

# Electronic Retailing Association Europe

Position Paper ERA Europe  
DECEMBER 2017

## E-PRIVACY REGULATION

### POSITION PAPER OF THE ELECTRONIC RETAILING ASSOCIATION EUROPE THE ASSOCIATION FOR THE MULTI-CHANNEL HOME SHOPPING INDUSTRY

#### Introduction

The Electronic Retailing Association Europe (ERA Europe) is the Association for the Multi-Channel Home Shopping Industry. Its represented Multi-Channel platform members - all located within the EU - and their suppliers are mostly small to medium sized enterprises (SMEs) and heavily dependent on not only their own sales/marketing/consumer data but to a greater extent on data provided by third party data resources in order to correctly analyse and understand their markets and remain competitive. European SMEs that rely on third party data will unfortunately be hampered by the new ePrivacy Regulation. As the larger US networks operating in EU markets have log-in models which greatly facilitate the collection of consent, they will be able to adhere to the new e-privacy regulations easily. Together with the principle of privacy settings in browsers, this will lead to other monopolistic effects which benefit the non-European oligopolies to the detriment of European SMEs competing as online Multi-channel platforms.

#### Key Messages

ERA envisages an update to the framework of electronic communications that will actually enhance trust and confidentiality in a proportionate, legally certain, robust, and technology-neutral manner while not contradicting the GDPR or disadvantaging SMEs in contrast to big US tech firms.

1. This proposal should fully align with the GDPR. More clarity is needed on a number of issues regarding the compatibility with GDPR. The full range of permitted processing capabilities afforded by Article 6 of GDPR should also apply to this area of electronic communications.

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2. The ePrivacy Regulation disadvantages SMEs and therefore our members. SMEs are not generating big data and have to rely on third parties that can use their network effects in comparison to the SMEs to have reliable market data and analysis
3. ePrivacy Regulation enhances monopolistic effects and hampers diversity of services and products because it strengthens the gatekeeper position of browsers or telecommunication companies via the prior consent principle.
4. Broader forms of online marketing are not covered by Article 16 as they do not target particular individuals. Article 16 should be clarified.  
In some member states (MS) the purchasing of a product might imply the consent for marketing. Yet Article 16 (1) and (2) will limit it to “similar products”, resulting in legal uncertainty about what a similar product is. The limitation on “similar products” should be removed in Article 16.

### 1. Scope of Regulation

E-Privacy Regulation – Article 4 (1)(b), Recital 12

Machine to machine data is an important and growing part of the development of the data economy. Therefore, machine to machine communication processes that have no clear or recognizable data subject should be removed from the scope of the regulation. Otherwise the regulation would introduce significant friction into a system where different entities interact electronically throughout the business supply chains.

Modern electronic devices are part of our global communication and infrastructure. Like other types of communication, meta data should be protected with respect to its specific situation and should be regulated under the flexible set of legal grounds in Art. 6.1. GDPR.

### 2. Use of cookies

Article 8 ePrivacy Regulation

Article 8 would significantly impede the functioning of ERA members’ business as consent by the customer is required for any tracking or third party advertising. This concept will advantage a) large networks with log-in models which greatly facilitate the collection consent and b) browser service providers, because the choice will be made in the browser. As a result the ePrivacy Regulation enhances monopolistic effects and strengthens the gatekeeper position of browsers or telecommunication companies. AS ERA members do not have their own advertising network or big log-in model, they might lose in sales.

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ERA members rely on data and information about websites or apps that a consumer uses. However, Article 8 allows audience measurement only where a business conducts the measurement itself. This renders measurement unlawful for most of our members who do not generate big data and rely on third party data to get relevant consumer insight, all of which allows our members to remain competitive. If our members cannot obtain consent they will be forced to use very basic websites and untargeted marketing, making them less competitive in comparison to the big tech platforms.

Furthermore, in the case of SMEs many of the website functionalities such as payments, price comparison or user behaviour are provided by third parties and will be banned by the proposal. Prior consent will cut off data for SMEs, such as our members,

- ➔ Consent requirements should be aligned with GDPR and not go beyond – at least with respect to SMEs

### 3. Privacy Settings in the browser, Art 10 E-Privacy Regulation

#### Article 10 ePrivacy Regulation

Consumers have to be asked to consent to tracking and third party advertising. Only one method is offered in the proposal on how privacy settings can be presented to users: The choice will be made in the browsers, making browsers and telecommunication companies the gatekeeper. Article 10 will result in a significant increase in third-party cookies impeding in particular the ability of SMEs – such as our members - to compete with the larger tech businesses that do not have to rely on these third parties or provide a browser service. An average SMEs online retailer and seller relies on third party advertising networks for 30-50% of its traffic.

Article 10 is not only making browsers the gatekeepers but is also not technology neutral and will not remain robust enough to encompass future developments.

- ➔ Art. 10 should either be deleted and handled within the GDPR or SMEs should be exempted.

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### 4. Communication to the customer / Commercial Activities and online marketing

#### Article 16 ePrivacy Regulation

As online sellers, our members have to rely on all forms of direct marketing to their customers and the technologies that enable it. It is a common marketing practice to inform one's customers of other products or services they could be interested in. Promotional activities are particularly relevant to SMEs. It is in some MS accepted that the purchasing of a product implies the consent for marketing. Yet Article 16 (1) and (2) will limit it to "similar products" resulting in legal uncertainty about what a similar product is.

- ➔ The limitation on "similar products" should be removed in Article 16.
- ➔ The status quo should be maintained for SMEs or at least sustained for another year.

Furthermore Article 16 should be further clarified: Online tools not requiring the consent, such as banner ads, pop-up ads, and newsfeeds should not be confused with true direct marketing practices requiring consent, such as direct mail or placement on social media outlets.

- ➔ These broader forms of online marketing do not target particular individuals and therefore do not fall under Article 16.

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