

Position Paper

Bitkom views concerning the Presidency's Discussion Paper 6726/18 – Short Paper

26/03/2018

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Introduction

The Presidency of the Council of the European Union recently published its Discussion Paper 6726/18 regarding the ePrivacy Regulation (ePR). The document deals with the Articles 1, 5, 6, 7, 12, 13 and 14 their related recitals.

Bitkom has commented on several questions regarding the ePR and on the latest Presidency Papers and would like to use this opportunity to comment on the latest developments as well, especially in preparation of the next WP TELE Meeting of March 28.

Overview

The latest Presidency Papers and developments in the WP TELE and DAPIX meetings regarding the ePrivacy Regulation have shown a need for more discussions on certain aspects of the Proposal. We would like to comment on the current framework laid out in the latest discussion paper. We would like to highlight the following aspects of our Position Paper at this time.

(1) Relation between GDPR and ePrivacy Regulation

In our view, the relation between GDPR and ePR is one of the most important issues. In addition to the statement in the Council document and also in our Bitkom statement of 7 March 2018, we see the need to incorporate the assessments found in the GDPR into the ePR. Particularly in the context of the discussion as to whether a legitimate interest should be included as a legal basis in the ePR (which we support), the discussions should assess whether the legal grounds provided in the GDPR could not be implemented in the ePR as a whole (or a reference be made).

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(2) Permitted Processing of Metadata

To achieve a sensible solution for the processing of metadata it would be necessary to include a clear legal basis and define relevant categories of data or scenarios in the text. Clarifications could also be provided in the recitals.

Where the Presidency asks whether the Regulation should set forth specific purposes for which the processing of electronic communications metadata would be permitted, or whether it would establish a non-specific purpose based permission to process electronic communications metadata. If specific purposes were to be included, however, the definitions of these specific purposes would hinder technical development. Further, the obligation to delete metadata at the latest after 24 hours after its collection could well exclude legitimate business models and be a burden on the providers.

(3) Prohibition of interception

The sentence "[...] prohibition of interception [...]" was moved to Recital 15a and "interference" was replaced by "processing" in the first movement. Recital 15 talks in detail about the Interception of Communication. However, the background to this is only mentioned in Recital 15a, which creates a rather confusing framework. Clarifications and a clear structure are needed with regard to these aspects.

(4) Articles 8 and 10

With regard to the technologies mentioned in Articles 8 and 10, they should be addressed in a technology-neutral manner. In particular, the reference to browsers in the recitals 22-24 is too narrow. It is quite conceivable that service providers will develop much more suitable technologies that enable appropriate data protection management, but which are not addressed by the current version of the ePR.

(5) Ancillary services

We need clarity on the inclusion/exclusion of ancillary services. Connecting ancillary services with the definition of interpersonal communication services blurs the lines and does not make the situation clear and/or legally certain.

(6) Consent, B2B Relationships

The new draft provides that companies may no longer give their own consent as soon as an individual is involved. Every employer would then be dependent on the consent of his employees if an app that is needed in the job is to be updated, new programs are to be installed on end devices, data from tablets have to be queried (GPS data of working machines), or even just the centrally maintained employee contact list that is stored on the mobile phone is updated.

That approach therefore is not practical and should be amended.

(7) Recital Changes and Coherence

The amended Recitals should be checked again for coherence with the text. Recital 15a gives examples on when the transmission is completed, e.g. for emails, when the addressee has collected the message from the server (see also above). Recital 15a now also provides that the "prohibition of interception of communication data should only apply during their conveyance [...]." The wording in this section is therefore linked only to "interception", whereas Art. 5 now puts "processing" on top of the enumeration of actions that are prohibited. In our view, this creates confusion. We ask the Presidency to clarify these points and would also like to raise the point that the general prohibition and the equal treatment of "interception" and "processing" should be discussed as a general issue again.

Recital 19b is not about a "one off" consent for companies (as declared on page three), but simply says that consent can be given at the time of the conclusion of a contract or later. That does not clarify the situation regarding the consent-issue at all. If legal entities allow a natural person to make use of a service in the context of their work or for their company, consent needs to be obtained from the individual concerned, which is not a practical approach. We urge the Presidency to reconsider the wording on this issue.

(8) Legal basis for processing of electronic communications metadata if it is necessary to carry out statistics in the public interest – purposes limitation principle

The presidency asks to assess whether a legal basis for processing of electronic communications metadata would be sufficient if it is necessary to carry out statistics in the public interest. Furthermore the presidency notes that a non-specific provision enabling processing of electronic communications metadata would hardly be compatible with the purpose limitation principle of the GDPR

According to Article 89 GDPR processing for statistical purposes is not connected to "public interest". To the contrary, the possibility to process for statistical purposes under the GDPR is already considered "compatible" further processing (Recital (50) GDPR as well as Article 5 (1) b. GDPR). Therefore, no specific legal base for statistical processing would be necessary, as long as compatible further processing is included in the ePR (see attached proposal for Art. 6 (2) e) NEW), in line with Recital (50) GDPR, which is reflected by Recital 17b ePR.

The purpose limitation principle (Article 5 (1) b. GDPR) remains applicable for any type of processing under any time of legal base, irrespective from whether data is sensitive (Art. 9 GDPR) or not: the processing needs to always be for a specified purpose and can only be further processed, if compatible (See Article 5 (1) b GDPR and Article 6 (4) GDPR). A systematic description of the envisaged processing operations and the purpose of the processing is

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an integral part of the Data Protection Impact Assessment (Article 35 (7) (a) GDPR) which would be mandatory for the processing of metadata according to the attached proposal for Art. 6 and Recital 17b.

Limit further processing of electronic communications metadata to a sub-set of electronic communications metadata, such as location data which have to be erased after max. 24 h. This option is too narrow. e.g. an analysis of the average duration of German consumers spent on the phone over a week (by processing traffic data) could not be done, although such processing would neither identify users, nor be considered to reveal political, religious etc. beliefs. If limited only to location data, similar business models could not be achieved.

A pre-defined period to determine of when a purpose is supposed to be fulfilled is a problematic approach. e.g. the analysis of movements over a longer period of time to provide insights on traffic situations for a municipality is not always possible, if pseudonymised location data would need to be deleted 24 hours after collection.

The duration is thus depended on “when the purpose” is fulfilled (purpose limitation principle, Art. 5 (1) c. GDPR) and should thus not be artificially limited to a random amount of hours (24h).

(9) Obligation to consult the DPA

This approach does not take into account that the consultation of a supervisory authority only takes place, if the company has not been able to mitigate the risks, as outlined under Article 36 (1), Article 35 (7) d. GDPR.

An obligation to always consult the DPA first, similar to the (justified) approach taken for processing the more intrusive “content data” (see recital 19 ePR), should thus not be applied for processing of metadata.

We would however agree with setting up a presumption that a company has to always do a DPIA, considering that the processing of metadata could result in a high risk for the end-user.

It would then be up to the company to take effective measures to mitigate these risks in the DPIA. Only if the risks could not be sufficiently addressed, Article 36 (2) and (3) would consequently apply.

(10) Article 15 – restriction to “number based” services

The restriction to “number-based services”, which runs through Recitals 30 and 31, but also through Art 15, ignores the fact that electronic communication is no longer limited to number-based services alone, but also and especially to “new services” such as e-mail services (which were explicitly mentioned in the commission draft and also in Recital 30 of this draft) or other services of the OTT, which are in some cases based on the use of user names or other identification options.

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A restriction to number-based services would clearly contradict the aim of the regulation to establish a level playing field with the OTT. The restriction to number-based services is therefore extremely counterproductive. We urge the presidency to amend the provisions.

Bitkom represents more than 2,500 companies of the digital economy, including 1,700 direct members. Through IT- and communication services only, our members generate a domestic turnover of 190 billion Euros per year, including 50 billion Euros in exports. Members of Bitkom employ more than 2 million people in Germany. Among the members are 1,000 small and medium-sized businesses, over 400 startups and nearly 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 sectors of digital media or are in other ways affiliated to the digital economy. 80 percent of the companies' headquarters are located in Germany with an additional 8 percent each in the EU and the USA, as well as 4 percent in other regions. Bitkom supports the digital transformation of the German economy and advocates a broad participation in the digital progression of society. The aim is to establish Germany as globally leading location of the digital economy.
