The draft ePrivacy Regulation and its impact on online advertising and direct marketing

The European Commission is in a rush to reform the EU's ePrivacy Directive, and its draft new legislation proposes a major shake-up of existing laws on cookies, direct marketing and confidentiality of communications. Nick Johnson and Georgina Graham of Osborne Clarke LLP review the implications of the draft for online advertising and direct marketing.

On 10 January 2017, the European Commission published its proposal for updating the ePrivacy Directive. While the proposal represents just the first key stage of the European legislative process - and may be subject to change before it is finally approved by the European Parliament - a number of very significant changes are proposed. This article focuses in particular on those aspects that would have a substantial impact on online advertising and direct marketing practices. There are quite a few.

The ePrivacy Directive (Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector) is part of the EU Regulatory Framework for communications[1]. It aims to reinforce trust and security in digital services in the EU, by ensuring a high level of protection for privacy and confidentiality in the electronic communications sector, as well as seeking to ensure the free flow of movement of personal data and of electronic communications equipment and services in the EU. It includes rules on confidentiality of communications, posting and accessing cookies (and other information) on users' devices and sending unsolicited commercial communications (including by email and SMS).

The Directive was last revised in 2009 (by Directive 2009/136/EC), and readers may recall that that led to a major flurry of activity in reviewing and amending website operators' practices in relation to consent for cookies. More recently, the European Commission's Digital Single Market Strategy[2] included a commitment to review the Directive again following adoption of the General Data Protection Regulation ('GDPR'). It has therefore carried out a 'Regulatory Fitness and Performance Programme' ('REFIT') evaluation of the Directive, and in 2016 issued a stakeholder consultation on that evaluation and on possible changes.

The Commission had already identified several policy issues that it saw as potentially needing to be addressed, including: ensuring consistency of ePrivacy rules with the GDPR; enhancing security and confidentiality of communications; addressing inconsistent enforcement and fragmentation at national level and 'updating the scope of [the Directive] in light of the new market and technological reality.' As will be seen, those policy issues appear to underlie many of the changes proposed in the proposed draft.

Regulation, not a Directive

The first significant change to note is that the proposed legislation is drafted as a Regulation rather than as a Directive. This would mean that it would be directly applicable in each EU Member State, rather than requiring national legislation for its implementation. The potential for different implementation in different territories - as we have seen for instance with cookies laws - is therefore significantly reduced and we would as a result see a more closely harmonised approach across the EU in relation to areas such as cookie consent and email marketing requirements.

Eyewatering penalties

The proposal includes a much tougher sanctions regime that may make businesses sit up and take more notice of European cookie and anti-spam laws. In line with the position under the GDPR, infringements of the proposed new Regulation would be subject in some cases to fines of up to €10 million or 2% of worldwide annual turnover, and in other cases to fines of up to €20 million or 4% of worldwide annual turnover (whichever is higher). If the Bavarian Data Protection Authority's guidance of 1 September 2016 is to be believed, those percentages should be interpreted as percentages of group-wide annual turnover, rather than just the revenue of the entity in question. Even if not, those sanctions are set at a level much more severe than the fines currently available in many EU Member States.

The Regulation also gives end-users rights to sue for compensation for 'material or non-material damage' caused by any infringement, with the burden of proof on the defendant to prove that it is 'not in any way responsible for the event giving rise to the damage[3].'

Territorial scope

Again taking a leaf out of the GDPR's book, the draft Regulation would have a broad territorial reach. It would not apply just to entities in the EU: rather, it applies in the context of any electronic communications services provided to end-users within the EU, regardless of the service provider's location, and also to any cookie usage, device fingerprinting or similar in relation to devices located in the EU[4]. As with the GDPR, the draft Regulation would require some businesses outside the EU to appoint a representative within the EU. The representative would need to be located in one of the EU Member States where end-user customers are located.

Email and SMS marketing

On the face of it, the provisions that govern unsolicited communications by email and SMS[5] appear largely unchanged. The basic position remains that prior opt-in consent is required. The 'soft opt-in' exception is also still

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available for electronic mail sent to existing customers promoting similar products or services, subject to an opt-out being offered at the time of data capture and with each message.

However, there are a few important changes:

- GDPR-grade consent: The proposal applies GDPR standards of consent[6]. This means all consents must be 'freely given, specific, informed and unambiguous' and must be expressed by way of a 'statement or by a clear affirmative action.' It also means that it must be just as easy to withdraw consent as it was to give consent in the first place[7], and that making performance of a contract (including the provision of a service) conditional on consent to email marketing will likely render that consent invalid if the email consent is not necessary for the performance of the contract[8].

- OTT messaging services: The Regulation will also apply email marketing opt-in rules to so-called OTT services (see below).

The extension of opt-in rules to a wider range of B2B marketing proposed in an earlier leaked draft of the Regulation was dropped in the final proposal.

Telephone marketing

The proposed draft maintains the position under the ePrivacy Directive that Member States are free to provide for either an opt-in or an opt-out regime for unsolicited communication by way of voice-to-voice live calls. However, under the Regulation, businesses placing direct marketing calls would be obliged either to display calling line identification (or at least the 'identity of a line on which [they] can be contacted') or to present a 'specific code/or prefix identifying the fact that the call is a marketing call[9].'

OTT services

The proposal strays significantly outside the ePrivacy Directive's original remit in seeking to apply the new Regulation's electronic communications rules to so-called Over-the-Top communications services ('OTTs'). The proposal sees services such as Voice-over-IP and messaging apps as falling within this category, describing them as online services that are 'functionally equivalent' to 'traditional as voice telephony, text messages (SMS) and electronic mail conveyance services.'

To date, the services of OTTs have generally fallen clearly within the category of 'information society services' as opposed to 'electronic communications services.' The proposed Regulation seeks, in line with the draft European Electronic Communications Code[10], to move away from that distinction with the stated aim of addressing what it describes as a 'void of protection of communications conveyed through new services,' by treating OTT services as falling within the definition of 'electronic communications services.'

This would mean, amongst other things, that the opt-in regime for unsolicited email and SMS marketing would be applied to communication via messaging apps. It would also mean that unsolicited video call direct marketing via Skype, FaceTime etc may only be permissible on an opt-in basis - as the 'voice-to-voice live calls' exception[11] would appear not to apply.

Many of course may question whether extending the legislation's remit in this way is necessary or useful. From a public policy perspective, there do not seem to be significant spam problems on OTT services, and the OTT providers already appear to be strongly incentivised to try and keep things that way.

Cookies

There are sweeping changes to the 'cookies' rules (which of course cover a much wider range of technologies and activities than simply posting and accessing cookies):

- Fingerprinting: Reflecting the position under existing Article 29 Working Party guidance, the 'cookies' rules would apply expressly not just to cookies and other information stored or accessed on people's devices, but also to information about a user's device that can be used for 'device fingerprinting[12].'

- GDPR-grade consent and consent reminders: Just as with email marketing, the consent requirements of the GDPR are also applied to cookie consent. Amongst other things, this means that it must be as easy to withdraw consent as to give it. The proposed draft requires certain kinds of consent under the Regulation to be checked periodically, with end-users reminded of the possibility to withdraw their consent at 'periodic intervals of 6 months, as long as the processing continues[13].' However, this does not appear to apply to cookie consent.

- Browser settings: The draft expressly provides that consent can be provided through browser settings[14] 'where technically possible and feasible.' Recital 27 makes clear that browser settings as a means of consent to cookies for tracking purposes may only be valid if 'affirmative action' is taken by

1. Alongside the 'Framework' Directive (2002/21/EC), the 'Access' Directive (2002/19/EC), the 'Authorisation' Directive (2002/20/EC), the 'Universal Service' Directive (2002/22/EC), Regulation (EC) No 1211/2009 on Body of European Regulators for Electronic Communications ('BEREC') and Regulation (EU) No 531/2012 on roaming on public mobile communication networks.
2. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, COM(2015) 192 final.
3. Article 22.
4. Article 3.
5. Article 16.
6. Article 9.
7. See GDPR Article 7(3).
8. See GDPR Article 7(4).
9. Article 16(3).
10. Commission proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code (Recast) (COM/2016/0590 final - 2016/0288 (COD)).
11. Article 16(4).
12. Article 8(1).
13. Article 9(3).
14. Article 9(2).
15. Article 8(1)(c).
16. Article 8(1)(d).
17. MEMO/17/17, 10 January 2017.
18. Bearing in mind the broad interpretation adopted in the ECJ *Breyer* case.
19. Article 29(2).

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the user to actively select consent to tracking. Article 10 in turn requires that all browsers should be configured so that on installation they require users to select options relating to cookies, fingerprinting etc (eg 'Accept third party cookies'). Under the proposal, browser suppliers would be required to include this feature in all new software placed on the market. As for browser software already installed, the draft Regulation envisages that this would need to be brought into compliance 'at the time of the first update of the software, but no later than 25 August 2018.'

- First party functional/analytics cookies: As in the existing ePrivacy Directive, cookies that are necessary for providing an information society service would not require consent. However the scope of this exception appears to be wider now, as the cookies no longer need to be 'strictly' necessary and nor must the service be 'explicitly' requested by the end-user[15]. The Recitals suggest a broader approach that would allow cookies without consent for purposes such as form filling, language preference and shopping cart functionalities. The Regulation also permits cookies without consent for first party analytics[16].

It seems clear that the Commission wants to move away from users being bombarded with cookie consent banners and to shift to consent being handled instead via browser settings. This would of course mean people would have to set their browser settings on each and every device they use online. The proposal also appears to place a substantial burden on browser manufacturers, particularly if they have to arrange updates for legacy browser software that they have long since ceased to support.

Adblockers

The Regulation does not regulate the use of adblockers. However the Commission's press release explains that the proposal allows website providers to check - without obtaining consent - whether the end-user's device is able to receive their content. If an adblocker is installed that prevents an ad being received, the publisher can ask the user if they 'use an ad-blocker and would be willing to switch it off for the respective website[17].'

Direct marketing definition

Perhaps worryingly for online advertising businesses - and the digital economy generally - the draft Regulation contains a new definition of 'direct marketing communications,' namely: 'any form of advertising, whether written or oral, sent to one or more identified or identifiable end-users of electronic communications services [...].' Historically, online advertising in the form of banner ads and other formats has, like advertising in other media, been seen as quite distinct from direct marketing. However this new definition risks blurring the distinction - if 'sent' is seen as including 'served' and if all end-users are ultimately seen as 'identifiable[18]' - with the result that programmatic advertising would arguably become unlawful in the absence of prior opt-in consent from recipients. However Recital 32 offers some comfort that 'direct marketing' here is intended to refer to communications sent 'directly' and (arguably at least) that 'identified or identifiable' should be assessed from the point of view of the sender/marketer. These are points that could usefully be clarified in the Regulations.

Consistency of approach

The European Data Protection Board is given authority under Article 19 to exercise various tasks with a view to ensuring the consistent application of the Regulation's provisions. This should help ensure a more harmonised approach across the EU.

Timetable

The proposal targets the new Regulation as applying from 25 May 2018 - the same date that the GDPR comes into effect[19]. This is an aggressive timetable, but potentially achievable. Of course, if there are delays in the legislative process then potentially the new ePrivacy Regulation may or may not be caught by the sweep-up transposition provisions of the UK's proposed 'Great Repeal Bill,' and so may cease to have effect in the United Kingdom following the UK's exit from the European Union.