EPC European Publishers Council

RESPONSE FROM THE EUROPEAN PUBLISHERS COUNCIL

TO THE COMMUNICATION BY THE EUROPEAN COMMISSION ON "A COMPREHENSIVE APPROACH ON PERSONAL DATA PROTECTION IN THE EUROPEAN UNION"

15TH JANUARY 2011

www.epceurope.org

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 at Annex 1.

OVERVIEW

The EPC would like to thank the European Commission for their open invitation to comment for a third time on a possible review of the Data Protection Directive. Once more, we highlight our disquiet with the view of some stakeholders that the directive needs to be updated through legislative amendment in order 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 clarifications and 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

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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 and find practical, proportionate solutions.

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 and citizens' ability to manage their personal data.

There is much debate about Privacy by Design whereas in fact through effective, targeted self-regulation the media and advertising sector is already delivering enhanced Privacy by Effect.

Our comments relate to the impact of Data Protection on the two sides of our businesses. Firstly on our commercial activities (with possible consequences for marketing and advertising) and secondly in the area of professional publishing and quality journalism, which has not been included in the latest Communication by the European Commission (COM 2010/609).

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 to ensure accountability and effectiveness.

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

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

- Note that technological developments and globalisation mean that European media compete not only *within* the European Union but globally. Therefore, overly restrictive *European* legislation regarding targeting of online advertising would bring disproportionate damage to European media companies;

- Note that in order to flourish and remain competitive, the European Information Society needs to be able to use and circulate personal data. This Directive was founded on internal market principles which must be upheld in order that European businesses remain competitive globally;

- Note that strict rules on processing of cookie data would reduce the competitiveness of the professional media. This activity was covered by the 'ePrivacy Directive' as part of the overhaul of the Telecoms legislation and as a result, the European media and advertising industry is currently putting in place EU-wide consumer tools, effective and accountable self-regulatory codes and independent complaint handling procedures. Any additional costs of compliance which might arise from new restrictions on our interaction with readers would stall the development of online media which rely heavily on advertising revenues thereby placing European media companies at a significant competitive disadvantage to their non-EU based competitors;

- Embrace the role and potential of Self-regulation fully as a crucial route to meeting the stated concerns of citizens in the online media and advertising 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 crucial to building trust with our readers. Informing our readers should always take place in a clear and consistent manner. We take our responsibilities in this area seriously as these are essential for effective self-regulation;

- Note that better education of European citizens is needed about the consequences of sharing personal data online. If individuals willingly and openly reveal personal information and images online, perhaps via social networks (including those hosted by media companies) they need to understand that companies will be free to access and process that data through an implied consent. By placing such data into the public domain it 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 clearer education of citizens generally is needed to ensure they take care of their personal information themselves;

- To provide greater clarity 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*;

- To note 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;

- To create a system of cross-border mutual recognition of supervisory authorities’ authorisations. 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).

- To overhaul the Registration process which is too onerous as the information requirements are disproportionate and create an administrative burden for the national regulators and businesses, without serving a specific purpose.

- To foster better Corporate Responsibility including by encouraging organizations to introduce Data Protection 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.

PRIORITY OBJECTIVES DURING THE POSSIBLE REVIEW

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

1. ***Strengthening individuals' rights and ensuring protection in all circumstances***

   The Data Protection Directive has provided individuals with appropriate protections for their own personal data while also enabling businesses to have confidence through compliance when processing and transferring data for legitimate purposes.

   The Directive is sufficiently broad and technology-neutral, which renders it particularly effective as it remains valid and applicable to current or even future technologies. The Directive's current principles already provide a high level of consumer protection which should not be reduced through change or exception.

2. ***Definition of personal data and IP addresses***

   We support the **definition of personal data** as currently set out in the Directive. It has been time-proven and successful. We believe that it is important to maintain the distinction between personal data, protected by the Data Protection Directive, and non-identifiable data which could be collected for various reasons, as for example website customisation or information for statistical purposes. Such types of activities are regulated by the e-Privacy Directive which is currently being transposed into national law. Transparency about the purpose and methods of data collection are key to consumer confidence but expanding the definition and the concept of personal data may have unintended negative consequences for the media and advertising businesses in Europe.

   A technological neutral Directive gives also the opportunity to companies to **innovate** and create competitive advantages. Legislation should not stand as an obstacle to Europe's innovation efforts. It is nevertheless the responsibility of the member states to better enforce the Directive in case of abuse.

3. ***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. If

legislative requirements are in future applied to IP addresses as 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[1] yet without bringing real privacy enhancing benefits to citizens.

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

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.

Thirdly, 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.

Finally, as happens in the physical world, companies process online an array of data without any interest in knowing who the individual users are. The use of cookies is a good example. The internet and mobile devices, with ever expanding possibilities through e-Commerce and online services offer huge benefits to consumers and businesses. As already stated, any attempt to extend the rules applicable to personal data in order to include data that does not identify the individual, would severely undermine the commercial viability of the internet.

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,

[1] 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.

the procedures identified by the Directive are excessively burdensome and not adequate to meet the data protection goals.

It is important therefore that the Commission identifies the principles and objectives to be achieved and simplifes 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.

5. Transparency for Data Subjects

The Commission proposes the introduction of a general principle of **transparent processing of personal data** while the Section IV (esp. Art. 10) of the Directive already establishes a sufficient level of transparency. Is there a proven need for introducing such a general principle? Member states should have the responsibility and the competence in case of enforcement challenges.

Obligations of the data controller with relation to **children** are already included in the Data Protection Directive. Moreover, all industry self-regulation codes as well as national legislation aim to protect children in different contexts. Hence, there is no need for more concrete legal measures.

That is not to say that more cannot be done to enhance the safety of personal data of children online. More resources and better coordination of **education** programmes are needed as well as recognising the responsibility of the parents in informing their children about their stance towards the online environment.

Privacy information notices are already in place, according to the rules set by Art.10 of the Directive. In addition, all publishers provide readers with clear and adequate privacy notices. Other industry sectors provide the same, according to their specificities.

With regard to the introduction in the general legal framework of a **general personal data breach notification**, there are concerns that extra burdens will be imposed on businesses without necessarily providing a higher level of protection to the data subjects. We believe that the current Directive remains effective in this regard. The Commission should provide all the relevant proofs that such a change is necessary.

6. Enhancing control

The principle of **data minimisation** is already in place in the current Data Protection Directive. Art. 6.1 (b) and (c) state that personal data must be

"collected for specified, explicit and legitimate purposes" and must be "adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed". What it is actually needed is to ensure an effective enforcement, by the responsible authorities, of this principle.

Publishers traditionally have a relationship built on trust with their readers, especially with their registered users and subscribers. They provide all the means to exercise the rights of access, rectification, erasure or blocking of data. Moreover, Art. 11, 12 and 14 already set out those rules. There is no reason why a European company should not comply with the existing rules as the data about the consumer and the respect for the consumer is the necessary basis of any long-term customer relationship and indeed provides a competitive advantage to businesses. On the one hand, it is clear that the consumers need to be better informed about their existing rights and how to exercise them on the other hand the industry should continue to enable people to exercise these rights.

Recently there is much discussion about the introduction of a new right, the so called **"right to be forgotten"**, which seems somewhat fanciful and in contradiction with the annals of our past (*verba volant, scripta manent)*. Furthermore, such a right could be misused to stifle press freedom (see below). Meanwhile Art.14 of the Directive already provides efficient means for the data subject to object to the processing of their personal data. If this is not being facilitated correctly or properly enforced we ask the Commission to address this failure rather than introducing new conflicting concepts.

A "right to be forgotten" would in the case of the media contradict Art. 9 and would certainly be detrimental to the freedom of the media in terms of news reporting, investigation or TV programme making. It could interfere with the maintaining or use of **press and photographic libraries**, which function as a vital resource of high-quality news content, and indeed provide important historical records. It would be unacceptable for individuals to have a "right" to re-write history through deletion or adaptation of public records and the media's archives, except through the order of a court following judgements concerning, for example, defamation (and for linear audiovisual services there is a specific rule in the AVMS Directive).

Data portability is a concept that exists to a certain degree today. For example you can easily transfer all your contacts from one email provider to another. In addition, the current Directive sets some reasonable parameters and controls on the appropriate use of personal data in the offline and online environment, and it would be costly to require companies to develop systems and adequate security in order to allow a general right of data portability.

Furthermore, data portability is not always directly related to the data protection of an individual, but rather an issue to be dealt with as part of facilitating possible change of service providers.

Moreover, **databases** have a legitimate commercial value and consequently are protected by copyright to protect the investment of the owners. Personal data contained in our databases have been collected and processed in compliance with the data protection Principles for legitimate purposes fully respecting the security of that data on behalf of the data subject. The introduction of additional "migration rights" could even jeopardise privacy and data security. Furthermore, in compliance with legislation, a copy of the data must remain with the original controller for a given period in order to comply with specific accounting, tax and similar regulations.

7. Raising Awareness

The EPC strongly supports the European Commission's initiative for **awareness campaigns for data protection** via the EU budget and the Member States in order to help consumers to understand how to protect their personal data, what are their rights, their responsibilities and what they should be accountable for. In this area we also see a role that could be played by consumer organisation as well as other relevant NGO's.

Education should always form the basis for any long-term successful change we want to achieve in our societies. **Media literacy** in schools and general awareness raising campaigns should be the focus both of the European Commission as well as that of the Member States.

On the other hand, industry is already engaged in awareness raising activities. **Companies, either on their own either through their sector or association behave responsibly to inform consumers about their rights and responsibilities** in relation to their dealings with these companies. We do not see any necessity for such an obligation to be written in the law, but a voluntary approach is to be welcomed.

8. Consent

The notion of **consent** remains for many, a hot topic. The current Directive however provides with sufficient definitions. Rightly, consent may be given explicitly or implicitly and it is important that these differences are maintained for practical reasons and in line with proportionality. In addition it should be remembered that consent is not the only basis for processing data under the current Directive. Retaining the current wording is crucial as it

will protect businesses from new and overly burdensome requirements both in the offline and online environment. Those burdens could result in significant unfavourable economic implications, which could hamper the development of digital media and the internet in general.

9. Consent 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 while at the same time delivering the benefits of innovative media and advertising. 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.

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 contemporaneously online, recommended articles, tailored advertising and marketing and special offers. However, not all users are aware that sometimes some of the advertising that is displayed while on a particular website is delivered to that site by other companies (the so called "third parties"). Therefore as first parties we publishers see the need to **provide enhanced "Privacy by Effect"** through self-regulatory codes or guidelines, to ensure the transparency of the system and the various mechanisms and players 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 leads to better more relevant, interesting advertising and saves 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 and in line with practices in the offline world. Advertisers have always sought to place relevant advertising to demographic profiles adjacent to matching TV programmes or press articles.

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.

The EPC subscribes to the EASA Best Practice Recommendation on Online Behavioural Advertising. This has been drawn up by the industry (advertising, media and internet companies) and national advertising self-regulatory organisations to ensure high levels of transparency to protect privacy in the use of cookies 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. This is enclosed at Annex 2 together with a set of slides which explain the requirements and timeline at Annex 3.

10. Sensitive Data

Art. 8 of the current Directive deals with the processing of the **special categories of personal data**. EPC considers the protection adequate and there is no actual need to extend the definition in order to include other kind of data. For example, "genetic data" are covered by the "health data" category.

The EPC would support however, a greater clarification on the current framework in order to ensure that there are no inconsistencies in the implementation of the Directive by member states and thus resulting to a patchwork of definitions.

11. Enhancing data controllers' responsibility

The EPC generally agrees with the Commission's proposition of a **Data Protection Officer** (DPO), as an appropriate safety mechanism. However, an obligation for controllers to have a DPO might, in particular for small and medium-sized companies, be an unjustifiable organisational and financial burden. Nevertheless, the controllers should have the possibility to appoint

an internal or external DPO. Indeed data controllers (having or not a DPO) have the obligation to comply with the existing data protection legislation.

Data Protection Impact Assessment should only be required for companies that handle extremely sensitive data for very concrete reasons although we recommend PIAs should form part of the risk management of companies as best practice.

Technology mandates such as the Certification Schemes for Privacy Enhancing Technologies (PETs) should be avoided because they can hamper business innovation. The Commission should ensure that any certification or standards should be market driven.

The concept of **"Privacy by Design"** has no clear definition and has different meanings to different people, resulting in an even greater confusion and uncertainly. We oppose the making of "privacy by design" a binding legal concept as it would undermine the technologically-neutral nature of the Data Protection Directive. In turn this could hamper innovation in the field of digital technology, an area ion which Europe needs to become more competitive towards other countries.

Having that in mind, EPC would like to reiterate the points made above in section 9 on consent, regarding our concept of **Privacy by Effect**. Privacy is thus delivered through effective, targeted self-regulation by the media and advertising sector. This ensures the transparency of the system and the various mechanisms and players 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 with the goal of **Privacy by Effect**.

12. Stronger Institutional arrangement

The cooperation and coordination of the national Data Protection Authorities takes place through the **Art. 29 Working Party**. We support the Commission's proposal for more transparency in the work of the group. This could include an unbiased participation of industry stakeholders, academics and consumer groups in order to feed valuable information to the Working Party's decision making process. This will result in more balanced and practical interpretations that are acceptable and feasible to all parties concerned.

In addition, it should be stressed that the Art. 29 Working Party should maintain its independent advisory role, while with regard to the powers of

national DPAs, we believe that the current regime is effective and no changes are needed at this stage.

CONCLUSIONS

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

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

1. Uphold the founding Principles of the Directive without deviation, remembering that the Information Society needs to be able to use and circulate personal data in order that businesses remain competitive globally.
2. Consider the inconsistencies in application and enforcement of the Data Protection Principles rather than the Principles themselves.
3. Provide definitive interpretation of some of the definitions in the directive;
4. Ensure that Member States provide for adequate derogations upholding the freedom of the press and adopt a broad interpretation of "journalistic purposes".
5. Ensure that legitimate newsgathering and investigative activities are given the greatest respect when balancing 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.
6. Delegate the application of the Principles with regard to new media and advertising techniques to self-regulation in order that legitimate business interests are not hampered by disproportionate legal requirements.

15th January 2011

Annex 1

MEMBERS OF THE EUROPEAN PUBLISHERS COUNCIL

Chairman: Mr **Francisco Pinto Balsemão**, Chairman and CEO, Impresa, Portugal

Members

Ms **Sly Bailey**, Chief Executive, Trinity Mirror plc, UK
Dr **Carlo de Benedetti**, Chairman, Gruppo Editoriale L'Espresso, Italy
Mr **Jonas Bonnier**, Chief Executive, The Bonnier Group, Sweden
Mr **Oscar Bronner**, Publisher & Editor in Chief, Der Standard, Austria
Ms **Rebekah Brooks**, Chief Executive Officer, News International Ltd, UK
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Mr **Andrew Miller**, Chief Executive, Guardian Media Group, UK
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