EPC European Publishers Council

CONTRIBUTION FROM THE EUROPEAN PUBLISHERS COUNCIL TO THE REVIEW OF THE EU DATA PROTECTION DIRECTIVE

18TH DECEMBER 2009

The European Publishers Council (EPC) is a high level group of Chairmen and CEOs of Europe's leading media groups representing companies with newspapers, magazines, online publishing, journals, databases, books and broadcasting. We have been communicating with Europe's legislators since 1991 on issues that affect freedom of expression, media diversity, democracy and the health and viability of media in the European Union. A list of our members is attached.

EXECUTIVE SUMMARY

The EPC would like to thank the European Commission for their open invitation to comment at the beginning of this process of review. We note that some stakeholders claim that the directive needs to be updated through legislative amendment to enable the legal framework to keep up with technological developments. The EPC would not be in favour of starting from this proposition. Rather we would wish to tackle the review through looking at inconsistencies in application and enforcement and assess where self-regulatory solutions might be used to deal with specific areas.

This is because the Directive is founded on technology-neutral Data Protection Principles to determine conditions and factors for the lawful processing of personal data, as well as maintaining a high level of consumer protection. The EPC finds these founding Data Protection Principles as valid today as they were in 1995. It is the *application* of these Principles to new technologies which should be addressed *not* the law. Thus we can meet the concerns of Europe's citizens about increased levels of data processing in the Internet age. Better education of the public and greater transparency, facilitated in large part by self-regulation, would also be important to a better understanding of effective Data Protection.

EPC
Chairman > Francisco Pinto Balsemão
mgil@impresa.pt
Executive Director > Angela C. Mills Wade
angela.mills@wade.uk.net

EPC > 26 Avenue Livingstone, Bte 3, B-1000 Brussels Tel: +32 (0)2 231 12 99 Fax: +32 (0)2 230 76 58

Our comments relate to the impact of Data Protection on the two sides of our businesses:

- *firstly* professional publishing with quality journalism and
- *secondly* our commercial activities (marketing and advertising).

The future of Europe's independent media relies on informed, light-touch law-making underpinned by sound self-regulation to ensure that we deliver these five freedoms:

1. The freedom to inform our readers;

2. The freedom for journalists to report and comment ;

3. The freedom to earn essential funding from advertising and make our content available in innovative ways through online and mobile platforms as well as in print;

4. The freedom to adapt our businesses in the ever-changing global media environment; and

5. The freedom to regulate ourselves by appropriate means, already tried and tested.

In order to deliver these essential freedoms we ask the European Commission to ensure that:

- the Data Protection Directive's "derogation for journalistic purposes" is preserved as an essential safeguard in the protection and maintenance of the freedom of the press;

- greater clarity is provided through interpretative communications about data protection concepts and definitions such as "data controller", "data processor", "IP address", "consent" and "personal data". For example, the distinction between data controller and data processor is artificial and creates unnecessary complexity whereas there is no distinction between personal and corporate data which would be helpful. Greater clarity and full transparency is essential in these difficult areas of jurisdiction and applicable law. Regulation that is difficult to interpret and apply works against the interests of European publishers and other European enterprises. However, any clarification should not lead to new mandatory *restrictions*;

- full account is taken of the fact that new technologies and globalization have made online media competition worldwide not European. Therefore if *European* regulation leads to new stricter

rules (e.g. in the area of anonymized profiling and targeting or use of personal data in advertising), then European media companies will be at a significant competitive disadvantage to their non-EU based competitors;

- due notice is taken of the fact that European legislation regarding targeting of online advertising would cover only a tiny minority of web sites . Therefore tougher EU legislation could have only a minor impact on global online advertising practices It would do disproportionate damage to European media companies because of the costs of compliance and the restrictions on their interaction with readers;

- a system of cross-border mutual recognition of supervisory authorities' authorisations is created. This would greatly reduce current levels of bureaucracy and provide a swifter flow of personal data between economic groups. Where Member States alter or strengthen the EU law, this creates inconsistencies across the region. This in turn creates an additional burden for commercial businesses trying to operate under one law and one internal policy (e.g. Germany).

- We would highlight that the Registration process is onerous. The information requirements are disproportionate and create an administrative burden for the national regulators and businesses, without serving a specific purpose.

- the role and potential of Self-regulation is recognised fully as a crucial route to meeting the stated concerns of citizens in the online environment. Openness in telling our readers online what kind of (a) personal data and (b) non-personally identifiable data will be collected and how it will be used is important. Informing our readers should always take place in a clear and consistent manner. This is essential for effective self-regulation;

- due note is taken that enforcement bodies have been slow in publishing guidance on their interpretation of how the data protection principles are to be applied to new technologies. In our view, enforcement should be comprehensive and act as an adequate deterrent to malpractice and should not therefore be linked to membership of associations;

- we avoid creating systems (legal and self-regulatory) where only specialists can give advice to ensure compliance. This would increase costs. Therefore better Corporate Responsibility should be encouraged including encouraging organizations to introduce Chief Privacy Officers and the inclusion of Data Protection Corporate

Governance Codes. This would facilitate more effective self-governance at the point of data processing and could lead to greater transparency about the processing of personal data;

- due account is taken that a crucial issue for media companies is the use of the internet to collect and process personal data. If individuals willingly and openly reveal personal information and images online, perhaps via social networks (including those hosted by media companies) media companies should be free to access and process that data through an implied consent. That data may be used for market studies or direct marketing unless the terms and conditions of the hosting site specifically prohibit such activity. Greater clarity is required for consumers when signing up to membership of such sites and better education of citizens generally is needed to ensure they take care of their personal information themselves;
- in order to simplify compliance with the legal framework of data protection, due consideration is given by Member States to providing consistent Data Protection Directive rules when implementing the latest amendments to the Data Protection sections of the Directive on Electronic Communications (ePrivacy directive).

PRIORITY OBJECTIVES DURING THE REVIEW

Our priorities for the review of the EU Data Protection Directive are as follows:

1. *Maintain the derogation for journalistic purposes*

With specific reference to journalism and freedom of information, article 9 of the Directive provides that *"Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression"* (see also recitals 17 and 37).

It is vital that this derogation is preserved as a minimum. This derogation is already limited in scope through the provision of a legislative basis to test against the public interest the rights of publishers to process and ultimately publish "personal data" on a case by case basis. Freedom of expression is a fundamental right that justifies derogations to the privacy principles. An interpretative communication could assist by ensuring that Member States provide

for derogations upholding the freedom of the press and adopt a broad interpretation of "journalistic purposes".

2. *Seek an explicit reference on the need to balance the right to privacy with other fundamental rights* such as the right to the protection of property, the freedom of economic activity (and the freedom of expression as above).

   In its judgment "Promusicae vs Telefonica"[1], the European Court of Justice ("ECJ") stated, for the first time, that Member States in transposing the various directives on intellectual property, e-commerce and data protection, must strike a fair balance between the fundamental rights that they protect - including the right to property in civil proceedings - and must respect general principles of Community law, such as the principle of proportionality. The conclusion reached by the ECJ sent a strong signal to all stakeholders that neither data protection nor IP protection should be given precedence over the other.

   Suggested action: An interpretative communication could include an explicit reference to the need to strike a balance between fundamental rights. The importance of freedom of expression should be further emphasized. Clear language should make it obvious that legitimate newsgathering activities should be given great respect.

   This would codify the ECJ decision and hopefully result in a more rational application of data protection laws across the EU. This could reduce, but not eliminate, the forum-shopping phenomenon; indeed it will be always for Member States to decide the procedure (i.e. judicial or non judicial) to follow in order to enforce such rights.

3. *Definition of personal data and IP addresses*

   The Article 29 Working Group considers IP addresses as personal data, irrespective of the context in which they are collected and processed. The ECJ recently received a referral for a preliminary ruling on this subject from a German Court; the case is still pending[2]. National case-law is not consistent since different approaches have been adopted, even by different courts of the same Member State.

[1] Case 275/06 "Productores de Musica *de* Espana (Promusicae) v Telefonica de Espana".
[2] Case C-92/09, "*Volker und Markus Schecke GbR vs Land Hessen"* and Case C-93/09 "*Hartmut Eifert vs Land Hessen"*.

If IP addresses are considered personal data irrespective of the context in which they are used, the potential consequences for any interaction over the internet would be far reaching and adverse[3].

Firstly, considering IP addresses as personal data could undermine online enforcement, education and awareness-raising activities by copyright holders and even ISPs. In particular, right holders and anti-piracy organizations could experience difficulties in conducting their activities, because of the impossibility of identifying the copyright infringer through its IP address.

Secondly, an important, and in some cases the main source of income for the Internet industry generally, and media companies specifically, comes from online behavioural advertising (OBA). The approach adopted by the Article 29 Working Group risks hindering dramatically the development of OBA and, therefore, the Internet itself.

Finally, the context is essential. Organizations other than an Internet Access Provider will not have the data to link an IP address to subscriber data. In order for an organisation other than the Internet Access Provider to obtain subscriber data linked to a particular IP address, the organisation will need to obtain a court order, thereby ensuring adequate due process.

Suggested action: The context of each case is highly important. We propose that IP addresses cannot be considered as personal data *per se*.

4. *Focus on the Principles of data protection, simplify the procedures and rely on industry-led initiatives*

One of the weaknesses of the Directive is that it focuses not only on the Principles of Data Protection and the desired outcomes, but on the procedures that shall be applied to implement these principles. Moreover, the procedures identified by the Directive are excessively burdensome and not adequate to meet the data protection goals.

Suggested action: identify the principles and objectives to be achieved and simplify the implementation of the legal framework on data protection, leaving more room to industry-led initiatives, such as self-regulatory initiatives and codes of conducts.

[3] Nowadays, almost all interaction of a user with a website or any other internet-service involves the processing of IP addresses. This approach would be even more challenging in the "Internet of Things' era" where many physical objects, such as clothes, vehicles, etc, will have an IP address to be connected with each others.

5. *Do not disrupt the user's experience in the online environment*

The internet is now inextricably linked to the evolution of societies and economies world-wide. When the right of privacy is exercised in the internet environment, all efforts should be undertaken to minimize any negative impact on the users` experience. In particular, cookies are essential to a positive online experience, facilitating security, ease of use of websites and e-commerce transactions. Any measures to protect privacy with regard to the use of cookies should be as user-friendly as possible, allow for the continuation of established working practices and contribute to an effective functioning of the internet. There should be no disruption to the experience of consumers.

The online audience is used to and expects a level of personal customisation of the websites they choose to visit (the so called "first party" website). Examples are new email alerts, notices of friends online, recommended articles for sale, tailored advertising and marketing and special offers. However, not all users are aware that sometimes some of that advertising is delivered to that site by other companies (the so called "third parties"). Therefore as first parties we publishers see the need (in any self-regulatory code or guidelines) for rules to ensure the transparency of the system and the various mechanisms in the chain. This is in recognition of the different expectations of consumers when first choosing to visit a particular site and what happens while they remain on that site. They need to be informed about data processing and the collection of information by third parties. This can be achieved most effectively through self-regulation and industry is working toward this goal.

Here we would ask the Commission to refer to recent studies about the positive acceptance of well targeted advertising by online users. Targeting of advertising through the use of anonymized data lead to better advertising and save users' time. Targeting is not a problem for most consumers - on the contrary, carefully considered and well targeted advertising is in the common interest of both users and advertisers.

The principles laid down in the present directive do *not* need to be amended. These principles provide a high level of protection for the European citizens, and ensure that users of personal data respect the fundamental rights of the citizen. The 95/46/EC Directive is also flexible and media-neutral. Attempting to "update it" to respond to specific media techniques may result in a loss of this flexibility and media-neutrality to the disadvantage of both the citizen and data users (which include governments as well as marketers).

However, the rules contained in the Directive are sometimes interpreted incorrectly in Member State own legislation. We believe therefore that there is a much greater role for self-regulation in order to find solutions to specific issues arising from new communications techniques.

Suggested action: allow the industry (advertising, media and internet companies) to draw up best practice guidelines. Thus they will ensure high levels of transparency to protect privacy in the use of cookies and similar technologies including for online behavioural advertising (OBA). Self-regulatory rules have already been agreed at US level and we feel it is important to ensure consistency with these at European level. Many of the companies involved in OBA operate at global level so standards and mechanisms to facilitate consumer opt-out must be consistent.

6. **A***void technology mandates* such as the Certification Schemes for Privacy Enhancing Technologies (PETs) because they can hamper business innovation.

   Suggested action: Ensure that any certification or standard should be market driven.

CONCLUSIONS

The EPC would not be in favour of re-opening the Directive.

Instead **we call on the Commission** to:

1. Look at the inconsistencies in application and enforcement of the Data Protection Principles;
2. Provide definitive interpretation of some of the definitions in the directive;
3. Following further consultation, publish an interpretative communication to ensure that Member States provide for adequate derogations upholding the freedom of the press and adopt a broad interpretation of "journalistic purposes". Clear language should make it obvious that legitimate newsgathering activities should be given great respect.
4. Include an explicit reference in an interpretive communication to the need to balance the right to privacy and other fundamental rights such as the right to protection of property, the freedom of economic activity and the freedom of expression;
5. Delegate the application of the principles with regard to new media and advertising techniques to self-regulation.

MEMBERS OF THE EUROPEAN PUBLISHERS COUNCIL

Chairman:

Mr Francisco Pinto Balsemão, Chairman and CEO, Impresa Publishing, Portugal

Members

Ms Sly Bailey, Chief Executive, Trinity Mirror plc, UK
Dr Carlo de Benedetti, Chairman, Gruppo Editoriale L'Espresso, Italy
Mr Carl-Johan Bonnier, Chairman, The Bonnier Group, Sweden
Mr Oscar Bronner, Publisher & Editor in Chief, Der Standard, Austria
Ms Rebekah Brooks, Chief Executive Officer, News International Ltd, UK
Mr Bernd Buchholz, Chief Executive, Gruner + Jahr, Germany
Dr Hubert Burda, Chairman and CEO, Burda Media, Germany
Mr Juan Luis Cebrian, CEO, Groupo Prisa, Spain
Dr Mathias Döpfner, Chief Executive, Axel Springer AG, Germany
Mr Erik Engstrom, Chief Executive, Reed Elsevier,
Ms Rona Fairhead, Chief Executive, Financial Times Group, UK
Mr Tom Glocer, Chief Executive, Thomson Reuters
Dr Stefan von Holtzbrinck, President and Chairman of the Executive Board, Verlagsgruppe Georg von Holtzbrinck GmbH, Germany
Mr Steffen Kragh, President and CEO, The Egmont Group, Denmark
Mr Christos Lambrakis, Chairman, Lambrakis Press Group, Greece
Mr Murdoch MacLennan, Chief Executive, Telegraph Media Group Ltd, UK
Mr James Murdoch, Chairman and CEO, News Corporation, Europe and Asia
Mr Piotr Niemczycki CEO, Agora, Poland
Sir Anthony O'Reilly, President Emeritus, Independent News & Media PLC, Ireland
Mr Didier Quillot, Chairman and CEO, Lagardère Active, France
Mr Michael Ringier, President, Ringier, Switzerland
The Rt. Hon. The Viscount Rothermere, Chairman, Daily Mail and General Trust, UK
Mr Rolv Erik Ryssdal, CEO, Schibsted, Norway
Mr Hannu Syrjanen, CEO, Sanoma Corporation, Finland
Mr Giorgio Valerio, CEO, RCS Quotidiani S.p.A Italy
Mr Christian Van Thillo, Chief Executive, De Persgroep, Belgium
Mr. Jose Manuel Vargas, CEO, Vocento, Spain

Executive Director: Angela Mills Wade
Press Relations: Heidi Lambert Communications