

On January 10th, the European Commission presented a proposal for updating the **rules for electronic communications**, through replacing the current ePrivacy Directive (2002/58/EC) by a Regulation on Privacy and Electronic Communications (ePrivacy Regulation). The ePrivacy legislation is of relevance to the news media industry as it has major implication on the rules for storing cookies or using similar technologies, advertising, targeted content and the collection and processing of user data.

This paper presents the views of News Media Europe, the voice of the progressive News Media Industry, comprising over 2200 news brands in print, online, television and radio. The industry is committed to fostering a free, independent and pluralistic media landscape in Europe. Independent news media requires a heavy investment in journalism and this is dependent upon and finance advertising revenue, which in the digital world is reliant on knowledge of the audience.

1. Introduction – a trusted ecosystem is key for online publishing

As in any relationship a business establishes with a customer, trust is key. This is no different for the news media sector, who are amidst a transition towards securing a more digital future. In our industry, consumers generally have a strong connection with a certain news brand, on which they rely for bringing them reliable quality news content, in a format they identify with.

It is therefore key to the industry to foster this trust also online: a transparent and reliable source for the consumption of local, national and international news. News Media Europe is convinced that consumer trust in online news consumption is key to the success of the transition towards online content offerings.

However, the business models that the news media sector applies to its digital offerings depend on online advertising. It is therefore that News Media Europe urges policy makers to take a critical look at any new legislation that hampers publishers' ability to monetize their content online.

In general, News Media Europe believes the General Data Protection Regulation (GDPR), and its well-balanced approach to data protection and privacy forms the best basis for the regulation of the online environment. Therefore, online news consumption and Online Behavioral Advertising (OBA) should be governed by the GDPR (subject to member states' exemptions for freedom of expression and press freedom) and a trustworthy and transparent relationship between the news media industry and consumers.

2. Question of regulation/directive

News Media Europe welcomes the change of legal instrument on electronic communications to a Regulation, making the rules horizontally applicable in all Member

States. This will reduce the legal cost for those publishers with online offerings in multiple Member States and makes the threshold to expand into another market lower.

3. Confidentiality of electronic communications

The Regulation proposal continues the requirement that communications data is considered confidential. This is an important recognition if we want to boost trust in online and digital services.

Notwithstanding the confidentiality of communications data, data including information that is related to end-users' *terminal equipment*, i.e. the information that may be stored on or obtained from a user's PC, laptop or mobile device is essential for online publishers to deliver and optimal services to its users. Such information may be relevant to the delivery of the service, including the ability to carry out *web audience measurement*, say for the purposes of determining how many ads have been viewed or frequency capping: audience measurement is essential for attracting and realising advertising revenue for publishers across all Member States.

4. Strict rule of Consent as the "only" solution for OBA

OBA will still be an inevitable factor in relation to online news media consumption. It provides a necessary revenue stream for the financing of digital press content, and News Media Europe has serious concerns about the impact of the proposed ePrivacy Regulation.

News Media Europe does not believe that the proposed strict requirement of consent for all data (and non-personal data) will solve the issue of intrusive cookie banners: indeed, the requirement is likely to make it worse, owing to the high standard necessary for consent under the GDPR. Also, consent as the only solution will have a huge impact on ad-revenue if the industry continues with the current business model. This could seriously undermine the ability of web companies and news websites to generate advertising income. In general, News Media Europe cannot support the strict consent requirement and propose the use of the publishers' legitimate interests, where the publisher could balance the business need against the rights of users as permitted under the GDPR (with the publishers being accountable for their use of legitimate interests). However, as it is the publisher that has the direct contact with the user and ability to provide the required privacy notices to inform the user of how their information will be used, we welcome the approach that the media companies will be more likely to have control of the data deriving from the use of their services: the third party ad tech companies used by the publishers are not in a position to provide the necessary notices to users.

5. Browser settings

Although publishers welcome the approach that consent can be given through browser settings, subject to competitive considerations being addressed, it is important that there is a balanced approach between the rights to privacy and the benefits of using e.g. cookies.

The use of cookie technologies make it possible to supply personalized news feeds to users, based on their individual preferences to make sure that they always receive the most

relevant news. The use of cookies is necessary to make sure that users not always get to see the same advertisement repeatedly but advertisement as close as possible to their preferences.

We believe that blocking of third party cookies per default might have a severe impact on the ad revenue. This is concerning as advertising is a main source of income for publishers, who would have to resort to applying different business models, for instance with the use of a paywall. This would lead to less access to news to the consumer, as well as a disproportionate advantage to PSBs who have a news section on their website open to the public.

Furthermore, the privacy warnings that needs to be communicated by software providers, regarding the high “risk” of third party cookies, will lead to end-users automatically declining third party cookies, without understanding the implications.

It remains to be seen whether consent collection or notice provision through the browser would meet the strict consent requirements, thereby exposing publishers to challenge if they seek to rely on it. In addition, it is not known currently whether browser vendors are prepared to accept the responsibility being placed on them in the Regulation proposal.

Browser companies, especially the more dominant ones, are commercial competitors to publishers. Allowing browser settings to be set through the browser may literally make them the gatekeepers to trusted European news websites, perhaps acting as a deterrent, preventing access to our trusted sites or sending the user to other sites. This potential competition issue must be satisfactorily addressed to prevent damage to the European media industry.

6. Extending the scope for exceptions (e.g. first party cookies and adblock detection)

Adblock technology seriously undermines the business model of online news publishing. It is therefore that News Media Europe welcomes the exception for adblock detection technologies, which would allow for a publisher to better tailor their offer to the consumer, although the exception should be made explicit as part of an Article rather than a Recital in the Regulation to provide certainty.

Also, the exception for first party cookies should be considered a positive step as it would allow for a better user experience of online news platforms.

It follows from the proposal’s Art. 8 (1) d that consent from the end user is not required “if it is necessary for web audience measuring, provided that such measurement is carried out by the provider of the information society service requested by the end user”. As we see it, this exception should not be limited to situations where the measurement is carried out by the provider itself, but by a third party acting on the provider’s behalf and under the provider’s instructions. This would be in line with the provisions in the GDPR, with the distinction should be drawn between data controllers and processors. As long as third parties are only acting as processors and cannot use data for their own purposes, there should be no further restrictions than for use of cookies from the provider itself (first party

cookies). Of course, should the third party act outside of the provider's instructions, then it would be liable for enforcement.

We also recommend that it is made explicit in the provision that "web audience measuring" include web analytics. This is closely related.

Furthermore, we see a need to clarify that communication that takes place to verify that consent or alternative legal basis is in place can be done. Thereto, the use of processing and storage capabilities of the terminal equipment to access online identifiers is required.

In addition, it is important to underline that ePrivacy legislation should maintain the clarification that is set forth in the existing ePrivacy Directive, that access to an online service may be made conditional on data processing for advertising purposes - even if it is not strictly technically necessary for the provision of the service as such, but for instance if the business model behind the service is dependent on advertising.

7. Unsolicited Communications

Prior consent is required for the sending of direct marketing communications across the internet. The definition of these communications has primarily included mail, telephone and SMS messages. However, with industry moving beyond traditional OBA by way of adding further information to a user's profile (and sometimes using email addresses to carry out matching), then display advertising may be captured within the interpretation of the definition. We do not support such an extension of the definition and seek explicit exclusion of display advertising.

This is of course additional to the obligation under the GDPR to allow users to opt out of profiling for marketing purposes.

News Media Europe welcomes the proposal of maintaining opt-out principle in telephone marketing which has an essential significance in subscriptions sale in some Member States due to specific geographical conditions.

However, the suggestion that telemarketing calls should be made identifiable via a prefix or code is both legally and technically very problematic. It could lead to blocking of calls which would have been in the interest of customers, for example an offer to renew the subscription. This kind of regulation should be left to Member States.

8. Liability issue

Further clarification is needed for to establish the terms of liability between the owners of news website (publishers) on the one hand and advertisers on the other. News Media Europe encourage the European Parliament and the Council to address the issue of liability, i.e. it is important to establish to what extent publishers can obtain consent on behalf of third parties and how to divide the responsibility for any future use and processing of the data.

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Position Paper ePrivacy

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9. Final consideration

Like all industries, the European news media sector is preparing for compliance with the GDPR. Ideally, we would ensure compliance with the reviewed ePrivacy legislation at the same time. That said, News Media Europe prefers a piece of legislation that is solid and workable over legislation that was rushed through the political process and does not adequately address the issues at hand and fails to provide a consumer-trusted EU media industry.

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