20.03.2019

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Position of iab austria regarding the drafting of a

directive 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 (Privacy and Electronic Communications Directive)

General remarks regarding the ePrivacy Directive

On 10th January 2017, the EU Commission officially presented the draft for a new directive by the European Parliament and by the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Privacy and Electronic Communications Directive) (ePR).

In autumn 2017, this draft was approved by the EU Parliament and passed on to the EU Council for a final decision and the issuing of the order to begin trialogue negotiations. Necessary amendments were made during the Austrian Presidency and have served as the basis for discussions in Council meetings. However, due to a lack of mutual agreement, sadly no conclusion has been reached. There also continues to be a lack of consensus under the Romanian Presidency. The latest draft that is currently available, dated 13th March 2019, still presents enormous risks to all industries in Europe which pursue a digital business model and favours the already overwhelming competition from overseas. Approving the current draft would mean that large portions of online advertising budgets could go to the American players like Google or Facebook!

Key issues

- The level of protection afforded by the General Data Protection Act (GDPR), which entered into force in May 2018, should mark the limit of what constitutes reasonable measures for creating a level playing field. The GDPR explicitly extends to the online environment and contains extensive regulations regarding the use and processing of data therein. It also offers a significantly more transparent level of protection than the ePR. The GDPR provides that the user is informed of the nature and manner of the use of their data before they give their consent and can agree (or not) to each individual service. Whereas the ePR regulates consent solely on the basis of technical origin (direct or indirect link to web service) by means of browser settings. Consistency with the provisions of the GDPR are therefore essential if transparency for the user and a level playing field for the economy are to be guaranteed. All lawful reasons for processing listed in Art. 6 of the GDPR must therefore be transposed into **Art. 8 (1) of the ePR**, especially “legitimate interest”, in order to ensure consistency with the GDPR.

- **Art. 10 of the ePR**, which elevates browsers to the position of being the sole “gatekeepers”, does not provide users with an adequate means of protection and prevents the emergence of a “level playing field” for Austrian and European companies with regard to the big global players, who, like Google or Apple for example, also operate browsers (Google Chrome, Apple Safari). Moreover, due to their market power, the aforementioned companies also possess the means by which to press users into granting consent. The GDPR, however, contains provisions which stipulate that consent must be given voluntarily in all cases and access to the service cannot be made dependent on the granting of this consent. In short, the draft of the ePR would allow the big digital players to strengthen their position and strike a major blow to Europe’s digital single market. Growth within the digital single market would therefore be made impossible, which would have huge implications for the European economy as a whole. It is therefore essential that the deletion of Article 10, as agreed by the Austrian Presidency, be upheld.

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- **Recital 20a**, which has been newly added to the current proposal of the Romanian Presidency, very closely resembles the currently removed Article 10. It urges the web browser providers to provide end users with a white list, with the help of which the end user can consent to the use of cookies for specific providers. This "whitelisting" may represent at most one alternative to consents which have already been granted by the data subject. Such white lists may not be "overruled" by the consents already granted by the data subject under any circumstances!

  In principle, it is technically feasible to transmit the information (consent given/not given) to the browser using a standardised script. However, a script of this kind must first be developed and rolled out on a global(!) scale. BUT – the website operators and media will once again be forced into a position of dependence on browser manufacturers as a result. The websites/media would be responsible for any malfunction, inadequate implementation, failure, conversion, etc. In practice, it is also apparent that technology companies, especially Google, for the most part fail to respond to technical queries or only issue very delayed responses. As a result of this, the websites/media can incur significant economic losses, which can eventually result in legal consequences.

  Recital 20a is therefore detrimental to Austrian companies and once again places the browser manufacturers in the role of gatekeeper. It must therefore continue to be possible to obtain consents through the respective website or even via networks involving several offers/websites (e.g. a login alliance).

- There is also a conflict between the provisions of the GDPR concerning consent in the case of direct marketing measures (no explicit consent, but the right to revoke consent at any time) and those of **Art. 16 ePR** regarding "unsolicited communications", which requires explicit consent for direct marketing measures. This would be an improper and enormous disadvantage for companies that wish to carry out such marketing measures using electronic communications services. The provisions of the GDPR must be fully taken into account in this respect.

The iab therefore asks that Article 10 of the ePR remain omitted and that Recital 20a not become a "hidden" Article 10. Both with regard to the obtaining of consent and the conditions under which permission exists (e.g. legitimate interest), reference should be made to the guidelines of the GDPR in order to prevent domestic companies losing out on sources of revenue from advertising, the financing of domestic internet offers from becoming impossible and once free internet offers from becoming subject to a fee or disappearing altogether. In addition, consistency with the GDPR should also be ensured with regard to Article 16, so as to ensure that companies which implement direct marketing measures via electronic communications services are not put at a great disadvantage.

The planned implementation of the ePR jeopardises the long-term digitisation of Europe and Austria, weakens the area, puts jobs at risk and imposes significantly limitations on Austria and Europe's innovative capacity. The high level of data protection in Austria will also be severely weakened by the technical approach featured in the ePR. It is the opinion of the iab that the draft of the ePR in this form should continue to be rejected.

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ABOUT THE INTERACTIVE ADVERTISING BUREAU

Around 180 leading companies operating in the digital economy are organised within the Austrian branch of the iab (interactive advertising bureau). It sets standards for digital communications, lends its expertise to advertising companies, ensures transparency and provides support to up-and-coming talent. The diversity of its members, which come from all areas of the digital economy, ensures a holistic view of the issues that are relevant to the sector. iab Austria engages in ongoing exchange with political figures, the public and other interest groups. You can find further information at **https://www.iab-austria.at.**