

HOPE Position Paper

on the Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications)

June 2018

European Hospital &
Healthcare Federation

On 10 January 2017 the European Commission adopted a proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications) COM(2017) 10 final.

The Digital Single Market (DSM) Strategy has as an objective to increase trust in and the security of digital services. The reform of the data protection framework, and in particular the adoption of Regulation (EU) 2016/679, the General Data Protection Regulation ("GDPR"), was a key action to this end. The DSM Strategy also announced the review of Directive 2002/58/EC ("ePrivacy Directive") in order to provide a high level of privacy protection for users of electronic communications services and a level playing field for all market players.

The proposal reviews the ePrivacy Directive, foreseen in the DSM Strategy objectives and ensuring consistency with the GDPR. The ePrivacy Directive had been designed to ensure the protection of fundamental rights and freedoms, in particular the respect for private life, confidentiality of communications and the protection of personal data in the electronic communications sector. It should also guarantee the free movement of electronic communications data, equipment and services in the Union. It should implement in the Union's secondary law the fundamental right to the respect for private life, with regard to communications, as enshrined in Article 7 of the Charter of Fundamental Rights of the European Union ("Charter").

HOPE welcomes this initiative but would like to draw the attention to several elements.

Article 4 Definitions

The scope of this Regulation is broader than the GDPR, with no contextualisation as provided by Articles 6 and 9 of the GDPR, on Lawfulness of Processing and Special Categories of Data. Electronic Communication Services should immediately delete or anonymise communications content and metadata. Without consent, they are not allowed to keep confidential records of communications and unlike in the GDPR, there is no legal clarity on processing of data for emergency situations (vital interests), legal defense, legitimate interest, health purposes, public health or scientific research. At a time where more devices and applications are being used on public networks by patients and when this data could increasingly be included in the patient's medical record, it could be difficult and even impossible for all data content to be processed using consent or by using anonymous data. In this context it is difficult for health service providers to understand where ePrivacy begins and ends, and where GDPR applies.

Article 5 Confidentiality of electronic communications data and Article 7 Storage and erasure of electronic communications data

In the same vein, Articles 5 & 7 create prohibitions on the storage, use or analysis of data sent over telephone or internet connection, potentially including data sent to/from websites, apps, and smart medical devices. This is worrying as this would cover for example a pacemaker sending heartbeat information. It would be important to restrict provisions of articles 5 and 7 for health purposes, public health and social security reasons.

Article 8 Protection of information stored in and related to end-users' terminal equipment

Article 8 creates more stringent measures for processing and storing data or retrieving information from devices that connect to the Internet - like small medical devices - for which the consent will often be practically impossible to obtain (for example the analyses of basic device data will be impeded, which would otherwise be allowed under the GDPR – and would not even be regulated by privacy laws, unless it is personal data). It would be important to restrict provisions of article 8 for health purposes, public health and social security reasons.

Article 11 Restrictions

Article 11 echoes article 23 (1)(a)-(e) of the GDPR with the most useful exemption in the ePrivacy Regulation from a public health perspective being Art 11 1 (e). This should be kept in as hospital and healthcare services may need to restrict certain rights provided by Articles 5-8 of the Regulation to access some metadata (i.e. location data) from public electronic communications to see, for example, peak times and locations of accident and emergency services, in order to plan better for them. This reference to Article 13 1 (e) of the GDPR is missing from the European Parliament's proposal.

Article 13 Exceptions to presentation and restriction of calling and connected line identification

It would be important concerning Article 13, that emergency services have enough legal clarity to be able to do what they need to do to respond to a person in a medical emergency. Article 13 mentions 'when a phone call is made' but in a situation of no call being made, an emergency service may need to be able to track GPS data on a phone to locate an unconscious person, for example.



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HOPE mission is to promote improvements in the health of citizens throughout Europe, high standard of hospital care and to foster efficiency with humanity in the organisation and operation of hospital and healthcare services.