

Position Paper

ePrivacy Regulation

bne views concerning the proposal for a Regulation concerning the respect for private life and the protection of personal data in electronic communications

Berlin, 26. September 2018. The draft Regulation on Privacy and Electronic Communications currently under discussion in the European Council was developed with the much-needed and good intention of strengthening users' rights in electronic communications and control over their data. However, the scope of the current draft regulation covers almost every form of electronic communication and does not distinguish between personal and non-personal data. In bne's opinion, this and other very narrow justifications for data processing in the draft will lead to massive legal and economic uncertainties for existing and in particular new business models based on digitalization and the decarbonization of the energy system. We therefore urge policymakers to consider our proposed amendments.

The proposed European ePrivacy Regulation is currently being discussed by the European Council. bne strongly supports the regulation's core objective to protect electronic communications and user's electronic data. However, we are very concerned about the current texts discussed in the European Council (known as of July 10th, 10975/18) as the proposals would have unintended but far-reaching consequences for all energy companies involved in the decarbonization of the energy system. The current draft of the ePrivacy Regulation would threaten various innovative and environmental-friendly business models and question the digitalization of the energy system and its transformation. This is due to the draft regulation's excessively broad scope of application without sufficient exceptions.

I. Broad scope of the proposed ePrivacy Regulation

According to Article 8 of the current draft version of the ePrivacy Regulation, information from the end user's terminal equipment may only be collected and pro-

cessed under the strictest conditions. The **scope of application of the current draft is not limited to personal data, but also extends to factual and business data.** The public discourse on Article 8 is misleadingly focused primarily on the topics of cookies and data for online advertising. However, the current regulation would also affect the energy industry to a considerable extent.

Almost all innovative business models in the energy sector are based on the processing of consumption, condition and measurement data collected by a wide variety of measuring devices. Only the smallest part of the data can be collected by using smart meters installed at the customer's premises. Other processed data points relate for example to the weather or grid conditions. All the aforementioned data are application-relevant information required for management and control in automated processes. The energy industry in transition to a decentralized energy system based on renewable energies with a multitude of actors and small plants depends on the use of these important data. This applies not only to the supply of electricity to household customers, but even more so to energy services provided to commercial and industrial customers, some of which use only business data. Article 8 in its current broad version therefore covers almost all innovative developments in the energy industry. These include services for intelligent energy management and the management and control of generation and consumer plants, services for electric mobility and numerous smart home applications. Such business models would be inconceivable without data collected through terminal equipment and devices.

II. Strict conditions for the justification of data processing

The proposed ePrivacy Regulation could make such data processing practically impossible, as the justifications in Article 8 of the current draft are clearly too narrow. Unlike the General Data Protection Regulation (*GDPR*) which does not apply to factual and business data, data processing under Article 8 of the ePrivacy Regulation cannot be justified on the grounds that it is necessary for the performance of the contract concluded with the end user or for the fulfilment of a legal obligation or due to overriding interests. **Curiously, factual and business data are thus protected more extensively under the ePrivacy Regulation than personal data under the *GDPR*.**

The processing of data from terminal equipment and devices could therefore only be based on the consent of end users. However, **this is not practicable for many business models.** The main problem is that consent can be revoked at any time. **It therefore does not represent a secure basis for investments and contractual relationships.** Contract offers based on long-term planning become impossible. The revocation of a consent leads to the fact that the contractually agreed service can no longer be rendered - thus the revocation of the consent has the effect of a termination of the contract without notice. The practical implementation of contractual re-

relationships also becomes inflexible if new consents have to be constantly obtained for innovations and adaptations in data processing. In addition, particularly in the case of complex energy services, the question arises as to whose consent must be obtained and to what extent.

III. Relation to national law is unclear

The ePrivacy Regulation severely challenges the achievements of the German law on Smart Meter Operation. It is uncertain whether the Smart Meter Operation Act (*in German: Messstellenbetriebsgesetz - MsbG*) would still be in conformity with European law. Even if the *MsbG* were to continue to apply as a special national law alongside the ePrivacy Regulation, numerous problems would remain unsolved. The data protection rules of the *MsbG* only regulate the handling of measurement data for grid-bound energy in the electricity and gas sectors, but not heat consumption data (if this data is not collected via smart meter as defined by the law) or application-relevant data required for automated control. For example, a complex system such as the control of a heat pump combined with a photovoltaic system on the roof and a heat accumulator cannot be set solely with the measurement data provided by the smart meter. Furthermore, customer-friendly applications for maintaining the heating system and ensuring correct operation would not be possible at all.

IV. Solution proposals

a. Specification of the scope of the ePrivacy Regulation

The scope of Article 8 of the ePrivacy Regulation should be limited and only related to cookies. Not all information from all terminal equipment and devices should be regulated in the same way. For complex special cases such as the energy sector, specific regulations are required and no general prohibitions such as in Article 8.

b. Limitation of the scope of Article 8

At the very least, the scope of Article 8 of the ePrivacy Regulation should be limited in such a way that innovative business models are not doomed to failure from the outset. The following changes should therefore be applied:

- Art. 8 shall be limited to personal data. It may not include all information.
- The exemptions in Art. 8 shall be extended: In particular, the justification under Article 8 paragraph 1 c) must not be limited to information society services. Instead, it should read - as in the *GDPR*:

c) it is necessary for the performance of a contract to which the end user is party or in order to take steps at the request of the end user prior to entering into a contract

c. Member States may introduce more detailed derogations

In addition, a provision such as Article 6 (1) sentence 1 c), (2) and (3) *GDPR* should be inserted and the opening clause in Article 11 extended. It should be made clear in the recitals that exceptions to the rules of the ePrivacy Regulation may also be introduced in particular for the purposes of environmental protection, climate protection and security of energy supply.

Who we are: Bundesverband Neue Energiewirtschaft e.V. (bne) / Association of Energy Market Innovators – a strong voice for independent energy companies

bne represents the interests of grid-independent energy suppliers and energy service companies in Germany. Unlike suppliers with a connected grid, bne-members are free of monopoly interests: We are committed to fair competition and a diverse energy market. Our members develop pioneering business models for electricity, heating and cooling as well as mobility applications.

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