

European Broadcaster Exchange (EBX)
Summary of concerns – draft ePrivacy Regulation

1. The members of EBX represent major broadcasters in Germany (ProSiebenSat.1), Italy and Spain (Mediaset), France (TF1) and the UK (Channel 4). EBX members provide free universally available services that are of huge importance for democratic societies. Public service broadcasters and commercial broadcasters play a key role in Europe's democratic and cultural life through: the provision of impartial news and information to citizens; investment in the creation of high quality original European content; enabling pluralistic and minority views to get air time; and ensuring that events of national and international significance are universally available on a free to air basis.
2. Funding from advertising is critical to both public service broadcasters and commercial broadcasters to fulfil their public service remit and regulatory obligations, including financing investment in a diverse range of high-quality European originated content. [REDACTED]
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3. Marketing campaigns are increasingly signed globally and EBX provides greater choice to brands to advertise Europe-wide which is currently dominated by the digital giants Google and Facebook. We believe EBX will enhance competition in the digital advertising market.
4. As set out in the current Council draft, the direct marketing provisions appear to cover any advertising sent by broadcasters to a user that can be identified. This would include the pre-roll and mid-roll advertisements shown around VOD programming on any device (whether or not targeted) and advertisements broadcast in the linear live broadcast if viewed through OTT (for example on a smart TV), since those users are also "identifiable".
5. Recital 32 states non-exclusively that "an identified or identifiable end-user is the user that has logged in with a private account or personal log-in". The two terms "identified or identifiable" are obviously borrowed from data protection law, and are now defined in Article 4(1) of the GDPR. Further, based on EU data protection case law (Breyer) any viewer/user is identifiable where transmission is via the internet because the user's IP address is known. In fact, whether or not a user is logged in, significant amounts - if not the same amount of information can be obtained about non-logged in users for profiling purposes, so the purpose of the distinction is unclear.
6. Therefore, any advertising, whether or not targeted, sent to a viewer of the broadcasters' programming, whether or not logged in, and including linear broadcasting shown OTT, would be direct marketing and therefore requiring consent. This is a significant extension of the old law, which covered unsolicited communications sent via interpersonal communications services whereby the message was stored in the recipient's device until collected.
7. If consent to showing advertising is not provided, the current draft Regulation does not explicitly allow you to withhold a service. It therefore appears that an ad-free service would need to be provided. If this is the intention of the legislators, this would undermine the EBX broadcasters' entire business model and will have a huge impact on all broadcasters' ability to fund original European content and cultural diversity throughout Europe. One further implication of this approach is that businesses that have already chosen a paid subscription model rather than an advertiser-funded model would be given an unfair advantage.
8. We would be grateful for clarification in the draft regarding whether the withholding of consent to direct marketing would enable broadcasters to require users to sign up to a paid-for service instead, or whether we would have to provide an ad-free service.
9. It should not be that under the pretext of wanting digital giants to obtain consent from their users in relation to advertising shown to them, for example in their social media accounts, that all advertising shown by broadcasters who exercise editorial control over their content, should be considered to be providing direct marketing. This will totally jeopardise the entire free-to-air TV and on-demand services advertising market.

10. Even if consent were required only for targeted advertising (which is not the position in the current draft as we understand it, nor under GDPR where legitimate interests can often be relied upon for targeted advertising), the ability of broadcasters to obtain consent is not equal to that of the digital giants, who have virtual monopolies and the market power to secure consent. There is significantly more consumer choice in relation to broadcaster platforms and we estimate only circa 10% at the most would consent to being shown advertising. The impact of this would be to decimate our ability to sell advertising on our platforms, resulting in massive damage to our revenue streams and our ability to create and show European content.
11. Furthermore, targeted advertising on broadcaster platforms is not as privacy intrusive as communications sent via an interpersonal communication service or those provided by social media networks such as Facebook. This type of advertising is not being delivered to their personal messaging service, nor is it stored waiting for them to retrieve it. Viewers are accustomed to seeing advertising in VOD services and prefer to see advertising relevant and of interest to them and their locality.
12. The collection and processing of personal data about viewers for profiling purposes is already strictly regulated by GDPR and the ePrivacy provisions relating to cookies and the consent requirements that exist around the interference with users' devices. In addition, broadcasting services must already comply with a variety of regulatory obligations, from the newly adopted AVMS Directive to the GDPR, which already provide users with the necessary safeguards off-line as well as online. Funding from advertising is critical to both public service broadcasters and commercial broadcasters to fulfil their public service remit and regulatory obligations, including financing investment in a diverse range of high-quality original European content. As any user of the Internet is identifiable by its IP address, linear broadcasting services and video on demand services transmitted over the Internet must be explicitly excluded from the definition of direct marketing communication, otherwise broadcasters would have to seek prior consent for broadcasting marketing communications (television commercials, advertising spots), which cannot be intended by the European Union.
- 13. We therefore request clarification in Article 4(f) of the draft Regulation that advertising sent as part of a linear broadcasting service or video on demand service is not considered to be a "direct marketing communication". In the alternative, we request an amendment to Recital 32 to make clear that the direct marketing provisions do not apply to users of broadcasting services and video on demand services.**

Presidency revised text of the ePrivacy proposal 22 February 2019 (OR. en) 6771/19	EBX amendment proposal
<p>Article 4 – Definitions - Direct marketing communications</p> <p>(f) 'direct marketing communications' means any form of advertising, whether written or oral, sent to one or more identified or identifiable end-users of electronic communications services, including the placing of voice-to-voice calls, the use of automated calling and communication systems with or without human interaction, electronic mail message, SMS, etc.;</p>	<p>Article 4 – Definitions - Direct marketing communications</p> <p>(f) 'direct marketing communications' means any form of advertising, whether written or oral, sent to one or more identified or identifiable end-users of electronic communications services <u>(but excluding end users of broadcasting services and video on demand services)</u>, including the placing of voice-to-voice calls, the use of automated calling and communication systems with or without human interaction, electronic mail message, SMS, etc.,</p>
<p>(32) In this Regulation, direct marketing communications refers to any form of advertising by which a natural or legal person sends or presents direct marketing communications directly to one or more identified or identifiable end-users using electronic communications services. The provisions on direct marketing communications do not apply to any other form of marketing, e.g. displaying advertising to the general public on a website which</p>	<p>(32) In this Regulation, direct marketing communications refers to any form of advertising by which a natural or legal person sends direct marketing communications directly to one or more identified or identifiable end-users using electronic communications services. The provisions on direct marketing communications do not apply <u>with regard to users of broadcasting and video on demand services</u> and to any other form of marketing, e.g. displaying advertising to</p>

<p>is not directed to any specific identified or identifiable end-user and do not require any contact details about the end-user. An identified or identifiable end-user is the user that has logged in with a private account or personal log-in. In addition to the offering of products and services for commercial purposes, Member States may decide that this should direct marketing communications also may include messages sent by political parties that contact natural persons via electronic communications services in order to promote their parties. The same should applies to messages sent by other non-profit organisations to support the purposes of the organisation.</p>	<p>the general public on a website which is not directed to any specific identified or identifiable end-user and do not require any contact details about the end-user. An identified or identifiable end-user is the user that has logged in with a private account or personal log-in. In addition to the offering of products and services for commercial purposes, Member States may decide that direct marketing communications may include messages sent by political parties that contact natural persons via electronic communications services in order to promote their parties. The same applies to messages sent by other non-profit organisations to support the purposes of the organisation.</p>
<p>(34) When end-users who are natural persons have provided their consent to receiving unsolicited direct marketing communications for direct marketing purposes, they should still be able to withdraw their consent at any time in an easy manner and without any cost to them. To facilitate effective enforcement of Union rules on unsolicited messages for direct marketing communications, it is necessary to prohibit the masking of the identity and the use of false identities, false return addresses or numbers while sending or presenting unsolicited commercial direct marketing communications for direct marketing purposes. Unsolicited Direct marketing communications should therefore be clearly recognizable as such and should indicate the identity of the legal or the natural person transmitting sending or presenting the communication or on behalf of whom the communication is transmitted sent or presented and provide the necessary information for recipients end-users who are natural persons to exercise their right to oppose withdraw their consent to receiving further written and/or oral marketing messages direct marketing communications, such as valid contact details (e.g. link, e-mail address) which can be easily used by end-users who are natural persons to withdraw their consent free of charge.</p>	<p>(34) <u>Making access to the website content provided without direct monetary payment condition on the consent of the end-user to the acceptance of direct marketing would not normally be considered disproportionate in particular if the end-user is able to choose been an offer that includes consenting to the receipt of direct marketing on the one hand, and an equivalent paid-for offer by the same provider that does not involve consenting to the receipt of direct marketing on the other.</u> When end-users who are natural persons have provided their consent to receiving unsolicited direct marketing communications for direct marketing purposes, they should still be able to withdraw their consent at any time in an easy manner and without any cost to them. To facilitate effective enforcement of Union rules on unsolicited messages for direct marketing communications, it is necessary to prohibit the masking of the identity and the use of false identities, false return addresses or numbers while sending or presenting unsolicited commercial direct marketing communications for direct marketing purposes. Unsolicited Direct marketing communications should therefore be clearly recognizable as such and should indicate the identity of the legal or the natural person transmitting sending or presenting the communication or on behalf of whom the communication is transmitted sent or presented and provide the necessary information for recipients end-users who are natural persons to exercise their right to oppose withdraw their consent to receiving further written and/or oral marketing messages direct marketing communications, such as valid contact details (e.g. link, e-mail address) which can be easily used by end-users who are natural persons to withdraw their consent free of charge.</p>