



6.6.2017

DRAFT OPINION

of the Committee on Legal Affairs

for the Committee on Civil Liberties, Justice and Home Affairs

on the proposal for a regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications)
(COM(2017)0010 – C8-0009/2017 – 2017/0003(COD))

Rapporteur: Axel Voss

SHORT JUSTIFICATION

The rapporteur does **not** welcome the proposal concerning the respect for private life and the protection of personal data in electronic communications ('ePrivacy Regulation').

All the aims of the creation of a digital single market (growth, promoting innovation, boosting Europe's IT-based economy, the free flow of data, and promotion of SMEs) will not be attained, and in some cases indeed the very opposite of what is intended will be brought about. Many existing business models would be outlawed by this.

The proposal would generate serious legal inconsistency with Regulation (EU) No 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation - 'GDPR') and with the proposal concerning the European Electronic Communications Code ('EECC') and bring about extreme legal uncertainty regarding the use of data, while having illogical consequences with regard to personal data.

A lack of courage and creativity, and an insistence on clinging to old structures and convictions, are not a good starting point for building a successful digital future.

The proposal should:

- 1) mainly be concerned with the confidentiality of communication;
- 2) (a) ensure fair competition in the field of communication and (b) align itself with a global situation;
- 3) not be a 'lex specialis' concerning the GDPR, but supplement it;
- 4) avoid duplication of structures provided for by the GDPR (e.g. consent, communication of personal data to third countries, penalties, EDPB, etc.). Personal data should be governed by a single legal framework. Communications data as personal data should on no account be treated separately. The same data ought to be subject to the same law/principles. Article 6 of the GDPR should be amended accordingly;
- 5) look to the future and accord with the EECC;
- 6) refrain from focusing on consent. Nowadays, consent is no longer the right criterion; transparency, data sovereignty, opt-out solutions, rights of objection, a new category of data (e.g. pseudonymised data) or at least better differentiation between anonymised, pseudonymised and encrypted data would be a better approach. Moreover, there is a danger that the balance that the GDPR has established between protecting privacy and new technologies may be destroyed again because in large areas data processing which would be permitted under the GDPR would either be subject to even stricter consent conditions or else be entirely prohibited. That is absolutely counter-productive.

Welcome features of the proposal are that:

- the ePrivacy Regulation is brought into line with technical reality and Articles 7 and 8 of the EU Charter of Fundamental Rights;
- the Commission has included provisions concerning Over-the-Top communication services within its scope;

- the Commission wishes to synchronise the time of entry into force with the GDPR. In fact, this will not be practical for businesses to comply with, particularly if the complicated duplication of structures were to be retained.

Specifically:

- Article 4, in particular, is based on the EECC. The ePrivacy Regulation therefore cannot be applied before the EECC has been adopted. This is a systematic error, which must be corrected;
- the proposal does not distinguish clearly between content, data and information;
- The demarcation line between the e-Privacy Regulation and the GDPR is unclear. In the interests of legal certainty, it should be established when one of them applies and when the other does, in order to create a comprehensible legal framework for those responsible. Therefore only personal data should be subject to ePrivacy during the communication process, as stipulated by Directive 2002/58/EC. In all other cases, the GDPR would then apply. The law should also make it clear when a communication ends;
- there must be a clear demarcation line between the confidentiality of the substance of communications and the processing of data (data protection), as the scope of ePrivacy extends to networked devices and machines. Not all of the definitions or of the scope of the proposal are clear. It would consequently have an unpredictable and illogical impact on machine-to-machine communication (e.g. in the car industry, logistics or smart homes). It is not clear where the conveyance of communications under ePrivacy begins and where data transmission under the GDPR begins. It is also unclear what consent, or denial of consent, for machine-to-machine communication would mean;
- the proposal requires consent even for the processing of anonymous data, which is totally illogical and technically impossible. The concept of pseudonymisation, which is implied in the GDPR, could have been built upon here;
- it is also logically unclear why metadata (ePrivacy) in effect have to be better protected than health data (GDPR);
- it is also incomprehensible why two systems of penalties should be introduced for the same offence;
- consideration should be given to whether a household exemption is needed;
- the proposed rule on cookies would favour big businesses and place SMEs (especially those in Europe) at a disadvantage. Precisely the opposite is desirable;
- As currently worded, Article 5 of the proposal could endanger the continued existence of email.

Improvements are needed on many points. The Committee on Legal Affairs therefore calls on the committee responsible to take into account the following amendments:

AMENDMENTS

The Committee on Legal Affairs calls on the Committee on Civil Liberties, Justice and Home

Affairs, as the committee responsible, to take into account the following amendments:

Amendment 1

Proposal for a regulation

Recital 12

Text proposed by the Commission

Amendment

(12) Connected devices and machines increasingly communicate with each other by using electronic communications networks (Internet of Things). The transmission of machine-to-machine communications involves the conveyance of signals over a network and, hence, usually constitutes an electronic communications service. In order to ensure full protection of the rights to privacy and confidentiality of communications, and to promote a trusted and secure Internet of Things in the digital single market, it is necessary to clarify that this Regulation should apply to the transmission of machine-to-machine communications. Therefore, the principle of confidentiality enshrined in this Regulation should also apply to the transmission of machine-to-machine communications. Specific safeguards could also be adopted under sectorial legislation, as for instance Directive 2014/53/EU.

deleted

Or. de

Justification

Recital 12 includes networked devices and machines within the scope of the proposal. Not all of the definitions or of the scope of the proposal are clear. That would render the impact on machine-to-machine communication (e.g. in the car industry, logistics or smart homes) uncertain. It is not clear where the conveyance of communications under ePrivacy begins and where data transmission under Regulation (EU) No 2016/679 begins.

Amendment 2

Proposal for a regulation Recital 16

Text proposed by the Commission

(16) The prohibition of storage of communications is not intended to prohibit any automatic, intermediate and transient storage of this information insofar as this takes place for the sole purpose of carrying out the transmission in the electronic communications network. It should not prohibit either the processing of electronic communications data to ensure the security and continuity of the electronic communications services, including checking security threats such as the presence of malware or the processing of metadata to ensure the necessary quality of service requirements, such as latency, jitter etc.

Amendment

(16) The prohibition of storage of communications **during conveyance** is not intended to prohibit any automatic, intermediate and transient storage of this information insofar as this takes place for the sole purpose of carrying out the transmission in the electronic communications network. It should not prohibit either the processing of electronic communications data to ensure the security and continuity of the electronic communications services, including checking security threats such as the presence of malware or the processing of metadata to ensure the necessary quality of service requirements, such as latency, jitter etc.

Or. de

Amendment 3

Proposal for a regulation Recital 17

Text proposed by the Commission

(17) The processing of electronic communications data can be useful for businesses, consumers and society as a whole. Vis-à-vis Directive 2002/58/EC, this Regulation broadens the possibilities for providers of electronic communications services to process electronic communications metadata, **based on end-users consent**. However, end-users attach great importance to the confidentiality of their communications, including their

Amendment

(17) The processing of electronic communications data can be useful for businesses, consumers and society as a whole. Vis-à-vis Directive 2002/58/EC, this Regulation broadens the possibilities for providers of electronic communications services to process electronic communications metadata **in accordance with Regulation (EU) No 2016/679**. However, end-users attach great importance to the confidentiality of their

online activities, and that they want to control the use of electronic communications data for purposes other than conveying the communication. Therefore, this Regulation should require providers of electronic communications services to ***obtain end-users' consent to process*** electronic communications metadata, which should include data on the location of the device generated for the purposes of granting and maintaining access and connection to the service. Location data that is generated other than in the context of providing electronic communications services should not be considered as metadata. Examples of commercial usages of electronic communications metadata by providers of electronic communications services may include the provision of heatmaps; a graphical representation of data using colors to indicate the presence of individuals. To display the traffic movements in certain directions during a certain period of time, an identifier is necessary to link the positions of individuals at certain time intervals. This identifier would be missing if anonymous data were to be used and such movement could not be displayed. Such usage of electronic communications metadata could, for example, benefit public authorities and public transport operators to define where to develop new infrastructure, based on the usage of and pressure on the existing structure. ***Where a type of processing of electronic communications metadata, in particular using new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons, a data protection impact assessment and, as the case may be, a consultation of the supervisory authority should take place prior to the processing, in accordance with Articles 35 and 36 of Regulation (EU) 2016/679.***

communications, including their online activities, and that they want to control the use of electronic communications data for purposes other than conveying the communication. Therefore, this Regulation should require providers of electronic communications services to ***comply with Regulation (EU) No 2016/679 when processing*** electronic communications metadata, which should include data on the location of the device generated for the purposes of granting and maintaining access and connection to the service. Location data that is generated other than in the context of providing electronic communications services should not be considered as metadata. Examples of commercial usages of electronic communications metadata by providers of electronic communications services may include the provision of heatmaps; a graphical representation of data using colors to indicate the presence of individuals. To display the traffic movements in certain directions during a certain period of time, an identifier is necessary to link the positions of individuals at certain time intervals. This identifier would be missing if anonymous data were to be used and such movement could not be displayed. Such usage of electronic communications metadata could, for example, benefit public authorities and public transport operators to define where to develop new infrastructure, based on the usage of and pressure on the existing structure.

Amendment 4

Proposal for a regulation

Recital 20

Text proposed by the Commission

(20) Terminal equipment of end-users of electronic communications networks and any information relating to the usage of such terminal equipment, whether in particular is stored in or emitted by such equipment, requested from or processed in order to enable it to connect to another device and or network equipment, are part of the private sphere of the end-users requiring protection under the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Given that such equipment contains or processes information that may reveal details of an individual's emotional, political, social complexities, including the content of communications, pictures, the location of individuals by accessing the device's GPS capabilities, contact lists, and other information already stored in the device, the information related to such equipment requires enhanced privacy protection. Furthermore, the so-called spyware, web bugs, hidden identifiers, **tracking cookies** and other similar unwanted tracking tools can enter end-user's terminal equipment without their knowledge in order to gain access to information, to store hidden information and to trace the activities. Information related to the end-user's device may also be collected remotely for the purpose of identification and tracking, using techniques such as the so-called 'device fingerprinting', often without the knowledge of the end-user, and may

Amendment

(20) Terminal equipment of end-users of electronic communications networks and any information relating to the usage of such terminal equipment, whether in particular is stored in or emitted by such equipment, requested from or processed in order to enable it to connect to another device and or network equipment, are part of the private sphere of the end-users requiring protection under the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Given that such equipment contains or processes information that may reveal details of an individual's emotional, political, social complexities, including the content of communications, pictures, the location of individuals by accessing the device's GPS capabilities, contact lists, and other information already stored in the device, the information related to such equipment requires enhanced privacy protection. Furthermore, the so-called spyware, web bugs, hidden identifiers and other similar unwanted tracking tools can enter end-user's terminal equipment without their knowledge in order to gain access to information, to store hidden information and to trace the activities. Information related to the end-user's device may also be collected remotely for the purpose of identification and tracking, using techniques such as the so-called 'device fingerprinting', often without the knowledge of the end-user, and may

seriously intrude upon the privacy of these end-users. Techniques that surreptitiously monitor the actions of end-users, for example by tracking their activities online or the location of their terminal equipment, or subvert the operation of the end-users' terminal equipment pose a serious threat to the privacy of end-users. Therefore, any such interference with the end-user's terminal equipment should be allowed only with the end-user's consent and for specific and transparent purposes.

seriously intrude upon the privacy of these end-users. Techniques that surreptitiously monitor the actions of end-users, for example by tracking their activities online or the location of their terminal equipment, or subvert the operation of the end-users' terminal equipment pose a serious threat to the privacy of end-users. Therefore, any such interference with the end-user's terminal equipment should be allowed only with the end-user's consent and for specific and transparent purposes.

Or. de

Amendment 5

Proposal for a regulation Article 1 – paragraph 2

Text proposed by the Commission

(2) This Regulation ensures free movement of electronic communications data and electronic communications services within the Union, which shall be neither restricted nor prohibited for reasons related to the respect for the private life and communications of natural **and legal** persons and the protection of natural persons with regard to the processing of personal data.

Amendment

(2) This Regulation ensures, **in accordance with Regulation (EU) No 2016/679**, free movement of electronic communications data and electronic communications services within the Union, which shall be neither restricted nor prohibited for reasons related to the respect for the private life and communications of natural persons and the protection of natural persons with regard to the processing of personal data.

Or. de

Justification

The deletion is necessary in order to synchronise this regulation with Regulation (EU) No 2016/679, which the legislature wishes to do. Regulation (EU) No 2016/679 applies only to 'natural persons', so the extension of the scope proposed here would turn this regulation into lex specialis. Moreover, it has also not been clearly established who is to give consent on behalf of legal persons.

Amendment 6

Proposal for a regulation

Article 1 – paragraph 3

Text proposed by the Commission

Amendment

(3) The provisions of this Regulation particularise and complement Regulation (EU) 2016/679 by laying down specific rules for the purposes mentioned in paragraphs 1 and 2. *deleted*

Or. de

Justification

Article 1(3) stipulates that this regulation particularises and complements Regulation (EU) No 2016/679 by laying down specific rules. This turns this regulation into ‘lex specialis’ in relation to the GDPR. This regulation should not be used to correct Regulation (EU) No 2016/679.

Amendment 7

Proposal for a regulation

Article 2 – paragraph 1

Text proposed by the Commission

Amendment

(1) This Regulation applies to the processing of electronic communications data carried out in connection with the provision and the use of electronic communications services *and to information related to the terminal equipment of end-users.*

(1) This Regulation applies to the processing of electronic communications data carried out in connection with the provision and the use of electronic communications services.

Or. de

Justification

Article 1(3) stipulates that this regulation particularises and complements Regulation (EU) No 2016/679 by laying down specific rules. This turns this regulation into ‘lex specialis’ in relation to the GDPR. This regulation should not be used to correct Regulation (EU) No 2016/679.

Amendment 8

Proposal for a regulation Article 2 – paragraph 2 – point c

Text proposed by the Commission

c) electronic communications services which are not publicly available;

Amendment

c) electronic communications services which are not publicly available ***pursuant to Article 2(2)(c) of Regulation (EU) No 2016/679;***

Or. de

Justification

The household exemption introduced by Article 2(2)(c) of Regulation (EU) No 2016/679 should also apply to this regulation.

Amendment 9

Proposal for a regulation Article 3 – paragraph 2

Text proposed by the Commission

(2) Where the provider of an electronic communications service is not established in the Union ***it shall designate in writing a representative in the Union.***

Amendment

(2) Where the provider of an electronic communications service is not established in the Union, ***Article 27 of Regulation (EU) No 2016/679 shall apply.***

Or. de

Justification

Article 27 of Regulation (EU) No 2016/679 stipulates how representatives of controllers or processors not established in the Union are to be treated. The more specific provisions in this proposal extend Article 27 of Regulation (EU) No 2016/679.

Amendment 10

Proposal for a regulation Article 5 – title

Text proposed by the Commission

Amendment

Confidentiality of electronic communications *data*

Confidentiality of electronic communications *content*

Or. de

Amendment 11

Proposal for a regulation Article 5 – paragraph 1

Text proposed by the Commission

Amendment

Electronic communications data shall be confidential. Any interference with electronic communications data, such as by listening, tapping, storing, monitoring, scanning or other kinds of interception, surveillance or processing of electronic communications *data*, by persons other than the end-users, shall be prohibited, except when permitted by this Regulation.

Electronic communications data shall be confidential. Any interference with electronic communications data *during conveyance*, such as by listening, tapping, storing, monitoring, scanning or other kinds of interception, surveillance or processing of electronic communications *content*, by persons other than the end-users, shall be prohibited, except when permitted by this Regulation.

Or. de

Justification

It is justifiable for electronic communication content to be protected against interference by third parties, with special requirements for the processing of content pursuant to Article 6(3) of the proposal. This does not apply to the processing of electronic communication metadata to which the principle of confidentiality is not relevant. Personal metadata may reveal personal information, but their processing is governed by Regulation (EU) No 2016/679.

Amendment 12

Proposal for a regulation Article 6 – paragraph 1 – point b

Text proposed by the Commission

Amendment

b) it is necessary to maintain or restore the security of electronic communications

b) it is necessary to maintain or restore the security *or availability* of electronic

networks and services, or detect technical faults and/or errors in the transmission of electronic communications, for the duration necessary for that purpose.

communications networks and services, or detect technical faults and/or errors in the transmission of electronic communications, for the duration necessary for that purpose.

Or. de

Amendment 13

Proposal for a regulation Article 6 – paragraph 2

Text proposed by the Commission

Amendment

(2) *Providers of electronic communications services may process electronic communications metadata if:*

deleted

- a) it is necessary to meet mandatory quality of service requirements pursuant to [Directive establishing the European Electronic Communications Code] or Regulation (EU) 2015/2120²⁸ for the duration necessary for that purpose; or*
- c) the end-user concerned has given his or her consent to the processing of his or her communications metadata for one or more specified purposes, including for the provision of specific services to such end-users, provided that the purpose or purposes concerned could not be fulfilled by processing information that is made anonymous.*

²⁸ *Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (OJ L 310, 26.11.2015, p. 1–*

18).

Or. de

Justification

Under Regulation (EU) No 2016/679, metadata are defined as personal data which explicitly do not fall into the special category of personal data referred to in Article 9 of Regulation (EU) No 2016/679. No comparable need for protection was therefore recognised in Regulation (EU) No 2016/679 for metadata, nor should provision for it be reintroduced by means of sector-specific legislation.

Amendment 14

Proposal for a regulation

Article 6 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

(2a) Article 6 of Regulation (EU) No 2016/679 shall apply.

Or. de

Justification

Article 6 of Regulation (EU) No 2016/679 already regulates the lawfulness of processing, and should therefore apply here.

Amendment 15

Proposal for a regulation

Article 7 – paragraph 2

Text proposed by the Commission

Amendment

(2) Without prejudice to point (b) of Article 6(1) **and points (a) and (c) of Article 6(2)**, the provider of the electronic communications service shall erase electronic communications metadata or make that data anonymous when it is no longer needed for the purpose of the transmission of a communication.

(2) Without prejudice to point (b) of Article 6(1), the provider of the electronic communications service shall erase electronic communications metadata or make that data anonymous when it is no longer needed for the purpose of the transmission of a communication.

Justification

Due to the deletion of Article 6(2), the reference here must likewise be deleted in order to maintain coherence.

Amendment 16**Proposal for a regulation
Article 7 – paragraph 3**

Text proposed by the Commission

Amendment

(3) *Where the processing of electronic communications metadata takes place for the purpose of billing in accordance with point (b) of Article 6(2), the relevant metadata may be kept until the end of the period during which a bill may lawfully be challenged or a payment may be pursued in accordance with national law.*

deleted

Justification

Due to the deletion of Article 6(2), the reference here must likewise be deleted in order to maintain coherence.

Amendment 17**Proposal for a regulation
Article 8 – paragraph 1 – point c**

Text proposed by the Commission

Amendment

c) it is necessary for providing an information society service requested by the end-user; or

c) it is necessary for providing an information society service requested by the end-user, ***particularly in order to preserve the integrity or security of the information society service or access to it, to improve what is offered or for measures to protect against unauthorised use of the service in accordance with the terms and conditions of use relating to the provision***

of services to the end-user; or

Or. de

Amendment 18

Proposal for a regulation Article 8 – paragraph 1 – point d

Text proposed by the Commission

d) if it is necessary *for web audience measuring, provided that such measurement is carried out by the provider of the information society service requested by the end-user.*

Amendment

d) if it is necessary *in order to measure the reach of an information society service desired by the end-user, including measurement of indicators for the use of information society services in order to calculate a payment due.*

Or. de

Amendment 19

Proposal for a regulation Article 8 – paragraph 1 – point d a (new)

Text proposed by the Commission

Amendment

(da) it occurs for the purpose of recording, for the undertaking as a whole, anonymous indicators concerning the use of information society services; or

Or. de

Amendment 20

Proposal for a regulation Article 8 – paragraph 1 – point d b (new)

Text proposed by the Commission

Amendment

(db) in order to mark terminal equipment for advertising purposes, on condition that the person responsible has clearly informed the end-user of this at the beginning of the data processing and has provided an opportunity for objection that is easy to exercise; or

Or. de

Amendment 21

Proposal for a regulation

Article 8 – paragraph 1 – point d c (new)

Text proposed by the Commission

Amendment

(dc) it occurs for purposes of the settlement of payments under contracts concerning the sale of products or services, provided that the contract pertaining thereto has been concluded on-line.

Or. de

Amendment 22

Proposal for a regulation

Article 8 – paragraph 2 – subparagraph 2

Text proposed by the Commission

Amendment

The collection of such information shall be conditional on the application of appropriate technical and organisational measures to ensure a level of security appropriate to the risks, as set out in Article 32 of Regulation (EU) 2016/679, have been applied.

The collection of such information shall be conditional on the application of appropriate technical and organisational measures to ***limit the collection and processing of information to the purposes required therefor*** and ensure a level of security appropriate to the risks, as set out

in Article 32 of Regulation (EU) 2016/679, have been applied, *for example by means of pseudonymisation of information collected pursuant to Article 4(5) of Regulation (EU) No 2016/679.*

Or. de

Amendment 23

Proposal for a regulation Article 9 – paragraph 1

Text proposed by the Commission

(1) The definition of and conditions for consent provided for under Articles 4(11) and 7 of Regulation (EU) 2016/679/EU shall apply.

Amendment

(1) The definition of and conditions for consent provided for under Articles 4(11) and 7(1), (2) **and** (3) of Regulation (EU) 2016/679 shall apply.

Or. de

Justification

The reference here to the conditions for consent laid down by Article 7 of Regulation (EU) No 2016/679/EU must at all events be limited to Article 7(1) to (3). The non-applicability of Article 7(4) of Regulation (EU) No 2016/679 to consent pursuant to Article 9 of the proposal for a regulation is necessary because, unlike in Regulation (EU) No 2016/679, data processing based on the general clause concerning justified interests is not provided for in this proposal.

Amendment 24

Proposal for a regulation Article 9 – paragraph 2

Text proposed by the Commission

(2) *Without prejudice to paragraph 1, where technically possible and feasible, for the purposes of point (b) of Article 8(1), consent may be expressed by using the appropriate technical settings of a software application enabling access to*

Amendment

deleted

the internet.

Or. de

Justification

Articles 4(11) and 7 of Regulation (EU) No 2016/679 define the conditions for consent and are perfectly sufficient here. The proposal goes beyond these definitions and thus creates a dual regime for consent and renders the situation less clear. Article 9(2) should therefore be deleted.

Amendment 25

Proposal for a regulation Article 9 – paragraph 3

Text proposed by the Commission

Amendment

(3) End-users who have consented to the processing of electronic communications data as set out in point (c) of Article 6(2) and points (a) and (b) of Article 6(3) shall be given the possibility to withdraw their consent at any time as set forth under Article 7(3) of Regulation (EU) 2016/679 and be reminded of this possibility at periodic intervals of 6 months, as long as the processing continues.

deleted

Or. de

Justification

Articles 4(11) and 7 of Regulation (EU) 2016/679 define the conditions for consent and are perfectly sufficient here. The proposal goes beyond these definitions and thus creates a dual regime for consent and renders the situation less clear. Article 9(3) should therefore be deleted.

Amendment 26

Proposal for a regulation Article 10

Text proposed by the Commission

Amendment

Article 10

deleted

Information and options for privacy settings to be provided

(1) Software placed on the market permitting electronic communications, including the retrieval and presentation of information on the internet, shall offer the option to prevent third parties from storing information on the terminal equipment of an end-user or processing information already stored on that equipment.

(2) Upon installation, the software shall inform the end-user about the privacy settings options and, to continue with the installation, require the end-user to consent to a setting.

(3) In the case of software which has already been installed on 25 May 2018, the requirements under paragraphs 1 and 2 shall be complied with at the time of the first update of the software, but no later than 25 August 2018.

Or. de

Justification

Article 25 of Regulation (EU) 2016/679 governs data protection by design and by default. Article 10 of the proposal for a regulation only undermines Article 25 of Regulation (EU) 2016/679 and would hamper most business models.

Amendment 27

**Proposal for a regulation
Article 10 a (new)**

Text proposed by the Commission

Amendment

Article 10a

Article 25 of Regulation (EU) No 2016/679 shall apply.

Justification

Article 25 of Regulation (EU) 2016/679 governs data protection by design and by default. Article 10 of the proposal for a regulation on ePrivacy only undermines Article 25 of Regulation (EU) 2016/679 and would hamper most business models.

Amendment 28

Proposal for a regulation Article 15 – paragraph 1

Text proposed by the Commission

(1) The providers of ***publicly available directories shall obtain the consent*** of end-users who are natural persons to include their personal data in ***the directory and, consequently, shall obtain consent from these end-users for inclusion of data per category of personal data, to the extent that such data are relevant for the purpose of the directory as determined by the provider of the directory.*** Providers shall give end-users who are natural persons the means to verify, correct and delete such data.

Amendment

(1) The providers of ***electronic information, communication and telecommunication services shall collect the data*** of end-users who are natural persons ***in order*** to include their personal data in ***publicly accessible directories.*** ***They shall give end-users that are natural persons the right to object to data related to them being included in directories.*** Providers shall give end-users who are natural persons the means to verify, correct, ***update, supplement*** and delete such data.

Or. de

Amendment 29

Proposal for a regulation Article 15 – paragraph 2

Text proposed by the Commission

(2) The providers of a publicly available directory shall inform end-users who are natural persons whose personal data are in the directory of the available search functions of the directory ***and obtain end-users' consent before enabling such search functions related to their own***

Amendment

(2) The providers of a publicly available directory shall inform end-users who are natural persons whose personal data are in the directory of the available search functions of the directory, ***which they shall do there. The providers of electronic information, communication***

data.

and telecommunication services shall inform end-users when new search functions are made available.

Or. de

Amendment 30

Proposal for a regulation Article 15 – paragraph 3

Text proposed by the Commission

(3) The providers of **publicly available directories** shall provide end-users that are legal persons with the possibility to object to data related to them being included in the directory. Providers shall give such end-users that are legal persons the means to verify, correct and delete such data.

Amendment

(3) The providers of **electronic information, communication and telecommunication services** shall provide end-users that are legal persons with the possibility to object to data related to them being included in the directory. Providers shall give such end-users that are legal persons the means to verify, correct, **update, supplement** and delete such data. **Natural persons acting for an economic purpose, such as independent professionals, operators of small businesses or freelancers, shall be equated with legal persons.**

Or. de

Amendment 31

Proposal for a regulation Article 15 – paragraph 4

Text proposed by the Commission

(4) The possibility for end-users not to be included in a publicly available directory, or to verify, correct and delete any data related to them shall be provided free of charge.

Amendment

(4) The possibility for end-users not to be included in a publicly available directory, or to verify, correct, **update, supplement** and delete any data related to them shall be provided free of charge.

Amendment 32

Proposal for a regulation Article 15 – paragraph 4 a (new)

Text proposed by the Commission

Amendment

(4a) The provisions of paragraphs 1 to 4 shall not apply to data and information published in other publicly accessible sources and data provided by end-users themselves.

Or. de

Amendment 33

Proposal for a regulation Article 15 – paragraph 4 b (new)

Text proposed by the Commission

Amendment

(4b) Any undertaking which provides publicly accessible information, communication or telecommunication services and which issues or uses telephone numbers, user names or other means of user identification shall be required, upon request and with due regard for provisions relating to data protection, to make the participants' data available to any undertaking which provides or operates directory or information services, in order to provide publicly accessible directory or information services. The data shall be communicated immediately and in a non-discriminatory manner.

Or. de

Amendment 34

Proposal for a regulation Article 16

Text proposed by the Commission

Amendment

Article 16

deleted

Unsolicited communications

- (1) Natural or legal persons may use electronic communications services for the purposes of sending direct marketing communications to end-users who are natural persons that have given their consent.*
- (2) Where a natural or legal person obtains electronic contact details for electronic mail from its customer, in the context of the sale of a product or a service, in accordance with Regulation (EU) 2016/679, that natural or legal person may use these electronic contact details for direct marketing of its own similar products or services only if customers are clearly and distinctly given the opportunity to object, free of charge and in an easy manner, to such use. The right to object shall be given at the time of collection and each time a message is sent.*
- (3) Without prejudice to paragraphs 1 and 2, natural or legal persons using electronic communications services for the purposes of placing direct marketing calls shall:*
- a) present the identity of a line on which they can be contacted; or*
 - b) present a specific code/or prefix identifying the fact that the call is a marketing call.*
- (4) Notwithstanding paragraph 1, Member States may provide by law that the placing of direct marketing voice-to-*

voice calls to end-users who are natural persons shall only be allowed in respect of end-users who are natural persons who have not expressed their objection to receiving those communications.

(5) Member States shall ensure, in the framework of Union law and applicable national law, that the legitimate interest of end-users that are legal persons with regard to unsolicited communications sent by means set forth under paragraph 1 are sufficiently protected.

(6) Any natural or legal person using electronic communications services to transmit direct marketing communications shall inform end-users of the marketing nature of the communication and the identity of the legal or natural person on behalf of whom the communication is transmitted and shall provide the necessary information for recipients to exercise their right to withdraw their consent, in an easy manner, to receiving further marketing communications.

(7) The Commission shall be empowered to adopt implementing measures in accordance with Article 26(2) specifying the code/or prefix to identify marketing calls, pursuant to point (b) of paragraph 3.

Or. de

Justification

Article 16 of the proposal for a regulation deals with direct marketing aspects without making any direct link to communications data or end-user terminal equipment. This provision is concerned with the law on advertising and consumer protection, matters which should be governed by a substantively appropriate EU legal instrument. Directive 2005/29/EC (Directive on unfair business practices) would be a more appropriate legal instrument here.

Amendment 35

Proposal for a regulation Article 17

Text proposed by the Commission

Amendment

Article 17

deleted

Information about detected security risks

In the case of a particular risk that may compromise the security of networks and electronic communications services, the provider of an electronic communications service shall inform end-users concerning such risk and, where the risk lies outside the scope of the measures to be taken by the service provider, inform end-users of any possible remedies, including an indication of the likely costs involved.

Or. de

Justification

Article 34 of Regulation (EU) No 2016/679, Article 40 of the European Electronic Communications Code (COM(2016) 590 final) and the Directive concerning measures for a high common level of security of network and information systems across the Union (EU 2016/1148) are adequate legal instruments containing information about recognised security risks.

Amendment 36

**Proposal for a regulation
Article 21 – paragraph 2**

Text proposed by the Commission

Amendment

(2) Any natural or legal person other than end-users adversely affected by infringements of this Regulation and having a legitimate interest in the cessation or prohibition of alleged infringements, including a provider of electronic communications services protecting its legitimate business interests, shall have a right to bring legal proceedings in respect of such infringements.

deleted

Or. de

Justification

Articles 77, 78 and 79 of Regulation (EU) No 2016/679 regulate the right to lodge a complaint with a supervisory authority, the right to an effective judicial remedy against a supervisory authority and the right to an effective judicial remedy against a controller or processor, and therefore provide sufficiently for complaints.

Amendment 37

Proposal for a regulation Article 22 – paragraph 1

Text proposed by the Commission

Any end-user of electronic communications services who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the infringer for the damage suffered, unless the infringer proves that it is not in any way responsible for the event giving rise to the damage in accordance with Article 82 of Regulation (EU) 2016/679.

Amendment

Article 82 of Regulation (EU) 2016/679 **shall apply.**

Or. de

Justification

Article 82 of Regulation (EU) No 2016/679 already regulates the issue of liability and the right to compensation. The article inserted in Article 22 of the proposal for a regulation extends and specifies Article 82 of Regulation (EU) No 2016/679 and makes this proposal *lex specialis*.

Amendment 38

Proposal for a regulation Article 23

Text proposed by the Commission

Article 23

General conditions for imposing administrative fines

Amendment

deleted

(1) For the purpose of this Article, Chapter VII of Regulation (EU) 2016/679 shall apply to infringements of this Regulation.

(2) Infringements of the following provisions of this Regulation shall, in accordance with paragraph 1, be subject to administrative fines up to EUR 10 000 000, or in the case of an undertaking, up to 2 % of the total worldwide annual turnover of the preceding financial year, whichever is higher:

(a) the obligations of any legal or natural person who process electronic communications data pursuant to Article 8;

(b) the obligations of the provider of software enabling electronic communications, pursuant to Article 10;

(c) the obligations of the providers of publicly available directories pursuant to Article 15;

(c) the obligations of any legal or natural person who uses electronic communications services pursuant to Article 16.

(3) Infringements of the principle of confidentiality of communications, permitted processing of electronic communications data, time limits for erasure pursuant to Articles 5, 6, and 7 shall, in accordance with paragraph 1 of this Article, be subject to administrative fines up to 20 000 000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher.

(4) Member States shall lay down the rules on penalties for infringements of Articles 12, 13, 14, and 17.

(5) Non-compliance with an order by a supervisory authority as referred to in Article 18, shall be subject to administrative fines up to 20 000 000

EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher.

(6) Without prejudice to the corrective powers of supervisory authorities pursuant to Article 18, each Member State may lay down rules on whether and to what extent administrative fines may be imposed on public authorities and bodies established in that Member State.

(7) The exercise by the supervisory authority of its powers under this Article shall be subject to appropriate procedural safeguards in accordance with Union and Member State law, including effective judicial remedy and due process.

(8) Where the legal system of the Member State does not provide for administrative fines, this Article may be applied in such a manner that the fine is initiated by the competent supervisory authority and imposed by competent national courts, while ensuring that those legal remedies are effective and have an equivalent effect to the administrative fines imposed by supervisory authorities. In any event, the fines imposed shall be effective, proportionate and dissuasive. Those Member States shall notify to the Commission the provisions of their laws which they adopt pursuant to this paragraph by [xxx] and, without delay, any subsequent amendment law or amendment affecting them.

Or. de

Justification

Article 83 of Regulation (EU) No 2016/679 regulates the general preconditions for the imposition of fines. The specification here amends Article 83 of Regulation (EU) No 2016/679 and creates a dual regime. This dual structure would hamper the correct application of the law by supervisory authorities and courts and lead to unfair treatment.

Amendment 39

Proposal for a regulation Article 23 a (new)

Text proposed by the Commission

Amendment

Article 23a

Article 83 of Regulation (EU) No 2016/679 shall apply.

Or. de

Justification

Article 83 of Regulation (EU) No 2016/679 regulates the general preconditions for the imposition of fines. The specification here amends Article 83 of Regulation (EU) No 2016/679 and creates a dual regime. This dual structure would hamper the correct application of the law by supervisory authorities and courts and lead to unfair treatment.

Amendment 40

Proposal for a regulation Article 24

Text proposed by the Commission

Amendment

Article 24

deleted

Penalties

(1) Member States shall lay down the rules on other penalties applicable to infringements of this Regulation in particular for infringements which are not subject to administrative fines pursuant to Article 23, and shall take all measures necessary to ensure that they are implemented. Such penalties shall be effective, proportionate and dissuasive.

(2) Each Member State shall notify to the Commission the provisions of its law which it adopts pursuant to paragraph 1, no later than 18 months after the date set forth under Article 29(2) and, without delay, any subsequent amendment

affecting them.

Or. de

Justification

Article 84 of Regulation (EU) No 2016/679 regulates penalties. The specification here amends Article 84 of Regulation (EU) No 2016/679 and creates a dual regime. This dual structure would hamper the correct application of the law by supervisory authorities and courts and lead to unfair treatment.

Amendment 41

Proposal for a regulation
Article 24 a (new)

Text proposed by the Commission

Amendment

Article 24a

Article 84 of Regulation (EU) No 2016/679 shall apply.

Or. de

Justification

Article 84 of Regulation (EU) No 2016/679 regulates penalties. The specification here amends Article 84 of Regulation (EU) No 2016/679 and creates a dual regime. This dual structure would hamper the correct application of the law by supervisory authorities and courts and lead to unfair treatment.

Amendment 42

Proposal for a regulation
Article 29 – paragraph 2 – subparagraph 1

Text proposed by the Commission

Amendment

It shall apply from 25 May **2018**.

It shall apply from 25 May **2019**.

Or. de

Justification

The regulation ought to apply from 25 May 2019 at the earliest, and, at the latest, from one

year after the entry into force of the European Electronic Communications Code (COM(2016)590 final). This proposal and Regulation (EU) No 2016/679 ought indeed to enter into force in parallel, but businesses must be given a realistic time frame for adjustment, and the definition must be aligned with the European Electronic Communications Code.