



The ePrivacy regulation proposal: a new data protection framework for electronic communications

Background

On 10 January 2017, the European Commission presented a proposal for a regulation on privacy and electronic communications, repealing the ePrivacy Directive 2002/58/EC that was revised in 2009. The proposal aims to establish a new data protection legal framework by complementing the General Data Protection Regulation 2016/679 (GDPR) regarding electronic communications data.

The proposed regulation will be self-executing and legally binding in all Member States. This offers the benefit of legal certainty and uniform rules to help foster a digital single market.

The ePrivacy proposal takes into account important technological and economic development in electronic communications and will modernize existing principles according to new practices. It aims to ensure a high level of confidentiality protection in communications regardless of the technology used.

The proposal is currently going through the European Union (EU) legislative process. Both the Article 29 Working Party (WP29) and the European Data Protection

Supervisor (EDPS) published their opinions in April 2017, as well as the European Economic and Social Committee (EESC) in July 2017. On 26 October 2017, the European Parliament voted in favor of the amendments proposed by the Committee on Civil Liberties, Justice and Home Affairs (LIBE) in a plenary session. For now, the new ePrivacy regulation is under discussion between Member States in the EU's European Council. The Council issued a recap of its proposed amendments for the regulation on 4 May 2018; further proposals were issued on 10 July 2018.

Implications of the new regulation and its amended version

► Extension of the scope of covered services

The ePrivacy proposal aims to adapt the existing rules concerning traditional telecoms services to the new forms of electronic communication services. Over-the-top technologies (OTT), such as Skype, WhatsApp, Facebook and Facebook Messenger, Gmail and others, will be affected by the new regulation.

► Extension of the territorial scope of the regulation

On the basis of the proposal, the regulation will have extraterritorial effect. It will apply to electronic communications services with end users located in the EU, even if the provider is established outside of the EU.

► A high protection for all communication data

Since communications data can reveal sensitive aspects of individuals' private lives, the ePrivacy proposal underlines the importance of ensuring a high level of protection for this data. The notion of communication data covers both electronic communications content and electronic communications metadata. The processing of electronic communications data is authorized by the regulation only in limited cases, mainly for technical reasons (i.e., transmission of a communication or provision of a service, maintenance of security, billing, etc.), or on the basis of prior consent by users. The regulation also provides for limiting the storage of such communications data.

The European Council proposes adding numerous cases in which communication data may be processed, particularly when it comes to the vital interest of a natural person, statistical counting or scientific research. The Council also proposes to include a compatibility test to be used when no listed case is applicable.

► Simpler rules on cookies and other identifiers

The most visible and discussed aspect of the new ePrivacy regulation is the new cookies policy. The ePrivacy proposal aims to give users control of their information by simplifying the rules regarding cookies and other identifiers.

According to the proposal, the use of cookies and other identifiers is prohibited except (1) on the basis of prior consent from the users, (2) where it is necessary for the transmission of electronic communications, (3) for providing an information society service requested by the user or (4) where it is necessary for web analytics.

The EU's European Parliament adds conditions to the use of cookies for web analytics, in particular on the aggregation of data. It also proposes other exceptions: (5) when it is necessary for security updates of the terminal equipment and (6) in the context of employment relationships. The European Council proposes the same exception related to security updates, maintaining security in information society services and for fighting against fraud, but there is no exception relating to employment relationships.

Moreover, Parliament proposes to expressly forbid service providers to deny users' access to any service or functionality on the ground that they have not provided consent for processing, storing and collecting unnecessary information (a "cookies wall").

► Marketing communications

The rules for unsolicited marketing communications, complementing the general right to object to direct marketing as provided by the GDPR, are similar to the current legislation. The user's prior consent is required before sending electronic communications for direct marketing purposes. When it comes to direct marketing products or services similar to those that a customer has purchased, the exception has been kept. The regulation also notes Member States can allow, by law, direct marketing by voice-to-voice calls if recipients did not express objection to receiving those calls.

However, in the new regulation, the scope of the concerned services is extended to all direct marketing communications sent via "electronic communication services." The EU Parliament report specifies that it covers automated calling, communications systems, semi-automated systems that connect a calling person to an individual, faxes, email and other uses of electronic communications services. The proposal also includes specific conditions applicable to unsolicited marketing calls and strengthens safeguards for individuals.

► New definition of consent and privacy by default

The conditions for users' consent are in line with the GDPR. In particular, consent must be given by a statement or a clear affirmative action. Therefore, when it comes to cookies and other identifiers, in particular, consent banners will no longer be considered adequate. A more "user-friendly" way of collecting the consent is required.



Moreover, the proposal initially outlined an obligation to build software to help prevent the use of cookies and other identifiers. The EU Parliament was more demanding by introducing the privacy-by-default principle. It requires software suppliers to configure their products with the greatest possible privacy protection settings. Software, including browsers, shall automatically protect privacy and prohibit tracking, storing and collection of information, without requiring any actions from users. Within the European Council, however, the principle raised many concerns about the burden implied for companies as well as the fines involved. Member State representatives were invited to discuss the removal of this provision on 10 July.

► **The increased sanctions for noncompliance**

The fines and sanctions for infringements of the ePrivacy regulation are in line with the GDPR. The maximum penalty for violations can reach up to EUR20 million, or up to 4% of the total worldwide annual turnover for the preceding financial year – whichever is higher.

Next steps

The European Commission's original intention was to make the ePrivacy regulation applicable starting 25 May 2018, in line with the GDPR. As a result of the complicated admission process and controversial discussions, this deadline has passed. In addition, both the EU Parliament and the European Council propose a one-year period of transition between the regulation's entry into force and its application.

Even if the final text is not yet adopted, it is recommended for organizations to already have in mind the upcoming ePrivacy Regulation and to anticipate some important elements in their GDPR strategy.

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