

Position Paper – ePrivacy Regulation

Bitkom views concerning the first Croatian Presidency’s Discussion Paper 5979/20

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The Croatian Presidency of the Council of the European Union recently published its first Presidency Discussion Paper (5979/20) regarding the ePrivacy Regulation (ePR).

Bitkom welcomes the steps already taken on the text of the ePrivacy Regulation but in our view there are still many unresolved areas and the file needs further work and in depth discussion. A clear, coherent and future-proof text is needed to move on to trilogue discussions. As Bitkom has always provided [comments and industry insights](#) on several questions regarding the ePR, we would like to use this opportunity to comment on the latest developments as well.

We appreciate the efforts of the Croatian presidency to make the ePR text simpler, more structured and to further align it with the GDPR¹. Therefore, we agree with the addition of another legal bases (legitimate interest). However, we disagree with the assumption that compatible further processing would no longer be needed, due to the introduction of legitimate interest. Compatible further processing is not a “legal base” according to GDPR, but a principle, and thus does not lead to “overlaps” or “duplications”. To the contrary, the requirements of legitimate interest foresee a careful weighing of interests between company and data subject. Also, as the basis of legitimate interest would allow the user to object to such processing, purposes such as network optimization, interconnection payments or statistics could be objected to as well which does not seem practical and would lead to considerable uncertainty. This also applies to the detection and stopping of fraudulent or abusive use of electronic communication services, as it would not make sense to allow objection to processing for fraud detection or the stopping of abusive use of a service.

Billing and interconnection, as well as network optimization and stopping of fraudulent or abusive use of electronic communication services are closely connected to the performance of the service and should therefore fall either under performance of contract, remain as legal basis, as it is already the case today under the current ePrivacy

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¹ Please refer to our latest Position Paper for elaborations regarding the need for such alignment:
<https://www.bitkom.org/Bitkom/Publikationen/Position-Paper-ePrivacy-Regulation>

Directive (see Recital 26, Art. 6 (2) ePrivacy Directive) or Art. 6 (1) a) should be reinstated (provide an electronic communications service). Therefore, we urge the presidency to reinstall the principle of compatible further processing as well as the legal bases in Art. 6b (2 a), b), f)).

We support the introduction of a new legal ground regarding "performance of contract." However, we believe this legal ground should be re-written for the sake of legal certainty. In a B2B environment, the end-user is not the contractual party. More specifically, electronic service providers often provide services in a B2B2C context, e.g. interconnection billing between the network operators or involved service providers. Operators often do not have a final contract with each of the end-users. Even in a B2C context, a single household with one contract might have several end-users (eg for a family). A more open wording would therefore be necessary to address this, e.g. "... it is necessary for the performance of the contract".

We also urge the re-introduction of Article 6(b)(f) on processing for statistical purposes. Permitting processing for statistical purposes could help the development of aggregated insights on measuring, for example, traffic movements during a certain period of time or to provide quantitative insights into improving road structure.

Additionally, Software updates must not be subject to new consent requirements and questions regarding the "end-user" characteristic must be clarified; it must be possible for legal entities to give consent for employees working in the company within the framework of business use.

The potential for innovation must be preserved, particularly opportunities in the field of AI, autonomous driving and developments of IoT platforms must not be obstructed; this requires above all the further processing of data for compatible purposes (see arguments above) and coherent rules for M2M-communications. With regard to end-users being legal persons, it should be clarified that the basis for processing may take the form of a contract.

Bitkom represents more than 2,700 companies of the digital economy, including 1,900 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.