

# FEDMA voices its concerns about e-Privacy draft regulation

The organisation wants to reopen the negotiations on unsolicited communications. **Laura Linkomies** talked to FEDMA's Director General, Mathilde Fiquet, in Brussels to find out why.

The Romanian presidency of the EU Council, which hopes to reach agreement on the e-Privacy file at Council within the next few months, faces many unresolved issues in the draft e-Privacy Regulation<sup>1</sup>. While there have already been two meetings dedicated to e-Privacy in January, the forthcoming elections for the European Parliament 23-26 May 2019 in the 27 EU Member States may cause delay, and the stakeholders are still some way off starting Trilogue which involves the Council of Ministers, the European Parliament and the European Commission negotiating to reach a consensus.

The previous Presidency of the Council, Austria, proposed deleting Article 10 that would make “do not track” settings legally enforceable, but some Member States do not support that. Other issues still to be resolved include confidentiality of communications, browser settings and cookie walls.

FEDMA, the Federation of European Direct and Interactive Marketing, states that the e-Privacy proposal is not just about cookies. B2B marketing and unsolicited communications are a major issue but have not received nearly as much attention.

communications. The article prescribes that natural or legal persons may use electronic communications services for the purposes of sending direct marketing communications to end-users who are natural persons who have given their consent.

“Article 16 is not talked about that much. Yet there is some misunderstanding about it – unsolicited communications are not necessarily always direct marketing. So we have tried to raise the profile of Article 16. Member States tend to think it is not a topic that needs further discussion – however Article 16 needs to be reopened to assess the actual impact that it will have on the industry in terms of being able to contact existing customers and prospects.”

Article 16, as proposed in the current draft text by the Council<sup>2</sup>, now states that natural or legal persons shall be prohibited from using electronic communications services for the purposes of sending or presenting direct marketing communications to end-users who are natural persons, unless they have given their consent.

The e-Privacy regulation also includes some flexibility to this general rule of consent, such as for marketing to existing clients as long as certain

raise two issues regarding this point:

1. For the first time, there is a definition of direct marketing at EU level; the FEDMA code of conduct includes one but the European Commission has taken a very different approach. The proposed definition seems to include online display advertising. From FEDMA's point of view these are two separate activities which have different definitions.
2. The rules that apply to direct marketing mean that the users can at any time decline further direct marketing whether it is a phone call, email or mail. With regard to display advertising, consumers cannot object to its presence on websites – the decision is with the publisher whether to display the ad or not. There is confusion between the control that the user should have over their privacy when the ad is targeted, and the control the user should have over the presence of the ad. So in FEDMA's view, digital advertising is separate from direct marketing.

Fiquet explained that the problem with the current approach, to solve the challenge of privacy with digital advertising, is that it is dealt with in Article 16 about unsolicited communication, while in fact it is now addressed in Article 8 which is about cookies and tracking. Users are already asked for consent to tracking for advertising purposes. Having both articles apply to digital advertising would cause confusion for consumers and the industry, Fiquet said.

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## Article 16 needs to be reopened to assess the actual impact that it will have on the industry.

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FEDMA's Director General, Mathilde Fiquet, explained in an interview that FEDMA follows a number of issues with regard to e-Privacy; obviously Article 8 on tracking and cookies, and Article 10 on information and options for privacy settings to be provided. However, lately, most of FEDMA's work has been focused on Article 16, unsolicited

safeguards are in place, voice to voice telemarketing and B2B marketing communications when decided by Member States. However, while the e-Privacy regulation does not fundamentally change the rules for direct marketing, these rules are likely to have a much broader scope due to a new definition of direct marketing.

Fiquet said that FEDMA wants to

### BUSINESS-TO-BUSINESS MARKETING

“B2B marketing currently benefits from a more flexible regime – the former e-Privacy Directive does not regulate B2B marketing – it refers to Member States to decide on the level of protection needed. The draft regulation keeps the same wording –

the problem is that now the GDPR is in place, widening the concept of personal data, it is not clear whether companies can continue to communicate with their business partners if the contact details include personal data.”

This is potentially a huge issue, as most work email addresses now include a name attached to the organisation, rather than a more generic info@email-address. As the email addresses including names of persons would be regarded as personal data, there is no clarity yet whether these types of marketing messages would benefit from an exemption or not.

“This is a huge concern. We want to keep the flexibility – we think it is working well. Member States have not requested this area to be further regulated but on the other hand this is now a loophole that has not been addressed. Otherwise there will be different interpretations at Member State level which would have an impact on business practices.”

Fiquet said FEDMA is not against the proposal as such – just that businesses need clarity. There has been positive feedback from Member States on FEDMA’s view, she said.

### TELEMARKETING

“Telemarketing is still a significant activity in many markets such as in the UK, Poland and Finland. It is mostly smaller businesses and charities that use telemarketing. E-Privacy proposals leave it up to the Member States whether to apply an opt-in or opt-out regime.”

Now, roughly 70% of European countries operate an opt-out system, and 30% opt-in. Most countries that demand opt-out, use the so-called Robinson list, which is a central register. The problem is the definition of automated calls and connecting systems.

“Pre-recorded calls require a consent. Definition of automated calls, however, now also include technology we call predictive diallers. It enables voice-to-voice calls and would require, according to the current proposal, an opt-in. So even if the e-Privacy proposal gives the impression in Article 16 that there is some flexibility with opt-in and opt-out for telemarketing, in fact in practice the vast majority of the

### PROPOSED E-PRIVACY REGULATION

**Article 6:** Permitted processing of electronic communications data.

**Article 8:** Protection of information stored on end users’ terminal equipment, such as cookies. Requires browsers and other software enabling access to the Internet to offer privacy settings to users.

**Article 10:** Information and options for privacy settings to be provided.

**Article 16:** Unsolicited communications.

telemarketing industry is moving to opt-in simply because of the technology that is being used. So far, no one wants to address this problematic issue. For example, in the UK which operates an opt-out regime, any company conducting telemarketing using a predictive dialler would have to switch to an opt-in system. This would have a major impact on business.”

### PRIVACY SETTINGS

Article 10 on providing information and options for privacy settings, and especially browser settings, is another controversial area. Some Member States have mentioned the need for a new impact assessment, and questions have been sent to the European Commission.

### CONSENT

The GDPR and the e-Privacy Regulations should complement each other. However, consent is one of the issues where there will be challenges.

“e-Privacy relies largely on consent whereas the GDPR provides many other legal bases for processing. There are many questions whether websites can refuse access for individuals who are seeking a service but do not consent to advertising.”

“We have interpretations by national DPAs and the European Data Protection Board about what freely given consent means, and there are complaints in parallel. The GDPR is being implemented. The e-Privacy Regulation could bring some clarity for publishers but but whatever the way forward, it risks being in conflict with the GDPR.”

Fiquet says FEDMA is not advising members as yet about e-Privacy compliance as there is still so much uncertainty about fundamental issues. She says the starting point would be to be

compliant with the GDPR and its consent requirement, as well as ensuring that companies have a procedure to object to direct marketing.

“The main message from FEDMA is to do what is right by the consumer. Think ethically what is fair and try to empower consumers.”

### POSSIBLE TIMEFRAME

Fiquet thinks that the Member States are looking to establish their position as soon as possible as they are under much pressure by the European Parliament and the European Commission. However, she thinks the Trilogue will not start before the European elections.

The Council discussion last summer indicated that Member States regard the current text as a good basis for discussion, but there are also some fundamental differences especially with regard to browser settings and Article 10. Article 8 is close to being agreed.

“The file could be adopted by the end of the year but will also depend a lot on the new Parliament. Birgit Sippel, the rapporteur at the Parliament for this file is likely to be re-elected so we can assume she will fight for this file to remain high on the agenda.”

If the Romanian Presidency reaches a common position by June 2019, then the file would move to the Finnish presidency after the election. Originally, when the Commission aimed at matching the GDPR timetable, the implementation period was proposed to be just six months, at the time when they were hoping to match the GDPR timetable. Now, it is more realistic than the implementation period will be close to two years, Fiquet said.

### REFERENCES

- 1 [ec.europa.eu/digital-single-market/en/news/proposal-regulation-privacy-and-electronic-communications](https://ec.europa.eu/digital-single-market/en/news/proposal-regulation-privacy-and-electronic-communications)
- 2 [www.parlament.gv.at/PAKT/EU/XXVI/EU/03/91/EU\\_39172/imfname\\_10848802.pdf](https://www.parlament.gv.at/PAKT/EU/XXVI/EU/03/91/EU_39172/imfname_10848802.pdf)



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DATA PROTECTION & PRIVACY INFORMATION WORLDWIDE

## Belgium: GDPR implementing Act enters into force

Laura Brodahl, Laura De Boel and Cédric Burton of Wilson Sonsini Goodrich & Rosati analyse the specifics of the law.

Following the adoption of the General Data Protection Regulation (GDPR) the Belgian legislator has adopted a new data protection law.

The Act of 30 July 2018 on the protection of natural persons with regard to the processing of personal data (the 2018 Data Protection Act)

repeals the Privacy Act of 8 December 1992 (the 1992 Privacy Act) and its implementing legislation. It entered into force on 5 September 2018.

The 2018 Data Protection Act is a massive piece of legislation. It

*Continued on p.3*

## IAB revises its transparency and consent framework

As a result of feedback from DPAs and other stakeholders, a new version of this industry standard will be issued soon.

Laura Linkomies talked to IAB Europe in Brussels.

IAB (Interactive Advertising Bureau) Europe, the industry association for the digital advertising ecosystem in Europe, is working hard to make improvements to the “Transparency and Consent

Framework” which was launched in April 2018 just in time for the GDPR. The voluntary framework is based on publishers and tech vendors using an open source standard to

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**comment****GDPR: The global benchmark**

According to the EU Commission, during the peak month of May 2018, GDPR was searched more often on Google than American superstars Beyoncé and Kim Kardashian. On a more serious note, GDPR is undoubtedly having a global effect, as shown in Professor Graham Greenleaf's articles and global tables of privacy laws issued here as a supplement.

Numerous countries have updated their data protection laws since 2017, invariably strengthening them in ways which reflect some aspects of the GDPR, and there are currently 28 bills for new privacy laws (p.14 and p.19). However, our US correspondents observe that "no law passed by one country, or even a political and economic union as powerful as the EU, can be global, regardless of ambition or breadth of terms" (p.6).

The key word for 2019 is adequacy – the countries which have it, such as Argentina, are being reviewed. Japan's newly acquired adequacy status is being supplemented in the form of some amendments to existing legislation (p.12) and the EU-US Privacy Shield has been given another lease of life (p.18). As key voices from US industry now support a federal privacy law, the US Senate is to hold a hearing on a federal privacy law on 27 February.

Within the EU, the GDPR's effect is felt in a most concrete way. According to the EU there have been 41,500 breach notifications, 255 cross border cases, and 95,000 complaints\*. The complaints mostly address telemarketing and promotional emails. For this issue, I interviewed FEDMA, the European umbrella organisation for direct marketers, about its concerns over the proposed EU e-Privacy Regulation (p.9) and IAB, the Interactive Advertising Bureau, about its Transparency & Consent Framework for GDPR compliance (p.1).

This issue introduces the new Belgian DP law (p.1). We aim to publish a report on each EU country's new GDPR adaptation law – if you would like to analyse your country's law please get in touch. An overview of GDPR implementation and the remaining issues will be provided at our 32nd Annual International Conference in Cambridge, 1-3 July 2019. See the 45 confirmed speakers and their sessions from 16 jurisdictions at [www.privacylaws.com/ac](http://www.privacylaws.com/ac)

**Laura Linkomies, Editor****PRIVACY LAWS & BUSINESS**\*EU statistics issued 28 January [ec.europa.eu/commission/sites/beta-political/files/190125\\_gdpr\\_infographics\\_v4.pdf](http://ec.europa.eu/commission/sites/beta-political/files/190125_gdpr_infographics_v4.pdf)**Contribute to PL&B reports**

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