

Megan Skelly

Subject: FW: ePrivacy follow up
Attachments: FB Communications Processing_18.1.18.docx

From: Niamh Sweeney [mailto:]
Sent: 18 January 2018 16:07
To: Anne Flanagan; Megan Skelly; Mairead McCabe
Cc: Vera Coughlan; Thomas Van der Valk
Subject: ePrivacy follow up

Dear Anne, Mairéad and Megan,

Many thanks for taking the time to meet with myself, Vera and Thomas on Monday. We very much appreciated it.

As promised, I have set out below our views on issues relating to Article 4 and the definition of “direct marketing communications” in the ePrivacy Regulation.

I have also attached a document setting out some practical examples with respect to content processing, as discussed. Please note that **this document is commercially sensitive in part.**

Direct Marketing

The Estonian Presidency’s attempt to broaden the definition of direct marketing communication, compared to the Commission proposal, could have a detrimental impact on many EU businesses of all sizes.

We suggest that Art. 4(3) (f) of the Commission proposal should be amended as follows:

- ‘direct marketing communications’ means any form of advertising, whether written or oral, sent to one or more identified or identifiable end-users of electronic communications services **by means of voice calls, electronic mail or SMS**, including the use of automated calling and communication systems with or without human interaction, ~~electronic mail, SMS, etc.~~ **Direct marketing communication does not include an advertisement that is shown in the context of a website, mobile application, or similar online service;**
- **(32) In this Regulation, direct marketing refers to any form of advertising by which a natural or legal person sends direct marketing communications directly to one or more identified or identifiable end-users by means of voice calls, electronic mail and/or SMS, but does not include the posting or publishing of advertising on a website, blog, social media site, mobile application or similar online service.** In addition to the offering of products and services for commercial purposes, this should also include messages sent by political parties that contact natural persons via electronic communications services in order to promote their parties. The same should apply to messages sent by other non-profit organisations to support the purposes of the organisation. **Such rules shall not apply to direct marketing sent to an email address that reasonably appears to the sender to be an email address used mainly by the subscriber or user in the context of the provision of a service the user has requested.**

The reasons are the following:

- By its very nature, all online advertising is “advertising . . . to one or more identified or identifiable end-users of electronic communications services” because of the technical means of delivering advertising online.
- This is especially the case if we consider communications not only “sent” but also “presented” to users (as some EP and Council amendments have introduced)

- All websites and other content platforms — including the advertising on those sites or platforms — require the use of the IP address of the end user in order to deliver the content to the user's browser, mobile application or other device. IP addresses are how information is sent from point A to point B on the Internet; the information has to know where to go, and the IP address is how it knows. While the delivery mechanism is different to broadcasting, it is functionally similar.
- But in the EU, IP addresses are generally considered “personal data” — i.e., “information relating to an identified or identifiable natural person.” See Art. 4(1) of the GDPR.
- This means that any advertisement sent to an IP address is arguably an advertisement sent to an “identified or identifiable” person.
- Note that the foregoing is true for the delivery of **all online content, including advertising — not just targeted advertising.**
- What's more, there is a clear distinction in European law between electronic communications services and information society services. They are regulated differently for good reasons. Electronic Communication Services are regulated in the Telecom Code and e-Privacy, while online advertising is regulated as an information society service under the e-Commerce Directive. If the e-Privacy Regulation seeks to encompass online advertising too, it creates a conflict between the two regimes.
- Finally, if online advertising is brought within scope of the ePrivacy regulation's provisions on direct marketing, it is difficult to see what privacy harm is being addressed, since this would simply be regulating 'content' on a website or similar (which is the proper domain of the information society services under the e-Commerce Directive, not privacy)
- The proposed LIBE committee amendments and Council amendments, aimed at yet further broadening the scope of direct marketing communications, appear intended to require prior consent before any provider can send a person an online advertisement.
 - “Consent” in the e-Privacy Regulation means the same thing as it does in the GDPR. Under the GDPR, consent must be able to be withdrawable — and users must not suffer a “detriment” as a result of withdrawing consent.
- With an overly extensive definition of direct marketing, DPAs would likely take the position that a person should be able to withdraw consent for receiving ads on a websites or mobile app — **but still be able to access the site or app**. In other words, the law would essentially require companies to make their services available but take away the principal means to pay for them (i.e. ad revenue).
 - The result for many companies will be a choice between moving to a subscription model or simply shutting down.
 - The impact of the e-Privacy Regulation would therefore be to render the business models of a vast number of European businesses unviable. This has never been debated politically, and there was no public consultation about the effect of rendering online advertising unviable as a primary business model.
- Asking for consent to serve any form of ad would make also the internet experience extremely disruptive for users, who will be bombarded by requests for consent. GDPR considers consent as a legal basis for data processing that should be reserved for those situations that merit a significant demand on people's attention. Moreover, research has shown that these demands may actually have a negative effect on privacy: where people are repeatedly requested to provide consent, they learn not to pay proper attention to requests for consent, clicking them away without reading them. This phenomenon, sometimes called notice fatigue, devalues the use of consent as a mechanism.
- Asking for consent for direct marketing is also inconsistent with the GDPR, which explicitly recognises legitimate interest as a lawful basis to process data for direct marketing communications. In other words, the GDPR says that consent is not necessary for direct marketing communications.
- It is essential to make a distinction between intrusive direct marketing communications, such as unsolicited calls, mail or email, and information society services which display advertising. For the latter, advertising is much less intrusive and it is in itself part of the service.
- A broad definition of direct marketing would disproportionately harm European small and medium businesses, depriving them of the most affordable and demonstrably-effective avenue to build awareness for their products and services. In contrast to multi-national corporations, small businesses lack the resources to purchase costly television campaigns that often run in the hundreds or thousands of euros. Online advertising levels this playing field, enabling advertisers to reach their target audiences using whatever budget they have available — even a few euros a day — with immediate feedback that enables them to ensure their limited funds are not being wasted.

- The impact of this proposal on Facebook would be extremely disruptive too. As with other websites and apps, Facebook (and Instagram) would be required to obtain prior consent before showing any ads on newsfeed — and would have to give people the option to use the service without seeing ads. Given that Facebook's business model relies on showing ads, requiring that people be able to use the service without ads would simply be impossible.
- We believe the original intent of the EC was that direct marketing communications is to be understood in the ordinary way and in the manner consistent with the existing e-Privacy Directive, i.e. it relates to the use of messaging services in their various forms to serve advertising – not to the inclusion of advertising content on a website, blog, social media site or similar platform. For this reason, we would suggest narrowing the definition to cover only those communications that have the potential to intrude upon a person's privacy by subjecting him or her to unwelcome direct contact by a marketer. We do not believe that online display advertising constitutes such direct contact.

Do let me know if you have any questions about the information set out above, or attached.

I hope yesterday's meeting went well.

Best,

Niamh

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