

EDiMA feedback on ePrivacy - German Presidency

EDiMA, the European trade association representing the online platform ecosystem, would like to continue playing a constructive role in the proposed ePrivacy Regulation (ePR) discussions that the German Presidency will lead in the second half of 2020.

EDiMA welcomes the German Presidency's efforts to align the proposal with GDPR. One of the main challenges during these discussions will be to avoid any overlapping provisions that could lead to inconsistencies with the GDPR and ensuing legal uncertainty. The ePR should therefore maintain its original goal: particularise and complement the GDPR.¹ We therefore support full alignment of article 6, 8, 9 and 10 with the GDPR, as well as the recognition of all of the GDPR's legal bases and rights.

As documented in a [study](#) by the CNIL in December 2019, the issue of consent fatigue must be acknowledged. EDiMA believes that undesired levels of over-reliance on consent should and can be avoided by adopting the full range of GDPR legal bases and principles, which provide the tools to match actual data protection and confidentiality risks with a sufficient level of transparency and GDPR safeguards.

Below please find our suggestions regarding some specific issues put forward by the German Presidency in its questionnaire from 6 July 2020:

Article 6b(1)(e) and Article 6b(2) – Legitimate Interest & Statistical Counting

Option 1 is the preferable choice, as it allows for much needed flexibility to process data when needed for safety and integrity purposes. EDiMA would, however, emphasize that the language needs to be fully aligned with the GDPR.

One inconsistency that is apparent is regarding Article 6b(1)(e), which for instance includes the restrictions that the legitimate interest legal ground may not be used if the end-user is a child. Since electronic communications service providers may not always know if the end-user is a child, more information would have to be collected on the end-user in order to ascertain the age of the end-user. This in itself would contravene the GDPR's 'data minimisation' principle. It is worth noting that any risk stemming from the potential processing of a child's data would be mitigated by the Data Protection Impact Assessment (DPIA) obligation contained in Article 6b(2)(a).

Article 8 – Protection of end-users' terminal equipment

EDiMA would advise to work on the basis of option 1, as it better aligns with the GPDR, while at the same time providing a balanced approach in terms of safeguards and conditions to allow for legitimate activity.

Regarding the risks of malicious software, it is worth noting that the end-users' interests prevail over the service provider's interest when it concerns software that allows for malicious use. Service providers would in those cases not be allowed to rely on legitimate interest. Additionally, service providers would need to conduct an impact assessment and inform end-users.

¹ See also 2019/05 EDPB Opinion

In addition to the specific feedback required from Member States, we would like to highlight the following elements which we believe should still be addressed during the German Presidency:

Product improvement – Consistency with GDPR

In order to allow electronic communication service providers to improve existing services and to innovate new services it is essential that the proposal explicitly allows them to do so. The proposal currently prohibits processing of communications data (Article 5). Processing of electronic communication services is only allowed for specific reasons, including where “necessary to provide the service” (Article 6(1)). The proposal should make clear that product improvement is permissible in an accurately framed way whereby the provider is accountable in accordance with GDPR (i.e. subject to robust safeguards). Take for instance a customer service chatbot that makes use of customer input to further improve future customer queries. Assistive technologies and translators are other services that automatically processes data that is not strictly necessary for the functioning of a service but is expected by individuals nowadays. These services often rely on legitimate interest and contractual necessity under GDPR. The proposal’s over-reliance on consent would have negative consequences for users and would contribute to consent fatigue.

Article 8 – Clarifying relation with GDPR

Clarity is needed on when the ePR and GDPR apply and what processing grounds of personal data are applicable when obtained through cookies or similar technologies. There is currently significant confusion on whether the consent requirement under the Directive applies to all subsequent proceedings of data collected from the terminal equipment.² The ePR should address this lack of clarity by clearly delineating where it imposes additional requirements, but also specifying that the ePR does not go further than that.

Article 6b(ca) – Performance of a Contract

In order to help further align the ePR with the GDPR, EDiMA encourages the introduction of a legal ground built around the provisioning of an electronic communications service for which an end-user has concluded a contract (Article 6b(ca)). We consider this a welcomed addition by the Croatian Presidency as numerous entities across a variety of sectors enter into agreements with customers (both consumers and enterprises) based on legal contracts.

Article 18 – Independent Supervisory Authorities and Enforcement

We support the Commission's originally proposed Article 18 that clarifies that Chapters VI and VII of the GDPR including its one-stop-shop (OSS) mechanism should apply *mutatis mutandis* when it comes to personal data.

As the proposed ePrivacy Regulation targets a wide range of companies across the entire EU Single Market, unlike the existing Directive (that primarily covers the telecom sector that predominantly have operations at national level), it is important that, for the sake of efficiency, companies operating in the EU have one lead regulator which then cooperates with its counterparts in other Member States. EDiMA would therefore suggest that the European Commission's original text in Article 18 is reintroduced to maximise efficiency and coherence.

² See recent Spanish DPA decision: <https://www.aepd.es/es/documento/ps-00299-2019.pdf>