

Direct marketing communications provisions of the ePrivacy Regulation

The signatories of this letter are concerned by the lack of focus on the provisions of the ePrivacy Regulation related to direct marketing in the Working Party on Telecommunications and Information Society and would urge Member States to fully assess the scope and implications of article 16 and its related recitals (32 to 35) and definitions (article 4.3 (f) and (h)).

The direct marketing industry allows millions of brands to engage directly with their existing and prospective clients, enabling stable and interactive customer relationship leading to economic growth in Europe. Technology multiplies ways of interaction with the customer, whether through social media, online platforms, on mobile, which can be added to email and telemarketing, for a multichannel experience.

The underlying pillar of the direct marketing industry is consumer trust, fuelled by transparency and consumer control over their privacy and data. Trust in an organisation is the main driver for the consumer to share their personal data with a company, as 51% of consumers put trust in their top three factors¹ when deciding whether to share personal data.

Article 16 of the ePrivacy Regulation provides a framework enabling individuals to have control over receiving commercial communications and to manage the level of engagement they expect from brands. It complements the General Data Protection Regulation and articles 6 and 8 of the ePrivacy Regulation. These set the rules on access to devices, collection and use of data to target commercial messages to an individual. Article 16's scope is limited solely to the delivery of such communication in the individual's private sphere.

We would like to call for the below issues related to direct marketing communications and article 16 to be further discussed to avoid any duplication with the GDPR and other articles of ePrivacy, to ensure a well-balanced text for consumers and the European economy.

1. The **definition of direct marketing communications** (art. 4.3(f)) should be aligned with the industry practice and defined by the two cumulative elements of being sent or directed (**not presented**) to particular individuals (**not a broad group**), thus excluding display advertising from the definition, regardless of the context in which display advertising takes place.
2. The ability for organisations to **communicate with their existing clients** (art. 16.2a) about similar products and services is essential. Furthermore, ePrivacy already gives individuals control over the communications they receive. Engagement with a brand can take multiple forms other than the purchase of a product or a service. Additionally, each product has a different purchase cycle and is linked to a different marketing strategy². The opportunity to develop a national rule on time limitation would fail the objective of harmonisation of the single market.

¹ Source: Global data privacy: What the consumer really thinks, May 2018, <https://www.fedma.org/wp-content/uploads/2018/05/Global-data-privacy-report-FINAL.pdf>

² Whether a customer purchases a three-year magazine subscription, a new car, or a piece of clothing, brands will communicate with their customer on a completely different timeline. The magazine may only engage with its customer after a three-year period for the renewal of its subscription, while the fashion brand will have new products to present to its customer on a more regular basis.

3. Applying a common **specific prefix number** (art. 16.3a) to all marketing calls would prove to be challenging to implement and require disproportionate effort while providing little added value for individuals³. Most European countries already have in place mechanisms enabling individuals to object to telemarketing such as Telephone Preference Services or Robinson lists, while others require the data subject's consent prior to placing a call.
4. The distinctive criterion between a voice-to-voice call and an automated call should be whether the recipient receives a call from an individual and has the possibility to interact with them, regardless of the technology used to initiate the call. **Automated calling systems** (art. 4.3(h)), such as predictive dialers, is a technology broadly used in Europe, connecting callers to the person called, enabling a voice-to-voice interactive conversation, where the user can express their preferences. Definitions and provisions in the ePrivacy Regulation should reflect this approach.
5. **B2B direct marketing communications** often benefit from a more flexible legal framework at the national level due to its business-only nature and the need for business to attract new clients and grow. The ePrivacy Regulation should keep the ability for the Member States to allow such flexibility. Clarification is needed so that the ePrivacy does not intend to require consent for B2B marketing sent to end users who are legal persons and individuals in their professional capacities.
6. Communications from charities should not be unfairly limited and should not be included in the scope of the ePrivacy Regulation.

We call on the Member States to allow additional time to discuss the provisions on direct marketing in the ePrivacy Regulation and ensure that the text will provide the right approach protecting individual's privacy while enabling Europe's economic development. We stand ready to support the Member States in their efforts towards finding the right balance for the final Regulation.

Signatories



³ Telemarketing calls with a prefix number can be blocked at the telecom operator level. This can lead to situations where calls to an individual having given his/her consent to be called, or having explicitly requested to be called back by an organisation cannot be connected.

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