

EPRIVACY: BROADCASTERS EXPRESS SERIOUS CONCERNS OVER NEW DIRECT MARKETING PROVISIONS

Brussels, 2 April 2019

WHY THIS MATTERS

Commercial Broadcasters (ACT) together with TV and radio sales houses (EGTA) believe ePrivacy provisions regarding direct marketing run the risk of inflicting unintended damage on operating business models based on advertising.

As the major producers of original and diverse content, we are at the forefront of Europe's cultural and entertainment space, providing the news, information, and educational output that underpins the democratic structures essential to our way of life. Advertising revenues are our main source of remuneration and enable us to make free online as well as free-to-air content, including news, available to all EU audiences.

The ePrivacy proposal in its current form does not take this critical element of our business model into account. This is particularly the case with the new direct marketing rules as laid down in Article 4 in combination with Article 16 and Recital 32 adjunct.

While we appreciate previous efforts to remedy parts of the shortcomings, (e.g. by limiting the focus to services that send rather than also present direct marketing communications), we fear that the original proposal by the European Commission still poses significant risks, while new Council wording has created more confusion. This is particularly the case with the reference to the log-in area in Recital 32, where we believe the intention was to provide clarification, but which could instead unintentionally lead to further complications.

FOCUS: NEW DIRECT MARKETING PROVISIONS

Article 4(3)(f) extends the traditional understanding of "direct marketing" to any form of advertising sent to an identified or identifiable user of electronic communications services.

In addition, **Recital 32** (as amended under the Austrian Presidency), states "*an identified or identifiable end-user is the user that has logged in with a private account or personal log-in.*"

Article 16, based on the above outlined new definition of direct marketing, imposes a consent requirement for direct marketing communications, as well as strict information and opt-out obligations.

COMPLICATIONS FOR BROADCASTERS

The direct marketing provisions as laid down in the European Commission's ePrivacy proposal build on the existing Directive which regulates so-called "unsolicited communications". The objective of this article is therefore **to limit intrusive practices** like the excessive use of phone calls, marketing emails and text messages.

However, the new definition of Direct Marketing Communications in Article 4.3f, as outlined above, entails the risk that direct marketing rules would also extend to non-targeted and non-intrusive forms of marketing with the inclusion of the word "advertising". Recital 32 does not bring any legal certainty in this regard since the exclusion of "any other form of marketing" (like display advertising) is only conditional (eg. as long as it is not directed to an identified or identifiable user but who can be

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the user that has logged in with a private account or personal log in). As a consequence, ad-funded services, whether linear or non-linear, would have to seek consent for the display of any type of advertising, and under GDPR, refusal to give consent cannot lead to blocking access to that service.

LOG-IN ENVIRONMENT (AS REFERRED TO IN RECITAL 32): Broadcasters increasingly use personal log-in areas when offering their online AV services. This helps them to deliver the relevant regional service (e.g. news and sports) but also enables them to comply with contractual obligations in relation to geographical geo-blocking (in respect of underlying agreements with rights holders). Though the user would be identified through his/her registration, advertising displayed in this log-in environment is not necessarily based on his/her personal data.

“IDENTIFIED” OR “IDENTIFIABLE USER”: Furthermore, irrespective of attempts to limit this to log-in services as mentioned previously, under Article 4.1 GDPR a user can be identifiable if a service provider has access to the user’s IP address or another identifier. Since TV set-top boxes are assigned an IP address by the service provider, viewers consuming audiovisual content via a set-top box could become “identifiable users”. Hence, the regulation’s remit goes far beyond the traditional understanding of direct marketing, and could extend its scope to any other form of advertising, whether on linear or non-linear services.

We believe that this extremely broad application of the scope of “direct marketing” was not intended by EU policy-makers. **We therefore urge legislators to clarify that direct marketing is a specific category of commercial communications and should be clearly distinguished from other types of advertising.**

It is also important to highlight that article 16 makes it mandatory to provide the following information each time a direct marketing communication is sent:

- Identity of the direct marketer and effective return addresses or numbers
- Nature of the communication and the person on behalf of whom the direct marketing communication is sent
- Means to object or withdraw consent, free of charge, at any time, in an easy and effective manner

It is difficult to see how these requirements, which stem from traditional direct marketing practices (such as email, text messages), would apply in the context of display/video advertisements.

SUGGESTED OPTION FOR RESOLUTION

As broadcasters exercise editorial control, they are excluded from the definition of electronic communication services as laid down in Article 2.4 of the EEC and should therefore not be affected by the new ePrivacy provisions regarding Direct Marketing. However, the broad definition in article 4 of the proposed ePrivacy Regulation raises questions as to what services might be covered, in particular whether article 16 could apply to linear and non-linear broadcasting services. We offer the following options in order to fully clarify the situation going forward and ensure broadcasters are not unduly impacted by rules that are not meant to target them.

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Suggested Amendments & Recital

<p>Council Text (22 February 2019 Document No: 6771/19)</p> <p>Recital 11</p> <p>The services used for communications purposes, and the technical means of their delivery, have evolved considerably. End-users increasingly replace traditional voice telephony, text messages (SMS) and electronic mail conveyance services in favour of functionally equivalent online services such as Voice over IP, messaging services and web-based e-mail services. In order to ensure an effective and equal protection of end-users when using functionally equivalent services, this Regulation uses the definition of electronic communications services set forth in the [Directive of the European Parliament and of the Council establishing the European Electronic Communications Code]. That definition encompasses not only internet access services and services consisting wholly or partly in the conveyance of signals but also interpersonal communications services, which may or may not be number-based, such as for example, Voice over IP, messaging services and web-based e-mail services. Services such as linear broadcasting, video on demand, websites, social networks, blogs, or exchange of information between machines, should not be considered as interpersonal communications services.</p>	<p>ACT & egta suggestion</p> <p>Recital 11</p> <p>The services used for communications purposes, and the technical means of their delivery, have evolved considerably. End-users increasingly replace traditional voice telephony, text messages (SMS) and electronic mail conveyance services in favour of functionally equivalent online services such as Voice over IP, messaging services and web-based e-mail services. In order to ensure an effective and equal protection of end-users when using functionally equivalent services, this Regulation uses the definition of electronic communications services set forth in the [Directive of the European Parliament and of the Council establishing the European Electronic Communications Code]. That definition encompasses not only internet access services and services consisting wholly or partly in the conveyance of signals but also interpersonal communications services, which may or may not be number-based, such as for example, Voice over IP, messaging services and web-based e-mail services; <u>it does not, however, encompass services providing or exercising editorial control over content transmitted using electronic communication networks and services.</u></p>
<p>Council Text (22 February 2019 Document No: 6771/19)</p> <p>Recital 32</p> <p>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 to any other form of marketing, e.g. displaying advertising to 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 should applies to messages sent by other non-profit organisations to support the purposes of the organisation.</p>	<p>ACT & egta suggestion</p> <p>Recital 32</p> <p>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> to any other form of marketing, e.g. displaying advertising to 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>EC Proposal</p> <p>Article 4</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 use of automated calling and communication systems with or without human interaction, electronic mail, SMS, etc</p>	<p>ACT & egta suggestion</p> <p>Article 4</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>

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EC Propososal	ACT & egta suggestion New Recital Advertising revenues provide the main source of financing for Europe's free to air broadcasters and a non-negligeable part of income for Pay TV and hybrid broadcasters. This revenue guarantees media plurality and diversity in Europe; ensuring the financing of news, children and other prominent European content.
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SIGNATORIES

About the Association of Commercial Television in Europe (ACT)

The Association of Commercial Television in Europe represents the interests of leading commercial broadcasters in 37 European countries. The ACT member companies finance, produce, promote and distribute content and services benefiting millions of Europeans across all platforms. A healthy and sustainable commercial broadcasting sector that plays an important role in Europe's economy, society and culture. For more information please consult

Contact |

About the European association of Television and Radio Sales houses (egta)

[egta](#) is the media trade body for television and radio advertising, representing 140 companies in Europe and beyond. egta members come from both public and private sectors and cover respectively 75% and 50% of the total TV and radio ad spend in Europe, thus playing a fundamental role in the sustainable funding of the European audiovisual and radio industries.

Contact |