

## IAB Europe's position: ePrivacy Regulation trilogues

### Overview

1. IAB Europe (Transparency Register: 43167137250-27) represents the broad digital advertising and marketing ecosystem, with 25 national associations whose 5000+ members include advertisers, agencies, publishers, and technology companies. We work with over 90 companies in our direct membership.
2. IAB Europe has been closely following and actively engaging on the ePrivacy Regulation proposal<sup>1</sup>. We welcome the progress achieved by the EU Member States who agreed on a negotiation mandate<sup>2</sup>, recognising it a major milestone toward an updated law. We look forward to the prospect of productive trilogue negotiations over the coming months.
3. Digital advertising remains the major revenue stream financing Europe's free and diverse press and media. It accounts for 81% of media digital revenues in the Union, enabling citizens to access trusted and high-quality content and services<sup>3</sup>.
4. A productive and successful trilogue phase should yield a final text that provides strong privacy protections and enables media and other online content and services to continue to rely on an advertising revenue stream. In its first reading of the proposal, completed in 2017<sup>4</sup>, the European Parliament proposed banning conditional access in a way that would grant users a right in law to consume all media and other website content for free, in effect expropriating publishers' work. It should be self-evident that such an approach would undermine the sustainability of media and other services that consumers use every day, leading to a race to the bottom in relation to information quality and more content and services being moved behind paywalls adding to unhealthy polarisation between income groups. It is important that the future ePrivacy instrument not result in a fragmented internet that is only partially accessible to citizens with limited capacity to pay subscriptions, which users do not want. In fact, the latest study confirms that given the choice, an overwhelming majority of Europeans (75%) prefer the current commercial model for the internet, which is funded largely by targeted advertising, over a scenario where sites and apps fund themselves through subscriptions<sup>5</sup>. IAB Europe hopes that the new Parliament will take a more balanced approach that builds on the strong foundation provided by the General Data Protection Regulation (GDPR)<sup>6</sup>. The adoption

<sup>1</sup>

[https://www.europarl.europa.eu/RegData/docs\\_autres\\_institutions/commission\\_europeenne/com/2017/0010/COM\\_COM\(2017\)0010\\_EN.pdf](https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2017/0010/COM_COM(2017)0010_EN.pdf).

<sup>2</sup> <https://data.consilium.europa.eu/doc/document/ST-6087-2021-INIT/en/pdf>.

<sup>3</sup> The Economic Contribution of Digital Advertising in Europe, IHS Markit, 2017.

<sup>4</sup> [https://www.europarl.europa.eu/doceo/document/A-8-2017-0324\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-8-2017-0324_EN.html).

<sup>5</sup> IAB Europe, What Would an Internet Without Targeted Ads Look Like?, April 2021, [https://iab europe.eu/wp-content/uploads/2021/04/IABEurope\\_What-Would-an-Internet-Without-Targeted-Ads-Look-Like\\_April-2021.pdf](https://iab europe.eu/wp-content/uploads/2021/04/IABEurope_What-Would-an-Internet-Without-Targeted-Ads-Look-Like_April-2021.pdf).

<sup>6</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016.

of the GDPR was a substantial milestone, establishing the principles of data protection for the foreseeable future, including, and indeed explicitly, in the digital advertising context.

5. Against this background, we would like to advise on our views in regard to the following:
  - a. Consent as a condition for accessing a service – where we support maintaining a clear permission for private actors to make access to online services conditional on the well-informed consent of the user to data processing for advertising purposes necessary for the monetisation model chosen by that service.
  - b. Protection of Information on a user's device ('cookies') – where we support direct recognition of the critical nature of ad-related purposes such as measurement, as well as security and fraud prevention, in the final regulation.
  - c. Software Privacy Settings – where we support a technology-neutral law that fosters competition, enables innovation and avoids requiring utilities such as browsers and operating systems to block processing at a technical level.
6. Lawmakers should take the necessary time to thoroughly assess and consider any new provisions, also bearing in mind experience and observations gained since the GDPR's implementation rather than pursuing expedited adoption of the ePrivacy Regulation. Experience with the GDPR has shown the importance of a reasonable transition period of 18-36 months to afford businesses enough time to assess the new rules and make the necessary changes to their privacy policies, products and services, as well as for industry standards to be adapted to enable compliant processing. The 24 months' applicability period agreed by the Council should by no means be shortened.
7. We encourage EU lawmakers to appreciate the fact that law-making does not take place in a vacuum, and that there are real-life business considerations that ought to be taken into account when prescribing any new rules affecting the digital advertising and media supply chain. A case in point is the current industry-wide reflection on re-architecting digital marketing technology amid the demise of 3<sup>rd</sup> party cookies that have long enabled smaller players to compete in the market.

### **Relevance of the EU privacy & data protection legal framework for the digital ads ecosystem**

8. The adoption of the GDPR was a substantial milestone, establishing the principles of data protection for the foreseeable future, including in the digital advertising sector. Its scope is comprehensive and guarantees the protection of personal data both in the context of electronic communication services and information society services. In fact, the GDPR unambiguously calls out pseudonymous identifiers (Rec. 26), online identifiers, such as cookies, and device identifiers, as examples of personal data (Art. 4(1), Rec. 30). In addition, the GDPR contains rules on profiling and provides enhanced rights to users where profiling takes place (Art. 4(4), Art. 22, Rec. 72), including where user behaviour is tracked online (Rec. 24). The GDPR also explicitly calls out online advertising (Rec. 58).

9. In practice, the mechanics of the digital advertising ecosystem<sup>7</sup> are underpinned by the ability to process data for advertising-related purposes, including but not limited to delivery and measurement of digital advertising. The data processed for such purposes may include IP addresses, online advertising identifiers, URLs of sites that users spend time on, information about user behaviour on those sites, and indications about the users' physical whereabouts ("geolocation" data)<sup>8</sup>. Most, or all of these data points are considered to be personal data under the GDPR. From this perspective, the EU privacy and data protection legal framework is the prime legal regime that the ecosystem players consider to be relevant<sup>9</sup>.

## **Interplay between the GDPR and the ePrivacy instrument**

10. The potential for the GDPR to bring stability is severely undermined by legal uncertainty caused by ill-timed legislative initiatives that introduce divergent rules on the same issues. The ePR proposal is a case in point. From the very beginning of the ePrivacy Directive review process, IAB Europe has been calling on lawmakers to understand the interplay between the ePrivacy instrument and the GDPR and focus on aligning the two rather than deviating from the principles adopted with the GDPR.
11. Misalignment in terms of the lawful grounds for processing available in Art. 6 GDPR and Art. 8.1 of the proposed ePrivacy Regulation, coupled with lack of reassurance about the ability for publishers to make access to online services conditional on the well-informed consent of the user to data processing for advertising purposes, will deprive businesses of the flexibility and diversity of data processing. It will also eventually put in question the viability of the data-driven digital advertising business model, significantly impoverishing the EU media landscape. As European publishers are trying to adapt and build more sustainable digital business models accessible to all types of audiences, it cannot be reasonably expected that they would switch to a subscription-only revenue model. Moreover, an inevitable consequence of the latter would be emergence of a two-tier society in which only those citizens who are able to pay for news and information will benefit from a rich range of sources, obviously an undesirable development in any democratic society.

## **Consent as a condition for accessing a service**

12. The ePrivacy Regulation must maintain a clear permission for private actors to make access to online services conditional on the well-informed consent of the user to data collection and processing for advertising purposes. Even if such collection and processing is not strictly

<sup>7</sup> There are many different digital advertising models, including but not limited to: ad servers, ad exchanges, SSPs, DSPs, DMPs, ad networks, attribution vendors, market research companies, data companies, affiliate marketing companies and cross device vendors. Each digital advertising company has its own unique characteristics. That said, in all instances the ecosystem as such relies on the interplay of a variety of market participants, from the buy and sell side, from technology and creativity.

<sup>8</sup> For background, the income for publishers and other content providers is increasingly dependent on behavioural targeting instead of non-targeted advertising, with 64% of all digital advertising campaigns drawing on some form of behavioural data. What is more, behavioural advertising allows publishers to grow digital revenues, with an income for 1000 ad-impressions typically ranging between €1.8 and €25, compared to non-targeted between €0.4 and €8. Source: The Economic Value of Behavioural Targeting in Digital Advertising, IHS Markit, 2017, available at [https://datadrivenadvertising.eu/wp-content/uploads/2017/09/BehaviouralTargeting\\_FINAL.pdf](https://datadrivenadvertising.eu/wp-content/uploads/2017/09/BehaviouralTargeting_FINAL.pdf).

<sup>9</sup> Currently, that regime is the conjunction of the GDPR and the ePrivacy Directive (2002/58/EC), with the former regulating the processing of personal data and the latter storage and access of information on a user's device.

technically necessary for the provision of that service, it remains essential for the monetisation model chosen by that service.

13. We appreciate the Council's efforts and progress made in this regard, in particular, in Rec. 20(aaaa) and Rec. 21(aa), and we encourage lawmakers to build on these. We believe in ad-supported media and welcome the explicit recognition of rights for 'services provided in accordance with the freedom of expression and information including for journalistic purposes'. At the same time, we observe great diversity of ad-funded content and outlets made available to users and submit that all online media are primarily financed through advertising. This underscores the importance of so-called *conditionality* for the continued sustainability of online media businesses.
14. Failing to guarantee these rights would put advertising-funded services on the Internet as we know it in jeopardy, result in a steep decrease in the quantity and quality of free services, and/or result in the erection of paywalls for previously free services. This is a key concern for the digital media and advertising industry as it is a severe interference in a digital media service's right to choose its own business model and to determine the terms under which it makes its service available to consumers. Such an interference touches on the fundamental right to property and the freedom to conduct business, which must be considered and carefully balanced with the fundamental right to privacy and data protection that the ePrivacy Regulation attempts to protect.
15. IAB Europe believes that online services should be allowed necessary flexibility, to ensure they are able to continue providing free, data-driven advertising-funded offerings. Requiring them to provide an 'equivalent' offer is constraining, whereas recognising that 'similar' or 'alternative' offers by other providers could prove more effective in light of the framing of the Recital 20(aaaa) language of the Council's mandate.
16. IAB Europe's Transparency & Consent Framework (TCF)<sup>10</sup> was created to facilitate legal compliance with the GDPR and existing ePrivacy Directive. It is an industry standard that aims to help companies ensure that where personal data is processed in connection with the delivery and measurement of advertisements or the personalisation of editorial content, consumers as well as industry stakeholders benefit from transparency and control.

### **Protection of Information on a user's device ('cookies')**

17. Ad-related data collection and processing purposes such as measurement, security and fraud prevention are critical for the functioning of ad-funded models.
18. As on any other media platform (e.g., TV, radio, print), collaboration with independent third-party service providers is essential to achieve effective and comparable measurement of reach and ad performance. Without it, advertising is of little value to the advertiser. Measurement functions are particularly important for small and medium sized enterprises that cannot rely on

---

<sup>10</sup> [www.iabeurope.eu/tcf](http://www.iabeurope.eu/tcf).

large audiences on their own individual site. Relevant Art. 8 provisions must enable the variety of market constellations through which these services are provided.

## Software Privacy Settings

19. IAB Europe believes in law that is technology neutral and allows companies to innovate. In the digital advertising context, it translates into a dynamic future in which advertisers, publishers and consumers have a wide range of paradigms and suppliers from which to choose. Consequently, we object to any provisions mirroring the reading of the original Article 10 on software privacy settings.
20. Allowing users to express their consent on a *general* basis arguably does not meet the *specificity* requirement of *consent* under the GDPR, this means users would still face specific consent requests in addition to the general consent of the software layer.
21. Where processing is based on consent it is important that legislation does not dictate which technologies must be used to do so, as to not unnecessarily inhibit innovation around providing information and requesting consent in the most appropriate fashion.
22. Mandating browsers or operating systems to block processing at a technical level will deprive media and other ad-funded digital properties of their relationship with end-users to explain the terms on which their products and services are placed on the market, and deny them the responsibility for obtaining the end-users' consent. Meanwhile, user experience will be hampered, and many websites will become inaccessible. We believe in a paradigm where the user would have actual freedom to make decisions on their own and practically be able to change the previously configured software settings.
23. The absence of Article 10 *verbatim* may still be obfuscated by similar language, such as in Article 4.2 and Recital 20a in the Council text, which in practice reinstates the removed Article 10 provision.