

Position Paper ePrivacy Regulation

ePrivacy Regulation – German Presidency Option Paper

24. July 2020

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Summary

Bitkom is committed to a modern data policy with a high level of data protection, aiming at enabling European companies to use digital technologies and develop innovative data processing while protecting the privacy and personal rights of EU citizens.

The GDPR has already established uniform EU-wide data protection rules for all sectors, guaranteeing a high level of data protection throughout the EU. However, the ePrivacy Regulation threatens to shatter the balance between privacy protection and new technologies that has been found in the long and arduous process.

The additional requirements and restrictions made in the proposal not only endanger and partly prevent existing business models, but also narrow the scope for innovation in the area of Industry 4.0, Artificial Intelligence and other new business areas. The competitiveness of the digital economy in Europe is thus called into question.

Bitkom therefore still has concerns about the e-Privacy proposal (see here for our previous [Position Papers](#)). The EU Commission's goal of 'better regulation' is still not reflected in the option paper currently on the table and drafted by the German presidency. The ePrivacy Regulation could, if the right balance is not found, make the development of a European digital data economy more difficult and thus run counter to the strategy for the digital internal market, the data strategy and the strategy for AI and digital sovereignty. In the negotiations on the e-Privacy Regulation, the German Federal Government should therefore advocate a lean regulation based on the GDPR in the interests of further harmonisation (especially keeping in mind that the Impact Assessment for the ePrivacy Regulation dates back 4 years already and additional legislation has been introduced since then).

Parallel provisions to the GDPR should be rejected in principle: The Commission's proposal for the e-Privacy Regulation provides for many parallel rules which deviate from the GDPR, e.g. separate requirements for consent or the use of location data. This is still part of the current Option Paper. This is neither conclusive nor necessary from the per-

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spective of the digital economy. On the one hand, the provisions are already covered by the GDPR, so that additional requirements such as the obligation to provide information call into question the rules of the GDPR which have only just been adopted. On the other hand, it creates asymmetries, since different data protection rules apply to comparable data processing operations. This undermines the objective of a level playing field which the GDPR seeks to achieve. Ultimately, the text of the Regulation creates new legal uncertainties for companies, thus thwarting the desired process of interpreting and implementing EU data protection rules as quickly as possible and aligning data processing with the proposed Data Strategy. We will go into more detail in the following sections.

Scope

The scope leads to unforeseeable effects on new technologies. The scope of application in the ePrivacy Regulation is also to apply to electronic communication which takes place not only between persons but also between machines (M2M communication). This is not only an unknown concept to data protection law, but will affect many more companies from sectors other than telecommunications that offer M2M communication platforms, for example in the context of networked vehicles or a supply chain. The wide scope will therefore have potential negative impacts on the development of Industry 4.0 and Internet of Things applications.

The proposed text by the German Presidency also does not account for necessary cybersecurity exemptions and should therefore be amended to allow for data processing for fraud prevention, screening for illegal and abusive content and cybersecurity measures (in Art. 6 as well as in Art. 8 of the proposed regulation).

Grounds for processing for electronic communications data

Bitkom recommend amendments to the text with regard to the possibilities of processing electronic communications data. The Croatian Presidency in a previous text f.i. allowed for the processing of metadata on the grounds of legitimate interest, as per Art. 6b(1)(e). Additionally, we consider it crucial that the principle of compatible further processing of metadata, alongside safeguards such as pseudonymisation, as included in the previous Austrian and Finish presidency proposals, is being re-instated. Compatible further processing is not a “legal base” itself, but a principle for secondary processing of data that have already been collected and processed. We therefore urge the Presidency to reintroduce this principle as a necessary complement to the legal grounds for processing and as a key principle in balancing the need for privacy protection and data innovation. The ePrivacy regulation proposal of the EC favours consent as legal basis for processing with regards to communications data, which does not take into account users and business context. In

that regard, the Presidency should consider the B2B sector, where consent would create significant but unnecessary burdens for companies, both providing and receiving services.

Bitkom furthermore recommends the previous wording of Article 6(1)(a) (“when it is necessary to provide an electronic communication service” in Document 14054/19 which created more legal certainty and provides clarity for operators. Moreover, we recommend that the legal grounds for processing communications content and metadata be amended to include statistical and scientific research purposes (as proposed by the German presidency Option paper).

Concerning Article 6 b (1) e, we prefer the proposed option 1, which allows the processing of metadata on the basis of a “legitimate interest” under certain conditions (see page 3 of the Council Working Paper). In addition, in connection with Article 6 ff, it is important to reinstate the principle of compatible further processing – and that the current recital 11a is preserved, as it stipulates the possibility that companies that communicate with their customers via their own communication channel (e.g. their own chat) are not considered to be providers of electronic communications services.

Another aspect Bitkom has stressed previously is the needed clarification on how consent would be provided by end-users, especially in the context of software updates. Operators, particularly in the B2B sector, often do not have direct contact with all the end-users, and would therefore find themselves in a situation where consent is given by some end-users but not all. Moreover, with regards to software updates it must be possible that employers can allow for updates to be activated on their employee’s devices. This has to be made clear at least in the Recitals of the text of the ePrivacy regulation. Even where software updates are not specifically “necessary” for security, software that is not routinely updated will create security vulnerabilities. Especially in the employment context, the text of Art. 8(1)(e) should therefore also make clear that the end-user who decides on business software updates must be the enterprise user. If every employee were to choose to reject, postpone, or even turn off the update (whether functional or security), this would be an opening for systemic security vulnerabilities and other serious risks for the company.

Deletion of Article 10

Bitkom welcomes that the German Presidency Draft follows the decision by the Croatian and Finnish Presidencies to delete Article 10 of the proposed Regulation. As discussed in many expert groups in the last three years we believe that browsers cannot know how to distinguish between the purpose of each specific cookie and should therefore not be put into a position to decide on the cookies purposes for the publishers who deploy them. We therefore recommend that the council preserves the deletion of Article 10.

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Bitkom represents more than 2,700 companies of the digital economy, including 2,000 direct members. Through IT- and communication services alone, our members generate a domestic annual turnover of 190 billion Euros, including 50 billion Euros in exports. The members of Bitkom employ more than 2 million people in Germany. Among these members are 1,000 small and medium-sized businesses, over 500 startups and almost all global players. They offer a wide range of software technologies, IT-services, and telecommunications or internet services, produce hardware and consumer electronics, operate in the digital media sector or are in other ways affiliated with the digital economy. 80 percent of the members' headquarters are located in Germany with an additional 8 percent both in the EU and the USA, as well as 4 percent in other regions of the world. Bitkom promotes the digital transformation of the German economy, as well as of German society at large, enabling citizens to benefit from digitalisation. A strong European digital policy and a fully integrated digital single market are at the heart of Bitkom's concerns, as well as establishing Germany as a key driver of digital change in Europe and globally.