

ARTICLE 29 Data Protection Working Party



Brussels, 9 December 2010

Vice-president of the European
Commission
Mrs N. Kroes
DG INFSO
European Commission
B - 1049 BRUSSELS
Belgium

Dear Vice-President, dear Mrs Kroes,

The Article 29 Data Protection Working Party is following the transposition of the amended E-Privacy Directive ('Directive'), which Member States must complete by 25 May 2011, with great interest.

We are aware of your attention to on-line advertising and to the necessary compliance with Article 5(3) of the Directive. This interest is shared by the Article 29 Data Protection Working Party, which has worked extensively on the applicable requirements under Article 5(3) of the Directive. This is reflected in our Opinion 2/2010 on online behavioural advertising, published on 22 June 2010.

In Opinion 2/2010 it is made clear that, according to Article 5(3) it is required to obtain informed consent to lawfully store information or to gain access to information stored in the terminal equipment of a subscriber or user. Taking into account that tracking cookies are 'information' stored in the data subject's terminal equipment and, they are accessed by advertising network providers when data subjects visit a partner website, Article 5(3) is fully applicable. Hence, any storage of cookies or similar devices (irrespective of type) and any subsequent use of previously stored cookies to gain access to data subjects' information will have to comply with Article 5(3).

From your speech of 17 September 2010 at the European Roundtable on the Benefits of Online Advertising for Consumers, we understand that you are encouraging on-line advertising industry to produce a self-regulatory instrument to facilitate compliance with Article 5(3) of the Directive. Although the Working Party agrees that self regulation can be a means to achieve compliance in order to fulfil the requirements of Article 5(3) and with a view to the enforcement tasks of national data protection authorities, we would however like to stress the importance of clearly ensuring data subjects' informed consent before any relevant information is stored or accessed.

Given the Working Party's interest in the matter, we would appreciate receiving information on any Commission guidance to the Communications Committee regarding the Directive and more particularly the implementation of Article 5(3). We would also appreciate receiving

This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

The secretariat is provided by Directorate C (Fundamental Rights and Union Citizenship) of the European Commission, Directorate General Justice, B-1049 Brussels, Belgium, Office No MO59 06/36.

Website: http://ec.europa.eu/justice/policies/privacy/index_en.htm

information regarding the status and timetable concerning the technical implementation measures with respect to the Directive's data breach notification provisions.

Naturally we are most ready to provide further input and would be willing to exchange thoughts on this matter.

Yours sincerely,
On behalf of the Article 29 Working Party,

Jacob Kohnstamm
Chairman