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From: Presidency

To: Permanent Representatives Committee/Council

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Subject: Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications)

- Progress report/Policy debate

The Presidency has foreseen a progress report and policy debate for the TTE Council of 8 June 2018 on the above file. In order to inform Ministers about the progress made to date and to identify issues requiring further discussion, the Presidency has put together the attached progress report (Annex I). In view of the Ministerial policy debate, delegations will find in Annex II the proposed questions.

The Coreper/Council will be invited to take note of the progress report set out in Annex I. The Council will be invited to address the questions set out in Annex II.

Progress report on the proposal for a Regulation on Privacy and Electronic Communications

The present report has been drawn up under the responsibility of the Bulgarian Presidency and is without prejudice to particular points of interest or further contributions by individual delegations. It sets out the work done so far in the Council's preparatory bodies and gives an account on the state of play with the examination of the above mentioned proposal.

I. INTRODUCTION

1. The Commission adopted the proposal for a Regulation on Privacy and Electronic Communications (hereinafter: ePR) on 10 January 2017 with the aim to replace the current ePrivacy Directive¹. The proposal is one of the actions foreseen by the Digital Single Market Strategy² to reinforce trust and security in the Digital Single Market.
2. In the European Parliament, the lead LIBE committee adopted its report, together with the mandate to start inter-institutional negotiations on 19 October 2017, which was confirmed by a plenary vote on 26 October 2017. The rapporteur for the file is Birgit Sippel (S&D, Germany).
3. In the Council, the examination of the proposal has been carried out in the Working Party on Telecommunications and Information Society (hereinafter: WP TELE). The TTE Councils of 9 June³ and 4 December⁴ 2017 took note of the progress made respectively under the Maltese and Estonian Presidency.

¹ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)

² Doc. 8672/15

³ Doc. 9324/17

⁴ Doc. 14374/17 + COR 1

4. The intense work continued under the Bulgarian Presidency. The WP TELE has discussed the proposal in 6 full-day meetings. In addition, the Presidency has organised two joint meetings of WP TELE and DAPIX - Friends of Presidency on Data Retention (hereinafter FoP DAPIX) on elements relevant for both formations. The Presidency steered the discussions with the help of several option papers⁵ and issued a number of compromise texts⁶. The Presidency believes that a considerable progress has been made on the file and is grateful for delegations' constructive approach in this context. On the basis of the discussions in the WP TELE and of the written comments submitted by delegations, the Presidency put together the present progress report.

II. STATE OF PLAY IN THE COUNCIL

i. Scope and link to the General Data Protection Regulation (hereinafter GDPR)⁷

5. During the discussions and in the written comments submitted by Member States, the question of the scope of the proposal and its link to the GDPR was raised repeatedly. Questions were raised regarding the protection of electronic communications content, and in particular the moment when the protection offered by the ePR ends. In the Presidency's view, the protection of content should be ensured during the end-to-end exchange between end-users, until the moment the recipient gains control over the content. After that moment, the protection offered by the GDPR comes into play. While many delegations seem to support this principle, it is necessary to find appropriate wording which would be sufficiently technology neutral but clear from the legal perspective.

⁵ Docs. 5165/18, 5569/18, 5827/18

⁶ Docs. 6726/18, 7207/18, 7820/18, 8537/18

⁷ Regulation (EU) 2016/679

6. Further clarifications were added in recitals, at the request of delegations, with regard to general relationship between the ePR and GDPR. Furthermore, the Presidency proposed clarifying text concerning the scope of the Proposal, including with regard to the processing of electronic communications content by end-users after the receipt or regarding electronic communications data of deceased persons, which are not covered by the ePR.

ii. Processing of electronic communications data (content and metadata) (Article 6(1))

7. Following the discussions and based on the Member States' written comments, the permitted processing of electronic communications data to maintain and restore the security of the electronic communications networks and services has been broadened to include the possibility to deal with cases of security risks. Further clarifications with regard to the concept of security as such and with regard to the application of this ground for processing have been included in recitals. The clarifications were welcome by delegations but some further fine-tuning might be necessary.

iii. Processing of electronic communications metadata (Article 6(2), (3a))

8. The permitted processing of metadata and achieving a proper balance between high level protection of confidentiality on the one hand, and sufficient incentives for innovation on the other hand has been one of the main concerns of the Member States. Subsequently, the Presidency has introduced several new permissions to process electronic communications metadata, in particular for purposes of network management and optimisation and for purposes of statistical counting. These new grounds for processing are accompanied by appropriate safeguards and additional recitals provide further explanations on their application.

9. Furthermore, the Presidency has further amended or reformulated other grounds for processing already present in the text, such as processing to protect vital interests or processing for the performance of the contract.
10. Certain delegations indicated that these changes move the text in the right direction. However further work is necessary, also possibly considering further grounds for processing. This topic remains one of the most sensitive issues.

iv. Protection of terminal equipment information (Article 8)

11. Also in the case of protection of terminal equipment information, delegations stressed the need to find a balance between ensuring proper privacy protection without undermining legitimate business models. As an outcome of WP TELE discussions, the general structure of Article 8 allowing for protection of end-users' terminal equipment information was maintained. The use of processing and storage capabilities of terminal equipment and the collection of information from end-users' terminal equipment, including about its software and hardware, other than by the end-user concerned is prohibited, except in well-defined instances.
12. The Presidency has introduced a new exception to the prohibition for the purpose of maintaining or restoring the security of information society services, preventing fraud or detecting technical faults. New recital text provides further clarifications, for instance on situations when consent is not necessary or on making access to websites conditional on the consent to store cookies.

v. Privacy settings (Article 10)

13. As a result of discussions, the Presidency has introduced significant changes to Article 10 on privacy settings. Although the text retains the requirement on software placed on the market permitting electronic communications to offer privacy settings, providers of the software are, according to the latest text, only obliged, at the time of installation or first usage and when updates change the privacy settings, to inform end-users about these settings and the way the end-user may use them. The provision requires that software offer as well the choice for the end-user to be reminded about the privacy settings options. The text moreover clarifies that this provision does not apply to software that is no longer supported. Further clarifications on website providers requesting cookies irrespective of the privacy settings have been included in preamble.
14. While delegations generally welcomed the direction of the new text, some still have doubts about the added value of the provision.

vi. Data retention related elements (Articles 2 and 11)

15. The issue of data retention has primarily been under the remit of the Justice and Home Affairs Council and has been, at the working level, analysed in the FoP DAPIX. However, discussions on certain elements of common interest, in particular the restrictions to rights and obligations, in relation to the scope of ePR, took place in two joint meetings of the WP TELE and the FoP DAPIX.

16. Based on delegations comments, the Presidency has introduced several changes. The new text excludes activities concerning national security and defence from the scope of the Proposal. The proposed text adds new general public interests allowing for national or Union laws to restrict the rights and obligations laid down in the Proposal for the purpose of protecting data subjects or the rights and freedoms of others and the enforcement of civil law claims. Furthermore the Presidency has included a specific reference to safeguards offered by the GDPR.

17. Delegations welcomed the direction the Presidency took but further work on the text is necessary.

vii. Exceptions to presentation and restriction of calling, connected line identification, access to emergency services (Article 13)

18. Discussions and changes proposed on Article 13 focused mainly on allowing the choice of end-users to reject incoming calls without the calling line identification to be overridden in case of emergency communications. Further changes introduced also allow for the access to the terminal equipment of an end-user calling an organisation dealing with emergency communications in order to obtain his/her location for the purpose of responding to such calls.

vii. Publicly available directories (Article 15)

19. The text obliging the providers of number-based interpersonal communications services to obtain the consent of end-users who are natural persons to include their personal data in the directory, was maintained. Further discussions led to the inclusion of the possibility for Member States to derogate from the consent requirement and provide by law that such inclusions can take place under the condition that the natural persons concerned have right to object to such inclusion.

20. For end-users that are legal persons, the text maintained the possibility to object to the inclusion in the directory. New recital text clarifies that end-users who are natural persons acting in a professional capacity should be treated as legal persons for the purpose of this provision.
21. Member States raised concerns with regard to the addressees of the obligation to give end-users the means to verify, correct or delete data included in a publicly available directory. In the latest text, the obligation remains addressed to providers of number-based interpersonal communication services. However, based on Member States comments, the Presidency has included a possibility for Member States to provide by law that this requirement applies to providers of publicly available directories, either in addition to or instead of, providers of number-based interpersonal communications services, thereby reintroducing the flexibility under the current directive.
22. Additionally, a new transitional provision clarifies that the data already included in a publicly available directory before the ePrivacy Regulation enters into force may remain included in such directory unless the end-user expresses his or her objection to this.
23. The provision now seems to be mostly supported by delegations.

viii. Unsolicited and direct marketing communications (Article 16)

24. Following the extensive discussions and written comments of the Member States, the text of the provision on unsolicited and direct marketing was further streamlined. With regard to direct marketing to own customers, new text allows Member States to provide by law a maximum period of time within which the customers' contact details can be used for direct marketing purposes.

25. Based on the Member States' comments, the “presenting” of direct marketing communications was deleted from the scope of the Article and corresponding recitals. Additionally, recital text provides clarification on the scope of the provision, explaining that displaying advertising to the general public on a website is not covered.
26. Delegations seem to generally support the provision. Some further work might still be needed with relation to the previous point.

ix. Supervisory authorities (Article 18)

27. The current text provides that the authorities responsible for monitoring the application of Regulation (EU) 2016/679 are also responsible for monitoring the application of Chapter II of the ePrivacy Regulation. Member States have an obligation to entrust the monitoring of the application of Chapter III to the supervisory authorities that have appropriate expertise and independence. They should have the power to provide remedies and impose administrative fines as prescribed by Chapter V of the Proposal.
28. Following further discussions on this issue, and while some delegations could generally support the current text, it is clear that most delegations seek further flexibility with regards to the supervisory authorities and more work is needed on this issue. The Presidency would like to stress that the further work will need to bear in mind the requirements stemming from Article 8(3) of the Charter and Article 16(2) of the TFEU.

Questions for the policy debate at the TTE Council of 8 June 2018

As substantiated in the progress report set out in Annex I, over the course of the past 16 months, the technical discussions within the Council, while complex and sensitive, have progressed significantly. The latest Presidency text is set out in the doc. 8537/18. In view of advancing the proposal towards a common Council position, the Presidency would like to ask Ministers for guidance on the following elements:

- 1) Do you think that the current approach as proposed by the Presidency and set out above on the permitted processing of metadata (art 5 and 6) is an acceptable basis to move forward? What other improvements could be made?*
- 2) Do you consider the approach concerning the protection of terminal equipment and privacy settings (art 8 and 10) to be an acceptable basis to move forward?*
- 3) Do you think that the latest compromise proposed by the Presidency enables advancement of the competitiveness of the European industry in providing innovative services while, at the same time, safeguarding the confidentiality of citizens' communications and the protection of citizens data (or sensitive data)?*