

Anu Talus

Chair of the European Data Protection Board

Ms Gallego
Directorate-General for Justice and Consumers
European Commission
1049 Brussels

Brussels, 13 December 2023

by e-mail only

Ref: OUT2023-0098

Subject: EDPB reply to the Commission's Initiative for a voluntary business pledge to simplify the management by consumers of cookies and personalised advertising choices – DRAFT PRINCIPLES (Ref. Ares(2023)6863760)

Dear Ms Gallego,

Thank you for your letter of 10 October 2023, regarding the initiative for the voluntary cookie pledge launched by Commissioner Reynders, and for requesting the EDPB's views on the draft pledge principles.

The EDPB welcomes the Commission's initiative to gather stakeholders and promote discussions and exchanges of views on the use of cookies and any other systems used for tracking users' online navigation. The EDPB supports actions that aim at simplifying the management by users¹ of cookies and personalised advertising choices and empowering users' control over their personal data and privacy, in compliance with the GDPR² and ePrivacy Directive.³

In the view of the EDPB, the aim of the initiative should be to help protect the fundamental rights and freedoms of users, empower them to make effective choices, and provide a platform for stakeholders to exchange views. While voluntary commitments may be a useful tool, the pledging principles should by no means be used to circumvent legal obligations. In addition, undertaking voluntary commitments does not equate or guarantee compliance with the applicable data protection and privacy framework. They are without prejudice to the exercise of supervision and enforcement powers of competent national authorities, including authorities competent to supervise compliance with the national

¹ References in this letter and its annex to "users" and "data subjects" are interchangeable.

² OJ L 119, 4.5.2016, p. 1–88.

³ OJ L 201, 31.7.2002, p.37, as amended by OJ L 337, 18.12.2009, p. 11–36.



European Data Protection Board

implementation law(s) of the ePrivacy Directive and authorities competent to supervise compliance with the GDPR.⁴

The EDPB understands from your letter that more work is needed to propose pledge principles that would allow a majority of interested parties to adhere to them. For this reason, the EDPB considers it useful to draw your attention to relevant guidance of the EDPB, and its predecessor the Article 29 Working Party, referred to in the Annex to this letter to inform your further work on the draft principles.

The EDPB remains available to continue assisting you further in the development of these pledge principles with a view to simplifying the management by users of cookies and similar technologies and personalised advertising choices while empowering users, in full compliance with the GDPR and ePrivacy Directive.

Yours sincerely,

Anu Talus

⁴ The EDPB does not address any specificities of national implementation laws of Article 5(3) ePrivacy Directive in this letter. In addition, the EDPB notes that it has not consulted national competent authorities responsible for the supervision of the national implementation laws of the ePrivacy Directive that are not a supervisory authority pursuant to Article 51 GDPR.

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ANNEX - FEEDBACK ON THE COOKIE PLEDGE DRAFT PRINCIPLES

In this Annex, the EDPB provides remarks to inform the further work on the draft principles. Where relevant, the EDPB's remarks and analysis of certain draft principles is grouped together. The EDPB's observations on any of the draft principles, or lack thereof, should not be understood as endorsement. In addition, the EDPB's feedback on the draft principles should not be understood as endorsement of the use of cookies for purposes of behavioural or personalised advertising, which may be highly intrusive and raise additional legal issues, even if conducted in adherence with the principles. Supervisory authorities maintain the prerogative to assess individual cases and exercise their powers if necessary. The EDPB takes the view that a case by case analysis remains necessary to assess whether access or storage of information in terminal equipment and subsequent processing of such information is compliant with the ePrivacy Directive, as implemented in national laws, and with the GDPR.

1 GENERAL REMARKS

The EDPB understands from the Commission's letter that the cookie pledge voluntary initiative refers to cookies and any other systems tracking users' online navigation. Considering that the monitoring of online (and potentially offline) behaviour may take place via different tools,¹ the EDPB welcomes that the scope of the initiative is broader than cookies used for online behavioural or personalised advertising.² The EDPB shall therefore in its analysis refer to access and storage of information in terminal equipment in accordance with Article 5(3) ePrivacy Directive, irrespective of the technology used to store or gain access to that information.

The EDPB shall in its feedback of the draft principles not analyse all requirements to obtain valid consent in accordance with Article 4(11) and 7 GDPR. It would however like to highlight certain requirements for consent for access and storage of information in terminal equipment to be valid that do not seem to be reflected in the draft principles, namely:

- 1) data subjects must express their consent with an affirmative action. For example, the mere continuation of browsing a website or the use of general browser settings allowing the use of cookies do not constitute consent;
- 2) where consent is required, no access or storage of information in terminal equipment must take place before valid consent is obtained; and
- 3) data subjects must be able to withdraw their consent at any time, withdrawing consent must be as easy as giving consent, and data subjects must be informed of how to withdraw consent when asked to give their consent.

¹ See in this respect e.g. EDPB [Guidelines 2/2023 on Technical Scope of Art. 5\(3\) of ePrivacy Directive](#), adopted on 14 November 2023; Article 29 Working Party [Opinion 9/2014 on the application of Directive 2002/58/EC to device fingerprinting](#), adopted on 25 November 2014; and Article 29 Working Party [Opinion 2/2010 on online behavioural advertising](#), adopted on 22 June 2010.

² The EDPB recommends to clearly reflect the scope in the draft principles, which as currently drafted appear exclusively focussed on the use of cookies as such. This is the more pertinent considering technological developments and the ongoing discussion on the phasing out of third party cookies.

Furthermore, the EDPB emphasizes the information requirement. The information given to users on the access and storage of information in terminal equipment and the processing of personal data at the time consent is sought, is of paramount importance to ensure that a valid consent can be obtained.

Finally, the EDPB also recalls the *lex generalis*– *lex specialis* relationship between the GDPR and Article 5(3) ePrivacy Directive, which the EDPB has explained in several Opinions and Guidelines.³

2 DRAFT PRINCIPLE A

A. The consent request will not contain information about the so-called essential cookies nor the reference to collection of data based on legitimate interest.

As essential cookies do not require consent, not showing information about them in the context of the request for consent will reduce the information that users need to read and understand. In addition, legitimate interest is not a ground for data processing based on Article 5(3) of the ePrivacy Directive so it should not be included in the cookie banner. Where applicable, the issue of subsequent processing of data based on legitimate interest should be explained in the privacy notice.

1) Information regarding ‘essential’ cookies

The controller must, in accordance with Articles 12-14 GDPR, inform the user of the processing of personal data that is accessed or stored in terminal equipment. This requirement applies to access or storage of information for purposes that do and do not require consent under Article 5(3) ePrivacy Directive. The EDPB agrees, however, that detailed information on the use of strictly necessary cookies that are exempt from consent under Article 5(3) ePrivacy Directive should be presented distinct from a consent request (for which only information relevant to the consent request should be provided). The EDPB refers to the Guidelines on transparency under Regulation 2016/679⁴ for further guidance.

Taking into account the above, the EDPB recommends clarifying in draft principle A that it remains necessary to provide users with information in accordance with Articles 12-14 GDPR whenever personal data are processed, even if the access or storage of information in terminal equipment does not require consent under Article 5(3) ePrivacy Directive. Information about the processing of personal data via the use of strictly necessary cookies could for example be accessible via a link on the first layer of the cookie banner, directing to the relevant section in the privacy policy, or the information could be provided on the second layer of the cookie banner, provided that the requirements of Articles 12-14 GDPR are complied with.⁵

The EDPB notes that the notion of “essential cookies” used in draft principle A may be misunderstood to cover more purposes than the two narrowly defined purposes which are exempt from the obligation to obtain consent pursuant to Article 5(3) ePrivacy Directive. As mentioned in the report of the Cookie

³ See for example EDPB [Opinion 5/2019 on the interplay between the ePrivacy Directive and the GDPR, in particular regarding the competence, tasks and powers of data protection authorities](#), paragraph 40. See also EDPB [Guidelines 01/2020 on processing personal data in the context of connected vehicles and mobility related applications](#), adopted on 9 March 2021, paragraph 14; and EDPB [Report of the work undertaken by the Cookie Banner Taskforce](#), adopted on 17 January 2023, paragraphs 1-3.

⁴ Article 29 Working Party [Guidelines on transparency under Regulation 2016/679](#), adopted on 29 November 2017, last Revised and Adopted on 11 April 2018. See also Article 29 Working Party Working [Document 2/2013 providing guidance on obtaining consent for cookies](#), adopted on 2 October 2013, p. 3.

⁵ In this regard, see also Article 29 Working Party [Guidelines on transparency under Regulation 2016/679](#), paragraph 27, regarding the timing for the provision of information.

Banner Taskforce, some controllers may incorrectly classify certain cookies and processing operations as “essential” or “strictly necessary”, which would not be considered as such within the meaning of Article 5(3) ePrivacy Directive, or under GDPR.⁶ The EDPB therefore recommends changing the term “essential” to “strictly necessary” within the meaning of Article 5(3) ePrivacy Directive. For more information on “strictly necessary” cookies, the EDPB refers to Opinion 04/2012 on Cookie Consent Exemption.⁷

2) No reference to ‘to collection of data based on legitimate interest’

The EDPB agrees that users should not be presented with information ‘referring to collection of data based on legitimate interest’ in the cookie banner, as this is not a valid legal basis under the ePrivacy directive for access or storage of information (including collection of data) in terminal equipment.⁸

In addition, the EDPB recalls that consent under Article 6(1)(a) GDPR will generally be the most adequate legal basis for the processing of personal data that takes place after access or storage thereof in terminal equipment based on consent under Article 5(3) ePrivacy Directive.⁹ To avoid misunderstanding, the EDPB recommends stating this in Principle A.

3 DRAFT PRINCIPLES B, C, AND D

B. When content is financed at least partially by advertising it will be explained upfront when users access the website/app for the first time.

From the moment a business obtains revenues either i) by exposing consumers to tracking-based advertising by collecting and using information about consumers’ online behaviour through trackers or ii) by selling to partners the right to put trackers on consumer’s devices through their website, the consumers need to be informed of the business model in question at least at the same time as when cookie consent is required. Asking consumers to read complex cookie banners and only after they did not consent confronting them with a “pay or leave” ultimatum, could be considered manipulative.

C. Each business model will be presented in a succinct, clear and easy to choose manner. This will include clear explanations of the consequences of accepting or not-accepting trackers.

Most cookies are used to implement a business model and therefore this concomitance should be easily described, understood and implemented in one joint panel regrouping the agreements under consumer law and consent under the e-Privacy/GDPR law. In this panel, the business model options (i.e. accepting advertising based on tracking, accepting other types of advertising or agreeing to pay a fee) will be presented together with the consequences in terms of the purpose of trackers, and this in plain and simple language.

D. If tracking based advertising or paying a fee option are proposed, consumers will always have an additional choice of another less privacy intrusive form of advertising.

⁶ EDPB [Report of the work undertaken by the Cookie Banner Taskforce](#), adopted on 17 January 2023, paragraph 26.

⁷ Article 29 Working Party [Opinion 04/2012 on Cookie Consent Exemption](#), adopted on 7 June 2012.

⁸ EDPB [Report of the work undertaken by the Cookie Banner Taskforce](#), adopted on 17 January 2023, paragraph 24.

⁹ See e.g. EDPB [Guidelines 01/2020 on processing personal data in the context of connected vehicles and mobility related applications](#), adopted on 9 March 2021, paragraphs 14-15. See similarly also EDPB [Report of the work undertaken by the Cookie Banner Taskforce](#), adopted on 17 January 2023, para.1-2.

In view of the extremely limited number of consumers who accept to pay for online content of various sorts and as consumers may navigate tens of different websites daily, asking consumers to pay does not appear a credible alternative to tracking their online behaviour for advertising purposes that would legally require to obtain consent.

The EDPB supports the objective of draft principles to enhance transparency on the business models used by stakeholders and to promote advertising models that are less intrusive than behavioural advertising. However, the EDPB highlights that beyond the consumer perspective, special attention should be paid to the protection of the terminal equipment as provided for by Article 5(3) ePrivacy Directive.

Draft principles B-D relate to the provision of valid consent under Article 5(3) ePrivacy Directive in conjunction with Article 4(11) and Article 7 GDPR, more in particular whether consent is freely given and informed, and will therefore be discussed together.

With regard to valid consent, the EDPB Guidelines 05/2020 clarify that in order to determine whether consent is freely given, it must be taken into account whether:

- i. there is any imbalance of power between the controller and data subject;¹⁰
- ii. consent is conditional, e.g. whether consent is “bundled” with acceptance of terms or conditions;¹¹
- iii. consent is granular and is asked for each individual purpose;¹² and
- iv. it is possible to refuse or withdraw consent without detriment.¹³

Consent can only be valid if the data subject is able to exercise a real choice, and there is no risk of deception, intimidation, coercion or significant negative consequences (e.g. substantial extra costs) if they do not consent. Consent will not be free in cases where there is any element of compulsion, pressure or inability to exercise free will.¹⁴ These elements must among others be taken into account when consent for access or storage of information in terminal equipment used for tracking based advertising is asked.

The EDPB also explained in Guidelines 05/2020 which elements of information are at a minimum required to obtain valid consent.¹⁵ The EDPB agrees with the concepts enshrined in principles B and C stating that the user must be provided with clear information at the moment consent is sought. Moreover, the provided information about alternative models/services to the provision of consent to the access or storage of information in terminal equipment for advertising purposes may serve as a relevant factor when assessing whether consent for access or storage of information in terminal equipment is valid. At the same time, the EDPB notes that ‘information on the business models’ could be understood in different ways and recalls that it may not substitute information obligations

¹⁰ EDPB [Guidelines 05/2020 on consent under Regulation 2016/679](#), adopted on 4 May 2020, paragraphs 16-24.

¹¹ EDPB [Guidelines 05/2020 on consent under Regulation 2016/679](#), adopted on 4 May 2020, paragraph 26.

¹² EDPB [Guidelines 05/2020 on consent under Regulation 2016/679](#), adopted on 4 May 2020, paragraphs 42-44.

¹³ EDPB [Guidelines 05/2020 on consent under Regulation 2016/679](#), adopted on 4 May 2020, paragraph 46.

¹⁴ EDPB [Guidelines 05/2020 on consent under Regulation 2016/679](#), paragraph 24.

¹⁵ EDPB [Guidelines 05/2020 on consent under Regulation 2016/679](#), adopted on 4 May 2020, paragraph 64: i. the controller’s identity; ii. the purpose of each of the processing operations for which consent is sought; iii. what (type of) data will be collected and used; iv. the existence of the right to withdraw consent; v. information about the use of the data for automated decision-making in accordance with Article 22 (2)(c) where relevant; and vi. information on the possible risks of data transfers due to absence of an adequacy decision and of appropriate safeguards as described in Article 46.

regarding access or storage of information in the terminal equipment and on the processing of personal data.

The EDPB notes that a business model using contextual advertising is not mentioned in draft principle B as means for a business to obtain revenue. Such business model may involve the accessing or storing of information in terminal equipment and the processing of personal data, although generally much more limited than a business model that relies on the tracking of users and presenting them with behavioural or personalised advertising. The EDPB considers that just as for the business models currently referred to in draft principle B, users should be informed of a business model using contextual advertising at least at the same time as when they are requested for consent for the use of cookies, and therefore recommends that the type of advertising used is explained clearly (e.g. behavioural or contextual advertising). In other words, the EPDB recommends to also make reference to contextual advertising in principle B.

Draft principle C provides as alternative to advertising based on tracking “accepting other types of advertising”. Draft principle D refers to “another less privacy intrusive form of advertising”. The EDPB understands in this context that services that use the mentioned types/forms of advertising are not offered for a fee and recommends to explicitly clarify this in the principles. The EDPB recommends adding to both draft principles (C and D) a reference to contextual advertising as an example of another type/form of advertising, where such a business model is being operated.

The EDPB recalls that controllers that are gatekeepers pursuant to the Digital Markets Act¹⁶ must comply with the respective requirements regarding the offering of alternative services. Recital 36 of the Digital Markets Act provides that gatekeepers should enable users to freely choose to consent to the processing of their personal data, by offering a less personalised but equivalent alternative.¹⁷ Recital 37 explains that, in principle, the less personalised alternative should not be different or of degraded quality.¹⁸

The EDPB notes that it cannot *in abstracto* assess whether the offering of a paid alternative to a service that involves tracking, mentioned in draft principles B-D, would ensure that a valid consent could be obtained for any processing for tracking of users for advertising purposes. When assessing whether consent is valid, the EDPB considers it among others relevant whether in addition to a service using tracking technology and a paid service, another type of service is offered, for example a service with a less privacy intrusive form of advertising, such as contextual advertising, and whether the data subject is able to exercise a real choice.

The European Court of Justice ruled in its judgment of 4 July 2023 that in the specific circumstances it assessed, it must be possible for a user to refuse to give consent without the user being obliged to refrain entirely from using the service. It considered that those users are to be offered, if necessary for an appropriate fee, an equivalent alternative not accompanied by the data processing operations in question.¹⁹ This means that if users decide not to give any consent, only storage and accessing

¹⁶ OJ L 265, 12.10.2022, p. 1–66.

¹⁷ Recital 36 Digital Markets Act: “[t]o ensure that gatekeepers do not unfairly undermine the contestability of core platform services, gatekeepers should enable end users to freely choose to opt-in to such data processing and sign-in practices by offering a less personalised but equivalent alternative, and without making the use of the core platform service or certain functionalities thereof conditional upon the end user’s consent.”

¹⁸ Recital 37 Digital Markets Act: “[t]he less personalised alternative should not be different or of degraded quality compared to the service provided to the end users who provide consent, unless a degradation of quality is a direct consequence of the gatekeeper not being able to process such personal data or signing in end users to a service.”

¹⁹ Judgment of 4 July 2023, Meta Platforms and others (General terms of use of a social network), C-252/21, ECLI:EU:C:2023:537, paragraph 150.

processes that are exempted from consent under Article 5(3) ePrivacy Directive may be carried out. The EDPB notes that the aforementioned analysis may differ depending on the circumstances of the case.

Taking into account the above, the EDPB recommends that the draft principles reflect the need for a case by case analysis of whether consent is freely given and valid, taking into account the different options provided to the user.

For the sake of completeness, the EDPB also recalls that cookies may serve multiple functions, beyond the implementation of a business model. The EDPB therefore recommends that the first sentence of draft principle C is amended to indicate that “cookies *may* be used to implement a business model”.

4 DRAFT PRINCIPLE E

E. Consent to cookies for advertising purposes should not be necessary for every single tracker. For those interested, in a second layer, more information on the types of cookies used for advertising purposes should be given, with a possibility to make a more fine-grained selection.

When users agree to receive advertising, it should be made clear to them at the same time how this is carried out and especially if cookies, including if relevant third-party cookies, are placed on their device. It should not be necessary for them to check every single tracker. Indeed, this may request checking one to two thousand different partners, making the choice totally ineffective and either giving an illusion of choice or discouraging people to read further, leading them to press “accept all” or “refuse all” buttons. This principle should be without prejudice to stricter rules in other sectoral legislation, such as the DMA.

Draft principle E also relates to the requirements of valid consent. The EDPB recalls its Guidelines 05/2020, as also mentioned in its feedback to draft principles B-D. More in particular, the EDPB points out that for consent to be valid, it must be *freely given*,²⁰ and it must be *specific*.²¹

The EDPB recommends explicitly confirming in the draft principles that individuals should be provided with the opportunity to “reject” all cookies that are not strictly necessary on the first layer of the banner. At a minimum, it should be clarified that if an “accept” (or “accept all”) button is presented on any layer, then a “reject” (or “reject all”) button should also be presented as this would be an essential element in favour of the validity of consent.²²

Further, as discussed above, for consent to be valid, the user must be informed among others about the identity of the controller that asks for consent to access or store information in terminal equipment, which information it concerns, and for what purpose.²³

The EDPB agrees that it is possible to consent to cookies for a specific advertising purpose without necessarily requiring users to separately consent to every single tracker or partner on the first layer of a cookie banner, combined with the possibility for the user to make a more granular choice per

²⁰ See also EDPB [Guidelines 05/2020 on consent under Regulation 2016/679](#), adopted on 4 May 2020, section 3.1.

²¹ See also EDPB [Guidelines 05/2020 on consent under Regulation 2016/679](#), adopted on 4 May 2020, section 3.2.

²² See also EDPB [Report of the work undertaken by the Cookie Banner Taskforce](#), adopted on 17 January 2023, Type A Practice – “No Reject Button On The First Layer”.

²³ EDPB [Guidelines 05/2020 on consent under Regulation 2016/679](#), adopted on 4 May 2020, paragraph 64.

controller per specific purpose on the second layer. Compliance with the GDPR requirements for valid consent of such set-up must be assessed taking into account among others Guidelines 05/2020,²⁴ the Guidelines on transparency under Regulation 2016/679²⁵ and the Guidelines 03/2022.²⁶ Further, the specific circumstances of the implementation are relevant. For example, the EDPB considers it unlikely that the use of a very large number of partners for a single purpose would meet the requirements of necessity and proportionality and consent would therefore unlikely be valid. The EDPB, therefore, suggests to clarify that, in any case, consent must be, in particular, informed and unambiguous, and that this may be more difficult to achieve if the number of partners is increasing.

Further, the EDPB suggests specifying that the user, when asked for consent, should be provided with the identity of the actors that actually access/store information in the terminal equipment and/or with whom data is subsequently shared, if applicable, and should not be provided with a list of potential actors.

5 DRAFT PRINCIPLE F

F. No separate consent for cookies used to manage the advertising model selected by the consumer (e.g. cookies to measure performance of a specific ad or to perform contextual advertising) will be required as the consumers have already expressed their choice to one of the business models.

One reason of the cookie fatigue is that all types of cookies are very often described in a lengthy and rather technical fashion that render an informed choice complex and cumbersome and de facto ineffective. Furthermore, from the moment the business model is made clear and agreed by the consumer, the need of businesses to measure the performance of their advertising services can be deemed inextricably linked to the business model of advertising, to which the consumer has consented. Other cookies not strictly necessary for the delivery of the specific advertising service should still require a separate consent.

As mentioned, according to data protection rules, consent must be requested for a *specific* purpose of the processing. Such purpose must be well defined and precise, in order to determine which processing activities take place for the purpose.²⁷ Further, for consent to be valid, purposes should not be combined.²⁸ If a user consents to access or storage of information in their terminal equipment for a well described advertising purpose, such purpose may concern technical processing operations intrinsically linked to the advertising purpose, such as the use of cookies for frequency capping or measuring the effectiveness of ad campaigns. Such technical processing operations may involve access or storage of information in terminal equipment. The users should be informed of such technical

²⁴ EDPB [Guidelines 05/2020 on consent under Regulation 2016/679](#), adopted on 4 May 2020.

²⁵ [Article 29 Working Party Guidelines on transparency under Regulation 2016/679](#), adopted on 29 November 2017, last Revised and Adopted on 11 April 2018.

²⁶ EDPB [Guidelines 03/2022 on Deceptive design patterns in social media platform interfaces: how to recognise and avoid them](#), adopted on 14 February 2023.

²⁷ Article 29 Working Party [Opinion 03/2013 on purpose limitation](#), adopted on 2 April 2013, p. 15-16: “*The purpose of the collection must be clearly and specifically identified: it must be detailed enough to determine what kind of processing is and is not included within the specified purpose, and to allow that compliance with the law can be assessed and data protection safeguards applied. For these reasons, a purpose that is vague or general, such as for instance 'improving users' experience', 'marketing purposes', 'IT-security purposes' or 'future research' will - without more detail - usually not meet the criteria of being 'specific'.*” See also [Article 29 Working Party Guidelines on transparency under Regulation 2016/679](#), adopted on 29 November 2017, last Revised and Adopted on 11 April 2018, paragraph 12.

²⁸ Recital 32 GDPR: “*When the processing has multiple purposes, consent should be given for all of them.*”

processing operations, for example on the second layer of the cookie banner. Conversely, the consent to use of cookies for specific advertising purposes would not extend to other processing operations that are not strictly necessary for that purpose, such as the collection and use of email addresses of a website to send marketing emails.

The EDPB also notes that draft principle F refers to a business model “agreed” by the consumer and a model of advertising to which the consumer has “consented”. Under Article 5(3) ePrivacy Directive, consent is given to access or storage of information (e.g. cookies) in the user’s terminal equipment. The EDPB recognizes that for an advertising business model, cookies may be used, and recommends for the sake of clarity clarifying the explanation to draft principle F, by referring to consent for the use of cookies for a specific model of advertising, as opposed to consent to a model of advertising.

6 DRAFT PRINCIPLE G

G. The consumer should not be asked to accept cookies in one year period of time since the last request. The cookie to record the consumer’s refusal is necessary to respect his/her choice.

One major reason of the cookie fatigue especially felt by the persons most interested in their privacy is that negative choices are not recorded and need to be repeated each time they visit a website or even every page of a website. Recording such choice is indispensable for an efficient management of a website and for respecting consumers’ choices. Furthermore, to reduce the cookie fatigue, a reasonable period e.g. a year should be adopted before asking again for consumers’ consent.

The EDPB understands that the scope of draft principle G relates only to the recording of a user’s refusal to, or withdrawal of, consent. The EDPB recommends clarifying the first sentence of the draft principle in this respect.

The EDPB agrees that to make the refusal to, or withdrawal of, consent effective, it may be necessary to record the decision of the user for a certain period, in order to reduce the frequency of consent request a user receives. The EDPB believes the proposed period of one year to be adequate for this purpose.

In addition, draft principle G on the recording of “negative consent” requires further details to effectively implement it. In particular, the EDPB recommends clarifying that the record of the “negative consent” relying on cookies should not contain a unique identifier, but should rather contain generic information, a flag or code, which is common to all users who have refused consent. The EDPB recalls that cookies recording the refusal of consent may be deleted by the user, or deleted due to a change of technical settings, within the one-year period. In such event, when the controller does not have access to the record of the consent refusal anymore, the EDPB considers it reasonable to prompt the user with a new consent request.

The EDPB further recalls that gatekeepers subject to the Digital Markets Act are already subject to rules on the frequency of prompting users to give consent, who initially did not consent or who withdrew their consent.²⁹

²⁹ Recital 37 Digital Markets Act: “Gatekeepers should not design, organise or operate their online interfaces in a way that deceives, manipulates or otherwise materially distorts or impairs the ability of end users to freely give consent. In particular, gatekeepers should not be allowed to prompt end users more than once a year to give consent for the same processing purpose in respect of which they initially did not give consent or withdrew their consent.”

7 DRAFT PRINCIPLE H

H. Signals from applications providing consumers with the possibility to record their cookie preferences in advance with at least the same principles as described above will be accepted.

Consumers should have their say if they decide that they want to systematically refuse certain types of advertising models. They should be empowered to do this and privacy and data protection legislation should not be used as an argument against such a choice provided the automated choice has been made consciously.

The EDPB recognises the abilities of software applications to empower users to protect their terminal equipment. The EDPB encourages the employment of data protection by default or design in such applications. The EDPB believes that software settings are a useful tool for users and supports the objective of draft principle H to enable users to express their choice to refuse any access or storage of information in terminal equipment via such settings. The EDPB believes that a pledge to respect the signals/settings expressing a user's refusal, and to not still ask users for consent, could help to reduce cookie fatigue.

Conversely, the EDPB considers that caution is necessary when aiming to use software settings to express affirmative consent. For consent to be valid, users must make an active choice (i.e. a default "yes" would not constitute a valid consent), and it must among others be specific and informed, with regards to the specific context in which this consent is given. The EDPB notes that it has not assessed yet any current use of signals from applications or software settings regarding the use of cookies that offer the granularity, specificity and information to ensure that consent can be validly given in advance.

Finally, the EDPB agrees that privacy and data protection legislation should not be used as an argument to not give effect to an individual's preference to systematically refuse certain types of advertising models.