

# SNAPSHOT

The latest updates from the team at FTI Consulting  
*Giving you insight to what is on the EU political agenda*

## ePrivacy: We are watching you...!

May 2019

ePrivacy regulation could have a significant impact on the digital economy. Following on from last year's GDPR, the EU has recently shifted its attention to new privacy rules for electronic communications. Any new laws will be EU wide, could set a new global standard and may involve the stricter regulation of cookies, Internet of Things (IoT) and Over-the-Top Services (OTT). Having initially stalled politically, the Commission is pushing for negotiations to be revitalised. It could become a key piece of new legislation after the EU parliamentary elections. FTI Consulting provides an update.

*Jan Hueckmann is a Director within the Technology team of FTI Consulting's Strategic Communications practice and is based in Brussels. Jack Fletcher is a Consultant in FTI Consulting's Technology practice and is based in London.*

GDPR, the EU's new data protection law, which was launched in May 2018, has set the scene globally for how personal data can be processed. It became a foundation for the EU's subsequent Digital Single Market package (DSM), from which the emerging ePrivacy legislation forms a part. A cornerstone of the Juncker Commission, the DSM has sought to deliver real value and benefits to the European consumer. ePrivacy is one of the last major initiatives still outstanding. What remains to be done?

### What is it?

The Commission originally proposed the ePrivacy regulation in January 2017, to regulate Over-the-Top services, which includes communication services provided over the internet, as opposed to a traditional phone line. This would also include confidentiality obligations, processing rules for cookies, law enforcement access to electronic communication data and to prevent unsolicited marketing communication.

### What has happened?

The proposed ePrivacy Regulation has largely flown under the radar to date, dwarfed by some of its more famous cousins in the DSM stable of new initiatives. It was originally due to be adopted at the same time as the GDPR.

This is due in part because negotiations stalled in Brussels, largely within the Council, caused by differences between Member States and concerns over the technical quality of the emerging legislation. There has been lively debate as to the level of protection that is required and how to appropriately balance the interests of consumers, industry and society as a whole.

Conceptually, the draft ePrivacy Regulation could have a significant impact on the digital economy. It could see the introduction of stricter regulation and new responsibilities for operators and providers. Having initially stalled, there is now a new push to get back on track.

### Why has progress been slow?

As with all draft legislation there are competing concerns. Everyone agrees it is needed but cannot quite agree on what it needs to include.

The sticking point is what the regulation should include. The two main protagonists are those who advocate for stricter regulation, who are more closely aligned to the concerns of the protection of individuals and civil society; and those who are more aligned to industry concerns.

Industry is pushing back. Many sectors, such as the clean energy sector, technology, telecommunications as well as car and toy manufacturers, have expressed concern, stating that the current draft makes it too easy for users to withdraw their consent over their personal data without prior notice. This change would make it considerably more difficult to provide and create personalised services.

*'Many sectors have expressed concern, stating that the current draft makes it too easy for users to withdraw their consent over their personal data without prior notice.'*

Industry has subsequently had some success in having the draft reviewed in more depth, slowing progress in the EU Council, where a strong cross-industry coalition has had greatest impact. As things stand, ePrivacy is one of the few remaining proposals under the Digital Single Market Strategy which will almost definitely be deferred to the new Mandate after the parliamentary elections later this month and the appointment of a new Commission by the end of year.

## What happens next?

The legislation that was drafted by the European Commission has been debated and amended by the Parliament. The Commission's frustration is largely directed at the Council, where the process has largely stagnated. It is keen that despite the politics between Member States, something is taken forward and that this initiative doesn't get lost and forgotten.

Consequently, it is putting considerable pressure on Romania, who currently hold the rotating Presidency of the EU Council, to secure agreement by adopting a more general approach to define a negotiating position in order to unblock the process. Once this has been achieved the draft legislation can then go forward for final negotiation between the three EU institutions and ratification. This means getting the Council to agree a joint position before the end of June.

So far, there appears to be no clear break-through despite many iterations of new texts circulated by the Romanians.

Key points of divergence include how consent should be given, the legal bases for processing electronic communications, cookies as well as alignment with GDPR.

A final deal might only be possible in 2020, once everyone is in place following the changes that will take place throughout 2019.

## What should you do?

Companies who want to share their expertise with negotiators working on the ePrivacy proposal need to make sure they stand out in a crowded field, ideally by both speaking with key decision-makers at EU level and in the relevant national capitals.

It may be too early to start planning compliance activities just yet, but it is important to track the direction of discussions, even at this early juncture. Assuming it ever gets adopted, ePrivacy will have a direct impact on your business and it is important that you understand how. Make sure it's on your radar.

### Authors



**Jan Hückmann**  
Director,  
Strategic Communication,  
Brussels  
[jan.hueckmann@fticonsulting.com](mailto:jan.hueckmann@fticonsulting.com)



**Jack Fletcher**  
Consultant,  
Information Governance,  
Privacy and Security Practice,  
London  
[jack.fletcher@fticonsulting.com](mailto:jack.fletcher@fticonsulting.com)



EXPERTS WITH IMPACT

### About FTI Consulting

FTI Consulting is an independent global business advisory firm dedicated to helping organisations manage change, mitigate risk and resolve disputes: financial, legal, operational, political & regulatory, reputational and transactional. FTI Consulting professionals, located in all major business centres throughout the world, work closely with clients to anticipate, illuminate and overcome complex business challenges and opportunities. Connect with us at [www.fticonsulting.com](http://www.fticonsulting.com) or on Twitter (@FTIConsulting), Facebook and LinkedIn. The views expressed herein are those of the author(s) and not necessarily the views of FTI Consulting, Inc. its management, its subsidiaries, its affiliates, or its other professionals, members of employees.

[www.fticonsulting.com](http://www.fticonsulting.com)