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19 October 2020

Facebook Ireland comments on the draft guidelines 8/2020 on

the targeting of social media users

Executive Summary

Facebook Ireland Limited ("Facebook") welcomes the opportunity to participate in the public consultation on the Guidelines 08/2020 on the targeting of social media users (the "Guidelines"). This consultation presents an opportunity for the EDPB to help improve data protection across the online advertising ecosystem by providing clear guidance on how the GDPR applies to a wide range of data practices and relationships among companies.

Personalised ads are the foundation of the free-access Internet, including social media providers like Facebook. Although the ad-based business model is decades old, the data protection regime that governs it, with the GDPR at its centre, is relatively new. Facebook therefore commends the EDPB for its desire to provide additional guidance in this crucial area. The Guidelines identify valid concerns relating to data protection and other fundamental rights and freedoms, and it offers concrete guidance that will help companies address those concerns.

We would note, however, that the Guidelines are likely to have a far-reaching impact on the fundamental rights of businesses and other organisations, and on the economy more generally. The Guidelines are likely to affect a wider variety of actors than their title – which mentions social media users – might suggest. The Guidelines themselves acknowledge this potential impact: although "[their] focus […] is on the distribution of roles and data protection obligations of social media providers and targeters […] analogous considerations may apply […] to the other actors in the online advertising ecosystem."[1] And, indeed, the reasoning and examples set forth in the Guidelines implicate a range of actors in the advertising ecosystem – from publishers, to advertisers, to AdTech service providers.

We therefore would urge the EDPB to conduct a suitably broad sectoral analysis, one that recognisses that the fundamental rights of these businesses and other organissations – including the freedom to conduct a business and the freedom of speech – must be reconciled with the fundamental right to data protection. Such analysis would help ensure that the Guidelines take into account the

existing practices of key players in the advertising ecosystem and the potential impact of these Guidelines on that ecosystem. This would enable a more nuanced understanding of the ad-supported Internet and the risks and benefits it presents for users and businesses. We believe the outcome of this effort would be a set of Guidelines that does more to reconcile the fundamental rights of users, advertisers, social media providers, and the many other actors that make up the advertising ecosystem.

Four reasons lead us to believe that a comprehensive sectoral analysis would help the Guidelines provide much-needed clarification on the GDPR requirements regarding personalised advertising:

1. The Guidelines Will Affect Much of the Ad-Supported Internet. The Guidelines purport to focus on the targeting of "social media users," a term that may suggest the Guidelines have a narrow scope. But the Guidelines have implications not only for social social media providers – those businesses that offer ways for people to share information with each other and build communities[2] – but for the millions of advertisers that use social media services to reach people with ads. In addition, most of the reasoning and examples effectively apply to many forms of personalised advertising, not just advertising on social media services. When one considers that the Guidelines may also apply to practices that are "analogous" to those discussed, their expansive scope becomes clear.

2. Personalised Advertising Keeps the Internet Open and Supports Small Businesses. Personalised ads help advertisers market their products and services efficiently. This is particularly important for SMEs because personalised ads help them market their products and services throughout the EU without the need for large marketing departments or costly support services. Personalised ads also help NGOs, international organisations, and governments reach audiences that are more likely to care about their issues, programs, and causes. The Guidelines appear to introduce novel interpretations of the GDPR that would require substantial changes by many of these businesses and other organisations.

3. Limiting the Available Legal Bases for Personalised Ads Would Harm the Advertising Ecosystem. Although the Guidelines acknowledge that there is no "specific hierarchy […] between the different lawful basis of the GDPR,"[3] their analysis of appropriate legal bases for personalised advertising evinces a clear hierarchy – one in which contractual necessity appears to be foreclosed and legitimate interests appears limited in ways that do not appear consistent with the text of the GDPR. Indeed, the Guidelines could be understood as suggesting that consent is the superior legal basis for much of the processing that supports personalised ads. This apparent hierarchy of legal bases is at odds with case law from the Court of Justice of the EU ("CJEU") and prior guidance from the EDPB and the Article 29 Working Party, all of which have emphasised that determining the appropriate legal basis for processing requires a fact-specific analysis that can only can be carried out on a case-by-case basis. If the final Guidelines are understood as setting forth a hierarchy of legal bases with consent at the top, many companies may believe that they must make significant investments to develop new approaches for obtaining users' consent. What's more, the EDPB's broad understanding of joint controllership may result in unwarranted new burdens, given that joint control is likely to be understood as applying to processing activities where one party does not have much

(if any) influence over the purposes and means of the processing. The brunt of these issues will fall hardest on SMEs, who often lack resources to address shifting legal guidance.

4. The Guidelines May Also Negatively Affect Users' Online Experiences. The Guidelines' prioritisation of consent could also lead to increasing burdens on users. Already faced with constant requests to provide consent across the Internet (largely because of now-ubiquitous cookie banners), users are likely to be faced with even more decisions about whether to allow this or that type of processing, whether to accept more non-personalised ads instead of personalised ads, or whether to pay for a service instead of seeing personalised ads. Continuously asking for user consent in an untimely and repetitive manner will make it harder to use online services and will diminish the quality of user consent. More non-personalised ads and paid services will also degrade the quality of people's online experience.

In light of these issues with the Guidelines, we urge the EDPB to take the necessary time to organise a sectoral analysis that will help the Guidelines reconcile all fundamental rights involved, in particular the right to protection of personal data, the freedom to conduct a business, and the freedom of speech.

We believe that it is possible and appropriate to interpret the GDPR in a way that protects individuals' data protection rights *and* preserves their ability to access a range of free services online. **With this in mind, we urge the EDPB to take the following steps:**

1. We propose that the Guidelines recognise that each data controller should take **a risk-based, fact-intensive approach to determining the appropriate legal basis for processing data for personalised ads**. This approach should take into account, among other things, the nature of the data involved in the processing, the user's ability to control the processing or the underlying data collection, the genuine benefits to the user, the user's relationship with the entity processing the data, and the safeguards that will be applied in the course of the processing. We believe this approach is more in line with the GDPR's text and previous EDPB guidance than the categorical approach suggested in some parts of the Guidelines. We also believe this proposed approach is reasonable and proportionate in that it provides for robust protection against the risks to fundamental rights and freedoms while preserving the foundation of the Internet as we know it today.

2. We propose that the Guidelines provide **additional clarity on the allocation of roles and responsibilities of the different players in the advertising ecosystem**. In several places, the current version of the Guidelines appears to treat personalised advertising – which involves a number of separate and independent decisions about purposes and means of processing – as an undifferentiated collection of activities for which all actors are jointly responsible. We would suggest that additional guidance about the responsibilities of players in different scenarios that takes into account the processing activities that these players influence would help avoid confusion and disruption in the ecosystem. Given the range of relationships implicated by these parts of the Guidelines, we would again emphasise the need for a broad sectoral analysis.

Lastly, given the breadth and potential impact of new guidance in this area, we would ask that, at a minimum, the EDPB (1) recognise that the Guidelines will require significant work to implement and (2) recommend to its members to delay enforcement for at least six months after the finalisation of the Guidelines, so as to provide stakeholders a sufficient period to implement the changes recommended by the Guidelines.[4]

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Comments

This consultation presents a timely opportunity to discuss issues that go to the core of the Internet – most notably, the critical question of how we can create a sustainable online advertising ecosystem that respects the fundamental rights and freedoms of people and businesses.[5] The magnitude of these issues and the number of stakeholders likely to be affected by the EDPB's guidance necessitate a far-reaching review of the data practices and relationships that make up the ecosystem. Only a comprehensive sectoral analysis will ensure that the GDPR is implemented in a way that achieves a proportionate balance among the rights and interests of all.

Our comments discuss the key players whose practices may be implicated by the Guidelines and the Guidelines' potential impact on these players. We conclude by proposing a path forward that, we believe, will mitigate this impact.

1. The Guidelines Will Affect Much of the Ad-Supported Internet

The Guidelines purport to focus on the targeting of "social media users", a term that, on its face, may suggest that the Guidelines have a narrow scope. In reality, the Guidelines are likely to affect a range of entities that make up the online advertising ecosystem: from social media providers and their advertisers to the multitude of publishers, advertisers, and AdTech providers that make up the broader ad-supported Internet. Three aspects of the Guidelines demonstrate their broad scope:

First, the Guidelines recognize that "social media" is a space that encompasses not only Facebook and other companies often referred to as social media providers (e.g., Twitter, Snap, and TikTok), but also a wide range of other services that enable people to build communities and share information online. These include "dating platforms […]; platforms where registered users can upload their own videos, comment on or link to other's videos; or computer games, where registered users may play together in groups, exchange information or share their experiences and successes within the game."[6]

Second, the Guidelines will significantly affect the practices of millions of advertisers that rely on social media providers to reach people with relevant ads. Facebook alone now counts more than nine million active advertisers globally, the vast majority of which are SMEs, non-profits, and other non-commercial organisations.[7]

Third, although the ostensible scope of the Guidelines extends only to social media providers, the reasoning and examples used therein can readily be used as a basis for extending restrictions to *personalised advertising in general*. The Guidelines themselves acknowledge this, stating that while "the focus of the guidelines is on the distribution of roles and data protection obligations of social media

providers and targeters […] analogous considerations may apply […] to the other actors involved in the online advertising ecosystem."[8]

But the broad scope of Guidelines is particularly clear in the examples they provide of "targeting."[a] We note that the first example involves the use of basic, user-provided information (age, gender, and relationship status) to reach people with shoe ads on the same website where the information was collected.[9] The use of such first-party demographic data for ad personalisation is a common practice across the Internet, and is certainly not limited to social media providers. The same is true for list-based marketing (described in Examples 3 and 4);[10] geo-targeting (Example 5);[11] and pixel-based targeting (Example 6).[12] Indeed, most of the Guidelines' examples describe practices that are common among many participants in the online advertising ecosystem, not just social media providers and their advertisers.

Considering their broad scope, the Guidelines are likely to be viewed as new rules of the road for the ad-supported Internet. As we discuss below, the impact of these rules may be considerable.

2. Personalised Advertising Keeps the Internet Open and Supports Small Businesses

To assess this potential impact, it helps to understand the value of personalised advertising not only on social media services but also more generally in the EU.

A. Personalised Ads on Facebook Help Small Businesses and Other Organisations to Grow and Thrive

Although the Guidelines extensively document the putative risks arising from personalised advertising, they say very little about its well-documented benefits.[13] A comprehensive sectoral analysis involving all stakeholders potentially affected would help the EDPB create a framework that both addresses the risks and helps to preserve these benefits, which are substantial for a wide range of businesses and other organisations.

1) SMEs

In late 2019, Copenhagen Economics surveyed businesses across fifteen European markets who said that using Facebook apps and technologies helped them generate sales corresponding to an estimated EUR 208 billion in economic activity over the prior year. Using standard economic modelling techniques, this translates into an estimated 3.1 million jobs.[14] Sixty-nine per cent of SMEs found lower costs of marketing to be the main benefit of using digital tools and social media for business purposes.[15] The same report noted that, in 2017, nearly half of all EU enterprises used social media for advertising purposes.[16]

Personalised ads are vital for SMEs because they level the playing field with large companies by lowering marketing costs. For example, 64% of surveyed French small and medium businesses agree that promoting a business on television, radio, or print is simply too expensive to consider. Seventy-

[a] Although there is some ambiguity in the Guidelines' definition and examples of "targeting" (a term we urge the EDPB to clarify in the next version), our understanding is that this practice is intended to encompass the use of personal data to deliver personalised advertising.

eight per cent of these businesses report spending at least some of their marketing budget on online tools and apps.[17]

It is therefore not surprising that small advertisers rely disproportionately on social media. In Q1 2019, Facebook announced that its top 100 advertisers represented less than 20% of the company's total ad revenue.[18]

2) NGOs

NGOs running public awareness campaigns or requests for contributions are able to reach their audience by using personalised ads on social media.[19] In 2019, the UK branch of the World Wide Fund for Nature ("WWF") used video ads on Facebook to share its case for fighting climate change with a wider audience. WWF, in partnership with its ad agency, developed an audience affinity framework to create "frozen," "cold," "warm" and "hot" audience segments, according to people's level of commitment to fighting climate change. They tailored their messaging to the different segments. The campaign reached 7.6 million people, driving mass awareness within "frozen" audience segments and ultimately reaching new advocates to combat the climate crisis.[20] The same year, Doctors Without Borders (Médecins Sans Frontières) combined Facebook ads and a Page fundraiser to drive $110,000 in donations.[21]

3) International Organisations

International organisations also use personalised ads on social media to reach their audience. For example, UNICEF used Facebook ads to promote a video to drive awareness that sixteen million babies were born into conflict zones in 2015. The video was targeted to a global millennial audience, and the targeting was refined over time. UNICEF found that the video resonated best with people in Vietnam, Mexico, United States, Philippines, and Turkey. UNICEF's aim to reach ten million millennials around the world was significantly exceeded.[22]

B. The Value of the Advertising Ecosystem to the EU Economy

Online advertising represents a significant, and growing, component of the European economy. In 2019 digital advertising grew 12.3% to €64.8b. 2019 was not an anomalous year – the digital advertising market has more than doubled since 2013, with an average of €4bn added to the market every year since 2006.[23]

This makes it all the more important for the Guidelines to consider the positive role that personalised ads have to play, not only for social media, but for the Internet in general.

3. Limiting the Available Legal Bases for Personalised Ads Would Harm the Advertising Ecosystem

Given their broad potential impact, we are concerned that, in some respects, the Guidelines appear to suggest new rules of the road, particularly on the issue of appropriate legal bases and joint controllership.

A. The Guidelines Take an Overly Narrow View of the Appropriate Legal Bases for Processing

In principle, the Guidelines recognise that the GDPR allows companies to rely on any of seven legal bases, and that none is superior to the others.[24] In practice, however, the Guidelines take a narrow view of the appropriate legal bases for processing personal data for personalised advertising, categorically excluding contractual necessity and appearing to prejudge the outcome of the legitimate interests balancing test based on generalised (rather than fact-specific) considerations. In addition to being inconsistent with the text of the GDPR, relevant case law from the CJEU, and past guidance from the EDPB and the Article 29 Working Party, this narrow interpretation of the GDPR would require burdensome changes to the practices of many actors in the online advertising ecosystem, as well as unexpected negative consequences for users.

As explained below, we believe that contractual necessity and legitimate interests – where relied on appropriately based on the facts of the specific processing – have important roles to play in connection with personalised advertising in general, and in the context of social media in particular. Preserving those roles will help protect users' data protection rights while sustaining the ad-supported business model that keeps the Internet open and accessible to all.[b]

1. Contractual Necessity

The Guidelines exclude contractual necessity as a legal basis for personalised ads.[25] Such exclusion – without any acknowledgement of the interests at stake – is inconsistent with the GDPR, with relevant case law from the CJEU, and with the guidelines on contractual necessity that the EDPB issued late last year. These precedents all make clear that determining whether contractual necessity is an appropriate legal basis requires a case-by-case, fact-based assessment. The Guidelines' categorical approach is at odds with the legal framework.

As the CJEU has explained, the EU legislature identified a limited number of grounds for justifying lawful processing of personal data – a list that can neither be added to nor subtracted from.[26] Moreover, the EDPB's own "Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of provision of online services to data subjects" emphasise that a "fact-based assessment of the processing" is appropriate when assessing whether contractual necessity is an appropriate legal

[b] We note our appreciation of the EDPB's perspective on special categories of data, particularly its guidance on when an inference may constitute a special category of data. There is an important nuance in Guidelines' discussion of Example 13 at paragraph 118. This example involves the creation of a targeting category called "interested in left wing liberal politics," and the Guidelines conclude that the creation of the category amounts to the processing of a special category of data. Importantly, this conclusion is based on the fact that, before placing the user in this interest category, the social media provider has inferred that the user is indeed a supporter of left-wing liberal politics. The EDPB explains (correctly, in our view) that the "interest" label is irrelevant because "the user is placed in the targeting category based on inferred political interests." This narrow view of special category data is appropriate, given previous guidance that these data categories are to be construed narrowly. As the Article 29 Working Party and the EDPB have recognised in the "Advice paper on special categories of data" and the "Guidelines 2/2019 on processing of personal data through video devices," respectively, Article 9 of the GDPR is not intended to restrict any and all processing that touches on the listed categories, but rather to stop potentially harmful categorisation of data subjects that could lead to discrimination. Thus, the narrow view espoused in the Guidelines strikes us as the correct one.

basis.[27] The Guidelines 2/2019 also state that this assessment should include questions about the "mutual perspectives and expectations of the parties to the contract" and whether "an ordinary user of the service [would] reasonably expect that, considering the nature of the service, the envisaged processing will take place in order to perform the contract to which they are a party."[28]

Questions like these require a thorough assessment of the context in which the specific processing occurs, one that takes into account facts such as the nature of the service being offered, the type and sensitivity of the data being processed, the nature of the relationship between the data subject and the controller, the transparency around the data processing, as well as any safeguards that have been implemented.

The intrusiveness of the processing should also form part of the assessment about whether contractual necessity is an appropriate legal basis for a given processing, and we would submit that not all processing of personal data for advertising is equally intrusive. In particular, as the Guidelines themselves recognise in the analysis of Example 1, the processing of first-party, non-sensitive data raises far fewer data protection concerns than other types of data, particularly if the processing is subject to additional safeguards that provide transparency and control to the user.[c]

We recognise that the EDPB guidelines on contractual necessity state that contractual necessity may not be a suitable legal ground for online behavioural advertising – a practice, as the Guidelines note, that involves tracking and profiling users across websites and apps owned by other companies.[29] But those Guidelines appropriately leave open the possibility that contractual necessity may be an appropriate legal basis for personalised advertising that involves less sensitive kinds of personal data. We believe that the EDPB should, at a minimum, recognise that contractual necessity may be an appropriate legal basis for processing first-party, non-sensitive data (e.g., basic demographic data such as age, gender, and language as well as user-provided interests) for advertising.

In addition, it is unclear why other legal bases such as legitimate interests would be more appropriate than contractual necessity in this context. In fact, contractual necessity may provide a more appropriate basis for the processing of first-party, non-sensitive data, given that the service provider and user have a commercial relationship and have entered into a contract. The user has the opportunity to consider and understand the service described by the contract and to choose whether or not to enter into it – and to choose which data to share with the service provider.

We believe it is important that the final version of the Guidelines clarify that determining whether contractual necessity is an appropriate legal basis requires a fact-intensive inquiry and should be assessed by a data controller on a case-by-case basis. We would also welcome further guidance about the circumstances in which this legal basis may be available. As noted above, we believe the Guidelines should recognise that contractual necessity may be appropriate when the data involved is not sensitive and the user has a first-party relationship with the service provider.

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[c] We note that the EDPB guidelines on contractual necessity state that contractual necessity may not be a suitable legal ground for online behavioral advertising -- a practice, as the Guidelines note, that involves tracking and profiling users. But these guidelines appropriately do not foreclose the processing of personal data for other types of online advertising, including advertising in the first-party context that only involves non-sensitive data. See Guidelines 2/2019, paras 51 and ff.

We believe such guidance is particularly important because of the relationship between contractual necessity and the freedom to conduct a business under Article 16 of the Charter. This freedom implies the right to freely choose the parties to a contract and freely set the conditions of the product on offer – and therefore also to conduct the necessary data processing. The Guidelines' interference with this fundamental right seems to go beyond what is necessary under Recital 4 of GDPR and Article 52(1) of the Charter to properly protect users' data whilst preserving service providers' and advertisers' interests in efficiently making personalised ads available online.

2. Legitimate Interests

Although the Guidelines do not categorically exclude legitimate interests as a legal ground, we are concerned that the analysis essentially prejudges the legitimate interests balancing test. As with contractual necessity, assessing whether it is appropriate to rely on legitimate interests requires a fact-intensive case-by-case analysis.[30] The Article 29 Working Party highlighted in its guidance on legitimate interests "the special role that safeguards may play in reducing the undue impact on the data subjects, and thereby changing the balance of rights and interests to the extent that the data controller's legitimate interests will not be overridden."[31] The EDPB recently provided similar guidance in the context of transfers of personal data that rely on legitimate interests.[32]

Given the vast improvements social media providers and others have made in this space over the past several years (which we discuss in more detail below), it is important that the Guidelines better recognise the role safeguards, such as transparency and privacy-enhancing technologies, may play in the legitimate interests balancing test.

At Facebook, we have implemented significant safeguards over the last several years. For example:

- Our "Why Am I Seeing This Ad?" tool enables people to understand the elements of an advertiser's personalisation they may have matched and to control how this data is used in future.[33] From any ad on Facebook, users can click on the three dots in the upper right-hand corner to access this tool, which has been used by tens of millions of Europeans to date. From "Why Am I Seeing This Ad?", people can easily access Ad Preferences, which was completely redesigned this summer in response to the feedback we have received from people, civil society and regulators, and is rolling out gradually globally. This new version of "Ad Preferences" enhances users' ability to control how their personal data is used for ads.
- Last year, we introduced an unprecedented tool called "Off-Facebook Activity", which shows Facebook users a summary of the data other companies have sent to Facebook and allows them to disconnect that data from their accounts.[34]
- In 2019, Facebook introduced a rigorous authorisation process for every account in the EU seeking to run ads about social issues, elections, or politics on Facebook. Once an advertiser is permitted to run these ads, we archive each political ad in our publicly accessible Ad Library. The Ad Library includes information on who is running the ad, spend, and demographics of the audience who saw the ad. This transparency far beyond the audience that saw the ad supports public discourse of political messages used by advertisers on Facebook.[35]

These additional safeguards have significantly improved the transparency we provide around our processing of personal data for advertising, and the controls people have over that processing. We recognise, however, that there are limits to what transparency and control can accomplish on their own.

As more of our daily transactions move online (a process that has been accelerated by the COVID-19 pandemic), we can expect notices and choice events only to increase in number. But, as explained in more detail below, asking people to constantly read notices and make decisions about their personal data may actually *undermine* their understanding of the ways their data is used and make it less likely that they will exercise control. Therefore, while transparency and control will always need to play a central role in the way companies process personal data, we believe the time has come for the industry to develop new safeguards for personal data that do not risk overburdening people with notice and choice experiences. The legal framework governing the processing of personal data for advertising should be able to accommodate technological advances in safeguards, which is why it is important that the legitimate interests balancing test only be conducted on a case-by-case basis that accounts for the context of the processing.

We believe privacy enhancing technologies ("PETs") will be the next evolution of the industry's efforts to provide value to people and businesses in a way that respects people's right to data protection. The value of these technologies is that they provide default protections for people's data – protections that do not rely on a person constantly having to make decisions. PETs will allow people and businesses to continue to reap the benefits of personalised advertising while enhancing the privacy of the ecosystem.

We are exploring the development of technologies to work towards a future where Facebook does not receive people's identifiable data from businesses and is unable to discern anything about an individual user from the offsite data we receive. The PETs we and others are researching include:

- (1) **Secure Multi-Party Computation**, which leverages cryptographic encryption to help multiple parties create a combined statistic without sharing underlying data;
- (2) **Federated Learning**, which enables personalisation without individual data ever leaving the device; and
- (3) **Differential Privacy**, which helps companies collect and use data with statistical guarantees against the risk of re-identification of activity that occurs off of Facebook.

As Facebook and others in the industry explore these technologies, we look forward to ongoing engagement with policymakers, regulators, academics, and other stakeholders throughout the EU. But categorical treatment of legal bases in the Guidelines – which does not sufficiently account for the role safeguards play – may disincentivise adoption of these technologies. We therefore urge the EDPB to clarify its guidance in this respect.

Finally, we are concerned about the Guidelines' unclear reference to a "prior right to object", in that this language could be interpreted as requiring that this right be provided before any processing begins if the controller is to rely on legitimate interests. Construing the right in this way would make it largely indistinguishable from consent, an entirely separate legal basis. In other words, requiring that the right to object be offered prior to processing nearly eliminates legitimate interests as a legal basis, subsuming it within consent, and removing the opportunity for the data controller to balance an objection with its legitimate interest in conducting the processing as provided for under Article 21(1) of GDPR. This was not the intent of the EU legislature that adopted the GDPR, which set out legitimate interests as a discrete legal basis. We would ask that the EDPB clarify this aspect of its guidance.

B. The Guidelines Take an Overly Broad View of Joint Controllership

Although we welcome the EDPB's efforts to clarify the roles and responsibilities among different actors in the advertising ecosystem, we believe the Guidelines' view of joint controllership is so broad as to raise more questions than it answers. Indeed, the Guidelines seem to suggest that ad platforms and advertisers are jointly responsible for virtually all processing that is geared toward displaying an ad to a particular set of users. This might mean, for example, that platforms and advertisers could each be jointly responsible for such diverse processing activities as selecting the audience parameters for an ad, sharing data about users the advertiser would like to reach, showing the ad, and reporting aggregate results about the ad's performance.

The Guidelines rightly recognise that joint control only exists where two or more controllers have effectively co-determined the purposes and means of the processing – and that there are activities that are solely carried out by the social media provider or other ad platform provider. However, the Guidelines appear to extend the concept of joint controllership to areas where the advertiser (or the platform) clearly is not involved.[36] These include the collection of observed user data and the use of data to create targeting categories by the platform. In addition, the fact that an advertiser makes use of a platform's systems is not sufficient to implicate it in these processing activities, which are generally undertaken solely by the platform, and, in many cases, before an advertiser becomes a client of the platform.[37] Similarly, while advertisers often have control over targeting criteria that define who is eligible to see their ads, they generally do not have control over the subsequent processes that determine which of the many eligible ads in the platform's system is delivered to a specific individual.

The CJEU's *Fashion ID* and *Wirtschaftsakademie* cases support a more nuanced view of controllership. In these judgments, the Court held that an entity "cannot be considered to be a controller [...] in the context of operations that precede or are subsequent in the overall chain of processing for which that person does not determine either the purposes or the means"[38] and that it was "impossible that [a third-party company sending data to Facebook Ireland] determines the purposes and means of subsequent operations involving the processing of personal data carried out by Facebook Ireland after their transmission to the latter, meaning that [the third party] cannot be considered to be a controller in respect of those operations."[39] [d] The court therefore held that joint controllership only extended to the collection and transmission of information to Facebook; beyond that point, Facebook was the sole controller.[40]

The Guidelines appear to disregard this case law, however, in that they fail to recognize that a controller's obligation only extends to the processing activities in which it is actively involved. The result is that the Guidelines leave open more questions about joint controllership than they answer, a consequence (as discussed below) that may disrupt many of the relationships that underpin the advertising ecosystem.

[d] With respect to Facebook Ireland specifically, we would note that, following the Fashion ID case, we have already put in place a joint controller agreement covering the collection and transmission of the actions people take while using an app.

C. What These New Rules Will Mean for The Advertising Ecosystem

For all of these reasons, the Guidelines, if adopted in their current form, may be understood to require significant changes to be implemented across the ad-supported Internet to the detriment of many stakeholders, and ultimately of users. In particular, the Guidelines' narrow view of the legal bases available for processing may cause a wide range of businesses to make significant investments to develop new consent experiences – experiences that may unduly discourage users from engaging with the business in the first place. The Guidelines' broad view of joint controllership will introduce significant uncertainty as to the allocation of responsibilities between ad platforms and advertisers, disrupting business relationships that are fundamental to the health of the Internet.

Where advertisers are unable to make the substantial investments needed to operate under this new environment, they may have to turn to non-personalised ads – which are far less efficient than personalised ads, meaning that advertisers and platforms will inevitably need to run more ads to achieve the same results. This inefficiency is bound to lead some publishers to abandon the ad-supported business model altogether and to adopt a paid model, but not all businesses will be able to sustain this model. In the end, the increasing burdens of the Guidelines' new rules will fall disproportionately on SMEs, who rely on personalised ads to reach people efficiently and, in the case of publishers (such as local news outlets), to support their apps and websites.

4. The Guidelines May Also Negatively Affect Users' Online Experiences

The Guidelines will likely lead to increasing burdens on users as well. Already faced with near constant requests to provide consent across the Internet (largely because of ubiquitous cookie banners), users will be required to make even more decisions about whether to allow this or that type of processing, whether to accept more non-personalised ads instead of personalised ads, or whether to pay for a service instead of seeing personalised ads.

We fear that continuously asking for user consent in an untimely and repetitive manner will make it harder to use online services and will diminish the quality of the consent they obtain. As the EDPB recognised in its 2020 guidelines on consent, "many services need personal data to function, hence data subjects receive multiple consent requests that need answers through clicks and swipes every day. This may result in a certain degree of click fatigue: when encountered too many times, the actual warning effect of consent mechanisms is diminishing."[41]

In addition to the potential erosion of meaningful consent, the Guidelines' tight restrictions around processing data for ads could lead to a less open Internet, an Internet in which people are increasingly asked to pay for content that previously was free. And those services that are able to maintain an ad-supported business model are likely to need to serve a higher number of less relevant ads in order to survive, resulting in a degraded experience for users. We believe that high-quality, free online services are good for the world because, among other things, they are more inclusive and bring many benefits to underserved communities. At a time when we are increasingly interacting with our communities online, we believe it is particularly important to preserve the open character of the Internet that so many rely on and enjoy.

5. A Proposed Path Forward

We believe it is possible to preserve the benefits of the open, ad-supported Internet while mitigating the risks involved in processing people's personal data for personalised ads, but doing so requires an approach that reconciles the fundamental rights of people and of the entities that make up the advertising ecosystem.[42] To effect this reconciliation, we propose that the EDPB conduct a sectoral analysis that is commensurate with the broad scope of these Guidelines – a sectoral analysis that accounts for the Guidelines' impact on the full range of players whose services underlie the ad-supported Internet. Rushing to adopt the Guidelines based on a partial analysis of the online ecosystem will not allow the EDPB to reconcile the fundamental right to data protection with the freedom to conduct a business and freedom of speech. We are concerned that positioning these Guidelines as solely focused on social media may have deterred broad participation in the consultation. The EDPB should give the businesses and other organisations the opportunity to be heard before deciding on rules that could fundamentally alter the way the ad-supported Internet works today.

For Facebook's part, we would propose two updates to the Guidelines that would go a long way toward mitigating their negative impact:

First, while the EDPB should of course provide what it considers to be useful general guidance, **the Guidelines must also make clear that the ability to rely on any legal basis in any given case will depend on a risk-based, fact-intensive approach**. This approach should take into account, among other things, the nature of the data involved in the processing, the user's ability to control that data, the user's relationship with the entity processing the data, and the safeguards that will be applied in the course of the processing. We believe the Guidelines should recognise, in particular, that processing first-party, non-sensitive data for advertising poses few risks to users' fundamental rights and freedoms, and that contractual necessity may be an appropriate legal basis for this processing. We believe this approach is more in line with the GDPR's text and spirit, and with previous guidance from the EDPB and WP29 on the legal bases available for processing. We also believe the approach will provide robust protection against the risks to fundamental rights and freedoms while preserving the foundation of the Internet as we know it today.

Second, the Guidelines should provide **additional clarity on the allocation of roles and responsibilities of the different players in the advertising ecosystem**. In several places, the current version of the Guidelines appears to treat personalised advertising -- which, in reality, involves a number of separate and independent decisions about purposes and means of processing – as an undifferentiated collection of activities for which all actors are jointly responsible. We would submit that further clarity around the precise responsibilities of individual players in different scenarios, depending on the processing activities that are actually influenced by each of them in line with the criteria established by the CJEU, would help avoid confusion and disruption in the ecosystem. Given the range of relationships implicated by these Guidelines, we would again emphasise the need for a broad sectoral analysis.

While we hope that the EDPB will consider these recommendations in drafting its final guidance, we would ask that, at a minimum, the EDPB (1) recognise that the Guidelines will require significant work to implement and (2) recommend to its members to delay enforcement for at least six months after the finalisation of the Guidelines, so as to provide stakeholders a sufficient period to implement the changes recommended by the Guidelines.

Again, we appreciate the opportunity to participate in this consultation, and we commend the EDPB for its desire to provide guidance in such crucial matters. And we would welcome the opportunity to discuss these comments with you in greater detail.

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[1] Para. 28 of the Guidelines.
[2] Para. 20 of the Guidelines.
[3] Introduction to para. 43 of the Guidelines (p. 14).
[4] CNIL, Decision 2020-091, 17 September 2020, Guidelines on cookies and other trackers, available here. The CNIL gave companies 6 months to implement these guidelines.
[5] Recital 4 GDPR. See for example Judgment of 22 January 2013, *Sky Österreich*, C-283/11, ECLI:C:2013:28, para. 42.
[6] Footnote 2 of the Guidelines.
[7] Facebook, Second Quarter 2020 Results Conference Call, 30 July 2020, available here.
[8] Para. 28 of the Guidelines. See also paras. 27 and 29.
[9] P. 13 of the Guidelines.
[10] P. 17 and 19 of the Guidelines, respectively.
[11] P. 19 of the Guidelines.
[12] P. 19 of the Guidelines.
[13] See paras 8 to 14 of the Guidelines.
[14] Copenhagen Economics, Empowering the European Business Ecosystem – An Impact Study of Business Using Facebook Apps and Technologies, pp. 13-14 (The Copenhagen Economics' Report). The report is available here.
[15] The Copenhagen Economics' Report, p. 17.
[16] The Copenhagen Economics' Report, p. 11.
[17] Ipsos Public Affairs, Small Medium Size Business Survey, 2019.
[18] Facebook, First Quarter 2019 Results Conference Call, 24 April 2019, available here, at. p. 5.
[19] https://socialgood.facebook.com/learning-support/ads/.
[20] https://www.facebook.com/business/success/world-wide-fund-for-nature-uk.
[21] https://socialgood.facebook.com/success-stories/doctors-without-borders-combines-facebook-ads-and-page-fundraiser-to-drive-110000-in-donations-on-givingtuesday/.
[22] https://socialgood.facebook.com/success-stories/unicef-engages-supporters-with-video/.
[23] iab Europe, adex Benchmark 2019, p.6. The report is available here.
[24] Introduction to para. 43 of the Guidelines (p. 14).
[25] Para. 53 of the Guidelines.
[26] Judgment of 11 December 2019, *Asociaţia de Proprietari bloc M5A-ScaraA*, C-708/18, EU:C:2019:1064, para. 37; Judgment of 19 October 2016, *Breyer*, C-582/14, EU:C:2016:779, para. 57; and Judgment of 24 November 2011, *ASNEF and FECEMD*, C-468/10 and C-469/10, EU:C:2011:777, paras 30 and 32.
[27] Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects (Guidelines 2/2019), 8 October 2019, para. 25.
[28] Guidelines 2/2019, para. 33.
[29] Paras 50, 71, and 80 of the Guidelines. See also Article 29 Data Protection Working Party, *Guidelines on Automated Individual decision-making and Profiling for the purposes of Regulation 2016/679*, adopted on 3 October 2017, as last revised and adopted on 6 February 2018, WP251rev.01, pp. 14-15, available at: https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=612053.
[30] See Judgment of 11 December 2019, *Asociaţia de Proprietari bloc M5A-ScaraA*, C-708/18, EU:C:2019:1064, para. 53; Judgment of 19 October 2016, *Breyer*, C-582/14, EU:C:2016:779, para. 62; and Judgment of 24 November 2011, *ASNEF and FECEMD*, C-468/10 and C-469/10, EU:C:2011:777, paras 47 and 48.
[31] Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, WP 217, 9 April 2014, p. 31.
[32] Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679, 25 May 2018, p. 16.
[33] https://www.facebook.com/facebookapp/videos/1292820370894105/.

[34] https://www.facebook.com/help/2207256696182627.
[35]https://www.facebook.com/ads/library/report/?country=US&campaign_tracker_time_preset=last_7_days&source=archive-landing-page&campaign_tracker_active_toggle=bar_graph.
[36] Paras 38-42 of the Guidelines.
[37] Paras 75-76 of the Guidelines.
[38] Judgment of 29 July 2019, *Fashion ID*, C-40/17, EU:C:2019:629, para. 74; See also Judgment of 5 June 2018, *Wirtschaftsakademie*, C-210/16, EU:C:2018:388, paras 16-17.
[39] Judgment of 29 July 2019, *Fashion ID*, C-40/17, EU:C:2019:629, para. 76.
[40] Judgment of 29 July 2019, *Fashion ID*, C-40/17, EU:C:2019:629, para. 85.
[41] Guidelines 05/2020 on consent under Regulation 2016/679, 4 May 2020, para. 87; B. Custers, F. Dechesne, W. Pieters, B. Schermer and S. van der Hof, "Consent and Privacy", eLaw Working Paper Series,Universiteit Leiden, 24 April 2019, available at: https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-metajuridica/elaw-working-paper-series/wps2018.008.custers.et.al.consent_privacypdf.pdf. See p. 256: " […] on the internet people are confronted with so many consent requests that they increasingly become disengaged in the consent process. When consent mechanisms are not effective or meaningful, their value may be disputed."
[42] Recital 4 GDPR. See for example Judgment of 22 January 2013, *Sky Österreich*, C-283/11, ECLI:C:2013:28, para. 42.