

Feedback to the European Commission on the ePrivacy Regulation proposal repealing Directive 2002/58/EC

September 2019

News Media Europe (NME) represents the progressive news media industry in Europe – over 2,500 news brands including newspapers, radio, television and internet. News Media Europe is committed to maintaining and promoting the freedom of the press, to upholding and enhancing the freedom to publish, and to championing news brands, which are one of the most vital parts of Europe's creative industries.

Summary

- **NME acknowledges the difficulties associated with the proposal;**
- **NME is concerned about specific elements of the proposal and their likely impact on the fragile revenue models of news organisations;**
- **NME cannot support a proposal that does not maintain the existing right to make access to content conditional on consent to data processing;**
- **NME stresses that fundamental rights need to be balanced, and that this exercise should not be left to data protection authorities alone;**
- **NME recommends expanding the legal basis for audience measurement to enable third parties to act directly on behalf of first parties;**
- **NME recommends reassessing whether browser settings really add any value to the proposal, and the technical issues that may follow;**
- **NME recommends clarifying several concepts under the provisions concerned with direct marketing, notably the definition of the term.**

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The proposal viewed from the European news media industry

The European news media industry is a modern industry that offers EU citizens news content on all platforms and channels, both online and offline. Our industry innovates and invests in services, products and technology which underpin quality journalism in the digital age. Our products remain, as they always have been, a cornerstone of democracy.

The news industry, and news publishers in particular, faces important economic and political challenges. The rise of online platforms, ongoing threats to media freedom, technological disruptions, and ongoing concerns over disinformation, have all contributed to the present situation.

The digital business model of news publishers continues to rely heavily on digital advertising as a key source of income. This is because revenues from the print business continue to fall sharply and the limitations of business models relying on digital subscriptions are becoming increasingly clear, all while the industry is making substantial investments in digital service offerings and quality journalism.

It follows that digital advertising revenue will continue to play a key role in sustaining a diverse and vibrant press and in mitigating the adverse effects of the industry's transition to a more sustainable and digital future. Furthermore, we note that data-driven online advertising is the fastest growing source of potential revenue for news publishers and generates more sustainable income than traditional advertising.

We therefore ask the European Commission to reconsider how the proposed rules would affect the ability of news publishers to monetise their online content, at a time of uncertainty for the sector as a whole. We are in particular concerned about a potential obligation to provide full access to online content in the absence of consent from users to process the personal data that funds journalistic content through advertising.

This is concerning as the news media industry would have fewer options to monetise content while it is clear that paywalls and subscriptions have been limited in their success and unable to compensate for industry losses in the print business. While these solutions work well for some titles and their audiences, other audiences will be lost if news media could no longer rely on advertising-based business models. This is not a viable option to safeguard the future of Europe's information landscape.

We fear that the proposed changes could result in lower revenues and therefore access to quality content, keep quality journalism in the hands of those who can afford it, unlevel the playing field between private sector and public service broadcasters, and further exacerbate the digital divide between digital businesses and tech giants.

NEWS MEDIA EUROPE

The key underlying questions, as we see it, are about what constitutes a legitimate business model, and about how to effectively balance the various fundamental rights at play, including the freedom to conduct business, while providing a satisfying level of privacy for citizens online. In our view, the debate on the ePrivacy Regulation would benefit from further consideration of these issues.

Feedback on the European Commission proposal

For the purpose of the present contribution, we provide feedback based on the assumption that cookies are best regulated through the ePrivacy Regulation proposal.

However, we note in this respect that we believe that all matters relating to the processing of personal data should have been fully dealt with by the GDPR, for several reasons including legal clarity and consistency.

As a general point, NME welcomes the proposed expansion of legal bases for data processing. However, we are concerned that whatever benefits may flow therefrom would be undermined by the lost ability of news organisations to make access to their online content conditional on users providing their consent to the use of cookies which in turn enables the ad-based models that funds professional journalism.

In addition, we also have other reservations about elements of the proposal relating to cookies, privacy settings and direct marketing, which also bear important implications for news organisations. Below, we address these issues separately.

Making access to content conditional on end-user consent (“conditionality”)

The ability of online news services to make access to their content conditional on user consent is crucial for the sustainability of the industry business model, and for publishers in particular. It enables the effective monetisation of content and is particularly important for smaller news outlets who are more reliant on advertisement.

The news publishing industry relies on advertising income for most of its revenues. Of that revenue, print advertising revenue is falling sharply while digital advertising will soon be the only meaningful source of revenue. When it comes to digital growth, 90% of the growth in the digital advertising market comes from programmatic advertising.

Programmatic advertising is essentially data-driven advertising and is ca. 3 times more valuable for publishers than traditional contextual advertising. It commands a higher price for advertising space and brings in more investments in digital advertising as marketers allocate their budgets between various forms of marketing tools.

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A blanket ban on conditionality would not only raise questions about whether such companies might in the future effectively be forced to give away their content at important lost value, if they are still in a position to fund that content, but also about whether the measures effectively reconcile the various fundamental rights in the EU Charter of Fundamental Rights (EUCFR).

We further note that the current ePrivacy Directive explicitly allows the making of access to content conditional on consent for cookies in Recital 25, and that the issue of conditionality was left unaddressed altogether as part of the Commission proposal. Consequently, it became inevitable that the European Data Protection Board (EDPB) would within the framework of its GDPR mandate seek to regulate “conditionality”.

In our view, there is an underlying question about how to strike the right balance and reconcile cross-cutting fundamental rights obligations between the right to privacy (Art. 7 EUCFR) and the right to data protection (Art. 8 EUCFR) with the right to conduct business (Art. 16 EUCFR). Insofar as our specific industry is concerned, we also note the importance of the right to freedom of expression (Art. 11 EUCFR).

Article 16 of the EUCFR on the freedom to conduct business is one of the less traditional rights. Nevertheless, it introduces a concept crucial to modern society. According to relevant ECJ case law, the right of freedom to conduct a business consists of a) the freedom to exercise an economic or commercial activity, b) the freedom of contract, and c) free competition.

As regards cross-cutting fundamental rights obligations, the freedom to conduct a business is a complex right, as opinions differ concerning the line to draw between the freedom to conduct a business and data protection. What is clear, however, is that the rights to privacy and to data protection are not absolute rights that supersede other rights. To that effect, the ECJ has developed relevant case law.

Further to this, we note that the EU also has cross-cutting fundamental rights obligations in the area of freedom of expression and access to information, which creates an obligation to consider the effect of regulatory measures on media pluralism. In this respect, we are of the view that the specific impact of the proposal on the sustainability of the business model of journalism warrants special consideration.

In our view, it is essential in any market-based system that the right of private economic actors to place products on the market on reasonable terms is preserved. A clear line, informed by careful analysis of the case law, needs to be drawn to avoid creating legal uncertainty. In any event, we do not recommend that the issue of conditionality is left to the EDPB, as this remains a largely political decision.

We note that the EDPB in its Guidelines on Consent recommends prohibiting conditionality. However, as explained above, this is an exercise in reconciling cross-cutting rights obligations. We question whether the field of expertise of the EDPB and

the resources at its disposal make it competent to carry out an authoritative analysis that requires a sophisticated understanding of other the fundamental rights at stake.

Moreover, we also consider, contrary to the view held by the EDPB, that consent can in fact be “freely given”, as required by Article 7 (4) of the GDPR, if it is bundled or tied. In other words, tying or bundling access to content to consent, does not necessarily mean that consent is not “freely given”. In our view, the EDPB provides in this particular case an excessively restrictive interpretation of the GDPR.

We note that, in any event, consent needs to follow the rules mandated in the GDPR, including meeting accurate, transparent and timely information requirements about the type of personal data concerned the purposes of processing so that consent is freely given, informed, specific and unambiguous.

Ultimately, we wish to highlight our concern that forcing online news sites to give content away for free, or at the very least forcing them to under-monetise content by up to two-third of its data-driven advertising value, could not only force news organisations to cut investment in professional and quality journalism, but also to put up paywalls and contribute to the growing phenomena of news inequality.

If high-quality journalistic content disappears behind a paywall, there is a risk that only those on higher income will be able afford it and maintain their access to quality news, while those who cannot afford a subscription or other similar arrangements would be confined to lower quality journalism and more disinformation.

We therefore recommend that the Commission revises its original proposal to introduce, either by way of a new recital or through direct additions to Article 8, the right to make access to content conditional. We believe this strikes a more appropriate balance between the interests and could form the basis for good political compromise.

Protection of end-user terminal equipment (cookies) under Article 8

Bearing in mind that the only legal basis available for under the current ePrivacy Directive is “consent”, we welcome the proposed expansion of legal bases allowing for the lawful “use of processing and storage capabilities of terminal equipment and the collection of information from end-users’ terminal equipment” under Article 8 (1).

We believe this will help create a better online experience for consumers and industry alike while maintaining high privacy and data protection standards, especially when compared to the current ePrivacy Directive where the only legal basis for all types of processing is consent.

NEWS MEDIA EUROPE

In particular, it is important that online news service providers are able to carry out audience measurement to better inform their efforts on how to tailor their products and services to their online audiences, and accordingly to continue improving their professional journalistic offering and monetisation strategies.

We note, however, that under the Commission proposal the use of the audience measurement legal basis under Article 8 (1) (d) is limited to cases where such measurement is carried out by the provider of the information society service requested by the end-user, in other words, on a first-party basis.

We note that many news organisations, in particular smaller news outlets, do not possess the in-house resources or capabilities to carry out such audience measurement or other analytical functions on a first-party basis, and therefore rely on externally contracted third parties to carry out audience measurement on their behalf.

To be clear, we do not believe audience measurement should be allowed in any situation. We believe that a good compromise would seek to, on the one hand, allow audience measurement to be carried out without a first-party limitation, while on the other hand, make sure that such audience measurement can also only take place if it is realised directly on behalf of information society services requested by the end-user.

Privacy settings (browsers) under Article 10

A user-friendly approach to consent is clearly an important aim for this proposal to consider. Yet, we question whether the proposal for privacy settings is consistent with this aim, and whether it is feasible in practice and even consistent with existing requirements under the GDPR. In our view, competition concerns may also arise or be aggravated as a result of the proposed role for browsers.

First, as regards user-friendliness, it is clear that the proposal does not remove the ongoing issue of continuous pop-up windows every time a user visits a new page, or every time the user re-visits a page after the time when renewed consent is required. In that sense, whether it is the website service provider or the browser that remembers a privacy preferences, there seems to be little difference and thus added-value.

There are further concerns about how a user would be able to modify consent through such settings. If consent, or refusal to consent, has been given, a user could then be required to go into the settings of the browser to review possibly hundreds of consent forms registered for each website previously visited, to modify consent for a single website. The mechanism for consent would then be rapidly become burdensome.

Second, requiring browsers to centralise privacy settings would require that every time a user gives consent to a service provider, the service provider somehow

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communicates this to the browser operator. In practice, this would require every website to communicate with the browser which in turn would require a number of technical solutions that may indeed prove to be complicated to implement in practice as interoperability would become an ongoing concern.

Furthermore, additional guarantees would be required to ensure that browser operators do indeed implement consent for a given website automatically and immediately once consent has been given and signalled. Additional safeguards would be necessary to avoid creating a gatekeeper role for browsers.

As regards consistency with the GDPR, and in relation to so-called “default settings”, we note that the bulk acceptance or rejection of cookies by default raises several concerns. Most importantly, when considering the requirements under the GDPR for consent to be specific and informed, we question how default settings can achieve this.

If, in that case, compliance requires individual websites to ask individually for consent, then the proposed role for browsers seems to add little value as its role becomes reduced to saving cookie preferences as regards a specific website, which individual websites already do within the timeframe permitted by the GDPR until renewed consent is required and accordingly sought.

Last but not least, we note that there is a competition angle to be considered as the proposed privacy settings risk reinforcing the role of one browser in particular as gatekeeper to the internet. Ultimately, we could see the dominance of some browsers over the online ecosystem entrenched and aggravate existing concerns about a growing digital divide.

We also note that it remains to be seen whether consent collection or notice provision through browsers would allow online publishers to obtain consent under fair circumstances compared to larger online intermediaries.

Taking all these considerations into account, we recommend removing the proposal under Article 10 to introduce privacy settings through browsers due to concerns relating to user-friendliness, consistency with the GDPR, and competition concerns.

Unsolicited communications under Article 16

The current ePrivacy Directive contains provisions on unsolicited communications and we welcome the proposal to review and ensure that relevant rules remain up to date and fit for purpose. Direct marketing plays an important role in the news industry, especially as regards the renewal of subscriptions and the promotion of new products.

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Depending on the Member State, direct marketing can be the main vehicle for communication with consumers. This may be due to local cultural adaptations to the way customer relations are best managed, or because direct marketing is seen as an effective vehicle for business development and marketing activities.

Our main concern in relation to the issue of direct marketing is the definition proposed under Article 4, which could be interpreted in an excessively broad manner with the wording used in the Commission's proposal. It is absolutely crucial that the definition used is accurate and factually correct to avoid an inappropriate scope.

We therefore recommend revising the definition to clarify that direct marketing refers to "any form of advertising..." which is "sent directly to one or more specific/particular end-users" to avoid any possible ambiguity in the scope of the rules proposed and ensure that other forms of advertising are excluded from the scope, as intended.

Finally, we note that there seem to be existing and overlapping provisions in the eCommerce Directive under Article 7. With an anticipated review of the Directive, we believe that rules on direct marketing should be covered by a single legal instrument rather than several.

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