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**BUREAU OF THE CONSULTATIVE COMMITTEE OF THE CONVENTION
FOR THE PROTECTION OF INDIVIDUALS WITH REGARD TO AUTOMATIC
PROCESSING OF PERSONAL DATA
(T-PD-BUR)**

**Draft opinions of the T-PD Bureau on the draft texts prepared by the Committee
of Experts on New Media (MC-NM) on search engines**

Secretariat document prepared by
the Directorate General of Human Rights and Legal Affairs

Introduction

1. The Bureau of the Consultative Committee of the Convention (CETS No. 108) for the Protection of Individuals with regard to Automatic Processing of Personal Data (T-PD) would first of all like to congratulate the Committee of Experts on New Media (MC-NM) on their work.
2. The T-PD Bureau received a request for an opinion on the two draft texts prepared by the MC-NM on search engines, namely a draft Recommendation (document MC-NM (2010) 4) and draft guidelines for search engine providers (document MC-NM (2010) 9).
3. After an initial exchange of views on these drafts at its 23rd meeting (22-24 March 2010), the Bureau called on its members to send in written comments on the texts with a view to preparing its opinion.
4. It should be stressed that this opinion has been drawn up by the T-PD Bureau and that, in view of the importance of the issues involved, it might be useful to consult the whole T-PD. This consultation of T-PD members will take the form of a written consultation based on the present opinion and the draft texts, and the T-PD's position will then be transmitted to the Steering Committee on the Media and New Information Services (CDMC) for its plenary meeting from 14 to 17 June 2011.

Structure

5. The T-PD Bureau firstly stresses that the link-up between the two draft texts (Recommendation and Guidelines) is not always easy, particularly because the Recommendation itself refers to guidelines (its appendix).
6. The guidelines for providers do not refer to the Recommendation, even though the latter is supposed to serve as the relevant legal instrument setting out the basic principles guiding the development of national strategies in this field.
7. Conversely, the guidelines for providers comprise a chapter on "the rights of users" which does not appear in the draft Recommendation; such a chapter would seem necessary to clarify individual rights for all concerned.

Referencing

8. The T-PD Bureau draws the MC-NM's attention to the relevant texts adopted at the European and international levels, to which their texts should refer, at least in the explanatory memorandum to the recommendation.
9. These texts include Opinion 1/2008 on the data protection aspects of search engines adopted on 4 April 2008 by the "Article 29" Data Protection Working Party, the Resolution on Privacy Protection and Search Engines adopted in London on 2 and 3 November 2006 by the 28th International Data Protection and Privacy Commissioners' Conference, and the joint position adopted on this subject in 1998 and revised in 2006 by the International Working Group on Data Protection in Telecommunications (IWGDPT).

Data protection principles

10. Broadly speaking, reference should be made to the "purpose" of data processing rather than the "*fin*" (in the French version) (the reference in paragraph 7 of the appendix to Recommendation to Article 9 of Convention 108 should in fact be to Article 5 of the Convention), or to the "aims".

11. In the specific case of the purpose pursued, the T-PD Bureau notes that the draft texts concentrate on the processing of personal data collected in the context of search requests by providers, because this is the primary purpose pursued. It should nevertheless be pointed out that the implications in terms of the right to privacy and protection of personal data can be all the more important if search engine providers act as content providers. The aforementioned Opinion 1/2008 points out that *by retrieving and combining various types of current information on an individual they can create a new profile, greatly increasing the risk for the data subject than if all the data published on Internet remained separate*, and a balance must be achieved between the right to data protection and the right to freedom of expression, the right to information.

12. Providers store the data gathered under search requests on the grounds that such data helps them subsequently to provide faster, more specific and more efficient responses to their users' requests. The T-PD Bureau would suggest that if the principle of non-storage of such data prevailed, it might be useful simply to retain "cookies"; however, such retention should not necessarily be a matter for the search engine providers, as the users themselves could install the cookies. If data storage by the providers were to be maintained, the retention period should never exceed that laid down for cases of data storage for security purposes, and the user should in all cases be able at any time to request the deletion of the data stored.

13. The T-PC Bureau feels that the data storage issue is closely linked to defining the purpose of the data processing. Data storage for security reasons can be accepted (subject to meeting the conditions on derogations provided for in Article 8.2 of the European Convention on Human Rights and Article 9 of Convention 108) for a maximum period of three months.

14. In connection with personal data processing for the purposes of service improvement, the Bureau notes that this should be possible without storing the user's IP address. Another possible purpose is an educational search (for instance, a map of global areas infected by the H1N1 virus was drawn up on the basis of data from search requests); the T-PD Bureau stresses that the same result can be achieved by sampling or polling or by anonymising personal data.

15. In the personal data protection field, the concept of "sensitive data" concerns "personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, (...) (and) personal data relating to criminal convictions". Data in this specific category cannot be processed automatically unless there are appropriate safeguards (Article 6 of Convention 108). Therefore, when the texts refer to such data (paragraphs 1 and 3 of the guidelines and paragraphs 6 and 7 of the appendix to the Recommendation) to convey the risk of infringement of privacy in the context of processing a large quantity of data, the text might be reworded to stress that the collection and processing of large quantities of data may reveal so-called "sensitive" personal data.

16. In connection with the rights of users (which might be the subject of a separate chapter in the appendix to the draft Recommendation, as mentioned above), in addition to the right of access and the right to object, the T-PD Bureau stresses the need for clear and comprehensible general information (which might be set out in a new paragraph 8 in the guidelines). It would also seem necessary to provide users with better training in the facilities at their disposal.

17. The T-PD Bureau welcomes the draft texts' position on consent, rejecting the "opt-out" approach. Consent should in fact also be obtained for any subsequent processing of the data in question.

18. The user's right to object to subsequent data processing, set out in the "Transparency" section of the guidelines, should also cover publication of personal data in the results of search requests.

19. In connection with the right of users to control their personal data, notably by correcting or deleting them (paragraph 8 of the guidelines for providers), it might also be specified that deletion of data should also extend to data contained in the “cache memory”.

20. Paragraph 8 of the appendix to the draft Recommendation on cross-correlation of data might include a reference to Recommendation (2010) 13 on the protection of individuals with regard to automatic processing of personal data in the context of profiling.

21. It is vital that the graphical presentation of content displayed on the user's screen clearly differentiates between the search result and any commercial advertisements.

**Appendix 1: Draft Recommendation or Declaration by the Committee of Ministers to Member states
on the protection of human rights with regard to search engines [MC-NM(2010)004_en]**



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 11 March 2010

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COMMITTEE OF EXPERTS ON NEW MEDIA

(MC-NM)

—————
2nd Meeting
25 – 26 March 2010
Agora Building
Room G 05
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**Draft Recommendation or Declaration by the Committee of Ministers
to Member states on the protection of human rights with regard to search engines**

1. Search engines play a central role as intermediaries in the information society by enabling a worldwide public to seek, impart and receive information and ideas, in particular to gain access to knowledge and expressions, engage in debate and participate in a democratic society.

2. Recommendation CM/Rec(2007)16 of the Committee of Ministers to member states on measures to promote the public service value of the Internet underlines the importance of access to information on the Internet and stressed that the Internet and other ICT services have high public service value in that they serve to promote the exercise and enjoyment of human rights and fundamental freedoms for all who use them. The Committee of Ministers is convinced of the importance of search engines for the realisation of the value of the Internet for the public and the World Wide Web and considers it important that search engines are allowed to freely index the information that is openly available on the Web. This activity needs to take due account of fundamental rights.

3. The operation of search engines may challenge the right to freedom of expression and information and the right to privacy and protection of personal data, and possibly other human rights and fundamental freedoms. This may stem inter alia from the design of algorithms, blocking and discrimination of content, market concentration and lack of transparency about both the process of selecting and ranking results and also the purposes for processing user data, including the retention periods of personal data.

4. There is a need to protect and promote the values of access, diversity, security and transparency in the context of search engines. It is equally important to foster media literacy and the acquisition of skills that enable users to have access to the greatest possible variety of information and services.

5. In certain member states, co- and self-regulatory mechanisms have been set up to regulate the accessibility of illegal and harmful content through search engines.

6. The Committee of Ministers therefore recommends that member states, in co-operation with private sector actors and civil society, develop and promote coherent strategies to protect freedom of expression, access to information and other human rights and fundamental freedoms in relation to search engines in line with the European Convention on Human Rights (ETS No. 5), especially Article 8 (Right to respect for private and family life) and Article 10 (Freedom of expression) and the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108), in particular by:

- fostering transparency about the way in which access to information is provided, in particular according to which criteria search results are selected, ranked or prioritised as well as whether certain search results have been removed in order to ensure access to and pluralism and diversity of information and services;
- encouraging transparency about the way in which personal data are being collected and the legitimate purposes for which they are being processed;
- promoting the further development of tools to minimise the personal data collected from and about users, including enforcing limited retention periods for personal data, adequate anonymisation as well as tools for the deletion of data;
- allowing users to easily access, and, where appropriate to correct or delete data collected by the search engine providers from and about them;
- ensuring that the principle of due process is adhered to when search results are removed from search indexes, ensuring also that access to redress mechanisms is provided, regardless whether the origin of removal requests is governmental, co-regulatory or private;
- promoting the development of specific knowledge in the field of media literacy about the functioning of search engines, in particular on the processes of selecting, ranking and prioritising of search results;
- taking measures with regard to search engines in line with the guidelines set out in the appendix to this recommendation;
- bringing this recommendation and its appended guidelines to the attention of all relevant private and public sector stakeholders.

GUIDELINES

I. Transparency on the selection and ranking of information

1. Search engines play a crucial role as a first point of contact to freely seek and access information, opinions, facts and ideas on the global internet. Such free access to information is essential to build one's personal opinion and participate in social, political, cultural and economic life. The process of seeking information is strongly influenced by the arrangement of the information, the selecting and ranking of search results.

2. Most search engines provide very little or only general information about the way results are being selected and ranked, and what values are being used to qualify a given result as the 'best' answer to particular queries. Thus users' right to freely exercise and enjoy the right to freedom of expression and information might be challenged.

3. While recognising that full disclosure of business methods may not be appropriate, given that the precise algorithms used may have a high relevance for competition, and might also result in increased vulnerability of search engine services to abuse of their services (search manipulation), member states, in cooperation with the private sector and civil society, are encouraged to:

- ensure transparency about the process of selecting and ranking results to allow the public to make informed decisions about their use of search engines.

II. Transparency of ownership and the challenge of concentration in the search engine market

4. There is concern that concentration in the search engine market could challenge access to a diversity of information, in particular if one considers that the display and ranking of information by search engines is not exhaustive or neutral. As first points of access to information and ideas, particular forms of bias in search results of major search engines may limit choice, challenge the freedom to access information of one's choice, diversity of sources and threaten pluralism. The public's right to receive and impart information and ideas and pluralism of information may be challenged by search engine bias, opaque prioritisation and the blocking of content.

5. The general dependence on a small number of well-known search engines increases the concern that major search engines may be in a position to abuse their power. Member states should:

- promote ongoing research into the dynamic search engine market, to address issues such as the increasing concentration of the search engine market, to what extent this leads or might lead to abuse of market power and whether and to what extent search results are biased, in particular as a result of advertising or search engine manipulation.

III. Transparency about the use of personal data and the respect of data protection regulation

6. Search engines process large amounts of personal data about the search behaviour of individuals, varying from cookies and IP addresses to individual search histories. An individual's search history contains a footprint which may include the person's interests, relations, and intentions, and should therefore be treated as sensitive data. The treatment of personal data by search engines is becoming even more crucial given the explosion and proliferation of audiovisual data (digital images, audio and video content) and the increasing popularity of mobile internet access. Specialised people search engines, location based services, the inclusion of user-generated images into general purpose search indexes and increasingly accurate face recognition technologies are some of the developments that raise concerns about the future impact of search engines on fundamental rights such as privacy and freedom of expression.

7. Given the sensitivity of the data already processed by search engines and foreseeable developments in the near future, it is vital to ensure compliance with the applicable data protection regulation. Personal data

may only be processed for legitimate purposes, as outlined in Article 9 of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) and search engine providers must delete or irreversibly anonymise personal data once they no longer serve the specified and legitimate purpose they were collected for. With respect to the retention of personal data collected by and through searches, a maximum retention period of 6 months should not be exceeded.

8. Cross-correlation of data originating from different services/platforms belonging to the search engine provider may only be performed if consent has been granted by the user for that specific service. The same applies to user profile enrichment exercises. Search engines must clearly inform the users upfront of all intended uses of their data and respect all user rights to readily access, inspect or correct their personal data.

9. Member states (through the designated authorities) should:

- enforce compliance with the applicable data protection regulation;
- in particular, encourage search engine providers to further develop tools that allow registered users to gain access to, and correct and delete data that have been collected in the course of the use of services, including a possible profile created for example for direct marketing purposes.

IV. Filtering and blocking

10. A prerequisite for the existence of effective search engines is the freedom to crawl the available information on the Web. There may be legitimate grounds for the blocking or filtering of certain types of content on specific web sources, for example in cases where other rights outweigh the right of freedom of expression and information. In many countries, search engine providers block or filter specific websites at the request of the government (or of public authorities), to meet the requirements in the legal framework or at their own initiative, for example in the case of websites spreading spyware.

11. In many other cases requests for the blocking or filtering of specific web sources are filed by private parties and individuals. It is important that any law, policy or single request on blocking or filtering is done with full respect of the right to freedom of expression and to seek information. The principles of due process and access to redress mechanisms should also be respected in this context. Member states should:

- ensure the freedom of search engines to crawl the available information on the Web and ensure that possible legislation on mandatory filtering and blocking of content by general purpose search engines is in accordance with Recommendation (2008)6 of the Committee of Ministers to member states on measures to promote the respect for freedom of expression and information with regard to Internet filters and its guidelines;
- guarantee that blocking or filtering mechanisms, in particular that nationwide general blocking or filtering measures are only introduced by the state if the conditions of Article 10, paragraph 2, of the European Convention on Human Rights are fulfilled. Member states should avoid the general blocking of content that has been defined in a democratic process as harmful for users who are not part of the groups for which a filter has been activated to protect. In many cases, encouraging search engines to offer adequate voluntary individual filter mechanisms may suffice to protect those groups.

V. Self and co-regulation

12. Examples of self regulatory initiatives by search engine providers exist for example in Germany and in France. Such initiatives should be welcomed. It is important to recall that all co- and self-regulation, as a form of interference, should be transparent, independent, accountable and effective. Member states should:

- ensure that all self regulatory arrangements meet the minimum requirements of the European Convention on Human Rights, in particular the right to due process. Complaints mechanisms have to be transparent, effective, independent and accountable.

VI. Media literacy

13. Users must be educated and made aware of the functioning of different search engines (search engine literacy) in order to make informed choices about the sources of information provided, in particular that a high ranking does not necessarily reflect the importance, relevance or trustworthiness of the source. As search engines play a more and more important role with regard to the accessibility of media and information online, media and information literacy strategies should accordingly be adapted. Member states should ensure that:

- search engine literacy becomes part of the national media literacy curricula;
- media literacy is considered a priority for national education strategies both in formal and informal education.

Appendix 2: Proposal for draft guidelines for search engine providers [MC-NM(2010)009_en]



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COMMITTEE OF EXPERTS ON NEW MEDIA

(MC-NM)

**2nd Meeting
25 – 26 March 2010
Agora Building
Room G 05**

**Proposal for draft
GUIDELINES FOR SEARCH ENGINE PROVIDERS**

I Transparency

1. There is a delicate balance between the commercial need for search engines to optimise results and thus generate advertising revenues and the necessity to respect the protection of the private life and personal data. In order to properly target the advertisements, search engines try to gain as much insight as possible into the characteristics and context of each individual query. An individual's search history contains a footprint of that person's interests, relations and intentions and should therefore be treated as sensitive data. The treatment of personal data by search engines is becoming even more crucial given the explosion and proliferation of audiovisual data (digital images, audio and video content) and the increasing popularity of mobile internet access. Specialised people search engines, location based services, the inclusion of user-generated images into general purpose search indexes and increasingly accurate face recognition technologies are some of the developments that raise deep concerns about the future impact of search engines on human rights such as privacy and freedom of expression.

2. Most internet users are unaware of the extent of the collection of personal data and of the purposes they are being used for. If they are not aware of this processing they are unable to make informed decisions about it. They require accurate, easily accessible and easily comprehensible information, adapted to different age groups and levels of education.

- ➔ Search engine providers should give a comprehensive overview of the different specified, explicit and legitimate purposes for which they process personal data. It is key for the search engine providers to explore innovative ways to present this information to the public, outside of the realm of the general terms and conditions.

3. The collection and processing of large amounts of these sensitive data for direct marketing purposes, for example in the form of behavioural targeting, poses a significant challenge to the right to privacy. Allowing the public to make an informed decision about such use is best guaranteed by asking for specific consent, instead of offering an opt-out. In practice, there is no easy strategy for users to opt-out. If they for example manage to delete all cookies from their computer, they will also delete the 'opt-out cookies' that would register their opt-out from behavioural targeting from the different advertising networks or publishers.

- ➔ Search engine providers must inform their (potential) users about the specific and legitimate purposes for which personal data are being processed. If data are being used for direct marketing purposes or the creation of profiles, consent of the users is clearly preferred over any opt-out strategy.

4. Some of the currently described purposes, such as 'the development of new services' or 'the offering of personalised advertising' are too broadly defined to offer an appropriate framework to judge the legitimacy of the purpose. Many large search engine providers also offer services on other platforms such as for example social networking services and webmail. The large amounts of personal data collected through the search platform can be used to develop new services within the search platform, or on other platforms. It is of some concern that such new purposes for the processing of personal data could be added retro-actively, without an informed decision of the users.

- ➔ Search engine providers should seek informed consent from their users if they wish to use the personal data they have already collected for new processing purposes.

5. There is an equally delicate balance between the necessity for search engines to protect their business methods and to protect the service against abuse by, for example, search spammers and malevolent distributors of spyware on the one hand and the importance of being transparent about the process of selecting and ranking search engine results on the other hand. Lack of transparency about the selection and ranking of search results, the possible blocking or filtering of specific types of content and the lack of knowledge by the public about the functioning of search engines pose an equally significant challenge to the right to freely seek and access information.

6. Full disclosure of business methods may not be possible, given that the precise algorithms used may have a high relevance for competition. Full disclosure about the ranking of results could also result in increased vulnerability of search engine services to abuse of their services. For example, undue influence could be exercised by malevolent distributors of spyware, but also search spammers and third parties with a legitimate commercial interest using search engine optimisation techniques.

7. By ranking results, search engines impose particular sets of values as regards the relevance and quality of information for the public. Commonly the relevance of results is decided on a combination of amount of hyperlinks pointing to particular websites and previous click-through rates of presented results. Often individual search histories are also being used, as well as geographical indications of the adequacy of results. The right of access to information may be challenged by un-transparent prioritisation.

- As a vital service for the information society, search engine providers should be transparent about the criteria they apply to select and rank results.

II Rights of users to control their data

8. As regards the data held on the search history of their users, search engines should respect the rights of users to access and, where appropriate, to correct or delete information held about them. These rights apply foremost to the data from authenticated users stored by search engines, including personal profiles. However, these rights also apply to non-registered users.

- In this context, search engine providers should apply their technological innovation capacity to find a meaningful solution to grant access to the search history held of non-registered users.
- Search engine providers should further develop tools that allow registered users to gain access to, and correct and delete data that have been collected in the course of the use of services, including a possible profile created for example for direct marketing purposes.

III Data minimisation

9. If personal data are stored, the retention period should be no longer than necessary for the specific purposes of the processing. As personal data could be deleted after the end of a search session, continued storage needs an adequate justification. For each purpose, a limited retention time should be defined. Moreover, the set of personal data to be retained should not be excessive in relation to each purpose. Following opinion WP148 of the EU data protection authorities, in any case the maximum retention period should not supersede 6 months.

- Given the sensitivity of search behaviour, search engine providers should determine adequate, non-excessive retention periods and irreversibly delete personal data once the limited retention period has expired.

IV Censorship

10. To ensure freedom of information the user should be able to access Web content without censorship or restrictions. With regard to systematic nationwide filtering or blocking at the request of public authorities, search engine providers should strive for transparency and foreseeability by the public. With regard to individual filtering requests by private parties and individuals, search engine providers must adhere to the principle of due process and provide access to redress mechanisms.

- Search engine providers must promote transparency about systematic nationwide blocking or filtering about certain types of content and adhere to the principle of due process when removing specific search results from their index and provide access to redress mechanisms.
- Search engine providers should offer and continue to develop adequate individual filtering tools to allow their users to protect themselves, or in a family situation their children, against specific kinds of content, as well as filters that block or warn users against sites that apparently spread viruses, spy and other kinds of computer malware.

V Co- and self-regulation

11. Efforts at co- and self-regulatory adherence to human rights standards have been made on a national level, for example in Germany, in France, and on a global scale by for example the Global Network Initiative.

- In order for co- and self-regulation to produce meaningful results, search engine providers should adopt adequate sanctioning mechanisms.