

**SECOND READING ON THE PROPOSAL FOR A DIRECTIVE CONCERNING THE PROCESSING OF
PERSONAL DATA AND THE PROTECTION OF PRIVACY IN THE ELECTRONIC COMMUNICATIONS
SECTOR
[COM (2000) 385]**

UNICE Comments

Adequate data protection is a necessary condition for consumer trust on the one hand and for the reliable free flow of information on the other hand. UNICE is fully aware of the importance of an adequate and uniform level of privacy protection throughout Europe.

In the context of the Council's Common Position¹ and the second reading of the proposed directive concerning the processing of personal data and the protection of privacy in the electronic communications sector, UNICE has strong concerns regarding the following issues in the Directive: **cookies** (Article 5), **unsolicited e-mail marketing** (Article 13), **data retention** (Article 15) and **directories** (Article 12).

I. COOKIES (RECITALS 24 AND 25, ARTICLE 5.3)

Whilst the initial Commission proposal did not address this issue, the European Parliament in first reading adopted an amendment (n° 26) that implies a general prohibition of *'devices such as cookies, spyware, web bugs, hidden identifiers and other similar devices that enter users' terminal equipment without their explicit knowledge or explicit consent.'*

This amendment raised particular concern due to the lack of differentiation between the devices subject to the proposed prohibition: cookies should not be considered as "spy devices" and thereby be subject to a ban.

In this context UNICE welcomes the Council of Minister's recognition that some of these devices, namely cookies, can be a "**legitimate and useful website tool**" (recital 25).

Cookies are short pieces of computer text generated by a web-server and stored in the user's computer to facilitate his/her movement between pages and visits of a website by, for example, removing the need to re-enter information already provided or selected by the consumer. In short, cookies serve to facilitate the use of the Internet and make web browsing a more 'user-friendly' experience. The cookie itself will not provide any personal data from the user (unless the user has consented to provide such data in accordance with existing Data Protection legislation).

UNICE supports the principle of informing the consumer of the possibilities of personal data being processed and the principle of allowing users to reduce this processing. However, the principles in the Council of Ministers' Common Position go beyond what is currently technically feasible regarding offering the right to refusing such processing and lacks technology neutrality.

¹ Council Common position dated 21 January 2002, presented to European Parliament Plenary Session on 6 February 2002.

UNICE, therefore suggests the following amendments to the Common Position in order to provide a workable solution for the Council's and Parliament's intention:

Recital (24)

Text proposed by Council Common Position

Amendment suggested by UNICE

(...) So-called spyware, web bugs, hidden identifiers and other, similar devices can enter users terminals without their knowledge in order to gain access to information, to store hidden information or to trace the activities of the users and may seriously intrude the privacy of those users. The use of such devices should be allowed only for legitimate purposes, with the knowledge of the users concerned.

(...)
Devices which enter users terminals without their knowledge in order to gain access to information or to trace the activities of the users and should be allowed only for legitimate purposes and with the knowledge of the users **or subscribers** concerned.'

JUSTIFICATION

- *Spyware, and hidden identifiers are software that executes on a users' terminal and could monitor passwords, credit card details and therefore cannot be used for legitimate purposes. However there are devices other than cookies that could be used for legitimate purposes. For example audit tools which identify to supplier whether a client is using an old version of software without a service patch allow suppliers to identify those requiring patches against impending viruses.*

Recital (25)

Text proposed by Council Common Position

Amendment suggested by UNICE

However, such devices, for instance so-called cookies, can be a legitimate and useful tool, for example, in analysing the effectiveness of website design and advertising, and in verifying the identity of users engaged in on-line transactions. Where such devices, for instance so-called cookies, are intended for a legitimate purpose, such as to facilitate the provision of information society services, their use should be allowed on condition that clear and precise prior information about the purposes of cookies or similar devices is provided by the operator of a website sending such devices or allowing third parties to send them via his website. The website operator should also give users at least the opportunity to refuse to have a cookie or similar device stored on their terminal equipment. Information and the right to refuse may be offered once for the use of various devices to be installed on the user's terminal equipment during the same connection and also covering any further use that may be made of those devices during subsequent connections. The modalities for giving information, offering a right to refuse or requesting consent should be as user-friendly as possible. Access to specific website content may still be made conditional on the well-informed acceptance of a cookie or similar device, if it is used for a legitimate purpose.

Such devices can be a legitimate and useful tool, for example, in analysing the effectiveness of web-site design and advertising, and in verifying the identity of users engaged in on-line transactions. Where such devices are intended for a legitimate purpose, such as to facilitate the provision of information society services requested by the subscriber, their use should be allowed on the condition that **users and subscribers have access to** clear and precise information about the purposes of **devices gaining access to terminal equipment.** **Users and subscribers should have the** opportunity to refuse to have **devices gaining access to their terminal equipment.** Information and the right to refuse may be offered once for the use of various devices to be installed on the user's terminal equipment during the same connection and also covering any further use that may be made of those devices during subsequent connections. The methods for giving this information, or requesting consent should be made as user friendly as possible. Access to a specific website content may still be made conditional on the well-informed acceptance of a cookie or similar device, if it is used for a legitimate purpose.

JUSTIFICATION

- *The references to cookies should be made technology neutral, as the article itself does not talk about cookies but of gaining access to terminal equipment which covers a wide range of technology.*

Article 5.3

Text proposed by Council Common Position

Amendment suggested by UNICE

Member States shall ensure that the use of electronic communications networks to store information or to gain access to information stored in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned, in advance, receives clear and comprehensive information, inter alia about the purposes of the processing, in accordance with Directive 95/46/EC, and is offered the right to refuse such processing by the data controller. This shall not prevent any technical storage or access for the sole purpose of carrying out or facilitating the transmission of a communication over an electronic communications network, or as strictly necessary in order to provide an information society service explicitly requested by the user.

"Member States shall ensure that the use of electronic communications networks to store personal data or to gain access to personal data stored in the terminal equipment of a subscriber or user is only allowed on the condition that the subscriber or user concerned **has access to** clear and comprehensive information, inter alia about the purposes of the processing, in accordance with Directive 95/46/EC **and shall be offered, as appropriate, guidance on refusing such processing by the data controller.** This shall not prevent any technical storage or access for the sole purpose of carrying out or facilitating the transmission of a communication over an electronic network, or as strictly necessary in order to provide **or facilitate** an information society service **requested** by the user.

JUSTIFICATION:

- *The Council's Common position suggests that information should be received **in advance**. This would lead to a real disruption of the browsing experience if consumers were required to click their way through a number of pop-up boxes as they surf the Internet. UNICE believes that terms such as promptly or timely would lead to similar debates over the timing of information provision. Obliging companies trading online to gain prior consent each time for cookies designed to facilitate the on-line experience would be entirely counter-productive. It would act as a disincentive to B2C e-commerce and impose discriminatory measures on an on-line world which do not exist off-line. We therefore support the intentions of the Council in obliging the operator to offer the consumer the right to refuse cookies;*
- *The way in which the Council text on opt-out is drafted is not feasible in technical terms for responding to consumer preference since for an operator to recognise a return visit from a user who had previously indicated a preference not to receive cookies, a cookie would have to be used for the purposes of identifying this return visitor and his/her associated preferences;*
- *The Council's Common Position suggests that the subscriber or user concerned must also be offered the right to refuse the processing. This amendment places the onus upon the website operator to put in place the technology to allow repeat visits from a consumer without a cookie being launched to identify them. Currently the best means for a consumer not to receive cookies is for them to alter settings on their browsers. Therefore it would be more appropriate, that users are offered guidance on refusing such processing;*
- *The Council's common position recognises that accessing terminal equipment is necessary to provide an information society service. This needs to be extended to also managing the information society service so as to include devices that identify users requiring service patches. As this is a service that will be requested by a subscriber and the definition of subscriber could cover both natural and legal persons the addition of "user" is unnecessary and indeed confusing.*

II Unsolicited Email Marketing (Article 13)

UNICE regrets that the national choice option between an opt-in and an opt-out approach to e-mail marketing, previously adopted by the European Parliament was rejected by the Council of Ministers. As UNICE has pointed out on a number of occasions a harmonised opt-in approach would have no impact on the recognised problem of “spamming”, as opt-in rules cannot be enforced upon illegal organisations. ‘Spammers’ often operate outside the law, respecting neither opt-in nor opt-out rules. Many are located outside the jurisdiction of EU law altogether. Opt-in would, though, unnecessarily punish responsible marketers, particularly SMEs that cannot rely solely on strong brands to generate pro-active customer approaches, and who also cannot finance expensive advertising campaigns.

UNICE notes the Council of Minister’s recognition that to allow the use of electronic details within the context of an existing customer relationship to offer similar products. However, this will not alleviate the problem being faced by SMEs developing their customer base as it will nonetheless limit the much required innovation in the B2C sphere to established firms.

The Council of Ministers in their Common Position have restricted the ‘revision clause’ to article 13 whereas the European Parliament in first reading adopted an amendment (n° 42) to article 18 inserting a general revision clause. UNICE supports a general revision clause calling for a report to be submitted by the European Commission to the European Parliament and the Council, not later than three years after the date of application of the Directive which will outline its impact on economic operators and consumers.

UNICE, therefore suggests the European Parliament reinstate Amendment 35 and 42 as adopted in first reading and reject all related aspects of the Council of Ministers Common Position

III DATA RETENTION (ARTICLE 15)

UNICE regrets the Council of Minister's rejection of the amendments to article 15 proposed by the European Parliament, ensuring that legal measure for law enforcement and national security reasons shall be entirely exceptional, shall be based on a specific law and shall be authorised by judicial or competent authorities for individual cases. On this basis Law Enforcement Agencies (LEAs) will be able to request that traffic data be retained for the investigation of specific crimes, but not to introduce blanket data retention. The latter would be in contradiction to existing data protection principles and human rights laws.

UNICE appreciates the need for law enforcement agencies to intercept communications and access data that has been retained for business purposes for the investigation of crimes. However, UNICE is concerned about the Council's amendment that would allow Member States to impose a general obligation on communications companies to retain data of all their customers in addition to what is already common practice, i.e. interception and preservation of data on a case by case basis.

Apart from the unpredictable costs and privacy implications of the Council's amendment, if each of the 15 member states would opt for different data retention periods and regimes, businesses will face the enormous task of streaming data from different countries and complying with different data retention rules.

UNICE believes that any regime in the context of law enforcement must be in connection with specific criminal investigations and proportionate to the potential threat in order to ensure trust and confidence in the EU as a place to do business online. Also law enforcement agencies should cover the costs for such measures.

In addition, UNICE supports the European Parliament’s efforts to ensure that the Article 29 Working Party will give interested parties the opportunity to comment within a reasonable time-frame.

UNICE, therefore suggests the European Parliament reinstates its Amendment to Article 15.1 and 15.3 and rejects the Council Amendment to Article 15.1 as well as the complementary Amendment to Article 6.1 which refers back to Article 15.1.

IV. DIRECTORIES (ARTICLE 12):

UNICE welcomes the European Parliament's 1st Reading Amendments. They will maintain the existing comprehensive directory system, as established by the Telecoms Data Protection Directive 97/66/EC. They will also ensure customer satisfaction and solid protection of privacy, while offering the subscriber the possibility to have his/her data corrected or withdrawn at any time free of charge. The way of managing directories, i.e. to be automatically listed in the directory without having to take any action, is proven to be customer oriented, effective and manageable.

It has also ensured the development of comprehensive and high quality directory databases. The availability of these databases for new actors has facilitated the launch of new directory services in other Member States. Several new companies have already emerged on the market to provide such services thereby creating both competition as well as new employment opportunities.

Parliament's amendments will ensure the continuation of this development and fulfill the EU objective to create a competitive directory services market as well as the development of comprehensive directories covering all listed subscribers regardless of chosen operator, as required by the Universal Service Directive.

UNICE therefore suggests the European Parliament reinstates Amendments on Article 12 and 16.

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