

POLICY PAPER

The ePrivacy Directive as a Test Case of Better Regulation

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- **This analysis focuses on the interaction between two key priorities on the agenda of the European Commission of President Juncker – the Better Regulation Agenda and the Digital Single Market Strategy, which were both launched in May 2015. It examines the application of the principles of better regulation in practice; focusing on the revamp of the Directive on Privacy and Electronic Communications (the ePrivacy Directive – ePD) as a case study. This paper identifies two points which potentially call these rules into question.**
- **Firstly, it considers an apparent disconnection between the 2009 review of the ePD and that of the Data Protection Directive (which is soon to be replaced by the General Data Protection Regulation). The paper suggests that the unaligned reviews of these Directives may have increased the possibility of the EU’s producing overlapping legislation – and therefore contributed to the need for the current review of the ePD, which seeks to prevent any duplications.**
- **The 2016 evaluation and review of the ePD is the main focus of the statistical analysis in the second section of this paper. At the time of writing, the review is ongoing and the prospective new proposal is due to be published at the beginning of 2017. The study concentrates particularly on the public consultation which, as part of the evaluation undertaken by the Commission during 2016, has collected a number of stakeholders’ opinions. The paper highlights differences among opinions of consumers and civil society on the one hand, and industry on the other hand.**
- **Furthermore, the paper reflects concerns expressed by industry organisations about the design of the consultation. Scrutinising responses by industry associations and umbrella organisations in particular, it reviews several questions from the consultation regarding the relevance of the ePD, the nature of the potential new instrument and its scope. The analysis highlights potential difficulties for formulating conclusions from these questions and proposes several recommendations to strengthen the coherence and transparency of policy-making by the European Commission.**

Introduction

Particularizing the Data Protection Directive (to be replaced by the General Data Protection Regulation in 2018) and specifying the Regulatory Framework for Electronic Communications, the ePrivacy Directive (ePD)¹ has been in place since 2002 with the purpose to protect the privacy of personal data in electronic communications in public networks. It has applied to telecom operators processing data when making a phone call or sending a text message, but not to online communication services such as video calls and instant messaging applications. Since its last amendment in 2009, it has often been labelled as the 'cookie law', obligating websites to obtain prior consent to store or access information on the user's phone or laptop and prompting the appearance of cookie banners as pop-ups.

In 2016, the European Commission launched a review of the ePD to improve consistency with existing legislation and with a view to reacting to technological developments. The paper argues that one of the reasons why the need for the present review originated was the fact that the last one in 2009 was separated from that of the future GDPR taking place in the same year. Apart from the coherency of ePD's legislative evolution to the present situation, the analysis focuses on the transparency of the ongoing evaluation, in particular with regard to the public consultation.

Why ePD is the focus

The ePD is an interesting case from the better regulation perspective for a number of reasons. Firstly, looking at the bigger picture, the Digital Single Market (DSM) Strategy, of which the ePD is part, shares the same ultimate goal with the Better Regulation Agenda (BRA). The key priority of the current European Commission has been to boost EU competitiveness and growth of EU businesses, so that they increase employment and investments in the

EU economy. **Based on the assumption that the precondition for competitiveness is innovation, the Commission identified two primary tools to enhance innovation in Europe. First, having the right legal framework and second, embracing the digital revolution.** Translating these visions to concrete policies, it introduced the Better Regulation Agenda and the DSM Strategy in May 2015. Launching just two weeks apart, the two policies might have been originally conceived separately. However, if they are to achieve common aims, they need to be compatible.

Secondly, the current revision of the ePD constitutes a great opportunity for the European Commission to prove its commitment to the better regulation principles. To date, the ePD has undergone a unique legislative evolution; oscillating between the telecoms regulatory framework and the data protection rules. However, its revisions have arguably not been fully-aligned in time with either of the two. In case of the General Data Protection Regulation (GDPR), this has resulted in a risk of overlapping legislation, which, if not eliminated, would contravene the spirit of lean EU laws. The future new proposal is therefore awaited with hopes to prevent that from happening.

Last but not least, due to ePD's being specifically oriented towards the traditional telecommunication service providers, the debate on its review provides a vivid illustration of the dynamics between the different stakeholders and a testimony of the modernisation of EU law against the backdrop of quick technology transformation.

Better Regulation Principles: the basics

The relationship between the ePD and the reform of the DPD (which led to the GDPR) is considered against the

¹ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in electronic communications sector

(Directive on privacy and electronic communications). Available at: http://ec.europa.eu/justice/data-protection/law/files/recast_20091219_en.pdf.

general aim of better regulation to simplify legislation.² In turn, the 2016 review of the ePD is examined in light of some of the concrete principles of the Better Regulation Agenda³ introduced by President Juncker's Commission in May 2015. The overriding objective of the BRA has been to improve EU legislation in terms of its efficiency, effectiveness and transparency and to reduce regulatory burdens. Reflecting the **back-to-back policy making logic**, the Commission's Better Regulation Toolbox requires that 'all the preparatory and analytical work, including stakeholder consultations, must be done in time to feed into the policy development process' and that 'lessons from implementation and retrospective evaluations must be taken into account as part of the **"evaluate first" approach** to policy development.'⁴ The **coherency principle** claims that initiatives and related activities such as evaluations, impact assessments and consultations within one policy area should be aligned. As the analysis of the two developments of the ePD suggests, the rigorous application of the rulebook in practice can be challenging.

The ePD and GDPR: a separate journey of complementary instruments

The ePD was adopted in 2002 as part of the new EU regulatory framework for electronic communications⁵ as a specific instrument safeguarding personal data processed in communications over public communications networks. As such, it has been a complement to the Data Protection Directive⁶ (DPD), the basis of the EU data protection rules.

However, when the ePD was first amended in 2009, it happened within the revision of the telecoms package, aside from the overhaul of the data protection legislation, which had begun a couple of months earlier. The updated ePD was adopted in mid-December 2009, while a public consultation on the legal framework for personal data protection ran from May until the end of December 2009. **Given the timeframe, it could be assumed that there was not adequate time to incorporate the final results of this consultation into the revision of the ePD.**

This may have affected some stakeholders, who also used the consultation to express concerns over the ePD. The data protection consultation asked open-ended general questions about new challenges and the relevance of current law. While internet services providers focused mainly on the Data Protection Directive, the telecommunications operators commented on the ePD too; perceiving both of them as key instruments for personal data protection. They resented the fact that the ePD did not apply to their new competitors – who, they claimed, have been providing functionally-similar services over the internet – and called for a level playing field. **However, these complaints were arguably not fully-addressed in 2009, seeing that the same issue reappeared more strongly when the ePD was opened again seven years later.**

Ideals and reality

The Commission then committed to reforming the personal data protection framework in its 2010 Work Programme and in November 2010 published a strategy on

² The Commission adopted the present better regulation rules in May 2015. However, it has been running previous programmes on better regulation with the goal of simplifying legislation since 2002. See for example: European Commission. 2016. *Better Regulation-simply explained* [Online]. Available at: http://ec.europa.eu/smart-regulation/better-regulation/documents/brochure/brochure_en.pdf. [Accessed: 26 October 2016], pp.6.

³ See European Commission. 19 May 2015. *Better regulation for better results - An EU agenda*. [Online]. Available at: http://ec.europa.eu/info/sites/info/files/communication-better-regulation-for-better-results-an-eu-agenda_may2015_en.pdf.

⁴ European Commission. 19 May 2015. *Better Regulation "Toolbox"* [Online]. Available at: [http://ec.europa.eu/smart-](http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf)

[regulation/guidelines/docs/br_toolbox_en.pdf](http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf). [Accessed: 26 October 2016], pp. 7.

⁵ *Regulatory framework for electronic communications* [Online]. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3A124216a>. [Accessed: 26 October 2016]

⁶ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Available at: <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A31995L0046>

how to achieve it.⁷ However, this ‘comprehensive approach’ only foresaw the revamp of the DPD. **It may have been presumed that changing the DPD would also have implications for the freshly-amended ePD, but there are a number of practical reasons which may explain the separate approach.** The first of those may be a lack of resources in the Commission limited personal capacity (which may prevent such processes’ taking place concurrently) or a lack of cooperation between individual parts of the organisation. There may also be more strategic reasons at play, such as isolating complicated initiatives in order not to block a bigger action.

Moreover, some officials of the European Commission have noted that a couple of weeks difference between consultations is not greatly significant, as it can take years for legislation to be adopted and stakeholders can still influence the legislative process through the European Parliament or their national governments. However, this paper considers that it would be easier if policy and legislative proposals took due account of stakeholders’ point of view at the beginning of the process. At the least, it is argued, this way could be more transparent than ex-post lobbying.

Assessing the impact on related legislation

A similar approach was repeated in January 2012, when the reform of the DPD resulted in the proposal of the new General Data Protection Regulation. It promised that ‘a single law will do away with the current fragmentation and costly administrative burdens’⁸ but the impact it would have on the ePD was considered only in a footnote in the

respective Communication. This could be deemed somewhat paradoxical, given that this is where the Commission foresees that the new Regulation will have ‘substantive legal consequences’⁹ for the ePD. Examining these impacts was nevertheless postponed to a later stage. **A 150-page long impact assessment of the GDPR¹⁰ did not provide analysis of its effects on other existing personal data protection acts, although did list these acts.** If we strive for a coherent and predictable legal environment, such omission appears rather as a shortcoming.

An overhaul of a major EU law should take into account its impact on the broader legislative framework and certainly on instruments to which it is tied, even if only as an outline of the main aspects which would need to be re-assessed in reaction to it. At the moment, the BRA rules insist that an ‘external coherence’ check is put in place; looking at how an instrument works together with others in the same policy field.¹¹ This applies however only to an ex-post evaluation of an existing intervention. **This paper suggests that a forward-looking check in an impact assessment may strengthen the legal certainty.**

Looming overlap

Eventually, the review of the ePrivacy Directive was promised in the final GDPR itself, which was adopted in May 2016. The motivation was to ‘ensure consistency’; indicating the looming overlap of the proposed GDPR with the ePD. This was asserted in a report assessing the ePD for the European Commission in January 2015. It found that

⁷ European Commission. 04 November 2010. *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions. A comprehensive approach on personal data protection in the European Union* [Online]. Available at: http://ec.europa.eu/justice/news/consulting_public/0006/com_20_10_609_en.pdf. [Accessed: 26 October 2016]

⁸ European Commission. 25 January 2012. *Press release: Commission proposes a comprehensive reform of data protection rules to increase users’ control of their data and to cut costs for businesses* [Online]. Available at: http://europa.eu/rapid/press-release_IP-12-46_en.htm?locale=en [Accessed: 27 October 2016]

⁹ European Commission. 2012. *Communication from the Commission to the European Parliament, the Council, the Economic*

and Social Committee and the Committee of the Regions. Safeguarding Privacy in a Connected World, A European Data Protection Framework for the 21st Century [Online]. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012DC0009&from=en>. [Accessed: 27 October 2016], pp. 4.

¹⁰ Available at: http://ec.europa.eu/justice/data-protection/document/review2012/sec_2012_72_en.pdf.

¹¹ European Commission. 19 May 2015. *Better Regulation “Toolbox”* [Online]. Available at: http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf. [Accessed: 17 November 2016], pp. 274.

there was a confusion in the applicability of certain of its provisions, with some regarding solely the electronic communication providers while others pertain also to providers of information society services, such as Art. 5(3) on cookie consent. Echoing calls for a level-playing field that surfaced in the 2009 consultation, the report noted that when it comes to processing of traffic data and location data other than traffic data, 'the narrow scope leads to unacceptable situations of unequal treatment'¹².

To ameliorate the situation, the study recommended to widening the scope of the ePD and suggested transforming it into a Regulation. It noted that if the extended form remained a Directive, it would result in 'two instruments containing provisions on personal data protection with mirroring provisions but on different levels.'¹³ It warned that such overlap with the GDPR would 'inevitably create a very complex situation.'¹⁴ In the same breath it noted however that this would be a provisional solution and that keeping a sector-specific legislation was not the way forward in the online age.

The crux of the 2016 review

The Scope Strife

In the current review of the ePrivacy Directive – which started with a public consultation in April 2016 – the scope has proven to be the key issue provoking contrasting views. Broadly speaking, there are three camps: telecoms companies, the technology industry and consumer and civil

society groups. In the first group, the so-called "over-the-top providers" (OTTs – companies which deliver their services over the internet) have argued against widening the scope of the Directive to apply to their activities. OTTs argue that they have already been sufficiently covered by the GDPR which has been designed with the 'online and broader ICT environment in mind'¹⁵, and which provides a 'clearer and higher level of protection regarding the processing of all types of data including data governed by the current ePrivacy regime'¹⁶. In fact, the GDPR was inspired by some of the provisions of ePD, such as the obligation for companies to notify personal data breaches to national authorities and to concerned individuals, which it made compulsory for all market players.

A similar perspective has been shared by the telecom providers, who insist that the ePD is no longer needed, as it duplicates provisions put in place in the horizontal and technology-neutral GDPR. The European Telecommunications Network Operator's Association (ETNO) published in the summer of 2016 a legal study showing that most of the ePD's privacy provisions have been covered in the GDPR and that the rest of the provisions has become obsolete.¹⁷ On the last day of the public consultation, the telecoms and technology sectors issued a joint statement¹⁸ calling on the Commission to repeal the ePD. However, the telecoms actors have also been consistent in defending their level-playing field line

¹² European Commission. 2015. *ePrivacy Directive: assessment of transposition, effectiveness and compatibility with proposed Data Protection Regulation* [Online]. Available at:

<https://ec.europa.eu/digital-single-market/en/news/eprivacy-directive-assessment-transposition-effectiveness-and-compatibility-proposed-data>. [Accessed: 27 October 2016], pp. 9.

¹³ *Ibid.* [Accessed: 28 October 2016], pp. 17.

¹⁴ *Ibid.* [Accessed: 28 October 2016], pp. 17.

¹⁵ Google Inc. 04 July 2016. *Questionnaire for the public consultation on the evaluation and review of the e-Privacy directive* [Online]. Available at: <https://ec.europa.eu/digital-single-market/en/news/contributions-received-industry-public-consultation-evaluation-and-review-eprivacy-directive>. [Accessed: 01 November 2016], pp. 13.

¹⁶ European Digital Media Association (EDiMA). 04 July 2016. *Questionnaire for the public consultation on the evaluation and*

review of the e-Privacy directive [Online]. Available at: <https://ec.europa.eu/digital-single-market/en/news/contributions-received-industry-public-consultation-evaluation-and-review-eprivacy-directive>. [Accessed: 01 November 2016], pp. 13.

¹⁷ European Telecommunications Network Operators Association (ETNO) and DLA Piper. August 2016. *Study on the revision of the ePrivacy Directive*. [Online]. Available at: https://etno.eu/datas/publications/studies/DPTS_Study_DLA_0408_2016_ePrivacy_Final.pdf. [Accessed: 17 November 2016]

¹⁸ *Joint Industry Statement: Empowering Trust and Innovation by Repealing the e-Privacy Directive*. 05 July 2016. [Online]. Available at: http://cdn.cciagnet.org/wp-content/uploads/2016/07/Joint-Industry-Statement_ePrivacy_FINAL.pdf. [Accessed: 01 November 2016]

and this time with much stronger vigour than in the 2009 consultation. They expressed discontent with being subject to sector-specific legislation, whereby a similar legislative regime would not apply to their OTT competitors such as Skype, Whatsapp or Facebook Messenger. Therefore, the telecoms companies' call for scrapping the ePD came with a small hitch – if it was, after all, to remain in place, then it should become a Regulation applying to all providers of communication services.

Privacy in peril

There was one privacy provision of the ePD which the telco study admitted 'may still be relevant'¹⁹: Article 5 on Confidentiality of Communication. In contrast, for NGOs representing consumers and civil society groups, this was of paramount importance. From their perspective, the main focus of the GDPR was *data protection*, but it lacked sufficient safeguards on *data privacy*. The heart of the argument is grounded in two articles of the Charter of Fundamental Rights of the EU²⁰. According to NGOs, the GDPR covers Article 8 concerned with the protection of personal data and their legitimate processing, but falls short on Article 7, which enshrines respect for private communications. In their view, securing data privacy is a vital role of the ePD, which should be broadened to the online sector and upgraded into a Regulation. Advocating for what it calls a 'Complementary Regulation', European Digital Rights (EDRi) defends sector-specific rules in this case. It asserts that 'online communications technology has such a profound impact on fundamental freedoms that it justifies specific applications of the principles of the Charter of Fundamental Rights...'²¹. It is important to note that for the NGOs, the debate on the ePD is wider, and is seen as presenting a chance to close some of the alleged loopholes of the GDPR in order to catch up with phenomena such as

personal profiling by social network sites and online tracking by advertising companies.

This brief outline of the different positions of stakeholders illustrates how difficult a task the Commission encounters in striking the right balance between consumer protection and innovation when revising the ePD. The palette of opinions becomes further varied with other participants in the consultation, composing of public bodies, national regulatory authorities and individual citizens. This is in addition to positions taken by EU Member States, which, together with the European Parliament, take centre stage in adopting EU legislation. In general, we can observe similarly-diverging dynamics in the Council of the EU, with a like-minded group of fourteen Member States' pushing for a liberal Digital Single Market²², whilst others such as France and Germany often take a more conservative approach.

Exceptions to 'Evaluate First'

The complexity of the balancing act may be one of the reasons for the delay in the review of the ePrivacy Directive. Originally scheduled for late 2016, the Commission postponed the review in the autumn of 2016 until January 2017. Given the nature of the challenge, this is a minor protraction. In the DSM Strategy unveiled in May 2015, the Commission outlined the ePD review together with fifteen other initiatives. It vowed to deliver upon them in about eighteen months in order to allow time for some of them to be adopted before the end of the current mandate. In addition, the evaluation of the ePD has been part of the REFIT Programme²³ for examining the effectiveness

¹⁹ European Telecommunications Network Operators Association (ETNO) and DLA Piper. August 2016. *Study on the revision of the ePrivacy Directive*. [Online]. Available at: https://etno.eu/datas/publications/studies/DPTS_Study_DLA_0408_2016_ePrivacy_Final.pdf [Accessed: 17 November 2016]

²⁰ Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>.

²¹ European Digital Rights (EDRi). 05 July 2016. *Questionnaire for the public consultation on the evaluation and review of the e-Privacy directive* [Online]. Available at:

<https://ec.europa.eu/digital-single-market/en/news/contributions-received-civil-society-and-consumer-associations-public-consultation-evaluation>. [Accessed: 01 November 2016], pp. 2.

²² For the list of states and their most recent joint position on DSM adopted on 02. December 2016 see <http://www.brukselaue.msz.gov.pl/resource/76f021fe-0e02-4746-8767-5f6a01475099:JCR>

²³ The list of Roadmaps/Inception Impact Assessments is available at http://ec.europa.eu/smart-regulation/roadmaps/index_en.htm.

of existing legislation; underlining the political importance of the exercise.

The tight schedule and high political priority of the DSM prove an endurance test for the rigorous application of the better regulation principles. If all the steps of the whole Better Regulation Guidelines were to be applied in an ideal order, allowing one stage follow the other, the legislation review culminating with a new proposal could take over a year at a minimum and easily up to three years. In case of the ePD, the Commission clearly does not have that much time. So to speed up the process, it has been working on the REFIT evaluation of the ePD by and large simultaneously with the impact assessment of its prospective changes. **Since according to the BRA Guidelines, the impact assessment is supposed to be fed by the evaluation conclusions from the start, it could be argued that this approach goes against the 'evaluate first'²⁴ principle of the BRA.** It also risks that the complex results from the public consultation, which is the key entry point for stakeholders to express their views during the evaluation phase, might be diminished as a message on its own, if there is already an impact assessment under way anticipating certain policy options.

The Commission makes no secret of the processes running in parallel and refutes suggestions that there should be reason for concern.

In the inception impact assessment on the ePD evaluation published on 3 October 2016, it declares that the evaluation and the impact assessment 'will be closely coordinated in terms of timing and contents'²⁵. In addition, the Commission has pointed to the fact that apart from the public consultation, there are also other inputs into the ePD's evaluation, such as feedback on the GDPR and new telecommunication rules, which help ensure holistic evidence.

The consultation questions: reason for concern?

As the public consultation gathers opinions rather than data, it could be seen as having more of an advisory nature. Nevertheless, as the consultation presents one of the main opportunities to provide structured feedback to the Commission – and stakeholders invest time and resources in doing so – they pay particular attention to the mechanism. In the case of the ePD, concerns were raised by industry about the way in which it was designed. Given the goal of the ePD is to protect consumers, it may be suggested that objections from industry should be analysed carefully, due to industry's inclination, for example, to avoid additional burdens stemming from EU legislation.

The following analysis considers the public consultation and identifies several potentially sensitive points regarding the relevance of the ePD, the nature of the prospective new instrument and its scope. It reviews these questions by examining the answers given in particular by industry associations. The choice of one subcategory of industry respondents has been motivated by the limited scope of this paper and is based on the assumption that associations represent a bigger number of stakeholders than individual companies and that their positions - negotiated among different members – are presumably closer to a more broadly-supported compromise.

On the whole, the public consultation includes reactions from four groups of stakeholders: citizens, industry, public bodies and civil society and consumer associations. It was undertaken by the European Commissions' DG CONNECT from April to July 2016.²⁶

²⁴ For definition see: European Commission. 19. May 2015. *Commission Staff Working Document: Better Regulation Guidelines*, p. 51. Available at: http://ec.europa.eu/smart-regulation/guidelines/docs/swd_br_guidelines_en.pdf.

²⁵ European Commission. 03 October 2016. *REFIT Evaluation and Impact Assessment of Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal*

data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [Online]. Available at: http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_cnect_013_review_eprivacy_en.pdf. [Accessed 07 December 2016], pp. 3.

²⁶ Information on the public consultation and filled-in questionnaires are available at: <https://ec.europa.eu/digital-single->

A brief Summary Report²⁷ was published in August 2016, which apart from the general data on numbers and affiliations of respondents provides barely two pages of insight into their contributions. A full report is supposed to follow, but has not yet been published at the time of writing at the beginning of December 2016.

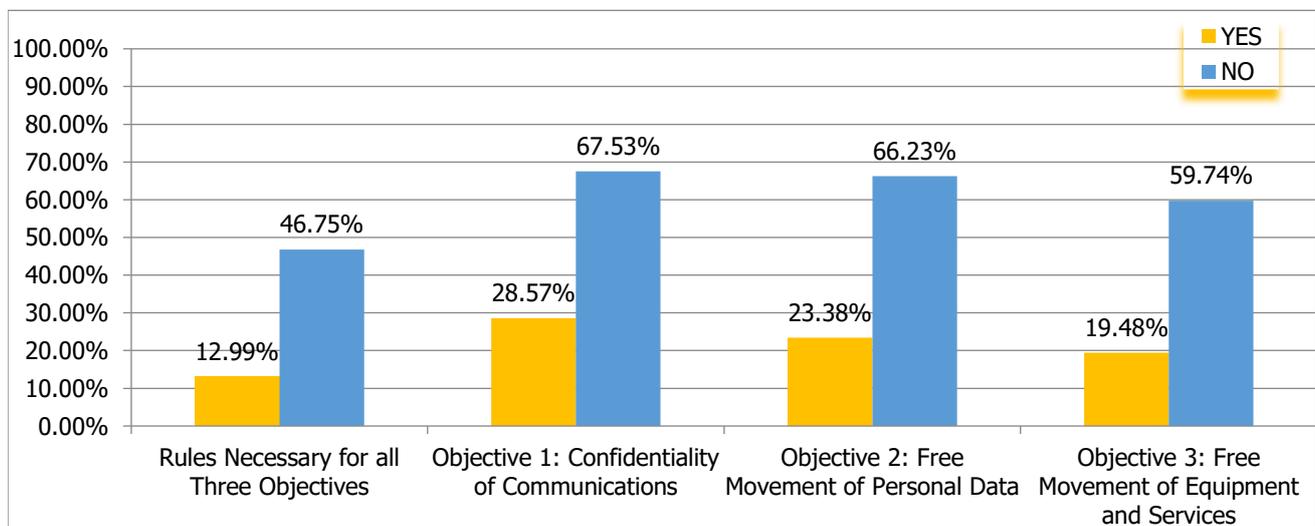
The More Complexity, the More Transparency

As part of the REFIT evaluation, the first section of the consultation inquired about the relevance of the ePD. Framed as a multiple choice question, question 5 (Figure 1) lends itself to various explanations. The peril lies in the fact

that it is potentially a key input for a conclusion on the necessity of the ePD and results should therefore be drawn in a very transparent manner. Concerning rules to deliver ePD's objectives, which are 1) ensuring full protection of confidentiality of communications, 2) free movement of personal data processed in electronic communications and 3) free movement of electronic communications equipment and services, figure 1 shows that only 13% of the industry associations think that special legislation is necessary for all three of the areas, while 47% hold that none is necessary in any of them.

Figure 1 on Question 5: **In your opinion, are specific rules at EU level necessary to ensure the following objectives?**

Responses of Industry Trade Associations/Umbrella Organizations



Note: The three objectives in full: 1) 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, 2) The free movement of personal data processed in connection with the provision of electronic communication services, 3) Free movement of electronic communications equipment and services.

Source: Filled-in questionnaires [published](#) by the European Commission within the public consultation in the category Industry Trade Associations/Umbrella Organizations. In total, 84 questionnaires were published, 7 of which were blank. The total number taken into consideration is 77.

[market/en/news/summary-report-public-consultation-evaluation-and-review-eprivacy-directive](#).

²⁷ European Commission. 04 August 2016. *Summary report on the public consultation on the Evaluation and Review of the ePrivacy*

Directive [Online]. Available at: <https://ec.europa.eu/digital-single-market/en/news/summary-report-public-consultation-evaluation-and-review-eprivacy-directive>. [Accessed: 06 December 2016].

If we look at the three goals individually, we see that just under 30% of associations desire legislation on confidentiality of communications, compared with over twice as many opposing it. On free movement on data, the difference is almost three fold. The biggest discrepancy pertains to free movement of equipment and services, where under 20% of associations call for EU laws and nearly 60% do not. It follows from the analysis of no responses and no opinions that of the ePD's three aims, the confidentiality of communications is the most important issue for the associations, illustrating the industry's rift with the civil society outlined above. The fact that these are basic data stemming from just one subcategory of respondents points to the complexity of this question with many response combinations.

Fundamental Future Focus

The reluctance of industry associations to support the ePD shows also in the second part of the questionnaire, which inquires about 'priorities for any future legal instrument'. In question 15, around 56% of the associations asserted that 'none of the provisions are needed any longer', only to find themselves answering a dozen of specific questions that followed on the details of this very instrument. That led some trade associations to suggest that there might have been a preference to maintain the ePD in one form or another from the start of the review. Irrespective of whether that has been the case or not, pursuing a political objective is a legitimate part of decision-making. However, for the process to maintain credibility and trust of the citizens, the Commission should be open about its preferences and provide sound reasoning of them.

Methods Matter

The same applies to methodology. The BRA obliges the Commission to prepare policies in a transparent way. **Disclosing methods it uses to extract information from the contributions may help to achieve this goal.** A prime example of such need in case of the ePD is question 16: *In your opinion, could a directly applicable instrument, one that does not need to be implemented by Member States (i.e. Regulation), be better to ensure an equivalent level of privacy protection in connection with processing of*

data in the electronic communications sector and to ensure the free movement of such data? The number of associations answering positively without any reservation is only at around 12%.

Since the consultation also allowed participants to provide comments, we learn that in fact around 60% industry associations either said they favoured to repeal the ePD, considered it unnecessary or wanted to scrap at least those parts of it which overlapped with the GDPR. Half of them then indicated regulation as a better option, but only as a second choice, that is, if it had to be at all. Complex as it is, it is important to be clear on how such a nuanced input is reflected – interpreting it as 30% of associations supporting a regulation would be quite far-fetched. In addition, it has been argued by some respondents that the way in which this question is formulated may be actually leading, pointing to the need for careful phrasing.

The Weight of Voice

Similarly, the Commission should shed more light on how it weights the voice of the different stakeholders. This is crucial in relation to the debate on the scope of the ePD. According to the Summary Report, 43% of industry favour extending it while 42% plead for the contrary. Given the significance of the issue, such little difference would merit more explanation, which the Summary Report however does not provide. On request, DG CONNECT, which is in charge of the consultation specified the full breakdown of the answers: 36.2% for extending the scope, 7.4% in part (together 43.6%); 41.6% against extension and 14.8% do not know.

The trickiness of weighing the contributions becomes obvious when we look more closely at their composition. The Summary Report regards the industry category as a whole. It builds on input from 64 publicly accessible questionnaires from individual companies and 84 from

České vize pro Evropu, evropské vize pro Česko
Czech Visions for Europe, European Visions for the Czechs

trade associations or umbrella organizations.²⁸ Approximately another 40 have been confidential, since in total the Commission received 186 entries. The disparities within the industry group are stark. As highlighted by figures 2 and 3, more than half of the represented companies seek to wholly or partly extend the scope, while only a quarter of the associations wish to do so.

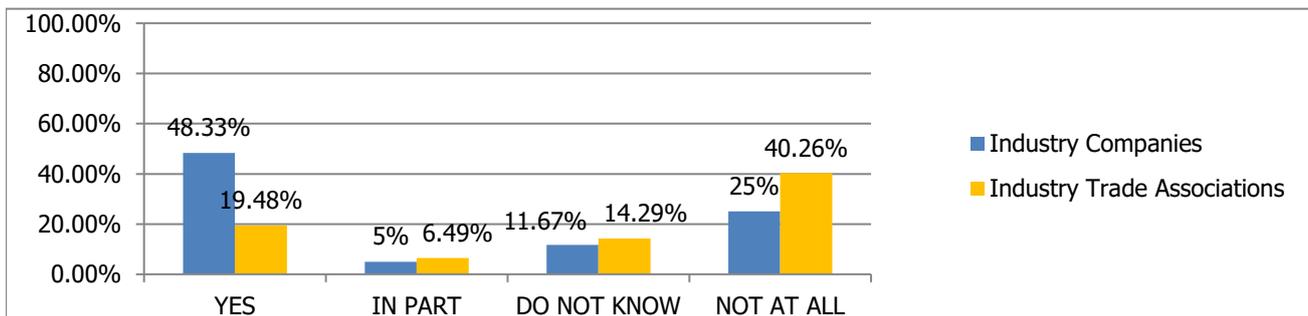
Preventing Fatigue by Feedback

Translating such ambiguous opinions into clear insights undoubtedly poses a big challenge. To increase

transparency, the Commission should make public more information on its assessment procedures together with the consultation report. The numerous consultations within the DSM Strategy have posed a strain on the capacities of both the Commission officials and the stakeholders, which within the industry category goes especially for the small and medium-sized enterprises. Providing them with comprehensive feedback would reward their participation in the consultation and serve as a positive motivation to actively engage in EU policy-making in the future.

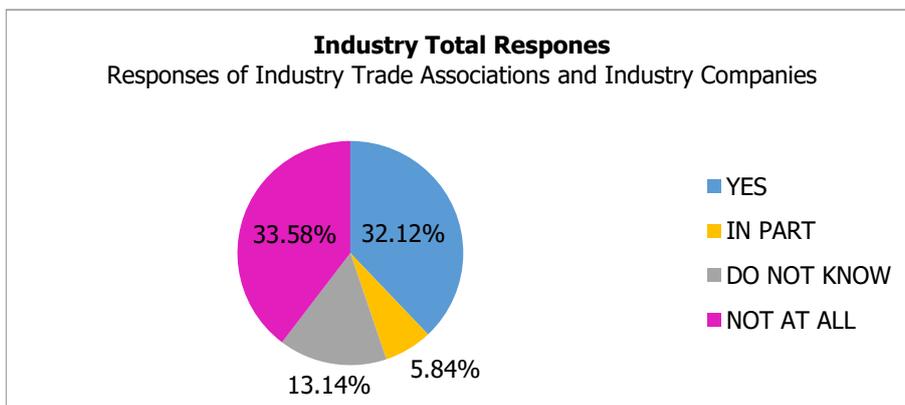
Figure 2 on Question 17: **Should the scope be broadened so that over-the-top service providers (so called "OTTs") offer the same level of protection when they provide communications services such as Voice over IP, instant messaging, emailing over social networks).**

Responses of Industry Trade Associations/Umbrella Organizations and Industry Companies



Source: Filled-in questionnaires published by the European Commission within the public consultation by Industry Trade Associations/Umbrella Organizations and Industry Companies. In the first category, 84 questionnaires were published, 7 of which blank. The total number taken into consideration is 77. In the latter, 64 questionnaires were made public, of which 4 blank, resulting in 60 questionnaires reviewed by the analysis.

Figure 3 on Question 17



Source: The same as for Figure 2.

Conclusion

This paper has examined two legislative developments regarding the ePrivacy Directive from the perspective of better regulation principles of the European Commission. Firstly, it focused on the 2009 review of the ePD in relation to the overhaul of the Data Protection Directive (replaced by the GDPR). This was triggered in the same year, although has been undertaken separately. The paper has suggested that the disassociation of these two policy review processes has exacerbated the need for the current review of the ePD, which has as one of its main goals the avoidance of any potential overlap with the GDPR.

Secondly, it has scrutinised the public consultation within the 2016 evaluation of the ePD, arguing that concessions have been made on the 'evaluate first' principle. The analysis identified several potentially sensitive questions which could be prone to multiple explanations, and recommended that the methods of interpreting results should be made public. The statistical analysis was based on the questionnaires by industry, reflecting concerns about the design of the consultation.

Nevertheless, even if the timing was tight and procedures parallel, the main elements of better regulation were still in place. To keep things in perspective, it should be emphasised that sticking to the tools of the Better Regulation Agenda is a task that the Commission has imposed upon itself, and that the BRA does not currently

extend beyond the Commission. In the legislative process which follows, the proposal can change significantly due to the amendments by the European Parliament and the Council of the EU, which are however not required to do impact assessments on the amendments. It follows that whilst improvements might still be needed in the Commission's policy preparation process, there are other loopholes to close in order to fully deliver on the promises of better regulation.

The ongoing review of the ePD is scheduled to conclude at the beginning of 2017. Its results will present an opportunity to demonstrate the successful practical application of the Better Regulation Agenda, specifically in a policy area of high political importance to the European Commission.

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