



The New ePrivacy-Regulation: Overview on the Most Important Changes

On 10th of January, the European Commission has published the official proposal for the [ePrivacy Regulation](#), expected to come into force with the General Data Protection Regulation in May 2018. Associations and players of the online marketing sector have already strongly criticized the proposal, as it would have serious consequences on the internet industry and on the information society. What exactly will the ePrivacy Regulation change, if the proposal will be accepted unmodified? [Dr. Frank Eickmeier and Prof. Dr. Christoph Bauer](#) have summarized the main changes for you.

A draft of a new ePrivacy regulation from the European Commission was leaked as early as December 2016. Now the final version of 10/01/2017 has been published as an official proposal from the EU Commission. The new Regulation should replace the ePrivacy Directive 2002/58/EC in the coming years and flanks the [General Data Protection Regulation \(GDPR\)](#), which comes into force on 25 May 2018. Unlike the old ePrivacy Directive, the planned ePrivacy Regulation applies directly in all Member States and takes priority over national legislation.

According to the current proposal of the ePrivacy Regulation, visiting a website by the end user can no longer be understood as consent to separate data processing. The currently customary banner with the content “By visiting this website, you (by implication) accept the use of cookies” or the notification “We use cookies” and an OK button will become impermissible because the user does not really have a genuine choice regarding giving consent. It is also not enough to provide information that the user affected can set up data protection in his browser.

Opt-in will be compulsory for many cookies

Rather, on first accessing the website and even before the first placement of a cookie requiring consent, the user must be notified about the use of cookies, at which point the user has the option to agree or to reject. The notification can be presented by way of a banner or a notification window which cannot be overlooked. The consent must be requested by way of an opt-in. Opt-in means that, if a checkbox is used, this may not already be filled in with a tick. The user must explicitly click on “Agree” himself in order to agree, as if he were concluding a purchase online. If he does not do this and does not pay attention to the banner/notification, no cookies which require consent may be placed.

Should the user refuse, the website may not however be blocked to him. In Recital 42 of the General Data Protection Regulation, it states that the design must be such that the user “[...] is in the position to refuse or revoke the consent without suffering disadvantages.” But there are plausible reasons to accept a disadvantage if the user who does not consent would be deprived of content in the website. But this cannot be said with absolute certainty because it is currently unclear how a “disadvantage” will be defined.

Opt-out must be possible at any time

Besides that, the website operator must also offer users who have already granted their consent an opt-out at any time, that is to say an option to later revoke their consent. Not least, website operators have to consider in future also the browser setting “Do Not Track” because this already establishes the non-consent of the user.

Strict compliance with the new rules of the ePrivacy Regulation will lead to significant expenses for the website operators to adapt their website. Especially in the case of website monitoring, companies must in future weigh up very precisely what forms of data collection require user consent. Intensive negotiations and a lot of lobbying work is expected before the norm comes into force.



Interview about the impacts of the ePrivacy Regulation with Prof. Dr. Christoph Bauer

The advertising industry has sharply criticized the proposal of the European Commission for the ePrivacy Regulation which is meant to improve online data protection. What do you think about the legislative proposal?

Christoph Bauer: The proposed text for the ePrivacy Regulation is a specification of the General Data Protection Regulation (GDPR), but which goes in a different direction than expected from the GDPR. So far, legislation pursued the objective to enable existing business models of the industry further on. This has changed significantly, as an opt-in by the user is required for third party cookies and other tracking technologies, what has not been the case before. Furthermore, the implementation period will not be two years, but the ePrivacy Regulation shall come into force together with the GDPR in May 2018. As it is so far only a proposal, the implementation period will probably be very short. In total, the procedure of the Commission is very unusual and thus astonished the impacted industry. Some people as IAB Germany vice president Thomas Duhr are afraid that the internet as we know it today will not exist any more.

The measures impacting the cookies is part of a longer list of legislative proposals for the improvement of data protection in electronic communication. The European Commission presented it as a possibility to simplify the settings of acceptance or denial of cookies that access data on the user's computer or that track the user's online behavior. Which consequences could this text have if it will be accepted unmodified?

CB: From the user's point of view, the big amount of tracking methods would be

reduced, because an opt-in would be necessary in the future. Until now, this tracking has been allowed in most countries. Insofar, the business models of the numerous third party tracking providers would be at risk. Furthermore, companies that already have got the user's opt-in (e.g. Google, Facebook) would not be impacted by this regulation, which means that their business model would not be endangered and they would probably take over their competitors' businesses. The reason is that big platforms as Facebook and Google often use first party cookies, but generally have got the user's opt-in for third party cookies, which is part of their large and detailed terms of use that users often accept without proper reading.

If the regulation comes into force unmodified, big shifts are to be expected in the online advertising and technology business, because this regulation actually favors the big players as Facebook and Google that already have got an opt-in. But the consequences for all other players of the online marketing industry would be devastating. That cannot be the interest of the Commission.

The European Commission wants to "guarantee the privacy of online behavior and of the users' devices" and to transfer the control to the user. In your opinion, how can that fundamental principle and the need to finance content with advertising be brought together? In other words, what amendments could be proposed for this law?

CB: It could be an idea to permit anonymous tracking, as neither the GDPR affects anonymous data. Thus, if someone tracks a user without knowing his personal data as name, address, email address, ip address etc, tracking by cookies and other trackers might be allowed. Because the person behind anonymous data cannot be identified by the one who gets the anonymous data. Besides, there are tracking methods that do not leave traces on the users' devices (as cookie text files in browsers do), but that track the device anyway. Insofar it can happen that third party cookies will be forbidden, but that other technologies will take their place, that actually have got the same effects but are not forbidden. Given that, the legislator would have missed the target.



A detailed statement by ePrivacy about the ePrivacy Regulation is available as PDF on our [website](#).

ePrivacy in the media about the ePrivacy Regulation

16.01. Article by Dr. Frank Eickmeier and Prof. Dr. Christoph Bauer about the ePrivacy Regulation on [OnlineMarketing.de](#)

16.01. Interview with Prof. Dr. Christoph Bauer about the ePrivacy Regulation on [Ad-Exchange.fr](#)

17.01. Article by Dr. Frank Eickmeier and Prof. Dr. Christoph Bauer about the ePrivacy Regulation on [ExchangeWire.com](#)



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