Robert Garskamp on ePrivacy. What's happening?

ePrivacy certainly exercises many minds. The new General Data Protection Regulation (GDPR) has been effective since 25 May 2018, and numerous organisations are busy implementing it. The Dutch Data Protection Agency, DPA, has been needling and otherwise tries to keep its flock together, like a true shepherd. However, in the wake of the GDPR, the European Commission is working on a following regulation that may have much bigger impact. This ePrivacy Regulation becomes a cornerstone of the increasingly digitising society. It must become part of the internal digital market within the European Union and beyond.

What is ePrivacy about?
The new regulation replaces the current ePrivacy Regulation, which applies to traditional telecom providers, such as internet providers. The regulation includes rules about the confidentiality of communication and cookies. Its primary aim is to protect the fundamental rights and freedoms, particularly the right to respect private life, the confidentiality of communication and the protection of personal data in the electronic communications sector. Also, the free movement of data, equipment and services within the Union is guaranteed. The regulation was originally adopted in 2002, amended in 2009.

The ePrivacy Regulation is a directive, and thus also a legislative instrument coming from the European Union; That means it is binding for the member states concerned. These member states are required to adjust their national laws and regulations, while the competence to choose the method to implement the directive into national laws and regulations resides with each individual member state.

In the Netherlands, compliance monitoring for the ePrivacy Regulation lies with the Dutch Data Protection Agency (DPA) and the Netherlands Authority for Consumers & Markets (ACM).

How does ePrivacy relate to the GDPR?
Like the General Data Protection Regulation (GDPR), the new ePrivacy Regulation will be a 'regulation', a binding legal act that applies throughout the EU.

Together with the GDPR, the ePrivacy Regulation constitutes the legal framework for the protection of personal data processing. Here, the GDPR is the starting point. Only where electronic communications data are concerned, the ePrivacy Regulation will take precedence.

While the current regulation is aimed at telecom providers, the new regulation will also apply to OTT (Over The Top) service providers. These are organisations that primarily target online communications, using tracking technologies and direct marketing.

Compliance monitoring changes as well. From now on, the Dutch Data Protection Agency will act as the sole watchdog. Especially since it already has the monitoring role regarding the GDPR – and penalties can be imposed for both regulations.

The ePrivacy Regulation continues to respect private life and protect personal data in electronic communications.

The European Commission had set out to bring the GDPR and the ePrivacy regulation into force simultaneously on 25 May 2018. Obviously, this has only worked for the GDPR. The discussion within the European Parliament and the difference of opinion regarding its impact are delaying the adoption of the e-Privacy Regulation for now.

Okay, so much for the relationship between the ePrivacy Regulation and the GDPR. But what does the ePrivacy Regulation consist of? Here's a list of key points.

Software
A major goal of the ePrivacy Regulation is to give citizens and consumers more control over the protection of their data when using electronic services.

Therefore, the European commission holds the opinion that electronic communications software providers are obliged to give end users choices in the use of privacy settings. When installing software, the users must in any case be able to refuse the use of so-called third-party cookies.

Not only at the moment of installation must the user be made aware of possible settings, but at other moments as well, when the provider

makes fundamental system changes. Think, for instance, of the moment when the user chooses to restore default settings.

So far, however, the European Commission has failed to make clear what that information requirement signifies. Think about it: users must be completely free and have the necessary information to make a decision. That freedom does not work, if consequences are pointed out to the user in an illegible text. Or if a consequent restriction of functionality forces users to choose a configuration that is disadvantageous to them.

Cookies

Furthermore, the new ePrivacy regulation aims to simplify the cookie regulations. Every EU member state has implemented the original EU directive into its own legislation. In the Netherlands, this is known as the Cookie act.

Apart from tracking cookies, other tracking techniques are included in the cookie regime. Tracking cookies track individual surfing behaviours and set up profiles, for instance to enable targeted advertising. No permission is needed for functional and analytical cookies that serve the ease of use for visitors, as they hardly have any consequences for privacy. However, informed consent is necessary for the use of tracking cookies. No news here, really.

What is new is that consenting must be made possible through the browser settings. Also new is that, while privacy settings do not need to be the most privacy-friendly by default, an option must be provided to render placing and reading out of cookies impossible. Apart from that consent given for tracking must always be revocable. The consumer must be reminded of this possibility on a regular basis.

Internet of Things

Lastly, the Regulation provides a guideline for the Internet of Things. Smart appliances are increasingly interconnected and made accessible through the internet, machine-to-machine communication. It is important that both the contents of and the information included in the communications, the meta data, remains confidential. That goes for the traditional telecom providers, but also for new online communications services such as Facebook and WhatsApp.

Thanks to the new ePrivacy Regulation, the user will have to be able to decide whether so-called third-party information may be placed on or read out from their appliances.

What is still missing, however, is the requirement to implement default settings that protect users from unsolicited placement on or reading out of information from their appliances. Among other things, this prevents that users' behaviours can simply be inventoried by third parties. Research makes clear that 90% of the users in the EU are very much in favour of this.

Conclusion

As European Commission chairman Juncker has already stated:

*"Digital technologies and digital communications
are permeating every aspect of life.
We need to work for a Europe that empowers our citizens and our
economy. And today, both have gone digital."*

Within the EU, the application of the ePrivacy Regulation, combined with the GDPR, must result in a uniform set van ePrivacy regulations for consumers and citizens. They must be allowed to rely on their privacy being properly protected online and they must have and keep control over their personal data.

By extending the scope to both telecom providers and OTT service providers, the definition of 'service provider' also changes significantly. This will have an even bigger impact on our economy and our society. In the meantime, the ePrivacy Regulation will obviously provide new opportunities for the public and private markets for innovation and development.

However, the ePrivacy Regulation will try our patience somewhat longer due to the internal intrigues and the power struggle within the European Parliament. Will time conquer bureaucracy? The future will tell!

References
- [GDPR](#)
- [ePrivacy directive 2002](#)

- [ePrivacy Regulation](#)
- [Dutch Digitalisation Strategy](#)

Who is Robert Garskamp?

Subjects such as identity management, access control, privacy and security are familiar territory to Robert. According to him, it is impossible to predict how the use of digital identity data and its vulnerabilities will develop in future. Still, one thing is clear: due to the incredible speed of technological developments nowadays, including digital transformation, Robert believes that digital transformation will significantly influence, build up and shape public and private organisations. As an expert with over 15 years' experience, Robert aims to share his knowledge and expertise with regard to various issues connected to digital identity, transformation, security, privacy, mobility, risk management and compliance with various organisations from several (public and private) sectors.

Further information: www.identitynext.nl

Robert is also the founder of the IDnextplatform. This is an open and independent platform that advocates supporting and facilitating innovative approaches in the world of safe digital identity and creating awareness about digital identity and its use.

Further information: www.idnext.eu