

**31st International Conference of Data Protection and Privacy  
Commissioners, Madrid**

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**“Smile! There’s a camera behind the ad” or “Send it to a friend”:  
privacy in light of the new advertising techniques**

**Online Ads:  
A new challenge for privacy?**

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**Why is the Council of Europe dealing with profiling?**

**Privacy and data protection** have always been **core values of the Council of Europe**, which celebrated its 60th anniversary this year.

Our activities are centred around the protection of and respect for human rights. Key achievements are:

- the **European Convention on Human Rights** (“ECHR”), thanks to which the right to privacy is a directly enforceable fundamental right since 1950, nowadays for 800 million Europeans and
- **convention 108**, the first internationally binding treaty on data protection.<sup>1</sup>

In its **2005 Declaration on human rights and the rule of law in the Information Society**, the Committee of Ministers reaffirmed that, “all rights enshrined in the ECHR remain fully valid in the Information Age and should continue to be protected regardless of new technological development.”

New information and communication technologies (ICT) allow to observe and store more easily, rapidly and invisibly than ever before most day-to-day human activities, such as buying and selling, undertaking researches, reading newspapers, sending and receiving emails. The **increasing use of profiling techniques has serious consequences for individuals** who may be deprived from accessing vital goods and services, such as credit or insurance, or may have to pay a higher price for them.

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<sup>1</sup> Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (CETS 108, 1981) and its additional protocol (CETS 181, 2001).

Profiling techniques are used in particular in online advertising, where **individual browsing habits are often tracked and collected without notice and permission.**

**Demonstration: the challenges for privacy resulting from the use of transclusive hyperlinks**

Let us take the example of a user who consults a popular newspaper on-line.

*slide 1*

The screenshot shows the EL PAÍS.com website in a Mozilla Firefox browser. The browser's address bar displays the URL <http://www.elpais.com/global/>. The website's header includes the title "EL PAÍS.com EDICIÓN GLOBAL" and a navigation menu with categories such as "Inicio", "Internacional", "España", "Deportes", "Economía", "Tecnología", "Cultura", "Gente y TV", "Sociedad", "Opinión", "Blogs", and "Participa". A search bar is also present. The main content area features several articles and sections:

- 10 AÑOS EN ARGENTINA**: A section celebrating the 10th anniversary of EL PAÍS in Argentina, with sub-articles like "EL PAÍS, 10 años en Argentina" and "Argentina: 200 años de soledad".
- EL FUTURO DE EUROPA**: A section with the main article "La UE llega a un pacto sobre cambio climático" (The EU reaches an agreement on climate change), discussing the Copenhagen summit and the impact of the crisis on Europe.
- Premio Nacional de Moda**: A section about the National Fashion Award, mentioning the first edition and the winner, Casillas Xavi.
- DEPORTES**: A sports section featuring "Casillas, Xavi..." and listing candidates for the FIFA World Player 2009 award.

There are also advertisements for "Un ordenador portátil" (A portable computer) and "match.com" (a dating portal).

When the web page is requested, a **translusive hyperlink** is added, ordering the browser to download content from external servers. This slide shows the Adblocks hyperlinks.

## Slide 2

The screenshot shows the EL PAÍS.com website in a Mozilla Firefox browser. The browser's address bar displays the URL `http://www.elpais.com/global/`. Below the browser window, an Adblock window is open, showing a list of "Blockable items on current page". The list includes several URLs, many of which are from `ads.prisacom.com` and `doubleclick.net`, indicating tracking and advertising scripts. The website content visible in the browser includes a banner for "12ª Encuesta ALMC a usuarios de Internet", the EL PAÍS.com logo, and various news articles such as "10 AÑOS EN ARGENTINA" and "La UE llega a un pacto sobre cambio climático".

The average user has no means to oppose these connexions. They remain invisible. The browser will communicate to **third parties**, such as advertising companies or Google analytics, the **exact URL reference of the article** the user is reading. This transmission of information may also include **keywords** typed in search engines or **interventions** made in discussion forums.

When the same advertiser is present on several websites which are systematically using a permanent unique identifying cookie, it collects on a daily basis the click stream of the majority of users. The following slide shows a popular site with Double-Click present in Adblock window.

## slide 3

La UE pacta una posición común sobre el cambio climático · ELPAÍS.com - Mozilla Firefox

File Edit View History Bookmarks Tools Help

http://www.elpais.com/articulo/internacional/UE/pacta/posicion/comun/cambio/climatico/elpepuint/20091030/elpepuint\_9/Tes#

Most Visited

La UE pacta una posición común ...

¡PRUEBA 72 horas GRATIS! match.com El portal nº1 para encontrar pareja. 19,95€/mes durante 1 Año

ELPAÍS.com Internacional

Viernes, 30/10/2009, 18:43 h

Inicio Internacional España Deportes Economía Tecnología Cultura Gente y TV Sociedad Opinión Blogs Participa

América Latina Europa Estados Unidos Oriente Próximo Corresponsales

ELPAÍS.com > Internacional 3 de 11 en Internacional

El futuro de Europa

### La UE pacta una posición común sobre el cambio climático

El presidente del Gobierno español, José Luis Rodríguez Zapatero, confirma el pacto con los Estados del Este y Centro de Europa

Blockable items on current page

Search:

Address	Filter
http://ad.es.doubleclick.net/adj/N2462.107994.2735571956521/B4030945;sz=1x1;ord=537907147	
http://ad.es.doubleclick.net/dot.gif?1231470705	
http://ad.es.doubleclick.net/dot.gif?1869238512	
http://ad.es.doubleclick.net/imp/v1;f;218940257;0-0;0;42172591;1 1;33831771 33849649 1;;cs=q%3fhttp://ad.es.doubleclick.net/dot.gif?1231470705	
http://ad.es.doubleclick.net/imp/v1;f;218940257;0-0;0;42172591;1 1;33831771 33849649 1;;cs=q%3fhttp://ad.es.doubleclick.net/dot.gif?1869238512	
http://ads.prismacom.com/RealMedia/ads/Creatives/OasDefault/ELPAIS_jaztel_oct_ca_1010_09/banner_16_220x90.swf	
http://ads.prismacom.com/RealMedia/ads/Creatives/OasDefault/ELPAIS_match_oct_1010_09/728x90_72nov.jpg	
http://ads.prismacom.com/RealMedia/ads/Creatives/OasDefault/ELPAIS_mercedes_glk_in_2_1010_09/300x250_banner.swf	
http://ads.prismacom.com/RealMedia/ads/Creatives/OasDefault/ELPAIS_mercedes_glk_in_2_1010_09/800x600_conAspa.swf	
http://ads.prismacom.com/RealMedia/ads/Creatives/OasDefault/ELPAIS_mercedes_glk_in_2_1010_09/300x250_600x250_panel.swf	
http://ads.prismacom.com/RealMedia/ads/Creatives/OasDefault/ELPAIS_self_bank_cuenta4_1011_09/145x27_nuevo.gif	
http://ads.prismacom.com/RealMedia/ads/Creatives/OasDefault/ELPAIS_self_bank_cuenta4_1011_09/145x27_nuevo.gif	
http://ads.prismacom.com/RealMedia/ads/Creatives/OasDefault/PATEP_peptravel_viajero_2_0708/pphone_lo_mas_6cent_oct.gif	
http://ads.prismacom.com/RealMedia/ads/Creatives/OasDefault/PATEP_peptravel_viajero_2_0708/pphone_lo_mas_6cent_oct.gif	
http://ads.prismacom.com/RealMedia/ads/Creatives/OasDefault/PATEP_peptravel_viajero_2_0708/pphone_lo_mas_6cent_oct.gif	
http://ads.prismacom.com/RealMedia/ads/Creatives/OasDefault/PATEP_peptravel_viajero_2_0708/pphone_lo_mas_6cent_oct.gif	
http://ads.prismacom.com/RealMedia/ads/Creatives/OasDefault/REC_EP_AIMC_201009_PLAN/12cas120x600.gif	
http://ads.prismacom.com/RealMedia/ads/Creatives/OasDefault/REC_EP_AIMC_201009_PLAN/12cas120x600.gif	
http://ads.prismacom.com/RealMedia/ads/Creatives/OasDefault/REC_EP_AIMC_201009_PLAN/12cas120x600.gif	

### What kind of regulatory framework do we need for online ads?

We have a **truly worldwide discussion**. Echoing the starting battle over the rules governing online advertising in the **United States of America**, the NY Times titled on 7 October 2009 **“Online Ads: Big Brother or Customer Service?”**

At the **Council of Europe**, 47 states are collaborating more discreetly in the preparation of a **new legal instrument** on the protection of individuals with regard to automatic processing of personal data in the framework of profiling.

For the application of international data protection standards, **the following question** is vital: **Is the data generated online anonymous or is personal data being processed?**

Some argue that convention 108 and the EU data protection directive would not cover data profiles generated online because they do not constitute “personal data”.

However, even anonymous surveillance can be contrary to the fundamental **right to privacy under art. 8 ECHR**. In **S. and Marper v UK**, the European Court of Human Rights held that, “the mere storing of data relating to the private life of an individual amounts to an interference within the meaning of article 8.”<sup>2</sup>

Even without identifying the name or address of a person, it is possible to **single somebody out** on the basis of certain criteria and attribute decisions to him or her. In the online world, the individual contact point (a computer) no longer necessarily requires the disclosure of a person’s identity in the narrow sense.<sup>3</sup> As recognised also by the ECJ in the *Lindqvist* case, what constitutes the **processing of personal data** in this context is the mere possibility of identifying individual persons for instance by providing their telephone numbers or other relevant personal information.<sup>4</sup>

In the Internet age, **communication covers all actions allowing data to be made available to a third party**, including transmission, dissemination and interconnection. The data may be made available **actively** - by replying to an individual request by a third party - or **passively** – by granting the third party on-line access to personal data.

The web browser editor, the cyber marketing company and the original website are thus involved in processing. While the information contained in profiles may be considered objective and irrefutable, their processing through automated means allows data controllers to go well beyond neutral identification.

**Individualised profiles are not so anonymous** as sometimes pretended and in many cases personal data is being processed. It follows that convention 108 applies.

### **What will be the main features of the draft recommendation?**

The recommendation is currently being prepared by the committee of experts which brings together all 41 states parties to convention 108, the **T-PD**. Several **observers**, such as the **ICC** and the **international conference** of data protection and privacy commissioners also participate actively.

The recommendation will eventually be adopted by the governments of all 47 Council of Europe member states. It will be an **expression of the collective will** of the community of democratic European States. Addressed to the **governments of member states**, it will contain **principles and guidelines**

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<sup>2</sup> S. Marper v UK, judgment [GC] of 4 December 2008, § 67.

<sup>3</sup> See Report on the application of data protection principles to the worldwide telecommunication networks, by Yves Poullet and his team, for the Council of Europe's T-PD Committee, point 2.3.1, T-PD (2004) 04 final and the concept of an identifiable person in Opinion 4/2007 of Article 29 Working Party.

<sup>4</sup> ECJ, Case C-101/2001, judgment of 06.11.2003 (Lindqvist), recital 27.

to be implemented through national **legislation and self-regulation**. It pursues three objectives:

- **to provide a coherent regulatory framework (blueprint)**, which strikes a **fair balance** between the protection of privacy and the legitimate interests of advertisers and consumers;
- **to ensure effective protection of the rights of data subjects and fair procedures** in situations where mass quantities of data are processed. Not only Internet searches, but also the use of mobile telephones or records of consumer habits;
- **to avoid** that individuals are being **subjected to decisions** – or even worse, **discrimination or stigmatisation** – automatically, on the basis of mere profiles.

### **Definition and scope**

According to the definitions retained so far, “**profiling**” will mean an automatic data processing technique that consists of applying a profile to an individual, namely for the purpose of analysing or predicting personal preferences, behaviours and attitudes, a “**profile**” being a set of automatically generated data characterising a category of individuals that is intended to be applied to an individual.

The recommendation’s exact scope of application is still under discussion. So far, it is foreseen that it will apply in the first place to the **private sector**, but member states may extend its application to the **public sector** as well.

### **Conditions for the collection and processing of personal data using profiling techniques**

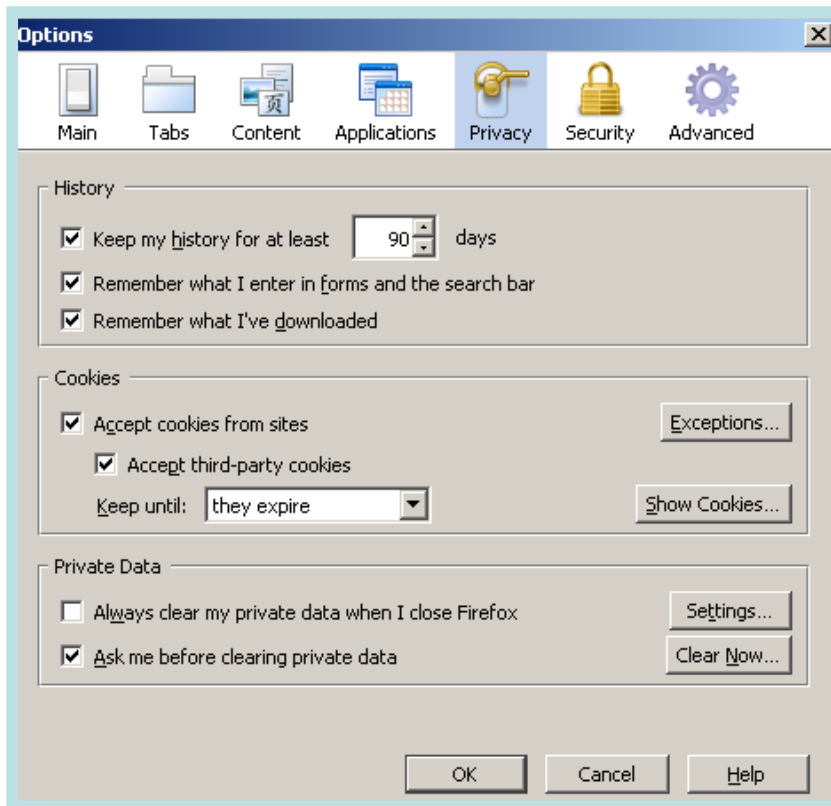
The current draft formulates essentially two conditions:

- it has to be **provided for by law**, or
- it is **permitted by law** with the consent of the data subject, for the performance of a contract or for the purposes of legitimate public interests or interests of the data controller.

**Consent** shall be free, specific and informed, even explicit in the case of sensitive data.

Today, browser options are configured by default in order to allow **third party cookies**. Does this constitute free, specific and informed consent?

## slide 4



The recommendation will also address the distribution and use of monitoring software without the data subject's knowledge, namely through a given terminal or electronic telecommunications network. This provision is not about spyware, but the production of terminals and technologies ("privacy by design").

### Basic rights of data subjects

The draft recommendation foresees in particular the following rights of data subjects:

- **to receive information** including on the purposes and effects of profiling. The right to be informed (by consulting on-line newspapers) shall not be interlinked by default with third party observation;
- **to object to the use of their personal data** for profiling;
- **to object to decisions** having legal or other significant effects, including where such decisions are taken in the course of the performance of a contract;
- **to obtain** from the data controller **communication** of personal data, the logic underpinning the processing, significance and consequences of the profiles attributed.

## Remedies

Domestic law should provide for appropriate sanctions and remedies; e.g. new German legislation on scoring which was enacted this year<sup>5</sup> provides for penalties of up to 300,000 € if the interests of data subjects are harmed through wrongful use of data (processing, profiling) or denial of information.

## Data security

Appropriate technical and organisational measures will be required to guard against **accidental and unlawful destruction and loss of data** as well as unauthorised access, alteration, communication or any other form of unlawful processing. The appointment of an **independent person** responsible for the security of information systems will be required as well as specific measures to **prevent re-identification** of data subjects through the use of aggregated statistical results.

## Conclusions

We are not privacy zealots. The recommendation recognises that **profiling pursues legitimate interests**, adapting offers to meet demand and allowing better analyses of risks and fraud, thus providing benefits for end users, the economy and society at large.

But there are currently **so many grey areas in online advertising** that if the end-user knew about it all, it would make their hair turn grey.

We are interested in gathering views by all interested parties. Following a request from the ICC, the T-PD has decided to organise a **consultation with the private sector**, not only with on-line advertising associations, but also with consumer associations. A hearing will take place in Strasbourg on 19 November 2009.

More transparency is in the interest of all. If Internet service providers, research and online advertisement companies care about the long-term success of their business, they should take an active role. This is why the recommendation will also promote **self-regulation**, not as a substitute for, but in addition to, domestic legislation.

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<sup>5</sup> See Section 43 of the Federal law on data protection (BDSG).

You will find the text of the draft recommendations as well as more information about our work at:



## For more information:

[http://www.coe.int/t/e/legal\\_affairs/legal\\_cooperation/Data\\_protection/](http://www.coe.int/t/e/legal_affairs/legal_cooperation/Data_protection/)

