

## Editorial

And there it is: the proposal for the e-Privacy Regulation,<sup>1</sup> published by the European Commission on 10 January 2017. Now that the General Data Protection Regulation (GDPR),<sup>2</sup> which will replace the Data Protection Directive (DPD) from 1995,<sup>3</sup> and the so-called Police Directive<sup>4</sup>, which will repeal the Council Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters from 2008,<sup>5</sup> have been adopted, it is apparently time to revise the e-Privacy Directive (e-PD) from 2002.<sup>6</sup> The e-PD, already partially amended in 2009 by the Citizens' Rights Directive<sup>7</sup>, was itself the successor of the Directive concerning the processing of personal data and the protection of privacy in the telecommunications sector from 1997.<sup>8</sup>

The proposed e-Privacy Regulation will surely incite much discussion, and I am afraid that it will be the infamous provision on cookies/consent/behavioural advertising that will attract most attention. I am getting a bit tired of the discussion myself - because I have the feeling that it has become repetitive and because I am a bit surprised about how lenient the European Commission and the Member States have been towards the advertising industry. My main question is always very basic: why allow for cookies at all, maybe with the exception of session cookies that aid the functioning of a web service? Ten small points in this respect:

1. Consent in Article 5.3 e-PD should not be read, I think, as a *lex specialis* of Article 7 DPD, as if the provision would restrict the number of potential grounds for legitimately processing personal data to one, namely consent of the data subject. I think Article 5.3 is not about processing personal data; it protects the integrity of consumer devices, such as personal computers. The provision does not regard cookies as such, it addresses a situation in which information is stored on or information is taken from a personal device and thus includes cookies, malware, spyware and the likes. Just like one cannot enter the home of a person without his permission, the provision in the e-PD specifies that one cannot enter the personal computer of a consumer without his consent.
2. Currently, consent given by the data subject for cookies is often not informed – the consumer remains mostly unaware of the fact that cookies are being placed on his device and the long and incomprehensible privacy statements do not help much in

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1 European Commission, 'Proposal for a Regulation on Privacy and Electronic Communications' (10 January 2017) <<https://ec.europa.eu/digital-single-market/en/news/proposal-regulation-privacy-and-electronic-communications>> accessed 27 July 2017.

2 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016.

3 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995.

4 Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016.

5 Council Framework Decision 2008/977/JHA of 27 November 2008.

6 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002.

7 Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009.

8 Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997.

understanding what exactly is done through the cookie. Consent is not specific – usually, the cookies used are persistent cookies, and the ‘Terms and Conditions’ contain vague explanations. Consent is not uncommonly unfree – this is particularly the case when there are so called cookie-walls. Consent is usually not explicit or unambiguous – which is required when sensitive data are being gathered - and there is often no statement or a clear affirmative action by the data subject - websites commonly work with an opt-out policy.

3. But even if the data subject would give legitimate consent in terms of data protection law, I would stress that there are a number of reasons to believe that placing cookies and gathering personal data through them may still not be legitimate. First, even when behavioral advertising would be deemed legitimate, is it necessary to work with cookies, or can less intrusive means be used to observe the behavior of Internet users.
4. The ‘Terms and Conditions’ of websites, through which consent is commonly gained (though this may potentially change when browser settings are acknowledged as a legitimate form of consent) may also be deemed problematic. I think here, from a contract law point of view (from which the notion of ‘Terms and Conditions’ derives), it is questionable whether the terms have been appropriately brought to the consumer’s attention<sup>9</sup> and whether or not they cause a significant imbalance in the parties’ rights and obligations arising under the contract to the detriment of that party.<sup>10</sup> More importantly, it is clear that ‘Terms and Conditions’ of a contract may only contain terms that are reasonably related to the contract that is being concluded. If I buy a house, the ‘Terms and Conditions’ may not contain a clause that requires me to praise Paul de Hert every time I see a red object. Such a term, especially when it is a standard clause not individually negotiated, is simply null and void, because it has no relationship with the contract being concluded. The same applies, I would say, to most third party cookies. The ‘Terms and Conditions’ are simply null and void if they allow 50 third party cookies when, for example, entering an ordinary news website, especially when their use is not news related.
5. What is the legitimate aim that is served by placing cookies? Improving customer experience and the web service itself may be legitimate, this could legitimate session or temporary cookies for this purpose. But as pointed out by many before me, is it itself a legitimate aim to make profit through processing (sensitive) personal data and if so, is it more important than the impact it has on the right to the protection of privacy and personal data by the millions of Internet users?
6. Another question is whether placing cookies for behavioral advertising purposes is necessary. As is well known, even if a data subject consents to the processing of his personal data, the data processing is only legitimate if it is necessary and propor-

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<sup>9</sup> Article 2:104 Principles of European Contract Law <<https://www.cisg.law.pace.edu/cisg/text/textef.html#a2104>> accessed 27 July 2017.

<sup>10</sup> Article 4:110: Principles of European Contract Law.

tionate. Here, the question is whether behavioral advertising is at all necessary. What would happen to the Internet if behavioral advertisement would be prohibited? Would it stop? Maybe nothing radical would change, other than that businesses such as Google and Facebook would make less profit. But, the onus should be on the data controller to prove that the processing of personal data is indeed necessary for its legitimate aim.

7. That leads to proportionality. One of the questions that might be raised, though there are a number of important others, is: which websites/services would disappear if behavioral advertising is banned and if there is such an effect, would that be disproportionate in light of the right to privacy and data protection of European citizens?
8. A related point is that of subsidiarity. If there are less intrusive means of achieving a goal, data processing will not pass the necessity test. I think in terms of subsidiarity, the first thing that should be demonstrated is that websites cannot survive on the basis of other sources of income, which require no gathering of personal data, such as asking remuneration for providing services. So far, I am not convinced that platforms like Facebook or Google could not survive on the basis of such alternative income models. While some websites and services may disappear, the question is how this would differ from normal market situations where businesses attract insufficient costumers. Consequently, I am unsure whether the subsidiarity requirement is met.
9. In addition, I am not confident that behavioural advertising is actually effective. Is behavioural advertising, for which it is necessary to collect personal data, much more effective than general advertisements or random specific ads (the latter means that a person is targeted as if he were in a specific group, without knowing whether he indeed belongs to that group)? Some reports suggest that it is, but others contradict those findings or find only marginal advantages. As long as there is no conclusive evidence about its effectiveness, behavioural advertising (in the light of which cookies are placed on the personal devices of consumers and personal data of data subjects are gathered) cannot be deemed necessary.
10. A final point is that there are certain goods and rights that are non-transferable. For example, one cannot sell oneself into slavery and cannot let his body be used for degrading purposes such as dwarf tossing.<sup>11</sup> Contracts to that end are deemed null and void because they are contrary to human dignity. In this sense, trading one's (sensitive) personal information, from which data regarding a person's physical health, sexual and political preferences and state of mind may be derived, can simply be deemed contrary to human dignity.

The proposed e-Privacy Regulation will presumably receive enough attention in the next editions of EdpL and is already discussed in this edition.

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<sup>11</sup> Office of the United Nations High Commissioner for Human Rights, 'International Covenant on Civil and Political Rights' (vol 8, United Nations 2007) <<http://bit.ly/2f0umDF>> accessed 28 July 2017.

Before introducing this edition, I want to draw the reader's attention to a contribution that appeared in the last edition of this journal, a critical article by our board member Marc Rotenberg, who analysed the role and position of the United Nations Special Rapporteur on the Right to Privacy. Of course, seeking to show both sides of the story, we have invited the Special Rapporteur, Joe Cannataci, professor of law at Groningen University, to publish a response. He declined the offer, stressing that Rotenberg's article was biased and expressing his doubts about EdpL's double blind peer review procedure, the competence of the specific reviewers and the journal's editors, and generally, the soundness of EdpL's editorial policy for allowing the publication of the article. We have made clear that the reviewers were competent, that our editorial policy was followed and that we feel that although the article was critical, it was rightly published in EdpL. As to the content of the article, professor Cannataci stressed that the contribution was outdated, missed, inter alia, numerous twitter posts and that the author did not have a proper understanding of the matter. He stressed that the article reflects the status quo in February 2017 (when the article was submitted and reviewed), not the situation in April 2017 (when the issue was published) and that Marc Rotenberg was one of the candidates considered for the position of Special Rapporteur. We have invited professor Cannataci to write down his concerns and views in the form of an article or response, to no avail yet. Our offer to him remains open.

Raphaël Gellert did respond to my editorial of last issue. There, I engaged critically with the notion of 'balancing', after having read Raphaël Gellert's article, which was selected as one of the three best papers for EdpL's Young Scholars Award and published in edition 2016/4. In that article, Gellert rather provocatively stressed that many, if not all, doctrines in data protection law include a form of balancing. In my editorial for issue 1/2017, I tried to reason the other way around, that no or very limited balancing is required in privacy and data protection law. Our discussion continues in this edition. Now, Gellert has responded to my concerns, pointing out, inter alia, that balancing is abundantly referred to in literature, by courts and by the Article 29 Working Party and that 'balancing' should not be rejected when determining the outcome of legal disputes. I have added some final thoughts, pointing out ten questions which I think should be answered before accepting and using the notion of balancing.

This edition opens with two forewords by European Digital Rights (EDRi) and the European Data Protection Supervisor (EDPS) on the proposed e-Privacy Regulation discussed above. In addition, sensei Paul de Hert takes the reader into a remarkable journey, from Wild Geese That Fly with the Moon on Their Wings to Negative Spirits and Empty Shells, discussing law with Nakata and Miss Saeki and slowly piercing into the well-known challenges concerned with the regulation of personal data. 'What do you mean?', as Justin Bieber would say – well, please find out by reading! Then, because of the size of this issue, we decided to include only one scientific article, namely an insightful analysis by Mistale Taylor of the *Google Spain* case, with a critical re-evaluation of its meaning and impact.

As always, I think the Reports section by Mark Cole deserves special mention. This section is unique to EdpL and it provides the reader with an update on all relevant developments in privacy and data protection in the various Member States of the European Union (EU) and in the EU institutions. Natalie Fercher has discussed GDPR-related developments in Austria, Stephanie De Smedt and Christophe Geuens deal with Belgium, Dominic Broy covers Germany, Celine van Waesberge reports from the Netherlands, Gizem Gultekin Varkonyi engages with what she calls Turkey's data protection adventure and Lorna Woods has contributed two reports on developments in the United Kingdom. Raphaël Gellert has analysed the Article 29 Working Party's Guidelines on Data Protection Impact Assessments, Dennis-Kenji Kipker has written a report on the EAID Conference in Berlin and the Practitioner's Corner contains an analysis by Wim Nauwelaerts and another by John Bowman and Myriam Gufflet, both discussing the implementation of the GDPR in practice.

In addition, we have case notes by Stephanie Mihail and Tijmen Wisman, by Will Mbioh, by Eike Michael Frenzel and by Eleonora Carava, discussing the recent jurisprudence of the European Court of Justice and the European Court of Human Rights in the fields of privacy and data protection. Finally, we have two book reviews, namely of Miller's *The Crisis of Presence in Contemporary Culture* and of Hildebrandt and Van den Berg's *Information, Freedom and Property: The Philosophy of Law Meets the Philosophy of Technology*.

For those interested in writing an article, report, case note or book review, please e-mail our executive editor, Nelly Stratieva at <stratieva@lexxion.de>. Upcoming deadlines:

- EdpL 2017/3: 1 August 2017;
- EdpL 2017/4: 15 October 2017 (Young Scholars Award 2017).

We hope you will enjoy reading EdpL's second edition of 2017!

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