

REFIT Platform Opinion

Date of Adoption: 27/28 June 2016

REFIT Platform Opinion on the submission by the Danish Business Forum on the E Privacy Directive and the current rules related to "cookies"

The REFIT Platform has considered the need to align the ePrivacy Directive with the recently adopted General Data Protection Directive and to harmonise the 'cookie provisions', suggested by Danish Business Forum.

The Platform recommends that the Commission gives due consideration to the issues identified by the Platform such as ensuring that the revised E-Privacy Directive (adopted in 2002 and amended in 2009) is aligned and consistent with the General Data Protection Regulation adopted in 2016 or that additional exceptions to the 'consent' rule for cookies are envisaged under certain conditions, provided they do not create any privacy risk, in the on-going REFIT evaluation of the Directive. The Platform also recommends that the Commission addresses national implementation problems and facilitates the exchange of best practice amongst Member States.

The detailed recommendations of the Stakeholder Group and Government group are provided within the main body of the Opinion.

Detailed Opinion

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1 Submission IV.1b by the Danish Business Forum (DBF)

The current rules on collection of data (following the e-privacy directive) are meant to enhance the protection of personal data. However, the regulation is very burdensome for businesses given that cookie information and consent mechanisms must be implemented on almost all websites. In addition, the current rules are likely to be counterproductive as the constant stream of "cookie pop-up-boxes" that users are faced with completely eclipses the general goal of privacy protection as the result is that users blindly accept cookies.

Suggestion

The "cookie regulation" should be amended in a manner which will both decrease industry costs of implementation and raise awareness of privacy among users. Less intrusive types of cookies (for instance cookies used for website statistics) should be exempted and regulation should be reserved for websites using cookies that pose genuine risks of privacy intrusion. The benefits will be fewer burdens to businesses, more alertness to privacy issues among users, and the possibility of more effective and targeted enforcement.

2 Policy context

The DBF submission relates to the so-called "cookie rule" enshrined in Article 5(3) of Directive 2002/58/EC on privacy and electronic communications (the ePrivacy Directive), as amended by Directive 2009/136/EC.

General Data Protection Directive

The right to the protection of personal data has been explicitly laid down in Article 8 of the Charter of Fundamental Rights and in Article 16 of the Treaty on the Functioning of the European Union. The latter gave the EU new responsibilities to protect personal data in all areas of EU law, including police and judicial cooperation.

On 25 January 2012 the European Commission has proposed a comprehensive reform of the EU's 1995 data protection directive (95/46/EC) to strengthen online privacy rights and boost Europe's digital economy.

Technological progress and globalisation have profoundly changed the way data is collected, accessed and used. In addition, the EU Member States have implemented the 1995 rules differently, resulting in divergences in enforcement, which in turn created complexity, legal uncertainty and administrative costs.

The data protection reform is a key enabler of the Digital Single Market which the Commission has prioritised. The reform allows European citizens and businesses to fully benefit from the digital economy and a single law (the General Data Protection Regulation) will do away with the current fragmentation and costly administrative burdens, leading to savings for businesses of around €2.3 billion a year. The GDPR will help reinforce consumer confidence in online services, providing a much needed boost to growth, jobs and innovation in Europe.

Current State of Play

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 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) was published in the Official Journal on 4 May 2016. The regulation entered into force in May 2016 and will be applicable as of May 2018.

Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purpose of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA was published in the Official Journal on the same day. The transposition deadline is 6 May 2018.

The e-privacy Directive

The e-Privacy Directive (2002/58/EC) specifies and complements Directive 95/46/EC with respect to the processing of personal data in the electronic communication sector, ensuring the free movement of such data and of electronic communication equipment and services in the Union.

The Commission announced in the Digital Single Market Communication of 6 May 2015 ('DSM Communication') that it would prepare the 'review (of) the ePrivacy Directive with a focus on ensuring a high level of protection for data subjects and a level playing field for all market players'. Furthermore, the GDPR requires that Directive 2002/58/EC should be reviewed in particular in order to ensure consistency with the General Data Protection Regulation.

Current state of play

The e-Privacy Directive is subject to an evaluation under the REFIT Programme where issues of effectiveness, efficiency, coherence, EU added value and relevance will be thoroughly assessed. A special emphasis on burden reduction is envisaged and the results of this evaluation will feed into the Impact Assessment of its revision and inform the design of the e-Privacy Directive.

3 Opinion of the REFIT Platform

3.1 Considerations of the REFIT Platform Stakeholder group

- The revision of the e-Privacy directive was announced in the Digital Single Market Strategy. The Commission's objective is to ensure a high level of protection for citizens and a level playing field for all market players as the digital economy is borderless.
- The e-Privacy directive regulates the processing of personal data and the protection of privacy in the electronic communication sector. It was originally adopted in 2002 to complement the 1995 Data Protection Directive and was last updated in 2009.
- With the recent adoption of the General Data Protection Regulation (GDPR), which defines the EU general legal framework for the protection of personal data, it is

essential to review the e-Privacy Directive to ensure that the two pieces of legislation are fully aligned. Given the importance of the provisions contained in the e-Privacy Directive, such as the one ensuring the confidentiality of communications, it is also necessary to ensure that the e-Privacy rules are fit for the digital age and the new technological reality.

- In terms of the choice of the legal instrument, turning the e-Privacy Directive into a Regulation would help create a coherent and consistent legal framework with the GDPR and facilitate the interplay between the two. In any case, since a Regulation has direct general application and it is also binding in its entirety in the whole of the Union, Member States cannot be requested in a directive to contradict rules contained in a regulation. This must be taken into account not only in revising the e-Privacy directive, but also in implementing the GDPR.
- Several provisions of the Directive, such as those related to cookies and similar techniques (art. 5.3), have been implemented in different ways by different EU countries, thereby generating fragmentation in the legal framework. For example, some countries have added “national flavour” to Article 5.3. Fragmentation has also affected the consistent enforcement of the e-Privacy rules, as the competent enforcement authorities may differ from one Member State to another. Even in the territory of a single Member State, the competence to enforce the Directive may be divided among different authorities depending on the instrument used to implement the different parts of the Directive in national law. All this fragmentation must be corrected in the revision of the e-Privacy Directive to avoid disruptions in the Digital Single Market.
- According to the e-Privacy Directive, browsers should by default reject 3rd parties’ cookies and require users to engage in affirmative action to accept the cookies. In addition, as required by the 1995 Data Protection Directive, the user or the subscriber should be informed about the identity of the entity that wishes to store information or gain access to information that is already stored in his terminal equipment and about the purposes of the processing. Moreover, users should be provided with any information relating to the recipients or categories of recipients of the data, whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply, and the existence of their right of access, the right to rectify the data concerning him and the right to refuse the storing of or the access to their information.
- The way the ‘cookie consent’ requirement, derived from the e-Privacy Directive, is implemented in practice could result in individuals being bombarded by constant requests several times a day. This may create a “tick-the-box” approach, with consumers not being aware any more of what they consent to and not being able to exercise a real choice, as cookies must be accepted to continue browsing. Companies – especially SMEs – also need to find ways to be able to comply easily with the ‘consent’ requirement without distorting the ‘user experience’. At the same time rules should be proportionate and should not create a disincentive for the development of the digital economy.
- It is essential to review the rules applying to cookies and similar techniques to ensure futureproof measures to protect users, promote privacy-friendly technologies and allow greater flexibility for those tools that do not pose any privacy risks whatsoever.

It is also key to look at how to ensure that, when required, consent is informed and meaningful.

- Exceptions covering, for instance, cookies used for website statistics should be envisaged. However, in that case, it would be fundamental to include all the necessary safeguards to avoid that such an exception is used for tracking users ‘through the backdoor’ or leading to uncontrolled sharing of personal data with third parties.
- It is also necessary to look at the provisions in the e-Privacy Directive that relate to unsolicited commercial communications to ensure that they provide effective and appropriate protection when it comes to new means of online commercial communications, for instance social media.

Conclusion:

- The Commission must propose amendments to the e-Privacy directive to align it with the general Data Protection Regulation and harmonize cookies provisions.

Recommendations:

- The Commission, Member States and Data Protection Authorities should ensure that the revised E-Privacy Directive (adopted in 2002 and amended in 2009) is aligned and consistent with, and does not overlap with, the General Data Protection Regulation adopted in 2016, both in terms of approach and of choice of legal instrument. The Commission and Member States should seek greater harmonisation in the implementation and enforcement of the Directive, including the provisions on cookies and the enforcement mechanisms. The review should also consider whether European standards can be used to implement the revised legislation.
- The European Parliament and Member States, including national Data Protection Authorities, should promote a ‘privacy by design’ approach. The rules related to cookies and tracking technologies, as well as the rules on unsolicited communications, should be reviewed to ensure that they are futureproof.
- Additional exceptions to the ‘consent’ rule for cookies and similar techniques could be envisaged under certain conditions. Information provided to consumers in relation to the ‘cookie consent’ requirement should be meaningful, comprehensive and easily to understand.
- Reforming the legislation should not open any back doors for tracking users and any exceptions to the consent rule should only affect cookies which do not create any privacy risks.

On the recommendation of the Government group, it is important to underline that Article 5(3) of the e-privacy directive, which is recommended to be amended, is not only about cookies and that we need future proof measures to deal with tracking tools beyond cookies.

3.2 Considerations of the REFIT Platform Government group

It is necessary to assess the implementation of the latest regulation on "cookies" (approved by Directive 2009/136/EU) to determine if it has achieved its objectives (users to be more aware of the use of these techniques to gather data about their Internet surfing and not to install

them if they do not consent to it).

The Commission envisages reviewing the e-Privacy Directive in accordance with Regulation (UE) 2016/679, which strengthened the protection of personal data while reinforcing the digital single market. This is according to the Strategy for a Digital Single Market in Europe (Communication COM (2015) 192 final, of 6 May 2015). Amending the "cookie" law to render it more effective in protecting personal data, while alleviating business' legal compliance burdens, is in harmony with the aim of the said Strategy.

The feedback from the consultation to prepare the new legislative proposal on ePrivacy will be useful to assess the impact of the e-privacy Directive.

If the consultation reveals that the current "cookie regulation" has not achieved a good balance between raising awareness of privacy among users and industry interests in keeping legal compliance costs at bay, that regulation should be amended in the way proposed by Danish Business Forum.

There is broad support to review the e-Privacy Directive once the European Commission consultation and subsequent analysis has been finalized.

RECOMMENDATIONS

- *Recommendations to the Commission (e.g. soft measures; legislative action)*
Legislative action: amendment of article 5(3) of the e-Privacy Directive, if needed.
- *Recommendations to other EU institutions (e.g. acceleration of legislative process; political commitment)*
EU Parliament support for this potential reform.
- *Recommendations to Member States (e.g. national implementation; exchange of best practice)*
National implementation of the reforms once approved at the EU level.