



Federation of the European  
Sporting Goods Industry

FEDERATION OF THE EUROPEAN  
SPORTING GOODS INDUSTRY

**DIGITAL STEERING  
COMMITTEE**



## **FESI position on the Proposal for an ePrivacy Regulation**

*Brussels, 21 January 2019*

FESI, the Federation of the European Sporting Goods Industry, has followed with great interest the current discussion on the Proposal for an ePrivacy Regulation. The sporting goods industry is committed to protect the right to privacy of citizens and consumers and at the same time to avoid limiting innovation, a beneficial use of collected data and the personalisation and customisation of users' experience.

Before the adoption of a General Approach by the Council on the ePrivacy Regulation, the sporting goods industry would like to reiterate its concerns over the following elements of the Proposal.

### **Information stored in and related to end-user's terminal equipment**

Article 8 of the proposed ePrivacy Regulation (and related recitals) sets the consent of end-users as the prevailing method to protect the information stored in and related to their terminal equipment. This approach differs significantly from the General Data Protection Regulation (GDPR), which sets out 6 legal bases for data processing, some of which have the potential to provide even stronger protection to end-users due to requirements for a detailed legal and risk-based analysis and increased accountability measures.

A consent-based approach will have an adverse effect on the end-users' experience with the sporting goods industry's services and jeopardize end-users' respective expectations. Our end-users are digital natives and, being used to and educated on the digital ecommerce environment, have rightful expectations towards a dynamic, seamless and uninterrupted service experience.

The sporting goods industry offers to consumers a considerable variety of goods that promote a healthy lifestyle: therefore, personalisation and customisation is key to offering a trusted and seamless online experience to end-users. Absolute consent requirements jeopardize these expectations and lead to non-favourable effects on our industry. Whereas the sporting goods industry aspires the digital transformation of sports, lifestyle and wellness related services, such transformation would be significantly obstructed, if we cannot meet our user's demands.

There are a wide range of activities for which e.g. tracking presents varied levels of risk to fundamental rights. Having said this, our industry acknowledges the necessity for effective means to protect the users' privacy

and certainly supports consent to be implemented where necessary – but as a last resort. However, GDPR already provides for procedural mechanisms to identify data processing severely impacting individual's privacy and data protection: the Data Protection Impact Assessment as per art. 35 is meant to identify potentially intrusive data processing and to enable the implementation of effective (while maybe less constraining in comparison to consent) protection means. Such means could include and are not limited to individual transparency procedures, opt-out mechanisms and/or pseudonymization application and – as necessary – of course also include consent. These considerations, including the underlying assessment of an existing risk, are being excluded without justification. This is even less obvious as GDPR already acknowledges and considers information society services and their impact on privacy and data protection through cookies (recital 30). The sporting goods industry accordingly encourages the legislator to embrace a risk-based approach as observed in the GDPR and its mechanisms to be also applied to information society services.

The sporting goods industry emphasises its enormous focus on brand reputation and consumer trust. Therefore, brands have any motivation to satisfy our consumers' expectations and needs. The sporting goods industry will therefore be engaged in the identification and effective mitigation of risks for its consumers' privacy and data protection even on this side of a consent requirement.

On a more general note, an inflexible and too rigid consent requirement would decrease the motivation for information society service providers to investigate and invest in flexible, tailored and effective privacy mechanisms (for which GDPR provides incentives and had therefore been rightfully applauded to). In the absence of such incentives under the ePrivacy Regulation, less ambitions regarding the design of information society services may be expected and respective innovation will likely not be a priority.

FESI is of the opinion that the GDPR's requirements are the most appropriate standard to protect the privacy and the data of citizens. Therefore, **FESI calls for a stronger alignment between article 8 of the ePrivacy Regulation and the GDPR risk and consent framework.**

### Privacy settings of web browsers

FESI shares the concerns of the European Commission about the proliferation of pop-ups for the purpose to educate end users on their privacy (rights) and obtain consent. During GDPR implementation activities, information society service providers therefore need to look closer into the implementation of transparency and consent management programs. It comes with nature that companies seek to include as many aspects as possible in these programs to ensure a 360-degree coverage of consent-dependent use cases. These use cases may also include use cases covered by art. 10 of the ePrivacy Regulation. The consent management enabled through internet browsers, apps and or mobile device operating systems, however, introduces a parallel and potentially conflicting and competing consent management platform applicable to these use cases. Consequently, consent status for the same use case may differ between (i) the browser related settings and (ii) the service-based consent management. There is no natural argument to believe that browser-based consent status needs to take precedence over the service-based permission. This is even less obvious as the relation between a user and the service the user is engaged with can be deemed closer and supported by trust than a "1:n" relation between the browser and an unknown variety of information security services. The proposal, however, seems to indicate a priority for the browser settings, which jeopardizes the FESI members' consent management programs.

Moreover, in terms of cookie applications, art. 10 does not distinguish between necessary cookies and marketing cookies. It cannot be excluded that browsers would in fact exclude the deployment of all cookies and therefore cause adverse effects on the user experience, even if the use case is the sole display of the website. This is certainly not intended and does not seem to be an appropriate result.

In addition, FESI foresees a significant market power for browser and mobile device operating system providers interfering the relation(s) and communications between users, information society service providers and advertising companies through the intermediary role of such applications, for which the proposal does not provide appropriate response.

Consequently, FESI does not believe that the prescriptive requirements of article 10 of the ePrivacy Regulation on when and how end-users' consent shall be gathered would be a suitable solution to appropriately address existing concerns; instead it would only create more burdens for both end-users and businesses without better protecting the privacy of the former and would not provide answers to obvious questions. **FESI therefore calls for the deletion of article 10 and related recitals as per doc. 14268/18 as of 16.11.2018, p. 5, paragraph 7.**

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*Founded in 1960 FESI - the Federation of the European Sporting Goods Industry represents the interests of approximately 2,400 sporting goods manufacturers (85% of the European market) through its 12 National Sporting Goods Industry Federations and its directly affiliated member companies. 70-75% of FESI's membership is made up of Small and Medium Sized Enterprises. In total, the European Sporting Goods Industry employs over 650,000 EU citizens and has an annual turnover of some 66 billion euro.*