

Reference: 552197

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Freedom of Information: Right to know request

Thank you for your request for information where you asked about the proposed EU ePrivacy Regulation.

This was received by Ofcom on 20 June and it has been considered under the Freedom of Information Act 2000 (the Act).

You asked:

I would like to know if Ofcom have recorded discussions/reports/thinkings/impact statements etc of how the upcoming ePrivacy regulation (replacing the current Privacy and Electronic communication regulations) will impact the current general conditions Ofcom enforce and whether Ofcom will create new general conditions on the back of this new regulation and whether Ofcom has started to document the impact on the industry e.g. metadata like Call Data records requiring consent outside of billing/keeping a service running.

Ofcom holds no such information with respect to how the upcoming ePrivacy Regulation will impact the current General Conditions that Ofcom enforces and whether Ofcom will create new General Conditions.

In regard to whether Ofcom has started to document the impact on the industry, especially in reference to metadata such as Call Data records requiring consent outside of billing or keeping a service running, Ofcom does hold a short briefing paper that makes reference to this – please see attached Annex. This briefing paper was prepared shortly after the EU Commission's initial proposals were published in January 2017.

Please note that the current Ofcom General Conditions do not deal with matters of privacy of electronic communications. The current EU Directive on privacy and electronic communications¹ is implemented into UK law by way of the Privacy and Electronic Communications Regulations 2003,² as amended (PECR 2003). Both enforcement of the current ePrivacy rules and any questions relating to implementation of the forthcoming proposed new EU ePrivacy Regulation are primarily matters for the Information

¹ <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32002L0058>

² <https://www.legislation.gov.uk/ukSI/2003/2426/contents/made>

Commissioner's Office³ and we would direct you to contact them should you have any further queries on this subject.

If you have any queries with respect to our response to your Freedom of Information request, then please contact information.requests@ofcom.org.uk. Please remember to quote the reference number above in any future communications.

Yours sincerely,

Jerin John

If you are unhappy with the response or level of service you have received in relation to your request from Ofcom, you may ask for an internal review. If you ask us for an internal review of our decision, it will be treated as a formal complaint and will be subject to an independent review within Ofcom. We will acknowledge the complaint and inform you of the date by which you might expect to be told the outcome.

The following outcomes are possible:

- the original decision is upheld; or
- the original decision is reversed or modified.

Timing

If you wish to exercise your right to an internal review **you should contact us within two months of the date of this letter**. There is no statutory deadline for undertaking internal reviews and it will depend upon the complexity of the case. However, we aim to conclude all such reviews within 20 working days, and up to 40 working days in exceptional cases. We will keep you informed of the progress of any such review. If you wish to request an internal review, you should contact:

Steve Gettings
The Secretary to the Corporation
Ofcom
Riverside House
2a Southwark Bridge Road
London SE1 9HA

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

³ <https://ico.org.uk/for-organisations/guide-to-pecr/what-are-pecr/>

Note on the General Data Protection Regulation and the E-Privacy Regulation

Out of scope

The ePrivacy Regulation (ePR)

The Commission released proposals in January 2017 seeking to repeal the ePrivacy Directive, which sets privacy rules for the communication sector, and replace it with a new Regulation on Privacy and Electronic Communications to reflect the GDPR. Its goal is for the new Regulation to be agreed swiftly so it will enter into force alongside the GDPR in May 2018.

The ePR will significantly strengthen the privacy regulations dealing with direct marketing and online services, and critically **brings into scope online communications providers (WhatsApp, Gmail etc)** which are not subject to the rules of the current e-Privacy Directive (the ePR uses the same extended definition of Electronic Communications Service as proposed in the EU Framework Review).

There is a material **change in the rules around “cookies”** which are used for user tracking and for profiling and targeted advertising, for which consent can be provided through browser settings rather than with the ubiquitous cookie banners.

It clarifies the conditions under which communications providers can **use “metadata”** (e.g. about the individuals or service providers with which a user communication); and **use “content data”** (e.g. the contents of the communications), with specific consent generally required from both parties to the use of content data.

It requires that **enforcement of the Regulation should sit with the Data Protection Authority** (e.g. the ICO). While the provisions will materially affect many of Ofcom’s regulated stakeholders, their enforcement is mostly a natural extension of the ICO’s existing responsibilities. Although the ICO and Ofcom currently share enforcement responsibilities for parts of the UK ePrivacy regulations which implemented the ePrivacy Directive, the arrangements agreed between us recognise that the ICO should take lead responsibility for privacy-related matters. The new ePR also contains a provision requiring the data protection authorities tasked with enforcement to cooperate with communications NRAs whenever appropriate. On this basis, we do not consider the rule that DPAs should be responsible for enforcement to be a source of concern.

Finally, it introduces a new obligation on providers to offer *“state of the art measures to limit the reception of unwanted calls”*, which may be important in relation to nuisance calls. The enforcement of this obligation is clearly one which will require particularly close collaboration between the ICO and Ofcom.