ACT POSITION ON THE E-PRIVACY REGULATION

On 10 January 2017, the European Commission proposed a Regulation on Privacy and Electronic Communications ('the Proposal'). If adopted, this new Regulation will replace the current 2002/58/EC e-Privacy Directive and will establish, together with the (EU) 2016/679 General Data Protection Regulation ('the GDPR'), a new privacy legal framework for electronic communications. The Proposal aims to be *lex specialis* for electronic communications to the GDPR and aims to enter into force on the same date as the GDPR, i.e 25 May 2018.

Areas of concern & Core requests by ACT

I. COOKIE PROVISION

- **ACT proposes to clarify the new role of browsers as gatekeepers**
- **ACT suggests exceptions to the consent rule, when the processing of personal data is carried out for specific purposes including**
  - **audience measurement,**
  - **statistical purposes,**
  - **where the processing is strictly limited to anonymised or pseudonymised data,**
  - **the ability to make content recommendations,**
  - **the ability to propose ways for the content to be discovered and delivered on the platform,**
  - **the ability to ensure continuity of user experience across devices (as users may switch devices watching the same content).**
- **As advertising is often the main source of revenue for commercial broadcasters, ACT asks for the possibility for the media to restrict access to users who refuse to pay the price (i.e. being exposed to an ad) for the content they want to access.**

II. DIRECT MARKETING

- **ACT suggest to specify that rules on direct marketing do not apply to any form of advertising but to direct marketing via electronic communications services**
- **ACT calls to specify that direct marketing should not be limited to similar products and services but also allowed for analogous products and services**

III. REMEDIES, LIABILITY AND PENALTIES

- **ACT believes a provision should be included to clearly prohibit double penalties for the same infringement to both the GDPR and the Proposal.**

As a general principle, commercial broadcasters believe that the Proposal should not replicate provisions of the GDPR, where no significant change to the GDPR is made, as there is a strong risk for divergent wording and interpretations. In those instances, and to ensure legal certainty and coherence between the two texts, the Proposal should only make references to the GDPR.

I. COOKIE PROVISION

The Proposal makes significant changes to the so-called "cookie provision" as it prohibits the installation of cookies except on a number of grounds, which mainly include consent of the user (Article 8). Article 9 provides that such consent can be expressed through browser settings and Article 10 obliges browsers to provide an easy way for internet users to accept or refuse cookies and other identifiers.

ACT recommends a cautious approach on the new cookie provision. The proposed changes in Article 8, 9 and 10, in combination with upcoming discussions on the implementation of the GDPR and the notion of 'consent', may dramatically affect the advertising industry, as well as businesses relying on advertisement. As the Proposal states:

> *"By centralising the consent in software such as internet browsers and prompting users to choose their privacy settings and expanding the exceptions to the cookie consent rule, a significant proportion of businesses would be able to do away with cookie banners and notices, thus leading to potentially significant cost savings and simplification.* ***However, it may become more difficult for online targeted advertisers to obtain consent if a large proportion of users opt for "reject third party cookies" settings****.[bold added]"*

The Proposal if adopted as proposed will make significant challenges for European media market operators as it will lead to an uneven playing field with internet giants who will become "gatekeepers" of user data. Concentration of information on users will end up with companies owning the browsers and as such strengthen their dominance in the digital economy. Therefore, it is important to ensure that "*centralising consent does not deprive website operators from the possibility to obtain consent by means of individual requests to end users and thus maintain their current business model*", as written in the explanatory memorandum of the Proposal. Software should also ensure that consent given by the end user prevails over the privacy settings at the installation of software. In addition, the Proposal should emphasise the impartiality of browsers and limit their ability to commercially exploit first party data, which are not necessary to provide a specific functionality to the user.

For broadcasters, advertising revenues play a fundamental role in financing the development, production and licensing of original high-quality EU content. They are the main source of remuneration for free online content. It is therefore appropriate to give the media the capacity, according to its own economic assessment, to restrict access to their websites to those who use adblockers or refuse to consent to the processing of their data.

Access to data is not only needed for advertising purposes but also the way the content is discovered and delivered on the platform. Viewers might want to start watching content on one device and continue on another. In this regard, it is important for broadcasters to be able to ensure continuity of user experience across devices and screens, therefore we welcome the initial intention of the Commission to include the exception to consent for OBA[1] in its Impact Assessment.

In addition, we welcome the exception for audience measurement (Article 8.1.d) however, as third-parties are not covered by this exception, it should at least apply to processors when they have been directly engaged by a website provider. Website providers rarely conduct audience measurement in-house.

Amendments

EC Proposal	**ACT suggestion**
Recital 21 […] Information society providers that engage in configuration to provide the service in compliance with the end-user's settings and the mere logging of the fact that the end-user's device is unable to receive content requested by the end user should not constitute access to such a device or use of the device processing capabilities.	**Recital 21** […] Information society providers that engage in configuration to provide the service in compliance with the end-user's settings and the mere logging of the fact that the end-user's device is unable to receive content, ~~requested by the end user~~, **including advertisements,** should not constitute access to such a device or use of the device processing capabilities. **Information society service providers should remain free to take appropriate measures in line with their respective business models, including restricting access to content when an end user uses an adblocker.**
Recital 23 The principles of data protection by design and by default were codified under Article 25 of Regulation (EU) 2016/679. Currently, the default settings for cookies are set in most current browsers to 'accept all cookies'. Therefore providers of software enabling the retrieval and presentation of information on the internet should have an obligation to configure the software so that it offers the option to prevent third parties from storing information on the terminal equipment; this is often presented as 'reject third party cookies'.	**Recital 23** The principles of data protection by design and by default were codified under Article 25 of Regulation (EU) 2016/679. Currently, the default settings for cookies are set in most current browsers to 'accept all cookies'. Therefore providers of software enabling the retrieval and presentation of information on the internet should have an obligation to configure the software so that it offers the option to prevent third parties from storing information on the terminal equipment; this is often presented as 'reject third party cookies'. End-users

[1] Impact Assessment, 10.1.2017, p.25, « *e. For a lawful business practice (e.g. OBA) where the processing is strictly limited to anonymised or pseudonimised data and the entity concerned undertakes to comply with specific privacy safeguards ».*

End-users should be offered a set of privacy setting options, ranging from higher (for example, 'never accept cookies') to lower (for example, 'always accept cookies') and intermediate (for example, 'reject third party cookies' or 'only accept first party cookies'). Such privacy settings should be presented in an easily visible and intelligible manner.	should be offered a set of privacy setting options, ranging from higher (for example, 'never accept cookies') to lower (for example, 'always accept cookies') and intermediate (for example, 'reject third party cookies' or 'only accept first party cookies'). **Such privacy setting options should differentiate between cookies from third parties that have a contractual relationship with website providers and other third party cookies.** Such privacy settings should be presented in an easily visible and intelligible manner.
Recital 24 For web browsers to be able to obtain end-users' consent as defined under Regulation (EU) 2016/679, for example, to the storage of third party tracking cookies, they should, among others, require a clear affirmative action from the end-user of terminal equipment to signify his or her freely given, specific informed, and unambiguous agreement to the storage and access of such cookies in and from the terminal equipment. Such action may be considered to be affirmative, for example, if end-users are required to actively select 'accept third party cookies' to confirm their agreement and are given the necessary information to make the choice. To this end, it is necessary to require providers of software enabling access to internet that, at the moment of installation, end-users are informed about the possibility to choose the privacy settings among the various options and ask them to make a choice. Information provided should not dissuade end-users from selecting higher privacy settings and should include relevant information about the risks associated to allowing third party cookies to be stored in the computer, including the compilation of long-term records of individuals' browsing histories and the use of such records to send targeted advertising. Web browsers are encouraged to provide easy ways for end-users to change the privacy settings at any time during use and to allow the user to make exceptions for or to whitelist certain websites or to specify for which websites (third) party cookies are always or never allowed.	**Recital 24** For web browsers to be able to obtain end-users' consent as defined under Regulation (EU) 2016/679, for example, to the storage of third party tracking cookies, they should, among others, require a clear affirmative action from the end-user of terminal equipment to signify his or her freely given, specific informed, and unambiguous agreement to the storage and access of such cookies in and from the terminal equipment. Such action may be considered to be affirmative, for example, if end-users are required to actively select 'accept third party cookies' to confirm their agreement and are given the necessary information to make the choice. To this end, it is necessary to require providers of software enabling access to internet that, at the moment of installation, end-users are informed about the possibility to choose the privacy settings among the various options and ask them to make a choice. Information provided should not dissuade end-users from selecting higher privacy settings and should include relevant information about the risks associated to allowing third party cookies to be stored in the computer, including the compilation of long-term records of individuals' browsing histories and the use of such records to send targeted advertising. Web browsers are encouraged to provide easy ways for end-users to change the privacy settings at any time during use and to allow the user to make exceptions for or to whitelist certain websites **at the specific demand of the user** or to specify for which websites (third) party cookies are always or never allowed.

Article 8	**Article 8**
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 carrying out the transmission of an electronic communication over an electronic communications network; or (b) the end-user has given his or her consent; or (c) it is necessary for providing an information society service requested by the end-user; or (d) if it is necessary for web audience measuring, provided that such measurement is carried out by the provider of the information society service requested by the end-user.	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 **unless the processing is necessary for the purposes of the legitimate interests including**: (a) it is necessary for the sole purpose of carrying out the transmission of an electronic communication over an electronic communications network; or (b) the end-user has given his or her consent; **which may be required to access the service;** or (c) it is necessary for providing an information society service requested by the end-user; or (d) if it is necessary for ~~web~~ audience measuring **or other statistical purposes**, provided that such measurement is carried out by the provider of the information society service requested by the end-user, **or on behalf of the provider**; **or (e) where the processing is strictly limited to anonymised or pseudonymised data and the entity concerned undertakes to comply with specific privacy safeguards;** **or (f) if it used for the personalisation of the electronic communications services such as ability to make content recommendations, ability to propose ways for the content to be discovered and delivered on the platform, ability to ensure continuity of user experience across devices as well as any other measures intending to preserve the business model of web publishers or the quality of the service provided to users.**
Article 9 1. The definition of and conditions for consent provided for under Articles 4(11) and 7 of Regulation (EU) 2016/679/EU shall apply. 2. Without prejudice to paragraph 1, where technically possible and feasible, for the purposes of point (b) of Article 8(1), consent may be expressed by	**Article 9** 1. The definition of and conditions for consent provided for under Articles 4(11) and 7 of Regulation (EU) 2016/679/EU shall apply.

using the appropriate technical settings of a software application enabling access to the internet.	2. Without prejudice to paragraph 1, where technically possible and feasible, for the purposes of point (b) of Article 8(1), consent may be expressed by using the appropriate technical settings of a software application enabling access to the internet. **This form of consent is without prejudice to information society service providers' ability to ask for end-user consent. End-user consent given to a specific information society service provider should be binding on, and enforceable against, any other party, and shall prevail over privacy settings set by the technical specifications of electronic communications services.**
	3. In the case envisaged by paragraph 2, web browsers and other applications permitting the retrieval and presentation of information on the Internet may use the information stored in, and related to, users' terminal equipment only to the extent that it is necessary to provide a specific functionality to the user.
Article 10	**Article 10**
1. Software placed on the market permitting electronic communications, including the retrieval and presentation of information on the internet, shall offer the option to prevent third parties from storing information on the terminal equipment of an end user or processing information already stored on that equipment.	1. Software placed on the market permitting electronic communications, including the retrieval and presentation of information on the internet, shall:
2. Upon installation, the software shall inform the end-user about the privacy settings options and, to continue with the installation, require the end-user to consent to a setting	a) by default, offer privacy protective settings to prevent other parties ~~offer the option to prevent third parties~~ from storing information on the terminal equipment of an end-user or processing information already stored on that equipment b)upon installation, inform and offer the user the possibility to change the privacy setting options by requiring the user's consent to a setting; c) offer the user the possibility to express specific consent through the settings after the installation of the software. ~~the software shall inform the end-user about the privacy settings options and, to continue with the installation, require the end-user to consent to a setting.~~ **Such software shall ensure that a consent given by an end user under point**

	(b) of Article 8 (1) prevails over the privacy settings chosen at the installation of the software.

II. DIRECT MARKETING

Contrary to the Directive 2002/58/EC on e-Privacy, the Proposal now defines what "direct marketing communications" are (Recital 32 and Article 4.3.f). The definition specifies that direct marketing communications mean any form of advertising which could potentially cover advertisements placed on the internet, television or radio. This would have a detrimental effect on the advertisement industry, as Article 16 would impose very strict rules on these players (i.e. they would be required to inform end-users of the marketing nature of the communication, the identity of the legal or natural person on behalf of whom the communication is transmitted and the necessary information for recipients to exercise their right to withdraw their consent). The Proposal should therefore clarify that direct marketing communications are a specific category of commercial communications and should be clearly distinguished from other types of advertising.

The opt-out proposed in Article 16.2 of the Proposal is similar to the one of Directive 2002/58/EC on e-Privacy and essential for the broadcasters allowing them to reuse consumers' details collected via a first sale to approach them in order to sell other products or services, as long as consumers are given a chance to object. Without such an exception, broadcasters would simply lose their ability to do direct marketing. Yet, the current wording of Article 16.1 contradicts the GDPR as it imposes consent as a condition of direct marketing and fails to provide for 'legitimate interest' as a legal ground. As stated by Recital 47 of the GDPR: *"The processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest"*.

Moreover, it should be specified that such direct marketing can be done not only for similar products or services but also "analogous" products or services. Without such a clarification, a broadcaster would not be able for instance to re-approach a client who is a pay-TV service subscriber for direct marketing for a non-linear VOD or SVOD service, since this would not necessarily constitute a 'similar service'.

Finally, it should be allowed for other parties than the person selling the goods or services to send users direct marketing communications, as long as similar conditions still apply. As underlined above, revenues from advertising and commercial communications are fundamental for broadcasters and advertising is gradually taking new forms. The Proposal should reflect these market changes and provide for more flexibility.

Amendments to Article

EC Proposal	**ACT suggestion**
Recital 32	**Recital 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 using electronic communications services. 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.	In this Regulation, direct marketing refers to any form of **commercial communications** ~~advertising~~ by which a natural or legal person sends direct marketing communications directly to one or more identified ~~or identifiable~~ end-users using electronic communications services. 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.
Article 4	**Article 4**
(f) '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, including the use of automated calling and communication systems with or without human interaction, electronic mail, SMS, etc	(f) 'direct marketing communications' means any form of **commercial communication** ~~–advertising~~, whether written or oral, sent to one or more identified ~~or identifiable~~ end-users of electronic communications services, including the use of automated calling and communication systems with or without human interaction, electronic mail, SMS, etc
Article 16	**Article 16**
1. Natural or legal persons may use electronic communications services for the purposes of sending direct marketing communications to end-users who are natural persons that have given their consent.	1. Natural or legal persons may use electronic communications services for the purposes of sending direct marketing communications to end-users who are natural persons that have given their consent as mentioned in Art 8.1.
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 similar 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 right to object shall be given at the time of collection and each time a message is sent.	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 **may be used** for direct marketing of ~~its own~~ similar **or analogue** 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 right to object shall be given at the time of collection and each time a message is sent.

III. REMEDIES, LIABILITY AND PENALTIES

Replication of GDPR provisions in Chapter V on Remedies, Liability and Penalties could result in situations where a company gets double penalties for the same infringement, in breach of both the e-Privacy Regulation and the GDPR. For instance, a company which does not respect the right of end-users to object to direct marketing would be infringing both Article 21 of the GDPR and Article 16 of the Proposal. Such company could therefore be subject to 1) "*administrative fines up to 20 000 000 EUR, or in the case of an undertaking, up to 4 % of the total wordwide annual turnover of the preceding financial year, whichever is higher*" (Article 83.5 of the GDPR) as well as 2) "*administrative fines up to EUR 10 000 000, or in the case of an undertaking, up to 2 % of the total worldwide annual turnover of the preceding financial year, whichever is higher"* (Article 23.2 of the Proposal). At the very least, a provision should be included to clearly prohibit double penalties for the same infringement.

Amendments to Article

EC Proposal	**ACT suggestion**
Recital 40 In order to strengthen the enforcement of the rules of this Regulation, each supervisory authority should have the power to impose penalties including administrative fines for any infringement of this Regulation, in addition to, or instead of any other appropriate measures pursuant to this Regulation. This Regulation should indicate infringements and the upper limit and criteria for setting the related administrative fines, which should be determined by the competent supervisory authority in each individual case, taking into account all relevant circumstances of the specific situation, with due regard in particular to the nature, gravity and duration of the infringement and of its consequences and the measures taken to ensure compliance with the obligations under this Regulation and to prevent or mitigate the consequences of the infringement. For the purpose of setting a fine under this Regulation, an undertaking should be understood to be an undertaking in accordance with Articles 101 and 102 of the Treaty.	**Recital 40** In order to strengthen the enforcement of the rules of this Regulation, each supervisory authority should have the power to impose penalties including administrative fines for any infringement of this Regulation, in addition to, or instead of any other appropriate measures pursuant to this Regulation. This Regulation should indicate infringements and the upper limit and criteria for setting the related administrative fines, which should be determined by the competent supervisory authority in each individual case, taking into account all relevant circumstances of the specific situation, with due regard in particular to the nature, gravity and duration of the infringement and of its consequences and the measures taken to ensure compliance with the obligations under this Regulation and to prevent or mitigate the consequences of the infringement. For the purpose of setting a fine under this Regulation, an undertaking should be understood to be an undertaking in accordance with Articles 101 and 102 of the Treaty. **Double penalties resulting from the infringement of both Regulation (EU) 2016/ 679 and this Regulation shall be prohibited.**

WHO WE ARE & WHY WE CARE

The Association of Commercial Television in Europe represents the interests of leading commercial broadcasters in 37 European countries. We entertain and inform hundreds of millions of EU citizens each week, delivering substantial value to EU citizens, for instance ensuring plurality in news provision as well as drama and sports to EU audiences. Europe's commercial TV's path to digitalization started 15 years ago, and we are now distributing TV according to our customers' preferences, whether that is digital terrestrial, digital satellite, cable or via stand-alone or multichannel networks online. We operate diverse digital business models that deliver unparalleled customer choice, varying from free-to-air advertising models to subscription on demand. The ACT member companies finance, produce, promote and distribute content and services benefiting Europeans across all platforms. At ACT we believe that a healthy and sustainable commercial broadcasting sector has an important role to play in the European economy, society and culture.

For more information on the ACT position please contact Masa Lampret – ml@acte.be

Commercial Television: central to the lives of Europe's citizens as the motor of media plurality & cultural diversity

- **Our TV channels reach over 200 million European households** in 28 EU member states and beyond
- **Our online TV services are available in over 150 million European homes** connected to the internet and are central to Europe's broadband story
- Our member companies deliver content to a range of devices and platforms in response to consumer demand, **going from television to total vision**