

# European Privacy



≥ MARKTPLAATS.NL

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# Overview

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- **95/46/EC revision**
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# About eBay

- eBay Inc. is a publically traded entity whose primary listing is the NASDAQ exchange in the USA.
- Around 400 million registered eBay users / > 500 million stores.
- Around 250 million PayPal account holders.
- Around 6 million NL Marktplaats users.



# Our privacy footprint

## Our approach

- Individuals choose to share personal information about themselves, in order to build trust with each other, in our platforms.
- Protecting personal data is therefore fundamental to our marketplaces ecosystem, because increased protection encourages broader data exchange, a more efficient market and as such higher transaction volume.
- Our business models are therefore incentivised to excel at privacy – *the worse our practices the greater the drag on our core revenue stream.*
- Our payments system PayPal allows consumers to pay for transactions without exposing their financial information. As such, we believe PayPal to be the most privacy protective payment mechanism commercially available today.
- This demonstrates that the principle of ‘privacy by design’ has economic value.
- In NL, our main operating platform is MarktPlaats, and this business contracts with internet users internationally.

# Our European footprint

- Luxembourg: eBay Europe S.à r.l. & PayPal Europe S.à r.l. & Cie, S.C.A., a bank, hold the contractual relationship with all EU users.
- Netherlands: MarktPlaats B.V. is the entity holding the customer relationship with multiple 'classifieds' brands in and out of the Netherlands – so we have non Dutch users who are then furnished with Dutch privacy rights and exclusive recourse to the CBP.
- Small data Controllers in Germany, UK, Ireland, Sweden - sometimes we have formal joint control with our Lux entities.
- All entities incorporated under our Binding Corporate Rules umbrella for data export. This reinforces privacy control as a shared service from Luxembourg. As such eBay Inc's key DPA in many situations is the Commission Nationale pour la Protection des Données (CNPD ) for User information, though for Marktplaats it's the CBP.

# How it works

- For user data, trading across most EU member states, 27 sets of DP law and 27+ regulators would provide a headache. Our corporate structure is intentionally cross-jurisdictional.
- In Marktplaats, we allocate non Dutch users, Dutch privacy rights on the basis of Control, clarified under A29 of WP169:
- **Controller shall decide who shall be responsible for compliance:** DPO appointment
- **Control stemming from implicit legal competence:** All EU users of Marktplaats *brands* contract exclusively with Marktplaats B.V
- **Controller shall allocate responsibility:** Marktplaats B.V . governs processing of its brands operations through the Privacy, Product & Legal functions
- **Allocation of responsibilities based upon factual influence:** Marktplaats B.V .'s DPO 's role is sufficiently senior to effect control in practice.

# 95/46

- 95/46/EC has been a spectacularly successful instrument, primarily responsible for global interest in privacy.
- Its extraterritorial characteristics have made it the global *de facto* standard of data protection for leading organisations, and it has stimulated many countries to develop and adopt European style privacy regulatory frameworks.
- Technology neutrality has been key to its success.
- A framework of empowered regulators has by and large proven to provide effective recourse to the citizenry for the enforcement of their rights.

# 95/46 roots

- The human rights tradition for privacy has resulted in a regulatory framework of data protection legislation, essentially a comprehensive set of fair information management practices, primarily concerned with protecting people against harm from misuses of their personal information.
- Harm is a narrow definition of freedom, which tended to crowd out other equally valid human rights freedom concepts in the fair information practices of 95/46:
  - freedom from injustice
  - freedom from inequality
  - freedom to determine how we are perceived as individuals.

# 95/46 revision

## What we can expect to see:

- **Instrument**

- The EUDPS has issued a proposal for a Regulation to replace the Directive – Member States expected to resist. There is a need for harmonization, but harmonization can be achieved whilst preserving sovereignty.

- **Enforcement**

- More audit powers, more fining powers, budget increases likely to be self funded, greater mutual recognition.

- **Consent**

- Pressure on 'bundling', move to opt in, constraints on data integration.

- **Jurisdiction**

- Controller / processor definitions are at the root of jurisdictional claims. Applying controller accountabilities to processors makes more member state law applicable but you can get as good protections through realistic DPA mutual recognition.

# Cookies

- Cookies are small text files that are part of the standard HTTP protocol.
- Because HTTP is stateless – that is your previous connections to a given URL are not ‘remembered’ - cookies allow the user’s session to ‘save state’ as one negotiates a given web site.
- Cookies therefore play a foundational role in how the internet works.
- Cookies have other purposes, however, and at present are a common implementation technology for online advertising.



- “Dropped” via a click or a view
- Location via IP
- Browsing activity
- Buying/converting activity
- Managed via clearing your system, ad-blocking software, browser settings, some opt out solutions

# Cookie observations

- Dutch online advertising market was €962m in 2010, expected to grow by 13% this year.
- Only 63% of the Dutch public knows what a cookie is.
- Clearly for most people, receiving advertising that is relevant is better than receiving spam.
- But, when you track individuals behaviour, particularly off-site, some people have a natural psychological aversion to being tracked – hence the renewed regulatory interest.

# Cookie observations

- 09/136/EC updates 02/58/EC and in **A5(3)** requires consent for cookie dropping:

*... user concerned has given his or her consent, having been provided with clear and comprehensive information, in accordance with Directive 95/46/EC, inter alia, about the purposes of the processing*

- Most Member States make use of **Recital 66** in interpreting A5-3:

*.... the user's consent to processing may be expressed by using the appropriate settings of a browser or other application.*

- This basically turns the opt in of 5(3) into an opt out for advertising cookies in most, if not all, member states.

# How it works in eBay

- eBay's cookie based advertising uses a 1st party cookie to target ads. This led us in 2007 to roll out AdChoice. AdChoice has two major components:
  1. a preference within *My eBay* (our control panel for user preferences) that provides users with more information about our personalised advertising programs and allows users to make choices about their participation and;
  2. a prominent link on the customised advertisements we serve, allowing users to access information about AdChoice and to set their preference

# What about the UK?

- ICO guidance recommends an opt in for 1<sup>st</sup> party advertising cookies and is currently silent on third party cookies.
- However DCMS, the Ministry proposing the legislation, has contradicted the regulator by stating that:
  - consent does not need to be prior or opt in
  - Browser based consent can be applied.
- This creates legal uncertainty and business confusion that is best avoided.

# Guidance from the ICO

Confusion notwithstanding, the ICO has provided guidance:

## **1: Audit what cookies are being dropped and how they are used**

## **2: Assess how intrusive your use of cookies is**

When cookies are used for site analytics, measurement, reporting – they're deemed necessary for the operation of a site. When cookies are used for advertising, ICO advises they should be considered more intrusive.

## **3: Decide what solution to obtain consent will be best**

For 1<sup>st</sup> party advertising based cookies you need to obtain consent before a cookie is set for the first time. Provided you get consent at that point you do not need to do so again for the same person each time you use the same cookie (for the same purpose) in future.

# Amendment to Article 11.7a of the NL Telecommunications Act

- **Proposed amendment 39** (passed in parliament and due for discussion in the Senate Sep 13) to Article 11.7a classifies cookies as 'presumably' personal data
- The **explanatory note** states that for cookies used in advertising, the "stricter regime of the WBP should always apply, meaning that the consent should be unambiguous".
- This would seem to imply that the only legal means to process advertising cookies is through a prior, and explicit consent. Browser based consent is ruled out for current browsers.
- This puts the Netherlands at odds with most, and possibly all, Member States.

# Some thoughts

- Controllers expect the WBP alone to define what is and isn't personal data.
- Personal data can be processed under the WBP without requiring consent:
  - 8b: performance of a contract
  - 8f: legitimate interests of a Controller
- The Telecoms Act sets specific rules for opting out of email marketing (11.7-3), cookies are arguably far less intrusive than email, but now subject to a stricter test.
- OPTA will focus oversight on people / entities established in NL, whereas the WBP can apply to non-Dutch residents / entities.
- Ruling out browser based consent is problematic as browser technology moves faster than legislative and regulatory process / it also has a role to play in enabling users to make informed decisions i.e. consummating contracts.

# Some more thoughts

- Strict opt in rules are likely to reduce advertising revenues for Dutch publishers, relative to foreign peers. This can reduce free content provision / user choice.
- If a strict opt applies to foreign operations of Dutch Controllers, those local operations would be less likely to attract local advertisers.
- Strict opt in therefore can affect revenue and hence corporate tax take.
- This also creates some internal market obstacles - Dutch users surfing to sites controlled by non Dutch companies are generally going to encounter an opt out.

# Moving forward

- Ensuring the Netherlands is reasonably consistent with other member states does not limit discretion on mandating user choice and understanding.
- What would be useful to consider is the different abilities publishers and adnetworks have to effect change:
- For example, publishers could create a preference page allowing users to see the type of data collected on them, and allow users to edit / control data they do not wish used.
- Publishers also have direct control over 1<sup>st</sup> party cookie based advertising:

# Moving forward

- **1<sup>st</sup> party advertising:** vast majority of users are repeat visitors so under contract. Cookie data is used for controlled purposes, internally, or through service providers.
- This is very similar to DM rules under 11.7-3 – yet far less invasive, which indicates when advertising through a 1<sup>st</sup> party cookie an opt out approach is intuitive.
- **3<sup>rd</sup> party advertising:** there are relatively few adnetworks serving the EU market of publishers, so even large publishers have limited negotiating power on:
  - terms and conditions
  - data processing post collection
  - country specific rules.
- This indicates that efforts could well be directed toward harmonized EU approaches to compel adnetworks to provide for user understanding and control.