Ecommerce Europe's Position & Amendments on the proposed ePrivacy Regulation

Introduction

In January 2017, the European Commission proposed new legislation to ensure stronger privacy in electronic communications, the Proposal for a Regulation on Privacy and Electronic Communications[1]. Overall, Ecommerce Europe has always supported the idea of modernising the current ePrivacy Directive[2] in order to make the ePrivacy legal framework fit for the future of digital commerce. Ecommerce Europe also supported the choice for a regulation as legislative tool to achieve a greater level of harmonisation of privacy (and cookie) rules across the EU.

Ecommerce Europe welcomes the progress made on the Proposal for a Regulation on e-Privacy under the leadership of the Portuguese Presidency of the Council. Although some of our concerns have not been addressed in the Council's last text, we recognise that good steps have been taken compared to earlier versions. However, we must remain cautious to ensure that the updated rules provide a balanced approach which enhances the protection of confidentiality of electronic communications, while allowing sufficient room for European businesses to innovate.

Electronic communication and processing of personal data is crucial for the e-commerce sector, as it is key for digital retailers to provide a high level of service and online customer experience. To achieve this high level of service, existing and new digital services process personal data, and make use of the storing capacity (cookies) and the information on the end user's mobile or static terminal equipment to personalise the consumer's experience. To maintain the competitiveness of the European digital commerce sector, Ecommerce Europe is of the opinion that the new ePrivacy Regulation must allow for this personalised service. Moreover, it should aim to create a uniform European legal framework which balances fostering digital innovation with end-users' rights to privacy and respect for their private sphere. This applies to purely online players, omnichannel businesses and brick-and-mortar retailers, as digitalisation is key for all of them to offer a high level of service.

While Ecommerce Europe recognises that the discussions on this draft regulation are complex, and that it has taken many in-depth policy and technical dialogues aimed at striking a balance between all the interests

[1] COM(2017) 10 final - 2017/0003 (COD)
[2] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)

at hand, in view of the trialogue negotiations, we would still like to highlight the importance of uniform interpretation across Member States and maximum alignment of the ePrivacy Regulation with the GDPR.

In light of the ongoing trialogue negotiations, Ecommerce Europe developed several key recommendations and amendments for EU negotiators, based on the proposal of the European Commission, the report of the Parliament and the Portuguese Council Presidency's compromise text.

1. Electronic communications data during and after transmission in Article 2 & 5

The Council proposal indicates that the ePrivacy Regulation only applies to electronic communications data in transit and not to electronic communications data "processed after receipt by the end user concerned" (Art. 2(2)(e)). By contrast, the Parliament proposal appears to apply the ePrivacy provisions to all uses of ECD, whether in transmission or at rest (Art. 5(1)), therefore applying confidentiality obligations beyond the scope of electronic communications and inaccurately overlapping with the GDPR. The Commission proposal is unclear as it does not expressly exclude post-transit processing in Article 2, but indicates that users could entrust third parties to store electronic communications data after receipt (Recital 19).

The Council draft sets out the clearest approach, but further clarity is needed, in particular, provisions on "compatible processing" are ambiguous about whether they apply only to electronic communications metadata in transit or to all subsequent processing of that metadata. The rules on deleting or anonymizing electronic communications data as soon as it is no longer necessary for the original purposes (Art. 7) also appears inconsistent with the principle that the ePrivacy Regulation should only apply to electronic communications data in transit as it is already covered by the data minimization principles laid down in article 5(1)(c).

The Council proposal is more consistent with the aim of limiting particularly intrusive "interception" of communications, which is the purpose of these provisions (Art. 5(1)), rather than duplicating the GDPR with respect to processing personal data contained in ECD, which would be the practical effect of the Parliament proposal.

2. Further processing and extension of access to end-users terminal equipment without consent in Article 6 & 8

Ecommerce Europe supports the clarification on the limited purpose of audience measurement processing activity in Article 8 of the Council's proposal. The Council's wording of Article 8.1(d) which is necessary to ensure that companies may analyse non-intrusive data that is essential to optimisation and innovation of digital services and for competitiveness on the global market. The same accounts for the proposed Council's wording of Article 8.2 that offers clear conditions and exceptions for a compliant use of device-to-device technology that is essential for both online and offline retail to benefit optimally from digitalisation. We particularly support the fact that the exemption in Article 8.1(c) is not limited to cookies that are technically strictly necessary for the service specifically requested by the end-user. This limitation would prevent businesses from optimising existing or creating new digital services ultimately catering to end-users' preferences and online experience.

With regards to the Council's proposed criteria (Article 8.1(g)) to be taken into account to check whether processing for another purpose is compatible with the purpose for which the electronic communications data are initially collected for, Ecommerce Europe stresses the importance of alignment with the GDPR. To achieve clarity for data controllers about their responsibilities on further processing of personal data, which is often the result of the use of cookies, it is preferable that data controllers are subject to only one set of aligned criteria to comply with, instead of different sets of criteria for further processing of telecommunications data (ePrivacy Regulation) and other personal data (GDPR). This is important to ensure compliance by businesses, which ultimately will benefit end-users' privacy and data protection rights. Ecommerce Europe therefore recommends amending the Council's wording of Article 8.1(g) in such a way that for the assessment of compatibility of further processing, the criteria laid down in Article 6.4

GDPR should be taken into account. We recommend a similar alignment for Article 6c of the Council's position on further processing.

Overall, Ecommerce Europe supports the achieved balance in Article 8 between end-users' right to privacy and data protection and the need for e-commerce companies to allow the use of non-intrusive cookies and information gathering necessary for the use of digital services without having the end users' consent. We also welcome the extension of the possibility to place cookies or retrieve information from the end users' terminal equipment without consent (e.g., for safety, fraud prevention, updating reasons etc.) and the reinsertion of provisions allowing further processing of electronic communications data (including metadata) where the processing is compatible with the initial purpose for which the data was processed (Article 6c of the Council's proposal). In our opinion, these elements of the Council's proposal should be maintained in the final text.

3. Deletion of Article 10

Ecommerce Europe also strongly supports the deletion of Article 10 of the Commission's proposal as browsers can be considered as gatekeepers of the terminal equipment (Recital 22 of the Commission's Proposal). Requiring browsers to prevent third parties from accessing the terminal equipment would have as a consequence that browsing software developers would become a power that is totally disproportionate to other players in the ecosystem of the Internet. The major players that develop browsing software, mostly established outside of the European Union, would be able to regulate standard access to the terminal equipment by browser setting consent systems, not only for themselves but also for their competitors. This would in fact allow these players to have a very favourable position, permitting them to use cookies necessary for the operation of the browser itself for all the services they provide on the web (search, advertising, audience analysis, etc.) and preventing competitors to benefit in the same way from the browser settings. In that perspective, Ecommerce Europe strongly supports the deletion of Article 10 as proposed by the Council as it will prevent the major browsing software developers to abuse browser setting consent systems to have a competition advantage or not complying with the European standards required by the GDPR. In that perspective, we also support the Council's position in Article 4.2aa, stating that consent that has been directly expressed by an end-user to a service provider always prevails over standard software settings that express consent (or not).

4. Article 16 on unsolicited communications

a. No limitation to "similar" products or services in Article 16.2

Under the current e-Privacy Directive, the use of electronic contact details received in the course of a sales or service contract for unsolicited direct marketing e-mails is restricted to marketing for own similar products or services as they were subject to the sales or service contract on which occasion the e-mail address was gathered. This restriction of unsolicited marketing towards own *similar* products is maintained in the Council's proposal for Article 16(2). In practice, it is highly problematic to assess which products or services fall within the scope of 'similar'. Moreover, traders have to file which products or services they sold, to assess every time they send a new unsolicited marketing e-mail whether they are allowed to do so without consent. This highly impractical approach is not only opposite to the GDPR obligation of data minimisation, but it is also not well understood by end-users (consumers), as they have a relation with the retailer and not with the good or service subject to the contract they concluded with the trader and, thus, expecting unsolicited offers on all the traders' products or services.

As suggested in the European Parliament's LIBE Report, to prevent legal uncertainty on what *similar* exactly means, the term "similar" should be removed, also taking into account it might be redundant as end-users always have an easy and free of charge right to object (opt-out) unsolicited marketing communications. This will allow retailers to bring all his goods or services under the scope of this regulation, avoiding unnecessary data storing and complex discussions on what is seen as a similar product or service.

b. Clear and uniform interpretation of "in the context of the purchase of a product or service"

Furthermore, Ecommerce Europe would like to mention that it is not quite clear what is meant by "in the context of the purchase of a product or service" (in Article 16.2 of the Council's text) and that it should be absolutely clear from the recitals referring to the provision that this notion should cover all stages of contracting, from the gathering of electronic contact details in the pre-contractual and orientation stage (e.g., when opening a personal account) to the gathering in performing after sales services (e.g., repair, maintenance, advise, etc.). As the term "sale" better encompasses the sales process described above, Ecommerce Europe supports the Parliament's wording and believes the term "sale" should be retained in the final text rather than "purchase".

c. No legal fragmentation on unnecessary limitation period

In addition, we want to flag the risk of legal fragmentation, caused by enabling Member States to set a limitation period for the use of the end-users' (e.g., consumers) contact details (Council's proposal, Art. 16.2a). Ecommerce Europe believes that there is no practical need for a limitation period because end-users always have, for every unsolicited advertising they receive, an easy and free of charge right to object. Ecommerce Europe therefore strongly advises to delete the Council's proposed Art. 16.2a.

d. Broadcasting advertising

Ecommerce Europe considers that the intended scope of Article 16 as a whole is to capture the sending of "electronic messages" and that it does not apply to broadcasting advertising (including teleshopping), including as Article 16(6) of the Commission's proposal mandates certain disclosure requirements which would not work in the context of broadcasting advertising. While neither the Commission's proposal nor the Council's position would appear to capture broadcasting advertising within the scope of Article 16, the European Parliament's position suggests introducing the term "presenting" into Article 16(1), which could unintentionally capture broadcasting advertising. We therefore call on the co-legislators to clarify that broadcasting advertising is not included in the scope of Article 16 and, specifically, to avoid including the term "presenting" in Article 16(1)."

5. Article 18 on supervisory authorities

The enforcement of the ePrivacy Regulation should be subject to the same cooperation and consistency mechanisms that are set out in the GDPR. Harmonised and consistent application of the new rules would best be ensured if the supervisory authorities responsible for enforcement of the GDPR would also be responsible for enforcing the ePrivacy Regulation. Ecommerce Europe believes the Commission's proposed text for Article 18 should be maintained, as the Parliament and Council's texts would increase the risk of different regulators in the Member States taking separate enforcement actions and would require small companies of electronic communication services to have to respond to communications from different regulators. This would result in barriers to entry in the market, and not in removing them in line with the objective of completing the digital single market. To ensure a harmonised approach and maximum alignment with the GDPR, Ecommerce Europe thus asks to maintain the Commission's proposal for Article 18.

6. Support for the 2-year period before the entry into application

Ecommerce Europe overall supports the Council's approach to give businesses 24 months to bring their services in line with the Regulation.

7. Legal grounds for processing Terminal Equipment Data should only apply to initial collection, not subsequent use

The compatible processing ground in the Council text gives companies flexibility to develop valuable new products and services. However, the ePrivacy Regulation should make it clear that the GDPR alone applies to subsequent processing of the data collected from terminal equipment in order to avoid the ePrivacy Regulation from replacing rather than particularizing the GDPR with respect to personal data collected online. Ecommerce Europe recommends co-legislators to ensure full alignment with the GDPR Article 6(4).

8. Final remarks on limitation of grounds for lawful processing of telecommunications metadata

In view of alignment and consistency of the proposal with the GDPR, Ecommerce Europe regrets that in the Commission's proposal and in the Council's and Parliament's preliminary positions, there appears to be an unjustified reluctance to accept all the grounds for legal processing of Article 6 GDPR in an equal way for the processing of metadata of telecommunications. In particular, the removal of legitimate interest in the proposed Article 6b seems to suggest that legitimate interest would offer insufficient protection to the privacy and data protection needs of the data subject for the processing of telecommunications metadata, compared to consent and the other grounds for lawful processing of the GDPR. While Ecommerce Europe recognises that, at this stage, reintroducing legitimate interest is not going to happen, we would still like to underline our belief that this should be considered as a lawful legal ground for processing telecommunications metadata.

9. Recommended amendments for the trialogue negotiations

Ecommerce Europe will constructively contribute to the trialogue discussions and will continue to represent the interest of the digital commerce sector with regards to this important Regulation. As stated above, Ecommerce Europe supports the majority of the Council's proposal and its wording for the new ePrivacy Regulation. Below you can find Ecommerce Europe's preferred position and proposed amendments. Our suggestions can be found in the second column.

Article 2.2(e) – Material Scope

Preferred position: Council	Ecommerce Europe amendment
This Regulation does not apply to: (a)…, (b)…,(c) …, (d)…, **(e) electronic communications data processed after receipt by the end-user concerned,**	Ecommerce Europe supports the Council's text in which they include that the Regulation does not apply to electronic communications data processed after transit.

Article 8.1(g) and (h) – Cookies and tracking technologies

Preferred position: Council	Ecommerce Europe amendment
(g) where the processing for purpose other than that for which the information has been collected under this paragraph is not based on the end-user's consent or on a Union or Member State law which constitutes a necessary and proportionate measure in a democratic society to safeguard the objectives referred to in Article 11 the person using processing and storage capabilities or collecting information processed by or emitted by or stored in the end-users' terminal equipment shall, in order to ascertain whether processing for another purpose is compatible with the purpose for which the electronic communications data are initially collected, take into account, inter alia : **(i) any link between the purposes for which the processing and storage capabilities have been used or the information have been collected and the purposes of the intended further processing ;**	(g) where the processing for purpose other than that for which the information has been collected under this paragraph is not based on the end-user's consent or on a Union or Member State law which constitutes a necessary and proportionate measure in a democratic society to safeguard the objectives referred to in Article 11, the person using processing and storage capabilities or collecting information processed by or emitted by or stored in the end-users' terminal equipment shall, in order to ascertain whether processing for another purpose is compatible with the purpose for which the electronic communications data are initially collected, take into account *the criteria laid down in article 6(4) of Regulation (EU) 2016/679*. ~~, inter alia :(i) any link between the purposes for which the processing and storage capabilities have been used or the information have been collected~~

Preferred position: Council	Ecommerce Europe amendment
(ii) the context in which the processing and storage capabilities have been used or the information have been collected, in particular regarding the relationship between end-users concerned and the provider ; **(iii) the nature the processing and storage capabilities or of the collecting of information as well as the modalities of the intended further processing, in particular where such intended further processing could reveal categories of data, pursuant to Article 9 or 10 of Regulation (EU) 2016/679;** **(iv) the possible consequences of the intended further processing for end-users;** **(v) the existence of appropriate safeguards, such as encryption and pseudonymisation.** **(h) Such further processing in accordance with paragraph 1 (g), if considered compatible, may only take place, provided that:** **(i) the information is erased or made anonymous as soon as it is no longer needed to fulfil the purpose,** **(ii) the processing is limited to information that is pseudonymised, and** **(iii) the information is not used to determine the nature or characteristics of an end-user or to build a profile of an end-user.**	~~and the purposes of the intended further processing ;~~ ~~(ii) the context in which the processing and storage capabilities have been used or the information have been collected, in particular regarding the relationship between end-users concerned and the provider ;~~ ~~(iii) the nature the processing and storage capabilities or of the collecting of information as well as the modalities of the intended further processing, in particular where such intended further processing could reveal categories of data, pursuant to Article 9 or 10 of Regulation (EU) 2016/679;~~ ~~(iv) the possible consequences of the intended further processing for endusers;~~ ~~(v) the existence of appropriate safeguards, such as encryption and pseudonymisation.~~ ~~(h) Such further processing in accordance with paragraph 1 (g), if considered compatible, may only take place, provided that:~~ ~~(i) the information is erased or made anonymous as soon as it is no longer needed to fulfil the purpose,~~ ~~(ii) the processing is limited to information that is pseudonymised, and~~ ~~(iii) the information is not used to determine the nature or characteristics of an end-user or to build a profile of an end-user.~~

Article 10 – Browsers

Supported position: Council	Ecommerce Europe amendment
~~*Article 10*~~	Ecommerce Europe supports the deletion of Article 10 as proposed by the Council.

Article 16.2 – Direct marketing communications

Preferred position: European Parliament	Ecommerce Europe amendment
16.2. Where a natural or legal person obtains electronic contact details for electronic mail from its customer, in the context of the sale of a product or a service, in accordance with Regulation (EU) 2016/679, that natural or legal person may use these	Ecommerce Europe supports the Parliament's deletion of the word 'similar' as seen in the Commission and Council's text: 16.2. Where a natural or legal person obtains electronic contact details for electronic mail from

electronic contact details for direct marketing of its own products or services only if customers are clearly and distinctly given the opportunity to object, free of charge and in an easy manner, to such use. The ***customer shall be informed about the*** right to object ***and*** shall be given ***an easy way to exercise it*** at the time of collection and each time a message is sent.	its customer, in the context of the sale of a product or a service, in accordance with Regulation (EU) 2016/679, that natural or legal person may use these electronic contact details for direct marketing of its own ~~similar~~ products or services only if customers are clearly and distinctly given the opportunity to object, free of charge and in an easy manner, to such use. The right to object shall be given at the time of collection and each time a message is sent.

Article 16.2a – Limitation period

Preferred position: European Parliament	Ecommerce Europe amendment
No inclusion of Article 16.2a	Ecommerce Europe supports the Parliament's text, in which Article 16.2a is not included as seen in the Council's text: ~~16.2a Member States may provide by law a set period time, after the sale of the product or service occurred, within which a natural or legal person may use contact details of the end-user who is a natural person for direct marketing purposes, as provided for in paragraph 2.~~