

**A counter-position to the
advertising industry's
letter to the German
Government, based on
empirical research**

Federal Ministry of the Interior
Federal Ministry for Economic Affairs and Energy
Federal Ministry of Justice and Consumer Protection
Federal Ministry for Digital Affairs and Modernisation
Federal Chancellery
The Federal Government Commissioner for Culture and the Media
by email

Berlin, 24 April 2026

Securing data as a competitive advantage: Towards a genuine strengthening of the European data economy through effective competition

Dear Federal Minister Dobrindt,
Dear Federal Minister Reiche,
Dear Federal Minister Dr Hubig,
Dear Federal Minister Dr Wildberger,
Dear Federal Minister Frei,
Dear Minister of State Dr Weimer

We endorse the aim of the [open letter](#) addressed to you on 13 March by 19 associations representing the German (advertising) industry:

“For Europe and Germany to become more competitive again, we must not only protect data, but actively recognise it as the key to innovation, value creation and prosperity. And above all, we must use it. The Federal Government’s coalition agreement provides the right answer to this: ‘We want a culture of data use and data sharing that establishes the data economy, focuses on innovation and protects fundamental rights and freedoms.’”¹

However, we see another way to achieve this goal: the advertising industry argues that there is a conflict of objectives between a culture of data use and data-driven innovation on the one hand, and the protection of fundamental rights and freedoms on the other. In our opinion, these two interests are not mutually exclusive, but rather mutually dependent. It is also the German government’s coalition agreement that takes this view. The European Commission has set as well the goal for its Digital Omnibus to “ensure that compliance with (European digital law) regulations is achieved at lower cost, meets the same objectives and provides a competitive advantage to responsible businesses.”²

Currently, the advertising industry is coordinating in a way that fails to achieve this objective. Both the democratic protection provided by the fundamental right to data protection under Article 8 of the ECFR and the liberal economic systems of the EU Member States are based on the principle that consumers can make informed decisions. To this end, the consent agents introduced in Article 88b of the Digital Omnibus draft – though criticised by the advertising industry – are the only solution known to date in both academic and practical circles.

¹ https://table.media/assets/berlin/2026-03-13_verbandsübergreifende-papier-zum-digital-omnibus.pdf.

² <https://digital-strategy.ec.europa.eu/de/library/digital-omnibus-regulation-proposal>.

Informed consumer decisions as a prerequisite for a functioning data market

Data protection law ensures that individuals can make self-determined decisions. This is a fundamental prerequisite for a liberal democracy. The Cambridge Analytica scandal exemplifies how political actors can use personal data to specifically influence voters.³ But even less visible cases highlight the issue's relevance: if citizens have to reckon with their mobile phone numbers being traded on data marketplaces – as happened with Friedrich Merz's mobile number prior to his election as Federal Chancellor,⁴ – this can inhibit their digital communication and undermine their fundamental rights. Negative consequences can arise more quickly than expected, even in stable democracies. For instance, the US agency Immigration and Customs Enforcement (ICE) buys and links millions of pieces of location data with immigration, financial and social media data to identify 'targets' – often without judicial oversight or effective safeguards.⁵ Recent investigations show that detailed location data on European citizens is also being offered for sale worldwide by data brokers.⁶

The free market economy, too, only functions if consumers can make informed and self-determined decisions. Only if they are able to assess the (data protection) quality of digital services can they consciously opt for better or cheaper offers. Only then can companies compete with one another. Without this transparency, a so-called 'market for lemons' emerges: providers of inferior quality have an advantage because their offerings cannot be clearly distinguished from better ones by users. This puts high-quality providers under pressure and forces them to lower their standards in order to keep up. This creates a downward spiral in which overall quality deteriorates. Whilst statutory minimum requirements attempt to limit this development, as they run counter to economic logic, they are circumvented in practice or merely met in a formal sense – without achieving the intended protective effect.

This situation currently applies to the processing of personal data, particularly in the advertising industry. In practice, 'informed consent' is often implemented merely as a formality and does not actually inform consumers. Due to the current implementation of consent, they are unable to recognise the respective level of data protection offered by digital services, nor can they distinguish between them. We all click away cookie banners every day without understanding exactly why the service in question processes our data, let alone what benefits and risks this entails for us. Numerous academic studies confirm that current cookie banners are not comprehensible.⁷ According to these, consumers do indeed

³ See https://www.bfdi.bund.de/SharedDocs/Pressemitteilungen/DE/2018/03_Facebook.html.

⁴ See <https://www.spiegel.de/politik/sicherheitsrisiko-datenhaendler-verkaufen-die-nummern-von-friedrich-merz-oder-seiner-minister-a-bae3b69f-66ba-4fd8-a116-7b183b058db7>.

⁵ See, for example, <https://www.zeit.de/digital/internet/2026-01/usa-behoerde-ice-ueberwachung-daten>.

⁶ See <https://netzpolitik.org/2025/databroker-files-das-wichtigste-zur-spionage-gefahr-durch-handy-standortdaten-in-der-eu/>.

⁷ See, for example, (Un)Informed Consent: Studying GDPR Consent Notices in the Field. Utz, C., Degeling, M., Fahl, M., Schaub, F., and Holz, T. 2019. In Proceedings of the 2019 ACM SIGSAC Conference on Computer and Communications Security (CCS '19). Association for Computing Machinery, New York, NY, USA, 973–990. <https://doi.org/10.1145/3319535.3354212>.

prefer privacy-friendly services to those with higher risks.⁸ However, they cannot recognise these and are therefore unable to choose them. In fact, cookie banners are dismissed so uninformed that one can hardly speak of ‘informed’ consent within the meaning of the law.⁹

When using digital services, such as visiting websites, consumers are unable to use the information in a way that is relevant to their decision-making, primarily for the following reasons:¹⁰

- Due to the sheer frequency of requests,
- the inopportune timing of the request (they wish to use the service rather than read the ‘small print’),
- the limited space available for the information, and
- the inadequate presentation of the information.

Consent agents as the only solution to date for informed decisions

Neither consumers nor the legislator are to blame for the inadequate implementation of informed consent – not, for instance, because the legislator introduced the requirement for consent in the first place. Further studies show that consumers make very diverse decisions once they understand the various purposes for which services process their data, and the associated benefits and risks.¹¹ Consent is therefore fundamentally the right tool, as it best takes account of consumers’ individual needs and does not treat them in a paternalistic manner.

In its open letter, the advertising industry proposes instead to dispense with the requirement for consent altogether. It is true that the legislator could indeed give priority to low-risk processing purposes and subject them to an opt-out rather than the strict opt-in procedure for consent. With opt-out, services do not have to wait for consent but may process the data until a consumer objects. However, to ensure that consumers can exercise this right to object effectively – that is, easily – it must also be made available at the start of service use and thus via a cookie banner. The question of opt-in versus opt-out therefore concerns only the default setting and thus the likelihood of a person consenting or objecting. Opt-out procedures therefore do not solve the problem of uninformed decisions, contrary to what the advertising industry’s open letter suggests.

The problem of uninformed decision-making stems rather from how decisions are brought about. So-called consent agents are the only solution known to date in both academic

⁸ The Effect of Online Privacy Information on Purchasing Behaviour: An Experimental Study, Janice Y. Tsai, Serge Egelman, Lorrie Cranor, Alessandro Acquisti, *Information Systems Research* Vol. 22, No. 2, June 2011, pp. 254–268.

⁹ How Effectively Do Consent Notices Inform Users About the Risks to Their Fundamental Rights? Grassl, P., Gerber, N., & Grafenstein, M. v. (2024). *European Data Protection Law Review*, 10(1), 96–104. DOI: 10.21552/edpl/2024/1/14.

¹⁰ From consent to control by closing the feedback loop: Enabling data subjects to directly compare personalised and non-personalised content through an On/Off toggle. Smieskol, P., Jakobi, T., & von Grafenstein, M. (2025). *Computer Law & Security Review*, 59, 1–22, November 2025; Privacy icons as a component of effective transparency and controls under the GDPR: effective data protection by design based on Art. 25 GDPR. Grafenstein, M. v., Kiefaber, I., Heumüller, J., Rupp, V., Graßl, P., Kolless, O., & Puzst, Z. (2024). *Computer Law & Security Review*, 52. DOI: 10.1016/j.clsr.2023.105924.

¹¹ From Cookie Banners to Consent Agents: A Comparative Study on Informed Consent and Consent Rates. Gerber, N., Grassl, P., v. Grafenstein, M. (under review). *Computer Law & Security Review*.

research and practice for resolving the problems listed above. The claims made by the advertising industry in its open letter are therefore incorrect. The integration of consent agents does indeed facilitate an individual and context-specific interaction between a digital service and its users:

Within an agent, consumers can view typical information centrally and in advance, and make preliminary decisions on this basis. As soon as they visit a specific website or use another digital service, the agent passes these preferences on to the service, whilst consumers can adjust their preferences via a dynamic button. The service thereby has the opportunity to inform consumers about its specific level of data protection.

What is new about consent agents is that, with the help of the information and decision-making process they facilitate, consumers can focus on the essentials and are no longer forced to click their way through every service, as the dynamic button disappears automatically after a certain period of time.

The claim that it is “technically unfeasible on the open internet” to store a refusal of a consent request for six months is also incorrect. This is because this obligation applies only to the specific browser with which consumers visit a website and in which the refusal of the consent request is stored via a cookie. This obligation ensures that websites and other services do not, as is currently common practice, repeatedly ask for consent even though it has long since been refused. A renewed request is, however, permitted if the service has improved its data protection standards since the consumer’s last visit. This is because there is then a new basis for decision-making on which they could, after all, grant their consent. The reverse also applies: if the level of data protection has deteriorated since the last visit, for example because the data is now stored outside the EU rather than within it, this must be notified to consumers, particularly if they had previously given their consent. In this case too, the basis for decision-making has changed, meaning that consumers must be able to withdraw their consent. In this respect, Article 88a(4) of the Digital Omnibus Directive needs to be strengthened, but not, as the advertising industry concludes in its open letter, abolished.

Consent agents thus enable tiered processes through which consumers have more options, time and, above all, greater attention available to make an informed decision. Studies show that under these conditions – unlike in current cookie banners, where almost all consumers click either the ‘Accept all’ or ‘Reject all’ button – consumers make granular decisions for the various purposes. The lower the risks or the higher the benefits for them, the more frequently consent is granted. Furthermore, services can increase the likelihood of consent by informing consumers about a high level of data protection whilst using the service – provided that it exists.¹²

Consent agents are also the only known solution to date for providing consumers with an overview of the consents they have given. Imagine the *current* situation regarding legal transactions in the offline world: you enter into a contract but are not given your own copy. In the digital world, nobody knows which services they have given consent to, or when. On this basis, however, vast amounts of information about us are collected and used in a wide variety of contexts. Not having an overview of this, and being unable to dispute it when a service claims that consent has been given, is absurd from the perspective of the rule of law.

¹² Evidence-based regulation: Article 88b Digital Omnibus – Increasing Consumer Awareness and Consent Rates through the Appropriate Design of Agent-Based Consent. Gerber, N., Grassl, P., Jakobi, T., v. Grafenstein, M. (pre-publication) available at <https://zenodo.org/records/19332894>.

Conversely, it is not “absurd”, as the advertising industry puts it, for the legislator to wish to remedy this situation.

The solution envisaged by Article 88b of the Digital Omnibus is not an immature concept. The advertising industry also makes this claim in its open letter. The solution is not only technically feasible but has already been developed in various projects. These include the core technical concepts developed in the EMIDD and DaSKITA projects at the Technical University of Berlin;¹³ the Advanced Data Protection Control (ADPC) specification, developed by the non-governmental organisation NOYB in collaboration with the University of Vienna;¹⁴ already existing and functional applications such as the Consent-O-Mat from Aarhus University,¹⁵ the “Super Agent” from the Portuguese design agency OCD,¹⁶ the “Taste” agent from the French consent management platform Axeptio;¹⁷ or the “Consenter” from the academic spin-off Law & Innovation, which builds on many of the aforementioned concepts. An ecosystem has therefore long since developed to drive these solutions forward. Digital services can already integrate such solutions today or replicate them based on the underlying, freely accessible publications.

Informed decisions foster trust and thus also consent rates and competitive advantages

Through the transparency enabled by agent-based consent processes, legally compliant services are realising for the first time the competitive advantage promised by the introduction of the GDPR and now again by the Digital Omnibus. Services with a high level of data protection can successfully distinguish themselves from those with a lower level. Even processing systems that, due to their complexity, are associated with fundamentally higher data protection risks – such as, above all, online advertising networks – benefit from this. A quantitative long-term field study involving approximately 1,000 users shows that consent rates, even for personalised advertising, were higher for almost all of the agent-based consent mechanisms compared than for the status quo cookie banner.¹⁸

This study also shows, however, that the specific design of these mechanisms is crucial. The mechanism favoured by the research group not only achieved the best user experience in terms of quality but also the highest consent rates, with an increase of up to 20% compared to the status quo cookie banner. In contrast, the consent rate for another test group fell significantly short of that of the existing status quo cookie banner. In this test group, participants had to actively confirm their settings from the agent on the website they were visiting once again. This solution therefore required more clicks than the existing cookie banner. This led to the situation where – presumably out of frustration – only a few test subjects clicked again, meaning that hardly any consents were passed on to the test website

¹³ <https://github.com/EMIDD-Projekt> and <https://www.tu.berlin/ise/projekte/daskita>.

¹⁴ <https://www.dataprotectioncontrol.org/>.

¹⁵ <https://consentomatic.au.dk/>.

¹⁶ <https://super-agent.com/>.

¹⁷ <https://taste.axept.io/>.

¹⁸ Evidence-based regulation: Article 88b Digital Omnibus – Increasing Consumer Awareness and Consent Rates through the Appropriate Design of Agent-Based Consent. Gerber, N., Grassl, P., Jakobi, T., v. Grafenstein, M. (pre-publication) available at <https://zenodo.org/records/19332894>.

they were visiting. It is therefore crucial how these consent processes are specifically designed.

These findings are not only applicable to similar cases. The research also shows that awareness, trust and, consequently, consent rates can be further increased through the use of agent-based consent mechanisms. The advertising industry's warning that the economic consequences of Article 88b of the Digital Omnibus would be severe is therefore misleading. In fact, the opposite is true: Article 88b not only builds trust in the processing of personal data, it also holds enormous economic potential.

Background to the advertising industry's criticism of Article 88b of the Digital Omnibus

So what is the advertising industry's criticism of Article 88b of the Digital Omnibus Directive all about? Why does it wish to prevent the introduction of agent-based consent mechanisms, even though these lead to significantly higher consent rates in some cases?

Three reasons appear plausible: Firstly, Article 88b creates a level playing field by enabling consumers not only to understand the benefits and risks of their data being processed, but also to compare services. This transparency represents an advantage for companies that invest considerable effort in designing their systems to comply with data protection regulations, but which, due to a lack of transparency, cannot distinguish themselves from other services with a lower level of data protection. Conversely, the greater transparency represents a disadvantage for those companies whose data processing practices entail above-average data protection risks. Examples include the major platforms, due to the high complexity of their systems, or the aforementioned data brokers, who sell personal data to any third party. As long as such risks are not disclosed, these companies benefit from the same consent rate as companies that go to great lengths to ensure a high level of data protection. It stands to reason that services which benefit from the current lack of transparency are not only very powerful in the market, but also leave their mark on the open letter regarding Article 88b.

Another reason may be that the addition of consent agent providers introduces a further group of stakeholders, making the balancing of interests within the already complex online advertising network even more complicated. This appears to be the aim of the advertising industry's letter when it warns that Article 88b threatens to "create complex procedures". For the technology behind consent agents is – at least in contrast to the complexity of the online advertising system – by no means complex. However, from the advertising industry's perspective, the online advertising system does indeed become even more complicated by the addition of the "providers of consent agents" as a new player. This increase in complexity appears to be a particular thorn in the side of the advertising industry, primarily because this player does not primarily represent economic interests, but rather the interests of consumers. However, a fair balance of interests must include both: the advertisers and the advertised. This is all the more true when constructive cooperation does not merely shift economic value from the business side to the consumer side, but generates additional value for all – as the studies described above demonstrate.

Nevertheless – and this is the third reason – powerful players in the advertising industry are spreading the claim that the introduction of consent agents would lead to a drop in consent rates. In their open letter, they claim that Article 88b would "jeopardise the financial basis of the free internet". However, this is incorrect in three respects: not only does Article 88b provide an exemption from the obligation to accept signals from consent agents for media

providers, who are known to rely on advertising revenue. In fact, agents provide media providers with an additional distribution channel. This is because the agent can inform its users that, when visiting the media outlet, consent to advertising or the conclusion of a subscription is mandatory; both can already be offered within the agent itself. Last but not least, agents and services built upon them can contribute significantly to customer satisfaction, customer loyalty and, as mentioned, to a higher consent rate or usage of the service.

The internet conglomerate Alphabet is also playing the fear card at the EU Commission's offices in Brussels by circulating a study (not yet publicly available) for the past few weeks, which claims that the economic consequences for Europe would be devastating. However, this study is based on a misleading premise, as it takes Apple's introduction of the App Tracking Transparency (ATT) mechanism as its starting point. With ATT, Apple has centralised the consent process for the processing of personal data in mobile apps for all third-party providers in such a way that their consent rates have fallen sharply;¹⁹ whilst Apple obtains consent for its own data processing via more user-friendly mechanisms (and has significantly expanded its own advertising business since then).²⁰ With ATT, Alphabet's study thus presents a case study of exactly how consent should not be designed. If, on the other hand, agent-based consent is designed to be genuinely informative, not only can awareness levels rise significantly – as shown above – but so too can consent rates.

Need for necessary amendments to Art. 88b to ensure a level playing field

Article 88b of the Digital Omnibus Directive thus offers great economic potential by creating a level playing field. With an appropriate clarification in Article 88b, Apple would no longer be able to design the consent mechanisms for its competitors in a way that is disadvantageous to them but advantageous to its own purposes.

To ensure genuinely informed decisions and fair competition, however, certain aspects of Article 88b would need to be clarified. Firstly, this includes ensuring that providers of browsers, app stores and operating systems are not permitted to offer consent agents themselves; at least if they are gatekeepers within the meaning of the Digital Markets Act. This would further increase their market power.

Article 88b would also need to ensure that consent agents genuinely enable informed decisions. Otherwise, it is likely that – depending on the provider's agenda – they would merely enable consumers to accept or reject all requests as easily as possible, without having understood their decision in each instance. However, existing legal requirements can be used as a basis for this. Under Article 25 of the GDPR, all requirements of the GDPR, such as informed consent, must be implemented *effectively* and in a technically sound manner, *taking into account the state of the art*. In its guidelines on Article 25 of the GDPR, the European Data Protection Board (EDPB) has already stated that this must be demonstrated empirically. The EDPB has also long since clarified the methods for assessing risks. Both the legal provision and the empirical methods for designing truly informed consents are therefore already in place. Article 88b would simply need to refer to their application.

¹⁹ Laub, R., Miller, K., Skiera, B., The Economic Value of User Tracking for Publishers.

²⁰ See the ongoing competition proceedings against Apple, for example those of the German Federal Cartel Office at <https://www.bundeskartellamt.de/DE/DigitalWirtschaft/VerfahrenGegenGrosseDigitalkonzerne/Apple/Apple.html>.

To ensure compliance with these and other requirements, consent management services must ultimately be accredited – that is, consent agents and consent management platforms alike – to ensure coordinated communication. This should be done in accordance with Article 10 et seq. of the Data Governance Act, on the one hand to avoid duplicated legal structures, and on the other to ensure a balance with the interests of the business sector.

The solution is there; we just need to apply it, with – not against – the advertising industry

The advertising industry employs many sophisticated methods to create the best user experience when it comes to displaying online advertising and measures its success by sales figures. It would therefore be perfectly capable of using its empirical methods to make the benefits and risks of its advertising practices transparent to consumers. It has not done so yet – perhaps because it mistrusts consumers or its own product?

It would, however, pay off economically. Studies also show that consumers generally see more benefits than risks in personalised advertising.²¹ The advertising industry therefore has no need whatsoever to mislead consumers. If personalisation truly makes advertising more relevant and the data protection risks are outweighed by the benefits, this will be reflected in greater trust, higher consent rates and better data quality. Article 88b creates a level playing field for this.

²¹ Smieskol, P., Jakobi, T., & von Grafenstein, M. (2025). From consent to control by closing the feedback loop: Enabling data subjects to directly compare personalised and non-personalised content through an On/Off toggle. *Computer Law & Security Review*, 59, 1–22. DOI: 10.1016/j.clsr.2025.106186.

Signatories' counter-position to the advertising industry's letter

Dr Nina Gerber (Technical University of Darmstadt – Institute of Psychology)

Prof. Dr Timo Jakobi (Nuremberg Tech – AI-based usability evaluation)

Dr Elias Grünewald (Charité – Institute of Medical Informatics)

Prof. Dr Frank Pallas (University of Salzburg – Artificial Intelligence and Human Interfaces)

Prof. Dr Matthias Kettemann (Alexander von Humboldt Institute for Internet and Society –
New Technologies and the Future of Law)

Prof. Dr Max von Grafenstein, LL.M. (Einstein Center Digital Future, Berlin University of the
Arts – Digital Self-Determination)





ATHENE
National Research Center
for Applied Cybersecurity



TECHNISCHE
UNIVERSITÄT
DARMSTADT



Technische
Hochschule
Nürnberg