



# Review of the ePrivacy Directive

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As the adoption of a legislative proposal for the review of the ePrivacy Directive has been announced for the 11<sup>th</sup> January 2017 by Commissioner Oettinger, FEDMA would like to contribute to the discussion during the last drafting steps of this proposal by the European Commission:

### **Coherence with the GDPR:**

One of the objectives of the review of the ePrivacy Directive is to ensure coherency of the text with the newly adopted General Data Protection Regulation (GDPR). This should be done by avoiding any overlap of provisions between both texts which may create confusion and legal uncertainty. However, coherency and compatibility of the two texts should be strengthened by ensuring that the material scope of application is similar in both texts (i.e: both texts apply solely with regard to personal data as defined in the GDPR) and that some of the concepts of the GDPR are also included in the ePrivacy instrument, such as the **risk-based approach** and the concept of **pseudonymisation**

Including these two concepts within the new ePrivacy instrument will ensure that both texts benefit from the same flexibility while affording the necessary protection of fundamental rights. Furthermore, this inclusion would prevent a “black or white” approach. An example of this is the use of cookies in online behavioral advertising. If the personal information about an individual is pseudonymised this would mean that an advertiser could serve an online advertisement to an individual on the basis of their general characteristic , for example that liked fine food and wine , without having access to specific personal information about them. It would make sure that the relevant factors (e.g. whether in a B to B or B to C environment) are taken into consideration when applying the new ePrivacy instrument rules, thus furthering the technology neutral aspects of the instrument.

### **Confidentiality**

When addressing the objective of confidentiality of electronic communications, FEDMA would like to encourage the Commission to take into consideration the impact that a systematic prior consent requirement would have on the users browsing habits, and the frustration that it may create. Requiring consent will penalise European SMEs with a small client-base, while encouraging existing large multinationals with millions of registered (and hence opted-in) users to dominate the digital economy. This would have a serious economic impact on the growth of the European economy since it is going to be small and innovative organisations that are going to drive the growth of the European digital economy in the Digital Single Market.. In our view, transparent, free and unambiguous consent would provide for more genuine customer choice and respecting consumer’s data protection rights, while preserving the current online business model which gives access to content pluralism. FEDMA also advises the Commission not to create an unnecessary myriad of compliance requirements but instead to encourage industry best practice and self-regulatory programmes.



Within the context of the review of the ePrivacy Directive, attention should be paid to the critical role that revenue from interest-based advertising plays in the financing of online media. Any rules in the new ePrivacy instrument should not go beyond the already stringent provisions of the recently-agreed GDPR. European media organisations will be severely impacted, by the removal of interest based advertising as a viable revenue stream with obvious negative implications for media plurality over the medium-to longer term, and ultimately for an informed citizenry and functioning democracies.

### **Telemarketing**

Member States have different perceptions of and practices in telemarketing based on national cultural differences. FEDMA believes that Member States where telemarketing can be performed on an unsubscribe/opt-out basis, with legal or natural persons, should be able to maintain their existing telemarketing rules under the revised ePrivacy instrument. Both government and industry have invested substantial resources in the development of Robinson lists which enable subscribers to express their preferences regarding telemarketing calls by adding their numbers to the list if they want to unsubscribe/opt-out of all unsolicited telemarketing calls. In Member States where they use a subscribe/opt-in system for unsolicited telemarketing calls, forcing telemarketers to offer consumers the opportunity to withdraw their consent to receive unsolicited telemarketing calls will increase the length of the call and therefore the telemarketers' costs, without benefitting consumers. Consumers are likely to find the repetition of the opportunity to withdraw their consent to receive further telemarketing calls on each call annoying. Consumers know that they can always ask an organisation to stop making telemarketing calls to them.

FEDMA understands that the Commission is considering the provision of a common prefix number for direct marketing calls. This suggestion may prove to be very technically complicated to implement and disproportionately costly for marketers compared to the protection it would offer to recipients of such calls.

### **Delegated acts**

FEDMA believes that the use of delegated acts should be as limited as possible within the new ePrivacy instrument in order to avoid increasing the great legal uncertainty which data controllers currently have to face with regards to the implementation of the GDPR, impacting further Europe's economic development. FEDMA believes that alternative solutions should be promoted, entailing the use of industry self-regulation or co-regulation to clarify legislative acts. The Commission should only produce delegated acts in cases where the relevant stakeholders do not develop their own self-regulatory or co-regulatory measures within a reasonable timescale and after consulting with industry stakeholders and legislators. As an example taken from the GDPR, FEDMA believes that the creation of mandatory icons to inform data subjects about processing of data, using



## Position paper

delegated acts is counterproductive, and prevents the industry from deciding how to best communicate and be transparent to data subjects.