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Cc: [REDACTED] (CNECT); [REDACTED] (CNECT); [REDACTED] (CNECT); [REDACTED] (CNECT)
Subject: Flash: Meeting Facebook on ePrivacy
Date: mercredi 31 janvier 2018 00:35:07

Protection of
personal data
Art 4(1)(b)

Dear Despina and dear colleagues,

Please see below the flash from today's meeting on ePrivacy with Facebook (FB) represented notably by the [REDACTED]. FB focussed on scope, consent, transmission, and software privacy settings. Next steps: FB is invited to suggest proposals.

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Scope

FB agrees with the proposal's aim to provide a level-playing field between telcos and OTTs (so FB does not oppose the inclusion of OTTs). OTTs are like telcos in the sense that they provide communications service and need to ensure its confidentiality; this is users' expectation. When FB messes up, it loses users. However, FB considers that the COM proposal has rules that are not adapted to the functioning of OTTs.

FB considers that the scope of the COM proposal is clear but not the scope defined by the EP report, which FB opposes and is concerned about. Under the EP report, all kinds of online services even those that do not look like telcos services would be covered.

FB considers that under the EP report, the definition of direct marketing definition explodes: it would cover all kinds of marketing (any message that is even displayed or presented to the user) which is a deliberately very broad scope, very bad for any business (it would mean you have to consent to any display of an ad). FB stressed that also SMEs rely on advertising for its financing, not only Facebook. The Parliament's position worries FB.

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Consent (communications and cookies)

FB considers that not all kinds of communications data are sensitive and therefore consent is not needed. According to FB, ePrivacy increases a number of cases where it'll have to ask the user to consent which is extremely burdensome (e.g. building the withdrawal mechanism). FB argues that every time you ask for consent, it becomes less meaningful. How do you balance that risk against the need to let a person know we do something with your data? What are the meaningful ways for consent?

Regarding cookies, FB considers that "ePrivacy replaces the GDPR": if it covers all data collection, it covers all of your internet activity. Potentially extremely broad and exceptions to consent are very narrow. FB would extend exemptions to cover: authentication (FB needs cookies to authenticate people – they use data, on third party site to log in), security and fraud prevention, and measurement: because it's less privacy intrusive. To allow this to happen when there is a legitimate interest in doing that. FB says that ePrivacy is for advertising and surveillance, but not such kind of things.

Web audience measurement is very important for any online service: how many ads were shown (you need to know it for billing purposes). FB says that no measurement happens by first parties except for FB and Google. Measurement is: how many people come to your sites, what articles people are reading, but also to bill your ads.

Transmission

FB Messenger works in the following way: Individual A sends a message to Individual B. The message is processed 'in the middle' (not at the end points of the communication) by Messenger that e.g., analyses the communications data to offer a scheduling assistant / suggest new friends / suggested replies / Uber prompts / etc. FB argues that this processing of communications in the middle is expected by users, and even more – a value because of which people sign up for and this is what differentiates it from other services. FB claims this is not a privacy violation but a service expected by users. Telcos – you are not expecting that someone does processing in between. OTTs: you do expect it on Messenger. If someone does not want to have such processing / services, s/he will use WhatsApp that offers end-to-end encryption.

Software privacy settings

FB agrees that browsers should provide choice; that browser must advise you upon installation. However, according to FB, the wording of the proposal (Recitals 23 & 24) nudges people in the direction of opting out from cookies. FB argues that the user cannot make an informed choice upon installation because of the lack of context; the user won't know that the web site won't work properly if cookies are rejected.

Best,



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