

On ePrivacy Directive:

The interest of publishers in the ePrivacy Directive lies in the 'cookie-provision'. Publishers use cookies or other techniques to track users' online behaviour and serve them personalised advertisement on their websites accordingly as a way to obtain revenue. The business model of some publishers is based on 'free' content, funded by targeted advertisement.

Currently the ePrivacy Directive requires an 'opt-in' consent from users before cookies or other identifiers can be installed on a device. Publishers are in favour of an 'opt-out' consent.

Therefore certain publishers support/take part in the **Online Behavioural Advertising (OBA)** self-regulatory initiative that was previously encouraged by former Director General Robert Madelin (DG CNECT).

Publishers would like to get rid of the cookie consent (Article 5.3) and do not want online tracking to be legally regulated. In general, they are in favour of giving consumers more choice online but through self-regulation. In their view, the cookie rule (opt-in) does not work and stifles their business model of OBA activities based on tracking citizens online in order to deliver targeted advertising. They find that an opt-out regime for tracking provides a sufficient protection for internet users and that therefore the current "cookie" consent rule under Article 5(3) based on opt-in should be repealed.

Publishers and the advertisement industry are against the possible solution of introducing a paying option as an alternative to paying by data (i.e. surfing for 'free' in exchange for being tracked).

III. Our position

On copyright.

Reason for expunging:
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-
- | Response | Percentage |
|---|------------|
| U.S. should take action | 65% |
| U.S. should not take action | 25% |
| U.S. should take action, but only if other countries do first | 10% |

The proposal for a revised **AVMSD**, adopted by the Commission on 25 May 2016. [REDACTED]

Reason for expunging:
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- The Commission strongly welcomes transparency initiatives regarding the use of cookies and online tracking.
- Providing transparency about online tracking does not in itself meet the legal requirements of the ePrivacy Directive. Providing transparency does not dispense companies from the legal obligation to ask users for consent before placing cookies on their devices and tracking their online behaviour (Article 29 WP strongly questions the compliance of the OBA initiative with the ePD).
- The Commission is aware of the current flaws of the current rules: because of the pervasive use of tracking cookies by many websites, consent is needed from users for each of these websites. Having to consent each time causes 'cookie-fatigue' (accepting without really reading the banners and thereby providing a 'fake' protection for citizens) and the chosen implementation of the rules by using cookie banner disrupts the Internet experience. We mean to address these concerns/flaws in the review.

IV. Line to take

On copyright:

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On AVMSD:

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¹ Judgement of 21 October 2015 in the "New Media Online GmbH"

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On ePrivacy Directive:

- Online tracking is regulated by the ePrivacy Directive. The protection of the integrity of citizens' smart devices, which is considered an extension of their privacy sphere (equivalent to their home), is ensured by giving citizens' control. Consent from users is required before information can be accessed or stored on a device.
- Given the ubiquitous use of tracking cookies by many websites, it has been necessary for all such websites to implement cookie banners asking for consent.
- I am aware of that having to consent to banners is said to have caused cookie-fatigue, it disrupts user's Internet experience - for example when it results in cookie walls² - and compliance can be costly for businesses.
- What should be done? Should we repeal the users' ability to control what third parties put in their devices? This seems to run against people's will to control their devices.
- We have asked people and we hear that citizens support the principle behind the rule. **90% of citizens want to be asked for consent before their device is accessed.** On the other hand, I am also well aware that many websites, mainly or even especially the ones

² 77% of citizens responding to the Public Consultation, believe that websites should not have the right to block access to their content if users refuse the storing of cookies

of publishers, are funded, or partially funded, by advertising. Therefore, the EC wants to come up with the **right balance** that takes into account the different interests at stake.

- Overall, the EC supports initiatives, such as the OBA self-regulatory initiative, that ensure more **transparency** regarding tracking and targeted advertising. Such initiatives **do not dispense companies to comply with the rules of the ePrivacy Directive** or on data protection but complement the legal requirements.
- In this respect, the ePrivacy rules require prior consent (opt-in) for online tracking; the consent option is in line with users' expectations.
- I understand that the OBA self-regulatory initiative uses an opt-out regime. The Art. 29 Working Party strongly questions the compliance of the OBA initiative with the ePD. Perhaps you could explain to me how the initiative with an opt-out regime gives users the control they need, as provided for the ePrivacy Directive? Opt-in means that nobody can store or access anything on users' devices unless they agree. If they want tracking, they have to click 'yes'; otherwise, no tracking is allowed. Please tell, if someone does not want tracking, what will these people have to do?
- I would like to **ask you to provide additional information on the initiative**, in particular with the view to verify the alleged success of this approach and whether it really ensures an effective protection of users' privacy:
 - I understood from prior meetings that on average, the website 'youronlinechoices' has 1.5 million visitors per month. I have seen that when users actually click on the icon next to an ad, they are not directly directed to the opt-out list on 'youronlinechoices'. The initiators have explained to the Commission in earlier meetings that **8%** (120,000) of the visitors go to this list. Have you researched how people navigate through 'youronlinechoices'? Have you tested if the information provided about online tracking is understandable for an average user to enable them to make an informed choice and to find the opt-out list?
 - What does the opt-out of users mean for the collection of information? Is it correct that under that this scheme, even if individuals opt-out, does not try to regulate the collection of data by third parties?
 - How do you actually ensure that the choice made on 'youronlinechoices' to opt-out remains valid when users surf on websites with tracking cookie from participating companies, especially when these websites force citizens to consent to tracking cookies (e.g. by statements such as: "*by continuing surfing on this website you agree to the use of cookies*")?
 - Lastly, I understood that you are concerned that Do-Not-Track software puts dominant non-European players in a more dominant position compared to European players. Could you please explain this to me?
- The Commission proposal for a revised ePrivacy instrument is due in January 2017.

*[You should **remain cautious and vague on the exact content of the Commission proposal**, underlining that the proposal would strike a right balance between ensuring confidentiality and privacy of users while not stifling innovation and the possibility for companies to do business.]*

IV. Defensives

A. Copyright

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B. AVMSD

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1. **Introduction**

The purpose of this document is to provide a comprehensive overview of the project's objectives, scope, and timeline. This document is intended for the project team and stakeholders.

2. **Objectives**

- 1. To develop a new software application that meets the requirements of the client.
- 2. To ensure that the application is scalable and secure.
- 3. To deliver the application on time and within budget.

3. **Scope**

The scope of the project includes the development, testing, and deployment of the software application. The project will not include the design of the user interface or the integration of third-party services.

4. **Timeline**

The project is scheduled to start on January 1, 2024, and is expected to be completed by June 30, 2024. The timeline is subject to change based on the progress of the project.

5. **Conclusion**

This document provides a high-level overview of the project. The project team will be responsible for the detailed planning and execution of the project.

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C. ePrivacy Directive

The Commission has participated in several round tables to set up the initiative. Can we count on the Commission's support in the future?

The Commission welcomes any effort to increase transparency towards regarding the processing of their (personal) data. Transparency will enhance user control. Transparency self-regulatory initiatives should be seen as complementary tool to the law but does not prevent companies from having to comply with legal obligations. It is not up to the Commission to assess the compliance of initiatives with the EU regularity framework on ePrivacy and data protection, it is up to data protection authorities. The Article 29 WP has expressed concerns regarding the compliance of the initiative in Opinion 16/2011.

When revising the ePrivacy Directive, will you keep the "cookie" consent rule?

- The so-called 'cookie rule' is wrongly labelled. This rule simply requires consent to access or store information in users' devices. In the light of the sensitivity of the information stored in our devices, which can be considered to be ones 'home', this rule makes a lot of sense. This provision aims to protect the user from unwarranted intrusion into their smart phones, computers, etc., which are considered part of the private sphere of individuals.
- But is the rule as it stands now efficient? The review will assess the effectiveness of the rule in the light of the experience gained through its application in recent years. For example we will look at whether the exceptions to the rule remain valid or if they need to be amended. Remain vague as to whether or not the rule remains.

The industry is afraid that Do-Not-Track software puts dominant non-European companies in an even more dominant position compared to European companies. What are the Commission's views on this?

All players active on the European market need to comply with the same rules. Of course we see the concerns of European companies. Companies (e.g. publishers) are concerned that users install Do-Not-Track (DNT) software on their devices. DNT-software prevents companies from serving personalised advertisement to users. At the same time, many users consent to being tracked by companies which establish a relationship with the users via login systems (there a few big U.S. players in the market). This way, these companies obtain a derogation' to DNT-software from their users. This is a business model that can be used by all players. However, we also see a call from citizens for more privacy. We encourage industry to develop their business model accordingly. While there is a new emerging market for European companies that should invest more in privacy oriented tools and techniques (so called PETs).

Will you impose opt-in for spam?

- Spam refers to email marketing. Currently the rule on spam already requires opt-in consent, except for ongoing relationships. This rule strikes a balance which seems appropriate between business needs and the right to privacy.
- The review will render the rule future proof, more coherent while taking into account the interest of companies to conduct direct marketing. As for the provision in the GDPR on the right to object to direct marketing, this rule does not render the ePD rules on spam redundant as they regulated different things. The GDPR rules seeks to regulate the right to process data for direct marketing purposes whereas the ePD regulates the follow-up to such processing, i.e. the right to conducted unsolicited communications, which is often perceived as an invasive practice to privacy (e.g. the right to call people for direct marketing). Indeed, the Eurobarometer on ePrivacy showed that more than six in ten (61%) respondents consider they receive too many unsolicited commercial calls.

V. Background

The Copyright package

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Background on the AVMSD legislative proposal

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Background on media freedom and pluralism

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Background on ePrivacy Directive

The OBA self-regulatory initiative was started by 10 associations from Brussels in 2011 and seeks to meet the challenge set by the Commission to address the concerns around OBA. It is based on 7 principles, of which transparency around personalised advertisement (by displaying an icon next to an ad on which a user can click for more information about tracking – being redirected to www.youronlinechoices.eu) and user choice are the most important. The initiative provides by the website the possibility for citizens to opt-out to being tracked online by certain companies. It is currently supported by 165 associated companies. The companies behind the initiative argue that this initiative touched millions of citizens and therefore is successful.

However, compliance of this initiative (which only enables to opt-out to personalised ads) with the prior consent rule for the use tracking cookies (and the collection of information from devices in general) set forth in the ePrivacy Directive is very strongly questioned, notably multiple times by the Article 29 WP. The Article 29 WP states that citizens are not given the protection as required by the ePD by giving users the possibility to object to the use of tracking cookies. They should be asked for permission before the tracking cookies are used. In addition, Art. 29 WP states that it seems that even if a user opts-out to personalised advertisement on youronlinechoices.eu, its data is still collected. This is not allowed under the ePD without consent.

Authors:

Reason for
expunging:
protection
of personal
data
(Article
4.1.b
Regulation
1049/2001).

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