To the attention of Minister Karel Havlíček

Ministry of Trade and Industry

Brussels, 04.11.2019

Dear Minister Karel Havlíček,

We write to you on behalf of the associations EMMA (European Magazine Media Association), ENPA (European Newspaper Publishers' Association), EPC (European Publishers' Council), NME (News Media Europe), AIG (Advertising Information Group), AMC (Audience Measurement Coalition), FEDMA (Federation of European Direct and Interactive Marketing), AER (Association of European Radios), EGTA (European Group of Television Advertising), GESTE (Les editeurs de contenus et services en ligne) and SPIR (The Association for Internet Progress), which together represent a large array of interests inside the European digital media market. In light of the latest Finnish Presidency text dated 30 October 2019, **we would like to reiterate our most urgent concerns with the latest Council draft amendments**. Many key elements still remain highly problematic for our industry, and we firmly believe that more time is needed to address the outstanding issues.

Over the past weeks, the undersigned associations have had numerous and constructive exchanges with Member States and the European Commission, where we have also repeatedly referred to the findings of the expert legal opinion mentioned below. **We are alarmed that even the few suggestions which would provide the necessary minimum protection for our sector as identified in the legal expert opinion have been entirely ignored in the latest Presidency text**.

In certain aspects of the newly proposed text, such as conditionality of access to content, we have noted that the latest changes would be detrimental for the European media sector. Unfortunately, the new wording in Recital 20 continues to impose an unfair obligation for all media outlets to provide an equivalent offer without data processing**. This essentially binds publishers, by law, to offer their content for free. We hope you agree that this is unsustainable and undesirable**. In addition, the current wording of the recital could be liable to stricter interpretations. We believe that the latest text does not adhere to basic principles for better regulation: one of them being that EU actions should be based on evidence and understanding of their impacts, as well as ensuring that regulatory burdens on businesses, citizens or public administrations are kept to a minimum.

Considering the findings of the recently circulated legal opinion of Prof Dr Jürgen Kühling, LL.M. (University of Regensburg), **the undersigned associations see the latest developments as**

unacceptable. Furthermore, the latest changes could endanger media freedom and diversity in the EU to an extent that would hurt the formation of opinion of European citizens and essentially European democracy.

The above-mentioned legal opinion addresses the highly important issue regarding consent and conditionality, which still remains unresolved in the latest text from the Council. The opinion also assessed the need to balance the fundamental rights at stake and provided a clear overview on the possible margin of manoeuvre of the European legislator. In particular, it found that:

- **Lex specialis derogat legi generali applies**. In other words, the ePrivacy Regulation - which contains sector specific provisions for electronic communications – can introduce provisions which deviate from the lex generalis (the GDPR). The provisions of the ePrivacy Regulation can and will override provisions of the GDPR. The legislator is not legally bound to previous general legislation and is free to provide rules that differ from the GDPR, i.e. less strict rules, within the limits of fundamental rights.

- It is essential in order to find a regulatory design that ensures **the necessary balance of fundamental rights at stake**, as well as to render the regulation neutral from a competition aspect. For one, the architecture of the Charter of Fundamental Rights and the case-law of the European Court of Justice specifically do not show that electronic communications data are more strictly protected per se by Art. 7 CFR than other data is by Art. 8 CFR. On the other hand, the demands of data protection ex. Art 7 and Art. 8 CFR and the freedom to conduct a business ex. Art. 16 CFR require a balanced assessment of interests. Moreover, as the possibility of financing the media via data processing is at stake, media freedom ex Art. 11(2) CFR takes effect as it also protects against legislative measures that would jeopardise financing conditions of the media. In this respect, regulation must ensure media services to be financially feasible in practice as well.

- The **framework in its entirety must satisfy this important balance of interests**: therefore, the more narrowly defined the rules on lawfulness of processing are, the greater the significance of consent is. Conversely, it follows that the stricter the requirements are with regard to consent, the more important the remaining rules on lawfulness are. The legal opinion concludes that the ePrivacy proposals presented are far from achieving this balance to the detriment of the free and independent media.

We firmly believe that many Member States acknowledge our concerns and have been attempting to mitigate risks brought on by the discrepancies of the proposal. And many continue to try to find the necessary balance between the many interests at stake. However, it seems that the legal opinion appears not to have been taken into account at all. Furthermore, **we see no improvement in the latest text, and hence it remains unacceptable to us**. **The proposals would seriously jeopardize media pluralism, media diversity and the formation of opinion in Europe**.

The EU has a fundamental obligation to protect freedom of expression. This obligation extends to considering the effect of regulatory measures on media pluralism as per Article 11 of the Charter of Fundamental Rights of the European Union.

Having regard to the extreme position enshrined in the European Parliament's report and the weak safeguards contained in the Council's text, we expect the trilogue to result in a compromise which - through Articles 8 to 10 - will solidify the data supremacy of the large US log-in platforms. Indeed, Articles 8 to 10 entrust the design of the privacy settings in the user interface to market dominant platforms. This power over the consumer and their competitors will clearly lead to less control over

privacy, not more. Moreover, such provisions will increase content providers' dependency on large platforms and will incentivise the latter to close off their walled data gardens.

As such, we strongly urge the Council to take more time to carefully reflect on the various questions that remain unanswered: for example, the inflexible legal bases; the scope of application; conditionality to access to content; and its profound impact on competition in the digital market.

Alternatively, Member States should request the European Commission to reassess the e-Privacy proposal in the light of the ongoing evolution of the GDPR, to reconsider its impact on competition, and to ideally repeal the proposal.

Yours sincerely,

Ilias Konteas
EMMA
Ilias.konteas@magazinemedia.eu

Ilias Konteas
ENPA
ilias.konteas@enpa.eu

Angela Mills Wade
EPC
Angela.Mills-Wade@epceurope.eu

Wout van Wijk
NME
wout.vanwijk@newsmediaeurope.eu

Dr. Bernd Nauen
AIG
nauen@zaw.de

Mathilde Fiquet
FEDMA
mfiquet@fedma.org

Agata Nowacka
AMC
agata@dotcoms.eu

Matt Payton
AER
matt.payton@aereurope.org

Amelie Delahaie
Geste
amelien@geste.fr

Connor Murray
EGTA
conor.murray@egta.com

Jana Břeská
SPIR
jana.breska@spir.cz