ANNEX I: From pledging to "Best practice principles" in recording consumers' choices regarding trackers used for advertising purposes.

The draft pledging principles, updated after taking into account the EDPB opinion, have a clear value to ensure a better presentation of trackers to consumers, to offer them more options and to reduce the need to repeat their choices. They can therefore be considered as best practice principles, even if only a subset is used.

Best practice principles for informing consumers on the business models of various digital service providers and for allowing them to express their privacy preferences.

NB: The below best practice principles refer to cookies and other similar technologies capable of tracking users' online navigation. The word "cookies" is therefore used as a generic word for all such trackers. It is recalled that applying the below principles, does not remove the need for a case-by-case assessment by the organisations whether access or storage of information in terminal equipment and subsequent processing of such information is compliant with the ePrivacy Directive, as implemented in national laws, and with the GDPR, which may be supervised and enforced by the relevant competent authorities.

A. The consent request will not contain information about strictly necessary cookies nor the reference to collection of data based on legitimate interest.

As strictly necessary cookies (often referred to as "essential cookies") are exempt from consent under Article 5(3) of the ePrivacy Directive, not showing information about them in the context of the request for consent will reduce the information that users need to read and understand.

In addition, legitimate interest is not a valid legal basis under the ePrivacy Directive for access or storage of information so a reference to this legal basis should not be included in the cookie consent request².

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

¹ Even if the access or storage of information does not require consent under Article 5(3) of the ePrivacy Directive, when personal data are processed users have to be provided with information based on Articles 12-14 of the GDPR. Such information could be provided via a link on the first layer of the cookie banner or on the second layer of the cookie banner.

² In principle, subsequent processing of personal data after access or storage of data in terminal equipment requires consent under Article 6(1)(a) of the GDPR.

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From the moment a business obtains revenues either i) by exposing consumers to tracking-based advertising by collecting and using information about consumers' online behaviour through trackers or ii) by selling to partners the right to put trackers on consumer's devices through their website, or iii) by using other types of advertising such as for instance contextual advertising, the consumers need to be informed of the business model in question at least at the same time as when cookie consent is required³. Asking consumers to read complex cookie banners and only after they did not consent confronting them with a "pay or leave" ultimatum, could be considered manipulative.

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

Cookies may be used to implement a business model and therefore this concomitance should be easily described, understood and implemented in one joint panel regrouping the agreements under consumer law and consent under the national laws implementing the e-Privacy Directive and the GDPR. In this panel, the business model options (i.e., 1) accepting advertising based on tracking, or 2) accepting other types of advertising⁴ or 3) agreeing to pay a fee) will be presented together with the consequences in terms of the purpose of trackers, and this in plain and simple language.

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

In view of the limited number of consumers who accept to pay for online content notably as consumers may navigate many different websites daily, asking consumers to pay does not appear a credible alternative to tracking their online behaviour for advertising purposes. When assessing whether consent for such tracking is valid, it may among others be relevant whether in addition to a second paid service option, another third option with a less privacy intrusive form of advertising, such as for instance contextual advertising, is provided to users.

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

When users agree to receive advertising, it should be made clear to them at the same time how this is carried out and especially if cookies, including if relevant third-party cookies, are placed on their device. It should not be necessary for them to check every single tracker or advertising partner on the first layer of the banner. The user should be provided with the possibility to make a more granular choice per controller and purpose, for example on the second layer of the banner. When users are asked for consent, they should be presented with a list of actors that place trackers with whom data is actually shared (rather than only potentially). It may indeed be difficult to ensure that the consent is informed and unambiguous in case the number of actors is very high. This principle should be without prejudice to stricter rules in other sectoral legislation, such as the DMA.

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³ It is clear that the information about the business model may not substitute information obligations regarding access or storage of information in the terminal equipment and regarding processing of personal data.

⁴ Such as for instance contextual advertising.

Consumers should have the possibility to "reject" all cookies that are not strictly necessary on the first layer of the banner.

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

One reason of the cookie fatigue is that all types of cookies are very often described in a lengthy and rather technical fashion that render an informed choice complex and cumbersome and de facto ineffective. Furthermore, from the moment the business model is made clear, and the consumer consented to the use of cookies for this specific advertising model, the need of businesses to measure the performance of their advertising services or to prevent click fraud can be deemed inextricably linked to the business model of advertising. The purpose of the processing relating to the advertising model should be well described and users should be informed about the technical processing operations, for example on the second layer of the cookie banner. Other cookies not strictly necessary for the delivery of the specific advertising service should still require a separate consent.

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

One major reason of the cookie fatigue especially felt by the persons most interested in their privacy is that negative choices are not recorded and need to be repeated each time they visit a website or even every page of a website. Recording such choice is indispensable for an efficient management of a website and for respecting consumers' choices. The record of the choice should not contain a unique identifier but should rather contain generic information which is common to all users who have refused consent. In case the cookies recording the refusal have been deleted by the user or due to a change of settings within the one-year period, the consumer can be asked for consent again.

Furthermore, to reduce the cookie fatigue, a reasonable period e.g. a year should be adopted before asking again for consumers' consent.

H. Explore solutions/applications providing consumers with the possibility to record their cookie preferences in advance while providing the necessary granularity and specificity for the valid consent.

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

Businesses are encouraged to explore and develop technical solution or applications that offer the granularity, specificity and information to ensure that consent can be validly given, for example in the form of real-life tests or other exploratory methods.