





The EU ePrivacy Regulation: Current Status and New Expectations for AdTech

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Session Goals

- In addition to the GDPR, the EU has been working on a major overhaul of its ePrivacy Directive.
- This session will provide an update on latest developments concerning the ePrivacy Regulation, which replaces the [ePrivacy Directive \(2002/58/EC\)](#) and take direct effect in all EU member states.
- Draft text of the Regulation has some of the same requirements as the ePrivacy Directive, but also many new requirements and prohibitions plus the possibility of fines of up to 20 million Euros, or four percent of global profits.
- **This session will describe the current status of the new Regulation and focus on steps that online and mobile advertisers, and their first-party and third-party advertising technology providers, will be expected to take to comply with the new Regulation, when it becomes final and enforceable.**

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■ Three Texts Need to Be Merged Into One

- 1/10/17 European Commission:
[ePrivacy Regulation](#) (COM/2017/010 final - 2017/03 (COD))
- 10/20/17: [EU Parliament](#)
- 9/20/2018:
[ePrivacy Regulation-Consolidated Austrian Compromise Text of the Draft ePrivacy Regulation](#) (Presidency Compromise Proposal 12336/18)

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■ **Background:**

- The Proposed Regulation would repeal and replace [Directive 2002/58/EC \(the 2002 ePrivacy Directive, as amended in 2009\)](#), which is also frequently referred to as the “Cookie Directive”).
- The proposal is designed to keep pace with the evolution of technical and market realities, and to [try to] ensure consistency with the General Data Protection Regulation 2016/679 adopted in 2016 (the “GDPR”).

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Key Provisions (Continued):

• Broader Applicability (Art. 1 (1) to (2) Presidency Compromise Proposal 12336/18)

- The Regulation would broaden the applicability of the framework by referencing to the broad definition of “electronic communications services” as proposed by the European Commission in its proposal for a [Directive of the European Parliament and of the Council establishing the European Electronic Communications Code \(Recast\) \(COM/2016/0590 final - 2016/0288 \(COD\)\)](#).
- That definition includes not only internet access services and services consisting wholly or partly in the conveyance of signals but also interpersonal communications services, which may or may not be number-based, such as for example, messaging services and web-based e-mail services.

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Key Provisions:

Change from a Directive to a Regulation

Material and Territorial Scope (Art's 2-3, Presidency Compromise Proposal 12336/18)

- The Regulation applies to:
 - The provision of electronic communications services to end-users who are in the EU;
 - The processing of electronic communications content and metadata;
 - The protection of terminal equipment of end users in the EU;
 - Sending direct marketing communication to end-users in the EU; and
 - The placing of software in the Union market that permits electronic communications.
- **NOT:**
 - Electronic communications after receipt.
- **Risk of Significant Sanctions (Art. 23, 24 (COM/2017/010 final - 2017/03 (COD))**
 - As with the GDPR, the Regulation would significantly increase the range of possible fines for non-compliance. The European Commission suggests that the amounts of administrative fines could be up to the higher of EUR 20 million or 4% of the fined party's total worldwide annual revenue of the preceding financial year

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■ **Key Definitions (Art. 4): Presidency Compromise Proposal 12336/18)**

- **‘electronic communications data’** means electronic communications content and electronic communications metadata.
- **‘electronic communications content’** means the content exchanged by means of electronic communications services, such as text, voice, videos, images, and sound.
- **‘electronic communications metadata’** means data processed in an by means of electronic communications network services for the purposes of transmitting, distributing or exchanging electronic communications content; including data used to trace and identify the source and destination of a communication, data on the location of the device generated in the context of providing electronic communications services, and the date, time, duration and the type of communication.

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■ **Key Definitions (Art. 4) (Continued)** **Presidency Compromise Proposal** **12336/18)**

- **‘electronic mail message’** means any electronic message containing information such as text, voice, video, sound or image sent over an electronic communications network which can be stored in the network or in related computing facilities, or in the terminal equipment of its recipient, including e-mail, SMS, MMS and functionally equivalent applications and techniques;
- **‘direct marketing communications’** means any form of advertising, whether written or oral, sent or presented to one or more identified or identifiable end-users of electronic communications services, including the placing of voice-to-voice calls, the use of automated calling and communication systems with or without human interaction, electronic mail message, SMS, etc.;

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Key Provisions (Continued):

- **Electronic Consent, including for Cookies (Art. 4a, recital 21a Presidency Compromise Proposal 12336/18)**
 - The Regulation is designed to be in conformity with the GDPR, meaning that it would be subject to the GDPR's heightened requirements for consent, which are stricter than those that exist in the current ePrivacy Directive.
 - Regarding the use of cookies in the user's terminal equipment, the recitals of the draft Regulation explicitly state that end-users are overloaded with requests to provide consent.
 - To address this problem, the Regulation contains express language regarding the use of technical means to provide consent through transparent and user-friendly settings (reference to "Privacy by design" and "Privacy by default").
 - Therefore, the Regulation states that software that is offered in the marketplace permitting electronic communications must offer the option to prevent third parties from storing information, including cookies, on the terminal equipment of an end-user or processing information already stored on that equipment.
 - **NOTE: The Article that addressed that provision of information and options for privacy settings is deleted in the Presidency Compromise Proposal 12336/18.**

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■ **Key Provisions (Continued):**

• **Article 16: Restrictions on Direct Marketing (Council Proposal 12336/18)**

- Under the proposed Regulation, direct e-marketing would not be permitted unless:
 - The end user consented; or
 - If a business obtains electronic contact details for electronic mail message from its customer end-users, in the context of the sale of a product or a service, in accordance with[the GDPR], the business may use these electronic contact details for direct marketing of its own similar products or services only if customers such end-users 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 of such end-users' contact details and, if that end-user has not initially refused that use, each time that when a natural or legal persons sends a message to that end-user for the purpose of such direct marketing communication is sent.
- The conditions for consent in the Regulation are the higher standards set out in the GDPR.

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■ **Article 5 (Presidency Compromise Proposal 12336/18)**

■ **Confidentiality of electronic communications data**

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

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- **Article 6: Permitted processing of electronic communications data (Presidency Compromise Proposal 12336/18)**
- **Providers of electronic communications networks and services shall be permitted to process electronic communications data only if:**
 - (a) it is necessary to achieve the transmission of the communication, for the duration necessary for that purpose; or
 - (b) it is necessary to maintain or restore the security of electronic communications networks and services, or detect technical faults and/or errors and/or security risks and/or attacks in the transmission of electronic communications, for the duration necessary for that purpose.

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- **Article 6 Exceptions (Presidency Compromise Proposal 12336/18):**
- Providers of electronic communications networks and services shall be permitted to process electronic communications metadata only if:
 - (a) it is necessary for the purposes of network management or network optimisation, provided that the purpose or purposes concerned could not be fulfilled by processing information that is made anonymous and for the duration necessary for that purpose, or to meet mandatory technical quality of service requirements;
 - (b) it is necessary for calculating and billing interconnection payments or for the performance of the contract to which the end-user is party, including to the extent more in particular if necessary for billing, calculating interconnection payments, or if it is necessary for detecting or stopping fraudulent, or abusive use of, or subscription to electronic communications services; 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; or
 - (d) it is necessary to protect the vital interest of a natural person, in the case of emergency, upon request of a competent authority, in accordance with Union or Member State law.

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- **Article 8 (Presidency Compromise Proposal 12336/18)**
- **Protection of end-users' terminal equipment information**
- **The use of processing and storage capabilities of terminal equipment and the collection of information from end-users' terminal equipment, including about its software and hardware, other than by the end-user concerned shall be prohibited, except on the following grounds:**
 - (a) it is necessary for the sole purpose of carrying out the transmission of an electronic communication over an electronic communications network; or
 - (b) the end-user has given his or her consent; or
 - (c) it is necessary for providing an information society service requested by the end-user; or
 - (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 or by a third party on behalf of the provider of the information society service provided that conditions laid down in Article 28 of Regulation (EU) 2016/679 are met; or
 - (e) it is necessary for a security software update provided that:
 - (i) security such updates are is necessary for security reasons and does not in any way change the privacy settings chosen by the end-user are not changed in any way, (ii) the end-user is informed in advance each time an update is being installed, and (iii) the end-user is given the possibility to postpone or turn off the automatic installation of these updates

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- **Article 8 (Presidency Compromise Proposal 12336/18) (Continued)**
- 2. The collection of information emitted by terminal equipment of the end-user to enable it to connect to another device and, or to network equipment shall be prohibited, except if on the following grounds:
 - (a) it is done exclusively in order to, for the time necessary for, and for the purpose of establishing or maintaining a connection; or
 - (b) the end-user has given his or her consent; or
 - (c) it is necessary for the purpose of statistical counting that is limited in time and space to the extent necessary for this purpose and the data is made anonymous or erased as soon as it is no longer needed for this purpose.

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■ **Key Provisions (Continued):**

• **Supervisory Authorities (Art. 18, 19, 20 (COM/2017/010 final - 2017/03 (COD))**

- The independent supervisory authority or authorities responsible for monitoring the application of the GDPR would also be responsible for monitoring the application of the Regulation.
- Further, the concept of a lead supervisory authority for data processing activities with cross-border effects of the GDPR and the detailed provisions regarding the cooperation between the lead supervisory authority and other concerned supervisory authorities in the GDPR would apply.

The EU ePrivacy Regulation: Current Status and New Expectations for AdTech: Differences in the Three Texts

■ **Main Amendments by European Parliament:**

- **Covering the different techniques used for direct marketing**
 - ‘any form of advertising, whether in written, audio, video, oral or any other format, sent, broadcast, served or presented to one or more identified or identifiable end-users of electronic communications services’ (Art. 4 (3) lit. f). It also clarifies the need for prior consent to contact people with unsolicited communications for direct marketing purposes.
- **Changes regarding permitted processing of electronic communications data (Art. 6)**
 - Restriction of processing of electronic communication data solely for explicitly requested services for purely individual usage, only for the duration necessary for that purpose and without the consent of all users only where such requested processing does not adversely affect the fundamental rights and interests of another user or users. It is also subject to specific safeguards, especially pseudonymization.
- **Changes regarding information and options for privacy settings to be provided, Art. 10**
 - Do-not-Track mechanisms (DNT’ s) should be technology neutral to cover different kinds of software and should ensure other parties can only store information on their terminal equipment if the user has given his consent
 - DNT’ s should offer users opportunity to change privacy settings options at any moment upon installation

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■ **Main Amendments by the Presidency Compromise Proposal 12336/18:**

- **Changes regarding permitted processing of electronic communications data**
 - Art. 6 (2)(a) allows processing for the purpose of network management or network optimization or to meet technical quality of service requirements
 - Scope of application of Art. 6 (2)(b) broadened because it does not necessarily need to be in the context of the performance of the contract; the processing is for instance permitted if it is necessary for the detection or stopping fraudulent, or abusive use.
 - As a new broad provision for further processing of metadata for compatible purposes (Art. 6 (2) lit.a)
- **Changes regarding permitted end users' terminal equipment information**
 - Grounds for exceptions (without end-user's consent) re the prohibition of terminal equipment information is broadened including situations where updates are not of purely security nature (Art. 8)
- **Deletion of Art. 10 regarding the information and options for privacy settings to be provided**

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Crucial provisions for online advertisers

• **The new definition of the term “direct marketing communications” makes it clear that online advertising is also included**

• **No ban of “Tracking Walls”**

- Recital 20 authorizes tracking walls, in particular if a payment option is available that does not involve access to the terminal equipment (e.g. tracking cookies).
- This amounts to a monetization of fundamental rights, as EU citizens will be forced to decide whether to pay for access to websites with money or by being profiled, tracked and abandoning their fundamental right to protection of personal data.
- This inherently contradicts the GDPR since consent to processing of personal data can become the counter-performance for access to a website, contrary to the aim of Article 7(4) of the GDPR.

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Crucial provisions for online advertisers

• Processing of electric communication metadata:

- Processing for compatible purposes can be done without consent. This comes very close to introducing a “legitimate interest” like Art. 6 (4) GDPR.

• As far as the controller is not able to identify a data subject, the technical protocol showing the consent was given from the terminal equipment shall be sufficient to demonstrate consent of the end-user according to Art. 8 (1) lit. b.

• Storage of electronic communications content:

- The Council draft limits the protection to the transmission of the communication. After the receipt of the message, the processing would fall under the GDPR.

• Complete deletion of Art. 10 on privacy settings allows to offer software products that are set to track



Questions?

How did things go? (we really want to know)

Did you enjoy this session? Is there any way we could make it better? Let us know by filling out a speaker evaluation.