

QUESTIONNAIRE FOR THE PUBLIC CONSULTATION ON THE EVALUATION AND REVIEW OF THE E-PRIVACY DIRECTIVE

Fields marked with * are mandatory.

QUESTIONNAIRE FOR THE PUBLIC CONSULTATION ON THE EVALUATION AND REVIEW OF THE E-PRIVACY DIRECTIVE

The e-Privacy Directive (Directive 2002/58/EC on privacy and electronic communications) concerns the protection of privacy and personal data in the electronic communication sector. The Communication on a Digital Single Market Strategy for Europe (COM(2015) 192 final) of 6 May 2015 (DSM Communication) sets out that once the new EU rules on data protection are adopted, the ensuing review of the e-Privacy Directive should focus on ensuring a high level of protection for data subjects and a level playing field for all market players.

Given that the e-Privacy Directive particularises and complements the Data Protection Directive 95/46/EC that will be replaced by the General Data Protection Regulation (**GDPR**), this questionnaire contains several questions related to the interplay between the e-Privacy Directive and the future GDPR.

In December 2015 the European Parliament and the Council of Ministers reached a political agreement on the final draft of the GDPR. All references to the GDPR in this questionnaire and background document are based on the text adopted in December[1]. After a legal and linguistic review, which may result in small changes to the text, the GDPR will be formally adopted by the European Parliament and Council and the official texts will be published in the Official Journal of the European Union in all official languages.

The purpose of this questionnaire is twofold: First, to gather input for the evaluation process of the ePD (see Section I of the questionnaire) and second, to seek views on the possible solutions for the revision of the Directive (see Section II). The Commission invites citizens, legal entities and public authorities to submit their answers by the 5th of July 2016.

The Commission will summarise the results of this consultation in a report, which will be made publicly available on the website of the Directorate General for Communications Networks, Content and Technology. The results will feed into a Staff Working Document describing the Commission findings on the overall REFIT evaluation of the e-Privacy Directive.

This questionnaire is available in **3** languages (French, English and German). You can skip questions that you do not wish to answer, except the ones marked with an asterisk. You can pause at any time and continue later. Once you have submitted your answers, you would be able to download a copy of your completed responses as well as upload additional material.

Please note that except for responses from visually impaired, in order to ensure a fair and transparent consultation process, only responses received through the online questionnaire will be taken into account and included in the summary.

[1]

http://www.emeeeting.europarl.europa.eu/committees/agenda/201512/LIBE/LIBE%282015%291217_1/sitt-

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PRIVACY STATEMENT

Please indicate your preference for the publication of your response on the Commission's website (see specific privacy statement):

Please note that regardless the option chosen, your contribution may be subject to a request for access to documents under Regulation 1049/2001 on public access to European Parliament, council and Commission documents. In this case the request will be assessed against the conditions set out in the Regulation and in accordance with applicable data protection rules.

- Under the name given:** I consent to publication of all information in my contribution and I declare that none of it is subject to copyright restrictions that prevent publication.
- Anonymously:** I consent to publication of all information in my contribution and I declare that none of it is subject to copyright restrictions that prevent publication.
- Please keep my contribution confidential:** it will not be published, but will be used internally within the Commission.

Specific privacy statement e-Privacy

[Specific 20privacy 20statement ePrivacy.pdf](#)

Before filling in the questionnaire, we suggest that you consult the background document at the right-hand side of the survey.

Background document

[05 2004 20Background 20document.pdf](#)

GENERAL INFORMATION

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Question I: If you answer on behalf of your organisation: Is your organisation registered in the Transparency Register of the European Commission and the European Parliament?

- Yes.
- No (if you would like to register now, please [click here](#)). If your entity responds without being registered, the Commission will consider its input as that of an individual.
- Not applicable (I am replying as an individual in my personal capacity).

*

Question I A: Please indicate your organisation's registration number in the Transparency Register.

16311905144-06

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Question II: Please enter the name of your institution/organisation/business:

European Digital Rights

Question III: Please enter your organisation's address:

20 Rue Belliard, 1040 Brussels, Belgium

Question IV: Please enter your organisation's website:

www.edri.org

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Question V: Please enter the name of a contact person:

Diego Naranjo

Question VI: Please enter the phone number of a contact person:

+3222742570

*

Question VII: Please enter the e-mail address of a contact person:

diego.naranjo@edri.org

*

Question VIII: In which capacity are you participating in this consultation:

- Citizen
- Consumer association or user association
- Civil society association (e.g. NGO in the field of fundamental rights)
- Electronic communications network provider or provider of electronic communication services (e.g. a telecom operator)
- Association/umbrella organisation of electronic communications network providers or providers of electronic communication services
- Association/umbrella organisation/ trade association (other than associations of electronic communication service provider/network providers)
- Internet content provider (e.g. publishers, providers of digital platforms and service aggregators, broadcasters, advertisers, ad network providers)
- Other industry sector
- Government authority
- Competent Authority to enforce (part of) the e-Privacy Directive
- Other public bodies and institutions

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Question IX: Please indicate your country of residence? (In case of legal entities, please select the primary place of establishment of the entity you represent)

- Austria
- Belgium
- Bulgaria
- Croatia
- Cyprus
- Czech Republic
- Denmark
- Estonia
- Finland
- France
- Germany
- Greece
- Hungary
- Ireland
- Italy
- Latvia
- Lithuania
- Luxembourg
- Malta
- Netherlands
- Poland
- Portugal
- Romania
- Sweden
- Slovenia
- Slovak Republic
- Spain
- United Kingdom
- Other

I. REFIT EVALUATION OF THE E-PRIVACY DIRECTIVE

Preliminary Question: How much do you know about the e-Privacy Directive?

	Very much	Much	Some	A little	Hardly anything	No opinion
Its objectives	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Its provisions	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Its implementation	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Its relation to GDPR	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

I.1. EFFECTIVENESS OF THE E-PRIVACY DIRECTIVE

The e-Privacy Directive aims to harmonise the national provisions required 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 and electronic communication equipment. This section seeks to explore the extent to which the objectives of the e-Privacy Directive have been achieved. For more information please refer to the background document (see Section III).

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

	significantly	moderately	little	not at all	do not know
Full protection of privacy and confidentiality of communications across the EU	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Free movement of personal data processed in connection with the provision of electronic communication services	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Free movement of electronic communications equipment and services in the EU	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Question 1 A: Please specify your reply. You may wish to focus on presenting the reasons why certain objectives were achieved/not achieved, please also consider whether factors other than the e-Privacy Directive influenced the outcome.

Text of 1 to 1500 characters will be accepted

The e-Privacy Directive (hereinafter "ePD") has failed to achieve full protection of privacy and confidentiality because, when the Directive was adopted in 2002, some elements of current technologies were not fully developed (smartphones' apps, tracking of users when browsing....), so the legislator were not able to take them into account. Thus, ePD contained language (in the definitions, but also in the security aspects and other articles) which were not specific enough nor future-proof.

On the other hand, market oriented goals (free movement of personal data and of electronic communications equipment) were successfully developed. The development of companies working on Big Data and Internet of Things has continued in the last decade. The movement of personal data is due to some of the norms in the 95 Directive on Data Protection and the ePD, while the free movement of equipment may rather be a consequence of the freedom of movement of goods and services. Finally, standardisation pushed by the ePD and other regulatory frameworks have undoubtedly helped companies to distribute their products to the EU market.

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

	Yes	No	No opinion
Notification of personal data breaches	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Confidentiality of electronic communications	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Specific rules on traffic and location data	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Unsolicited marketing communications sent and received though the Internet	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Itemised billing of invoices	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Presentation and restriction of calling and connected line	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Automatic call forwarding	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Directories of subscribers	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

Question 2 A: If you answered “Yes”, please specify your reply.

Text of 1 to 1500 characters will be accepted

- Notification of personal data breaches: The text related to data breaches should be in line with the one in the GDPR.
- Confidentiality of electronic communications: Regarding Art. 5.2, the scope of the exception is vague and unpredictable. More detail - especially if the new instrument is a Regulation - is clearly needed.
- Specific rules on traffic and location data: Personal data such as traffic data and location data and any other personal data processed should be reduced to the least-precise type needed for the relevant (initial or subsequent) purpose for which they are collected and used, and deleted as soon as they are no longer needed for the initial or subsequent purpose, inline with the principles of “data minimisation” and “purpose limitation” defined under the GDPR.
- Some data can be both location and traffic data, depending on the context. There is a need for more clarity on the particular regime that applies.
- Regarding anonymisation, the opinion of Article 29 Working Party on this regard should be taken into account:
http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp216_en.pdf.
- There are special difficulties with regard to the de-identification of location data that were not apparent when the current directive was written.

Question 3: It is currently up to Member States to set up the national bodies entrusted with the enforcement of the e-Privacy Directive. Article 15a of the e-Privacy Directive refers indeed to the “competent national authority” and, where relevant, “other national bodies” as the entities entrusted with supervisory and enforcement powers in relation to the national provisions implementing the e-Privacy Directive.

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

	significantly	moderately	little	not at all	do not know
to divergent interpretation of rules in the EU?	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
to non-effective enforcement?	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Question 4: If you answered 'significantly' or 'moderately' to the previous question, has this in your view represented a source of confusion for:

	Yes	No	Do not know
Providers of electronic communication services, information society services and data controllers in general	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Citizens	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Competent Authorities	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

Question 4 A: Please specify your reply.

Text of 1 to 1500 characters will be accepted

Data Protection Authorities, not Telecoms Regulators, should be in charge of enforcing the successor of the ePD, particularly because of the provisions related to the confidentiality of communications and the processing of traffic and location data. Telecoms Regulators do not possess the necessary expertise of the Data Protection Authorities concerning processing of personal data, nor are they obliged to enforce the opinions and guidelines issued by the Article 29 Working Party or the European Data Protection Board. If the scope of the successor of the Directive is expanded to all online activities, as we propose, the enforcement would fall beyond the scope of the Telecoms Regulators. Lastly, the Telecoms Regulators are not and cannot be involved in the crucially important “cooperation and consistency” mechanisms introduced by the GDPR – which should fully apply to the new instrument replacing the ePD.

DPA's should also be engaged in standardisation processes. For example, in NL and SE, the DPAs have decided that one cannot geotrack users through public networks. Users are tracked because of the way authentication is done in a network. Either this can be fixed definitively by having smartphones standardised to randomize MACs (this possibility was raised by the Swedish DPA in its final decision), or base equipment for wireless networks can be standardised differently so that information for wireless networks can be standardised differently so that information doesn't leak.

I.2. RELEVANCE OF THE E-PRIVACY DIRECTIVE

The Data Protection Directive 95/46/EC, which will be replaced by the General Data Protection Regulation (GDPR), is the central legislative instrument in the protection of personal data in the EU. More detailed rules were considered necessary for the protection of privacy and data protection in the electronic communications sector, which led to the adoption of the e-Privacy Directive. This section seeks to assess the relevance of the objectives of the e-Privacy Directive and each of its articles, taking into account technological, social and legal developments. For more information please refer to the background document.

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

	Yes	No	No opinion
An equivalent level of protection (full protection) across the EU regarding the right to privacy and confidentiality with respect to the processing of personal data in the electronic communications sector	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
The free movement of personal data processed in connection with the provision of electronic communication services	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Free movement of electronic communications equipment and services	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

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

	Yes	No	No opinion
Notification of personal data breaches	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Confidentiality of electronic communications	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Specific rules on traffic and location data	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Unsolicited marketing communications sent and received through the Internet	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Itemised billing of invoices	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Presentation and restriction of calling and connected line	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Automatic call forwarding	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Directories of subscribers	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

Question 6 A: Please specify your reply if needed.

Text of 1 to 1500 characters will be accepted

We believe that having specific rules on the issues mentioned above will provide the added value that the ePD represents at the moment as *lex specialis*. However, a review of the scope should be considered. The scope of and definitions in the ePD are currently limited to providers of e-communication services. We believe that its successor should cover all processing of personal data relating to online activities, insofar as not already specifically covered by the GDPR. With this adjustment, the new instrument would again “complement and particularise” matters covered by the main instrument (now the GDPR).

I.3. COHERENCE OF THE E-PRIVACY DIRECTIVE

This section aims to assess whether the existing rules fit with each other and whether they are coherent with other legal instruments. See background document for more details (see Sections III.3 and III.6).

Question 7: Are the security obligations of the e-Privacy Directive coherent with the following security requirements set forth in the different legal instruments:

	significantly	moderately	little	not at all	do not know
<p>The Framework Directive (Article 13a): requiring providers of publicly available electronic communication services and networks to take appropriate measures to manage the risks posed to the security and integrity of the networks and services and guarantee the continuity of supply.</p>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
<p>The future General Data Protection Regulation setting forth security obligations applying to all data controllers: imposing on data controllers and processors to implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk, including, as appropriate, the pseudonymisation and encryption of personal data and the ability to ensure the ongoing confidentiality, integrity, availability and resilience of systems and services processing personal data.</p>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
<p>The Radio Equipment Directive: imposing privacy and data protection requirements upon all terminal equipment attached to public telecommunication networks.</p>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

<p>The future Network and Information Security (NIS) Directive: obliging Member States to require that digital service providers and operators of certain essential services take appropriate and proportionate technical and organisational measures to manage the risks posed to the security of networks and information systems which they use in their operations.</p>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
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Question 7 A: Please specify your reply if needed.

Text of 1 to 1500 characters will be accepted

All of these legal instruments include security obligations which are, in one way or another, in the spirit of the text of the ePD. However, given the divergencies in the different instruments, we believe that the framework stated in the GDPR concerning security requirements should be set as the standard and be applied to the future legal instrument substituting the ePD.

Question 8: The e-Privacy Directive prohibits the use of electronic mail, fax and automatic calling machines for direct marketing unless users have given prior consent (Article 13.1). However, it leaves to Member States the choice of requiring prior consent or a right to object to allow placing person-to-person telemarketing calls (Article 13.3).

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
- No
- No opinion

Question 8 A: Please specify your reply if needed.

Text of 1 to 1500 characters will be accepted

The position which empowers citizens the most in this case would be to require consent. Given such an intrusive marketing technique, the only way to prevent abuses and to avoid overloading the supervisory authorities (DPAs or Telecom Regulators) with objections which have not been taken into consideration adequately would be requiring users to consent to that type of marketing.

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.

	Yes	No	No opinion
I find it more reasonable to apply to marketing messages sent through social media the same rules as for email (opt in)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
I find it more reasonable to apply to marketing messages sent through social media opt out rules (Art 13)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

I.4. EFFICIENCY OF THE E-PRIVACY DIRECTIVE

In the following section we would like stakeholders to assess the costs and benefits of the e-Privacy Directive, including for citizens at large.

Question 10: The protection of privacy and personal data in the electronic communications sector is also aimed to increase users' trust in these services. To what extent have the national provisions implementing the e-Privacy Directive contributed to raising users' trust in the protection of their data when using electronic communication services and networks?

- Significantly
- Moderately
- Little
- Not at all
- Do not know

Question 10 A: Please specify your reply if needed.

Text of 1 to 1500 characters will be accepted

When the e-Privacy Directive was created and later on reformed, it was not possible to foresee the huge and fast developments of the telecommunications sector and the new ways that privacy and confidentiality of communications could be affected by new (OTT) services. However, many of the provisions are already in the minds of European citizens as new "standards", some of them working, but some of them needing an update to the new realities. Furthermore this review of the ePD should be future proof so that new technologies and services that we cannot foresee now are also covered by the new instrument.

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

- Significantly
- Moderately
- Little
- Not at all
- Do not know

Question 11 A: Please provide an estimation of the percentage of the total cost and/or any other information.

Text of 1 to 1500 characters will be accepted

Although we do not comment on the costs that the ePD had for businesses, we believe that by making the new instrument a Regulation instead of a Directive, the potential costs of compliance with the new instrument could be substantially lower than the costs of compliance with the different national implementations of the ePD. Furthermore, not only businesses had costs: spam and wild direct marketing calls can generate a cost for consumers too. The ePD has certainly helped with that.

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?

- Yes
- No
- No opinion

Question 12 A: Please specify your reply if needed.

Text of 1 to 1500 characters will be accepted

See the response above

I.5. EU ADDED VALUE OF THE ERIVACY DIRECTIVE

This section seeks to assess the EU added value of the e-Privacy Directive especially in order to evaluate whether action at EU level is needed for this specific sector. See background document for more details (see Section III).

Question 13: Do you think that national measures would have been/be needed if there were no EU legislation on e-Privacy for the electronic communication sector?

- Yes
- No
- No opinion

Question 14: In your experience, to what extent has the e-Privacy Directive proven to have a clear EU added value to achieve the following objectives:

	Strongly agree	Agree	Disagree	Strongly disagree	Do not know
Increasing confidentiality of electronic communications in Europe	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Harmonising confidentiality of electronic communications in Europe	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Ensuring free flow of personal data and equipment	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

II. REVISING THE E-PRIVACY DIRECTIVE: LOOKING AHEAD

This section covers forward looking questions to assess the possible solutions available to revise the e-Privacy Directive, in case its evaluation demonstrates the need for review.

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? Multiple answers possible:

- Widening the scope of its provisions to over-the-top service providers (OTTs)
- Amending the provisions on security
- Amending the provisions on confidentiality of communications and of the terminal equipment
- Amending the provisions on unsolicited communications
- Amending the provisions on governance (competent national authorities, cooperation, fines, etc.)
- Others
- None of the provisions are needed any longer

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?

- Yes
- No
- Other

Question 16 A: If you answered 'Other', please specify.

Text of 1 to 1500 characters will be accepted

II.1. REVIEW OF THE SCOPE

The requirements set forth by the e-Privacy Directive to protect individual's privacy apply to publicly available electronic communication services (**ECS**). Such rules do not apply to so called Over-The-Top (**OTT**) services (e.g. unmanaged Voice over IP, instant messaging, web mail, messaging in social networks). This may result in both a void of protection for citizens and in an uneven playing field in this market. Although the rules to protect personal data of Directive 95/46/EC and the future GDPR apply to OTT communications services, some specific rules of the e-Privacy Directive, such as the principle of confidentiality of communications, do not apply to these services. See background document for more details (see Section III.2).

Question 17: Should the scope be broadened so that over-the-top service providers (so called "OTTs") offer the same level of protection when they provide communications services such as Voice over IP, instant messaging, emailing over social networks).

- Yes
- In part
- Do not know
- Not at all

Question 18: If you answered "yes" or "in part" to the previous question, please specify which e-Privacy principles & obligations should apply to so called OTTs (multiple replies possible):

	Strongly agree	Agree	Disagree	Strongly disagree	Do not know
Security obligations	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Confidentiality of communications (prior consent to intercept electronic communications)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Traffic and location data (prior consent to process)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Unsolicited marketing communications (i.e. should Article 13 apply to messages sent via OTT services?)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Question 19: In your opinion, which obligations should apply to the following types of networks (eventually subject to adaptations for different actors on proportionality grounds)?

	All networks, whether public, private or closed	Non-commercial WIFI Internet access (e.g. ancillary to other activities) provided to customers/public in, e.g. airport, hospital, mall, universities etc.	Only publicly available networks (as currently)
Security obligations	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Confidentiality of communications	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Obligations on traffic and location data	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

II.2. ENSURING SECURITY AND CONFIDENTIALITY OF COMMUNICATIONS

The e-Privacy Directive requires Member States to ensure confidentiality of communications in public communication networks and for related traffic data. Listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users without the consent of the citizen concerned, except when legally authorised, is prohibited. The requirement for prior consent is extended to cover the information stored in users' terminal, given that users have very sensitive information in their computers, smartphones and similar devices. See background document for more details (see Sections III.3 and III.4).

Question 20: User empowerment and the possibility for users to protect their communications, including, for example, by securing their home WiFi connections and/or by using technical protection measures, is increasingly relevant given the number of security risks.

Do you think that legislation should ensure the right of individuals to secure their communications (e.g. set forth appropriate passwords for home wireless networks, use encryption apps), without prejudice of law enforcement needs to safeguard important public interests in accordance with the procedures, conditions and safeguards set forth by law?

- Yes
- No
- Do not know

Question 20 A: Please explain, if needed.

Text of 1 to 1500 characters will be accepted

The question should not be IF individuals should have this right. Individuals have this right. In order to be consistent with the GDPR, privacy by design (which would obviously include the use of available privacy technologies, such as encryption) and by default (which means that encryption should be on by default) are already part of the acquis. The question is how to complement and particularise this general obligation in the e-communications field in the new ePrivacy instrument.

Law enforcement exceptions are provided for in the GDPR Article 23 and do not need to be rehashed in this instrument.

We have put "do not know" as an answer because we cannot answer the question, as formulated.

Question 21: While an important number of laws imposing security requirements are in place, numerous publicly reported security breaches point to the need for additional policy measures. **In your opinion, to what extent would the following measures improve this situation?**

	significantly	moderately	little	not at all	do not know
Development of minimum security or privacy standards for networks and services	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Extending security requirements to reinforce coverage of software used in combination with the provision of a communication service, such as the operating systems embedded in terminal equipment	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Extending security requirements to reinforce coverage of Internet of Things devices, such as those used in wearable computing, home automation, vehicle to vehicle communication, etc.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Extending the security requirements to reinforce coverage of all network components, including SIM cards, apparatus used for the switching or routing of the signals, etc.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

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?**

	strongly agree	agree	disagree	strongly disagree	do not know
Information society services should be required to make available a paying service (without behavioural advertising), as an alternative to the services paid by users' personal information	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
Information service providers should not have the right to prevent access to their non-subscription based services in case users refuse the storing of identifiers in their terminal equipment (i.e., identifiers not necessary for the functioning of the service)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Question 22 A: Please explain, if needed.

Text of 1 to 1500 characters will be accepted

The notion that privacy should be the preserve of either those that can afford to pay for it or those who have the capacity to foresee the potential risks is a deeply troubling one. The solution to entirely nontransparent, unpredictable (indeed unpredictable for the providers themselves) harvesting and monetisation of personal data, profiling, reselling of data cannot be allowing an elite to avoid this.

Ultimately, the solution to people paying an unspecified amount of security and privacy is to implement meaningful transparency for products is to implement meaningful transparency and meaningful consent. As indicated in the answer to question 15, an opener for standards to report the collection of data and make it transparent could help to accomplish our suggestion.

Question 23: As a consumer, do you want to be asked for your consent for the processing of your personal data and other information stored on your smart devices as regards the following? Select the option for which you want to be asked for your consent (several options possible):

- Identifiers placed/collected by a third party information society service (not the one that you are visiting) for online behavioural advertising purposes
- Identifiers placed/collected by an information society service you are visiting – when their purpose is website analytics, measuring number of website visitors, where visitors go within the website, etc. (e.g. "first party" cookies or equivalent technologies)
- Identifiers placed/collected by an information society service you are visiting whose purpose is to support user experience, such as language preference cookies[1]
- Identifiers collected/placed by an information society service to detect fraud
- Identifiers collected/placed by and information society service for frequency capping (number of times a user sees a given ad)
- Identifiers collected and immediately anonymised in a way that it is impossible to identify the users' device
- Other

[1] See Article 29 Working Party Opinion 04/2012 on Cookie Consent Exemption of 7.06.2012

Question 23 A: Please explain, if needed.

Text of 1 to 1500 characters will be accepted

First option: The e-Privacy law should be in line with the GDPR, to achieve legal certainty for consumers and businesses, and compliance with data protection and privacy rights. The core issue is not the storage of information, but the pervasive surveillance of citizens by electronic means. Possible justifications for the collection of personal data could be a prior consent or an overruling legitimate interest of the third party. As it is unlikely that such an overruling interest of a third party can be proven, the only other option remaining is a prior given consent. However, consent must be freely given and can only be legitimate if enough information is provided to enable the data subject to give truly informed consent

Generally, we refer to the 29WP Opinion on Cookie Consent Exemption.

First party cookies (or equivalents) can be allowed within the context of the wider privacy policy of a website.

It is unclear whether the question on "first party or equivalent" technologies cover third party analytics, whose privacy policy may be different from the site being visited.

Fraud detection must be strictly limited to that activity.

The frequency capping question is not clear as to whether it is first- or third-party or is understood as strictly limited for that purpose.

To prevent click fatigue and get rid of meaningless cookie - banners, new privacy enhancing technologies should be blessed to empower the user in relation to his personal data.

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):**

- Require manufacturers of terminal equipment including operating systems and browsers to place on the market products with privacy by default settings (e.g. third party cookies off by default)
- Adopt legislation, delegated acts for example, defining mechanisms for expressing user preferences regarding whether they want to be tracked
- Mandate European Standards Organisations to produce standards (e.g. Do Not Track; Do not Store/Collect)
- Introducing provisions prohibiting specific abusive behaviours, irrespective of user's consent (e.g. unsolicited recording or filming by smart home devices)
- Support self-co regulation
- Others

Question 24 A: Please explain, if needed.

Text of 1 to 1500 characters will be accepted

To ensure a user's ability to consent, it is important that manufacturers of terminal equipment and software developers (e.g. browsers) follow the data protection by default principle, as required by the GDPR. As a pre-condition, consent can only be given to the collection of personal data that is necessary to serve a limited and specific purpose. It is unlikely that third party cookies are necessary for the initial service. Self- and co-regulation have demonstrably failed in this policy area.

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.

Do you consider that the exemptions to consent for processing traffic and location data should be amended? You can choose more than one option. In particular, the exceptions:

- should be broadened to include the use of such data for statistical purposes, with appropriate safeguards
- should be broadened to include the use of such data for public purposes (e.g. research, traffic control, etc.), with appropriate safeguards
- should allow the data to be used for other purposes only if the data is fully anonymised
- should not be broadened
- the provision on traffic and location data should be deleted

Question 25 A: Please explain, if needed.

Text of 1 to 1500 characters will be accepted

The question fails to recognise that anonymisation is not a static concept, but is changing rapidly, as technology changes. What is anonymous today may not be anonymous tomorrow. What constitutes an appropriate safeguard today, may not constitute an appropriate safeguard tomorrow.

In narrowly defined circumstances, with a clear public legitimate interest, with data being deleted at the earliest opportunity and the real anonymity of the data being under constant review, some narrowly defined exception could be envisaged.

II. 3. NON-ITEMISED BILLS, CONTROL OVER CALL LINE IDENTIFICATION, AUTOMATIC CALL FORWARDING AND SUBSCRIBERS DIRECTORY

The e-Privacy Directive provides for the right of subscribers to receive non-itemised bills. The e-Privacy Directive also gives callers the right to prevent the presentation of the calling-line identification if they wish so to guarantee their anonymity. Furthermore, subscribers have the possibility to stop automatic call forwarding by a third party to their terminals. Finally, subscribers must be given the opportunity to determine whether their personal data is included in a public directory (printed, electronic or obtainable through directory inquiry services). See background document for more details (see Section III.5).

Question 26: Give us your views on the following aspects:

	This provision continues being relevant and should be kept	This provision should be amended	This provision should be deleted	Other
Non-itemised bills	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Presentation and restriction of calling and connected line identification	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Automatic call forwarding	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Subscriber directories	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Question 26 A: Please specify, if needed.

Text of 1 to 1500 characters will be accepted

II.4. UNSOLICITED COMMERCIAL COMMUNICATIONS

The e-Privacy Directive requires prior consent to send commercial communications through electronic mail (which includes SMS), fax and automatic calling machines without human interaction). However, companies which have acquired an end-user's email in the context of a sale of products or services can send direct marketing by email to advertise their own similar products or services, provided that the end-user is given the possibility to object (often referred to as 'opt-out'). Member States can decide whether to require opt in or opt out for marketing calls (with human interaction). Furthermore, the protection against all types of commercial communications also benefits to legal persons but the e-Privacy Directive leaves it to Member States to decide whether they are protected by an opt-in or opt-out regime. See background document (see Section III.6) for more details.

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:

	Yes	No	Do not know
Direct marketing telephone calls (with human interaction) directed toward individual citizens	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Direct marketing communications to legal persons, (automatic calling machines, fax, e-mail and telephone calls with human interactions)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

Question 28: If you answered "no" to one or more of the options in the previous question, please tell us which system should apply in your view?

	consent (opt-in)	right to object (opt-out)	do not know
Regime for direct marketing communications by telephone calls with human interaction	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Regime of protection of legal persons	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

Question 28 A: Please explain, if needed.

Text of 1 to 1500 characters will be accepted

Generally, an opt-in regime avoids undesired communications which are not beneficial for neither businesses nor individual citizens. The cost of communications is dropping rapidly (which is central to the growth of the e-mail spam problem) and it is both time-consuming and often risky to "opt out". For both businesses and citizens, the only realistic option is opt-in.

II.4. FRAGMENTED IMPLEMENTATION AND INCONSISTENT ENFORCEMENT

Some provisions of the e-Privacy Directive may be formulated in too broad and general terms. As a consequence, key provisions and concepts may have been implemented and transposed differently by Member States. Moreover, while the Data Protection Directive entrusts the enforcement of its provisions to data protection supervisory authorities, the e-Privacy Directive leaves it up to Member States to designate a competent authority, or where relevant other national bodies. This has led to a fragmented situation in the Union. Some Member States have allocated competence to data protection supervisory authorities (DPAs), whereas others to the telecom national regulatory authorities (NRAs) and others to yet another type of bodies, such as consumer authorities. See section III. 7 of background document for more details.

Question 29: Do you consider that there is a need to allocate the enforcement to a single authority?

- Yes
- No
- Do not know

Question 30: If yes, which authority would be the most appropriate one?

- National data protection authority
- National (telecom) regulatory authority
- National Consumer protection authority
- Other

Question 30 A: If 'Other', please specify.

Text of 1 to 1500 characters will be accepted

Question 31: Should the future consistency mechanism created by the GDPR apply in cross-border matters covered by the future e-Privacy instrument?

- Yes
- No
- Do not know

Question 32: Do you think that a new e-Privacy instrument should include specific fines and remedies for breaches of the relevant provisions of the new e-Privacy legal instrument, e.g. breaches of confidentiality of communications?

- Yes
- No
- Do not know

Question 33: These questions aim to provide a comprehensive consultation on the functioning and review of the e-Privacy Directive. Please indicate if there are other issues that should be considered. Also please share any quantitative data reports or studies to support your views.

Text of 1 to 3000 characters will be accepted

Please upload any quantitative data reports or studies to support your views.

16ebc48d-3b48-4603-bd55-908313f8ead1/EDRi_ePrivacyDir-final_layout.pdf

Background Documents

[document de rfrence \(/eusurvey/files/c6df1ba2-dd8d-4833-829d-5d777561d8c6\)](/eusurvey/files/c6df1ba2-dd8d-4833-829d-5d777561d8c6)

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