

Position Paper

EU Commission Review of the ePrivacy Directive

Mission

EMOTA's¹ main goal is to assist policy makers in removing any barriers to cross-border trade. EMOTA's commitment to a barrier free EU Single Market is long standing and can be traced across all our positions and actions.

We are making the following comments with the aim to constructively contribute to the debate over the future of the EU Digital Single Market for products and services by reflecting the views of online sellers across 17 markets, including the largest.

Key messages

- EMOTA supports the goal to **fully harmonize** the data protection and privacy rules across the EU
- The updated rules should be **technology and channel neutral** to avoid uncertainty.
- Current **consent requirements** should be simplified. They are hard to implement due to complexity.
- **Coherence** is needed between the General Data Protection Regulation and the updated ePrivacy framework.
- Traders should be **free to decide their business model**, based on advertising or paid access.
- Policy makers should avoid unnecessary duplication with the **existing rules on unfair commercial practices**

General remarks on the ePrivacy Directive and the connection to the General Data Protection Regulation

The ePrivacy Directive Article 5.3 requires an informed consent for the placing of cookies on the computer of the user.

This in turn was interpreted by the Article 29 Working Party in 2013² as a pro-active explicit consent to be provided by the websites before the processing takes place, claiming that otherwise it cannot be considered as an informed action by the user. The ePrivacy Directive also includes rules on electronic marketing. EMOTA would claim that the General Data Protection Regulation, adopted in 2016, covers already many of the aspects concerning privacy and electronic marketing.

Should the EU Commission decide to go forward and keep electronic marketing in the scope of the ePrivacy Directive, EMOTA would stress the importance of a coherent approach, especially in the context of the difficult timing chosen by the EU Commission to revise the ePrivacy Directive which would lead to the enforcement of a new Directive on privacy and data protection soon after the enforcement of the General Data Protection Regulation in May 2018.

¹ EMOTA, the European eCommerce and Omni Channel Trade Association, is the European level umbrella federation representing online and distance sellers across Europe. The main mission of EMOTA is to promote eCommerce and Distance Selling and help policy makers remove any barriers to cross-border selling. Transparency register N° 11251212351-96

² 02/2013 WD on consent for cookies

Answers to the EU Commission questionnaire:

Question 1: Based on your experience, do you consider that the e-Privacy Directive objectives have been achieved?

The general consent requirement in Article 5.3 contributed in the opinion of EMOTA to more visibility for the debate around the use of cookies. It is difficult to say to what extent that is because the level of consumer information and education about the online activities has also increased over the years

In the case of Article 13 on telemarketing, the transposition has been quite different and achieved in a more structured way. The general opt-in requirement for electronic marketing to consumers is by now an established procedure and no further elements are needed.

The main criticism for the ePrivacy Directive remains that it introduced a requirement which severely restricts business freedom, including the competition on how to best inform consumers of their rights and the personal data processing that takes place. Reflecting the interpretation of the Article 29 Working Party, collecting consent via a banner after the consumer has arrived on landing page might not be compliant, as the processing would have already started. The approach taken by the Directive also lead to legal fragmentation because of the differences in the implementation of the Directive.

This process also leads to “consent fatigue”. Consumers are unlikely to read the different explanations and requests for consent and would click through regardless.

The General Data Protection Regulation, with a broader scope than the 1995 Data Protection Directive, covers all personal data processing, including, if it is the case, the use of cookies. Therefore, there seems to be no justification regarding the maintaining of privacy/data protection rules in the ePrivacy Directive, other than those needed for the confidentiality of communications.

Question 2: Have you encountered problems in applying/understanding the rules (in your role of provider or as individual)?

The implementation of the obligations of Article 5.3, especially in a cross-border context proved very difficult.

Question 3: On the basis of your experience, did the fact that some Member States have allocated enforcement competence to different authorities lead

Yes, some took a very strong and strict privacy focus while others concentrated on the telecommunications aspects.

Question 5: In your opinion, are specific rules at EU level necessary to ensure the following objectives:

EMOTA supports the adoption of a fully harmonized set of data protection and privacy rules across the EU.

Question 6: Is there an added value to have specific rules for the electronic communications sector on...?:

EMOTA would argue that the it is essential to avoid duplication and to ensure coherence between the ePrivacy Directive and the Data Protection Regulation especially concerning Article 5.3 and 13.

Question 8: In your opinion, is the choice left to Member States to make telemarketing calls subject either to prior consent or to a right to object, coherent with the rules of Art 13.1 (which require opt in consent for electronic mail, fax and automatic calling machines), given the privacy implications and costs of each of the channels?

Yes, the provision is coherent. Confusion should be avoided in the EU Commission documents between unsolicited and unwanted communications. EMOTA supports the adoption of a fully harmonized set of data protection and privacy rules across the EU.

Question 9: There is legal uncertainty as to whether messages sent through social media are covered by the opt-in provision applying to email (Art 13.1) or by opt-out provisions (Art 13.3). Please indicate whether you agree or not with the following statements.

EMOTA argues for a channel/technology neutral approach, based on principles rather than on specific guidance or requirements for specific channels. The EU Commission could be more specific about the concerns raised in question 9 and also explain why it does not consider that existing legislation covers these aspects sufficiently.

Question 11: To what extent did the e-Privacy Directive create additional costs for businesses?

The ePrivacy Directive brought significant compliance costs as a result of the lack of harmonization.

Question 12: In your opinion, are the costs of compliance with the e-Privacy Directive proportionate to the objectives pursued, in particular the confidentiality of communication as a measure to safeguard the fundamental right to privacy?

The costs for compliance were not justified by the outcome, which resulted in a unclear and fragmented legal framework for what concerns electronic marketing.

Question 15: Based on your experience with the e-Privacy Directive and taking due account of the content of the GDPR, what should be the priorities for any future legal instrument covering privacy and data protection issues in the electronic communications sector?

EMOTA supports the adoption of a fully harmonized set of data protection and privacy rules across the EU.

Questions 16: In your opinion, could a directly applicable instrument, one that does not need to be implemented by Member States (i.e. a Regulation), be better to ensure an equivalent level of privacy protection in connection with the processing of data in the electronic communications sector and to ensure the free movement of such data?

In principle the adoption of a Regulation could improve the enforcement but this depends on how clear the Regulation is drafted. Such a Regulation would have to be drafted with the to avoid duplication with the General Data Protection Regulation and to avoid imposing additional burdens on businesses and disrupt the consumer experience.

Question 22: The practice of websites to deny access to those users who refuse to accept cookies (or other technologies) have generated critics that citizens do not have a real choice. To what extent do you agree to put forward the following measures to improve this situation?

EMOTA strongly defends the freedom of traders to choose their business model, as long as this is compliant with the law. For those traders that consider that without an explicit consent for the placing of cookies they would not be compliant and do not have the certainty that cookies can be disabled completely (for different reasons), it should be possible to choose the best course of action, be it to return customers where they came from, or redirect them to a “neutral” page.

This is a negative effect of the current ePrivacy Directive and should be avoided in the future. The EU Commission should be clearer about the “other technologies”. The other cases referred to by the EU Commission should be analyzed through the perspective of existing legislation on unfair commercial practices or data protection (e.g. “private mode” paying access instead of access funded via advertising).

The EU Commission should also consider that a paying model would actually require consumers that otherwise provided limited information to the controller in a freemium model, to register and pay, thus providing more personal data. So in the view of EMOTA this debate is rather a debate about data ownership and switching, which would probably be best discussed separately.

Question 24: It has been argued that requesting users' consent to the storage/access of information in their devices, in particular tracking cookies, may disrupt Internet experience. To facilitate this process and users' ability to consent, a new e-Privacy instrument should (several options possible):

The request for consent clearly disrupts the user experience and increases operating costs for sellers without a clear privacy benefit. Introducing a “by default” no advertising scenario will reduce website income and restrict the development of new services and products. Such a measure will be disproportionate when compared to the potential privacy benefits. EMOTA would recommend to the EU Commission to support industry initiatives in this area to improve transparency and consumer information.

Question 25: The e-Privacy Directive contains specific privacy protections for the processing of traffic and location data in order to ensure confidentiality of the related communications. In particular, they must be erased or made anonymous when they are no longer needed for the purpose of the transmission of a communication or consent to users should be asked in order to use them for added value services (e.g. route guidance, traffic information, weather forecasts and tourist information). Under the existing exemptions, the processing of traffic data is still permitted for a limited time if necessary e.g. for billing purposes. See background document for more details.

With the spread of mobile and apps the power of location data has become a powerful driver of economic growth. While it is right that privacy rights should be protected in accordance with the agreed principles of the GDPR it important for policy-makers to see the potential of location intelligence data and services as an opportunity and not a problem. Location based data can reduce transactions costs; power commerce and trade; provide more bespoke services and offers to consumers and ultimately open up wholly new sectors of the kind that Uber has done. Protecting the privacy issues involved in a manner that is simple, proportionate, convenient and understandable to businesses and users should guide policy-makers.

80 per cent of business data has some location element to it and the use of such geo-intelligence help companies across a broad range of industries glean more insight from their data which in turn helps drive productivity for them, and for consumers relevance and values. Location data is critical to help businesses identify customers, locate opportunities, enable communications, manage payments and streamline fulfillment – all critical in the cross border ecommerce market.

Question 27: Do you think that the Member States should retain the possibility to choose between a prior consent (opt-in) and a right to object (opt-out) regime for:

Evidence collected by the EU Commission does not seem to support the theory that a stricter consent requirement improves consumer protection. In reality for email marketing there is a general consent requirement. However, the real focus should be to educate all participants to this market on their rights and responsibilities. A one size fits all approach would not benefit consumers or the further development of the market.

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