Proposal for a Regulation on Privacy and Electronic Communications (ePrivacy Regulation)

WFA Key Messages

The World Federation of Advertisers (WFA) is the voice of marketers worldwide, representing 90% of global marketing communications spend – over €800 billion per year – through a unique, global network of the world’s biggest markets and biggest marketers. WFA champions responsible and effective marketing communications worldwide.

We represent over 100 global brands and 60 national advertiser associations worldwide. This includes national advertiser associations in 20 EU Member States, and around 50% of the companies we represent are European.

Our work with brands focuses on creating better interaction between brands and consumers in a digital world. This includes looking at ways to go beyond compliance to give consumers transparency, choice and control about how their data is used by brands in a marketing context. This is both a societal and economic issue for brands: consumers will only trust brands which use their data in a responsible way.

WFA’s corporate members

[Image of corporate members’ logos]

WFA’s national advertiser association members

[Image of national advertiser association members’ logos]
1. EXPERTISE AND USER TESTING ARE NEEDED TO ENSURE THAT CONSENT ISN’T SIMPLY A BOX-TICKING EXERCISE

Article 10: Information and options for privacy settings to be provided

**Position:** Since the adoption of the GDPR in 2015, WFA has been working closely with its members to develop guidance and principles to help companies share best practice on how, where and when to ask for consent. We believe that user testing is an essential component of defining how, where and when consent should be gathered in order to create the best conditions for consumers to have transparency, choice and control over their personal data.

Regulation is the right tool for developing principles around consent, but policymakers should be cautious about trying to impose methods which may be ineffective and potentially irrelevant in several years as technology evolves. In many cases, the best methods for asking for consent will vary depending on the context: prescriptive regulation cannot take this into account. Article 10 is too prescriptive because it mandates how (via software settings) and when (during installation) consent should be gathered. There is no evidence to suggest that this method is an effective way of informing users about their privacy and enabling them to make a choice. In fact, research carried out by KPMG has shown that less than 21% of people read privacy policies when installing software (see Figure 1). And consumer research carried out on behalf of one WFA member has shown that,

> ![Figure 1: % of people who read privacy policies when doing specific tasks](image)

when asked, people want to make choices about their privacy in context e.g. when providing bank details (i.e. when making a purchase), uploading a picture or subscribing to a loyalty programme. Only 6% of people said they would be inclined to make choices about their privacy when downloading a new browser. Also, more respondents said that they understood information about their rights and how their data is tracked at website level, rather than in browser settings.

There is also an economic impact. This piece of research revealed a drop-out rate of 61% when people were asked to change their browser settings on a tablet, and 40% on mobile. On average, it took people more than 60 seconds to access and change their browser settings. In an e-commerce context, this could have a significant impact on businesses by leading to potential buyers abandoning their purchases.

We believe industry is best placed to determine the most effective methods to get consent from users, within the parameters of the principles laid out in the GDPR. This work requires input from experts in user experience (UX), web designers, e-commerce analysts, experts in online behaviour and many others. Most importantly,
methods for gathering consent must be tested on users in real-life situations to avoid consent becoming a ‘box-ticking’ exercise, with little or no understanding of what people are actually consenting to.

**Recommendations:**

- Remove prescriptive requirements on browsers and other types of software to obtain consent during installation.
- Replace language which mandates how, where and when consent should be obtained with a principle-based approach.

### 2. EXCEPTIONS FOR WEB AUDIENCE MEASURING SHOULD NOT BE LIMITED TO FIRST PARTIES

**Position:** Website analytics are a fundamental tool for website owners to understand whether or not their websites are performing effectively. Tracking this information is necessary not only to ensure the proper functioning of the website, but also to enable website owners to improve and enhance features and tools which are made available to website users. In many cases, companies may outsource the technical elements of this analysis and tracking to third parties who have technical expertise in this area. For WFA members, this often means agencies and other third parties who provide these services in exchange for a payment, agreed as part of a contract. The wording of Article 8.1(d) in the Commission’s proposal could prohibit website owners from engaging agencies and other third parties to carry out this work for them, as it restricts the exception only to ‘measurement carried out by the provider of the information society service requested by the end-user’.

**Recommendations:**

- Extend the exception to measurement ‘authorised’ by the provider of the information society service requested by the end-user.

### 3. CONSISTENCY WITH THE GDPR IS CRUCIAL FOR LEGAL CERTAINTY

**Article 8: Protection of information stored in and related to end-users’ terminal equipment**

**Position:** WFA members have invested significant resources to implement the GDPR. In particular, WFA members have reviewed all their data processing activities to assess which legal bases to apply in different scenarios. The GDPR sets out 6 legal bases for data processing, some of which require a detailed legal and risk-based analysis in order to assess whether they can be used. This is a major piece of work, which in many cases requires mobilising internal and external resources to assess internal data management structures, including hiring additional staff and fees for external contractors (including legal fees). However, the draft proposal of the ePrivacy Regulation only makes one of these legal bases available to companies (consent). This means that companies may need to restart the process of assessing and applying the relevant legal bases to their data processing activities once a political agreement is reached on the final ePrivacy text in trilogue. This could put at risk all the work which companies have already done to prepare for the GDPR and leave them in a situation where they only have a few months to re-assess all their data processing activities in order to comply.

**Recommendation:** Ensure consistency with the GDPR throughout the legislative process. In particular, WFA recommends maintaining the same legal bases which underpin the GDPR in the ePrivacy Regulation.

### 4. A TECHNOLOGY NEUTRAL, RISK-BASED APPROACH IS NECESSARY TO AVOID UNINTENTIONAL RESTRICTIONS

**Articles 8 and 10**

**Position:** Whilst much of the debate around Articles 8 and 10 has tended to focus on cookies used for interest based advertising, WFA members are concerned that this approach could risk having unintentional consequences on other types of tracking which are necessary for brand websites to operate effectively and provide the kind of experience which users want and expect. Here is a concrete example:

>A user visits a shampoo brand website and looks at a particular shampoo which they like. The brand owner would like to be able to store this preference using anonymous data so that the next time the same website is visited using the same browser, links to the shampoo and recommendations for other similar products can be displayed on the homepage.
Recommendations: Consider a broad spectrum of applicable cases for tracking which may present different levels of risk to fundamental rights. This risk-based approach is a core component of the GDPR and should also be applied to the ePrivacy Regulation.

5. PEOPLE SHOULD BE EMPOWERED TO MAKE INFORMED CHOICES ABOUT HOW THEIR DATA IS USED

Position: In line with the GDPR, WFA supports the objective of enabling users to have transparency, choice and control over how information about them is used. We believe that the notion of ‘value exchange’ goes hand in hand with the definition of consent in the GDPR (‘freely given, specific, informed and unambiguous’). Advertising contributes to funding for internet services so that they can be enjoyed for free or at a reduced rate. This includes free email, social media and search services which are dependent on by citizens and businesses across Europe. Although alternative business models do exist in this space (e.g. email software which is available at a cost, without adverts), when asked the majority of people would choose to use free services in exchange for seeing adverts. Policy makers should question options which remove the opportunity for users to be made aware of this value exchange and actively decide whether or not they want their information to be collected for advertising purposes.

Recommendations:
- WFA calls to maintain the choice-based approach of the Commission’s proposal. We support the objective of getting users to make an active, informed choice about the collection of information stored on their terminal equipment.
- Reject policy options which advocate measures which remove the need for users to make active decisions about the collection of their information (e.g. mandating Do Not Track by default).

6. THERE SHOULD BE A CLEAR DISTINCTION BETWEEN DIRECT MARKETING AND OTHER TYPES OF ADVERTISING

Articles 4 and 16

Position: WFA is concerned that amendments to the definition of direct marketing (Article 4) could have wide-ranging unintended consequences for all types of online advertising, not just direct marketing. By extending the definition to advertising ‘sent or presented to one or more identified or identifiable end-users of electronic communications’, the Parliament text expands the scope of the ePrivacy Regulation far beyond what the public and the advertising industry would consider direct marketing. Recent drafts of the consolidated Council text also extending the scope of direct marketing communications sent to ‘a user that has logged in with a private account of personal log-in’. The provisions in Article 16 related to direct marketing are intended to limit marketing which is sent directly to a consumer to only what the consumer has consented to receive. It is logical that these provisions should apply to all forms of offline and online marketing which is sent directly to a particular recipient, such as voice calls, emails and letters delivered to a person’s home address. However, WFA does not believe that these provisions should also apply to all advertising. This could unintentionally extend the scope of Article 16 to many types of advertising which are not considered to be direct marketing: for example, display advertising on platforms with logged-in users and ‘pre-roll’ ads which appear at the beginning of online videos. WFA believes that since these adverts are not sent directly to individuals by a particular company in the same way as emails or voice calls, certain requirements of Article 16 would be not only inappropriate but also problematic to implement: for example, the requirement to disclose the legal or natural person on behalf of whom the communication is transmitted (Article 16).

Recommendations: Maintain a clear distinction between direct marketing and other types of advertising by limiting the definition of direct marketing to communication using an interpersonal communication service of any advertising or marketing material which is carried out by the Direct Marketer itself or on its behalf and which is directed to particular individuals.

---

2 Regulation 2016/679, Article 4.11
3 http://valueofadvertising.org/