

The draft ePrivacy Regulation may lead to an unnecessary increase of regulatory burdens, costs, and legal uncertainties for companies – the Member States can still prevent this from happening during the negotiations within the Council of Ministers.

Position Paper ONL voor Ondernemers

The proposal for the ePrivacy Regulation is currently under discussion within the Council and ONL has noted that there is a lot of disagreement between the Member States. The Dutch government, amongst others, has expressed its wish to conclude a final agreement on the proposal as soon as possible. ONL finds this alarming, since the current proposal will have an unnecessary negative impact on companies once adopted. ONL therefore advises the Member States to not push for a quick agreement, but instead to aim for a better proposal which will be in line with previous European legislation on privacy and electronic communication, such as the General Data Protection Regulation.

- Both the General Data Protection Regulation (GDPR) and the ePrivacy Regulation concern the protection of personal data. The latter must therefore be complementary to the GDPR in order to avoid unnecessary regulatory burdens and legal uncertainties for companies. The current proposal, however, seems to be inconsistent with the GDPR and ONL is afraid that the proposed text will therefore lead to problems.
- ONL does not understand why the Council wants to adopt a proposal which overlaps with the GDPR. It is namely illogical and undesirable that the ePrivacy Regulation wants to address matters that have already been laid down in the GDPR. For example, the ePrivacy Regulation wants to determine the period in which companies may send their customers marketing e-mail, while the GDPR also arranges this. Such unnecessary overlaps may cause extra regulatory burdens for entrepreneurs and can easily be avoided.
- In addition, the relationship between both regulations is unclear. To illustrate, article 8 of the ePrivacy Regulation handles a lower level of protection of personal data than previous outlined in the GDPR. ONL foresees that, as a result of such inconsistencies, companies will not know which privacy standards they should apply. This will evidently lead to legal uncertainties, which is undesirable. Companies may even spend money and resources to change their privacy settings again, only to find out afterwards that they do no longer comply with the GDPR.
- The implementation of, and compliance with, the GDPR has already been time-consuming and posed many difficulties to companies across the EU. This is especially true for small and medium-sized enterprises (SMEs). ONL observed that SMEs often lack the knowledge and resources to comply with the GDPR. This is the case in the Netherlands, for example. The Member States must prevent the same from happening with the introduction of the ePrivacy Regulation.
- ONL therefore suggests to first carry out an evaluation on how SMEs experience the implementation of the GDPR. Such evaluation will shed light on some of the undesirable side effects stemming from the Regulation. With that knowledge the Member States governments can work on additional privacy protection rules such as the ePrivacy Regulation. Only then will companies experience the least amount of burden when they have to implement complementary rules on personal data protection.

In sum, ONL likes to stress that it is of the utmost importance that the upcoming ePrivacy Regulation extends and complements the GDPR. It is, in addition, desirable that the Member States governments await the full implementation of the GDPR by SME's in the EU before adopting the ePrivacy Regulation. Only then will the introduction of the ePrivacy Regulation cause minimal problems for European entrepreneurs.