

25 January 2021
Brussels

Subject: Strengthening privacy and confidentiality of communications

Dear Member of the WP TELE,

Four years after the ePrivacy Regulation was proposed, the undersigned organisations reiterate our support to the much-needed efforts to reform Europe's ePrivacy legislation. The reform is essential to strengthen individuals' right to privacy and confidentiality of communications. It has the potential to become the cornerstone for the regulation of online tracking. The current business model of many platforms and the opaque AdTech industry contribute to promoting disinformation, political manipulation and illegal content. As representatives of human rights organisations we would like to encourage you to keep up your work in order to agree on a general approach as soon as possible.

As we have said in previous communications, the lack of a strong ePrivacy Regulation has left Europe with an outdated Directive with limited enforcement which requires the CJEU to become the enforcer.ⁱ Furthermore, not having a strongly enforced privacy legislation has allowed Big Tech to become even more dominant during the current pandemic crisisⁱⁱ and to keep absorbing most of the revenues of the online advertising market against the interests of press publishers.ⁱⁱⁱ

We would like to bring five specific issues that we understand are of particular relevance for your current discussions on the text:

- **We urge you to reject of proposals that seek to bypass the CJEU case law on data retention**, under the umbrella of a broad exception for national security, public order, in draft Article 2.2(a).
- **Articles 6 through 7 in the Council draft contain a number of extensions for permitted processing compared to the current Directive. We are concerned that the broad scope of some of these exceptions** (especially compatible processing in Article (6c) could undermine the principle of confidentiality of communications, for example by making voluntary data retention the rule rather than the exception.
- Regarding the cookie-related provisions we welcome the latest available text in recital 20(a) where it says that the “[i]mplementation of technical means in electronic communications software to provide specific and informed consent through transparent and user-friendly settings can be useful”. However, we are concerned with the following language: “consent directly expressed by an end-user must always prevail over software settings”, as this could lead to the advertising industry to develop new dark-patterns effectively forcing users to authorise tracking that may be off by default in order to protect their privacy. **Given the regrettable deletion of Article 10 of the Regulation on privacy by design and by default in prior discussion in Council, we urge you to not create additional hurdles for the application of end-users’ rights.** The current language could undermine the possibility to express opposition to consent in operating systems and browsers instead of dealing with the “”cookie banner fatigue” that the industry created.
- **We recall that so-called”cookie walls” that seek consent for online tracking for advertising purposes cannot be considered to have solicited valid consent as defined in the General**

Data Protection Regulation (GDPR), and that the ePrivacy Regulation is without prejudice to the GDPR. Finally we would like to recall the results of the Eurobarometer on ePrivacy that showed that 70% of Europeans are concerned about how companies use their data and that 74% want to be asked to give specific consent before their information are collected and processed.

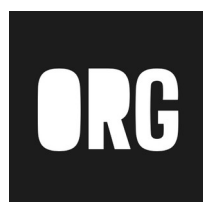
- Finally, we call on the Council to **harmonise language around tracking technologies in the text to ensure that it is future-proof and technologically-neutral.** The Regulation should not limit itself to speaking about “cookies” or “cookies and similar techniques” but to “tracking tools” or “cookies and other tracking techniques”.

We congratulate the Portuguese Presidency on the willingness to move this important reform forward, as confirmed by the number of discussions organised and planned on this file. Ahead of your next working party meetings, we urge you to bring in these improvement to the text and to agree on a general approach text in order to begin negotiations with the European Parliament towards adopting an upgraded and improved ePrivacy Regulation for individuals and businesses. We stand ready to support your work.

Yours sincerely,

Diego Naranjo,
Head of Policy
European Digital Rights (EDRi)

On behalf of
Access Now, Bits of Freedom, European Digital Rights (EDRi), IT-Pol Denmark, noyb, Open Rights Group, Privacy International



- i <https://edri.org/cjeu-cookies-consent-or-be-tracked-not-an-option/>
- ii <https://www.theguardian.com/technology/2020/oct/29/google-facebook-apple-amazon-third-quarter-earnings>
- iii <http://fortune.com/2017/04/26/google-facebook-digital-ads/>