

Opinion on EDPB Guidelines concerning the interpretation of scope of Article 5(3) of ePrivacy Directive

EDPBs Guidelines 2/2023 on Technical Scope of Art 5(3) of ePrivacy Directive expand the scope of the ePrivacy Directive in a manner that does not appear to reflect legislators original intent. In particular, initially understood to mainly address cookies, the proposed Guideline extends its application to cover nearly all digital communications and software use on computers and other devices. This also includes information that a device transmits automatically, such as URLs or IP addresses, and information stored ephemeraly, like that in RAM or CPU cache, resulting in complicating the practicality of things. The interpretation made by the EDPB extends beyond its original intent, broadening the scope of application beyond what is necessary, thereby implicating the daily functioning of businesses.

Furthermore, the EDPB introduces a novel and widened approach as to what constitutes "access" to terminal equipment, which is beyond the scope of necessity. The Guidelines suggest that even an automatic (passive) transmission of information following a communication protocol (e.g.: sending an IP address) could be considered such "access", in comparison to the original approach of requiring an active transmission of information initiated by an entity. The implication of widening the notion of access directly undermines the basic functioning of the Internet of Things (IoT) and the World Wide Web (WWW), as the broad notion would make any communication over the Internet, as well as any use of software on a computer an "access" by the recipient. By definition all internet communications require the transmission of certain information as defined by the relevant communication protocol.

The stance taken by EDPB directly impedes daily operational activities of digital-present firms including fintech companies. These firms, already navigating complex data privacy landscapes, face further challenges under these guidelines, particularly in areas such as user consent management and adaptation of technology to meet these expanded definitions. The newly defined notion of "access" could mean that even receiving an email might be considered access, as it involves automatically transmitted information. This could also impact email retention and other common digital practices, virtually every firm using digital technology is implicated in. Simple web elements like ad-banners and newsletter sign-up popups might now also fall under these regulations. If this is the case, it could necessitate

GDPR-compliant consent or proof of strict necessity for the provision of the digital service, impeding digital operations even further. Apart from the factually arduous implementation of the Guidelines into real life practice, there is a further burden arising out of the new Article 5(3) interpretation: Potential Overreach and Consent Fatigue of the user.

The Guidelines overextending the Directive's original wording and intent, lead to a situation where even basic interactions with computers and other devices require user consent or fit within the narrow exceptions. This could exacerbate the issue of consent fatigue, as businesses might then need to provide detailed information processing notices akin to cookie notices for a wide range, if not nearly all, of digital interactions. The potential for increased administrative burden and operational disruption is significant, particularly for fintech companies that are heavily reliant on seamless digital interactions and user data for their services.

Lastly, EDPB shall take a stance that accurately reflects current societal developments and clearly represents today's ever present digital advancement by adopting an allowing rather than restricting approach. The need for a balanced framework that both protects user privacy and supports digital innovation is critical. It is essential for regulatory bodies to consider the practical implications of their guidelines on the digital economy, ensuring that they do not inadvertently stifle innovation or create undue burdens for businesses, especially in the rapidly evolving fintech sector.