

# Position on the ePrivacy Regulation

## Key messages

- This proposal severely restricts the collection, access and use of data and is a major impediment to data economy and e commerce in particular.
- The data economy is extremely intertwined and complex; data is being generated, processed and used to the best interest of citizens, business and the economy.
- Machine to machine data is an important and growing part of the development the data economy and should not be banned or quasi-banned.
- SMEs do not generate big data, for this they need third parties that can use the network effects to produce valuable input for SMEs.
- The proposal raises a number of questions regarding the compatibility with the GDPR.
- Browsers or telecommunication companies cannot be made the gatekeepers; it will lead to monopolistic effects and hamper more diversity in services and products.
- A distinction between B2B and B2C marketing must be maintained.

## Introductory remarks

EMOTA's<sup>[1]</sup> represents online sellers, small and large, and is well aware of the complexities its Members face in their day-to-day business, particularly after the results of the 2009 revision of the ePrivacy Directive, the ongoing implementation of the GDPR, and the interaction between the two-data protection legal frameworks.

You will find below our main concerns and suggestions.

## Key areas of concern

### Article 8: Who will be able to use cookies?

Following the EC proposal an online seller would be able to use cookies on the device of the consumer only if:

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<sup>[1]</sup> EMOTA, the European eCommerce and Omni Channel Trade Association, is the European level umbrella federation representing online and distance sellers across Europe. The main mission of EMOTA is to promote eCommerce and Distance Selling and help policy makers remove any barriers to cross-border selling. Transparency register N° 11251212351-96

- obtained prior consent (the GDPR conditions for consent)
- or if the processing is necessary (essential or technically necessary depending on the approach) for delivering the service requested by the consumer
- or to place cookies on the device of the user for measuring purposes.

#### Consequences of the proposal:

- Cookies are necessary to create data which will allow retailers to be more precise in their targeting and therefore less intrusive (privacy friendly). The proposal forces retailers towards untargeted marketing.
- Websites visits and searches are organised according to individual customer's preferences, which will disappear due to the restriction of cookies use. As a result, searches and web visits will be a disappointing experience.
- SMEs have not enough traffic to create data as much as the larger sellers. SMEs rely on third party data to get relevant consumer insight thus making them more competitive. Thirds parties need cookies to collect this data.
- Many sellers use ready-made sales websites and have little control over what data is processed. If they cannot obtain consent through these sites, they will be forced to use very basic websites which will frustrate consumers and their business will fail.
- The uploading of websites will slow down considerably due to the loss of cookies each time the browsing session ends and their data in sites or apps is lost.
- Many of the website functionalities are usually provided by third parties, such as the shopping basket, payments, price comparison or user behavior and interests – these services also collect data, without which they wouldn't be able to function (e.g. machine learning, algorithms). These features allow for a smooth customer experience, which will disappear with the proposal.
- Because they are provided by third parties and collect and process data, these functionalities will most likely fall outside the very strict interpretation taken by the EU Commission and EU Parliament (essential for the delivery/technically necessary) and therefore the sellers are likely to be forced to require consent in order to be able to use such services.

#### What is needed?

*Regulation should promote the use of data and allow for the consumer to get informed about the use of cookies. Prior consent will cut of data streams for SMEs and should be avoided. Consent requirements should certainly not go beyond what is already laid down in the GDPR.*

#### Article 10: Understanding where today's sellers get their traffic from?

Today, consumer data is aggregated by third parties, who can offer advertising to groups of interested people, rather than in the past, when everyone had to see the same advertising. An average SME online seller gets today between 30-50% of their traffic from such third-party advertising networks (Criteo, etc.).

#### Consequences of the proposal

- Under the Commission proposal consumers would have to be asked for a choice (consent) for tracking and third party advertising. This choice will be made in the browser, making browsers the gatekeepers (please see recent Apple Safari announcements).
- The experience of the EMOTA Members shows that in over 90% of the cases consumers are unlikely to agree to third party advertising. Consumers will just choose those sites that do not display such messages, ticking boxes, and other elements that just disrupt the experience.
- As the conditions for consent will be those of the GDPR, being extremely demanding and strict, sellers are almost sure not to be able to meet these conditions. The attraction of a small seller is too little to convince shoppers to go through consent procedures.
- Large networks have log-in models (social media, etc.), greatly facilitating the collection consent. They will be able to further consolidate their market position, leading to less competition and higher costs for SMEs.
- Without third party website traffic and input, SME sellers are estimated to lose around 20% of sales. Not having their own advertising networks, they won't be able to make up for the lost traffic or the information on how they should position their offer versus their competitors.
- **The great advantage of the advertising networks is just that, they are a network and have a great understanding and perspective of the market. This makes them very efficient in displaying consumers with the most relevant adds which are most likely to result in a sale.**

#### What is needed?

*Policy makers should promote the use of data and enable third party advertising. EMOTA considers that the challenges in this area are a question of bad enforcement not a question of lacking rules. Making more rules wont address the poor enforcement and awareness.*

#### eMail Marketing for Similar Products: Will this work?

- Direct marketing is an essential tool for eCommerce, in particular SMEs.
- EMOTA would rather suggest that the marketing aspects are to be covered by the GDPR. Including these in the ePrivacy Regulation will create unnecessary complexity for eCommerce sellers.
- If policy makers do decide to maintain e-mail marketing within the scope, the provisions should be flexible enough as to allow sellers to contact their existing customers without the need for consent (e.g. by removing wording such as "similar products")

#### Other critical issues: Ensuring clarity and avoiding duplication with the GDPR

##### **Removing the distinction between B2B and B2C**

- EMOTA does not support the removal of the distinction between B2B and B2C electronic marketing.
- Removing this distinction will trigger the application of the same stringent protection rules for B2B data and result in significant losses in business opportunities.

### Articles 12-14 Telemarketing

- Articles 12-14 introduce further restrictions concerning telemarketing calls, including obligations for service providers to introduce blocking mechanisms
- The ePrivacy Regulation seems to aim to create a “gatekeeper” mechanism for telemarketing. As this is highly disputed in the case of the potential browser role as a gatekeeper, it seems counterproductive.

### Conclusions

- The E-Privacy Regulation should focus on improving access to data, instead of prohibiting the processing of data unless certain conditions are met. This is no longer a viable policy strategy in a digital economy.
- The use of personal data in eCommerce has led to efficiencies for the e-commerce sector, smoother consumer experience and lower prices. The benefits to the economy and consumers greatly outweigh the relatively low impact on privacy.
- EMOTA considers that is highly questionable and not legally justifiable to introduce the notion that electronic devices and the data produced from them should be subject to the same legal standards and protections as personal data.
- Modern electronic devices are part of our global communication and information infrastructure. Like other types of data, communication and meta data should be protected with regard to its specific situation and should therefore be regulated along a flexible set of legal grounds as found in Art. 6.1 GDPR.
- Timing: negotiations should not be rushed to meet the Commission’s ambitious 2018 GDPR implementation timeline. Instead, a transitional period is needed in order to not create significant burdens on the smallest businesses.
- The link to the Electronic Communication Code must be clarified to ensure coherence in definitions.

You will find attached the EMOTA proposals for amendments