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COMMENTS OF FENCA (Federation of European Collection Associations) ON THE EPRIVACY REGULATION CONCERNING THE RESPECT OF PRIVATE LIFE AND THE PROTECTION OF PERSONAL DATA IN ELECTRONIC COMMUNICATIONS

Executive Summary

On 10 January 2017 the European Commission presented its draft proposal for a Regulation of the European Parliament and the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (COM(2017)10 final) (hereafter ePrivacy Regulation).

This new regulation is due to enter into force on 25 May 2018, together with the new European General Data Protection Regulation (hereafter GDPR).

The legal, legitimate and considered use of personal data and other data forms the basis of the important business activity of the entire credit management, debt collection and debt purchase sector ("the credit sector"). In most cases a customer transfers the data necessary for the management and recovery of their receivables electronically to a credit sector company.

Digital and electronic means of communication and data transfer, however, are increasingly being used also for the communication between credit sector companies and their customers, i.e. consumers who are in arrears (also known as debtors). One common example would be the use of a customer portal, through which the consumer can gain information about their account, access sources of debt advice, and pay an outstanding debt or installments online at their convenience.

In order to comply with the new provisions of the GDPR, all small, medium-sized and large credit sector companies already have to adapt to the new rules and are in the process of changing their business systems and processes. All software producers and other service providers to the entire sector have to do the same.

If the ePrivacy Regulation were be implemented in its proposed form, companies and service providers in our sector would be confronted with a number of additional set of rules and regulations regarding data handling. Coming on top of the adaption of credit sector companies to the GDPR regime – which in itself has created a sense of insecurity as to how many of the general provisions therein are to be interpreted and applied to the sector – the implementation of the provisions of the ePrivacy Regulation would add further confusion and increase legal uncertainty.

For this reason FENCA first and foremost asks the Commission and the co-legislators to adopt **full alignment** between the provisions of the GDPR and the proposed ePrivacy Regulation, which can only be achieved by **a thorough revision of the current ePrivacy proposal.**

Consideration of Articles

Article 4: Definitions

The definitions of the relevant concepts and terms, as set out in Art. 4, should be seen as technical definitions which require a high degree of expertise, clarity and differentiation . FENCA's view is that the definitions as they stand do not adequately reflect the business practices of the credit sector and other parts of the financial services industry.

Recommendation: All definitions should be aligned with the General Data Protection Regulation. In particular, the term "provider" of electronical services is seen as critical to the credit sector and should, like most terms, undergo a thorough review.

Article 6: Permitted processing of electronic communications data

From the credit sector point of view, it is necessary to clarify that data transferred by a creditor to a credit sector company is to be treated in full alignment and accordance with the provisions of Art. 6(1) of the GDPR.

As a lex specialis, the ePrivacy Regulation should not provide stronger measures than the GDPR, nor should it increase the preconditions for the transfer of data since this would cause detriment to the customers of credit sector companies and could jeopardize the entire business model of the credit sector.

The lack of any provision for further processing of data of any kind in Art. 6 of the ePrivacy Regulation proposal would mean that the transfer of legitimately held data by a creditor to a credit sector company was no longer permitted. This would also affect the credit sector company's own collection of data, for example through its online customer portal. The ePrivacy Regulation should also make clear that the storage of communication data in the respective claims files and systems (e.g. for the purpose of providing evidence) is not prohibited.

FENCA therefore calls for clarification within the ePrivacy Regulation that the transmission of electronic communication data for the purposes of debt claims and legal prosecution should not be restricted, in particular with reference to:

- Art 6(1)(c) of the GDPR, which states that processing is lawful if the 'processing is necessary for compliance with a legal obligation to which the controller is subject';

- Art 6(1)(f) of the GDPR, which states that processing is lawful if the 'processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party [...].

Recommendation: Aligning the entire Article 6 of the ePrivacy Regulation with the provisions of Article 6 of the GDPR, in particular including legitimate interests and the

compliance with legal obligations as grounds on which transmission and processing of electronic communications data is permitted.

Article 7: Storage and erasure of electronic communications data

From FENCA's point of view the provision does not clearly indicate when, i.e. under which circumstances, and how electronic communications data has to be deleted. Here, too, a conflict with the GDPR must be avoided, while at the same time the necessary legal certainty for companies has to be assured.

For the credit sector in particular the question arises whether an electronic file has to be deleted in its entirety, although this is required by the provisions of the GDPR.

Recommendation: Aligning Art 7 of the ePrivacy Regulation with the GDPR with reference to FENCA's recommendation above, i.e. the call for clarification that the transfer of electronic communications data for the purposes of debt claims and legal prosecution should not be restricted.

Article 9: Consent

The provision in Article 9(3) to remind end-users of the possibility to withdraw their consent at regular intervals of six months would lead to numerous undesired notifications to the person concerned, especially those consumers who are in arrears and therefore already receiving numerous notifications from creditors and credit sector companies.

Recommendation: This provision of paragraph 3 should be deleted.

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

Recommendation: The provisions of Art 10(2) are too far-reaching and should be deleted without replacement.

Article 16: Unsolicited communications

With regard to the direct marketing industry, the possibility provided in Article 16 to engage with customers via electronic means of communication, if they do not object, is certainly a welcome provision.

Customers contacted by credit sector companies should, however, be exempt from the provisions of Article 16 (2). In the course of the collection process, customers are also contacted by email or by telephone for further processing.

From the point of view of FENCA, it is necessary to clarify that the provision of Article 16 relates solely to direct marketing, but not to the handling of contracts and the management of claims, which must not be hindered by this provision.

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About FENCA

Since 1993 the Federation of European National Collection Associations (FENCA) has represented the interests of credit management, debt collection and debt purchase sector on the European level, liaising with the institutions of the European Union, stakeholders in the European financial services industry, consumer groups and the public. FENCA's 23 national member associations represent over 75% of all credit management, debt collection and debt purchase companies in Europe and hold more than 80% of the market share within the EU, with in excess of 80,000 staff providing services for more than five million businesses, including SMEs, European and overseas banks, as well as the public sector across the EU.

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