IAB Europe's comments on the European Data Protection Board's "Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects"

IAB Europe (Transparency Register: 43167137250-27) represents 25 European national associations who in turn represent over 5,000 companies from across the online advertising ecosystem, from advertisers and media agencies to ad tech intermediaries, publishers and eCommerce companies. We have 70 companies in direct membership, including agencies, ad tech intermediaries, publishers and eCommerce companies.

We have reviewed the European Data Protection Board's (hereinafter 'EDPB') "Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects" (hereinafter 'the Guidelines'), which have been circulated for consultation until 24th May. We are grateful for the opportunity to provide comments on the Guidelines.

Preliminary remarks

Article 6 of the GDPR offers six legal grounds for processing personal data. At least one legal ground must apply to justify processing under EU law. All legal grounds are equal and no single legal ground enjoys an elevated status. A company's choice of the most appropriate legal basis for the processing of personal data should be subject to a context-specific assessment, taking into account all relevant provisions found in the GDPR and other laws.

The Guidelines construe the applicability of Article 6(1)(b) so narrowly as to virtually exclude the processing of personal data in connection with the delivery of digital advertising, whether that advertising is targeted based on user behaviour or not. They draw more heavily on previous WP29 Opinions than on the letter of the law, and are in places internally contradictory (e.g. in the case of data processing for the personalisation of advertising, which must meet the standard of being "essential", whereas data processing for content personalisation need only meet the standard of "expected"). They omit to provide guidance on critical elements such as why the concepts of contract and consent are inherently different, and why content personalisation for the purpose of increasing user engagement would not be possible on the basis of Article 6(1)(b), whereas content personalisation for other purposes would.

The Guidelines appear to constitute a further erosion of a central proposition of the GDPR pursuant to which if users have transparency about, and control over, how their personal data are processed, and data controllers are bound to adhere to principles such as data minimisation, purpose limitation, and privacy by design and default, personal data may be processed, including in relation to the delivery of digital advertising. The erosion of that proposition at a time when the GDPR has only been enforced for one year diminishes the investment companies have made in legal compliance and may foreclose consumers' ability to benefit from technical, scientific, entertainment and business services that exist because they can be wholly or partly funded by advertising.

We hope that following the public consultation period, the EDPB will reflect some of our concerns in its final text. We would be pleased to have the opportunity to discuss these observations with the EDPB at an appropriate time.

This submission addresses the following sections of the Guidelines:

- **Part 1 – *Introduction***
  - Section 1.1, *Background*
- **Part 2 – *Analysis of Article 6(1)(b)***
  - Section 2.2, *Interaction of Article 6(1)(b) with other lawful bases for processing*
  - Sections 2.4 and 2.5 on *Necessity* and *Necessary for performance of a contract with the data subject*
- **Part 3 – *Applicability of Article 6(1)(b) in specific situations***
  - Section 3.1, *Processing for service improvement*
  - Section 3.2, *Processing for fraud prevention*
  - Section 3.3, *Processing for online behavioural advertising*
  - Section 3.4, *Processing for personalisation of content*

It concludes with some general observations that are relevant for the entire text of the Guidelines.

Part 1 – *Introduction* – Section 1.1, *Background*

The Guidelines state: "Tracking of user behavior for the purposes of such advertising is often carried out in ways the user may not be aware of, and it may not be immediately obvious from the nature of the service provided, which makes it almost impossible in practice for the data subject to exercise any control over the user of their data" (paragraph 4).

As the EDPB will be aware, tracking of consumers without their knowledge and without providing them control of their data is a violation of the GDPR. This sentence in the Guidelines suggests that the situation it describes – where users are tracked without their knowledge and without being able to do anything about it – is something that the current EU regulatory and legislative landscape somehow permits, and that the Guidelines on the processing of personal data under Article 6(1)(b) are intended to address. This is clearly not the case. Such tracking would be a breach of a number of provisions of the GDPR. We would suggest either that the sentence be deleted, or that it be modified as below:

> *Tracking of user behavior for the purposes of such advertising* ~~*is often carried out in ways the user may not be*~~ ***without the user being*** *aware of* ***the tracking and able to exercise control over it (e.g. by withholding consent, withdrawing it, or exercising a right to object, is illegal under the GDPR.*** ~~*, is often carried out in ways the user may not be aware of, and it may not be immediately obvious from the nature of the service provided, which makes it almost impossible in practice for the data subject to exercise any control over the user of their data.*~~

Part 2 – *Analysis of Article 6(1)(b)*

Section 2.2, *Interaction of Article 6(1)(b) with other lawful bases for processing*

Contract v consent

This section contains the statement at paragraph 20 that the concepts of contract and consent "are not the same and have different implications for data subjects' rights and expectations". The text notes that it is "important to distinguish between entering into a contract and giving consent within the meaning of Article 6(1)(a)" and warns of the risk that data subjects will "erroneously get the impression that they are giving their consent in line with Article 6(1)(a) when signing a contract or accepting terms of service" (para. 20). However, there is no explanation offered of how the two concepts – which intuitively seem indeed to be very similar – are materially different. It would have been a welcome development if the EDPB had taken the opportunity of these Guidelines to shed some light on this important question.

Explicit consent as an alternative to contract

In several places throughout the Guidelines, as discussed in more detail below, Article 6(1)(b) is held not to be an appropriate lawful basis for data processing that is not "objectively necessary" to deliver the service. The finding that it is not appropriate is often based on argumentation that seems equally applicable to the consent legal basis, yet the potential availability of other legal bases, *including consent* or even legitimate interests, is nonetheless evoked. It is hard to know what to make of these references to either consent or legitimate interests as potential alternatives to contract – that is, whether they are intended sincerely, and if so, why[1]. Section 2.2, paragraph 21 on exceptions to the general prohibition on processing sensitive personal data seems to suggest a possible explanation for the apparent contradiction. This explanation is that the EDPB considers *explicit* consent to be a potential alternative to contract for the processing of data that is not "objectively necessary" (in the sense of strict, technical necessity) to deliver an online service but is considered by the controller to be necessary (e.g. because it enables him to finance the creation of his service). It would be helpful if the EDPB could clarify whether this reading is correct.

Sections 2.4 & 2.5, *Necessity* and *Necessary for performance of a contract with the data subject*

- Assimilation of "necessary" to "essential" or "indispensable"

The Guidelines construe the concept of "necessity" so narrowly – and in a way that in our view is at variance with what the legislator intended in the relevant legal Articles and recitals – that not only would personalised advertising be out of scope of Article 6(1)(b), but even processing for the delivery and measurement of contextual advertising would likely require some other legal basis. Thus, necessity is assimilated to *indispensability*. For example, if the requested service can be provided without the specific processing taking place (even if the consequence was a more expensive or functionally inferior experience for the user?), the EDPB considers Article 6(1)(b) not to be an appropriate legal basis (see paragraphs 17 and 19). If there are "realistic, less intrusive alternatives, the processing is not necessary" (paragraph 25). Article 6(1)(b) "will not cover processing which is useful but not objectively necessary for performing the contractual service". Similarly, per paragraph 30, the data controller must be able to demonstrate that the "main object of the specific contract… cannot, as a matter of fact, be performed if the specific processing of the personal data does not occur". In a further extension that finds no basis in the wording of the GDPR, the Guidelines

[1] Put another way, the Guidelines seem to suggest that contract is an available legal basis - perhaps even the sole appropriate legal basis - for processing that is necessary to deliver the service, whereas if the processing does *not* meet the necessity test, then consent is preferable. Yet, Article 7(4) clearly contemplated consent as a potential legal basis for processing that is necessary to deliver an online service. Importantly, the recent Opinion of Advocate General Szpunar in Case C-673/17 Planet49 GmbH can certainly be read as giving service providers a measure of discretion in determining what is necessary and what not.

refer to necessity as requiring that the data processing be "for a purpose that is *integral* to the delivery of [the] contractual service to the data subject" (emphasis added) (paragraph 30).

- Is it necessary to pay staff and keep the lights on in order to deliver an online service?

The Guidelines artificially separate the technical delivery of a service from how it is funded, removing considerations relating to the latter from the assessment of necessity in a way that no functioning business would actually be able to (see e.g. paragraphs 25 and 36). Thus, data processing that is *merely* "necessary for the controller's wider business model" would not meet the standard for necessity (paragraph 36). Data processing to enable an advertising revenue stream (whether behavioural or not) falls outside the enforcers' notion of necessity, though it may be seen as primordial in the service supplier's understanding of the same concept. Imagine a website trying to match stray dogs and cats with owners seeking new pets. Putative new owners need to provide personal data, including names, addresses, and proof that they are able to take care of a new animal. The site uses Article 6(1)(b) to process data relating to user registration, and wishes to use the same legal basis to process personal data to deliver advertising by local pet supply stores. In theory, data processing to enable the advertising would be considered by the EDPB to be "unnecessary", since it relates to how the site is funded and since in theory and with unlimited resources, the site could presumably deliver its matching service without advertising. But in reality, without the possibility of an additional revenue stream from advertising, the service might not be able to function.

- Suppliers of online services are specifically excluded from deciding what is necessary

Importantly, the Guidelines explicitly take the job of defining what constitutes "necessary" processing out of the hands of the online service suppliers. Thus, paragraph 27 notes that the "person who creates and offers the service may not decide what is necessary and impose that". The Guidelines reaffirm the view taken in the WP29's 2014 Opinion on the legitimate interests of the data subject that processing that is "unilaterally imposed on the data subject by the controller" may not be "genuinely necessary" for the performance of a contract merely because it is processing that the *controller considers to be necessary* (see citation of WP29 Opinion on page 8 of the Guidelines, at paragraph 28). Whereas freedom of contracts gives a private party the right to make a legally binding agreement without any external interference as to what type of obligations they can take upon themselves. Specifically, in the online context, many suppliers of online media and other sites would challenge the idea that they can impose terms on potential readers or other customers, who with rare exceptions can simply go elsewhere to obtain an equivalent service if they find the conditions for accessing a given site to be unfavourable to them.

- Overburdening the notion of necessity to achieve policy ends

Necessity becomes a compound notion in the Guidelines, integrating not only whether the data processing is needed in order to render the service but whether it is the least intrusive means of doing so. The assignment in the guidance of this special, compound meaning to the notion of "necessity" offends against the principle of law pursuant to which words should not be arbitrarily assigned a meaning within legislation that is significantly different from their normal meaning in everyday discourse. There is nothing wrong with data controllers being required to conduct their activities in the manner that is least privacy-intrusive possible. But that requirement is laid down elsewhere in the Regulation. It should not be arbitrarily integrated into the notion of "necessity" for the purposes of Article 6(1)(b).

- Potential impact of the proposed way forward

The narrow construction of necessity detailed above would directly and negatively impact data-driven online advertising and the media and other online services it currently enables. Private actors, including the digital media, should be able to process data for advertising purposes that are not strictly technically necessary for provision of the service but are necessary for the monetisation model chosen by that service, as long as long as the processing is demonstrably lawful under the EU law. The rationale behind ad-supported services is that they are offered in a value exchange. Without the ability to benefit from that value exchange, they could not be financed and consequently would not be offered. From the service provider's point of view, the service and its monetisation model are inextricably linked and cannot be treated as separate.

Part 3 – *Applicability of Article 6(1)(b) in specific situations*

Section 3.1, *Processing for service improvement*

The Guidelines provide that service improvement for correction of bugs, errors, fixes and minor improvements should not fall within Article 6(1)(b). The processing carried out for these purposes identify operational issues and correct them (debugging), as well as facilitate ad measurement (e.g. measuring whether an ad is serving in a suitable editorial environment (brand-safe) context). Both are relevant from the perspective of the user consuming the content. Improvements made upon collecting intelligence of this type need not adversely impact user's privacy. Adjustments to the service delivery can be deduced from analytics undertaken on users and their engagement with the product.

Flexibility to justify data processing in related situations is critical, while the choice of the legal basis available for a business should come upon them carrying out a data protection impact assessment. It is vital that the Guidelines do not foreclose permissibility of relying on Article 6(1)(b) in such instances.

Section 3.2, *Processing for fraud prevention*

The Guidelines state that processing for fraud prevention is likely to go beyond what is objectively necessary for the performance of a contract with a data subject. However, the media must be in a position to verify the genuine engagement with advertising and content, to deliver the service as agreed. A bot used to fraudulently mislead businesses on engagement will lead to a dilution of the value of content or advertising. It will more broadly undermine the organisation's business. Whereas the data facilitates effective fraud and spam prevention, including verifying that ads are not seen or clicked on by bots or other malicious actors.

Flexibility to justify data processing in related situations is critical, while the choice of the legal basis available for a business should come upon them carrying out a data protection impact assessment. It is vital that the Guidelines do not foreclose permissibility of relying on Article 6(1)(b) in such instances.

Section 3.3, *Processing for online behavioural advertising*

The Guidelines contain the unsupported assertion that "[a]s a general rule, behavioural advertising does not constitute a necessary element of online services" (see paragraph 49) though the provider of a website that derives critical revenue from an advertising stream (while providing full

transparency and control to users about the related data processing) might well consider the need to pay its staff and overhead costs to be not only necessary but essential. Similarly, Article 6(1)(b) "cannot provide a lawful basis for online behavioural advertising simply because such advertising *indirectly* [emphasis added] funds the provision of a service" (no explanation is provided of the difference between directly funding and indirectly funding – surely from the point of view of the supplier, revenue that enables content to be created and staff to be paid is simply revenue). Because processing for OBA "is separate from the objective purpose of the contract between the user and the service provider", it is "not necessary for the performance of the contract at issue" (paragraph 50). The argument of its being separate from the purpose of the contract has no origin in the language of the Regulation; moreover, the assertion begs the question of who would decide whether and to what degree the funding of a service is separate from its delivery. Indeed, under the freedom of contract and principle of party autonomy it is the parties to a contract that determine its contents, and therefore, what is necessary.

The ensuing paragraph notes that data protection is a fundamental right. It goes on to assert that "personal data cannot be considered as a tradeable commodity". Whereas "data subjects can agree to the processing of their personal data", they "cannot trade away their fundamental rights". It is difficult to understand what this statement means. Does it mean that the consent lawful basis may be appropriate for OBA but not Article 6(1)(b)? Arguably it is not the data themselves that are the currency in the paradigm that is referenced, but rather the possibility of using data to deliver more relevant advertising and measurement, linked to which is the user's willingness to receive advertising based on those data. Yet, the GDPR is precisely about creating a safe space for users to elect to have their data process in exchange for valuable services. These passages in the Guidelines undercut the possibility for users to make choices – something that will penalise citizens seeking information and other online content and services on terms that align to their economic possibilities.

The real-life potential negative effects of such an approach are not hard to guess. As evidenced recently in a report by Guillaume Klossa, special adviser to European Commission Vice-President Andrus Ansip, the media sector is principally reliant on advertising as one of the three major revenue sources, alongside consumer payments (transaction and subscription) and public funding[2]. Press sustainability would be seriously impaired without advertising revenue. Moreover, it can be demonstrated that behavioural targeting data generates significant revenue uplifts in comparison with run-of-network advertising, which buys clicks or impressions without reference to behavioural data'[3]. This in turn allows media companies to build more sustainable digital business models.

It is worth stressing that data processing is critical even for showing basic ads and contextual advertising, which also can be used to directly fund the service. This is possible with, for instance, usage of real-time information about the context in which the ad will be shown, including information about the content and the device (device type and capabilities, user agent, URL, IP address) with respect to basic ads, as well as collected information about content that the user had seen with respect to contextual advertising. In addition, any modern online advertising relies on ad measurement to understand whether an ad has been successfully displayed and viewed as per the agreement between a publisher selling advertising and an advertiser purchasing advertising. While it may theoretically be possible to advertise online without processing any personal data beyond an IP address for transfer of ad files across the internet, such advertising would have virtually no value

[2] https://ec.europa.eu/commission/sites/beta-political/files/gk_special_report-european_media_sovereignty.pdf, p. 37.
[3] https://datadrivenadvertising.eu/wp-content/uploads/2017/09/BehaviouralTargeting_FINAL.pdf, p. 4.

as a result of not being behaviourally or contextually targeted, frequency capped, and measured, and is therefore not a realistic alternative.

The EDPB acknowledges that personalisation of content may constitute an expected element of certain online services (paragraph 54). As corroborated by the report and research referenced in the third paragraph of this section, advertising is recognised as an integral element of the media, which implies that users will expect to see advertising in various outlets. The same principle will apply to the expectation of personalised advertising in digital media, which should inform permissibility of processing for online behavioural advertising under Article 6(1)(b).

Section 3.4, *Processing for personalisation of content*

We welcome the indication in the Guidelines that Article 6(1)(b) may be considered to be a suitable legal basis for content personalisation, on the basis that such personalisation may constitute an expected element of online services. However, we note that the guidance provided is vague and susceptible of different interpretations, and in places contradictory. For example, whether Article 6(1)(b) is an available legal basis will depend on the nature of the service provided, the expectations of an "average" user, and how the service in question is promoted (paragraph 54). A further criterion is whether the service can be provided without personalisation, which seems incoherent with the lower standard of whether or not the user is likely to expect it that is evoked earlier in the same paragraph. Finally, for reasons that are not explained, if content personalisation is done for the purpose of increasing user engagement (which may in practice be the same as increasing user enjoyment and interest), then Article 6(1)(b) is not an available legal basis. The examples given on p. 14 increase the impression of a standard being applied arbitrarily.

Data controllers are advised in this section, as in others, to "consider an alternative lawful basis" to 6(1)(b) if the conditions for its use appear not to be met. Against this context, it is important to bear in mind that, at least in relation to consent, previous WP29 and EDPB guidance is equally, if not more, constraining. Perhaps as noted above, the aim is to drive the industry toward the use of "explicit consent" for the data processing for ad personalisation and content personalisation that these Guidelines would seem to place outside of scope of Article 6(1)(b).

Brussels, 24 May 2019