To: Members of the Council Working Party on Information Exchange and Data Protection (DAPIX)

Re: Concerns ahead of DAPIX meetings – Threat to Economic Basis of Press Publishing

In light of the ongoing discussions in the Council, and ahead of the DAPIX meeting on 15–16 January 2015 regarding Chapter II of the Proposed General Data Protection Regulation (GDPR), we would like to reiterate our main concerns. We are particularly concerned that "opt out" direct marketing necessary to sustain readership are under threat.

Press publishers need to be able to reach out to both current and potential readers to inform about new offers or services that may be of interest to them. This is essential to compensate circulation decline due to subscriber fluctuations. The cooperation with third parties in getting new subscribers is essential to the future of the press and its readers. In some Member States **up to 40% of new subscribers result from opt-out direct marketing**. For the B2B press, controlled circulation based on the use of special address lists accounts for up to 90% of some business titles' readership in some Member States.

In order to maintain subscription readership and safeguard successful press distribution in Europe, further changes are indispensable to Articles 6(1)(f), 6(4) and 20 and the respective Recitals.

Executive summary:

- To maintain the current legal basis of direct marketing and controlled circulation models of press publishers, Article 6(4) must allow "*further processing*" *on the grounds* ***of legitimate interest***" (Article 6(1)(f)) as suggested by many Member States.
- Clarification in Recital 39 that *the processing of personal data for direct marketing purposes can be regarded as carried out for a legitimate interest*" is indispensable and should also be included in the body of Article 6(1)(f).
- Should legal presumptions for the legitimate interest of the controller or a third party be included in Article 6(1)(f) (e.g. for pseudonymisation) the inclusion of a legal presumption for direct marketing becomes imperative.
- Requirements for profiling must not apply to opt-out direct marketing. Article 20 should only apply to decisions that produce legal effects or similarly significantly affect the data subject concerned.
- Moreover, any profiling rules going beyond the current Article 20 by further specifying requirements will put opt-out direct marketing in danger. Any such rule would need to be discussed in depth, because they would create a whole new level of regulation, not taking into account effects on the data subject.
- ***German Note on Pseudonymisation:*** We welcome the objective of the Note to legalise pseudonymised processing of personal data. However, Article 6(1)(f) of the Note has to be amended: In cases **of pseudonymisation and direct marketing** there is a refutable presumption that the data subject's interests and fundamental rights and freedoms do not override the controller's or third party's interests.
- We acknowledge and welcome that the Presidency text of 19 December 2014 takes into account the legitimate interests of both the controller and a third party in Article 6(1)(f). This is consistent with the current Article 7(1)(f) of Directive 95/46/EC.
- ***German Note on Consent:*** The requirements for a lawful consent must not be extended to a degree that makes everyday data processing impossible. The Note on Consent introduces new and extensive barriers to processing data based on the consent of the data subject.

Furthermore, it is essential that the respective Recital 58 clarifies that individual negative legal effects – or similar actual effects – do not cover measures relating to commercial communication like for example in the field of customer acquisition or customer relationship, including direct marketing.

Moreover, any profiling rules going beyond the current Article 20 by further specifying requirements will put opt-out direct marketing in danger. Such additional rules **would need to be discussed in depth** because they would create a whole new level of regulation. All suggestions we have seen to date would have damaged essential ways of data processing to an unforeseeable extent. This applies especially to additional restrictions that do not take effects on the data subject into account.

4. German Note on Pseudonymisation of 24 October 2014 (14705/14)

Pseudonymised processing of data has to be legal under the GDPR. In this regard, we welcome the general objective of the German Note on Pseudonymisation. However, as stated above, should presumptions be included in Article 6(1)(f) that in certain cases the subject's interests and fundamental rights do not override the controller's interests, a corresponding **inclusion of direct marketing in this Article becomes imperative.** Mentioning one specific presumptive example in the Article puts unreferenced cases inevitably into question.

Article 6(1)(f) of the German note therefore has to be adapted: In cases **of pseudonymisation and direct marketing** there is a refutable presumption that the data subject's interests and fundamental rights and freedoms do not override the controller's or third party's interests.

5. Legitimate interests of third parties

We acknowledge and welcome that the Presidency text of 19 December 2014 takes into account the legitimate interests of both the controller and a third party in Article 6(1)(f). This is consistent with the current Article 7(1)(f) of Directive 95/46/EC. In many cases of direct marketing or controlled circulation publishers partner with third parties in order to reach new customers.

6. German Note on Consent of 27 October 2014 (14707/14)

The requirements for lawful consent **must not be extended to** a degree that makes everyday data processing impossible. Consent is an important basis of data processing for the cases not covered by legal stipulations. The German Note on Consent introduces new and extensive barriers to data processing based on the consent of the data subject.

Contrary to the Commission proposal, the Note foresees in its Article 7(1)(1b) – as a principle – a mandatory written or electronic form of the consent. Combined with the form requirement, the controller has far-reaching additional obligations.

Article 7(2a) introduces new and burdensome information requirements for the use of standard declarations as regards the validity of "consent". Article 7(2b)(a – e) foresees unacceptable legal presumptions of unreasonable disadvantage of the data subject resulting from the consent itself. Article 7(2c) takes this concept even further by declaring any consent given to a controller in any relationship of "permanent dependency" as principally not freely given and thereby invalid.