

EU

New Regulation Proposed to Ensure Privacy in Electronic Communications

The European Commission has published its formal proposal for a [new regulation on e-Privacy](#). The proposed legislation would replace the existing e-Privacy Directive in order to keep pace with technological developments and to complement the General Data Protection Regulation (GDPR). The new legislation [would regulate the processing of electronic communications data](#) (including content and metadata), storage and erasure. In line with the proposed Electronic Communications Code, the regulation would extend obligations applicable to traditional electronic communications networks and services to cover web-based email and VOIP, but would additionally cover ancillary services (e.g. messaging services in dating apps and video games). The Commission's proposal also contains revised rules regarding cookies and similar applications, as well as the sending of unsolicited communications. The proposed legislation will now be reviewed by the European Parliament and the Council. The Commission has set an ambitious target of 25 May 2018 for the adoption of the new regulation, which would coincide with the GDPR entering into force.

Germany

Bavarian Data Protection Authority Informs on Marketing in the GDPR Context

As part of its regular non-binding information on the General Data Protection Regulation (GDPR), the Bavarian data protection authority (the Authority) has issued a [short paper](#) on the topic of marketing. The Authority stated that the GDPR will replace the detailed provisions of the German Federal Data Protection Act on data processing for marketing purposes. In future, the relevant provision for assessing the legality of processing for marketing purposes will be Article 6(1)(f) of the GDPR, which requires a balancing of interests. In line with Recital 47 of the GDPR, the processing of personal data for direct marketing purposes may be regarded as constituting a legitimate interest. However, the Authority holds that in the context of telephone or fax marketing, the balancing of interests will rather lead to the conclusion that such processing still requires prior and explicit consent. The Authority, among others, also affirmed a recent statement by the "Düsseldorfer Kreis", according to which older consents (for receiving advertisements) remain valid if they were given in conformity with the GDPR.

German Lawyers' Association Takes Stand on the Issue of Data Ownership

The German Lawyers' Association (Deutscher Anwaltsverein) (DAV) has issued [information](#) on the question of ownership of data and information. The DAV follows up on the longer ongoing debate as to whether there can be data ownership which is independent from the ownership of the data carrier. Examples would be property rights on car data or smart devices. The DAV welcomes the EU Commission's initiative to examine the need for legislation on this topic, but also warned against a premature legislative "fix". As regards the German legislation, the DAV thinks that it is inadequate in so far as it does not provide for claims in rem concerning data. The DAV is a voluntary association counting around 66,000 members and representing the interests of German lawyers on the national, European and international level.

US

Email Privacy Act Again Before US Congress

The [Email Privacy Act](#), which was approved 419-0 by the US House of Representatives last year, has been reintroduced for consideration by a bi-partisan group of co-sponsors. The proposed legislation would update the existing Electronic Communications Privacy Act, enacted over 30 years ago, to provide that US government agencies must obtain a warrant to search the online communications of US citizens. This would change the current law that permits federal agencies — without a warrant — to search any email communication older than 180 days that is stored on a third-party server. Last year, the bill was stymied in the US Senate Judiciary Committee in part by demand for an amendment that would have permitted the Federal Bureau of Investigation to use another device — a national security letter — to gain access to a lengthy list of electronic communications data. Reintroduction of the bill is strongly supported by a variety of consumer and privacy organisations, such as the Consumer Technology Association and the Information Technology Industry Council. Some supporters have noted that the bill does not go far enough, in that it does not protect geo-location data.

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