

# CTAM Europe Data Protection Workshop

11 December 2017



# Workshop Presenters



**Ann LaFrance**  
Partner, London  
Data Privacy & Cybersecurity  
T: +44 207 655 1752  
E: [ann.lafrance@squirepb.com](mailto:ann.lafrance@squirepb.com)



**Monika Kuschewsky**  
Partner, Brussels  
Data Privacy & Cybersecurity  
T: +32 2 627 76 46  
E: [monika.kuschewsky@squirepb.com](mailto:monika.kuschewsky@squirepb.com)



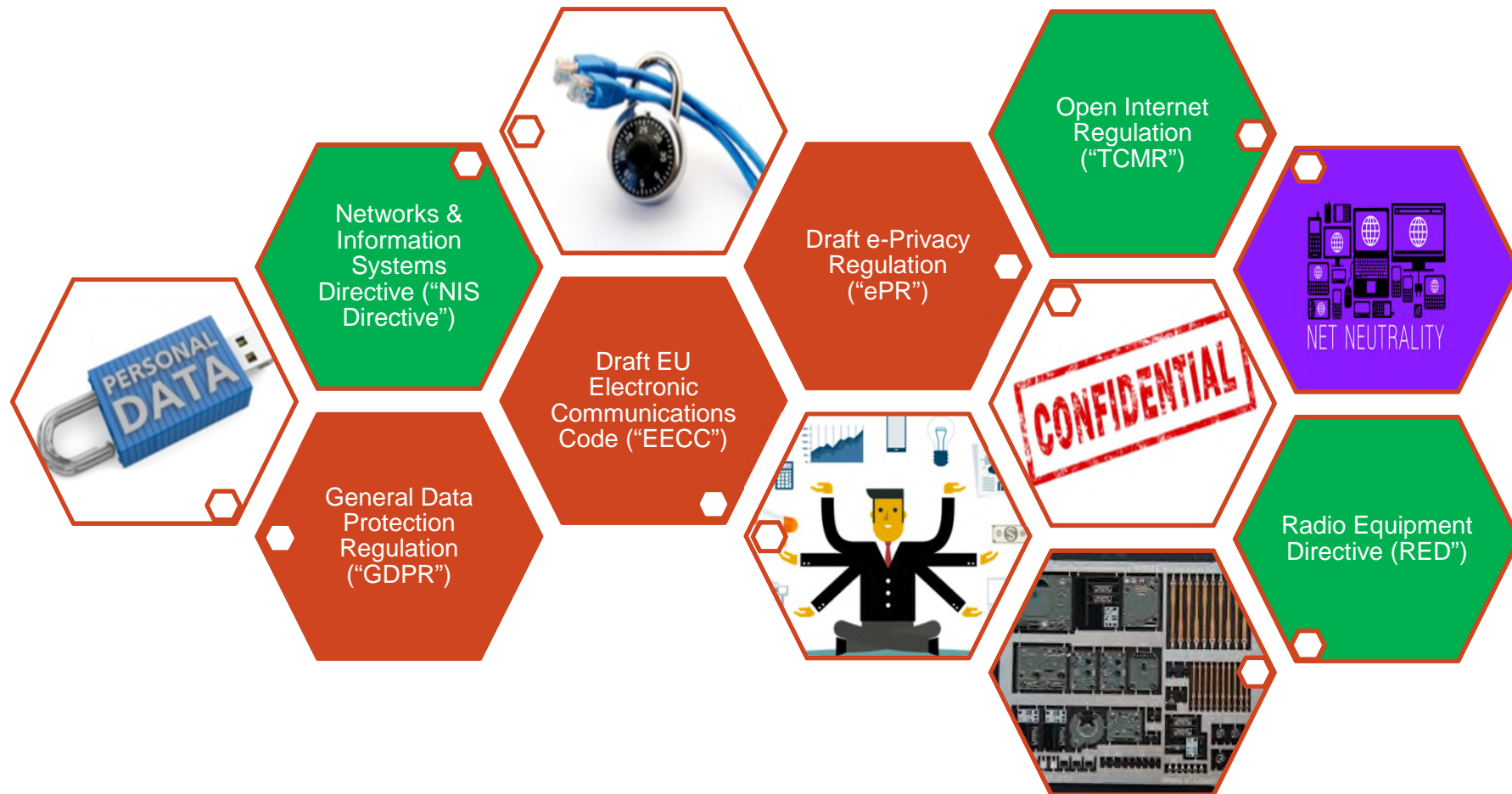
**Robert Wegenek**  
Partner, London  
Intellectual Property and Technology  
T: +44 207 655 1534  
E: [robert.wegenek@squirepb.com](mailto:robert.wegenek@squirepb.com)



**Christina Economides**  
Public Policy Advisor  
European Public Policy  
T: +32 2 627 11 05  
E: [christina.economides@squirepb.com](mailto:christina.economides@squirepb.com)

- Part 1 – GDPR
  - Key GDPR Slides
  - Direct Marketing
  - Profiling
  - Relevant Guidance and Responses
- Part 2 – e-Privacy Regulation (ePR)
  - Interplay between GDPR and proposed ePR
  - Targeted advertising
  - Online behavioral monitoring
  - Cookies
  - Unsolicited Communications
- Part 3 – Parallel Transparency in Advertising Trends

# 1. Relevant Legislative Instruments



# PART 1

# GDPR

Confidential / Privileged Attorney  
Client Communication / Work

Lawfulness, fairness and transparency

Purpose limitation

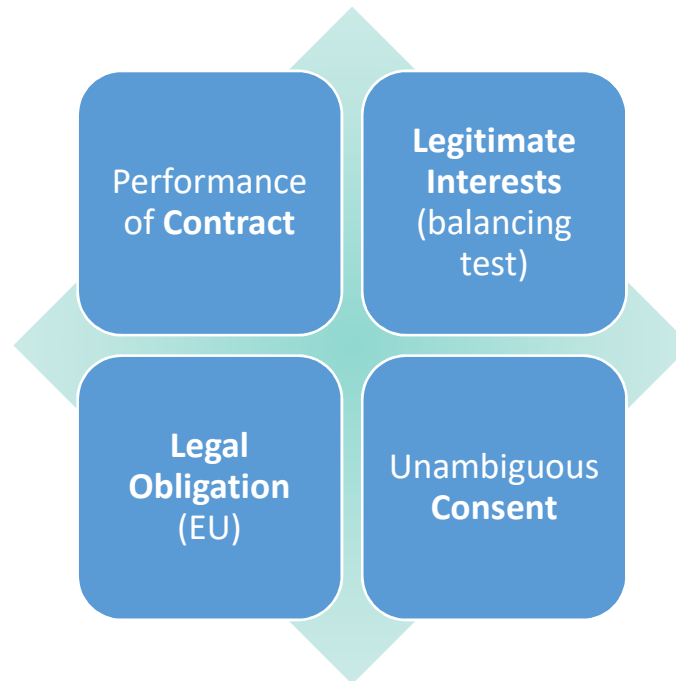
Data minimisation

Accuracy

Storage limitation (data retention)

Integrity and confidentiality (security)

## What are the business-related legal bases for processing (non-sensitive) personal data?



- For **special categories of personal data**, *explicit consent* is required.
- For **minor children** (under [13-16] years), *parental consent* is required.
- Recital (47): processing for direct marketing purposes may be regarded as “legitimate interest.”

- How will the new or enhanced individual rights established under GDPR impact marketing campaigns?
- Examples:
  - Notice and Transparency
  - Right of Access
  - Right of Erasure
  - Rights to Restrict / Object to Processing



- When must Notice be provided?
  - When personal data is collected *from a data subject or a third party*, regardless of lawful basis. **Some exceptions apply**, e.g.:
    - Where data subject already has notice of the intended processing (e.g., Joint Controllers)
    - Where Notice is impossible or requires disproportionate effort in the case of data obtained from third parties

- What information must be provided?
  - Identity and contact details of controller and data protection officer
  - Purposes of processing and legal basis
  - If basis is legitimate interests, specification of same
  - Recipients or categories of recipients of the data
  - International transfers and safeguards
  - Retention periods or criteria
  - Existence of individual automated decision-making (ADM) and logic involved
  - How to exercise rights, to complain, and more...!

# Right of Access

(Article 15)

- Applies regardless of lawful basis
- Individuals have the right to obtain:
  - Confirmation that their data is being processed
  - Access to their personal data [to verify lawful basis – Recital (63)]
  - Supplementary information, including:
    - Purposes of processing
    - Categories of personal data concerned
    - Period of data retention of criteria used to determine period
    - Right to lodge a complaint



- Individuals have a right to have personal data erased by the Controller without undue delay, where:
  - Personal data no longer necessary for purpose collected
  - Individual withdraws consent and no lawful basis remains
  - Individual objects and there is no overriding legitimate interest to process
  - Personal data was collected/processed in violation of GDPR
  - To comply with legal obligation
  - Personal data of a minor child has been collected/processed

**NOTE:** Does not provide an absolute ‘right to be forgotten’

# Right of Restriction of Processing

(Article 18)

Controller will be required to restrict the processing of personal data where:

- An individual contests the accuracy of the data
- An individual objects to the processing
- Processing is unlawful and individual opposes erasure and requests restriction instead
- If you no longer need personal data but individual requires the data to establish, exercise or defend a legal claim

# Right to Object to Processing based on Legitimate Interests

(Article 21)

- Data subjects have a **right to object** at any time if processing is based on the “legitimate interests” of the controller or a third party
- In such cases, controller has burden to demonstrate:
  - *compelling* interest overriding rights/interests/freedoms of data subjects, or
  - legal defence exception
- If personal data is processed for direct marketing purposes, processing must stop (no override)
- Objection rights must be clearly conveyed to data subjects in Notice

# Right not to be subject to ADM

(Article 22)

- Data Subjects have right not to be subject to **decision based solely on** automated processing, including profiling
- Article 29 Data Protection Working Party (WP29) published draft Guidelines on ADM & Profiling – responses now submitted
- Draft Guidelines recognise distinction between “Profiling” and “ADM”
- Takes view that Art. 22 GDPR sets out **a general prohibition** on ADM, with three exceptions:
  - 1) Necessary for performance of contract
  - 2) Member State derogations
  - 3) Based on data subject’s **explicit consent**



Controversial view:

General prohibition on ADM, or optional right to prevent/stop ADM?

# WP29 Guidelines on ADM & Profiling

- Draft Guidelines state that in many typical cases, targeted advertising does not have a ‘significant effect’ on individuals
- Interpretation of “*similarly significant effects*” – WP29 view is that this means
  - the effects of processing “*must be more than trivial*”
- Situations identified by WP29 where ADM may have significant effects include:
  - Intrusiveness of the profiling case
  - Expectations and wishes of the individuals concerned
  - Way advert is delivered
  - Particular vulnerabilities of the data subjects targeted
- WP29 also notes that processing with little impact in general, may have a significant effect on certain groups of society
  - E.g., individual in financial difficulties being regularly shown online gambling adverts



# WP29 Guidelines on ADM & Profiling (cont'd) - Safeguards

- Controllers should:
  - Carry out frequent assessments on data sets to check for any bias
  - Develop way to address prejudicial elements, including over-reliance on correlations
  - Have systems that audit algorithms
  - Regular reviews of accuracy and relevance of ADM, including profiling



## Next Steps on ADM & Profiling

---

- Awaiting WP29's final guidance on ADM & Profiling – substantial industry opposition to draft text
- Awaiting draft guidance on Consent (expected this month)
- NB also:
  - Information Commissioner's Office (ICO) consultation document on Consent
  - ICO paper on 'Big Data, Artificial Intelligence, Machine Learning and Data Protection'

Per ICO:

*“Given some of the difficulties associated with consent in a big data context, legitimate interests may provide an alternative basis for the processing, which allows for a balance between commercial and societal benefits and the rights and interests of individuals.”*

## Next Steps on ADM & Profiling (cont'd)

- Internet Advertising Bureau (IAB) Europe published a consent standard announcement on 28 November 2017
- The proposed standard will:
  - Enable first parties to dynamically disclose third parties and the purposes for which they collect and process the data
  - Allow first parties to obtain “global” or “service-specific” consent from users, who will also be able to update consent choices and withdraw consent at any time
  - Enable third parties to receive information about a user’s consent choices from first parties
  - Enable the creation of a consent record and audit trail
- To be effective, Code of Conduct will need approval by Supervisory Authority/ies (SAs)

# Data Protection Impact Assessments (DPIA)

- DPIAs are required for “high risk” processing activities, e.g.:
  - Systematic and extensive evaluation of personal aspects relating to natural persons **based on** automated processing, including profiling, with significant effects on individual (compare ADM Art. 22: “*solely*” missing)
  - Large scale use of special categories of personal data or
  - Systematic monitoring of a publicly accessible area on a large scale
- Compliance with approved Codes of Conduct shall be taken into account
- Where appropriate, Controller shall seek views of data subjects or their representatives on the intended processing
- Prior consultation with SAs required in some cases
- SAs shall publish black lists specifying when DPIAs required (and may publish white lists where DPIAs not required)
- WP29 Guidance on DPIAs -- sets out risk assessment and procedures

# Consent: Additional Requirements

(Articles 4, 6 -9)

- **EU General Data Protection Directive**
  - Express or implied consent was permitted

- **GDPR**

- “Consent” definition more rigorous
- Requires consent to be **freely given, specific, informed and unambiguous** (see Article 4(11))

*“any freely given, specific, informed and unambiguous indication of his or her wishes by which the data subject, either by a statement or by a clear affirmative action, signifies agreement to personal data relating to them being processed”*



# Consent: Additional Requirements (cont'd)

(Articles 4, 6 -9)

- Must be specific – no “bundled” consent
- Informed – it should be obvious to the data subject how their data is going to be used
- Consent must be given “by a statement or clear affirmative action”
  - Ticking a box when visiting a website
  - Choosing technical settings
  - Any other conduct which indicates acceptance
- Implied consent likely no longer sufficient (e.g., opt-out boxes)
  - Silence, not responding to a request
  - Pre-ticked boxes
  - Pre-set browser settings at lowest privacy level [?]

# Consent: Additional Requirements (cont'd)

(Articles 4, 6 -9)

- Controller must be able to prove consent was obtained
  - Requires an audit trail linking the notice, consent and processing of the data
  - Failure to keep proof of consent is a breach of the requirements for legal consent
- Withdrawing consent must be possible and easily accomplished, and data subject should be so informed
- Consent may not be deemed “freely given” if contract or provision of service is conditional on processing of personal data unnecessary for performance
- Verification of parental consent for children (13-16)

## PART 2

# e-Privacy Regulation



- The ePrivacy Directive (ePD) was adopted in 2002 and updated in 2009
- ePD is currently in the process of being replaced by the ePR
- Originally ePR was intended to come into force on 25 May 2018 to coincide with the GDPR
- Currently gearing up to enter trilogue negotiations between the EU Parliament and Council, but Council has yet to agree on its draft
- The EU Parliament has proposed a one-year transition period from when the ePR is adopted
- It is possible that a staged approach to implementation may be adopted – e.g., certain provisions may come into force immediately or sooner

# Interplay between the GDPR and the proposed ePR

---

## What does the ePR cover?

- The ePR will complement the GDPR and will take precedence where the ePR rules apply – linkage also to the draft Electronic Communications Code (EECC)
- Cross refers to the GDPR consent requirements in various provisions
- Contains specific provisions for providers of electronic communications services where content and metadata are processed (and uses root definitions)
  - Covers Interpersonal Comms Service Providers and beyond
  - Confidentiality provisions for electronic communications data will apply to machine-to-machine communications
  - Covers all end-users, including legal persons (not just natural persons as under the GDPR)
- Will unify and expand rules on cookies, tracking apps and related software
- Will also cover connection-related information emitted by terminal equipment
- Will expand application of existing rules related to unsolicited direct marketing communications

## Which types of Electronic Communications Data (ECD) are covered by the ePR?

- The proposed application is broader than the proposed EECC definition of Electronic Communications Services:  
**IAS + ICS + Conveyance of Signals**
- ICS definition will be extended to apply to “ancillary services” – scope under debate.



# ePR – Will Linear/Non-Linear TV Services Be Classified as eCD?

## Some baseline definitions:

- *Electronic Communications Content and Metadata* definitions are linked to EECC definitions of ECS and ECN:
  - ECS covers *services normally provided for remuneration* via electronic communications networks, including transmission services in networks used for broadcasting, but **excludes “services providing, or exercising editorial control over**, content transmitted using electronic communications networks and services.”
  - ECN definition is broad, covering the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks ... internet, mobile terrestrial networks . . . to the extent used for transmitting signals, **networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed**

# ePR – Will Linear/Non-Linear TV Services Be Classified as eCD (cont'd)

- **Electronic Communications Content** means content exchanged by means of ECS, such as text, voice, videos, images and sound
- **Electronic Communications Metadata** means data processed in an ECN for *purposes of transmitting, distributing or exchanging* electronic communications content, including source and destination of communication, device location, and date, time and duration of the communication
- **Terminal equipment means** “*equipment directly or indirectly connected to the interface of a public telecommunications network to send, process or receive information; in either case (direct or indirect), the connection may be made by wire, optical fibre or electromagnetically; a connection is indirect if equipment is placed between the terminal and the interface of the network.*”

# ePR – Will Linear/Non-Linear TV Services Be Classified as eCD (cont'd)

- Linear TV Services – Is free-to-air broadcasting excluded from ECS definition (“normally provided for remuneration”)?
- Non-Linear TV Services – Do these services constitute electronic communications content (like any other broadband OTT service)? If so, metadata may be interpreted to include data processed in the ECN to distribute or transmit the programming content of non-Linear TV services
- Implications of eCD classification: Under draft ePR, only unambiguous, opt-in consent may be used as the lawful basis for processing eCD for marketing purposes – cannot rely on legitimate interests test or other lawful bases
- GDPR Notice and other Data Subject Rights apply in any event if personal data is involved
- In relation to ePR rules on tracking apps and *terminal equipment* emissions, broad ECN definition would appear to catch both linear and non-linear services:
  - equipment directly or indirectly connected to the interface of a public telecommunications network, including:
    - networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed and
    - are used wholly or mainly for the provision of ECS available to the public

## What new technologies will be covered by the ePR?

The EU Parliament applies the principle of confidentiality to devices that listen to the environment, e.g. smart home devices



## When can you process ECD without consent?

Processing is prohibited unless one of the following lawful bases for processing applies (Council and Parliament proposals diverge):

- Necessary to achieve the transmission (all ECD)
- Security purposes (all ECD)

### *METADATA ONLY:*

- Mandatory quality of service obligations
- Performance of the contract including billing, interconnection payments and stopping fraud (Council)
- Billing, interconnection payments and stopping fraud (Parliament)
- Necessary where a natural person is physically or legally incapable of giving consent (Council)
- Scientific research or statistical purposes under MS law (Council)
- Compliance with a legal obligation (Council)
- Necessary for audience measuring by the provider of an information society service (or a third party)



# ePR – Terminal Equipment: Cookies

## How will the ePD “cookie rule” be affected by the ePR?

→ Expanded application to cookies and other tracking apps

- GDPR level prior consent (opt-in) is required to use the processing and storage capabilities of terminal equipment
- This widens the scope of the ePD to go beyond traditional cookies
- ePD “cookie rule” has not been implemented uniformly across the EU:

Jurisdiction	Specific Requirements				Exemptions	
	Opt-in Requirement	Duty to Inform	Duty to Inform About Third Party Cookies	Browser Settings Consent	Communications Only	Service Explicitly Requested by User
Ireland						
Germany						
France						
Estonia						

- The ePR, as a regulation, will harmonise the rules across the EU
- Parliament proposal: would prevent use of so-called "cookie walls" and "cookie banners" that do not help users to maintain control over their personal data

### → **New provisions limiting use of information emitted by terminal equipment**

The collection of information “emitted” by terminal equipment to enable it to connect to another device or network equipment will be prohibited

Exceptions:

- Necessary for establishing a connection
- Consent (Council and Parliament)
- Statistical counting (Council)
- A prominent notice is displayed (Council)
- The risks are mitigated (Parliament)



# ePR – Unsolicited Direct Marketing Communications

## How does the ePR affect the existing ePD restrictions?

- The baseline restrictions will not change, but major expansion of scope
  - Opt-in consent is still required for direct marketing
  - There remains an exception for direct marketing where there is an existing relationship



## How is the scope affected?

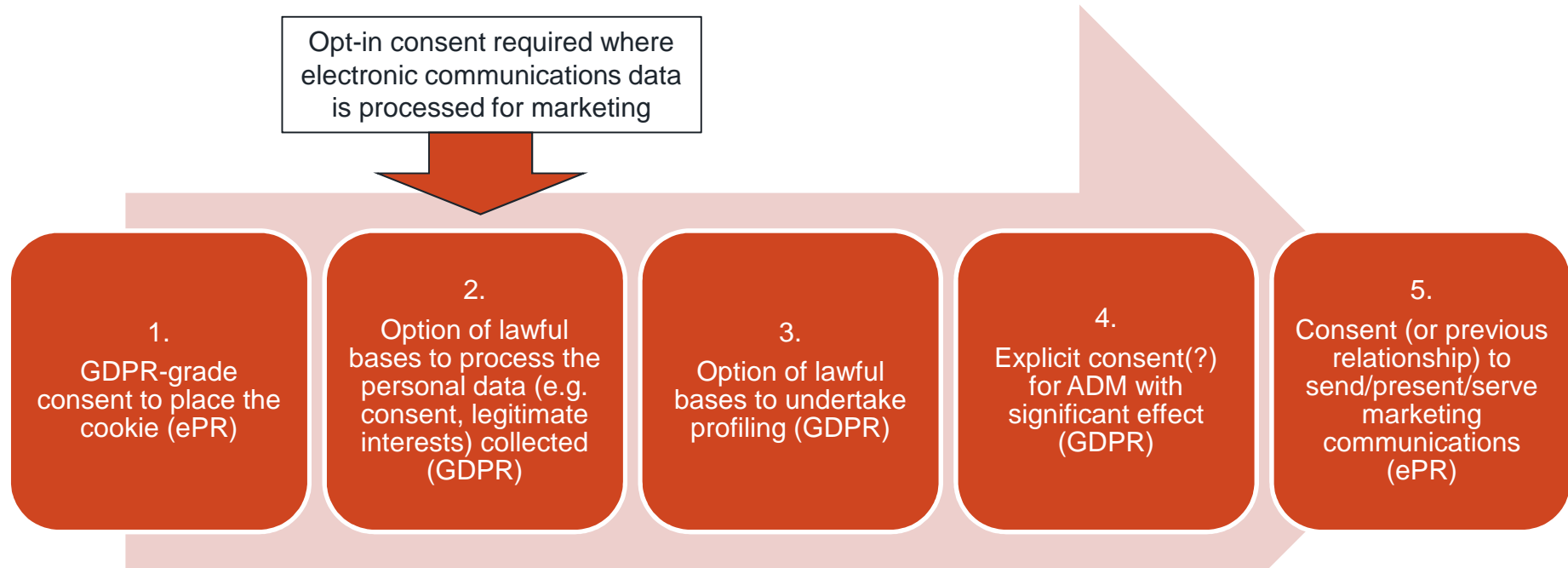
- No longer limited to specific technologies, e.g. fax, calls or e-mail
- Covers any form of advertising through electronic communications
- Expanded application to cover:
  - oral or video format that is sent, served or presented (Parliament); or
  - written or oral format, that is sent or presented (Council)
- Under the Council draft, provision would expressly not cover advertising displayed to the general public on a website which is not directed to any specific identified or identifiable end-user

### How will the opt-in obligations work in practice?

- All new software placed on the market permitting electronic communications, including the retrieval and presentation of information on the internet, must have settings to prevent cookies or other tracking devices being placed on terminal devices
- Existing software must be updated no later than [Aug. 2018]
- The user should be offered the chance to set these settings on first use of the browser
- Parliament proposes that the default setting should be at highest privacy level, i.e. to reject installation of tracking apps



# ePR – Value Chain Effects for Marketing



## **Related Obligations**

- Notice
- GDPR consents are opt-in
- Easy withdrawal of consent
- Right to object
- DSARs
- Children/parental consent

## PART 3

# Parallel Transparency in Advertising Trends

# The Broader Context – Challenges for Digital Advertising Ahead

---

The ePR's impact on programmatic advertising should be viewed in the broader industry context

- Global Advertising Revenue Reached \$532 Billion in 2016. Will Hit \$590 Billion in 2017
- US digital ad revenue is expected to reach nearly \$100 billion by 2021. This represents compound annual growth of 8% from the \$68.9 billion expected in 2016
- During Procter & Gamble's fourth-quarter earnings call the packaged-goods giant reported that it cut approximately \$100 million to \$140 million in digital advertising spend last quarter (28 July 2017)

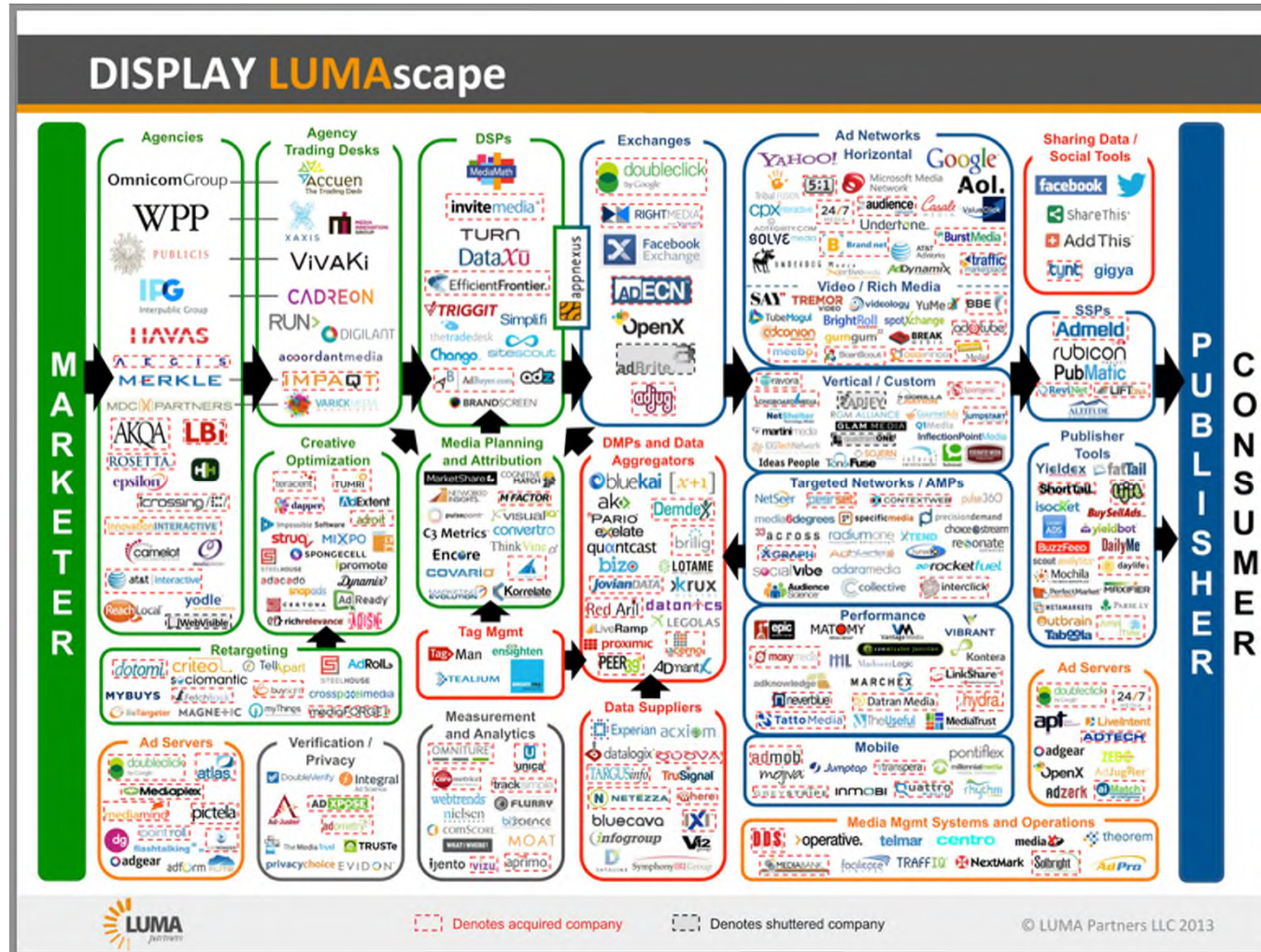


# Pressure on Media Agencies – Financial Transparency

---

- France – Loi Sapin 1993 (updated 2015)
- World Federation of Advertisers transparency report 2014: “CONTRACT COMPLIANT”
- Association of National Advertisers announces fraud investigation 2015
- Institute of Practitioners in Advertising – “standard media agency contract” announced 2015, published 2016
- Association of National Advertisers “standard media agency contract” published 2016 (based on IPA)
- Dentsu press release issued – overcharging international clients for digital media August 2016
- Other markets – nb Hungary

# The Programmatic Chain: Luma Partners Graphic



- Length of programmatic chain
- Lack of financial transparency
- Multiple layers of mark up
- Viewability and verification issues
- Concerns over quality of placements
- Little incentive for traditional media agencies to “solve” the problems
  - Audience-based charging model means no incentive to seek solutions
  - Each individual transaction is of such little value

## “TIME FOR ACTION” -- Marc Pritchard, P&G

---

### Key Takeaways from January 27<sup>th</sup> ANA Conference

- " *The days of giving digital a pass are over,*" Mr. Pritchard said, urging the rest of the ad industry to follow P&G's lead. "*It's time to grow up. It's time for action.*"
- P&G doesn't "*want to waste time and money on a crappy media supply chain,*" he said. And he urged others in the industry to follow suit.

**“The most important advertising speech for a generation ...”**

Campaign (UK Press)

# Q & A

# Global Coverage

Abu Dhabi  
Beijing  
Berlin  
Birmingham  
Böblingen  
Bratislava  
Brussels  
Budapest  
Cincinnati  
Cleveland  
Columbus  
Dallas  
Denver  
Doha  
Dubai  
Frankfurt  
Hong Kong  
Houston  
Kyiv  
Leeds  
London  
Los Angeles  
Madrid

Manchester  
Miami  
Moscow  
Newark  
New York  
Northern Virginia  
Palo Alto  
Paris  
Perth  
Phoenix  
Prague  
Riyadh  
San Francisco  
Santo Domingo  
Seoul  
Shanghai  
Singapore  
Sydney  
Tampa  
Tokyo  
Warsaw  
Washington DC  
West Palm Beach

Africa  
Argentina  
Brazil  
Chile  
Colombia  
Cuba  
India

Israel  
Mexico  
Panamá  
Peru  
Turkey  
Venezuela

■ Office locations  
■ Regional desks and strategic alliances

