MINISTRY OF BUSINESS AND GROWTH
DENMARK

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Danish response to the Commission's consultation on the revision of the e-Privacy-directive

The Danish Government would like to thank the Commission for the opportunity to give its view on the existing e-Privacy Directive (EPD) and the up-coming revision of the Directive. We welcome the Commission's open process and broad involvement of stakeholders at an early stage, which is crucial for the future regulation in this area.

The Danish Government is a strong supporter of the Digital Single Market. The EU must make progress on all the elements in the strategy for the Digital Single Market. We need a Digital Single Market that is open to competition, innovation and new business models. We should strive to make the regulatory framework better by reducing unjustified barriers, removing unnecessary burdens and making all our legislation fit for the digital age.

Accordingly, the Danish Government is in favour of an up-date of the EPD in light of the significant technological and societal developments following digitalisation since the adoption of the directive in 2002 and the latest revision in 2009. The revision of the EPD should seek a balanced approach, ensuring actual protection of personal data and privacy without imposing unnecessary burdens on the industry or hamper innovation.

It is from this perspective the Danish Government replies to the consultation. The reply is not structured around the Commission's questionnaire. However, the Danish Government has strived to cover the themes from the questionnaire.

The Danish Government concludes that the revision of the EPD should focus on the following:

- Striving for a coherent legislative framework by eliminating overlapping regulation from the general data protection regulation (GDPR) and removing sector specific regulation where appropriate.
- Exploring the possibility to simplify the e-Privacy regulation by integrating provisions that are still considered necessary in other parts of the telecommunication framework regulation and possibly repealing the EPD.
- Ensuring a level playing field for the electronic communications sector and companies providing similar services (OTT), preferably by reducing

the regulatory burden rather than extending the scope of the EPD's present sector specific regulation.

- Ensuring a more balanced "cookie" regulation. The regulation should be amended in a manner that will both decrease industry costs of implementation and protect the privacy of users.
- Introducing a technology neutral regulatory approach to unsolicited communication (SPAM) to prepare for future technological developments.

I: General remarks

The Danish Government welcomes the revision of the EPD in order to ensure an up-to-date European legislation which should be relevant, coherent and not unnecessary burdensome for businesses in the digital age.

The EPD was introduced in 2002 (and revised in 2009) as a set of additional data protection and privacy measures with particular focus on the electronic communications sector and digital direct marketing which was deemed not sufficiently covered by the current general data protection legislation.

The Danish Government supports the general aim of securing a high level of privacy and personal data protection in a digitalized world in order to enhance digital trust.

The relevance of maintaining the EPD should, however, be thoroughly examined. The fast technological development followed by new business models and market players calls for an evaluation of both market conditions and the level of consumer protection.

The evaluation should especially take into account the revision of the general framework of data protection with the adoption of the GDPR, strengthening protection of personal data and privacy and imposing obligations on businesses and the public sector in general. The Danish Government urges the Commission to conduct a thorough evaluation of the two legal acts in order to avoid any overlaps and to deregulate where possible.

Furthermore, the Danish Government supports the approach presented in the Commission Communication on Online Platforms and the Digital Single Market (COM (2016) 288 final) to explore possibilities to simplify the e-Privacy legislation and we further propose to integrate provisions that are still considered necessary in other parts of the telecommunications framework regulation or other relevant regulation and possibly repeal the EPD.

These general observations are supplemented with the following remarks on specific provisions.

II: Remarks to the specific content of the e-Privacy Directive and proposals for changes

II.1 Scope of the e-directive

As stated above, the Danish Government finds that the starting point of the revision of the EPD should be a thorough evaluation of the relevance of sustaining sector specific regulation regarding protection of personal data and privacy.

Securing a level playing field for providers offering the same services regardless of the technology used is important. The starting point should be reducing the regulatory burden and preferably roll-back the sector specific regulation. However, if an evaluation concludes that some provisions are still relevant, the Danish Government suggests to integrate such provisions in other parts of the telecommunications framework regulation or other relevant regulation and possibly repeal the EPD.

II.2: Ensuring security and confidentiality of services

Security provision in article 4

The general goal of protecting personal data through appropriate technical and organisational measures as stated in article 4 (1) is highly respected by the Danish Government. However, due to corresponding rules in the new GDPR there does not seem to be a separate need to uphold the sector specific rule on this.

The same goes with the provisions in Article 4 on data breach notifications which are also introduced in general by the GDPR. A dual regime of notification obligations may cause unnecessary administrative burdens and risk of non-compliance for the telecom industry as they are forced to make an individual assessment of which notification procedure to follow for each data breach event (especially to which authority a notification should be addressed).

Confidentiality and use of data – Articles 5, 6 and 9.

- *The rules on "cookies" in Article 5*

Article 5 (3) which extends the general principle of confidentiality to the user's terminal equipment in connection with the use of "cookies" and other technologies seems to have been the most controversial provision of the EPD. It has been criticised by both businesses and consumers, particularly following the introduction in 2009 of the requirement of prior consent.

The Danish Government finds it necessary that the regulation on cookies and similar technologies is thoroughly evaluated in light of the GPDR in order to determine whether the GPDR offers the same level of protection and therefore could replace the specific cookie regulation.

The provision has proved counterproductive in terms of raising consumer awareness and vigilance on privacy. The constant stream of "cookie pop-up-boxes" that users experience on websites today, following the requirements of prior consent, eclipses the general goal of privacy protection as consumers are "fatigued" or unintentionally mislead by the information.

Furthermore, the current regulation is burdensome to the industry as information regarding cookies and consent mechanisms have to be implemented on almost all websites. Cookies are used as a natural part of the internet and are regulated almost regardless of the purpose for which they are used. Thus, the current regulation does not distinguish between data collected for privacy intrusive purposes or less intrusive purposes. Further to this, the cookie legislation has created considerable uncertainty especially for businesses using new technologies even when no privacy intrusion can be detected. This is due to the broad approach to cookies or similar technologies and the lack of clarification within the current legislation,

Hence, the cookie legislation has become an example of the complexity and difficulty in regulating new techniques using traditional protection mechanisms.

The Danish Government would like to stress the need for a more balanced cookie regulation in order to ensure actual protection of personal data and privacy without undermining innovation and digital growth. In light of the adoption of the GDPR it should - as stated above - be carefully analysed whether the purpose of the cookie regulation is now embraced by the horizontal rules in the GDPR.

A solution of adding new exceptions to the requirement of information and consent for the usage of cookies and similar technologies has been widely discussed. Due to the rapid pace in which both the technologies and usage patterns of the web evolves The Danish Government believes that it would be unwise to hard-code specific exceptions into primary legislation, which should be kept technology neutral. Therefore, if specific legislation is needed in this area it is important that the regulation is related to the purpose for which data is being collected rather than related to the technique used.

- *Specifically on traffic and location data in Articles 6 and 9*

It should be carefully analysed whether the regulation of traffic and location data are sufficiently covered by the GPDR and adequately protected by the principles herein (i.e. request for consent or other legal base, data minimisation and storage limitation) hence also eliminating the need for sector specific rules.

The Danish Government finds that both traffic data and location data relevant for electronic communications providers pursuant to EPD are to be considered personal data.

It has been argued that repealing articles 6 and 9 in the EPD would broaden the possibilities for using such data as the legal grounds for processing are not limited to consent or to the specific legitimate interests mentioned in articles 6 and 9. However, the GDPR, especially in regards to processing based on legitimate interest, contains several safeguards and limitations for processing.

The protection within the GDPR should therefore be considered sufficient following both the general principles on data processing and the right for the data subject to object to processing, including for direct marketing.

And so, the Danish government would argue for repealing articles 6 and 9 in the EPD.

II.3 Consumer rights – non-itemised bills, control over call line identification, automatic call forwarding and subscribers directory

The consumer rights provisions should be carefully evaluated to assess whether they are still necessary taken into account technological developments as well as changes in consumer habits.

In order to simplify the legal framework the Danish Government finds that the provisions – if considered necessary - are more suitably placed within other parts of the telecommunication framework regulation and should be considered in the up-coming revision of the framework.

II.4 Unsolicited commercial communications

The Danish Government finds article 13 on unsolicited commercial communications still relevant with the given opt-in and opt-out solutions

However, in regards to direct marketing telephone calls and direct marketing communications to legal persons the possibility for member states to choose between an opt-in or an opt-out solution should be revoked in order to ensure a level playing field for businesses.

Following the technological development article 13 should be modified in order to make the provision up to data and future proof, hence technology neutral.

The provision should also be clarified as direct marketing in established customer relations should be possible for all products within the shops selection of products and services as long as this is within the reasonable expectations of the costumer.

The provision would be more appropriately placed within the e-commerce directive as it is based on e-mails, which is send from web based content services rather than from public communication networks.