each website. The European Commission has been considering this issue for years, with the aim of reconciling the interests of business with those of consumers. What is often overlooked, however, is that it is EU legislation itself that led to the need for so many cookie banners and, consequently, to cookie fatigue. In light of the EU Commission's efforts to combat cookie fatigue, it is all the more surprising that the consequence of the broad interpretation of Art. 5(3) ePD will lead to new, additional cookie banners and activities requiring the consent of internet users. This completely undermines the efforts of the EU Commission to simplify the situation regarding cookie banners, such as the so-called “cookie pledge” currently under discussion, which has also been endorsed by the EDPB. As the cookie pledge and similar initiatives also raise some concerns, this comment should be understood as pointing out inconsistencies in the approach to the amount and level of detail of consent requests.

b. Impact on the European media landscape

Advertising and marketing are essential for the financing of free media, culture and sport. Targeted, data-driven advertising and marketing carries benefits for advertisers, service providers and users alike. Firstly, it facilitates users to see more timely and relevant ads, which leads to a better and more personalised user experience whilst at the same time optimising consumer engagement with brands. Secondly, users who agree to providing (pseudonymised) data get access to quality content in exchange.

An interpretation of Art. 5(3) ePD that extends its applicability to all electronic communications leads to a disproportionate interference with the freedom of expression and information under Art. 11 of the Charter of Fundamental Rights of the European Union. This requirement of consent and justification endangers media freedom, plurality and the right to freedom of expression in the long term, as it makes the distribution of privately-funded media content on the Internet dependent on the consent of the user for almost every connection process.

It is important to emphasise that data-based, functioning websites and other online offerings with advertising space are crucial for the financing of free media, especially in the context of competition from global Big Tech platforms. These dominate the online advertising environment and claim the majority of advertising revenues. The interpretation of Art. 5(3) ePD should therefore be critically questioned in the light of this market situation and analysed for its media compatibility. Such an interpretation could create additional and innovation-inhibiting hurdles for the distribution of electronic media and the display of (data-based) advertising.

Last but not least, it is to be feared that at a time when data-based business models are flourishing in the European Union, the disproportionately broad interpretation of Art. 5(3) ePD would result in considerable competitive disadvantages, particularly for small and medium-sized enterprises, due to the financial and technical costs involved.

The implementation of the requirements published in the Guidelines will result in the mandatory adaptation of all websites. The costs and operational and technical effort involved are disproportionate to the objectives of European data protection policy. Indeed, they contradict them, as the key aim set out in Article 1 of the ePD is not only to protect privacy and confidentiality but “to ensure the free movement of such data and of electronic communication equipment and services in the Community”.

Furthermore, the draft guidelines could have an impact on other provisions within the ePD. Article 13(2), for example, allows marketers to rely on the so-called soft opt-in to send direct marketing emails to existing customers without having to ask for their consent for sending each new email, though customers, of course, must always have the possibility to opt-out. A possible use case are marketing emails press publishers might send to existing subscribers to remind them to renew their subscriptions or to inform them of new services. Subscriptions are an essential part of press publishers' revenues. Nonetheless, email pixels that do not collect any sensitive information but simply track engagement with the email itself may be embedded in those marketing emails. Therefore, the draft guidelines would require marketers to obtain a separate consent, even when relying on the soft opt-in, to use email pixels and measure the effectiveness of their email campaigns with existing customers. Hence, this would make the use of the soft opt-in meaningless. We would argue that this creates an imbalance between the right to privacy and the right to conduct a business.

c. User experience

Empty, white web pages and even more consent requests are definitely not in the user's interest.

d. Lack of incentive for non-personalised advertising

If all advertising were subject to consent (which would be the consequence of the new rules (see comments under "3. Technical Assessment"), the industry would lack the incentive for non-personalised advertising. The call for more contextual advertising (previously known as "no-consent advertising") loses its core basis as it would also be subject to consent and there would be no incentive for website/application operators and the advertising industry to show more contextual advertising instead of personalised advertising.

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ENPA, the European Newspaper Publishers' Association is the largest representative body of newspaper publishers across Europe. ENPA advocates for 14 national associations across 14 European countries and is a principal interlocutor to the EU institutions and a key driver of media policy debates in the European Union. See: www.enpa.eu/