

Analysis of processing electronic communication data on the basis on consent in the light of Council's e-privacy regulation proposal

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Abstract

The article reviews the changes proposed by the European Commission in the field of e-privacy, i.e. the proposal of regulation on the processing of personal data and privacy in the electronic communications sector, which is expected to replace the existing legislation, with particular regard to the conditions for consent, as the basis for the processing of electronic communications data. The article analyzes among other things: the matter of the relationship between the already existing legal acts and the draft e-privacy regulation regarding the consent, contemplates the potential scope of application of the new regulation and the entities which shall be the subject to protection of their data of electronic communication, resulting from the project. The article's analysis concerns the issue of consent, its scope, entities obliged to receive it, as well as the doubts arising from the provisions on obtaining consent, and also the provisions of the proposal on information obligations prior to obtaining consent. In addition, attention has also been drawn to the possibility for service providers to use terminal services and the restrictions imposed therein, the problem of default settings for obtaining the consent, as well as for modified rules for transmission for direct marketing purposes, or concerning creating publicly available directories.

Keywords: e-privacy, data protection, protection of electronic communication data, EU legislation, consent on processing of data, processing of electronic communication data, inquiry regarding obtaining the consent on processing of data, information obligation of service provider

The Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR)¹, which regulation shall apply from 25th of May 2018, introduces significant changes regarding the data protection on the EU territory. This being the case, European legislator in article 98 of GDPR stated, that the review of other Union legal acts on data protection shall be made. One of such acts which was subject to revision of European Commission is Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)².

Commission revising currently in force Directive 2002/58/EC, indicated that changes were needed in respect to its scope, in particular in the light of the adopted Single Market Strategy for Europe, which is expected to ensure a high level of protection for users of electronic communication services and equal rights and obligation for participants in this market. While the foundation and objectives of Directive 2002/58/EC remain relevant, the Commission considers that the substantial technological and economic changes, that have taken place in recent years, had led to the point in which the protection under Directive 2002/58/EC is insufficient, outdated, and does not keep pace with the changes on digital market.³ Particularly it is pointed out that both consumers and entrepreneurs are transferring their activities to the internet, which is replacing the traditional means of communication. Whereas in recent years new types of services have emerged i.e. Over-the-Top communication services (OTT) consisting of providing electronic communication services through application provided by service providers, operating of the internet, such as instant messaging, e-mail services etc. However, such services are not covered by the current regulations of Directive 2002/58/EC, which constitutes a loophole in the protection of users of such services⁴.

Moreover, regulating the protection of users at the level of Directive is, in the EU Commission's view, insufficient, as it leads to law being fragmented and to unequal levels of protection in each individual EU countries. This is particularly evident in terms of protecting the confidentiality of electronic communications and end-user data, as end-users are faced with numerous requests to accept cookies, often without understanding their

¹ Official Journal of the European Union L 119/1.

² Official Journal of the European Communities L 201/37.

³ see recital 6 of EPR.

⁴ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), page 2, Brussels 2017, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017PC0010&from=EN>.

methods of operation⁵. On the other hand, the rules in Directive 2002/58 / EC, on the basis of which consent is given, do not cover certain elements of the activity of service providers such as tracking techniques.⁶ Furthermore, the necessity to adapt to the GDPR regulation regarding electronic communication market sector has made some of the hitherto applicable provisions superfluous, i.e. article 4 of the Directive 2002/58/EC concerning the obligation to provide security services by the provider⁷. In the view of the above, it is considered that the most appropriate legal remedy, to regulate abovementioned issues, which would be more compatible with reality and in line with the subsequent legislative acts adopted by the European legislator, including in particular GDPR, is the general regulation on respect for private life and the protection of personal data in electronic communications (hereinafter referred to as EPR), which is supposed to replace the current Directive 2002/58/EC in this area.

It should be indicated that the adoption of provisions of the EPR Regulation, as in the case of the GDPR, will make this act directly applicable in all EU countries without the necessity and the possibility for Member States to introduce provisions in this regard. European countries will be able to introduce into their legal systems such regulations, only if it is necessary for the proper enforcement, implementation or execution of EPR provisions or EPR explicitly permits it. Taking the foregoing into account, it should be noted, that Polish provisions transposing the provisions of Directive 2002/58/EC, inter alia the provisions of the Telecommunications Law of 16 July 2004⁸, will have to be repealed or substantially amended, in order to remove provisions from the Polish legislation, that would be contrary to the EPR or would duplicate its provisions. However, despite the fact that the European Commission's review of the e-privacy sector and the introduction of the Single Market Strategy resulted in the adoption of the EPR project, other EU legal acts, which also address these issues, will still be applicable. As an example of such legal act, is, among others, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')⁹, the provisions of which have been transposed into Polish legislation in the Act on Rendering of Electronic Services of 18 July

⁵ Explanatory Memorandum in: Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), Brussels 2017, pages 6-16, http://eur-lex.europa.eu/resource.html?uri=cellar:bb21abb2-d809-11e6-ad7c-01aa75ed71a1.0001.02/DOC_1&format=PDF.

⁶ Proposal..., *ibid.*, page 6.

⁷ Proposal..., *ibid.*, page 3.

⁸ Journal of Laws 2016, pos. 1489 with amendments.

⁹ Official Journal of the European Communities, L 178/1.

2004¹⁰. Pursuant to the Article 10 of abovementioned Act, service providers have been required to obtain, prior consent, to send commercial information to natural persons. On the example of the abovementioned act it should be stated that in practice, service providers are aware that prior to the transmission of commercial communications they are required, pursuant to Article 10 of the Act on Rendering of Electronic Services, to obtain the consent of a natural person for transmitting the electronic communication of commercial information, to which the said communication is addressed to. However, prior consent of the subscriber or end-user for the use of terminal equipment and automatic calling systems for direct marketing purposes, stated in Art. 172 sec. 1 of telecommunication law, is often not obtained. Providers are misconceived that the consent granted under the Act on Rendering of Electronic Services for receiving the transmission of commercial information also includes the use of terminal equipment for marketing purposes, leading to the processing of end-user electronic communications data with violation of applicable regulations, i.e. without the consent of the end-users. As a consequence, end-users are unaware of how their data or terminal equipment are used. thus, the absence of a comprehensive and coherent regulation of all issues relating to widely understood as electronic commerce, contrary to the assurances provided by the EU legislator, will lead to a discrepancies between the various institutions of law.

The draft of EPR regulation indicates, that the core data protection law still will be positioned in the GDPR, but to provide adequate protection for electronic communications, the EPR adopts additional solutions that outline regulations on protecting the personal data from electronic communications and electronic communication data. Accordingly, the recital 5 of EPR states, that the provisions of this proposal are *lex specialis to the GDPR and will particularise and complement it as regards electronic communications data that qualify as personal data*.¹¹ Therefore the level of protection of personal data shall be retained. On the other hand, if the provisions of GDPR would be in conflict with the provisions of the EPR, the, EPR provisions shall prevail¹².

One of the fundamental differences between Directive 2002/58/EC and the EPR Regulation, which is explicitly stated in the EPR, is that the protection of data under the EPR rules, will apply to both natural and legal persons. In the case of legal entities, information such as commercial/business secrets or other data that have measurable economic or commercial value for the entity will be protected. It should also be indicated, that to the extent of EPR regulations, the relevant provisions of the GDPR shall apply to the end-users who are legal persons and its electronic communications data, in particular this concerns the issue of consent, as regulated by the GDPR.¹³

¹⁰ Journal of Laws 2016, pos. 1030 with amendments.

¹¹ Proposal..., *ibid.*, 1.2, page 2.

¹² See, B.Fischer, Prywatność informacyjna w usługach audiowizualnych z perspektywy nowych rozporządzeń unijnych (RODO i ERP), *Zeszyty Prasoznawcze* nr 1/2017.

¹³ Proposal..., *ibid.*, page 13, recital 3 of EPR.

Moreover, It should be noted that the definition of legal persons, indicated in the EPR, also includes all other entities which, in the light of national laws and regulations, are not legal entities, but have legal capacity - in the Polish law such entities primarily are organisational units with no legal personality (i.e. partnerships). It must be remembered, that EU legislation and its legal definitions are comprehended and interpreted autonomously, without reference to interpretations of national laws of Member States. In addition, the legislation of the EPR regulation implies, that its purpose is to cover all players in the electronic communications market in general, whereas, for obvious reasons, the commercial secrets which, in the light of EPR, deserve protection, may be owned by not only legal persons within the meaning of Polish law, but any other participant of a trade relations. Therefore it must be considered, that in principle, all subjects of the law will be under the protection of EPR. In the event of a possible breach of the EPR provisions by a service provider or administrator, legal persons or organisational units with no legal personality will be entitled to the same rights as natural persons. Whereas, the national independent supervisory authorities will be responsible for the application and enforcing the provisions of the EPR also in relation to the abovementioned entities¹⁴.

The EPR project in article 9 sec. 1 stipulates, that the consent granted by end-users based on the provisions of this Regulation shall meet the conditions set out in GDPR. Which means that the consent shall be *freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her*¹⁵. Moreover the request for consent, according to the EPR and GDPR provisions *shall be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language. Any part of such a declaration which constitutes an infringement of this Regulation shall not be binding*¹⁶. The EPR also constitutes that the end-users shall be authorised to withdraw their consent at any time, and shall be reminded by the providers of such possibility *on periodic intervals of 6 months, as long as the processing continues*.¹⁷ However such regulations in the EPR are obsolete in the light of the provisions of the GDPR, due to the fact, that such right stems explicitly from the GDPR. Moreover the article 9 sec. 3 of EPR may suggest that *a contrario* any other consent, may not be withdrawn at any time, which is unacceptable in the light of the GDPR regulations. In addition, the introduction such obligation to remind of the right to withdraw the consent raises doubts as to whether such a regulation is appropriate, since the service provider will, at the time the end-user is asked to give consent, be obliged to inform him or her of their rights, including the right to withdraw the consent. Periodic reminders of the right to withdraw consent may result in end-users

¹⁴ See, B. Fischer, M. Mazewski, Zgoda na podstawie projektu rozporządzenia e-privacy, ABI Expert nr 2(3), Wrocław 2017, p. 56.

¹⁵ Article 4 (11) of GDPR.

¹⁶ Article 7 sec. 2 of GDPR.

¹⁷ Article 9 sec. 3 of EPR.

receiving significant number of messages or notifications, which may result in users ignoring such messages¹⁸.

Furthermore, the abovementioned requirements are much more restrictive in relation to the existing regulations. Service providers will be obliged to meet significant information requirements of GDPR, and the processing of the electronic communication data on conditions other than consent will be excluded.¹⁹ An end-user before they start using any electronic service will have to obtain complete and comprehensive information, including, but not limited to, the following: information about what data the provider wants to process, for what purpose and how the data will be processed, as well as a number of information indicated in the GDPR. Moreover, in legal publications it is indicated, that in spite of the fact that EPR art. 9 is a referencing provision regarding the consent only to art. 4 sec. 11 and Art. 7 GDPR, it should be considered that other provisions of GDPR, mainly art. 12 - 14, will also be applicable. Service providers will therefore be obliged to provide concise, clear and understandable information to the addressee regarding the scope of electronic communications data processing, including supplier data, purpose or legal basis for data processing²⁰.

The main principle of any electronic communications service regulations, both EPR and the Directive 2002/58/EC, is the confidentiality of electronic communications, indicated in Article 5 EPR, and therefore any interference with data from electronic communications, including processing, monitoring, storage by persons other than end-users is excluded, except the exceptions explicitly stated in the EPR. The EPR in its definitions divides electronic communications data into electronic communication metadata which means data related to end-user, processed for the purposes of transmission, including tracking data, end device identification, and into electronic communications content that is the content of a specific message such as voice, text, video, etc. Contrary to Directive 2002/58/EC, the EPR provides for the possibility of processing metadata based on end user-consent²¹. Therefore, any use and processing of metadata, if not used for billing purposes, detection or prevention of fraud or abuse, or is necessary to meet additional quality requirements under the EU law, will be permitted only after end-user approval. So any activity of tracking user, monitoring their behavior, location, etc., will depend on his or hers exclusive consent. Thus, processing of electronic communications content will basically be possible only with the consent of the end-user if the service cannot be provided without processing such content, or if the service cannot be realized by processing the anonymized information. Such change in e-privacy will make any processing of metadata or content for additional services dependent on the end-user's consent in compliance with the GDPR. Contrary to the processing of personal

¹⁸ See, B. Fischer, M. Mazewski, p. 57.

¹⁹ Proposal..., *ibid.*, page 18, recital 20 of EPR.

²⁰ See, B. Fischer, M. Mazewski, p. 57.

²¹ Proposal..., *ibid.*, page 16, recital 17 of EPR.

data based on GDPR, the processing of electronic communications data without the consent, for example when it is necessary to use a particular service will be forbidden²².

The European legislator, developing new end-user protection rules, has introduced regulations regarding the processing of cookies as well as tracking software which acquire information about the end-user. Therefore, it is assumed that the access to or retrieval of such data will, in principle, be permitted when the end user agrees to that, and which will include the specific purpose of the processing. In recital 22 EPR noted, that in connection with the widespread use of cookies and advanced tracking techniques, end-users are repeatedly asked to give consent to the use and storage of such files, in the course of any online activity, particularly when using the Internet. Thus, in Art. 9 sec. the 2 EPR provides for the possibility of giving consent by using appropriate settings or options in the software that allows access to the internet, mainly web browsers. The end-user will be able to choose, to what kind of processing and cookies they agree to by default, and this setting will automatically apply to all web pages visited by the end-user. Service providers, without the end user's consent, will not be able to store cookies on their device, monitor users activity on the network, or track their location, for example, to offer them a suitable ad. The introduction of such mechanism, may however significantly affect the advertising business, which was pointed out by the advertisers raising objections to the EPR project, as there is a risk that a large number of end-users may refuse to consent to processing electronic communications data for this purpose. At present, more and more web pages are associated with additional tracking applications, whether in connection to advertising or social networking. Third parties are able to monitor users activity and use cookies regarding particular user, i.e. how much time each user spends on each activity, what kind of page they view, etc. - unless a specific user installs additional blocking software.

EPR, in its provisions regarding the use of terminal equipment and use of cookies, allows the processing of electronic communications data where it is necessary for the transmission of an electronic message, the fulfillment of an information society service requested by the end-user or is necessary to measure the web activity. It should be borne in mind, that the EPR in the latter case provides, that the measurement must be performed by the information society service provider requested by the end-user. The wording of this provision therefore indicates, that the measurement performed by third parties will be possible only if the consent is given. Nevertheless, it is common that any analytical programs of the web, measuring activity on the network, surveys, etc. are used by such entities, and not by the service provider of the particular service requested by the user²³.

It should be pointed out that EPR in Art. 11 stipulates, that Member States will be entitled to restrict by way of a legislative measure the scope of the obligations and rights provided for in Articles 5-8 of EPR where such restriction constitutes a necessary, appropriate and proportionate means of safeguarding the public interest referred to in art. 23

²² See, B. Fischer, M. Mazewski, p. 57.

²³ See, B. Fischer, M. Mazewski, p. 58.

sec. 1 a) -e) GDPR. Therefore it will be possible to regulate the aforementioned rules in a different way, e.g. allowing processing of electronic communications content in the case of crime prevention without the consent of the end-user, provided that such restriction will respect the substance of the individual's freedom rights. The practice will show the extent to which Member States will introduce such modifications. However, the possibility of derogations in national legislation from the general standards provided for in the EPR should be minimized, since the introduction of significant restrictions in national law can lead to a disruption of the European data protection electronic communications cohesion system, and to problems for service providers, who providing services throughout the EU, will be required to apply different, national rules.

The EPR project also introduces changes to publicly available directories, compared to the existing provisions of Directive 2002/58/EC. In art. 15 EPR indicates, that the providers of publicly available directories shall obtain the consent of end-users who are natural persons to include their data in the directory. Regulation is similar to the current Directive 2002/58/EC. However, on the basis of the Directive, when implementing its provisions into the Polish legal system, Art. 169 sec. 3 telecommunication law states, that the inclusion of personal data of a subscriber, who is a natural person, takes place after the prior consent of the subscriber, without prejudging however, whether this applies also to persons conducting business activity. Nevertheless, in this case the Polish courts stated, that in the scope of data of a natural person conducting business activity, which were disclosed as data concerning their activity, were not entitled to protection.²⁴ At the same time, EPR provisions do not in any way divide natural persons into leading and non-conducting businesses activity, nor do they differentiate the protection of those individuals for that reason. In view of the above, it should be recognized that after 25 May 2018, any natural person with respect to his or her personal or electronic communications data, whether or not connected with their business activity, will have to give his or her prior consent in accordance with the GDPR rules, in order to include his or her data in the directory²⁵. While under Directive 2002/58/EC Member States could adopt different regulations in this area, it would be impossible within the framework of the EPR. The change introduced in this matter will have a significant impact on the way businesses operate, which deal with various types of inventories or directories, especially telephone directories for entrepreneurs, a large number of which are natural persons conducting business activity. The necessity of obtaining prior approval may raise the question of the reasonableness of this type of activity, as certainly some of these people will refuse to consent to the inclusion of their data in the directory, which will affect the number of entities included in such directories.

The EPR also modifies the existing rules for use of electronic communications services for the purpose of transmitting direct marketing communications, but, similarly to Directive

²⁴ See judgements of Supreme Administrative Court from 28.11.2002 r., II SA 3389/01, and from 15.3.2010 r. I OSK 756/09.

²⁵ See, B. Fischer, M. Mazewski, p. 58.

2002/58/EC, this will be permitted for end-users who are natural persons who have given their consent. It should be recognized, as in the case of publicly available directories, that the definition of a natural person should also cover a person conducting an economic activity, since the EPR provisions do not in any way differentiate between the status of such entities, and any exceptions to the general rule cannot be implied. It will be admissible, in accordance with art. 16 sec. 2 EPR, as in the current directive, that electronic communications services for marketing purposes may be sent without the need for consent, in the case of the use of obtained electronic contact details, in connection with the sale of own products or services. In this case, similar to the GDPR, end-user's electronic mail for direct marketing of similar products or services may be used, and the end-user will be able to object to such use of his data.

Moreover, EPR obliges the service providers to obtain consent in every case of transmitting direct marketing communications, therefore in much wider scope than the current Polish telecommunication law. Which means that any use of the electronic communications service that will involve sending messages for direct marketing purposes will require the consent of the natural person. In addition, the EPR allows Member States to regulate under national law, that marketing voice-to-voice live calls made to end-users who are natural persons are regulated through an opt-out system. It also seems, that since the abovementioned exception may apply to all natural persons, therefore this rule can concern only a particular group, e.g. entrepreneurs.

In contrast, regarding the entities other than natural persons, i.e. legal persons within the meaning of the EPR, Member States have greater freedom to make regulations governing this matter. The only requirement will be obligation to ensure sufficient protection of the legitimate interests of those entities, as to the transmission of unsolicited communications for marketing purposes. It will therefore be possible to regulate the rules of transmission of direct marketing communications by adopting the opt-in or and/opt-out systems²⁶.

Regardless of the final form of the regulations in that matter, any entity sending direct marketing communication will be required to inform each end-user (whether he or she will be a consumer, entrepreneur, or the legal person) about the marketing nature of the material, the entity on whose behalf they are being transferred, and the right to withdraw consent when it is granted.

²⁶ See B. Fischer, M. Mazewski, p. 59 and provisions cited there regarding the opt-out and opt-in system concerning marketing communications.

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