



BDI

Bundesverband der
Deutschen Industrie e.V.

POSITION PAPER

EU consultation on the evaluation and review of the e-Privacy Directive

I. Objective and effectiveness of the e-Privacy Directive

BDI stands for a strong data protection law and the protection of the electronic communications of EU citizens in the EU. Strong data protection will reinforce people's trust in the digital world and eliminate competitive distortions between European companies and their competitors from other parts of the world. This EU wide future proof level of protection can only be achieved by a common and harmonized approach to all industries. The General Data Protection Regulation (GDPR) will create uniform data protection rules that will be applicable throughout Europe. The GDPR creates a real level playing field, the same conditions for all businesses operating in Europe. Companies will therefore have to comply with one law instead of 28, which will help to reduce costs and reinforce trust in digital services. For this reason, it is important to analyse carefully, for which cases additional sector specific regulations with regard to privacy are still necessary.

BDI notes, that the e-Privacy Directives' (EPD) aim of a harmonised and equivalent level of privacy in the electronic communications sector has not been sufficiently reached in practice. This is due to different implementation in EU member states (e.g. cookies in Art. 5 (3) EPD) and due to a failure to adopt progressive rules which are fit for a data-driven economy and society. Diverging applications of national authorities have aggravated this situation. Therefore, BDI observes different rules for companies with regard to privacy and consequently a partly unequal level of protection of privacy for consumers. Users should be able to rely on consistent protection standards across the digital market even when using comparable services. The EU legislator should now take the chance to continue the harmonized approach of the GDPR in order to create a real European level on data and privacy protection for all companies and citizens in the EU.

II. Revision of the e-Privacy Directive

Currently, there are various national and European, sector and non-sector specific legislations, which address privacy and data protection issues. This creates a complex legislative situation for companies, who have to deal with overlapping privacy-related rules. The interpretation and adaption of those rules have caused legal uncertainty and confusion for companies applying those rules especially because EU Member States have implemented them differently.

There are for example some member states, who have already widened the scope of the provision to telecom-like services.

The EU Commission should work towards a more harmonized approach avoiding overlaps and discrepancies between legislative instruments. For example, once the GDPR is applicable, inconsistencies and imbalances in regard to the notification obligation of the e-Privacy Directive would apply in regard to differing data breach notification rules (e.g. data breach in Directive 2002/58 EC has to be notified within 24 hours in accordance with Art. 2 of Regulation 611/2013, there is no general obligation on businesses to notify, GDPR requires a breach notification period of 72 hours). There are no objective reasons to maintain such differences that would create operational complexity. As a result and demonstrated with the above examples, the current e-Privacy Directive is fragmented and does not reflect sufficiently the dynamic and rapid technological developments of communication in the digital market.

III. Conclusion

For the upcoming review of the e-Privacy Directive it is therefore important that the Commission takes the following general principles into account:

- Overlapping rules should be avoided. It should be carefully analysed if additional rules in the e-Privacy Directive are still necessary or should rather be repealed. Privacy issues are already sufficiently regulated in the GDPR. Further, with the recently adopted Network and Information Security Directive (NIS), an additional instrument has been created to protect digital network infrastructure. Lastly, consumer-related provisions of the e-Privacy Directive, if still considered necessary, should be transferred to more appropriate legislation (e.g. consumer legislation). Where still required, self-regulatory measures can replace regulation. This flexible tool is particularly reasonable in dynamic and competitive markets like the telecommunications sector.
- The EU should reconsider its actual fragmented approach and regulate in line with future developments to achieve the objective to create a real Digital Single Market. Therefore, it is important to minimize co-existing privacy and security provisions in too many different, sector specific regulations. The EU Commission should take a comprehensive and holistic approach by taking into account already existing legislative instruments. Functionally equivalent services should be subject to the same rules as a general principle in order to reach an equal level of protection of personal data and privacy, regardless of the technologies.
- The review should focus on measures that are necessary both in order to protect the confidentiality of consumers' communication and trust. As a matter of consistency, the Commission should consider transferring the related provision of confidentiality of the e-Privacy Directive to the updated new framework covering all services that allow communication.
- The EU Commission should furthermore work towards a stronger and more consistent European-wide application and enforcement, as it is already the case with the GDPR. In addition, best practices should be promoted building upon already existing and flexible approaches (e.g. ISO certification). The GDPR leaves room for such developments (e.g. risk-based approach in technical and organization measures, Privacy Impact Assessments or data breach notifications; privacy by design and default; data portability, etc.) and emphasizes a co-regulatory approach to address technological developments more quickly.

Impressum

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