EuroCommerce for retail & wholesale

Position Paper
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e-Privacy Regulation: key articles to encourage use and innovation of digital services

Introduction

A key element for retail and wholesale companies' competitiveness is to provide a high level of customer online experience through simple, innovative and personalised services. Both existing and new digital services use cookies and tracking technologies to achieve this aim. EuroCommerce is of the strong opinion that if EU companies are to stay competitive in this fast-moving industry, the ePrivacy Regulation must allow for and encourage the use of existing and new digital services as well as create a legal framework which fosters digital innovation although balancing end-users' right to privacy. This applies both to the online market but also for brick-and-mortar stores to be able to benefit from the digitalisation. Moreover, it is important that such rules also create a level playing field for global competition.

Another aspect is that the ePrivacy Regulation must contain a clear set of rules which are interpreted consistently in all EU member states. Given the close connection to the General Data Protection Regulation (GDPR), harmonisation of the application of the rules, including the following processing of personal data where applicable, would best be ensured if the supervisory authorities of the GDPR also would monitor compliance with the ePrivacy Regulation. Indeed, to truly achieve a Single Market, harmonisation of the ePrivacy Regulation is essential. Where possible, reference should also be made to the relevant article of the GDPR to avoid confusion and discrepancy in interpretation, e.g. article 6c.1-2 and 8.1 (g)-(h) of the ePrivacy proposal (Council's version) should instead refer to article 6.4 of the GDPR.

In light of the above, EuroCommerce has identified three key articles in the proposal for a new ePrivacy Regulation. Please see Annex 1 which contains the supported position and our proposed amendments (if applicable).

Summary of key articles of the ePrivacy Regulation

Article 8 Cookies and tracking techno-logies	• EuroCommerce supports the Council's position on article 8 which balances end-users' right to privacy with companies' need for non-intrusive cookies necessary for the use of digital services. • Particularly, the exception stated in article 8.1(c) should not be limited to cookies that are strictly technically necessary for the service specifically requested by the end-user. Indeed, this would discourage and impede the possibility for companies to optimise existing or create new digital services ultimately catering to end-users' preferences and online experience. • EuroCommerce also would like to stress that article 8.1(d) is essential to the optimisation and innovation of digital services. The Council's wording of the article is indeed necessary to ensure that companies may analyse non-intrusive data that is essential for competitiveness on the global market. • Moreover, article 8.2 is essential for brick-and-mortar stores to fully be able to benefit from the digitalisation. In particular, the Council's position offers clear exceptions as to when device-to-device technology may be used.

Article 10 Browsers	• EuroCommerce fully supports the Council's removal of article 10. • Advertising via search engines and social media providers dominates all other advertising channels and this trend is likely to continue in the future. This means that any retail and wholesale company need to rely on such services in order to reach out to customers to generate traffic to its website. Two players currently dominate the online advertising ecosystem and article 10 would further strengthen their position to the detriment of other advertising service providers. • In any case, and in accordance with the Council's position in article 2aa, it is crucial that consent that has been provided directly to a service provider overrides software settings for the reasons stated above. • EuroCommerce also wants to stress that if article 10 was to be included in the final version, browsers should not be set by default to reject third-party cookies, as this would lead to further concentration of the online advertising market. Rejecting third-party cookies by default would create a disproportionate disadvantage for retailers, and especially for SMEs.
Article 16.2 Direct marketing communi-cations	• EuroCommerce supports the European Parliament's position on article 16.2 and the removal of the term "similar". • The limitation of direct marketing practices to only "similar" products set in Article 16(2) is unclear. In practice, if active consent has not been given, companies would only be able to send marketing communication about products that a customer has already bought. EuroCommerce would like to point out that when companies have an existing relationship with a customer, the customer expects more precise and more personalised advertising that accurately caters to the customer's needs. • It is also unclear whether retailers can market other products than "similar products" to customers that have consented actively to receive email advertising. • EuroCommerce is strongly against article 16.2a of the Council's position. Indeed, the proposed provision not only undermines the consolidation of the Single Market, but also does not provide any concrete added value for the consumers. EuroCommerce also wonders if the article in fact is redundant as every natural or legal person always may ask to cancel/amend/review his/her data and consent. • Lastly, traders may obtain contact details of customers in connection with the creation of an account or after a purchase when providing after-sales services. The term "sale" should be used instead of "purchase" of a product or service. In our view, the term "sale" has a broader meaning to it as "in the context of the sale of the product or a service" reflects the sale process, i.e., all stages leading up to a purchase of a product or a service. This distinction is important as traders can have an existing relationship with a customer in other ways than through a traditional purchase. Indeed, the term "sale" would be a more appropriate wording in the context of new and innovative customer relations.

Annex 1 – Supported positions and proposed amendments

Article 8 – Cookies and tracking technologies

Supported position: Council	EuroCommerce proposed amendments	Justification
Article 8 (Protection of end-users' terminal equipment information) 1. The use of processing and storage capabilities of terminal equipment and the collection of information from end-users' terminal equipment, including about its software and hardware, other than by the end-user concerned shall be prohibited, except on the following grounds : (a) it is necessary for the sole purpose of **providing** an electronic communication **service** ; or (b) the end-user has given consent; or (c) it is strictly necessary for providing a service **specifically** requested by the enduser; or (d) ~~if~~ it is necessary for **the sole purpose** of audience measuring, provided that such measurement is carried out by the provider of the service requested by the enduser, **or by a third party, or by third parties jointly on behalf of or jointly with provider of the service requested provided that, where applicable, the conditions laid down in Articles 26 or 28 of Regulation (EU) 2016/679 are met; or**	**(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~~**	• EuroCommerce supports the Council's position on article 8 which balances end-users' right to privacy with companies' need for non-intrusive cookies necessary for the use of digital services. • Particularly, the exception stated in article 8.1(c) cannot be limited to cookies that are strictly technically necessary for the service specifically requested by the end-user. Indeed, this would discourage ad impede the possibility for companies to optimise existing or create new digital services ultimately catering to end-users' preferences and online experience. • EuroCommerce also would like to stress that article 8.1(d) is essential to the optimisation and innovation of digital services. The Council's wording of the article is indeed necessary to

(da) it is necessary to maintain or restore the security of information society services or terminal equipment of the end-user, prevent fraud or prevent or detect technical faults for the duration necessary for that purpose; or **(c) it is necessary for a software update provided that:** **(i) such update is necessary for security reasons and does not in any way change the privacy settings chosen by the end-user,** **(ii) the end-user is informed in advance each time an update is being installed, and** **(iii) the end-user is given the possibility to postpone or turn off the automatic installation of these updates; or** **(f) it is necessary to locate terminal equipment when an end-user makes an emergency communication either to the single European emergency number '112' or a national emergency number, in accordance with Article 13(3).** **(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 ;** **(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**	~~**capabilities have been used or the information have been collected 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**~~	ensure that companies may analyse non-intrusive data that is essential for competitiveness on the global market. • Moreover, article 8.2 is essential for brick-and-mortar stores to fully be able to benefit from the digitalisation. In particular, the Council's position offers clear exceptions as to when device-to-device technology may be used. • Lastly, in relation to our proposed amendment, it is important that the legal framework provides clarity for data controllers regarding their responsibilities. As the use of cookies and tracking technologies often results in further processing of personal data, it is preferrable if data controllers have one set of criteria to comply with. EuroCommerce strongly believes that an aligned legal framework will facilitate compliance, ultimately to the benefit of end-users' privacy rights. A similar wording should be used for article 6c of the Council's position.

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.** **(i) For the purposes of paragraph 1 (g) and (h), data shall not be shared with any third parties unless the conditions laid down in Article 28 of Regulation (EU) 2016/697 are met, or data is made anonymous.** 2. The collection of information emitted by terminal equipment **of the end-user** to enable it to connect to another device and, or to network equipment shall be prohibited, except **on the following grounds**: (a) it is done exclusively in order to, for the time necessary for, and for the purpose of establishing **or maintaining** a connection; or **(b) the end-user has given consent**; or **(c) it is necessary for the purpose of statistical purposes that is limited in time and space to the extent necessary for this purpose and the data is made anonymous or erased as soon as it is no longer needed for this purpose,** **(d) it is necessary for providing a service requested by the end-user.** **2a. For the purpose of paragraph 2 points (b) and (c),** a clear and prominent notice ~~is~~ **shall be** displayed informing of, at least, the modalities of the collection, its purpose, the person responsible for it and the other information required under Article 13 of Regulation (EU) 2016/679 where personal data are collected, as well as any	~~**(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.**~~	

measure the end-user of the terminal equipment can take to stop or minimise the collection. 2b. For the purpose of paragraph 2 points (b) and (c), the collection of such information shall be conditional on the application of appropriate technical and organisational measures to ensure a level of security appropriate to the risks, as set out in Article 32 of Regulation (EU) 2016/679, have been applied. 3. The information to be provided pursuant to paragraph 2a may be provided in combination with standardized icons in order to give a meaningful overview of the collection in an easily visible, intelligible and clearly legible manner. 4. The Commission shall be empowered to adopt delegated acts in accordance with Article 25 determining the information to be presented by the standardized icon and the procedures for providing standardized icons		

Article 10 – Browsers

Supported position: Council	Justification
~~*Article 10*~~	• Advertising via search engines and social media providers dominates all other advertising channels and this trend is likely to continue in the future. This means that any retail and wholesale company needs to rely on such services in order to reach out to customers to generate traffic to its website. Two players currently dominate the online advertising ecosystem and article 10 would further strengthen their position to the detriment of other advertising service providers. • In any case, and in accordance with the Council's position in article 2aa, it is crucial that consent that has been provided directly to a service provider overrides software settings for the reasons stated above. • EuroCommerce also wants to stress that if article 10 was to be included in the final version, browsers should not be set by default to reject third-party cookies, as this would lead to further concentration of the online advertising market. Rejecting third-party cookies by default would create a disproportionate disadvantage for retailers, and especially for SMEs.

Article 16.2 – Direct marketing communications

Supported position: European Parliament	Justification
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 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.	• EuroCommerce supports the European Parliament's position on article 16.2 and the removal of the term "similar". • The limitation of direct marketing practices to only "similar" products set in Article 16(2) is unclear. In practice, if active consent has not been given, companies would only be able to send marketing communication about products that a customer has already bought. EuroCommerce would like to point out that when companies have an existing relationship with a customer, the customer expects more precise and more personalised advertising that accurately caters to the customer's needs. • It is also unclear whether retailers can market other products than "similar products" to customers that have consented actively to receive email advertising. • EuroCommerce is strongly against article 16.2a of the Council's position. Indeed, the proposed provision not only undermines the consolidation of the Single Market, but also does not provide any concrete added value for the consumers. EuroCommerce also wonders if the article in fact is redundant as every natural or legal person always may ask to cancel/amend/review his/her data and consent. • Lastly, traders may obtain contact details of customers in connection with the creation of an account or after a purchase when providing after-sales services. The term "sale" should be maintained instead of "purchase" of a product or service. In EuroCommerce's opinion, the term "sale" has a broader meaning to it as "in the context of the sale of the product or a service" reflects the sale process, i.e. all stages leading up to a purchase of a product or a service. This distinction is important as traders can have an existing relationship with a customer in other ways than through a traditional purchase. Indeed, the term "sale" would be a more appropriate wording in the context of new and innovative customer relations.