

# EUROPEAN ECONOMIC AREA

## STANDING COMMITTEE OF THE EFTA STATES

Ref. 17-2577  
22 September 2017

### SUBCOMMITTEE II ON THE FREE MOVEMENT OF CAPITAL AND SERVICES

#### EEA EFTA Comment

**on the Commission proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications) (COM(2017) 10 final)**

#### 1. INTRODUCTION

1. The EEA EFTA States welcome the European Commission's objective to achieve good, effective protection of confidentiality in its proposal for a Regulation on Privacy and Electronic Communications. The EEA EFTA States support the aim of ensuring effective protection against unsolicited commercial communication, and of simplifying and updating the regulatory framework to keep up with technological changes and new services.
2. The EEA EFTA States are of the opinion that many of the proposed changes in the legal framework will lead to improved protection of confidentiality in electronic communications. This is of great importance because efficient use of electronic communications in today's society depends on the individual user being able to trust that their privacy and confidentiality are being protected.
3. At the same time, it is essential that the regulation strikes the right balance between the protection of consumers and communications on the one hand, and innovation and development of services on the other. In this regard, the EEA EFTA States would like to raise their concerns about the following issues.

#### 2. PUBLICLY AVAILABLE DIRECTORIES – ARTICLES 15 AND 16

4. A telephone number can be used as a unique identifier of the end user. Telephone directories have proven to be important databases for innovation and development of new services. This has especially been the case in the EEA EFTA States, where these databases have high quality and credibility among their populations.
5. The EEA EFTA States are of the opinion that it should be up to each Member State to choose between a consent-based approach (opt-in) or a reservation-based approach

(opt-out). In the EEA EFTA States, publicly available directory services are well integrated in society and business. Many value-added services are based on information from these types of directory services, for example payment services by mobile phone. The EEA EFTA States believe that they have well-functioning directory inquiry services, which are important both as an information database and as a basis for the further development and innovation of services. End-users who wish to avoid appearing in a directory service may do so by addressing a single inquiry (“reservation”) to their electronic communications provider. This system has worked well, also when it comes to privacy.

6. Below is the EEA EFTA States’ proposal to amend Article 15 regarding publicly available directories:

*1. Each Member State shall ensure that subscribers have the opportunity to determine whether their personal data are included in a public directory, and to what extent such data are relevant for the purpose of the directory as determined by the provider of the directory service, and to verify, correct or withdraw such data. Providers shall give end-users who are natural persons the means to verify, correct and delete such data.*

*2. The providers of a publicly available directory shall inform end-users who are natural persons whose personal data are in the directory of the available search functions of the directory before enabling such search functions related to their own data.*

7. Notwithstanding the foregoing, the EEA EFTA States believe that in order to ensure the right of consumers to object to telemarketing calls (Article 16(4)), it is important that consumers are able to identify traders placing telemarketing calls to them. Consequently, it is essential that the regulation does not give *traders placing telemarketing calls to consumers* the right to be excluded from publicly available directories. If Article 15 is not amended as proposed above and legal persons are still to be given the right to exclude their data from publicly available directories, the EEA EFTA States propose that Article 16 (3) (a) be amended in order to ensure a clear exception from Article 15 (3). This can be done by stipulating in Article 16 (3) that traders placing telemarketing calls to consumers must use visible phone numbers, which consumers can find easily and free of charge in publicly available directories.

### **3. UNSOLICITED COMMUNICATIONS – ARTICLE 16**

8. Also where telemarketing (Article 16 (4)) is concerned, the EEA EFTA States are of the opinion that it should be up to each Member State to choose between a consent-based approach (opt-in) or a reservation-based approach (opt-out). The regulation should not confine Member States to one specific solution for telemarketing, especially not one that is less consumer friendly, such as an opt-out approach compared to an opt-in approach.

9. The EEA EFTA States believe that the regulation should include specific requirements on the harvesting of consent to telemarketing (so-called “lead generation”). In Norway, it has been reported that online competitions and surveys have brought about

a significant increase in complaints regarding telemarketing. To participate, consumers are required to give their consent to direct marketing from a large number of different traders. Consent is often obtained by a third party on behalf of several traders, and seemingly consumers do not have a clear understanding of the extent of this consent.

10. The EEA EFTA States' proposal is to amend Article 16 (1) by stipulating that end-users' consent to direct marketing communication can only be given to one trader at a time. If such a requirement is not included in the regulation, the EEA EFTA States would like to emphasise the importance of the regulation not precluding national rules with such a requirement, in order to overcome problems caused by lead generation.
11. The EEA EFTA States believe that it is of utmost importance for consumer privacy to limit telemarketing to specific days and time periods. Consequently, the regulation should not preclude national rules prohibiting traders from placing telemarketing calls at certain specific times, such as early morning, evenings, night time, weekends and public holidays. The Commission could also consider incorporating rules on this into the regulation.
12. The EEA EFTA States are of the opinion that the regulation should clarify what kinds of marketing communications, such as those made via social media, are covered by Article 16 (1).

#### **4. INDEPENDENT SUPERVISORY AUTHORITIES – ARTICLE 18**

13. The EEA EFTA States are of the opinion that it should be up to each Member State to decide which national authority is best suited for supervising the tasks following from the proposed regulation (Article 18). National circumstances, such as market developments or current organisation, may influence the choice of national authority. However, the EEA EFTA States still believe that it is important to secure an appropriate coordination mechanism under the regulation at European level to ensure harmonisation.
  14. The EEA EFTA States propose the following amendments to Article 18 regarding independent supervisory authorities:
    1. *Each Member State shall provide for one or more independent authorities to be responsible for monitoring the application of this Regulation. The tasks and powers of the supervisory authorities shall be exercised with regard to end-users.*
    2. *The supervisory authority or authorities referred to in paragraph 1 shall cooperate whenever appropriate with other relevant national regulatory authorities.*
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