CRITICAL ANALYSIS OF THE EUROPEAN DATA PROTECTION BOARD'S OPINION 08/2024 ON CONSENT OR PAY MODELS

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1. EXECUTIVE SUMMARY

1.1 This White Paper offers a critical analysis of the European Data Protection Board's (the "**EDPB**") Opinion 08/2024 on "Valid Consent in the Context of consent or pay" ("**consent or pay**") (the "**Opinion**") models implemented by large online platforms. The Opinion has already been the subject of considerable debate among academics, practitioners, businesses and privacy activists and is one of the EDBP's most controversial opinions to date. It has potentially enormous implications, from the expansion of the definition of consent under GDPR, to the entitlement of controllers to set their own prices and determine their own business models. As we will discuss, advertising (including behavioural advertising) is a legal activity in the EU and its use has enabled online businesses to offer their services free of charge, with the obvious benefits that this entails. However, the Opinion casts doubt on the ability of controllers to use this commercial model. Beyond the obvious commercial issues the Opinion could cause, it also creates a plethora of legal issues. It leaves controllers in the EU with no certain legal basis for behavioural advertising. It also causes issues from a rule of law perspective by creating significant uncertainty and undermining the existing regulation in this area set by the legislature and the courts.

1.2 The Paper will begin by discussing the background to the Opinion. Consent or pay models were introduced in part due to the consent requirements under the ePrivacy Directive and the regulatory evolution under General Data Protection Regulation ("**GDPR**"), which forced controllers to abandon contractual necessity, and then legitimate interest, as legal bases for their processing of personal data for behavioural advertising. The Opinion has now cast serious doubt over the ability to obtain valid consent as the remaining legal basis, risking rendering behavioural advertising effectively unlawful for certain controllers, unless they offer users of their services an option of availing of the service free of cost without behavioural advertising.

1.3 The Paper will then discuss a number of considerations that have been neglected by the EDPB in the Opinion. The first of these is the right to conduct a business. As we will outline, data protection is not an absolute right and must be balanced against other fundamental rights in accordance with the principle of proportionality. The right to conduct a business, a fundamental right under the EU Charter for Fundamental Rights and a right explicitly recognised in Recital 4 GDPR, is not considered in the Opinion, even though the Opinion's conclusions place significant restrictions on the ability of certain controllers to decide on their own business models. Section 4 will explain how data subjects have protections under both the GDPR and consumer law when their personal data is processed for behavioural advertising. The EDPB suggests that data subjects forfeit their rights over their personal data when they consent to such advertising. But it should be obvious that controllers are required to comply with their obligations and there is a significant framework in place for data subjects with respect to such advertising, that the EDPB does not adequately consider. Section 4 will also critically analyse the EDPB's requirements for consent and explain how they are fundamentally flawed when one has regard to the meaning of consent and the ability of data subjects to make their own informed decisions.

1.4 The next section will discuss the Opinion in the context of the competencies of the EDPB. While the EDPB has a wide latitude to issue recommendations on issues relating to the GDPR, it has stepped into an area that has been occupied and heavily regulated by lawmakers and pronounced upon by courts. As a result, the Opinion, which is inconsistent with what has been said by lawmakers, courts and other regulators, has created significant legal uncertainty.

1.5 Section 6 will then discuss some of the key issues with the Opinion itself. For a start, it does not interpret the GDPR systemically, ignoring the right to conduct a business and the principle of proportionality as well as giving no consideration to the GDPR's objective of facilitating the free movement of data. The Opinion also ignores the existing legal framework that exists in respect of digital services, and behavioural advertising in particular. Legislation such as the Digital Services Act[1] ("**DSA**") and the Digital Markets Act[2] ("**DMA**") have set the boundaries as to what is acceptable in relation to advertising and has laid down very specific rules in that respect. Recent consumer legislation also explicitly recognises the principle that personal data may constitute valid consideration for a service, which is at odds with the EDPB's aversion to consent or pay models. The Opinion is also inconsistent with the *Bundeskartellamt* decision of the CJEU, which recognised the permissibility of providing an equivalent alternative to behavioural advertising, "*for an appropriate fee*".

2. BACKGROUND TO THE OPINION

2.1 Advertising has been around for as long as commerce has - as has behavioural advertising. In a non-digital context, if a trader at a market sees a customer perusing another stall selling shoes then the trader infers that the customer is in the market for a pair of shoes. This trader may start extolling the benefits of its own shoes and may try to incentivise the customer with a discount. A well-placed trader outside a sports stadium may do well to advertise its sports memorabilia to departing fans inferring that they are likely to be interested.

2.2 In today's world, we spend a large part of our time reading, interacting and shopping online where advertisers and traders, who cannot physically interact with customers to infer their interests, pay for ads on the basis of profile information on potential customers provided by websites, both in relation to activity on the website (first party data) and their activity on other websites (third party data). This model of targeting advertising to those people most likely to be interested assists big brands but also has a unique benefit to small businesses that can focus their limited advertising spend on relevant potential customers.

2.3 Since the inception of the Data Protection Directive[3] and more recently the GDPR, where these activities involve the processing of personal data, the website must have a lawful basis under the GDPR and comply with rules on the confidentiality of information on user devices under the ePrivacy Directive.

2.4 When it comes to guardrails on data processing, the GDPR is largely a permissive regulation in that it permits processing of personal data subject to certain conditions. In fact, the "*proper functioning of the internal market requires that the free movement of personal data within the Union is not restricted or prohibited for reasons connected with the protection of natural persons with regard to the processing of personal data*" (Recital 13). This being said, certain information is particularly sensitive so, as a default, processing of this data is prohibited, subject to certain limited exceptions.

[1] Regulation (EU) 2022/2065 of the European Parliament And Of The Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act).

[2] Regulation (EU) 2022/1925 of the European Parliament And Of The Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

[3] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

However, there are no general prohibitions under the GDPR on types of processing activities or specific technologies used to process data.

2.5 This means that, as a general rule, use of personal data to create profiles for the benefit of personalised advertising reflecting a user's particular interests or activities is lawful subject to compliance with the guardrails in the GDPR, including that such processing must have a lawful basis under Article 6(1) of the GDPR. In fact, Recital 47 specifically says that "*processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest*". As marketing is a form of advertising the inference is that advertising may be carried out on the basis of a controller (or third party's) legitimate interest. Albeit the particular question here is what lawful basis would apply to the processing of data to personalise such advertising.

2.6 There is no consensus from data protection authorities or courts on this question. They have in turn chipped away at controllers' reliance on contractual necessity, then legitimate interest and most recently even consent – as per the recent Opinion.

2.7 Initially, some organisations, including Meta, processed user data for behavioural advertising purposes based on contractual necessity under Article 6(1)(b) GDPR. Users were offered a free service on the basis that their data, collected through the use of that service, was part of the contractual bargain for the receipt of that service at no financial cost to them, as explained in the relevant Terms of Service.

2.8 However, privacy advocacy group, None Of Your Business ("**NOYB**"), challenged the reliance on contractual necessity for behavioural advertising on Facebook and Instagram. In its preliminary decision on this complaint, the Irish supervisory authority, the Data Protection Commission, found that the GDPR, the jurisprudence and EDPB guidance did not preclude Meta from relying on Article 6(1)(b) GDPR as a legal basis to carry out the personal data processing activities involved in the provision of its service to users, including behavioural advertising, insofar as that process forms a core part of the service, which it found that it did for Facebook and Instagram. However, nine concerned supervisory authorities disagreed and ultimately the matter was referred to the EDPB under the Article 65 dispute resolution procedure.[4]

2.9 In December 2022, the EDPB found that use of user data for behavioural advertising purposes by Meta in the context of Facebook and Instagram was objectively not necessary for the performance of Meta's contract with users, was not an essential or core element of these services and therefore Meta was not entitled to rely on contractual necessity for behavioural advertising.

2.10 In response to this decision and with a view to complying with this new interpretation, on 5 April 2023, Meta changed the lawful basis for use of on-Facebook/Instagram data for behavioural advertising purposes from contractual necessity to legitimate interest

[4] This determination was made by the DPC in its preliminary decision which is not published but is summarised in the EDPB's decisions:

EDPB Instagram decision: Binding Decision 4/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its Instagram service (Art. 65 GDPR) (Adopted on 5 December 2022): https://www.edpb.europa.eu/system/files/2023-01/edpb_binding_decision_202204_ie_sa_meta_instagramservice_redacted_en.pdf.

EDPB Facebook decision: Binding Decision 3/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its Facebook service (Art. 65 GDPR))Adopted on 5 December 2022): https://www.edpb.europa.eu/system/files/2023-01/edpb_bindingdecision_202203_ie_sa_meta_facebookservice_redacted_en.pdf.

under Article 6(1)(f) GDPR. Consent continued to be the lawful basis for the collection of off-Facebook/Instagram data for behavioural advertising.[5]

2.11 However, on 14 July the Norway SA issued an unprecedented temporary ban under the Article 66 urgency procedure (bypassing the one-stop-shop mechanism) and issued a 3-month ban on Meta using Norwegian user data to personalise ads on Facebook and Instagram, based on the basis of contractual necessity and legitimate interests. This resulted in an urgent opinion from the EDPB confirming and extending the ban across the EEA, on the basis that Meta could not rely on contractual necessity or legitimate interests for the processing of on-Facebook/Instagram data for behavioural advertising purposes.

> "*The EDPB considers that the ban should refer to Meta IE's processing of personal data collected on Meta's products for behavioural advertising purposes on the basis of Article 6(1)(b) GDPR and Article 6(1)(f) GDPR across the entire EEA. The processing activities to which the ban refers are: (i) the processing of personal data, including location data and advertisement interaction data, collected on Meta's products for behavioural advertising purposes, having established in this respect the infringement of Article 6(1) GDPR arising from inappropriate reliance on Article 6(1)(b) GDPR; (ii) processing of personal data collected on Meta's products for behavioural advertising purposes, having ascertained in this respect the infringement of Article 6(1) GDPR arising from inappropriate reliance on Article 6(1)(f) GDPR.*"[6]

Seemingly, the six potential lawful bases had reduced to one lawful basis for behavioural advertising – consent.

2.12 In response to the rapidly changing legal interpretations, from November 2023, Meta offered Instagram and Facebook users the option to either: (a) pay for a service that does not show advertising and does not use on-Facebook/Instagram data for behavioural advertising; or (b) consent to the use of on-Facebook/Instagram data for behavioural advertising. This "consent or pay" model tracked legal interpretations from the CJEU in the *Bundeskartellamt* decision and various supervisory authority decisions and, importantly, offered platforms such as Meta a commercially viable way of complying with evolving regulatory expectations.

2.13 This business model, which tracks that of many other organisations including media outlets that exercise a paywall, was called into question in the recent EDPB Opinion. In short, the Opinion suggests that large online platforms (which are undefined) are unlikely to be able to comply with requirements for valid consent if they confront users only with a binary choice between consenting to processing of personal data for behavioural advertising purposes and paying a fee. Extraordinarily, the EDPB suggested that the only way to secure consent in such circumstances is to offer an alternative of the service with the same functionality and no behavioural advertising (it remains unclear if this is based on off- and on-site activity) which is provided to users at no cost. Up to this point, organisations tracking judicial interpretations and supervisory authority decisions have moved from contractual necessity to legitimate interests to consent. The suggestion is now that for some large online platforms, a viable consent can only be supported by a free service without behavioural advertising. In other words, unless large online platforms provide users with a free alternative

[5] *Ibid.*

[6] Para. 323 – Urgent Binding Decision 01/2023 requested by the Norwegian SA for the ordering of final measures regarding Meta Platforms Ireland Ltd (Art. 66(2) GDPR): https://www.edpb.europa.eu/our-work-tools/our-documents/urgent-binding-decision-board-art-66/urgent-binding-decision-012023_en.

without behavioural advertising, they may be left with no legal basis at all for behavioural advertising.

3. ESTABLISHED PRINCIPLES

3.1 "**The right to the protection of personal data is not an absolute right**"

(a) As with almost all fundamental rights, the right to the protection of personal data is not an absolute right. It must be counter-balanced with other fundamental rights that are engaged, having regard to the principle of proportionality. This is explicitly recognised in Recital 4 of the GDPR,

> "*The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality. This Regulation respects all fundamental rights and observes the freedoms and principles recognised in the Charter as enshrined in the Treaties, in particular the respect for private and family life, home and communications, the protection of personal data, freedom of thought, conscience and religion, freedom of expression and information, freedom to conduct a business, the right to an effective remedy and to a fair trial, and cultural, religious and linguistic diversity.*"

(b) Thus, the GDPR cannot be interpreted in isolation and must be read systematically in conjunction with the Charter as well as general principles of EU law. This means that when drafting opinions or guidance on the GDPR, the EDPB must consider other fundamental rights, including the freedom to conduct a business, which is enshrined in Article 16 of the Charter and specifically referenced in Recital 4 GDPR. This point is particularly salient in the context of this Opinion, which assesses the validity of consent under GDPR with respect to consent or pay models for behavioural advertising. The Opinion therefore goes to the very heart of how many online services make money and has significant implications for the business models of such services that operate in the EU. As we will discuss, the Opinion suggests that large online platforms may have to offer users an alternative free service without behavioural advertising. What is more, the Opinion suggests that national supervisory authorities have the power to impose corrective measures when they believe that the amount of a particular fee imposed by a controller undermines the ability of a data subject to freely give consent.

(c) Yet despite these conclusions, which would place significant restrictions on the ability of such platforms to decide on their own commercial models, not once does the Opinion mention the freedom to conduct a business. Nor does the EDPB, as Craddock points out, leave any room for consideration of whether implementing a free alternative without behavioural advertising would be commercially unviable.[7]

(d) For a person unfamiliar with guidance issued by the EDPB, this might seem like a significant oversight. However, it is not surprising when one looks at other guidance issued, especially in recent times. One striking example is the EDPB's Guidelines 01/2022 on data subject rights - Right of access which stated that "*the right of access is without any general reservation to*

[7] Peter Craddock, "*Op-Ed: A critical analysis of the EDPB's 'Pay or Consent' Opinion*": https://www.linkedin.com/pulse/op-ed-critical-analysis-edpbs-pay-consent-opinion-peter-craddock-obl3e/.

proportionality with regard to the efforts the controller has to take to comply with the data subjects request under Art. 15 GDPR".[8] This statement wilfully neglects the principle of proportionality and the freedom to conduct a business. It is demonstrative of an absolutist approach to data protection rights, where all other rights and considerations are ignored.

(e) But, with some rare exceptions, no right is absolute, not even fundamental rights, as the CJEU has recognised. This is demonstrated by the CJEU's approach to intellectual property rights, another fundamental right, and its relationship with the right to conduct a business. The CJEU emphasised that "*national authorities and courts must in particular strike a fair balance between the protection of the intellectual property right enjoyed by copyright holders and that of the freedom to conduct a business enjoyed by operators such as hosting service providers*".[9] This view was reinforced later when the CJEU stated that a national measure would be set aside if "*the transferee's contractual freedom is seriously reduced to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business*". The CJEU has even held that the freedom to conduct a business enjoyed by a company included the freedom to impose a dress code as part of a policy of neutrality, even where the exercise of such freedom put certain employees who belonged to certain religious groups at a disadvantage.[10]

3.2 **Behavioural advertising is a legal activity and the personal data processing enabling it requires a lawful basis under GDPR**

(a) Craddock notes that some analysts often dismiss the freedom to conduct a business in this context on the basis that such freedom does not enable a business to engage in criminal practices. This logic is of course flawed since the law prohibits these practices.[11] By contrast, behavioural advertising is a lawful activity. This is recognised by the various pieces of legislation passed by the EU's legislative bodies in recent years, including the DSA and DMA, which regulate the practice.

(b) For example, the DSA has regulated advertising by imposing significant transparency obligations on online platforms in respect of any advertising on their platforms. What is more, it deals specifically with the issue of the use of personal data for advertising on online platforms. Article 26(3) provides that providers of online platforms shall not present advertisements to recipients of a service based on profiling using special category data. For the protection of minors, it has provided that providers of online platforms shall not present advertisements on their interface based on profiling when they are aware with reasonable certainly that the recipient of the service is a minor. Despite the many restrictions imposed on online platforms by the DSA, it restricts, rather than prohibits the use of behavioural advertising.

[8] Guidelines 01/2022 on data subject rights - Right of access, para. 166.

[9] Case C-70/10 Scarlet Extended SA v SABAM, ECJ 24 November 2011 and Case C-360/10 SABAM v Netlog, ECJ 16 February 2012.

[10] Case C-201/15 AGET Iraklis ECJ 21 December 2016.

[11] Peter Craddock, "*Op-Ed: Who dares question the primacy of data protection?*": https://www.linkedin.com/pulse/op-ed-who-dares-question-primacy-data-protection-peter-craddock-kfkxe/?trackingId=MFgtLRj2SamFpTcC%2F6tlXg%3D%3D.

(c) As has been explained above, the contractual necessity and legitimate interest legal bases for behavioural advertising have been chipped away by regulators, leaving consent as the only option. However, the EDPB now suggests that certain controllers cannot rely on this legal ground for consent or pay models unless they offer a free alternative. It would be a perverse outcome if certain controllers had no legal basis they could rely on for behavioural advertising (and were therefore prohibited from engaging in it) unless they offered their service for free, even though behavioural advertising has been recognised by the legislature and the courts as a lawful activity.

3.3 The meaning of consent is not a GDPR invention but a legal concept

(a) It should also be acknowledged that consent is a legal concept that existed long before GDPR. The GDPR's requirements for a valid consent – that it be freely given, specific, informed and unambiguous – reflects pre-existing common law and civil law principles. This means that the EDPB cannot use the GDPR to expand the understanding of consent beyond its ordinary meaning.

(b) The EDPB relies heavily on Recital 43 GDPR which says, "*consent should not provide a valid legal ground for the processing of personal data in a specific case where there is a clear imbalance between the data subject and the controller, in particular where the controller is a public authority and it is therefore unlikely that consent was freely given in all the circumstances of that specific situation*". It also points to Recital 42 which says "*consent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment*". These considerations reflect the general principle that for consent to be valid, it must be truly voluntary. Specifically, consent is not freely given if the circumstances are such that the choice of the data subject is not voluntary as a result of an imbalance of power or particular detriment they might suffer.

(c) However, the fact a particular choice is undesirable or difficult does not mean that it is not voluntary. As Nettesheim points out, the "pay-or-consent" model opens up a decision-making space if the price charged is not so high that it exceeds the financial capacity of the average user. The fact that a user with limited financial resources must make trade-offs (e.g. foregoing other purchases) does not call into question the voluntary nature of their decision, but points to the dilemmas of dealing with scarce (financial) resources.[12] The EDPB's view that there should be "*no adverse consequences at all*"[13] for the data subject if they do not consent is an extreme position and is not supported by the GDPR or the long standing legal concept of informed consent that is reflected therein. It is common sense that every choice involves pros and cons. The mere fact that one choice has disadvantages does not mean that a data subject cannot voluntarily accept such disadvantages so that they may avail of the corresponding benefits.

(d) This is why it is quite ironic that the Opinion says the imposition of a fee "*should respect data subject's autonomy*".[14] Yet respecting the autonomy of the data subject acknowledges the data subject's agency and ability to select

[12] Martin Nettesheim, "*GDPR Overreach? The Challenges of Regulating Pay-or-Consent Models through Data Protection Law*": https://verfassungsblog.de/gdpr-overreach/.

[13] Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms, para. 79.

[14] *Ibid*, para. 134.

between several difficult choices. After all, the law allows persons to consent to (legal) elective medical procedures, despite the risks and potential harms involved, provided such consent is sufficiently informed. The EDPB's reasoning is rather infantilizing in that it says that data subjects will usually not be able to give a valid consent to behavioural advertising based on consent or pay models on a large online platform. The EDPB supports this controversial assumption by pointing to the fact that these large online platforms are often essential in people's lives in terms of their ability to apply for jobs or to connect with other people online. Even if that were true, which is doubtful,[15] it simply does not follow that a person cannot consent under a consent or pay model for that platform. This idea that people are incapable of consenting when faced with binary choices was wholeheartedly rejected by Conseil d'Etat in GESTE in the context of cookie walls.[16]

(e) The Opinion's conclusion that people generally cannot voluntarily consent to behavioural advertising on a large online platform under a consent or pay model is based on the highly flawed assumption that the ability to use a service without paying a fee or being subject to behavioural advertising would constitute a "*detriment*". This may be because certain platforms are "*decisive for a data subjects' participation in social life*" or because not using them may result in them being "*denied access to professional or employment-oriented platforms*". Even if we were to accept the highly questionable assumption that certain large online platforms are this essential, this does not mean that not being able to use them without paying or being subject to behavioural advertising is a detriment. That can only be true if we assume that a person has a right to use a particular online platform for free. If we instead take as our starting point that a person is not entitled by right to access a private, for-profit service for free, there is no detriment.

(f) Many online platforms enable data subjects to access their service for free, the trade-off being that they agree that their personal data may be used for behavioural advertising. This option allows data subjects to access a service for free that they would otherwise have to pay for. If the data subject does not want behavioural advertising, they are in no worse position than they would otherwise have been in – their access to the service is simply conditional on payment, as with any service that is not predominantly funded by advertising. As Nettesheim points out, if a company offers an advertising-financed and monetarily free service in addition to a "*service for money*", this expands the scope of action of the users, who are financially better off than in the normal case, even if they agree to the use of their personal data for the placement of personalised advertising.[17] Not only are they financially better off, they have a greater range of choices since most services are offered on a take it or leave it basis, without a free option.

(g) Therefore, the option of accessing a commercial service for free, albeit with behavioural advertising, is a benefit. This is supported by the fact 85% of Europeans want to decide which online services they pay for and which they

[15] The Opinion does not substantiate this point with any evidence.

[16] *Décision n° 434684 du Conseil d'Etat du* 19 juin 2020.

[17] Martin Nettesheim, "*GDPR Overreach? The Challenges of Regulating Pay-or-Consent Models through Data Protection Law*": https://verfassungsblog.de/gdpr-overreach/

don't have to pay for because they are funded by advertising.[18] The IAB correctly points out that end-users largely prefer to have "Consent or Pay" choices than to be restricted to only one option (e.g. only paying subscriptions).[19] Absurdly, one way of ensuring consent in accordance with the EDPB's recommendations might be to offer a data subject less choice, i.e. by offering data subjects a subscription only option. Yet based on the evidence, it appears that most data subjects prefer to have the option of accessing the service for free with behavioural advertising.

(h) In light of the above considerations, it is notable that the Hamburg Data Protection Commissioner, Thomas Fuchs, in distancing himself from the Opinion, stated that the Opinion's conclusions represented a "*strong overstretching of the requirements for consent*".[20] The Opinion's conclusions only make sense if a person has a right to use an online service in the first place. The EDPB endorses such flawed reasoning by saying that the more "*essential*" a service is, the more likely a controller is required to offer data subjects a free alternative to behavioural advertising. Yet in a market economy, very few things are free, even resources that are seen as essential.

3.4 Processing of personal data for behavioural advertising is also subject to all of the GDPR provisions as well as other regulations protecting consumers and users

(a) A data subject does not waive their rights or their protections under the law when they consent to behavioural advertising. The EDPB refers to the idea that "*personal data cannot be considered as a tradeable commodity*".[21] It also states that there is the obligation on controllers using consent or pay models to prevent "*the fundamental right to data protection from being transformed into a feature that data subjects have to pay to enjoy, or a premium feature reserved for the wealthy or the well-off*".[22] Both of these statements are misleading in that they suggest that a person forfeits their data subject rights once they consent to behavioural advertising. However, as was outlined by the IAB's letter to the EDPB, data subjects do not waive their rights by consenting under a consent or pay model.[23] Controllers are still obliged to comply with their obligations under the GDPR and respect the rights of the data subject in relation to the processing of their personal data, which includes complying with Article 5 principles, providing data subjects with Article 13 transparency information, and taking the appropriate measures to respond to the exercise of

[18] See the study conducted by an independent third-party research agency Savanta, with a total sample size of 2,439 surveyed individuals: https://iabeurope.eu/wp-content/uploads/2021/04/IAB-Europe_What-Would-an-Internet-Without-Targeted-Ads-Look-Li ke_April-2021.pdf.

[19] Opinion on "Pay or Okay" Models Requested from the EDPB by the Norway Data Protection Authority ("**NO SA**"), Hamburg Supervisory Authority ("**DE SA**") and the Netherlands Supervisory Authority ("**NL SA**") https://iabeurope.eu/wp-content/uploads/20240319-Letter-to-EDPB-upcoming-opinion-and-guidelines-on-the-consent-or-pay-model.pdf.

[20] Friederike Moraht, "EU data protectionists consider pay-or-consent to be inadmissible" https://background.tagesspiegel.de/digitalisierung/eu-datenschuetzer-halten-pay-or-consent-fuer-nicht-zulaessig.

[21] Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms, para. 130.

[22] *Ibid*, para. 132.

[23] Opinion on "Pay or Okay" Models Requested from the EDPB by the Norway Data Protection Authority ("**NO SA**"), Hamburg Supervisory Authority ("**DE SA**") and the Netherlands Supervisory Authority ("**NL SA**") https://iabeurope.eu/wp-content/uploads/20240319-Letter-to-EDPB-upcoming-opinion-and-guidelines-on-the-consent-or-pay-model.pdf.

data subject rights under Chapter III. Whether a person decides on the free option with behavioural advertising or the paid option without it, the GDPR applies just the same.

(b) The statement that personal data is not a "*tradeable commodity*" is also technically false. As we explain further below, the EU Consumer rights Omnibus Directive 2019/2161[24] and EU Digital Content Directive 2019/770[25] explicitly recognise that personal data can act as alternative consideration to money for a service. This makes sense. For example, intellectual property is also a fundamental right under the Charter. Yet that does not mean that holders of such rights cannot transfer and exploit those rights for commercial gain. Even if the intention of the Opinion was to assert that people's rights in relation to their personal data cannot be considered a tradeable commodity, that assertion would be based on a false assumption that data subjects forfeit their rights by consenting to behavioural advertising.

(c) We also know that consumer law tightly regulates the terms that online services may enter into with consumers. The large online platform category that the Opinion refers to also includes "*Gatekeepers*" and "*Very Large Online Platforms*" which are subject to even heavier regulation under the DMA and DSA respectively. As noted above, these laws regulate how advertising may be used by online services. This further highlights the fact that data subjects do not leave their legal rights and protections behind when they use a service that has behavioural advertising.

4. EDPB COMPETENCE

4.1 Advisory and decision making roles of the EPDB

(a) Establishment of the EDPB: Articles 68 to 76 of the GDPR establishes the EDPB as a "*body of the Union*" with "*legal personality*". Further, Recital 139 elaborates that the EDPB should "*contribute to the consistent application of this Regulation throughout the Union, including by advising the Commission, in particular on the level of protection in third countries or international organisations, and promoting cooperation of the supervisory authorities throughout the Union.*" Essentially this means the role of the EDPB is to work towards harmonising the application of the GDPR by national data protection authorities primarily by "*steering*" how the law should be interpreted.

(b) Opinions and Decisions: Article 70 GDPR further confirms the content and scope of the duties and powers entrusted to the Board, namely to issue "*guidelines, recommendations, best practices and opinions in the manner described in Article 70 (1).*" With regard to the Opinion, this followed a request from Dutch, Norwegian, and German (Hamburg) supervisory authorities to issue an opinion pursuant to Article 64(2) GDPR, which provides that any supervisory authority may request that any matter of general application or producing effects in more than one Member State be examined by the EDPB with a view to obtaining an opinion. With regard to the request made pursuant to Article 64(2), such requests are generally intended (but not limited to) cover

[24] Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules.

[25] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services.

matters of general application in circumstances where a lead supervisory authority ("**LSA**") has not complied with its obligations for mutual assistance (and there is no suggestion that this was the case here).

(c) The EDPB's own rules of procedure do not contain any provision for consultation with controllers on foot of such a request under Article 64(2) - the EDPB alone decides on the admissibility of the submission, whether the request made is adequately reasoned, and the EDPB adopts the final opinion by majority vote. The lack of any input from the businesses whose models are being critiqued in the Opinion is regrettable - the failure of the Opinion to consider the right to conduct a business is an obvious consequence.

(d) The EDPB's decision-making competencies are also set down in the GDPR. These are limited to issuing binding decisions pursuant to Article 65 GDPR where a supervisory authority concerned has raised a relevant and reasoned objection to a draft decision of the LSA and that LSA has not followed or rejected that objection;[26] where there are conflicting views on the main establishment of the controller;[27] or where a concerned supervisory authority ("**CSA**") does not request the opinion of the Board or does not follow a previously issued opinion of the Board pursuant to Article 64(1) GDPR.[28] The EDPB does not have rule-making competence otherwise.

(e) Competences and EU legal instruments: "opinions" as soft law: In the context of the Opinion, it is worth reflecting on the typology of such an instrument within the constitutional framework of the European Union. There is no further detail on the explicit competence of EDPB contained within the GDPR, or indeed within the EDPB's own rules of procedure,[29] however, the stated legislative competences of the EU, together with the typology of a soft law instrument itself (in the case of this Opinion) are instructive in this regard and are well defined. Within the constitutional framework of the EU, (Treaty of the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) (collectively, the "**Treaties**")), Article 288 TFEU makes a distinction between regulations, directives, and decisions, and recommendations and opinions. Regulations, directives and decisions are binding, while recommendations and opinions are not legally binding instruments.[30] Such binding instruments are in most cases, adopted under the ordinary legislative procedure, which involves joint adoption by the European Parliament and the Council, on receipt of a proposal from the Commission. They can then be implemented or further specified at EU level by delegated and implementing acts, in accordance with Articles 290 and 291 TFEU. Such delegating and implementing acts are also binding instruments of EU law and must be based on an explicit competence set down in a regulation, directive or decision, and procedural rules for their adoption are included in and on the basis of Articles 290 and 291 TFEU.

[26] See Article 65(1)(a) GDPR.

[27] See Article 65(1)(b) GDPR.

[28] See Article 65 (1) (c) GDPR.

[29] See the EDPB's Rules of Procedure, Version 8, 2022 at edpb_rules_of_procedure_version_8_adopted_20220406_en.pdf (europa.eu).

[30] See Article 288 TFEU - "*Recommendations and opinions shall have no binding force*" - eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2012:326:FULL.

(f) The aims of such non-binding opinions and recommendation are to persuade, encourage and clarify. However, the fact that they are not binding does not mean that they lack legal effect. Case law from the CJEU has confirmed that such instruments often result in the same impact as legal instruments of a binding nature:

> "*In that connection, it should be borne in mind that the Court has consistently held that, even if recommendations are not intended to produce binding effects and are not capable of creating rights that individuals can rely on before a national court, they are not without any legal effect. The national courts are bound to take recommendations into consideration in order to decide disputes brought before them, in particular where such recommendations cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding provisions of EU law*".[31]

(g) Furthermore, as identified by the Meijers Committee,[32] further legal effects arising from the issuing of soft law instruments are various, including, legal effects as a result of reliance on legitimate expectations, and "*self-bindingness*", citing the specific example of guidance provided by the EDPB binding the national data protection authorities which are members of the EDPB.[33] It therefore has consequential and impactful legal effects for all controllers who designed their behavioural advertising programmes to comply with the established legal framework and who are now faced with legal uncertainty.

(h) Contrast with other law-making procedures in Europe: The consequences of the EDPB's opinion in creating a new quasi-legal standard reflecting regulatory expectations across the EEA, and its shortcomings from a transparency, competence and stakeholder consultation perspective are all the more noteworthy when contrasted with the checks and balances incorporated into mechanisms for the making of binding Union law, e.g., the ordinary legislative procedure[34] (the "**OLP**"). Pursuant to Article 294 TFEU, the European Commission is responsible for preparing almost all proposed legislative acts under the OLP. To prepare a legislative proposal, the Commission carries out extensive consultation with stakeholders and the public, including, where it considers appropriate, the consideration of Green and White Papers.[35] It also carries out an impact assessment to assess the direct and indirect implications of a proposed new law, including, critically, an assessment of any direct economic impacts of new measures expected to have significant impacts. Such measures were recognised by the three main EU

[31] Case C-322/88 Grimaldi [1989] ECR 4407, paragraphs 7, 16 and 18, and Case C-207/01 Altair Chimica [2003] ECR I-8875, paragraph 41).

[32] The Meijers Committee is an independent group of experts that researches and advises on European criminal, migration, refugee, privacy, non-discrimination and constitutional law – See *Meijers Committee – Home - Meijers Commission - Standing Committee of Experts on International Migration, Refugee and Criminal Law (commissie-meijers.nl)*.

[33] See Meijers Committee Note - *1806 Note on the use of soft law instruments under EU law, in particular in the area of freedom, security and justice, and its impact on fundamental rights, democracy and the rule of law 9 April 2018* eu-meijers-ctte-soft-law-instruments.pdf (statewatch.org).

[34] See Article 289 of the Treaty of the Functioning of the European Union ("**TFEU**").

[35] See – "*Ordinary legislative procedure"* available at - Legislative procedure (europa.eu).

institutions in the 2016 Interinstitutional Agreement[36] (part of the European Commission's "Better Regulation Agenda") as important in contributing to better law-making.[37] Crucially, an impact assessment initiated under the Better Regulation Tools always involves stakeholder consultation, plus a public call for evidence.[38] The Commission also notes that the correct application of the principles of subsidiarity (no EU intervention when an issue can be dealt with effectively by EU countries) and proportionality (EU action does not exceed what is necessary to achieve the objectives) when developing policies is also assessed in the Better Regulation impact assessments.

(i) By contrast, very little of the Opinion focuses on the economic consequences of adopting and implementing the EDPB's guidance. While it refers to content-creators suffering "*very substantial and potentially irreparable loss*",[39] it is silent on the impact of the eminently more substantial loss for a large online platform controller who may be reliant on advertising revenue, if it is now required to resource and build free alternatives, in line with the EDPB's "*third option*".[40] The lost economic opportunity for those who advertise on those platforms is also not considered.

(j) In the same vein, one might be forgiven for thinking that no consultation mechanisms were included in the text of the GDPR in the context of the EPDB's review and advisory powers. In fact, Article 70(4) GDPR requires the EDPB, "*where appropriate, to consult interested groups and provide them with the opportunity to comment*." The EDPB makes no reference to its reasoning of why it did not consider it "appropriate" to consult affected groups in this context.

4.2 **The EDPB is not a lawmaker nor market maker**

(a) The EDPB provided reasoning for its competence in making this Opinion by reference to Article 51(1) and (2) GDPR, contending that this allows supervisory authorities to "*assess the validity of consent used as a legal basis for the processing of personal data, including when such consent is collected in the context of 'consent or pay' models where personal data is processed for behavioural advertising purposes*". However, data protection supervisory authorities are not market regulators, nor do they have a mandate or explicit

[36] See *Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making* - EUR-Lex - 32016Q0512(01) - EN - EUR-Lex (europa.eu).

[37] See Articles 12 – 18, *Interinstitutional Agreement*.

[38] Based on these findings, the lead Director General prepares a draft impact assessment report with an extensive level of detail, including (but not limited to) a description of the social, economic and environmental impacts; a clear indication of who is affected by the initiative and how, impacts on fundamental rights, plus, a detailed description of the consultation strategy and the results obtained from it. The co-legislators can also carry out impact assessments in relation to substantial amendments during the legislative process.

[39] See paragraph 92, Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms (Adopted on 17 April 2024) – edpb_opinion_202408_consentorpay_en.pdf (europa.eu).

[40] See paragraph 7, Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms (Adopted on 17 April 20245) – edpb_opinion_202408_consentorpay_en.pdf (europa.eu).

> "*This alternative must entail no processing for behavioural advertising purposes and may for example be a version of the service with a different form of advertising involving the processing of less (or no) personal data, e.g. contextual or general advertising or advertising based on topics the data subject selected from a list of topics of interests.*"

competence within the constitutional framework of the EU to examine pricing practices. Competence for such matters is appropriately vested with the European Commission at EU level[41] and with Member State competition and consumer protection authorities at national level, whose mandates extend to not just the promotion of fair competition and protection of individual consumers, but ensuring that markets remain open and competitive.

(b) The EDPB comes close to acknowledging their lack of competence at paragraph 138 of the Opinion.[42] Strikingly, the EDPB appears to mirror the discretionary language of Article 70(4) GDPR in this paragraph, with the use of "*if appropriate*", suggesting that the EDPB may elect to consult with other market authorities if they deem it necessary, making this appear as if it is a purely moral, rather than legal consideration. An attempt at striking a balance occurs in the next sentence where it states that consultation "*may*" be legally mandatory where supervisory authorities "*apply or interpret fields of EU law that are subject to other authorities' supervision*". The EDPB's audience are left no clearer on the thresholds or circumstances for when such consultations are indeed required, with the only confirmatory statement occurring at paragraph 48, where the EDPB acknowledges that "*input*" was sought from national and EU regulators in the fields of competition and consumer protection law. The scope of this input is not elaborated upon.

(c) Duty of sincere cooperation: Given the interplay between different regulatory frameworks in the EU and that online platforms operate in several countries across that EU, it is all the more important that relevant authorities act in a coordinated manner, with due consideration provided for each other's remit when interpreting rules and carrying out their supervisory duties. It is worth recalling that in the *Bundeskartellamt* ruling,[43] the CJEU imposed a duty of sincere cooperation between the national competent competition authority and the competent data protection authority. In the context of this Opinion, the EDPB have added uncertainty to how such cooperation should play out at supranational level.

(d) The reason for such boundaries between market regulators and other supervisory authorities are well established, having regard to the separation of powers, in particular the need for the rule of law and the principle of legal certainty. Why are these boundaries important? The separation of powers and the principle of institutional balance[44] are a cornerstone of the legitimate

[41] See Article 101 TFEU; Article 102 TFEU; Article 105 TFEU.

[42] See paragraph 138, Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms (Adopted on 17 April 2024) – edpb_opinion_202408_consentorpay_en.pdf (europa.eu):

> "*The EDPB highlights that enforcing the GDPR is a task of supervisory authorities. Assessing whether consent is valid and freely given is not a task that can be outsourced. However, there are many circumstances in which supervisory authorities may benefit from consulting authorities in other fields of law, including in particular consumer protection and competition authorities, in line with principle of sincere cooperation under Article 4(3) TEU, as recently underlined by the CJEU. If appropriate, supervisory authorities may choose to consult with such authorities in the exercise of their tasks. Consultation with such authorities may be legally mandatory where supervisory authorities apply or interpret fields of EU law that are subject to other authorities' supervision"*.

[43] See paragraph 53, Case C-252/21 – Meta Platforms Inc; Meta Platforms Ireland Ltd; Facebook Deutschland GmbH vs Bundeskarellamt: CURIA - Documents (europa.eu).

[44] See - Institutional balance - EUR-Lex (europa.eu).

exercise of power in modern democracies. The rule of law has been set down as an enduring basic value of the EU since its inception, being enshrined in the Treaties, and continuously affirmed in the case law of the CJEU. These fundamental principles of democracy are essential for ensuring that government and supervisory institutions remain accountable, and that they operate in the best interests of society as whole, as against the alternative of a concentration of power or politically motivated preferences in one rule-making entity alone. Such interests include economic interests, and as demonstrated, while the EDPB's competence in matters of competition and market matters have been seemingly inferred (overly broadly) into the wording of the GDPR, this is once more, incongruous with the lack of any weighting given to economic interests within the reasoning of the Opinion, coupled with a total absence of analysis regarding the freedom to conduct a business.

(e) Closely related to this principle is the principle of legal certainty. If the principles of legislative competence and the rule of law are not upheld, this risks significantly impacting the certainty of the legal framework and the viability of the European digital legal landscape. As Lapuente and Vidal hold, economic operators within the EU need a certain and reliable legal framework that permits them to create and sustain financially viable business models within such a framework.[45] Such frameworks need a supporting and cohesive strategy to ensure that the EU remains a global leader in a world empowered by technology and data, while ensuring the different rights and freedoms in the Charter are balanced in the context of the EU Data Strategy. With the adoption of the DSA and DMA, European lawmakers have already taken significant steps in regulating behavioural advertising, in addition to existing obligations under the GDPR as explored further below. During these legislative processes, various studies were commissioned on the impacts of online advertising, and were incorporated into the end state of both the DSA and the DMA. While the EDPB makes reference to the specific obligations contained in the DSA and DMA,[46] acknowledging that a coherent application of EU law is necessary, it adds no analysis on how such coherence is to be achieved. This adds a great deal of complexity, cost and uncertainty for online platforms who, prior to the adoption of the DMA, will have invested considerable resources in engineering their consent models with the established parameters set out by Article 5(2) DMA. The EDPB's Opinion is all the more incongruous in light of the protracted and significant efforts to legislate cohesively in this area.

5. KEY PROBLEMS WITH THE OPINION

5.1 Failure to interpret the GDPR systemically

(a) We explained above how the GDPR cannot be read in isolation and that any interpretation must take account of the principle of proportionality and other fundamental rights such as the freedom to conduct a business. However, the Opinion gives no regard to these principles, even though it makes far-reaching

[45] Op-Ed: "Subscription models for digital services in the EU – Lights and shadows" by Leticia López Lapuente and Patricia Vidal - EU Law Live (April 15, 2024).

[46] See paragraph 47, Op-Ed: "Subscription models for digital services in the EU – Lights and shadows" by Leticia López Lapuente and Patricia Vidal (April 15, 2024) - edpb_opinion_202408_consentorpay_en.pdf (europa.eu)

> *"In addition, the EDPB notes that the Digital Services Act ('DSA') lays down specific obligations for providers of online platforms, as well as for providers of very large online platforms . This Opinion refers to relevant provisions of the DMA and the DSA insofar as necessary to foster a coherent application of EU law."*

conclusions about the business model used by many controllers, the ability of supervisory authorities to determine the appropriateness of pricing, and the obligation of certain controllers to provide a free version of their service without behavioural advertising. For example, the Opinion states, "*While there is no obligation for large online platforms to always offer services free of charge, making this further alternative available to the data subjects enhances their freedom of choice. This makes it easier for controllers to demonstrate that consent is freely given.*"[47] This implies that there are circumstances in which controllers are obliged to offer their services for free. Such a radical conclusion cannot be consistent with the principle of proportionality and the freedom to conduct a business.

(b) The Opinion also ignores that one of the overarching goals of the GDPR is to ensure a high level of protection for personal data while also ensuring the "*free movement of such data*". That wording is in the title of the GDPR itself. Also notable is Recital 13 which says:

> "*in order to ensure a consistent level of protection for natural persons throughout the Union and to prevent divergences hampering the free movement of personal data within the internal market, a Regulation is necessary to provide legal certainty and transparency for economic operators… The proper functioning of the internal market requires that the free movement of personal data within the Union is not restricted or prohibited for reasons connected with the protection of natural persons with regard to the processing of personal data.*"

The Opinion is striking in that it has no regard to the principle that economic operators are entitled to legal certainty and transparency when building their business models. They should not be restricted or prohibited from operating those businesses by constantly changing regulatory interpretations. Indeed, such principles are reflective of the founding ideals of the EU single market which was based on the "four freedoms" - that goods, services, people and capital can move freely throughout the territory of the EU. The free movement of data is also currently a high priority of the EU, as demonstrated by the EU's "European Data strategy", reflected in the Data Act and Data Governance Act, which seeks to ensure that more data becomes available for use in the economy and society, to ensure Europe's global competitiveness and data sovereignty.

5.2 **The Opinion is at odds with the legal order determined by the courts and legislators**

(a) As we touched on briefly above, it is also questionable whether such an Opinion was warranted when the area of behavioural advertising has been extensively regulated by other organs of the EU's legal framework, including the CJEU and the EU's legislative bodies. As discussed, behavioural advertising is a heavily regulated area with significant protections already in place, so it is interesting that the EDPB felt it necessary to impose more restrictions on its use. It seems especially unnecessary when one considers that the *Bundeskartellamt* judgment of the CJEU explicitly recognised the offering of an equivalent alternative to behavioural advertising for an appropriate fee,

[47] See paragraph 76, Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms (Adopted on 17 April 2024): edpb_opinion_202408_consentorpay_en.pdf (europa.eu).

even in the case of providers of online services who hold a dominant position in the market.

(b) We discussed in the context of the DSA how providers of online platforms are not permitted to present advertisements to recipients of a service based on profiling using special category data, or present advertisements on their interface based on profiling, when they are aware with reasonable certainty that the recipient of the service is a minor. Very large online platforms or very large online search engines must also take into account the risks associated with their systems for selecting and presenting advertisements in their risk assessments and take any necessary and appropriate measures to mitigate such risks.

(c) Also of relevance is the DMA which deals extensively with the use of personal data, including in the context of advertising by "*gatekeepers*". Note that gatekeepers are one of the types of online service which the EDPB states would fall within the category of large online platforms. The Opinion takes the view that consent to the processing of personal data by such services for the purpose of behavioural advertising is unlikely to be valid. Yet Article 5(2) of the DMA provides that these gatekeepers may undertake certain activities with the "*consent of the end user which includes process, for the purpose of providing online advertising services, personal data of end users using services of third parties that make use of core platform services of the gatekeeper*". This implies that gatekeepers can in fact secure consent from users for behavioural advertising. If securing such consent required that there be a free alternative service offered, surely the DMA would have provided for this.

(d) The Opinion also overlooks the fact that EU's legislative bodies have explicitly recognised that personal data can be a valid form of payment for a service. For example, Article 3(1) of the EU Digital Content Directive 2019/770 states that:

> "*This Directive shall apply to any contract where the trader supplies or undertakes to supply digital content or a digital service to the consumer and the consumer pays or undertakes to pay a price. This Directive shall also apply where the trader supplies or undertakes to supply digital content or a digital service to the consumer, and the consumer provides or undertakes to provide personal data to the trader*…,"

The above principle has been implemented in domestic law in Member States. For example, under the Consumer Rights Act 2022 in Ireland, which defines a digital service contract as a contract where a "*trader supplies or undertakes to supply a digital service to the consumer*" and the consumer either or both *"(i) pays or undertakes to pay the price of the digital service*" or "*(ii) provides or undertakes to provide personal data to the trader, other than where the personal data are processed by the trader only for the purpose of supplying the digital service in accordance with this Act or complying with any other legal requirement to which the trader is subject*". Similarly, Recital 31 of the EU Consumer rights Omnibus Directive 2019/2161 recognises "*digital services provided in exchange for personal data*". As we discussed above, many consumers are willing to agree to certain processing activities such as behavioural advertising so that they are not required to pay for a service. These new laws recognise this fact by explicitly providing that consumers may offer their personal data instead of monetary consideration for access to a service. The Opinion's conclusion that a consent or pay model is unlikely to be valid in respect of large online platforms works against this principle. If the Opinion's recommendations are followed, platforms are more likely to

implement pure subscription models and other models which offer consumers less choice (it seems unlikely that for-profit market participants would seriously consider implementing a free alternative without behavioural advertising). This is surely detrimental to consumers.

(e) In addition, the *Bundeskartellamt* judgment dealt with the specific question of whether consent given by the user of an online social network to the operator of such a network may be regarded as freely and validly given when such operator holds a dominant position in the market for online social networks. The CJEU made clear that the fact an online operator holds a dominant position in the market for online social networks does not in itself preclude the users of such a network from being able to validly consent to the processing of their personal data by that operator. However, a dominant position is an important factor to be considered in whether consent has been freely given. The CJEU also said that where it appears that certain processing operations are not necessary for the performance of a contract, users must be free to refuse to give their consent to such operations, without having to refrain from using the service entirely. Such users "*are to be offered, if necessary for an appropriate fee, an equivalent alternative not accompanied by such data processing operations*".[48]

(f) The Opinion relies on this judgment but also selectively interprets it and expands its scope. First of all, the EDPB ignores the fact that the judgment related to "*off-Facebook data*" or off-platform data. This is data which relates to activities outside the social network itself, including data concerning visits to third-party webpages and apps, which are linked to Facebook through programming interfaces as well as data concerning the use of other online services belonging to the Meta group, including Instagram and WhatsApp. This type of processing is clearly different from the processing of data directly on the platform that the data subject is using. However, the EDPB makes no such distinction in its Opinion. In addition, the CJEU's principles discussed above were made in respect of online services that hold a dominant position. Yet the EDPB states that "*a controller does not need to have a 'dominant position' within the meaning of Article 102 TFEU for their market power to be considered relevant for enforcing the GDPR"*.[49] Without having any basis in the judgment or the GDPR itself, the Opinion creates a new category of controller called "*large online platforms*" and seeks to apply the same principles to these controllers, while also taking them much further.

(g) This is demonstrated by the fact that even in cases of off-platform data and even in cases where the controller occupies a dominant position, the CJEU acknowledged that an equivalent alternative for an appropriate fee could be used by controllers. Despite this, the EDPB states that "*certain circumstances should be present for a fee to be imposed, taking into account both possible alternatives to behavioural advertising that entail the processing of less personal data and the data subjects' position*". It also says that "*controllers should assess, on a case-by-case basis, both whether a fee is appropriate at all and what amount is appropriate in the given circumstances*". This is a clear case of the EDPB taking things further than is justified by the judgment or the GDPR itself. Nowhere in the judgment did it say that controllers could not

[48] See paragraphs 147-150, Case C-252/21 – Meta Platforms Inc; Meta Platforms Ireland Ltd; Facebook Deutschland GmbH vs Bundeskarellamt, CURIA - Documents (europa.eu).

[49] See paragraph 103, Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms (Adopted on 17 April 2024): edpb_opinion_202408_consentorpay_en.pdf (europa.eu).

charge a fee in certain circumstances or that they were required to assess the amount of a fee in determining whether a valid consent could be given.

(h) It should be noted a recent decision of the District Court in Regensberg, relying expressly on the *Bundeskartellamt* judgment, has reached a diametrically opposing view to the EDPB on this issue. That decision, which was made after the EDPB opinion was published, held that the consent given under Meta's consent or pay model to targeted advertising constituted a valid consent.[50] The court acknowledged that the introduction of the consent or pay model ensured that the user's freedom to consent was appropriately safeguarded and confirmed that a dominant position in the market for online social platforms does not preclude users from giving valid consent. Not only this, but the judgment highlighted how this particular business model is far from unusual and gave examples such as free newspapers and free-to-air and private television stations.

(i) The EDPB is not entitled to adopt positions which are inconsistent with positions taken by the EU's legislative and judicial bodies or with the EU's constitutional framework. As we discussed in Section 5, the issuing of opinions in relation to existing commercial practices that are already highly regulated interferes with the EU's overall legal framework and creates significant legal and commercial uncertainty. Also, as we discussed in that section, while an Opinion is not officially binding on controllers, the EDPB's guidance usually becomes de facto law for supervisory authorities in the EEA.

5.3 The Opinion introduces uncertainty, not certainty

(a) As discussed above, if the EDPB's conclusions are accepted, certain controllers are in a situation where they have no valid legal basis for the use of personal data for behavioural advertising, unless they provide a free alternative. It is also unclear who this Opinion applies to, which conflicts with the GDPR's objective of providing legal certainty and transparency for economic operators. The Opinion is putatively limited to so called "*large online platforms*" but then notes that the factors are "*not exclusively limited*" to such operators.[51] The concept of a large online platform is also undefined. The Opinion gives a list of vague, non-exhaustive criteria which should be used on a case-by case basis to determine whether a service is a large online platform:

(i) whether they attract a large amount of data subjects as their users;

(ii) the position of the company in the market;

(iii) whether the controller conducts 'large scale' processing; and.

(iv) whether they are "very large online platforms" under the DSA or "gatekeepers", as defined under the DMA.[52]

[50] See paragraph 49, Regional Court of Regensburg, GRUR-RS 2024, 11690.

[51] See paragraph 31, Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms (Adopted on 17 April 2024): edpb_opinion_202408_consentorpay_en.pdf (europa.eu).

[52] See paragraphs 25 to 28, Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms (Adopted on 17 April 2024): edpb_opinion_202408_consentorpay_en.pdf (europa.eu).

The reference to "*a large amount of data subjects*" and "*large scale processing*" are highly nebulous and indeterminate concepts and could easily extend to controllers who are neither large nor dominant. This is not to mention that these are non-exhaustive criteria which suggests that a controller can be a large online platform without meeting any of the above criteria. Given this uncertainty, many controllers across the EU will be left scratching their heads as to whether this Opinion is applicable to their business model.

(b) As mentioned above, the "consent or pay" model is not new and has been confirmed in the *Bundeskartellamt* decision as well as regulatory guidance. Therefore, it is unclear why the Opinion seeks to diverge from this existing guidance.

(c) The Opinion is not consistent with a number of regulatory authorities and decisions that have been made in relation to consent or pay models. For example, the dating app 'Grindr' brought an appeal against the Norwegian Data Protection Authority to the Norwegian Privacy Appeals Board to determine whether Grindr had an obligation to offer a free dating app. The Tribunal agreed with Grindr that they are under no such obligation and recognised that a key feature of the business model for social media and applications is that data subjects "pay" for the use of social media and applications by accepting that their personal data is used commercially, for example by being disclosed to advertising partners. It was held that if the user was offered a choice between the free version of the app or purchasing the app before registration was complete, the requirement for voluntary consent would be met.[53]

(d) Another example is a legal challenge by industry associations especially press and media publishers, including GESTE1. The *Conseil d'État* (French highest administrative court) ruled on June 19, 2020, that the CNIL could not impose a blanket ban on cookie walls. The court emphasized that obtaining free consent for data processing should be evaluated individually, in consideration of diverse situations and contexts.[54]

(e) Consistency is important throughout the EU and EEA and a number of other regulators have issued guidance and recommendations on how to lawfully implement consent or pay models, e.g. Denmark[55], Germany[56], Austria[57], Spain[58], and France[59] have all issued guidance. For instance, the "*consent or pay*" model was also opined on previously by the Germany federal and state supervisory authorities who found it permissible. In a conference on 5 March

[53] PVN-2022-22 Grindr PVN-2022-22 *Grindr - utlevering av personopplysninger uten gyldig samtykke - overtredelsesgebyr | Personvernnemnda*.

[54] *Conseil d'État*, ECLI:FR:CECHR:2020:434684.20200619 *Décision n° 434684 - Conseil d'État (conseil-etat.fr)*.

[55] Datatilsynet, 'Cookie Walls', Cookie walls (datatilsynet.dk).

[56] See *Beschluss: der Konferenz der unabhängigen Datenschutzaufsichtsbehörden des Bundes und der Länder vom 22. März 2023 Bewertung von Pur-Abo-Modellen auf Website*: *DSK_Beschluss_Bewertung_von_Pur-Abo-Modellen_auf_Websites.pdf (datenschutzkonferenz-online.de)*.

[57] Datenshutz behorde, 'FAQ about cookies and data protection': FAQ about cookies and data protection (dsb.gv.at).

[58] Agencia Espanola Protección Datos, '*Guía sobre el uso de las cookies*', guia-cookies.pdf (aepd.es).

[59] CNIL, 'Cookie Walls: the CNIL publishes the first evaluation criteria', Cookie walls: the CNIL publishes the first evaluation criteria | CNIL.

2023, the German supervisory authorities assessed "*pure subscription models*" and found that, contrary to the EDPB Opinion on Consent or Pay, that such models were permissible subject to certain conditions such as ensuring that the paid-for service is equivalent to that of the consent-based service.[60]

(f) Guidance from the Austrian authority also confirmed the permissibility of cookie or "pay or okay" models[61] referencing its previous decision to this effect in relation to the cookie wall on the *Der Standard* website.[62] This guidance, like that of the German authorities and unlike the EDPB Opinion, focusses on the conditions for validity of "pay or okay" models, e.g. ensuring granularity of consent, appropriate and fair fee, etc.[63]

(g) The Spanish supervisory authority, in cookie guidance going back to 2019, found that cookies walls are permissible as long as the user is informed about their purpose and users are not denied the ability to exercise a legal right. In updated guidance from January 2021[64] the AEPD re-confirmed that cookie walls are permissible where the website provider offers a genuinely equivalent alternative.

(h) The UK Information Commissioner's Office has also produced detailed cookie guidance on cookie walls,[65] like most authorities, it refers to the conditions for consent and clearly states that the right to the protection of personal data is not absolute, should be considered in relation to its function in society and must be balanced against other fundamental rights, including freedom of expression and the freedom to conduct a business.

(i) In March 2023, the Austrian supervisory authority also made a determination on cookie walls – i.e. essentially a "consent or pay" model – in relation to a complaint by NOYB against the cookie paywall on the Austrian newspaper, *Der Standard* website.[66] It did not find that a cookie paywall was invalid per se. It found fault with the Der Standard paywall but only because the consent was not sufficiently granular as it bundled consent for targeted advertising, analytics and social media plugin purposes. Unlike the EDPB Opinion, the Austrian authority also recognised the right to a conduct a business enshrined in the EU Charter of Fundamental Rights.

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[60] Beschluss: der Konferenz der unabhängigen Datenschutzaufsichtsbehörden des Bundes und der Länder vom 22. März 2023 – Bewertung von Pur-Abo-Modellen auf Websites: https://datenschutzkonferenz-online.de/media/pm/DSK_Beschluss_Bewertung_von_Pur-Abo-Modellen_auf_Websites.pdf.

[61] **Reference**: *FAQ zum Thema Cookies und Datenschutz*: *https://www.dsb.gv.at/download-links/FAQ-zum-Thema-Cookies-und-Datenschutz.html* (December 2023).

[62] **Reference**: *Datenschutzbeschwerde (Art. 77 Abs. 1 DSGVO, § 24 Abs. 1 DSG*: https://noyb.eu/sites/default/files/2023-04/Standard_Bescheid_geschw%C3%A4rzt.pdf.

[63] **Reference**: *Beschluss: der Konferenz der unabhängigen Datenschutzaufsichtsbehörden des Bundes und der Länder vom 22. März 2023 Bewertung von Pur-Abo-Modellen auf Website*: https://datenschutzkonferenz-online.de/media/pm/DSK_Beschluss_Bewertung_von_Pur-Abo-Modellen_auf_Websites.pdf.

[64] **Reference**: Guide on use of cookies (January 2021): https://iapp.org/media/pdf/resource_center/aepd_guide_on_use_of_cookies.pdf.

[65] **Reference**: https://ico.org.uk/for-organisations/direct-marketing-and-privacy-and-electronic-communications/guide-to-pecr/guidance-on-the-use-of-cookies-and-similar-technologies/how-do-we-comply-with-the-cookie-rules/#comply12.

[66] *Datenschutzbeschwerde (Art. 77 Abs. 1 DSGVO, § 24 Abs. 1 DSG)*: https://noyb.eu/sites/default/files/2023-04/Standard_Bescheid_geschw%C3%A4rzt.pdf.

(j) Most recently, in a decision on 18 March 2024, the Danish supervisory authority[67] also confirmed the legality of cookie walls which require users to consent to use of their data for advertising purposes or pay a reasonable fee. It accepted that use of data for marketing purposes constitutes a necessary part of the alternative to payment for the service as distinct from use of data for statistical purposes which is not necessarily part and parcel of the in-kind remuneration for the service.

(k) An Austrian court also held that the creation of a customer account for the online purchase of goods can be made dependent on consent to the processing of personal data for advertising purposes, provided that the controller also offers an option to purchase the same goods as a "guest" on the website, i.e. a valid alternative to consent for processing of data for advertising purposes.[68]

(l) Further, the Austrian Court of Appeal has commented specifically that the nature of personalised advertising is neither "*immoral or unusual*".[69] On referral of that same case to the CJEU, the Advocat General acknowledged that while indeterminate retention of personal data is not compatible with the principles of the GDPR; the justification of such retention must be a matter for the national courts within the EEA, having regard for the legitimate aim of personalised advertising.[70] The Opinion contradicts these regulatory authorities and judgments of the national and EU courts by requiring large online platforms to provide a third option, which will have negative consequences for companies who have made significant investments to comply with the guidance provided by their regulators. The consent or pay model is not new and has been confirmed in the *Bundeskartellamt* decision as well as regulatory guidance. Therefore, it is unclear why the Opinion seeks to diverge from this existing guidance.

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[67] **Reference**: Cookie walls: *Statistik var ikke en nødvendig del af alternativet til adgang mod betaling*: https://www.datatilsynet.dk/afgoerelser/afgoerelser/2024/mar/cookie-walls-statistik-var-ikke-en-noedvendig-del-af-alternativet-til-adgang-mod-betaling-guloggratis.

[68] Decision of the Austrian Federal Administrative Court, dated 12 June 2023, ECLI:AT:BVWG:2023:W252.2248630.1.00, available here: https://www.ris.bka.gv.at/Dokument.wxe?ResultFunctionToken=97409be9-cb79-4399-93d8-b668356c7513&Position=1&SkipToDocumentPage=True&Abfrage=Bvwg&Entscheidungsart=Undefined&SucheNachRechtssatz=True&SucheNachText=True&GZ=&VonDatum=01.01.2014&BisDatum=&Norm=DSGVO&ImRisSeitVonDatum=&ImRisSeitBisDatum=&ImRisSeit=ZweiWochen&ImRisSeitForRemotion=ZweiWochen&ResultPageSize=100&Suchworte=&Dokumentnummer=BVWGT_20230612_W252_2248630_1_00.

[69] See - Supreme Court Case 6 Ob 56/21k - Vorlage_sw_EN.pdf (noyb.eu)

> "*The nature of this Facebook business model and the contractual purposes associated with it (from the perspective of the Facebook user, above all: gaining access to a personalized communication platform - also through tailored advertising - without having to pay money for it; from the perspective of Defendant, in particular: Generating income through personalized advertising, made possible by the personal data of Facebook users) is explained in the Terms of Services in a way that is easily understandable to any reader who is even moderately attentive. This model is also neither immoral…. nor unusual. Finally, the contractual purposes (…) are clearly illustrated in the overall structure of this set of rules. (…) The processing of personal user data is a supporting pillar of the contract concluded between the parties. Only this use of data enables tailor-made advertising, which significantly shapes the 'personalized experience' (…) and at the same time provides (…) the income necessary to maintain the platform and to make a profit. This data processing is therefore 'necessary' for the performance of the contract (…)".*

[70] See paragraph 49, Case C 446/21 – Opinion of Advocate General Rantos, paragraph 49 – CURIA - Documents (europa.eu); delivered on 25 April 2024.

5.4 **Network Effects**

(a) Whereas the EDPB Opinion strays into competition issues, it references network effects and lock in as negative consequences of certain large online platforms that then affect the ability of those platforms to rely on consent due to an imbalance of power.

(b) However, the EDPB's suggestion that large online platforms offer a free alternative with no behavioural advertising might also have the effect of increasing lock in / network effects. If users who do not wish to consent or pay are then willing to explore other alternatives in the market, and in doing so increase competition on the large online platform, then the requirement that the platform be all things to all people (consent to behavioural advertising, pay for no behavioural advertising at a not unreasonable fee or receive a free equivalent service with no behavioural advertising) might ensure that users do not engage in other alternative services. In other words, requiring a large online platform to subvert its business model and provide a non-behavioural advertising funded option for free, will remove one of the reasons that competitors might challenge the dominance of the large online platform – in effect to the detriment of alternative services that may step into the void with a service and business model that the large online platform does not provide.

5.5 **The use of qualifying language does not cure the problem**

(a) Since an opinion cannot give a definitive ruling on an issue, the EDPB largely couches the Opinion in conditional language. This suggests that the conclusions the Opinion makes are not mandatory. Yet for the reasons we discussed above, EDPB opinions form the basis of how the GDPR is interpreted on a daily basis, including by local supervisory authorities enforcing GDPR in their jurisdictions, and by controllers when deciding what they can and cannot do in relation to personal data. For this reason, Opinions can in practice have similar effects to laws that are adopted by legislators and courts.

(b) However, because they are only Opinions, they are not challengeable or subject to judicial review in the manner that a binding decision of a court or a law enacted by a legislature would be. This results in a regrettable accountability deficit which would not be present if the opinions were subject to more consultation and scrutiny before being published.

6. CONCLUSION

6.1 The Opinion is likely to have more dramatic and far-reaching impacts than many people might assume. As discussed, the Opinion is likely to be relied on by national supervisory authorities in assessing the validity of consent or pay models in their jurisdictions. What is more, while ostensibly limited to "*large online platforms*", the Opinion is "*not exclusively*" limited to such platforms. In any event, the concept of large online platforms is so open-ended that it gives supervisory authorities significant scope to apply the Opinion's conclusions to almost any large online services operating in the EEA. We can therefore assume that the Opinion has direct legal implications for all controllers who design their behavioural advertising programmes to comply with the established legal framework under the GDPR.

6.2 Regrettably, the Opinion leaves all controllers (and not only the undefined "large online platforms") with 42 pages of confusing guidance which appears to be founded on a philosophical disapproval of a business model, rather than any evidential assessment

of harms caused by such a model. It also ignores the extensive legal and regulatory frameworks that already provide a very high level of protection for EU consumers in this area. Despite the recognition of consent or pay models as lawful by the EU legislature and courts, the Opinion effectively leaves large online platforms without a legal basis for behavioural advertising, therefore arguably making the practice unlawful for such platforms unless and until the Opinion is overruled by the CJEU or through another judicial or legislative process.

6.3 It also represents the continuation of a trend whereby the EDPB interprets the GDPR in a myopic fashion, ignoring the fundamental right to conduct a business as well as the GDPR's objective of facilitating the free movement of data and establishing certainty for controllers.

6.4 This Opinion has already created significant uncertainty which in turn could hamper the free and efficient movement of data, currently one of the EU's key objectives under its "*European Strategy for Data*". Such uncertainty is not only a threat to the commercial viability of many online businesses and their freedom to decide on their own business models and set prices, but also to the market competitiveness of the EU as a whole.

6.5 The Opinion's recommendations also arguably harm data subjects and consumers, the very people it is tasked with protecting. If controllers can no longer fund their services under the current model, the accessibility of online services are likely to shift to subscription models and other alternatives that do not offer the same level of choice, and the accessibility of such services will in turn be more limited.

6.6 As controllers are left with little if any ability to challenge the Opinion, there is a strong argument that the EU Commission should intervene so as to ensure that the Opinion is revised to reflect the issues discussed in this Paper, while ensuring that the appropriate levels of checks and balances are in place. The EDPB expects controllers and processors to be accountable under Article 5(2) GDPR. It should equally be held accountable for adopting an Opinion without sufficient market consultation and without any obvious accountability to the stakeholders across the EU market that it directly impacts.