

Commission of the European Communities
Directorate-General for Justice, Freedom and Security Unit D5 – Data protection

Postal address : European Commission Directorate-General for Justice, Freedom and Security
Unit D5 – Data protection B - 1049 Brussels

E-mail : JLS-PRIVACY-CONSULTATIONS@ec.europa.eu

Subject: Consultation on the legal framework for the fundamental right to protection of personal data

Vienna, December 31, 2009

Dear Sir or Madam,

ISPA, the Austrian Association of Internet Service Providers appreciates the opportunity to express its views on the new challenges for personal data protection.

Protection of personal data is most significant in a modern digital connected environment. Nevertheless the balance between the level of protection and the usability of handling personal data has to be preserved. The current legal framework of personal data protection introduced a solid level of protection and had sustainable impacts on the standard of European data protection. However, technological developments and practical experiences when applying the framework show the necessity of an amendment. The objective is to settle a balance between the right of data subjects on efficient data protection through effective enforcement and accountability mechanisms and a flexible framework that allows business to create and offer products and services at a worldwide level.

Please find our comments directly beneath the questions.

1. Please give us your views on the new challenges for personal data protection, in particular in the light of new technologies and globalisation

The new challenges for personal data protection from our, an association of Internet Service Providers, point of view are search engines combined with additional applications on a cloud computing basis, location based services, social networks and social platforms etc. Furthermore, the international transfer, collection and use of data have extended. Directive 95/46/EC (hereafter, the Directive) provides a framework for the standard use of personal data but it does not mention the data protection challenges arising with the newly-created web 2.0 applications and cross-border data flows which are relevant in a globalised economy and the emerging business models around search engines, cloud computing and advertisement. In addition to these new

developments based on new technologies and globalisation new challenges are arising because of new legal initiatives like the Data Retention Directive that obliges Internet Services Providers to store much more customer data as ever before. In this newly created area of conflict between massive data storage without suspicion for law enforcement and a sound level of data protection new requirements for storage, access and providing information have to be met in order to create a balance of interest and provide legal certainty for the industry.

2. Does the current legal framework meet these challenges?

The Directive plays a crucial role in protecting the rights of individuals and creates a solid base for the protection of personal data. However, the Directive was not successful in achieving a harmonised data protection framework across the single market: The implementation by the different member states bears several distinctions that make it hard or nearly impossible for a cross-border company to keep track and fulfill all obligations regarding data privacy. The current legal framework with its strict distinction between data controller and data processor does not match the current situation in the online environment and the new developments of cloud-computing and outsourcing. Finally we see a lack of data protection on the European institutional level. The current legal framework does not provide an European institution for the protection of personal data that is involved in legal processing and has the power to examine and reject legal initiatives should data protection rules be harmed.

In this connection we want to highlight the importance of raising awareness and education of data subjects about data privacy in the online environment and non-legislative measures of the industry in this field. In co-operation with the European Internet Services Providers Association (EuroISPA) the Council of Europe developed so called "Human right guidelines for Internet Service Providers" (hereafter, the "Guidelines") with the scope to instruct the different kinds of Internet Service Providers (ISPs) in their specific roles such as access providers, providers of content, etc. (see para 14. Guidelines). The Guidelines especially address the right to respect for private life and data protection (see para 27. to para 33. Guidelines) and emphasise the importance of information of the customers (para 31. Guidelines) as well as the restrictive usage of data (para 32. Guidelines).

3. What future action would be needed to address the identified challenges

As correctly mentioned in the Communication, "An area of freedom, security and justice serving the citizen", COM (2009) 262 final from 10.06.2009, technology is currently developing very fast. The basic principles are mostly masked in the current legal framework but there is need for a consistent implementation of data protection rules in the single market.

To foster the worldwide activities of EU companies, the existing EU-US Safe Harbour Agreement should be extended even to the Telecommunications sector. This sector is currently excluded, but bears a strong international component and would therefore profit from being included, especially regarding competition in local extra-European competition.

Furthermore, the current legal framework should be reformed to be more flexible regarding the role of data controller and data processor, as in the new digital environment purposes and means of the processing are more and more determined by different players that implement different business models based on user data often under a joint umbrella. Especially the data controller's rules of liability should be adapted accordingly.

Finally we would like to stress the importance to continue the principle-based approach of the Directive and the effectiveness of non-legislative measures (eg the Guidelines mentioned above) as flexible and effective measures to deal with data privacy challenges in the fast developing technology markets.

In case you require additional information please do not hesitate to contact us.

Sincerely,

ISPA Internet Service Providers Austria



Dr. Andreas Wildberger
Secretary General

Attached: Human rights guidelines for Internet service providers Developed by the Council of Europe in co-operation with the European Internet Services Providers Association (EuroISPA)

About ISPA: ISPA is the Austrian association of Internet Service Providers, representing approximately 200 ISPs. ISPA is a major voice of the Austrian Internet industry. Our goal is to shape the economic and legal framework supporting an optimal growth of the Internet and Internet services. We regard the use of the Internet as an important cultural skill and acknowledge the resulting socio-political responsibilities.