

ARTICLE 29 Data Protection Working Party



Brussels, 1 March 2012

OBA industry

Alain Heurieux
President
IAB Europe

Angela Mills-Wade
Vice Chair
EASA

By email

Dear Mr Heurieux, dear Mrs Mills-Wade,

The Article 29 Working Party welcomes your willingness to maintain a constructive and substantive dialogue shown in your letter of 17 January 2012 and appreciates your explanations. Nevertheless, we have to repeat that the current approach of the Code of Conduct does not meet the consent and information requirements of the revised ePrivacy Directive, as has been stated in Opinion 16/2011 on the EASA/IAB Best Practice Recommendation on Online Behavioural Advertising.¹

The WP 29 is aware of a number of different mechanisms which will allow users to provide meaningful consent for tracking their web surfing behaviour. One of the most promising initiatives regarding consent mechanisms is the work done by the W3C on the *Do Not Track (DNT)* protocol. The WP 29 shares with Commissioner Kroes the opinion that this mechanism “*can become a very successful standard...empowering the citizen, by putting control in the hands of the user in a way that is fair and transparent*”.²

The WP 29 is of the opinion that a global DNT mechanism could be a very efficient way to deal with user consent for the tracking of their web surfing behaviour across different websites.

However, such consent can only be provided if users of all browsers have made **an active and informed choice** to allow or disallow the tracking. Such a choice could be offered in a manner similar to the browser selection tool in an operating system.

¹ Opinion 16/2011 on the EASA/IAB Best Practice Recommendation on Online Behavioural Advertising, adopted 8 December 2011, URL: http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2011/wp188_en.pdf

² Weblog Commissioner Kroes, 20 January 2012, Why we need a sound Do-Not-Track standard for privacy online, URL: <http://blogs.ec.europa.eu/neelie-kroes/donottrack/#more-1161>

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 2/13.

A second essential condition for DNT to meet the requirements of European data protection law is that a DNT-setting in a browser means that users should no longer be tracked, instead of just not being shown targeted advertisements. DNT should imply that no user data are collected, retained, processed and shared anymore, with the exception of information strictly necessary to provide the service explicitly requested by the subscriber or user.³ It must be clear that data from a user with an active DNT-setting cannot be used for purposes such as "market research" and "product development".⁴

If the DNT-standard meets these two essential conditions, the combination of initial consent in the browser with the current opt-out website could comply with the revised e-privacy directive, as this website and the icons can serve as an additional measure to remind users that they can withdraw their consent.

For this reason, the WP 29 encourages IAB and EASA to constructively contribute to the standard-setting group W3C. According to the planning of this group, the standard should be adopted in June 2012. As soon as this standard is adopted, and assuming it will meet the two essential conditions described above, the WP29 invites IAB and EASA to review the Code of Conduct including the implementation of this mechanism and present their Code of Conduct to the Working Party for formal approval. Such an approval would be beneficial for user trust, provide legal certainty for data controllers and promote wider participation with the Code.

Yours sincerely,

On behalf of the Article 29 Working Party,

Jacob Kohnstamm
Chairman of the Article 29
Working Party

³ Article 5 (3) of the revised e-Privacy Directive (2009/136/EC).

⁴ Such exceptions are proposed by the Digital Advertising Alliance (DAA) in November 2011. URL: <http://www.aboutads.info/resource/download/Multi-Site-Data-Principles.pdf>