

ADVISORY NOTE

ePrivacy Regulation

30th March 2022

INTRODUCTION

The European Union (EU) is in the process of replacing the current e-privacy law with a new **ePrivacy Regulation (ePR)**. Its full name is "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)" (see [here](#))

The ePR will repeal the Privacy and Electronic Communications Directive 2002 (ePrivacy Directive) and will be '[Lex Specialis](#)' to the EU version of the General Data Protection Regulation (EU GDPR). It will particularise and complement the latter in respect of privacy-related topics.

It was intended the ePR was to have come into effect on 25th May 2018, together with the GDPR, but it is still being deliberated by the European Commission (EC).

OVERVIEW

The ePR is a proposal for the regulation of various privacy-related topics, mostly in relation to electronic communications within the EU. It will apply to any business that processes data in relation to any form of online communication service, uses online tracking technologies, or engages in electronic direct marketing.

Key fields of the proposed regulation are the confidentiality of communications, privacy controls through electronic consent and browsers, and cookies.

The proposal includes the following key changes:

- **New players:** Privacy rules will also apply to new players providing electronic communications services such as WhatsApp, Facebook Messenger, and Skype. That will ensure that the popular services guarantee the same level of confidentiality of communications as traditional telecoms operators.
- **Stronger rules:** All people and businesses in the EU will enjoy the same level of protection of their electronic communications through this directly applicable regulation. Businesses will also benefit from one single set of rules across the EU.
- **Communications content and metadata:** Privacy is guaranteed for communications like the time and the location of a call. Metadata have a high privacy component and must be anonymised or deleted if users did not give their consent unless the data is needed for billing.

- **New business opportunities:** Once consent is given for communications data (content and/or metadata) to be processed, traditional telecoms operators will have more opportunities to provide additional services and to develop their businesses. For example, they could produce heat maps indicating the presence of individuals, which could help public authorities and transport companies when developing new infrastructure projects.
- **Simpler rules on cookies:** The cookie provision, which has resulted in an overload of consent requests for internet users, will be streamlined. The new rule will be more user-friendly, as browser settings will provide for an easy way to accept or refuse tracking cookies and other identifiers. The proposal also clarifies that no consent is needed for non-privacy-intrusive cookies improving internet experience (like to remember shopping cart history) or cookies used by a website to count the number of visitors.
- **Protection against spam:** The proposal bans unsolicited electronic communications by emails, SMS, and automated calling machines. Depending on national law, people will either be protected by default or be able to use a do-not-call list to avoid receiving marketing phone calls. Marketing callers will need to display their phone number or use a special pre-fix that indicates a marketing call.
- **More effective enforcement:** The enforcement of the confidentiality rules in the regulation will be the responsibility of data protection authorities, already in charge of the rules under the GDPR.

PENALTIES

The proposed penalties for noncompliance will be up to €20 million or, in the case of an undertaking, up to 4% of the total worldwide annual turnover, whichever is higher.

WHAT DO YOU NEED TO DO?

Nothing at present as the ePR is **not expected to enter into force before 2023**. A potential transitional period of 24 months means that any new regulations would then not come into effect before 2025.

Although no longer part of the EU, the UK is expected to update the Privacy Electronic Communications Regulations 2003 (as amended), known as 'PECR', when the ePR comes into effect.

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