AMENDMENTS TO THE EPRIVACY REGULATION PROPOSAL & DRAFT REPORT

egta – European association of television and radio sales houses

egta is the media trade body for television and radio advertising, representing 137 companies in Europe and beyond. egta members come from both public and private sectors and cover respectively 75% and 50% of the total TV and radio ad spend in Europe, thus playing a fundamental role in the sustainable funding of the European audiovisual and radio industries.

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1) LEGAL GROUNDS FOR COLLECTING INFORMATION FROM END-USERS' TERMINAL EQUIPMENT

ART. 8(1)

Text proposed by the European Commission	Amendment
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: […]	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: […] ***(e) if it is necessary for the performance of a contract to which the end-user is party or to act at the request of the end-user prior to entering into a contract;*** ***(f) if it is necessary for legitimate interests pursued by the information society service provider;*** ***(g) it is necessary for the provision of personalised/targeted advertising, where the processing is strictly limited to anonymised or pseudonymised data and the entity concerned undertakes to comply with specific privacy safeguards.***

Justification:

- The GDPR was adopted in May 2016 following 4 years of difficult negotiations. Its 173 recitals and 99 articles cover extensively the protection of personal data and represent both a huge step in consumer protection and an implementation challenge for European companies in the coming years.
- The GDPR strengthens the conditions for consent which may be more difficult for broadcasters to obtain in the future, especially if consent centralisation and/or privacy by default provisions are introduced in the new ePrivacy framework. While in the GDPR, this evolution is balanced by the existence of alternative legal grounds for processing data, it is not the case in the proposed ePrivacy regulation. Legal grounds for data collection should – to the greatest extent possible – be aligned between the two instruments in order to ensure both legal consistency and a workable ecosystem.

- Media service providers and sales houses have committed significant efforts and resources in adapting their operations to the new GDPR provisions which will come into force in May 2018, in particular by investing in anonymisation and pseudonymisation tools. Diverging provisions in the future ePrivacy legislation could render these investments redundant, on top of creating legal uncertainty.
- Specific privacy safeguards could be drafted based on the suggestions from the European Commission's impact assessment[1]. These safeguards could help avoid consent fatigue by offering an alternative to the consent regime while maintaining a high level of protection. The consent regime, where one click suffices to give away personal information, should not be seen as the only recourse to protect users' privacy.

2) MAINTAINING MEDIA SERVICE PROVIDERS' CAPACITY TO ASK FOR INDIVIDUAL/SPECIFIC CONSENT PER WEBSITE/APP

ARTICLE 9 (2)

Text proposed by the European Commission	Amendment
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 using the appropriate technical settings of a software application enabling access to the internet. 3. […]	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 using the appropriate technical settings of a software application enabling access to the internet. ***This specific form of consent is without prejudice to information society service providers' capacity to ask for end-user consent. End-user consent given to a specific information society service provider should be binding on and prevail over privacy settings of software permitting electronic communications.*** 3. […]

ARTICLE 10 (2)

Text proposed by the European Commission	Amendment
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-	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-

[1] European Commission impact assessment part 1/3 SWD(2017)3, p.24, footnote 87: "all or some of the following safeguards may be included: 1) no data relating to the specific content of the communications is collected; 2) the data stay anonymised or pseudonymised and that no effort or technique will be applied to re-identify the users; 3) the processing complies with the principle of proportionality and subsidiarity; 4) access and further information are guaranteed upon request; 5) the data processed do not constitute special categories of personal data as defined under the GDPR; 6) the entity concerned has carried out a data protection impact assessment under Article 35 of the GDPR; 7) prior authorisation from a supervisory authority. Additional safeguards may be specified, including the differentiation on the basis of the risk, in Commission's delegated act"

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user or processing information already stored on that equipment. 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. 3. In the case of software which has already been installed on 25 May 2018, the requirements under paragraphs 1 and 2 shall be complied with at the time of the first update of the software, but no later than 25 August 2018.	user or processing information already stored on that equipment. 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. ***This shall not preclude information society service providers from asking for end-user's consent in order to access individual services.*** 3. In the case of software which has already been installed on 25 May 2018, the requirements under paragraphs 1 and 2 shall be complied with at the time of the first update of the software, but no later than 25 August 2018.

Justification

- The architecture introduced by the Commission would make browsers and other software permitting electronic communications the gatekeepers of any data interaction between end-users and media service providers. It would put European media service providers at a disadvantage with internet giants who would have much easier and wide-ranging access to first-party data to monetise content, while often owning the browsing services.
- Consent at browser-level raises questions as to its consistency with the GDPR: it could be considered not specific enough (it disregards the differences between media service provider's data policy), it may not properly inform end-users (it comes before websites can inform consumers on the use of the data collected, the identity of the collector/processor, etc.), and it is linked with the source (1st-3rd party) instead of the purpose of the collection.
- It is unclear whether browsers/software will be able to appropriately distinguish what technologies are necessary for the provision of a service requested by the end-user. This risks to create website dysfunctions unless users change their browsers settings.
- The explanatory memorandum of the ePrivacy regulation proposal recognises 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". However, to ensure that individual consent is an actionable right for media service providers, it must be included in an article.
- Recital 22 of the regulation proposal foresees that "the choices made by end-users when establishing general privacy settings of a browser or other application should be binding on, and enforceable against, any third parties". Nevertheless, if consumers choose to consent to the collection of data for a specific website, there is no reciprocal obligation lying on software providers/browsers to enforce this choice. This is unfair to media service providers and should be addressed in the final text.
- While egta welcomes the introduction by the rapporteur of the possibility for users to express specific consent (amendment 98 of the draft LIBE report), the wording used could be improved in particular to address the reciprocity of consent mentioned in the previous bullet point.

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3) MAINTAINING MEDIA SERVICE PROVIDERS' CAPACITY TO CONTROL ACCESS TO CONTENT.

ARTICLE 9 (1) (EC) / ARTICLE 8 (EP)

Text proposed by the European Commission	Text proposed by the LIBE rapporteur	Amendment
Article 9 (1) 1. The definition of and conditions for consent provided for under Articles 4(11) and 7 of Regulation (EU) 2016/679/EU shall apply. (..)	**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: (…) (b) the ***user*** has given his or her ***specific*** consent***, which shall not be mandatory to access the service***; or (…) ***1a. No user shall be denied access to any information society service or functionality, regardless of whether this service is remunerated or not, on grounds that he or she has not given his or her consent under Article 8(1)(b) to the processing of personal information and/or the use of storage capabilities of his or her terminal equipment that is not necessary for the provision of that service or functionality.***	**Article 9 (1)** 1. The definition of and conditions for consent provided for under Articles 4(11) and 7 of Regulation (EU) 2016/679/EU shall apply. ***Access to an information society service may still be made conditional on the well-informed acceptance of a cookie or similar device, if it is used for a legitimate purpose, such as the provision of advertising and audience segmentation.***

Justification

- Recital 25 of the current ePrivacy Directive 2002/58/EC mentions that "*access to specific website content may still be made conditional on the well-informed acceptance of a cookie or similar device, if it is used for a legitimate purpose*". There is no legitimate reason to change this.
- The main provision on access to content in the GDPR is article 7(4) which states: "when assessing whether consent is freely given, utmost account shall be taken of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract".

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- Broadcasters consider that providing lawful targeted advertising is necessary in order to finance free content on the internet. On the other hand, taking away the capacity to block access to content would be a disproportionate restriction on the freedom to conduct a business, guaranteed under article 16 of the EU Charter of fundamental rights.
- The EU offers its citizens the highest standards regarding data protection. Introducing new obligations forcing media service providers to provide access to their online content – as proposed in the draft report of the LIBE Committee[2] – would go beyond what is necessary to protect users and would step over companies' freedom of choice by imposing certain business models (log-in or pay-for content) over others (freely available content financed through lawful targeted advertising).

4) ADBLOCKING

RECITAL 21

Text proposed by the European Commission	Text proposed by the LIBE rapporteur	Amendment
(21) […] Information society providers that engage in configuration checking 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.	(21) […] Information society providers ***could*** engage in configuration checking ***in order*** to provide the service in compliance with the ***user's*** settings and the mere logging ***revealing*** the fact that the user's device is unable to receive content requested by the ***user***, should not constitute ***illegitimate access***.	(21) […] Information society providers that engage in configuration checking 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.***

Justification

- Recital 21 of the European Commission's proposal only allows website providers to check if the end-user's device is able to receive their content, including advertisements, without obtaining the end-user's consent. It does not clearly affirm media service providers' right to deny access to customers who use adblockers. The same is true for the rapporteurs proposed wording.
- Adblocking is a business model based on the capacity for users to differentiate advertising from content and to block the serving of advertisements (be they targeted or not).

[2] Amendments 23,78 and 83 of the Draft report of the Committee for Civil Liberties, by Ms Marju Lauristin.

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- Advertising is the main source of revenue for free content online, as acknowledged in recital 18 of the proposal: "in the digital economy, services are often supplied against counter-performance other than money, for instance by end-users being exposed to advertisements".
- Therefore, it seems only fair to give the media an equivalent capacity to deny consent to users who refuse to pay the price (being exposed to an ad) for the content they want to access. Denying access to content is generally considered a risky decision for media service providers because it can turn away audiences from their services; however, each company should have the right to make this choice according to its own economic assessment.

5) AUDIENCE MEASUREMENT

ARTICLE 8(1)(D)

Note: egta supports the Coalition for audience measurement's wording hereafter along with, among others, the European Broadcasting Union and ESOMAR.

Text proposed by the European Commission	Amendment
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: […] (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, except on the following grounds: […] (d) if it is necessary for ~~***web***~~ audience measuring, provided that such measurement is carried out by ***or on behalf of*** the provider of the information society service requested by the end-user.

Further taking into account amendments proposed by MEPs Marju Lauristin and Axel Voss, the following amendments could also be envisaged noting the Coalition's preference for the amendment to the Commission's proposal suggested above.

Marju Lauristin amended LIBE Article 8(1)d	Amendment
(d) if it is ***technically*** necessary for web audience measuring ***of the information society service requested by the user***, provided that such measurement is carried out by the ***provider, or on behalf of the provider, or by an independent web analytics agency acting in the public interest or for scientific purpose; and further provided that no personal data is made accessible to any other party and that such web audience measurement does not adversely affect the fundamental rights of the user;***	(d) if it is ~~***technically***~~ necessary for ~~***web***~~ audience measuring ***of the information society service requested by the user***, provided that such measurement is carried out by the ***provider, or on behalf of the provider, or by an independent web analytics agency acting in the public interest or for statistical or scientific research purposes; and further provided that no personal data is made accessible to any other party and that such audience measurement does not adversely affect the fundamental rights of the user;***

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Axel Voss amended JURI Article 8(1)d	Amendment
d) if it is necessary ***in order to measure the reach of an information society service desired by the end-user, including measurement of indicators for the use of*** information society ***services in order to calculate a payment due***.	(d) if it is necessary ***in order to measure the ~~reach~~ audience of an information society service desired by the end-user, including measurement of indicators for the use of*** information society ***services in order to calculate a payment due***.

Justification

- Broadcasters rely on independent measurement provided by technology partners in order to ensure a reliable and unbiased currency to monetise content towards advertisers and agencies.
- The issue with the Commission's wording is that such independent measurement companies would be considered third parties, which would make the exception ineffective in practice. In order to solve this issue, it is necessary to extend the exception to providers acting "on behalf of" the provider of the information society service requested by the end-user.
- Also, it is of particular importance to broadcasters that audience measurement can be carried cross-device in order to aggregate viewing figures from TV, VOD and catch-up and therefore to be able to compete with online actors. This is why this exception should broadly apply to audience measurement and not be restricted to "web" audience measurement.

6) EXCEPTION FOR THE PROVIDING AN INFORMATION SOCIETY SERVICE REQUESTED BY THE END-USER

ARTICLE 8(1)(C)

Text proposed by the European Commission	Text proposed by the LIBE rapporteur	Amendment
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: […] (c) it is necessary for providing an information society service requested by the end-user; or	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: […] (c) it is ***strictly technically*** necessary for providing an information society service requested by the user; or	**Maintain the Commission's wording.**

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RECITAL 21

Text proposed by the European Commission	Amendment
Exceptions to the obligation to obtain consent to make use of the processing and storage capabilities of terminal equipment or to access information stored in terminal equipment should be limited to situations that involve no, or only very limited, intrusion of privacy. For instance, consent should not be requested for authorizing the technical storage or access which is strictly necessary and proportionate for the legitimate purpose of enabling the use of a specific service explicitly requested by the end-user. This may include the storing of cookies for the duration of a single established session on a website to keep track of the end-user's input when filling in online forms over several pages. Cookies can also be a legitimate and useful tool, for example, in measuring web traffic to a website. Information society providers that engage in configuration checking 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.	Exceptions to the obligation to obtain consent to make use of the processing and storage capabilities of terminal equipment or to access information stored in terminal equipment should be limited to situations that involve no, or only very limited, intrusion of privacy. For instance, consent should not be requested for authorizing the technical storage or access which is ~~***strictly***~~ necessary and proportionate for the legitimate purpose of enabling the use of a specific service explicitly requested by the end-user. This may include the storing of cookies for the duration of a single established session on a website to keep track of the end-user's input when filling in online forms over several pages. ***This may also cover situations where end-users use a service across devices for the purpose of service personalisation and content recommendation.*** Cookies can also be a legitimate and useful tool, for example, in measuring web traffic to a website. Information society providers that engage in configuration checking 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.

Justification

- Media service providers use data not only for advertising purposes but also to improve the user experience and provide more targeted and individualised video viewing experiences – from the type of content that is purchased and proposed to users to the way the video is discovered and delivered on the platform, or to the fact that one user might start a video on one device and finish it on another. This element is crucial in an era of global competition for viewing audiences, because users increase viewing time and have a more positive appreciation of their entertainment experience when it is better tailored to their taste and habits.
- Therefore, being able to access and use non-intrusive data (including data on the technical performance of the video e.g. page loading time, video completion ratio, etc.) in order to improve and ensure continuity of user experience across devices and screens. This would serve both media service providers and users, while still ensuring a high respect for privacy.
- To that purpose, egta proposes going back to the European Commission's wording in article 8(1)c and adding a sentence in recital 21 clarifying that this type of activity can be considered necessary for the provision of an information society service requested by the end-user. Alternatively, this exception could be included directly in article 8(1)c.

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7) DEFINITIONS

a) ELECTRONIC COMMUNICATION SERVICE – ARTICLE 4 (3)

Text proposed by the European Commission	Text proposed by the LIBE rapporteur	Amendment
Article 4(3) (…) (b) the definitions of 'electronic communications network', 'electronic communications service', 'interpersonal communications service', 'number-based interpersonal communications service', 'number-independent interpersonal communications service', 'end-user' and 'call' in points (1), (4), (5), (6), (7), (14) and (21) respectively of Article 2 of [Directive establishing the European Electronic Communications Code]; *[Note: the definition of electronic communications service in the European Electronic Communication's Code proposal from December 2016 reads as follows:]* 'electronic communications service' means a service normally provided for remuneration via electronic communications networks, which encompasses 'internet access service' as defined in Article 2(2) of Regulation (EU) 2015/2120; and/or 'interpersonal communications service'; and/or services consisting wholly or mainly in the conveyance of signals such as transmission services used for the provision of machine-to-machine services and for broadcasting, ***but excludes services providing, or exercising editorial control over, content transmitted using electronic communications networks and services***.	Article 4(3) (…) (-aa) 'electronic communications service' means a service provided via electronic communications networks whether for remuneration or not, which encompasses one or more of the following: an 'internet access service' as defined in Article 2(2) or Regulation (EU) 2015/2120; an interpersonal communications service; a service consisting wholly or mainly in the conveyance of the signals, such as a transmission service used for the provision of a machine-to-machine service and for broadcasting, but excludes information conveyed as part of a broadcasting service to the public over an electronic communications network or service ***except to the extent that the information can be related to the identifiable subscriber or user receiving the information.***	**Maintain the European Commission's proposal from the EECC text.**

Justification

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- The Commission's proposal follows the logic of the current definition in the Framework Telecoms Directive 2002/21/EC which ***excludes from the scope of the regulation "services providing, or exercising editorial control over, content transmitted using electronic communications networks and services"***.
- The Working Party 29 already pointed out in its Opinion 1/2008 on data protection issues related to search engines (adopted on 04.04.2008)[3] that article 5(3) of the current ePrivacy Directive is a general provision which is applicable not only to electronic communication services but also to any other service when the respective techniques are used.
- Therefore, there is no need to extend the definition of electronic communications services in order to cover media services, as **they are already covered by the articles that are relevant to them**. On the contrary, extending the definition could be dangerous for media service providers as it would make the whole Directive applicable to them, even when the rules are not directed at them (especially rules related to telecommunications providers).

b) DIRECT MARKETING COMMUNICATIONS – ARTICLE 4(3)

Text proposed by the Commission	Text proposed by the LIBE rapporteur	Amendment
Article 4(3) (…) (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.;	Article 4(3) (…) (f) 'direct marketing communications' means any form of advertising, whether in written, oral ***or video format,*** **sent*****, served or presented*** 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 4(3) (…) (f) 'direct marketing communications' means any form of ~~advertising~~ ***commercial communications***, 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.; [*Note: recital 32 should be modified accordingly*]

Justification

- Direct marketing communications are a specific category of commercial communications that convey a specific message to a particular individual and therefore they should be clearly distinguished from other types of advertising or marketing techniques.
- This distinction is necessary as some of the requirements imposed on direct marketing communications could not be extended to other types of commercial communications. For example, the obligation to inform end-users of the identity of the legal or natural person on behalf of whom the communication is transmitted would be unworkable in a real-time bidding and programmatic advertising environment.

[3] As mentioned in WP 29's Opinion 2/2010 on online behavioural advertising

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