

The grey areas between media regulation and data protection

**A workshop of the
European Audiovisual Observatory**
in collaboration with the
European Platform of Regulatory Authorities (EPRA)

**European Youth Centre, Strasbourg, France
11 December 2015**

Summary of the debate



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Introduction to the Workshop¹

Privacy and media: the issues

In the age of the Internet, connected TV sets and “second screens”, the possibilities to obtain personal data of media users (in both legal and illegal ways) have multiplied exponentially.

Such data is a very important commodity for advertisers, since it can be used for individually targeted ads in online services and on all sorts of connected devices. Furthermore, personal data obtained via search engines, social media and connected devices can be used as a means to provide a better experience for the user of an online service.

However, the obtaining and using of personal data by third parties, whether provided willingly or inadvertently by the users, can also have a very intrusive effect on their personal lives. Moreover, there are situations that require insight into a user's life that goes beyond what a user is prepared to accept in terms of privacy.

The legal debate

What interests the public is not necessarily of public interest. To protect the privacy of the individuals concerned, there should be a balance between accessing information that is really needed and obtaining everything certain people want to know.

In the media sector, the need for a trade-off between what is wanted and what is needed is particularly relevant when it comes to the exploitation of "big data", considering both their influence on existing business models and their potential impact on freedom of expression, pluralism of information and its corollary: editorial responsibility. At the same time there are cross-over cases in which the borders between audiovisual regulation and data protection are not necessarily clear, both with regard to applicable provisions, and monitoring and enforcements aspects.

This year's Observatory workshop, organised in Strasbourg at the European Youth Centre of the Council of Europe in collaboration with the European Platform of Regulatory Authorities (EPRA), has tackled these issues from four different angles: 1) setting the scene; 2) impact on freedom of expression; 3) impact on pluralism of information and editorial responsibility; 4) working together.

Opening of the workshop

Susanne Nikoltchev, Executive Director of the European Audiovisual Observatory, welcomed the participants, underlining that the event was the product of a close and long-lasting collaboration between the Observatory and EPRA. She said the event would allow focus on media-related issues like pluralism and freedom of expression, and an exploration of some of the grey areas between media regulation and data protection. The content and composition of the workshop mirrored, she

¹ This report was drafted by Ismail Rabie and is based on notes taken during the workshop. It comprises key information that emerged from the discussions. Please note that it does not reproduce in full all interventions and presentations. Links are provided where available.



added, the mission of the Observatory: to contribute to transparency in the audiovisual sector through the collection of reliable factual data in the field of law, market and financing.

Celene Craig, Chairperson of the EPRA, the oldest and largest network of audiovisual regulators in Europe, thanked the European Audiovisual Observatory for hosting the workshop. She emphasised that the EPRA's participation was part of its collaboration with the Observatory, following a successful first workshop in 2014 on the protection of minors in the new media environment.²

This year's topic, she said, would broaden understanding of how data protection intersects with the audiovisual regulatory agenda.

Panel 1. Setting the scene

Emmanuelle Machet (EPRA) introduced the first panel of the workshop. The objective of this panel was to identify the important interconnections between data protection and media regulation, in order to facilitate a better understanding of complex issues, by: setting the scene and introducing some key facts, issues and concepts; mapping the regulatory framework; and providing some useful threads for the thematic debates followed.

Empowerment of users was the first key theme to be highlighted. The topic was at the centre of last year's workshop and can be defined as "giving people the tools and knowledge they need to organise their lives and participate in a cultural, social and political context". This notion is at the very centre of "Do Not Track", a web documentary series on the collection and use of data.

"Do Not Track"

Alexander Knetig (ARTE) presented the "Do Not Track"³ project, an interactive web documentary series inspired by Canadian author Brett Gaylor and co-produced by ARTE, the National Film Board of Canada, and Bayerischer Rundfunk. It explains how the industry of tracking data works, by exploring some of the key notions and practices: what is tracking? ; cookies; tracking on social media; tracking on mobile devices, big data; and "the filter bubble". It was launched in April 2015, to enormous success [more than one million viewers], and tremendous user engagement [more than 5,000 comments a week, for 12 weeks]. The first of seven episodes was screened during A. Knetig's presentation.

A. Knetig underscored that the main aim of the documentary was not to demonise tracking in general, but to raise awareness about how far the use of personal data can go. Indeed, tracking is a very complex issue. On the one hand, targeted information may, at some point, be actually useful to customers [targeted advertising]; but on the other hand, it is a challenge to the role of media and the state of democracy. What if people only get what they want or what they like, as opposed to what they need? What then is the purpose of media? Raising awareness about the use of data in business models is an important matter. Free offers always come at a cost. There's an economy behind them, in which collected data is used as "currency".

² Workshop "Empowering Users: Rating Systems, Protection Tools and Media Literacy across Europe", 15 December 2014, http://www.obs.coe.int/web/obs-portal/other-publications/-/asset_publisher/ftPso1wTlky7/content/dli-workshop-obs-epra-empowering-users

³ *Do Not Track*: <https://donottrack-doc.com/en/episodes/>



"We are still tracking the information (...). You've seen the disclaimer here. Guess what? 'Do Not Track' is tracking you, and we've been using cookies to do so (...)."

- Alexander Knetig illustrating a central theme of the documentary.

Various media companies in Germany were approached to talk about data tracking during the production of "Do Not Track". Despite the accuracy of the claims made in the documentary, they all refused to comment, as they felt the claims constituted criticism of their business models [e.g. pay walls, banner ads, subscriptions].

A. Knetig also mentioned a couple of similar initiatives: "Supernerds" for e.g., a documentary about surveillance, was broadcast by Westdeutscher Rundfunk (WDR), a regional branch of Germany's public broadcaster. So far, most such projects have dealt with data protection issues related to government mass surveillance, like that conducted by the National Security Agency (NSA) in the United States, but not with the commercial aspect of big data.

Overview of digital technologies exploiting personal data in the media⁴

Lucia D'Acunto (TNO) followed on with a more technically-oriented presentation and provided an overview of the main data-tracking methods: cookies and browser fingerprints. Cookies are small files attached to the content viewed by users and stored on a user's computer to match the advertising banners' with the viewed content. Browser fingerprints are created when Internet browsers transmit information about the user, including some technical information about the tools used to access content [e.g. type of browser; screen dimensions etc.].

There are many purposes behind data tracking: "User profiling" for e.g. is based on the compilation of users' behaviours and preferences. Collected data is used to determine sets of user profiles. By analysing and comparing different profiles, algorithms may decide to recommend a certain type of content to one user based on similarities with another user, for targeted advertising and for the personalisation of information.

User #1 likes sports + brand A of cars + energy drinks + combat movies
User #2 likes sports + brand A of cars + energy drinks
Algorithm may suggest content about combat movies to User #2

The concept of "value chain" was then presented to highlight the link between the economic purposes behind data tracking and the technical methods involved, with a focus on Google as a key example. Google's business model is based on advertising. The company has different services [Hangout; Maps; Youtube; Google Play etc.], which can be used on different devices [laptops; tablets; smartphones, smart TVs etc.]. When one of Google's applications is used, information is collected and used for targeted advertising or content recommendation in another Google application and/or device.

⁴ Link to the presentation of Lucia D'Acunto: <http://www.obs.coe.int/documents/205602/8358997/Panel+1+-+Lucia+D+Acunto+TNO.pdf/b53d01ce-7bb9-45c4-b747-6620a93e22cb>



Mapping the regulatory framework⁵

Sebastian Schweda (EMR) gave an overview of the legal framework on data protection and privacy, stressing the importance of Article 8 of the European Convention on Human Rights with respect to the right to privacy, as well as the Council of Europe's Convention No. 108 on data protection adopted in 1981, which has underpinned fundamental development of data protection within the European Union. At the European Union level, the Charter of Fundamental Rights, which became legally binding on the European Union in 2009, includes the right to the protection of privacy and the right to the protection of personal data.

S. Schweda also provided an overview of two key rulings by the Court of Justice of the European Union (CJEU) contextualising the two rights: the Google Spain⁶ and the Schrems⁷ cases. The Court has also created an exception to the general prohibition on processing data, which makes it legal for journalistic purposes along with other key conditions.

The march of smart TV and the search for smarter regulation⁸

Britt van Breda (IViR), brought the participants closer to the core of the workshop, as she illustrated the circulation of personal data in an audiovisual environment with the concrete example of smart TVs.⁹ Smart TVs are characterised by multiple functionality: e.g. external audio recording; interactivity; Internet connectivity; advertising profiling through data collection. Meanwhile, the regulatory framework has yet to match this technological development. It remains fragmented and faces challenges, particularly in terms of coordination between the different media regulation and data protection authorities.

To illustrate the importance of cooperation, B. Van Breda presented a German study offering a highly critical view of the state of privacy in relation to the use of smart TVs. The study found that: six out of 13 examined smart TVs collected information related to data protection before the device was connected to the Internet; seven out of 10 TV channels tracked switching between television channels; and out of the 12 smart TV devices with a recorder function, five sent encrypted communications. Following this study, the German Data Protection Authority and the country's public media organisations provided guidance on transparency requirements, anonymous use of smart TVs, and technical security measures.

Discussion

For **Jeremy Olivier (Ofcom)** there is no gap between media regulation and data regulation. The development of technology, he suggested, allows more actors in particular media providers - to

⁵ Link to the presentation of Sebastian Schweda: <http://www.obs.coe.int/documents/205602/8358997/Panel+1+-+Sebastian+Schweda+EMR.pdf/8b940614-9d51-417c-9816-cd34d87e74ce>

⁶ Thomas Margoni, "Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos", European Audiovisual Observatory, IRIS 2014-6:1/3, 2014, <http://merlin.obs.coe.int/iris/2014/6/article3.en.html>

⁷ Ronan Ó Fathaigh, "Schrems v. Data Protection Commissioner", European Audiovisual Observatory, IRIS 2015-10:1/2, 2015, <http://merlin.obs.coe.int/iris/2015/10/article2.en.html>

⁸ Link to the presentation of Britt van Breda: <http://www.obs.coe.int/documents/205602/8358997/Panel+1+-+van+Breda+IViR.pdf/62bb91a0-b0b0-4813-a13b-e4b4fec7d6cc>

⁹ Britt van Breda is one of the authors of the Observatory's IRIS Special report on "The regulatory framework around Smart TVs", to be published soon.



collect data. This raises a need for specific regulations well as a need to identify systematic problems. There is also a strong necessity for cooperation with data protection authorities, like in the UK, where Ofcom cooperates with the Information Commissioner's Office (ICO).

Paul Canessa (GRA) joined J. Olivier in underscoring the importance of cooperation, noting that the media regulator of Gibraltar conducts campaigns to inform people about their rights in terms of data protection.

Carine Léa Chardon (ZVEI) understands that a dynamic and rapidly developing market, such as in the case of smart TVs, raises new issues. However, it seems not appropriate to focus only on specific devices such as Smart TV since all modern communication devices are connected to the internet and thus potentially raising a similar challenge on flow on date. As for privacy in the specific world of smart TV, she underlines that consumers have the choice to use TV sets anonymously, by not connecting them to the Internet. She also suggested looking into the positive effects of devices now being "smart", such as for the issue of protection of Minors. Various smart TV brands allow users to set extra options in order to address the needs of minors. There are some functions developing within the market that would offer more personalisation options, as a service to the user.

Panel 2. Impact on freedom of expression

The second panel of the workshop, chaired by **Francisco J. Cabrera Blázquez (European Audiovisual Observatory)**, focused on the impact of data protection on the right to freedom of expression and information. Both freedom of expression and freedom of information have hit a big milestone thanks to search engines and social media. What helps these tools play such a major role is the fact that they are widely accessible, and free. But, as users are not paying for the services, they end up being the product itself. Indeed, their private data is used to fuel the Internet industry and to create profit.

Moreover, private data helps Google and Facebook for e.g. deliver a more individualised service. As said before, on the one hand this can be very helpful to users, but on the other hand users will end up getting only the information they want, without the opportunity to obtain information they might actually need. Such a compromise is far from satisfactory when it comes to promoting pluralism of information.

Data protection and freedom of expression¹⁰

Peggy Valcke (KU Leuven) focused in her presentation on the balance between data protection and freedom of expression. These two fundamental rights are protected by international treaties and by European conventions, namely by Article 8 of the European Convention on Human Rights (ECHR) and by Articles 7 [respect for private and family life] and 8 [protection of personal data] of the European Charter. Freedom of expression and information are protected by Article 10 of the ECHR and by Article 11 of the European Charter.

Many view these two fundamental rights as being in conflict with each other but without the right to privacy, genuine freedom of expression cannot be ensured. Indeed, there are some tensions between the two rights: privacy and data protection rights may limit freedom of expression, as in

¹⁰ Link to the presentation of Peggy Valcke: <http://www.obs.coe.int/documents/205602/8358997/Panel+2+-+Valcke+KU+Leuven.pdf/64fbefb6-2e33-4d4a-852c-6e1e99bc3d21>



the case of defamation. Meanwhile, journalism allows for certain derogations to data protection law with regard to access to state-held information and the disclosure of private information of public interest, for example. In the past years, the European Court of Human Rights (ECtHR) has dealt with cases of tension between privacy rights and press freedom.

The protection of journalistic sources has been a hot topic over the past couple of years. Media rely on sources providing information. These sources need confidentiality in order to fully exercise their freedom of expression, P. Valcke said. Since the *Goodwin v. the United Kingdom*¹¹ case relating to the protection of journalistic sources, and *Guja v. Moldova*¹² relating to whistleblowers, the Court has given noticeably strong protection to the confidentiality of sources. Still, new forms of journalism such as WikiLeaks present new challenges to press law.

The ECtHR outlined some criteria regarding the privacy of news objects in the *Von Hannover*¹³, *Axel Springer*¹⁴ v. *Germany* case. The fact that public figures [e.g. politicians and celebrities] have to tolerate more criticism, according to the Court, does not mean they are not entitled to protection of their privacy. A quick overview of some cases emphasising different challenges triggered by online media with regard to the privacy of news objects was presented, for e.g. *RTBF v. Belgium*¹⁵ relating to the right of individuals to request a prior restraint on the publication of information in order to protect privacy; the *Times Newspapers v. UK*¹⁶ and *Węgrzynowski and Smolczewski v. Poland*¹⁷ relating to online news archives; and *Satamedia v. Finland*¹⁸ relating to the publication of a public database. *Delfi v. Estonia*¹⁹, meanwhile, offered an opportunity to discuss the role of active audience and the question of reliability.

Discussion

Ingvil Andersen (OSCE FoM) discussed the challenges of state surveillance and its impact on freedom of expression. Governments do have the right to protect national security, she argued. Still, laws should not be misused to affect the fundamental rights of freedom of expression and privacy. Some laws have already been adopted and enforced in France, and discussions on the matter of state surveillance are ongoing in, among other countries, the UK. It has become clear that journalists and sources are becoming targets, as highlighted by civil rights organisations in recent years. Many

¹¹ Dirk Voorhoof, "The journalist's sources protected by Article 10 of the European Convention on Human Rights", European Audiovisual Observatory, IRIS 1996-4:5/4, 1996, <http://merlin.obs.coe.int/iris/1996/4/article4.en.html>

¹² Dirk Voorhoof, "Case of Guja v. Moldova", European Audiovisual Observatory, IRIS 2008-6:2/1, 2008, <http://merlin.obs.coe.int/iris/2008/6/article1.en.html>

¹³ Dirk Voorhoof, "Case of von Hannover v. Germany", European Audiovisual Observatory, IRIS 2004-8:2/2, 2004, <http://merlin.obs.coe.int/iris/2004/8/article2.en.html>

¹⁴ Dirk Voorhoof, "Axel Springer AG v. Germany", European Audiovisual Observatory, IRIS 2012-3:1/1, 2012, <http://merlin.obs.coe.int/iris/2012/3/article1.en.html>

¹⁵ Dirk Voorhoof, "RTBF v Belgium", European Audiovisual Observatory, IRIS 2011-6:1/1, 2011, <http://merlin.obs.coe.int/iris/2011/6/article1.en.html>

¹⁶ Dirk Voorhoof, "Case of Times Newspapers Ltd. (nos. 1 and 2) v. UK", European Audiovisual Observatory, IRIS 2009-5:2/1, 2009, <http://merlin.obs.coe.int/iris/2009/5/article1.en.html>

¹⁷ Dirk Voorhoof, "Węgrzynowski and Smolczewski v. Poland", European Audiovisual Observatory, IRIS 2013-9:1/1, 2013, <http://merlin.obs.coe.int/article.php?id=14422>

¹⁸ Dirk Voorhoof, "Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland", European Audiovisual Observatory, IRIS 2015-8:1/1, 2015, <http://merlin.obs.coe.int/iris/2015/8/article1.en.html>

¹⁹ Dirk Voorhoof, "Delfi AS v. Estonia (Grand Chamber)", European Audiovisual Observatory, IRIS 2015-7:1/1, 2015, <http://merlin.obs.coe.int/iris/2015/7/article1.en.html>



countries are turning towards communication monitoring by granting law enforcement agencies special surveillance power without sufficient judicial oversight. Under these laws, spying on journalists occurs without judicial scrutiny, and police may conduct searches and bypass traditional protection granted to journalistic sources. The OSCE has issued several warnings about many cases of bad use of law and non-compliance with European rules on human rights. As a side effect, and to avoid surveillance, people, including journalists, are encrypting information. This raises questions about the effects of encryption on freedom of expression, and the right to encrypt information and be anonymous online.

Anne-Catherine Berg (EBU) emphasised the ambiguity of the notion of “public interest”. The focus should be on “information of public interest”, she suggested, and not on what interests the public [what attracts the public’s curiosity]. In practice, as there is no clear definition of the notion of public interest, it is up to each media outlet to come up with its own definition, in a case by case approach. In this respect, each media outlet has its own guidelines and codes of conduct. As the editorial policy of public service media is not commercially driven, there is less tension in public media than in the private sector. In the UK, the BBC has set explicit provisions regarding privacy specifying that private behaviour and private conversations, for instance, shall not be brought into the public domain unless there is a public interest. According to the BBC, the notion of public interest includes but is not limited to a number of aspects such as the exposure of crimes, injustice, anti-social behaviour, unsafety, etc. As for the editorial decision on broadcasting information, there are some criteria to take into account, such as the nature of the information, the sensitivity relating to the individual’s private life, and also the interest of the public. According to the Court of Justice of the European Union (CJEU), the interest of the public depends on the role played by the news object in public life.

Luigi Montuori (Italian Data Protection Authority) underlined the importance of balancing the two fundamental rights, freedom of expression and privacy. The Italian Data Protection Authority uses two types of tools: legislation and codes of conduct. In Italy, journalistic activities are taken into account within the data protection legislation, which is not the case in other countries. A code of conduct was issued as part of the cooperation between the Italian Data Protection Authority and the National Board of Journalism. This cooperation initiative was driven by the need to raise awareness among journalists on privacy rules. This code does not apply only to journalists, but to all individuals providing news containing personal data.

Bradley Tosso (GRA) commented on the two previous interventions. He argued that the notion of public interest was complex and without clear delimitation. Furthermore, the pace with which journalism evolves poses new challenges to the balance between data protection and freedom of expression. From a data protection authority’s perspective, the journalistic exception is acknowledged under certain conditions: a journalistic purpose; public interest; and the justification of this interest. In Gibraltar, as for Italy, there is a code of conduct.

The “Right to be forgotten”²⁰

Andra Giurgiu (SnT, University of Luxembourg) explored the various aspects related to what is known as the “right to be forgotten” with a presentation on the Google Spain decision.²¹ The Court of Justice of the European Union (CJEU) argued that by indexing information through its search

²⁰ Link to the presentation of Andra Giurgiu: <http://www.obs.coe.int/documents/205602/8358997/Panel+2+-+Andra+Giurgiu+Uni+Lux.pdf/c39af177-18c9-4d4b-8d41-172cfae4851e>

²¹ Thomas Margoni, “Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos”, European Audiovisual Observatory, IRIS 2014-6:1/3, 2014, <http://merlin.obs.coe.int/iris/2014/6/article3.en.html>



engine Google played an active role, and therefore had to comply with its obligations as a data controller. The Court had to find the right balance the data subject's right to privacy and data protection; the right to freedom of information of the general public; and Google's right to conduct business.

The judgment stated that, based on an interpretation of the Data Protection Directive of 1995, the data subject had the right to ask for the erasure of all the search results so that they were no longer accessible through Google's search engine. By doing that, the Court took position in favour of the right to privacy and data protection, without hindering the right to freedom of expression of the initial publisher as only the link to the original information was to be deleted whereas the data is not removed from the original website.

This right has been called by many names. The "right to be forgotten" is the most commonly used one. But a term more closely reflecting reality would be the "right to be delisted". Indeed, the decision was limited to search engine operators when the search was conducted based on a person's name. What the Court actually ordered was the delisting of the information, meaning that the content itself remains accessible on the publisher's website as well as through a web search using other keywords.

As a consequence of this judgment, Google set up a delisting procedure allowing individuals to directly request the delisting of content they believe infringes their right to privacy and data protection. Requests are reviewed on a case by case assessment basis. The Article 29 Working Party²² issued guidelines containing criteria used to evaluate a request, such as the purpose and context of publication or whether the data subject requesting the delisting plays a role in public life, etc.

The forthcoming General Data Protection Regulation (GDPR) proposes an extended right to erasure as opposed to a true "right to be forgotten" as advocated at the beginning.

Discussion

Andrea Stazi (Google) commented on Mrs. Giurgiu's presentation by listing examples of initiatives undertaken by Google. Maintaining users' trust is a fundamental task for Google, he said. Trust rests on two factors: transparency and user empowerment. Google also took part in consultations involving public authorities and data protection agencies, and set up an advisory council that issued a transparency report on the "right to be forgotten". Since May 2014, Google has received around 340,000 delisting requests regarding over one million URLs.²³ A. Stazi also took the opportunity to highlight Google's efforts to set up protection tools for users. One of them is *My account*, which enables users to control privacy settings.

According to **Jacob Kornback (EDPS)** there is a need for better adapted solutions. Early on, in the "analogue world", issues related to privacy and freedom of expression in the press already existed, and adequate solutions were found, such as the "right of reply". But of course such rights take on a different hue in the digital world. The problem has been accentuated by the widespread accessibility of digital means of communication. There is no hierarchy between the right to privacy and the right to freedom of expression. What is needed is the right balance in concrete cases. The access to information has to be well-founded. That is why the divulgation of information was denied in

²² See http://ec.europa.eu/justice/data-protection/article-29/index_en.htm

²³ See Google's figures on European privacy requests for search removals: www.google.com/transparencereport/removals/europeprivacy/?hl=en



Bavarian Lager.²⁴ Also, information might be personal, but it might not be private in the context of public information, as was evident in the *Dennekamp* case.²⁵

Paolo Celot (EAVI) insisted that the “right to be forgotten” was a remedy, a reaction to the collection of data, and that more proactive action from public authorities was more than welcome. However, there is still a lot to do in terms of legal and technical enforcement actions regarding the “right to be forgotten”. Sorting these issues out is not only a matter of legislation. Media literacy among users is not advanced enough to enable them to control their privacy settings. The media industry and manufacturers need to make the public more aware in order for the process to be more effective.

Rolf H. Weber (University of Zurich) raised a judicial issue, suggesting that in handling delisting requests, Google is playing the role of a private arbitration court. He argued that balancing the two fundamental rights of privacy and freedom of expression should remain a judicial matter.

Panel 3. Impact on pluralism of information and editorial responsibility

Sophie Valais (European Audiovisual Observatory) briefly listed the main issues discussed in the first two panels. Following an overview of digital technologies, the exploitation of personal data and the mapping of the regulatory framework with certain legal issues, this panel discussed the impact of big data and algorithms on the media sector, in particular pluralism and editorial responsibility.

Big data and television business models²⁶

Gilles Fontaine (European Audiovisual Observatory) highlighted the big change in the delivery of audiovisual programming, involving transformation from a broadcast model to an on-demand model requiring service providers to deliver the right content to the right consumer at the right moment. Big data is therefore needed to link consumer expectations, content characteristics and the usage context.

Big data empowers all key functions of a media company: technology [delivering the content with a satisfactory quality of service]; marketing [adapting the service line-ups to increase penetration and limit churn]; and even more importantly content and advertising.

“Maybe content is King but context is Queen, when it comes to managing data.”

²⁴ Judgment of the Court (Grand Chamber) of 29 June 2010, European Commission v the Bavarian Lager Co. Ltd, C-28/08 P, <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30dd318634439d604393b0adf6fa8a6e559f.e34KaxiLc3qMb40Rch0SaxuSax10?text=&docid=84752&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=870618>

²⁵ Judgment of the General Court (Second Chamber) of 23 November 2011, Gert-Jan Dennekamp v European Parliament, Case T-82/09, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=115062&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=902178>

²⁶ Link to the presentation of Gilles Fontaine: <http://www.obs.coe.int/documents/205602/8358997/Panel+3+-+Gilles+Fontaine+OBS.pdf/1ed7838b-0af0-4363-add9-28f72802f927>



- Gilles Fontaine on the importance of big data to media business.

As regards content, big data goes beyond the recommendations algorithms and is also used to make better-informed decisions on production, by using analytics of the audience, and to automate the production of video stories. In the long run, the content itself will be adapted to the usage context, for e.g. with shorter versions of programmes to be viewed on public transportation.

With respect to advertising, big data is a tool that can be used to extend programmatic advertising beyond the web to linear television. More information on viewers, combined with the data of advertisers and addressable TVs will lead to the personalisation of linear television advertising.

However, big data implies complexity and costs. Complexity lies in the many different categories of data, data producers and data sources. Costs associated with big data therefore derive from the need to structure the data, from storage and processing costs and from the need to purchase external data to leverage internal data.

In that context, one of the main assets is scale, and the key question is whether media companies will keep control of their data operations or will let web platforms or data brokers handle them.

Maybe content is King but context is Queen, when it comes to managing data, G. Fontaine said.

Discussion

Damien Tardieu (Niland) shared his experience in the field of music regarding content analysis and customer targeting. Music recommendation is based on the analysis of similarities between users' behaviour or between different contents, through the use of algorithms. Content analysis is the latest trendy method, thanks to the development of recognition technologies tagged *Deep Learning* and used in software like Apple's Siri. *Deep Learning* involves an algorithm that is able to scan and understand the composition of music [identifying instruments, voices, tones etc.]. A better understanding of the content that is offered to the user, and of the user himself, makes targeted advertising easier. Targeted advertising is applicable not only in on-demand contexts, but in linear broadcasting as well, as is the case for radio channels that use advertising servers.

The process is quite different in the audiovisual field. The information that can be extracted doesn't reveal much about the content as a whole, or provide a clear image of users' behaviours. Watching audiovisual content presupposes a more active role from the user as it requires more attention, unlike music, which can be listened to in tandem with other activities. Only recommendations based on users' behaviours and/or on an analysis of the description of the content on the web can be useful. On YouTube, for e.g., recommendations are based only on users' behaviour.

Heiko Zysk (ProSiebenSat.1 Media AG) insisted that the media industry has benefited from big data and the flow of information in social media. There is no such thing as "traditional" broadcasting, he argued, because of the whole shift in the ecosystem of television broadcasting and in particular the explosion of social media and big data. In the context of competition, it is very important to remain visible, and big data has become crucial for content promotion. BuzzFeed is a good example. Articles are posted with different headlines on BuzzFeed's social media webpages. The headline that generates the most interactions is used to promote the content on BuzzFeed's website. Big data is

Although the evolution is imminent, not all cable operators are yet in a phase in which they are able to keep and process the data necessary to serve targeted advertising, claimed **David Stevens (Telenet)**. Interactive digital TV is quite new. Of course, targeting better is an objective, and digital TV is in competition with other fields in terms of targeted advertising, even with the analogue world.



Moreover, traditional TV advertising is at risk, and might soon become irrelevant if it cannot be targeted better. D. Stevens said advertising is more and more going to online platforms and the advertising money is now flowing to big global players such as search engines and social networks. He refers to this phenomenon as the "leaking" of advertising euros from the traditional European audiovisual eco-systems to these new international players. If advertising and broadcasting become more personal and more on-demand, the question is how the (local) media eco-systems can respond to this. Every player in the value chain will have to look for a new position. On the longer term, one could even doubt what role is left for public service broadcasters, if the main paradigm would be to merely serve users the content and advertising they want.

Antoine Larpin (Panasonic) provided a view from the device manufacturers' side, which faces the same questions regarding the use of personal data. Making sense of the data is an extremely complex process because people consume audiovisual content on several devices. Smart TVs are family devices which make data exploitation more complex than for personal devices, such as smartphones.

Impact on pluralism of information and editorial responsibility²⁷

To follow-up on G. Fontaine's presentation, **Anne-Catherine Berg (EBU)** explored the new challenges raised by big data in the age of media convergence.²⁸ Big data offers new business opportunities for different stakeholders: better audience measurement and analysis; content offer improvement in terms of quality and diversity; the enabling of recommendations and personalised services; and a better targeted advertising. It therefore creates a special relationship between media providers and consumers. On the other hand, though, it raises questions about the liabilities and obligations related to the exploitation of users' data.

In the context of media convergence, audiovisual media have become more accessible thanks to online platforms that work as intermediaries between media service providers and their audiences. By the nature of their activity, such platforms are able to unduly restrict providers' access to users' data. Public media service should, upon request, be given access to such data, provided that it is related to the use of their services as part of an effort to improve them. This surely implies greater transparency regarding data collection and sharing with actors such as advertising networks.

Different techniques are used for data tracking, such as "social plug-ins" and cookies. The Flemish public broadcasting company in Belgium (VRT) offers platforms such as Facebook the possibility to gather users' data by using "social plug-ins" [Share and Like buttons) on the VRT website. Recently, VRT received a notice from the Belgian Privacy Commission about its responsibility relating to privacy violations, along with Facebook. This notice followed a legal procedure initiated by the Commission before a Court in Brussels, regarding the alleged violation of Belgian privacy law by Facebook. The Court ordered Facebook to stop all tracking of unregistered Facebook visitors. Facebook was also required by the Court to ask for visitors' consent and provide an explanation about data collection. The ruling also applies to the use of cookies, for which users' consent must be obtained in advance.

²⁷ Link to the presentation of Anne-Catherine Berg: <http://www.obs.coe.int/documents/205602/8358997/Panel+3+-+Anne-Catherine+Berg+EBU.pdf/7b1a7ede-65c2-4d8b-bc02-e4760a83532e>

²⁸ The EBU will organise a conference on 22 - 23 March 2016 in Geneva: "Big data: A game changer for public service media?" <https://www3.ebu.ch/events/2016/03/big-data-a-game-changer-for-psm>



Trust and transparency are the two keys to a good provider-user relationship. There should be greater transparency regarding the collection and use of personal data. Along with raising awareness, there is a clear need to engage with the viewers in order to have a more public, friendly policy, by adopting a data-friendly charter like France Télévision, for example. In terms of security, secured access and encryption of users' data exchanges are vital.

Discussion

Bernardo Herman (CSA Belgium) commented on the impact of big data on pluralism from a media regulator's point of view. The CSA has carried out a monitoring experiment on different media services distributed on various platforms. It was found that some recommendation systems were guided by the similarities of content already viewed, or by the users' profiles. Thus, recommendations have a significant impact on content visibility and may negatively impact cultural promotion policies, such as the promotion of European and local works. It follows that despite their usefulness to users, recommendation tools could in fact be a threat to pluralism and diversity. Algorithms may lead to confining users within their own habits and tastes. While they appear to be promoting the discoverability of content, they are in fact limiting the opportunity to do so. There is a need to readapt the recommendation process in order to ensure a more equitable balance between the provision of services to the users and promotion of pluralism. This requires initiating a dialogue with the industry and all the market players.

To **Ingvil Andersen (OSCE FoM)**, it has become evident that Internet intermediaries have gained power as facilitators as well as enhancers of interactivity in a world of open journalism. This has raised many questions related to media pluralism and editorial responsibility. On the one hand, Internet intermediaries don't exercise any editorial responsibility and should not be held liable for third party content that has not been moderated – a principle that is under threat. On the other hand, they have tremendous control and apply their own terms and community standards.

In any discussion on the role of intermediaries, a primary concern is that public discourse is being "privatised" by leading social networks such as Facebook, Google and Twitter, that extensively use algorithms and profiling to personalise content for the users. They can also take down content upon request from governments and from individuals.

I. Andersen also underscored the role and obligations of the state in the ICT sector regarding the protection of users' fundamental rights. There remains a lack of transparency that must be addressed by the ICT sector.

Meanwhile, the fostering of media literacy should not be only a public task, **Marijke Dejonghe (VRM Belgium)** suggested. Third parties could also play a positive role in enhancing user empowerment. Media regulators often don't have data protection enforcement powers. In Belgium, VRM is competent when it comes to media regulation, but not data protection, which falls under the responsibility of the Belgian Privacy Commission. In addition, there is a centre for media literacy in Flanders.

Panel 4. Round-up discussion: Working together



The last panel of the workshop offered the opportunity to take part in a "working together" experience. **Maja Cappello (European Audiovisual Observatory)**, who chaired this panel, invited the





participants to engage in group discussions [media regulators; data protectors; users; the industry, the EU Commission] inspired by a “world café and future search approach”.

After intense brainstorming, a rapporteur for each group [Jeremy Olivier (Ofcom) for the media regulators; Paul Canessa (GRA) for the data protectors; Paolo Celot (EAVI) for the users; Carine L. Chardon (ZVEI) for the industry; and Marcel Boulogne for the EU Commission] summarised the main points of discussion in the following table:




	Expectations towards Media regulators	Expectations towards Data protectors	Expectations towards Users	Expectations towards Industry	Expectations towards EU Commission
Media regulators 	<p>Can do</p> <p>Foster close relations with data protectors. Promote exchange of expertise with counterparts. Research implications of the data market for regulatory objectives [such as diversity and promotion of European culture].</p> <p>Cannot do</p> <p>Intervene in sector of data protectors.</p>	<p>Share expertise with media regulators. Learn from media regulators' expertise in the sector. Identify common purposes.</p>	<p>Take responsibility and exercise it. This may be hard. NGOs could take responsibility for representing and defending the interests of the users.</p>	<p>Educate users. Offer more transparency. Take on media literacy responsibility. Organise campaigns to raise awareness.</p>	<p>Deliver joined-up regulation, which has been promised in the context of the Digital Single Market but remains a big task. Give regulators more powers.</p>
Data protectors 	<p>Liaise more with data protectors.</p>	<p>Can do</p> <p>Raise awareness, with more campaigns directed at all actors on requirements of data protection laws and on what people can and cannot do.</p> <p>Implement more robust enforcement upon breaches of the regulation.</p> <p>Award compensation [for the authorities who have the power to do so].</p> <p>Cannot do</p> <p>Intervene in sector of media</p>	<p>Take more responsibility to protect data.</p> <p>Exercise rights when needed.</p>	<p>Integrate data protection into business models, e.g. "privacy by design" [an initiative by the Canadian Data Protection Commission). Think about privacy when developing new products. Ensure security of collected data. Be transparent with users and regulators. Empower the users to be able to take decisions. Foresee the establishment of a dedicated data protection officer to give advice.</p>	<p>Apply consistency in drafting legislation and documents. Harmonise the wordings in the Audiovisual Media Services Directive and the Data Protection Directive. Review some definitions and adapt them to fit in the digital era, e.g. the definition of a journalist. Have more data controllers.</p>



	Expectations towards Media regulators	Expectations towards Data protectors	Expectations towards Users	Expectations towards Industry	Expectations towards EU Commission
		regulators.			
Users 	Base decisions on research. Raise awareness among users. Consult each other and NGOs in the decision-making processes. Inform about the collected data.	Create easier complaint forms for users. Make information available through transparent databases for consultancy by other stakeholders. Inform about the collected data. Raise awareness.	Can do Be more informed about rights and duties, along with the other stakeholders. Incentivise media literacy while remaining cognisant that this will not solve all the issues. Cannot do Take on all responsibilities relating to educating users, because of the variety of issues to address [legal, technical, social].	Inform about the collected data. Underscored the distinction between public/private: public industry has remitted to serve public interest. Both private and public industries should develop technology and tools that allow users to protect their rights.	Make homogenous rules. Have quality label for awareness initiatives.
Industry 	Adopt a technical neutral approach. Embrace consistency. Have lighter regulation.	Redefine the concept of consent in the digital world [different from the analogue world]. Adapt regulatory framework to the evolution of the market.	Make use of rights. Inform yourselves and be aware. Make choices in a thoughtful way, and be proactive in the consumption of media content.	Can do Raise trust, transparency. Give choice to users and enable them. Ensure they have control, and consent to services they use. Commit to collecting data in a thoughtful and respectful way. Gain trust by following the	To have a technical neutral approach in data protection regulation, consistency, more concise regulation, stick to a pan European level, more transparency



	Expectations towards Media regulators	Expectations towards Data protectors	Expectations towards Users	Expectations towards Industry	Expectations towards EU Commission
				<p>guidelines set by the industry itself.</p> <p>Cannot do</p> <p>Avoid following innovation and allow opportunities to pass by. Avoid adapting business models to stay competitive.</p>	
<p>EU Commission</p> 	<p>Fulfil roles, and make sure to refer requests for information to the right instance. Promote more cooperation and raise awareness.</p>	<p>Fulfil their roles, and make sure requests for information are referred the right instance. Promote more cooperation and raise awareness.</p>	<p>Get more informed about their rights.</p>	<p>Act with responsibility.</p>	<p>Can do</p> <p>Before acting, determine what should be addressed on a European level rather than on a national level, to close regulatory gaps.</p> <p>Cannot do</p> <p>Create ex ante regulation for future problems. Not consider subsidiarity [the role of the Commission is very limited when it comes to public service broadcasters]. Act alone, as the responsibilities are shared among institutions [the Council; the European Parliament].</p>



Discussion

The table discussions were followed by an eager exchange of comment on what had been reported by the rapporteurs of the five working groups. Many ideas emerged, such as the need for more harmonisation of rules on a European level, as more harmonisation means fewer rules - which would help remove legal uncertainty. The fact that different devices are covered by different regimes creates uncertainty and insecurity among users.

Some participants suggested having built-in technologies that comply with data protection and ensure that privacy is built into the system. But, they added, while integrating privacy into the technical system is a good start, it is not enough. Responsibility lies not only with the industry but also with the other actors of the value chain.

A number of participants highlighted the need for regulators to understand how the evolving media environment impacts on themselves and on citizens, and to engage with the regulation policy. Despite the fact that the regulatory framework is highly fragmented, there is still room for cooperation.

As technologies are changing rapidly, the significant benefit for the users flows from the respectful use of personal data. Respect is the key and is one of the essential competition rules.

Closing remarks

Each of the four panels could easily have filled a full-day conference, but the highly interactive character of the workshop allowed most aspects to be put on the table.

An IRIS *Special* report on the regulatory framework around smart TVs is soon to be published by the European Audiovisual Observatory. The report will focus on the collection and use of personal data in the context of audiovisual media consumption in the European Union, digging into the tension between users' intellectual privacy and new business models in the audiovisual sector, notably with regard to smart TV devices.

There will be much more to come. The topic clearly merits further attention.

