

Response to the European Commission paper: 'A comprehensive approach on personal data protection in the European Union'

14 January 2011

1. The Advertising Association

The Advertising Association is the only organisation that represents all sides of the advertising and promotion industry in the UK - advertisers, agencies and the media. The list of our members is included at the bottom of this response. In the UK, the advertising industry employs nearly 250,000 people. In 2009, advertising expenditure was £14.5bn.

We promote and protect advertising. We communicate its commercial and consumer benefits and we seek the optimal regulatory environment for our industry. Our goal is that advertising should enjoy responsibility from its practitioners, moderation from its regulators, and trust from its consumers.

2. Overview

The Advertising Association believes that the European data protection legislative framework should remain high level, principle-based and technology-neutral. We believe that the Commission should focus on inconsistencies of application and enforcement across the EU. We believe that the UK implementation has been very effective in reflecting the British culture in respect to data protection and privacy, and urge other member states to adopt a similarly effective approach.

We would support efforts to more effectively implement the Data Protection Directive (the "Directive"), but believe that no benefit would be derived by fully reviewing this highly effective Directive. Any moves to modernise the Directive should fully take into account the needs of the wider economy to develop innovative products and services, not least in the field of advertising. It is important that any review strikes a balance between protecting the rights of citizens and the objectives of the single market as well as the EU Digital Agenda and economic development. A failure to achieve this would lead to a barrier to market entry and to the EU's competitiveness.

3. Protection for individuals

The Data Protection Directive has provided individuals with appropriate protections for their own personal data while also enabling businesses to have confidence when processing and transferring data for legitimate purposes. The Advertising Association believes that the Directive is particularly effective in the way that it is sufficiently broad and technology-neutral so as to be valid and applicable to current technologies. We do not hold the view that there needs to be substantial legislative amendments to update the Directive for the online environment, as the Directive's current principles already provide a high level of consumer protection.

We support the definition of personal data as set out in the Directive. We believe that it is important to maintain the distinction between personal data, protected by the Data Protection Directive, and non-identifiable data or statistical information that can be collected to help customise a website, for example. This type of activity is separately regulated through the E-Privacy Directive which is in the process of being implemented

in Member States. An expansive definition of the concept of personal data may have unintended consequences.

It is critical to understand that companies process an array of data without any interest in knowing who the individual users are. Cookie usage is a good example in this respect. The internet offers huge benefits to consumers and business and the growth of e-commerce in the UK – driven by digital advertising - has been a great success story. Any attempt to extend the rules applicable to personal data so as to include data that does not identify the individual, would severely undermine the commercial viability of the internet.

4. Transparency

Rather than introducing a general principle of transparent processing which is unnecessary given the level of information already provided to individuals, we would encourage the Commission to promote media literacy and awareness raising campaigns.

The personal data of minors is already subject to the protections afforded by generally-applicable provisions of the Data Protection Directive. In addition, self-regulatory codes and laws in the Member States provide protection for children in different contexts. Therefore, we do not see the need for a specific rule in this Directive.

In addition, we believe that parental control has an important role to play in respect of "minors" data, especially in certain circumstances where minors need special protection such as on social networking sites. In this context we support the promotion of efficient awareness-raising schemes.

Article 10 already sets clear and efficient rules on information to be provided by the controller when collecting and processing personal data. In addition clear and efficient privacy notices are already provided for by the different industry sectors, according to each sector's specificities.

The Advertising Association believes it to be very important to protect data subjects when their personal data is breached and we believe that the Directive is very effective in this regard. We would, therefore, not support any proposals for mandatory breach notifications.

5. Control

The data minimisation principle derives from Article 6.1 (b) and (c) of the Directive 95/46/EC, which provides 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". This is in our opinion more than sufficient protection for individuals and there is no evidence of a need to strengthen this principle. The Advertising Association would support greater enforcement in this area so as to ensure that the principles of data minimisation are adhered to.

The Directive already sets out rules in Article 11 to provide people with information on the identity of the organisation processing their personal data, and the purpose of this. Articles 12 and 14 provide a right of access and a right of objection. Individuals can require their personal data to be erased, blocked, changed or deleted. There is certainly a need to provide greater information to people about these rights, and for the industry to wherever possible enable people to exercise them.

The introduction of a specifically prescribed "right to be forgotten" is not needed. Article 14 of the Directive provides for efficient means for the data subject to object to the processing of their personal data.

The current Directive sets reasonable parameters and controls on the appropriate use of personal data in the offline and online environment, and it would be very costly to require organisations to develop systems and adequate security to allow data portability. Instead the focus should be on developing clear terms and conditions to enhance consumer awareness about individuals' rights.

6. Raising awareness

While consumers are increasingly aware of the risks of data management, we would encourage the Commission to focus on increasing consumer education programmes so that consumers understand how to protect their personal data.

Media literacy and awareness raising campaigns have an important role to play in helping the average user in understanding their rights when their personal data is being processed. In this context we encourage the Commission to, in particular, promote media literacy and awareness raising campaigns.

7. Informed and free consent

Consent may be given in different ways (explicitly and implicitly). It is important that these differences are maintained. Any move to require users to provide explicate prior consent for all processing operations would be a negative step and a misjudgement of the commercial and technological realities.

Changing any wording would place new and onerous burdens on business in both the offline and online environment that could have significant adverse economic implications, and also hamper the development of the internet and digital media.

8. Sensitive data

The necessary categories of sensitive data are already covered by Article 8 of the Directive, which deals with the processing of special categories of personal data, and we do not believe that there are any other types of personal data that should be classed as sensitive personal data. The Advertising Association sees that the Directive is effective in prohibiting the processing of personal data revealing: racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and the processing of data concerning health or sex life, except under certain conditions (for example, where the data subject has given explicit consent) that are specified in Article 8.

The Advertising Association would support greater clarification of the current conditions so as to ensure a consistent approach is taken across Europe, but would not support any extension of the categories of sensitive data.

9. Legal certainty

Extension of the powers to bring actions before the courts, strengthening of sanctions and further harmonisation of data protection rules at EU level are unnecessary. As we suggest above/below, improving awareness of the current data protection regime, rights and sanctions in Member States would more effectively achieve such objectives. This should be the Commission's priority.

10. Enhancing data controllers' responsibility

We do not see any need for changing the current provision on automated individual decisions. The current directive does not prohibit "profiling" and already provides sufficient consumer protection in article 15 in respect of profiling. Should the

Commission intend to define "profiling" it should take into account the different industry sectors and recognise that there are fair ways of profiling.

A clear definition of "privacy by design" is needed before we can provide a perspective on the concept of privacy by design. We believe the objectives of 'privacy by design' are best served by innovative self-regulatory approaches rather than being prescribed in a legal framework. We remind the Commission that the introduction of any new principle should be subject to a thorough economical impact assessment.

11. Self-regulatory initiatives

We would encourage other Member States to develop self-regulatory solutions which complement the legal framework. In the UK, we have a long tradition and considerable experience at developing self-regulatory systems in a number of areas and these are well supported and complied with by industry. Furthermore, they are well-known and trusted by the public. In relation to privacy, the Information Commissioner's Office has recently published a Code on Online Personal Information setting out how the Data Protection Directive applies to the collection and use of personal data online, and this also provides good practice advice for organisations doing business online. However, the current rules concerning self-regulatory initiatives as laid down by the Directive make the process very burdensome and complex. This should be improved.

Good practice guidance and self-regulation can be a useful complement to law and in some areas it can be a better alternative, because this combination is more quickly adaptable to changing circumstances, technologies and commercial practices.

By way of an example, industry is currently working to develop pan European self-regulation for online behavioural advertising that enables greater transparency and control for consumers.

The Advertising Association supports the approach detailed by the Commission to encourage self-regulation. However, such self-regulation cannot and should not be prescribed in a legal framework. The legal framework needs to allow space for such initiatives and innovation to develop, as well as not to introduce requirements which cannot be implemented in practice.

12. The international dimension

It is our view that the current cross-border transfer of data regime is not effective and is neither consistent nor business-friendly. There are significant legal costs which impact on businesses, and ultimately consumers, borne out of over-regulation and varying approaches to regulation which must be addressed in this area.

13. Stronger institutional arrangement

The role of the Article 29 Working Party should not be changed. They should remain an **independent advisory** body. We would oppose any moves to harmonise and strengthen the status and the powers of the national DPAs as we firmly believe that the current regime is effective. However, increased dialogue between industry and the Working Party is something that we would encourage.

For further information please contact William Blomefield, Regulatory Affairs Manager, Advertising Association at: william.blomefield@adassoc.org.uk or on 020 7340 1100

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