

The e-privacy 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 Directive 2002/58/EC on e-privacy, revised in 2009. The proposal aims to achieve the establishment of a new data-protection legal framework by complementing and particularizing the General Data Protection Regulation (GDPR) 2016/679 in regard to electronic communications data.

The legal instrument chosen is a regulation that will be self-executing and legally binding in all Member States. This will offer the benefit of legal certainty and uniformity of the rules to foster a digital single market.

The e-privacy proposal takes account of the important technological and economic development in the sector of electronic communications and will modernize existing principles according to the new practices. It aims to promote a high level of protection of confidentiality 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) released their opinions, in April of this year, as well as the European Economic and Social Committee (EESC), in July. On 26 October 2017, the European Parliament has voted in favor of the amendments proposed by the Committee on Civil Liberties, Justice and Home Affairs (LIBE) in plenary session. The next step in the process toward the new e-privacy regulation is the discussion among Member States in the Council of the European Union.

Implications of the new regulation and its amended version

Extension of the scope of covered services

The e-privacy proposal aims to adapt the existing rules concerning the traditional telecoms services to the new forms of electronic communication services. Over-the-top technologies (OTT), such as Skype, WhatsApp, Facebook, Gmail and others will be concerned 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 the provision of electronic communications services to end users located in the EU, even if the provider is established outside the EU.

A high protection of all communication data

Since it can reveal sensitive aspects of individuals' private lives, the e-privacy proposal underlines the importance of promoting a high level of protection of communication 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) or on the basis of prior consent of the users. The regulation also provides for limitations to the storage of such communications data.

Simpler rules on cookies and other identifiers

The most visible and discussed aspect of the new e-privacy regulation is the new cookies policy. The e-privacy proposal aims to give back control to users over 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 the prior consent of the user, (2) where it is necessary for the transmission of electronic communications or (3) for providing an information-society service requested by the user or (4) where it is necessary for web analytics.

The EU Parliament adds conditions to the use of cookies for web analytics, in particular the aggregation of data. It also proposes other exceptions: (5) when it is necessary for security updates of terminal equipment and (6) in the context of employment relationships.

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

Marketing communications

The rules for unsolicited marketing communications, complementing the general right to object to direct marketing 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, and the exception for direct marketing regarding products or services similar to the one already bought by the customer is kept.

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

the call person to an individual, faxes, email or other uses of electronic communications services. The proposal also includes specific conditions applicable to unsolicited marketing calls and strengthens the safeguards for individuals.

New definition of consent and privacy by default

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

Moreover, the proposal initially provided for the obligation to build software to offer the option to prevent the use of cookies and other identifiers. The EU Parliament is 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.

Increased sanctions for noncompliance

The fines and sanctions for infringements of the e-privacy regulation are in line with the GDPR. The maximum penalty for violations can reach up to EUR 20 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 e-privacy regulation applicable starting 25 May 2018, in line with the GDPR. As a result of the complicated admission process and from the controversial discussions, it is unlikely that the regulation will be adopted soon enough. In addition, the EU Parliament proposes a one-year period of transition between the entry into force of the regulation and its application.

Even if the final text is not yet adopted, it is recommended for organizations to keep in mind the upcoming e-privacy regulation and to anticipate some important elements in their GDPR strategy.

Please contact us for further queries:

Fabrice Naftalski

Global Data Protection Law Leader
Ernst & Young Société d'Avocats
Email: fabrice.naftalski@ey-avocats.com

Peter Katko

Global Digital Law Leader
Ernst & Young Law GmbH
Rechtsanwaltsgesellschaft Steuerberatungsgesellschaft
Email: peter.katko@de.ey.com

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