

## EDPS COMMENTS ON SOME ISSUES IN THE REVIEW OF DIRECTIVE 2002/22/EC (UNIVERSAL SERVICE)

### I. THREE STRIKES APPROACH SCHEMES: BACKGROUND

#### I.1. Three Strikes Approach Schemes in a Nutshell

1. The European Parliament ('EP') discussed issues related to the "graduated response schemes" or so called "three strikes approach" during the debate that preceded the adoption of a legislative resolution on the Universal Service and ePrivacy Directives ('**first reading**').
2. In a nutshell, under such types of schemes ("graduated response" or "three strikes approach"), copyright holders would identify alleged copyright infringement by engaging in systematic monitoring of Internet users' activities. After identifying Internet users alleged to be engaged in copyright violation by collecting their IP addresses, copyright holders would send the IP addresses of those alleged to be engaged in copyright violation to the Internet Service Provider ('ISP') who would warn the subscriber to whom the IP address belongs about his potential engagement in copyright infringement. Being warned by the ISP three times would result in the ISP's termination of the subscriber's Internet connection.

#### I.2. EDPS Overall Views on "Three Strikes Approach Schemes"

3. Intellectual property rights, including copyright, are recognized as crucial elements of an innovative information society and as an important basis for innovation. As such, they feature prominently in a number of European policies, including in the Lisbon Agenda. However, a proper use of the opportunities offered by modern communications must also ensure the protection of individuals' personal data and privacy. A careful balancing between the fundamental rights of privacy and protection of personal data on the one hand and the legitimate interests of copyright holders on the other is, therefore, necessary.
4. The EDPS has no objection to cooperation between authorities, copyright and ISP industry towards the protection of lawful content, including copyright, in the Internet at a general level. However, he is concerned about the broad, systematic monitoring of individuals' use of the Internet, independently of the existence of a suspicion of copyright infringement, on which three strikes approach mechanisms typically rely. The EDPS considers that a balance should be struck between the interest to privacy and data protection of individuals on the one hand and the rights of copyright and ISP industries on the other. The EDPS comments in this note reiterate the positions he has expressed in his Comments<sup>1</sup> of September 2008 with respect to this balancing.

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<sup>1</sup> EDPS Comments on selected issues that arise from the IMCO report on the review of Directive 2002/22/EC (Universal Service) & Directive 2002/58/EC (ePrivacy), 2 September 2008.

## II. EP DISCUSSIONS ON THE "THREE STRIKES APPROACH"

5. The Universal Service Directive deals mainly with issues related to the availability of services to users at an affordable price, without distortion of competition. The ePrivacy Directive sets forth obligations to ensure the protection of privacy and personal data in the context of using electronic communications. Given the subject matters of both Directives, obviously they are far from being the appropriate legal instruments to regulate copyright/intellectual property rights, much less to create such schemes.
6. However, some stakeholders have been trying to use the telecom package<sup>2</sup>, mainly the Universal Service and ePrivacy Directives, to enable the systematic monitoring of the Internet and introduce obligations upon ISPs and more generally upon PECS<sup>3</sup> (particularly the obligation to serve warning to alleged copyright infringers and eventually disconnect them from their Internet access). In a letter dated 2 September 2008 addressed to Mr Malcolm Harbour as Rapporteur for the Universal Service Directive, the EDPS expressed concerns about the privacy implications related to the systematic monitoring of Internet usage, which is an inherent element of "three strikes approach" schemes<sup>4</sup>. He also questioned the practice of entrusting the role of guardian of fundamental rights to private organizations (i.e. copyright holders and internet service providers), rather than to judicial authorities.
7. Opposition was expressed to the use of the Universal Service Directive and ePrivacy Directives as tools to surreptitiously introduce a "three strikes approach scheme". The EP first reading responded to public concerns about such schemes, including those of the EDPS in his Comments of September 2008 by (1) watering down the amendments seemingly aimed at facilitating the creation of three strikes approach schemes that would entail systematic monitoring of Internet use and (2) adopting "safeguards" amendments. The EDPS welcomes that the majority of his suggestions were reflected in a series of amendments, adopted in EP first reading.
8. In order to analyze the extent to which the Council Common Position does or does not maintain the EP's position, the first section below recalls the relevant proposed EP amendments that rejected the three strikes approach schemes. The next section assesses the extent to which the Council Common Position has confirmed the above approach.

### II.1. Relevant Provisions in the Universal Service Directive

9. The relevant Universal Service Directive provisions to be considered include Articles 21.4a, 33.2 and Recitals 12c and 25, requiring Member States to promote the creation of coordination procedures between PECS and representatives of content providers. These amendments also provide as an example of such cooperation, among others, for the development and distribution of information to subscribers related to copyright infringement.

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<sup>2</sup> The telecom package includes Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (Framework Directive), Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and services, Directive 2002/20/EC on the authorisation of electronic communications networks and services, Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks, and Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on consumer protection cooperation.

<sup>3</sup> PECS: Providers of publicly available electronic communications services in public communications networks which include Internet access providers, telecommunications operators, etc.

<sup>4</sup> As highlighted in point 2 in order for copyright holders to identify alleged infringers, they have to engage in systematic monitoring of internet users' activities.

10. While these amendments definitively lay the grounds for the creation of a "three strikes approach scheme", which the EDPS regrets, on the other hand, they are not sufficiently prescriptive to lead to the mandatory creation of such an approach.
11. Indeed, the European Parliament amendments *do not mandate* a cooperation procedure between copyright holders and ISP towards monitoring the Internet, but rather, require Member States to *promote* cooperation. Furthermore, the language of the EP amendments emphasizes that dissemination of copyright related information to individuals, which is an element of the cooperation procedure, should focus on "public interest information". It should not consist in letters addressed to individuals about particular, private alleged copyright infringements which are characteristic of "three strikes schemes". This may include the distribution of information related to the lawful use of copyright materials on the Internet, including the uploading or downloading of copyright protected information.
12. From a data protection and privacy perspective this is particularly welcome insofar as the distribution of general warnings does not require the monitoring of individual's use of the Internet and overall surveillance of individuals' activities on the Internet.
13. In addition to the above, particularly important are the safeguards introduced by Recital 25 that describe the cooperation procedures. Recital 25 clarifies that any cooperation system cannot allow for systematic monitoring of the Internet which is a key element of three strikes approach schemes: "*Any cooperation procedures agreed pursuant to such a mechanism should ... not allow for systematic surveillance of Internet usage*". Also very significant is Article 32a requiring Member States to ensure that any restrictions on access to content shall be implemented by appropriate measures and according to basic principles of proportionality, effectiveness and dissuasiveness, and shall not conflict with citizen's fundamental rights, including the right to privacy<sup>5</sup>. Finally, also welcome is the new Recital 14 b which recalls that it is the task of the authorities and not of the providers of electronic communications networks or services, to decide, in accordance with due process, whether content, applications or services are lawful or harmful or not.<sup>6</sup>

## II.2. Amendment 138 of the Framework Directive ("Bono Amendment")<sup>7</sup>

14. In addition to the above, Amendment 138 which creates Article 8, paragraph 4 point (ga) of the Framework Directive should also be considered.
15. Article 8, paragraph 4 requires national regulatory authorities to promote the interest of citizens through the application of a principle that no restrictions may be imposed on the fundamental rights and freedoms of end-users without a prior judicial ruling.
16. Article 8, paragraph 4 appears to oppose the creation of "three strikes approach schemes" by preventing the termination of subscriber's access to the Internet on the basis of a

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<sup>5</sup> Article 32a reads as follows: "*Access to content, services and applications Member States shall ensure that any restrictions to users' rights to access content, services and applications, if they are necessary, shall be implemented by appropriate measures, in accordance with the principles of proportionality, effectiveness and dissuasiveness. These measures shall not have the effect of hindering the development of the information society, in compliance with Directive 2000/31/EC, and shall not conflict with citizens' fundamental rights, including the right to privacy and the right to due process*".

<sup>6</sup> "*In the absence of relevant rules of Community law, content, applications and services are deemed lawful or harmful in accordance with national substantive and procedural law. It is a task for the relevant authorities of the Member States, not for providers of electronic communications networks or services, to decide, in accordance with due process, whether content, applications or services are lawful or harmful or not.*"

<sup>7</sup> "*applying the principle that no restriction may be imposed on the fundamental rights and freedoms of end-users without a prior ruling of the judicial authorities, notably in accordance with Article 11 of the Charter of Fundamental Rights of the European Union on freedom of expression and information, save when public security is threatened,* "

determination made by the relevant industry. This would mean that it would not be allowed for Internet Service Providers to cut subscribers' Internet connections on the basis of mere alleged copyright infringements made by private sector organizations.

### III. THE COUNCIL COMMON POSITION AND THE EP APPROACH

#### III.1. Articles 21.4a, 32 a, 33.2a and Recitals 12c, 14b and 25 of the Universal Service Directive and Amendment 138 of the Framework Directive (“Bono Amendment”)

17. The Council has maintained the cooperation procedure set forth in Article 33.2a and Recitals 12c and 25 that foresee the distribution of copyright-related information to subscribers. Therefore, the basis for the creation of a three strikes approach mechanism, which typically relies on these two elements, remains in the Council Common Position.
18. Yet, as further described below, the Council Common Position has maintained the positive elements included in the EP amendments watering down the provisions that set up the basis of a three strikes approach mechanism. For example, the Council's version of Article 21.4a and Recital 12c which describe the content of information to be distributed, has improved upon, in different ways, the EP version. Indeed, the Council version of Recital 12c not only maintains the references to public interest information, but eliminates the word "warnings," which has the "three strikes approach" flavor.
19. More importantly, whereas the EP Article 21.4a and Recital 12c require information to be distributed, the Council version reads "*Member State may require ... to distribute information*", thus emphasizing that the distribution of such information is a mere possibility and leaving it to the discretion of Member States to decide whether to use it or not. This is further confirmed by the language of Article 33, paragraph 2a and Recital 25.
20. In addition, the EDPS notes with satisfaction that the Council text retains the safeguards embodied in Recital 25 opposing the systematic surveillance of Internet usage as well as Recital 14b.
21. The EDPS deeply regrets that the Council Common Position has not maintained Amendment 138, despite the fact that it was not only broadly accepted by the EP but also by the Commission's Amended Proposal. The same applies to Article 32a of the Universal Service Directive. The EDPS considers that Amendment 138 and Article 32a of the Universal Service Directive provide for a balanced wording by emphasizing fundamental rights. The need to safeguard such rights is particularly important in the context of these Directives which, as pointed out above, lay the grounds for the creation of "three strikes approach mechanisms" entailing broad, systematic surveillance of individuals' use of the Internet.
22. The combination of Articles 21.4a and 33.2a and Recitals 12c, 14b and 25 of the Universal Service Directive probably ensure that any cooperation mechanism has to (1) respect the protection of privacy and personal data of individuals; (2) avoid the systematic monitoring of Internet usage and (3) respect due process, meaning that it is up to authorities, by applying due process, not to copyright holders or Internet Service Providers, to determine whether content is lawful or not. However, it would have been preferable if Amendment 138 and Article 32a had been accepted by the Council insofar as they would have strengthened these safeguards.
23. In the light of the above, the EDPS calls upon the decision makers to re-introduce them as the Directive makes its way through the final steps of the legislative process.

## IV. INTERCEPTION OF COMMUNICATIONS FOR THE PURPOSE OF TRAFFIC MANAGEMENT

### IV.1. EP Position towards traffic management policies

24. Broadband services are based on the principle that many users share the same network resources. It may happen that the demand for the available bandwidth exceeds the capacity of the network. This may cause degradation of the service for some. To ensure overall better services for customers in general, Internet Access Providers implement a set of policies in order to manage the data. These mechanisms are occasionally referred to as "traffic management policies". Among others, such policies entail the use of a mechanism to recognize different types of traffic in order to handle them in a way that ensures similar capacity for all the users. Some of these mechanisms may entail interception or surveillance of Internet usage.
25. The EDPS understands the *rationale* behind these policies. However, he is concerned about the implementation of traffic management policies that require the monitoring of Internet usage and interception without appropriate data protection safeguards.
26. Article 5 of the ePrivacy Directive which concerns the confidentiality of communication requires consent to enable the "...*listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by person other than users, ...*". Article 5 is not currently being modified in the context of the review of the ePrivacy Directive. The EDPS notes that if ISPs implement traffic management policies which constitute interception or surveillance of communications, Article 5 would apply and require consent from individuals concerned.
27. The EDPS welcomes the EP support with the obligation set forth in Article 20, paragraph 4 of the Universal Service Directive. This Article, which was initially proposed by the Commission, imposes upon ISPs the obligation to include in customers contracts information about ISP practices that may limit the subscriber's use of the Internet.
28. The EDPS further welcomes the EP version of Recital 14a which provides that consent may be necessary under Article 5 of the ePrivacy Directive if providers implement traffic management policies that entail surveillance of communications.

### IV.2. The Council Position towards traffic management policies

29. The Council has maintained the main substance of Article 21, paragraph 4 of the Universal Service Directive, which the EDPS welcomes. However, rather than referring explicitly to the duty to provide "*information on any restrictions imposed by the provider regarding a subscriber's ability to access, use or distribute lawful content or run lawful applications or services*" it only refers to the obligation to provide information on the provider's traffic management policies. Furthermore, the Council omits the reference in Recital 14 to the potential need for user consent under Article 5 of the ePrivacy Directive.
30. The EDPS prefers the EP's version of Article 20, paragraph 4 and Recital 14 to that of the Council. This is because a reference to "traffic management policies" which is not accompanied by a definition of such policies may only lead to legal uncertainty. The EDPS considers that the EP version which is more descriptive of the type of actions regarding which information must be provided is preferable.

31. The EDPS is convinced that Article 5 of the ePrivacy Directive would apply whenever traffic management policies entail "*listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data*". Therefore, users will have to give informed consent for these practices to be lawful. Given that Article 5 of the ePrivacy Directive is applicable, the EDPS does not understand the Council's decision to exclude the reference to its application and suggests that it is reintroduced.

## V. CONCLUSION

### *On "three strikes approach schemes"*

32. The EDPS finds the attempts made to use the telecom package, mainly the Universal Services Directive, as tools to regulate copyright/content related issues unfortunate. It would have been preferable if the European Parliament had not given up to pressure by laying down the foundation for a three strikes approach and if all these issues had been addressed separately in different legal instruments, after careful analysis and debate.

33. Fortunately, the EP first reading of the Universal Service Directive was adopted with guarantees and safeguards towards ensuring the protection of individuals' rights, including the right to data protection and privacy and due process.

34. The EDPS is pleased to see that the Council Common Position has maintained *some* of the guarantees and privacy safeguards introduced by the EP first reading of the Universal Service Directive, watering down the basis for the creation of "three strikes approaches". The EDPS welcomes the Council's wording of Articles 21.4a, 33.2a and Recitals 12c , 14b and 25. He is particularly pleased with the express opposition in Recital 25 to systematic monitoring of Internet use and the reference to due process in the determination of lawful content.

35. On the other hand, the EDPS regrets the Council's rejection of Amendment 138 and Article 32a of the Universal Service Directive. Acceptance of these provisions would have strengthened the safeguards provided by Articles 21.4a, 33.2a and Recitals 12c, 14b and 25. Therefore, the EDPS calls upon decision makers to re-introduce them.

### *On traffic management policies*

36. Article 5 of the ePrivacy Directive applies whenever traffic management policies entail interception or surveillance of Internet usage. Therefore, to avoid confusion, it seems only just and reasonable to recognise that pursuant to this article informed consent from users is necessary.

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