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On 6th of January 2023, Deutsche Telekom AG, Orange SA, Telefónica S.A. and Vodafone Group have notified to the European Commission their intention to create a new-joint venture.

As part of their investigation, the European Commission (DG Competition) are currently in the process of gathering the views of market participants as well as other interested authorities.

This note should not be seen as a “formal response” of the CNIL board members (it is not intended to reflect the position of the board) but should rather contribute to an “an exchange of views” between CNIL departments and DG COMP. The purpose of the note is to feed into the European Commission analysis of the proposed transaction from a data protection angle.

Furthermore, **the analysis below is based on our understanding of the functioning of the platform and constitutes preliminary comments as it is still being discussed with other DPAs.**

1 General observations

As a preliminary remark, the situation should be assessed taken into account the specific position of telco operator which process a considerable amount of data about its subscribers.

As regards the impact of the proposed operation on the digital advertising market, we observe that **TrustPID could be described in the context of the current digital advertising value chain as an additional retargeting technique, more than an alternative one.**

The proposal is not meant to circumvent in any case the obligation to gather consent of the user and will be available to the players alongside classical techniques based on third party cookies, because its scope is reduced to mobile devices.

Moreover, it is designed to be integrated to the operations of existing parts of the current value chain (DSPs, SSPs), rather than replacing these intermediaries. **As such, it is likely to increase competition on one specific segment of the digital advertising value chain, without directly challenging dominant actors on it.**

The potential/supposed positive effect of the introduction of this new technique would thus crucially depend of the business model of the new solution and the scope of its availability for the supply side of the market..

From a technical point of view, we can expect that this solution will coexist with the current ones based on third party cookies for example, even on the long run; **but this potential/supposed positive effect on the market shall not be at the expense of mitigating privacy risks as we recommend** (see below our proposal of removing the DSP access to the UMID of data subjects and setting a minimum size of the targeted audiences) **and more generally, make sure that the solution is proved lawful under GDPR and the ePrivacy directive by the contracting parties.**

2 Legal issues

2.1 The TrustPID platform need to rely on consent

User consent is required based on several provisions:

- **There are several steps when article 5.3 of the ePrivacy directive, regarding cookies storage on users' devices, might apply and notably:**

- [REDACTED]
- At any further steps where the MarTech ID and AdTech ID are used. [REDACTED] so the application of ePrivacy is quite obvious.
- **Prior consent must be provided in light of article 6(3) of the ePrivacy directive for telco operator.** As a reminder, as per Article 6(3) of the ePrivacy directive, by principle, traffic data must be erased or made anonymous when it is no longer needed for the purpose of the transmission of a communication unless that data proves to be processed for the provision of value-added services to which the user has given consent.
- In accordance with the EDPB doctrine, consent (article 6.1.a GDPR) will be the appropriate legal basis for onwards processing operations, following consent to place cookies on the terminal when the processing follows advertising purposes which are quite intrusive.

2.2 Concerns about consent collection

Various issues surround the scope and extend of consent provided and understood by the user which, in result, could imply issues to ensure informed and unambiguous consent as per article 4 (11) of the GDPR:

- [REDACTED] this concerns should be tackled following the experimentations;
- Besides, when a company owns different websites (like in the case of a media group), it is not clear if the consent extent only to the domain visited or to all the sites belonging to the group.

In addition, a user will most likely be confused by the fact that TrustPID is only applicable when he/she accesses a website via the 4G. The discrepancies while using the wifi or 4G can lead to difficulties in ensuring informed consent. In that regard, **extra care should be given to the information of data subjects through enhanced pedagogical efforts.**

Regarding the withdrawal of consent, [REDACTED] that respect, users might get confused regarding the respect of the withdrawal of their consent.

Finally, we have further interrogations regarding the functioning of the TrusPID system by roaming customers while roaming on a mobile network in another Member State. It has to be noted that some concerns will raised regarding the validity of his/her consent. Indeed, the data subject consent will be valid if and only if he/she is informed of all the different actors that are involved in the trusPID platform and that will be processing their data in this context.

2.3 Preventing excessive collection of data

According to our understanding of the functioning of the platform, [REDACTED]

[REDACTED] While Vodafone might try to have contractual agreement to avoid that data collection, they will have a very limited capacity to enforce said agreement.

While the question of whether this trade-off is acceptable for the testing phase remains open, it is very clear that **the scheme should not be rolled out while this issue is not solved.**

2.4 Risk of microtargeting of users

According to our understanding, [REDACTED]

[REDACTED] We consider that this would defeat the goal of the scheme (the introduction of layers of de identification of the user).

It is recommended, as a measure to enhance privacy by design, **to ensure that there is a minimum size (at least a few thousand according to the state of the art) in audience segmentation when segments are transmitted to DSP.**

2.5 Combination of data between members of the potential future joint venture : the need for “data silo remedy”

First, it should be made clear that no information in the TrustPID platform is anonymized, it is merely pseudonymized. [REDACTED]

Secondly, [REDACTED]

We consider that this measure is not a very efficient safeguard against the reidentification by network operator. [REDACTED]

Regarding the record of Publisher/Advertiser websites, it should be noted:

In conclusion, **should there be a full access to TrustPID’s data, the network operator could indeed match the data collected by TrustPID with their own database.** However it should be noted that even without that access, they already have available most of the data through the normal functioning of the platform. This access is solely limited to their own users, provided network operators use sufficiently strong hashing schemes. For this reason, it cannot be excluded that the network operators have incentives to recombine those data with their own data or enrich their databases with the websites visited by natural persons, with risks of further uses of those data by the network operators.

We do advise in any case, given the potential sensitivity of the browsing history and taking into account the specific status of telco operators, that an engagement be made for TrustPID to never make their internal data available to the network operators ('data silo remedy'), which reduces the risk of the operation from a data protection point of view and possibly from the competitive point of view¹. Such combination of data could be seen as disproportionate and would require, at least, consent of the data subject².

3 Ongoing exchanges at EDPB level: an informal “taskforce” with some DPAs to ensure a coherent response at national level

As a couple of DPAs were interested in having a more in-depth conversation about TrustPID (Member States were experimentations was taking place), it has been decided to create an informal “task force” to discuss the project at the EDPB level.

The goal would be to address a letter to Vodafone pointing the issues identified by the services after having discussed the content of the letter with our European counterparts in the “task force”.

¹ This analysis only applies to the inner working of the TrustPID platform as was presented to us, with the caveat that choices made for the experimentations might not be the same as those made for the generalisation.

² Furthermore it has to be noted that, in France, processing of content data by telco operators in the context of the provision of electronic communications services to the public is more strictly regulated than within the ePrivacy directive since it's strictly prohibited. Hence, subject to further analysis, such combination may conflict with/defeat the objectives of such rules (article L. 34-1 of the French Code of Post and Electronic Communications).