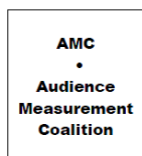




NEWS MEDIA EUROPE



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GESTE



To the attention of Minister Karel Havlíček

Ministry of Industry and Trade

Brussels, 18.10.2019

Dear Minister Havlíček,

We are writing on behalf of 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 order to express our strongest concerns with regard to the latest Finnish Presidency text, published on 17 October 2019.

The undersigned associations urge you not to agree to this text, which is far from being ready to be elevated to the political level, as there are many outstanding issues unresolved. The proposed drafts of the e-Privacy Regulation, including the latest text of the Finnish Presidency, would consolidate market dominance of the same handful of players, whose power it actually seeks to curtail. Our member companies are under extreme competitive pressure from a handful of dominant online platforms and this Regulation will have a detrimental impact on competition, innovation and to the consumers it seeks to protect. The e-Privacy Regulation in its current form creates new competition issues and will (indirectly) only benefit large log-in platforms.

We believe that many Member States understand our concerns and have tried to mitigate the worst aspects of the proposal through various amendments. In spite of such efforts, the text remains unacceptable and would be a backward step in European objectives to protect media pluralism, diversity and the formation of opinions in Europe. This is because it puts the future financial viability of independent, advertising funded media at risk.

We would like to highlight some of the many outstanding questions, in particular the question of conditionality of access to content. The majority of freely accessible journalistic editorial content is financed by advertising revenues. The use of suppliers (cookies) is essential to monetize the vast array of services which free and independent media across Europe provides. This is why it is essential that

the EU legislators adopt a provision which clearly guarantees that access to an information society service can and should be made conditional on the user's acceptance of cookies.

Recital 20 fails to provide a solution and it forces media outlets to offer an equivalent offer without data processing, essentially asking publishers to offer their content for free. A potential obligation for service providers to provide a cookie-free option under the current wording of the recital would have far reaching effects in terms of media diversity and would lead to a (partial) expropriation of our intellectual property. In our view an obligation to offer an alternative service, e.g. one that is subject to direct monetary payment, can only be justified when the service holds a dominant market position (Recital 43 GDPR: "Imbalance of power") and is inappropriate for the media sector which is characterized by a diverse and plural offer to citizens

We further note that the EU has cross-cutting fundamental rights obligations in the area of freedom of expression, which creates an obligation to consider the effect of regulatory measures on media pluralism as per Article 11 of the Charter of Fundamental Rights of the European Union.

We would like to share with you some key findings of an expert opinion by the leading expert in European and data protection law, Prof Dr Joachim Kühling (University of Regensburg)¹:

- The report states that - contrary to what is often claimed but has never been substantiated - there is extensive margin for how and what can be regulated. The GDPR does not legally limit this margin with regards to the e-Privacy Regulation. In particular, it does not prevent the Regulation from deviating from GDPR, nor does it only allow for stricter regulations than those under GDPR.
- The expert opinion examines the proposals on the question of admissibility and the limits of a conditional relationship between consent and service provision, as well as the system of the legal bases and the fact that the current draft provides no legal basis other than consent for the economic purposes of refinancing media services. It is clear that the proposals of the Commission, Council and the European Parliament are unacceptable under European law.

Although Article 10 is deleted in the current Council text, we are genuinely concerned that Article 10 will be reintroduced under pressure from the Parliament and the owners of the dominant browser, without any safeguard in the Council text, that providers or software have to ensure that any consent requested by a website and given to the website is applied by the software immediately.

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 text which - through Articles 8 to 10 - will solidify the data supremacy of the large US log-inplatforms. Indeed, Articles 8 to 10 entrust the design of the privacy 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 urge the Council most strongly to take more time to carefully reflect on the various questions that remain unanswered: for example, the inflexible legal bases; the scope of application; the ambiguous relationship with GDPR; and its profound impact on competition in the digital market.

¹ The English translation will be available and circulated shortly.

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.

Therefore, if you believe, as we do, that media diversity is a cornerstone of European democracy and a vital instrument for the formation of opinion in Europe, please do not proceed to an agreement on the current Presidency text.

Yours sincerely,

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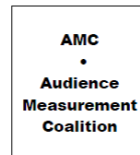
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