

EU ePrivacy-Regulation: Expert view on Article 15 & role of EU GDPR – UPDATE from July 2019

Article	Proposal EU Commission 01/2017 (main aspects)	Position EU Parliament (EP) 10/17 (main aspects)	Council Paper Presidency 11001/19	Expert view of information provider
Recital 30 Issue: Scope	End-users that are natural persons [shall be] asked for consent.	Natural persons acting in a professional capacity... shall be equated with legal persons.	Natural persons are asked for consent . Legal persons have the right to object. End-users who are natural persons acting in a professional capacity should be treated as legal persons	Natural persons acting in business capacity are equated to legal persons. This is a useful clarification and in accordance with the position of the EP.
15.1. & 15.2. Issue: Determine actor in charge -	The providers of publicly available directories shall obtain the consent of end-users.	The electronic communication services providers shall obtain the consent of users.	number-based interpersonal communications services shall obtain the consent [BUT new 15.3.aa says task(s) can go to directory providers!]	The article and recitals are restricted to number-based interpersonal communication services. This excludes OTTs and contradicts the political intentions to create a level playing field for OTTs and telecom companies. In alignment with the EECC the text should refer to interpersonal electronic communication services. The reference to the singular “directory” ignores the fact that there are several directories. Hence, the plural form “directories” should be used in the text.
15.1. Issue: Consent	The providers of publicly available directories shall obtain the consent of end-users .	The electronic communication services providers shall obtain the consent of users .	15.1. “obtain consent” AND 15.1.aa “right to object”	Keep the status quo of the ePrivacy directive (article 12(2)): “..shall give end-users the opportunity to determine...” Based on this many EU countries have today a functioning and well-regulated opt-out system!

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				Having both approaches (opt in and opt out) on equal terms will likely contradict the goal of a EU wide and harmonized set of rules. The GDPR has not changed the legal grounds for legitimate processing: Art. 6 (1)(f) GDPR = Art. 7 (f) DP-Directive (see explanation below)
15.1. Issue: Access to data	--	When electronic communication service providers obtain consent of users, they shall make users' data available for public directory providers in an immediate, non-discriminatory and fair manner.	Access to data is not regulated in this document	To ensure fair access to data which has been cleared by users providers have to grant access in a fair and non-discriminatory manner, in alignment with requirements of the EECC.
15.2. Issue : search functions	The providers of publicly available directories shall inform end-users of available search functions and obtain consent before enabling such search functions.	The providers of a publicly available directory shall inform users whose personal data are in the directory of the available search functions of the directory and provide the users the option to disable such search functions related to their own data.	15.2.: additional consent of end-users' for any search functions that is not based on name	Getting consent for any search function not based on name is not practical. The reference in art 15.2 to search functions "that are not based on name" should be removed, and instead let the possibility to users to disable search functions in directories
15.3. Issue: Object resp. correct inclusion in directories	The providers of publicly available directories shall provide legal persons the possibility to object to data being included in the directory	The electronic communication services providers shall provide legal persons the possibility to object to data being included in the directory. Natural persons acting in a professional capacity... shall be equated with legal persons.	The electronic communication services providers shall provide legal persons the possibility to object to data being included in the directory. Natural persons acting in a professional capacity... shall	To ensure natural <u>and</u> legal persons have the right to verify, correct and delete data and align treatment of sole traders with the one of legal persons.

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			be equated with legal persons.	
15.4a		Existing data-bases are not affected by new regulations	A carve-out for existing databases is put in place	Keep the carve-out for existing databases in place.
<p>Present legal situation:</p> <p>Art. 12 (2) of the e-privacy Directive states, that ‘Member States shall ensure that subscribers are given the opportunity to determine whether their personal data are included in a public directory’.</p> <ul style="list-style-type: none"> • i.e. no difference made between natural and legal persons as subscribers. • Based on Art. 12 (2) e-privacy Directive, a number of EU countries have today a functioning and well-regulated opt-out system. <p>This present system is not based on ‘consent of the data subject’ (Art. 7 (a) of the DP Directive), but a) on ‘legitimate interest of the controller or third parties’ (Art. 7 (f) of the DP Directive), combined with b) the right of the data subject to object (‘opt-out’) (Art. 14 (a) of the DP Directive).</p>			<p>Legal situation under the GDPR:</p> <ul style="list-style-type: none"> • Art. 7 of the DP Directive about the acceptable legal grounds for processing personal data has been taken over into Art. 6 (1) GDPR without any relevant changes. • The right to object against processing based on ‘legitimate interest’ (Art. 14 (a) DP-Directive) is now to be found in Art. 21 GDPR. <p>➔ Compared to the present legal situation nothing will change in the GDPR concerning the legal basis of lawfully processing data</p> <p>➔ If inclusion into public directories should need consent in the future, such directories will no longer be produced, which will be deplored by many consumers</p>	