

## German-led EU Council pushes tougher ePrivacy draft

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In yet another twist in a long-running saga, the German presidency of the Council of the EU has proposed removing a GDPR-style legitimate interests provision from the ePrivacy Regulation.

In a leaked document setting out its proposed revisions to the draft law – the last version of which was amended by the Croatian presidency of the council, which rotates leadership every six months – the German presidency suggested removing all provisions that would allow electronic communications based on “legitimate interests” as an alternative to consent.

The legitimate interests provision has been a sticking point for the legislation for some time, with industry proponents saying that allowing electronic communications only on the basis of consent would be unworkable.

But privacy activists proponents, [including](#) the head of the Slovenian data protection authority, argue that allowing the legitimate interests provision would erode the privacy rights the law is meant to enshrine.

The new law, which would update the 2002 ePrivacy Directive, has not got past the council, with a succession of presidencies unable to secure a popular compromise. The updated ePrivacy rules were originally meant to come into force alongside the GDPR in May 2018.

The rules are particularly important for the adtech industry, which relies in large part on cookies and other trackers, which fall under the law's remit as electronic communications. Though cookies may be facing their downfall, in part due to [legal and regulatory developments](#) and in part because of the [policies](#) of major tech companies like Google, they remain integral to online advertising.

European Data Protection Supervisor Wojciech Wiewiórowski also [argued](#) earlier this year that the EU's plans for a wide-ranging data strategy may fail without completed ePrivacy updates. Observers suggested that the decision to remove the legitimate interests from the draft is significant, though not necessarily surprising.

Phil Lee, a partner at Fieldfisher in London, said: "Privacy laws, as a rule, only tend to become stricter over time, not more relaxed – and permitting access to communications metadata, or allowing the setting of cookies on the basis of legitimate interests, would always have been perceived by many as a significant and unacceptable relaxation."

Lee added that with the UK – one of the supporters of legitimate interests – no longer influencing the negotiations due to its departure from the EU, it is "difficult to imagine that there is much remaining support" among EU countries for a legitimate interests approach.

Lee criticised the decision to remove legitimate interests from the draft. "At face value, it seems the council is minded to continue flogging a regulatory approach – unambiguous consent for cookies – that is widely disliked by consumers and industry alike, and that has never really worked since its inception," he said.

Alja Pöller De Zwart, a partner at Morrison Foerster in Brussels, said the inclusion of a legitimate interests provision is “underrated”. The provision, she said, was proposed as a “sort of compromise and a step away from the consent-based approach when it became clear that many EU member states would not support the existing text”.

“Critics of the consent approach have been rightfully arguing that requiring consent is a flawed approach because it will result in consent fatigue and not contribute to greater privacy protections,” Pöller De Zwart said. She said it is currently unclear whether the removal of the legitimate interests proposal will accelerate or slow the law making process – though added that “this point alone has the potential [to] become the prime reason for another delay to finally wrapping up the regulation”.

Estelle Masse, a policy analyst at digital rights organisation Access Now, praised the German presidency’s movement towards the removal of the legitimate interests rule. However, she said that the delay in the law’s drafting remains a bigger problem.

“We are concerned by the slow process of negotiations in council, more than three years after the reform was introduced by the European Commission. This latest text we are commenting on was not even (as far as we know) formally presented in council and was a discussion draft, meaning that discussions are still very slow,” Masse said.

“The regulation was also not on the agenda for discussion at yesterday’s [council working party on telecommunications]. All of this indicates that the reform of the ePrivacy Regulation is not being prioritised in council.”

Masse said it is important for the discussions to move forward, given the importance of the ePrivacy rules for regulating AdTech. “The presidency needs to make this reform a priority.”