



UPDATED POSITION PAPER ON

THE PROPOSAL FOR AN E-PRIVACY REGULATION

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Updated Position Paper on the Proposal for an E-Privacy Regulation

The Developers Alliance represents software developers and the companies invested in their success. The Alliance's members include businesses of all sizes that are leaders in consumer, enterprise, industrial, and emerging software development, along with a global network of more than 70.000 developers.

The European Commission's proposal for an ePrivacy Regulation ("ePR") has a very broad scope. It aims to cover communication content and metadata, even if it is processed by a minor ancillary feature. It proposes to regulate the use of storage and processing capacity of a device. It also contains rules on software that allows connecting to the internet.

EVERY app uses the storage and processing capacity of a device and is technically software that allows the retrieval and presentation of information on the internet. Most apps will likely process communication content and metadata also and thus would fall under Articles 5 - 10 of the proposal.

This means that, for the app world, the ePrivacy Regulation will de facto overtake the General Data Protection Regulation ("GDPR") rules.

This is extremely worrying for several reasons.

- **It significantly moves the compliance goalpost:** GDPR is a complicated set of legal requirements, and digital SMEs and developers are working hard on implementing its principles. The ePR - given its broad scope, both in terms of services as well as data covered – risks jeopardizing these complicated compliance efforts.
- **It adds restrictions without meaningful exceptions:** The ePR also introduces a new range of very severe restrictions, such as the prohibition to process communication content and metadata as well as the use of storage and processing capacity of a device and relies on a newly defined consent as the main exception.
- **It risks jeopardizing the main revenue stream for developers: advertising.** As proposed – and, in particular, as amended by the European Parliament – the Regulation represents a clear attack on the ad-funded business model, which is the main source of revenue for most developers.¹

¹ 38% of worldwide developers base their business model on advertising, while only 21% ask users to pay to download their apps and 19% are looking for subscription revenue. On top of this, the trend of adopting mixed business model is growing: in many cases, paid app business models are integrated with alternative ads-based models. For more details see Vision Mobile blog from August 2016: [Why are mobile developers so obsessed with advertising.](#) A [Gfk study](#) highlights that online personal advertising is important to 87% of SMEs in the UK, 82% in Germany and 84% in France.



In order to ensure that users' communications remain confidential and their data protected, while also supporting the flourishing European developer community, we encourage policy makers to re-evaluate the content of the proposal in order to:

1) Ensure that developers can understand their legal obligations

The ePR does not answer the basic question any developer will ask: when do I have to apply the GDPR and when the ePR? This needs to be predictable and, as such, cannot depend on user settings. The clear-cut **solution is to limit the scope to apps whose core function is real-time voice communication or messaging.** Any solution where user action or user settings defines the scope is not predictable for developers. Accordingly, applicable law should not depend on whether the user sent a message to five or 50 people, or whether a user opened an email.

The ePR alters basic standards in the GDPR, such as consent. As it stands, there are about a dozen additional new requirements on consent. So, a developer would not only need to develop different solutions for the GDPR and the ePR, but also further options according to the applicable Article of the ePR. This is obviously unworkable, especially in light of the existing fine line between these obligations and will undermine the effort undertaken by developers to comply with GDPR obligations. **There should be one consent requirement across all legal instrument and that should be the one adopted under the GDPR. All the additional requirements in the recitals and Articles of the ePR should be deleted.**

The ePR must be simplified. The multiple layers introduced by the Commission's proposal that outline different, yet overlapping, rules for communication content, metadata, device related processing, software and potentially hardware are extremely complicated and not digestible or understandable for a small company. The proposal should follow a much simpler structure – like the current ePrivacy Directive – having one set of consistent exceptions (instead of several – like in Articles 6-10), preferably coupled with a risk-based approach and the recognition of multiple legal basis to process data in line with GDPR obligations.

2) Developers should be able to define the most appropriate user settings according to their products to enable the best possible user experience

Apps should be able to rely on both opt-in and opt-out features. If everything is turned off by default and is subject to strict user consent, the installation process of any app will be extremely burdensome and many of the features that allow an app to distinguish itself in a crowded marketplace would be lost. This might also negatively impact the user experience, which is incredibly important for these kinds of businesses. Developers should be allowed to rely on both opt-in and opt-out options, coupled with strong transparency and control tools, of course. This is only achievable if the **ePR moves away from the current consent-based approach and allows for all the GDPR legal basis.**

The Developers Alliance is very concerned about the proposed provisions of Article 8 and 10. As mentioned, EVERY app is storing information on the device and processes information already stored. This is obviously not limited to advertising purposes. Preventing this would mean installing apps would be prohibited. Article 10 represents a real risk as it ignores the reality of the technologies used in the app world.



3) Developers must be able to monetize their services

There is an increasing number of studies² that prove the negative impact the ePR would have on the ad-funded business model if adopted as proposed by the Commission and modified by the Parliament. Advertising is the main source of revenue for a large number of developers. Prohibitions that would go beyond the already restrictive provisions of the GDPR would take away the livelihood of most of our members and severely restrict the development of new apps and services. Online advertising was one of the core subjects of the GDPR and, as the latter enters into force, transparency and control will certainly improve in this space. We recommend policy-makers wait for the GDPR to take effect, instead of approving a new set of rules risking to force a large number of small business out of the market.

Conclusions

The app economy is fast growing. Developers are writing mobile applications for billions of users and create almost two million jobs in Europe³.

The developer community is concerned about the potential serious disruption of the ePrivacy Regulation on small businesses and software developers' business models and market choices. Software developers are committed to the highest protection of their users' data and privacy, and support any effort aimed at streamlining existing privacy rules and making them fit the digital age. However, we believe that the ePrivacy Regulation, as it stands now, will not deliver on either of those objectives and will instead do considerable harm to the digital ecosystem.

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About the Developers Alliance

The [Developers Alliance](#) is the world's leading advocate for software developers and the companies invested in their success. Alliance members include industry leaders in consumer, enterprise, industrial, and emerging software development, and a global network of more than 70,000 developers.

² See following studies:

- WIK study "[Economic impact of the ePrivacy-Regulation provisions on online advertising and ad-based digital business models](#)", November 2017
- VDZ study "[The business relevance of the ePrivacy Regulation in Germany](#)", January 2018
- [The 2017 Tenjin Ad Monetization Report](#), March 2018

³ Progressive Policy Institute study "[The App Economy in Europe: Leading Countries and Cities](#)", October 2017