FEDMA
Federation of European Data and Marketing

Dear Ambassadors,
Dear MEPs,

We are contacting you as the Federation of European Data and Marketing (FEDMA), an umbrella organization representing the data and marketing industry across Europe via a network of 22 national Data Marketing Associations (DMAs) and significant companies in the sector's value-chain, to highlight our concerns and to emphasise the priorities of the data and marketing industry as the trilogue negotiations on the proposal for a Regulation on e-Privacy have been launched.

The European Data and Marketing industry plays a crucial role in helping marketers to effectively communicate reliable information and services to individuals. Reaching the right audience is particularly important for European small on medium sized enterprises (SME) which are trying to survive in a highly competitive environment violently hit by the economic crisis caused by the COVID pandemic. User's trust in the responsible behaviour of the marketer is the foundation of this relationship and data marketing must indeed comply with the GDPR.

As the discussions on the ePrivacy proposal are progressing, we believe that certain red-lines, if crossed, would have serious unintended consequences on the European business community, especially SMEs, who rely on data-driven marketing to communicate to consumers alternative offers to well established brands and large commonly known online platforms.

The proposal for an ePrivacy Regulation will shape the EU Digital Single Market through new standards on users' privacy, access to data and unsolicited communications. With this in mind, we sincerely hope that the trilogue negotiations can find a solution that consider the broader digital ecosystem, thus safeguarding the privacy of citizens while ensuring fair competition and the long-term sustainability of all economic players.

Against this background, we ask you to consider the following firm red-lines during the trilogue negotiations on the proposed e-Privacy Regulation:

- **Refraining from adopting legal and technical solutions which would deepen the asymmetrical access to data in the EU Digital Single Market at the advantage of few dominant players.** While Art.8.1 creates a consent-only scenario that would exclusively benefit global digital platforms due to their strong network effects and login data ecosystem across multiple Core Platform Services (under the forthcoming Digital Markets Act), Art.10 would further strengthen the gatekeeper position of specific service providers by allowing their software settings to override user consent for specific websites. In doing so, we believe that both the consent-only scenario in Art.8.1 and the primacy of software settings over user consent in Art.10 will raise further barriers to SMEs and marketers to improve their products and services based on their users' data while also increasing their dependence over large online platforms. This outcome counters the logic of the proposed Digital Markets Act (DMA) which aims to address the overwhelming market power and dependency over gatekeeper platforms. We therefore point out that while a better integration of the GDPR's risk-based approach in Art.8.1 will enhance the contestability of digital markets without having to compromise on user's privacy, the final text should also preserve the primacy of user consent over software settings, keeping Art.10 deleted as proposed by the Council.
- **The ePrivacy Regulation should preserve end-user's individual consent over telecom providers' technical solutions blocking direct-marketing calls.** Art.14(2)a and Art.16(3)b of the Council's and Parliament's text would indeed enable telecom providers to block by default all incoming direct marketing calls labelled by a common prefix. As a result, both prospect and longstanding consumers will not be able to communicate anymore with those marketers and brands for which they have specifically opted to receive their calls. This would override users' individual consent and de facto turn telecommunication providers into gatekeepers. In doing so, the two articles would lead to a situation comparable to software settings prevailing over consent expressed at website level: a

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specific case which is prohibited in Article 4a(2aa) of the Council's text. Additionally, bad companies who do not apply the prefix could easily circumvent the telecoms' blockage, thus gaining an unfair competitive advantage over compliant businesses and creating incentives towards non-compliance in countries where the prefix will be introduced.

- **Excluding unsolicited commercial communications for non-commercial purposes from the scope.** While it can be deduced from Recital 32 that non-commercial direct marketing communications should be excluded from the scope, Art.16(1) broadly refers to "direct marketing communications". In doing so, the proposed ePrivacy risks affecting not only purely commercial direct marketing communications, but also other forms of unsolicited communications, including non-profit organisations which rely on direct marketing channels for their fundraising campaigns. Considering that in case of contradictions between recitals and articles, the Court of Justice of the EU gives priority to the articles, we recommend including the limitation to "offering of products and services for commercial purposes" in Art.16(1).

- **Keeping a clear distinction between Business-to-Consumer (B2C) and Business-to-Business (B2B) communications.** While the main objective of the ePrivacy Regulation proposal is to protect individuals' privacy, unsolicited communications sent to individuals in a professional capacity do not have a direct impact on their private life. In their professional capacities, many individuals have purchasing responsibilities, including responsibilities to compare offers to ensure the organisation gets the product or services which suits best. In such context, unsolicited marketing communication plays an important role for the daily running of an organisation, while having little impact on individual's privacy. We therefore recommend clarifying that consent is required for individuals "who are natural persons and not traders" following the definition in the Unfair Commercial Practices Directive. Art.16(1).

- **Rules on soft opt-in should refrain from setting horizontal time limits which override Data Subjects' right to object under the GDPR.** FEDMA supports the protection of consumers from commercial communications unless a customer relationship exists or the communication has been requested or consented to by the user. However, we believe that Art.16(2)a of the Council's text, which would enable Member States to provide a set period to send direct marketing communications based on pervious purchases of products or services, would dismiss users' self-determination enshrined in Art.21(2) of the GDPR whereby recipients of direct marketing communication shall always have the right to object to the processing of his/her data at any time for direct-marketing purposes. Moreover, the Council's provision does not consider that, in order to send direct marketing communications based on soft opt-in to previous customers, marketers take into account different criteria which determine the timeframe of their direct marketing communications, including the life cycle of a product and the possibility to win back the Customer. Accordingly, a horizontal time limit on soft-opt in would result in a one-size-fits-all solution which would be especially unfair for marketers of products with longer life cycles.

We thank you in advance for taking our comments into account and remain at your disposal in case you would require any further clarifications.

Yours sincerely,

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