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NOTE

From: Presidency
To: Delegations

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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)
- Examination of the Presidency text

I. INTRODUCTION

1. For the purposes of the **WP TELE meetings of 19, 20 and 25 September**, delegations will find in Annex A a revised text of the ePrivacy proposal (ePR). The revisions are based on the discussions held in the WP TELE meetings and on the written comments provided by delegations to date, and are without prejudice to any comments delegations might wish to make in the future.

2. The Presidency would like to point out that as many delegations are still in the process of analysing the proposal, the work on the text will be incremental. This first redraft aims mainly at clarifying certain elements and outlining specific issues to be examined for the purposes of advancing the discussions on the file.
3. The amended text focuses on the operative part of the proposal (articles) as the recitals will be examined at a later stage. For ease of reference, the amendments to the Commission proposal are marked in **bold** and deletions in ~~strike through~~. In addition, to further facilitate the examination of the proposal, delegations will find in Annex B definitions that are only referred to in art. 4 of ePR, such as the latest version¹ of the relevant definitions from the European Electronic Communications Code (the Code) (Art. 4(1)(b)), the definition of 'terminal equipment' as provided in Commission Directive 2008/63/EC (art. 4(1)(c)) and the newly added definition of 'information society service' as provided in Directive 2015/1535 (art. 4(1)(d)).

II. AMENDMENTS TO THE COMMISSION PROPOSAL AND ISSUES FOR DISCUSSION

Delegations will find below an overview of the changes introduced in the text together with a number of issues for discussion in chronological order of their appearance in the articles.

Article 1: Subject matter

4. The changes **in art. 1(1) and (2) and the new art. 1(1a)** aim at clarifying the difference in subject matter regarding legal persons vis-à-vis natural persons.
5. In **art. 1(2)** the wording concerning the free movement of electronic communications data and services has been aligned with the wording used in the General Data Protection Regulation (GDPR) regarding the free movement of personal data within the Union.

¹ Doc. 11679/17 of 29 August 2017.

6. **Issue for discussion (1):** In the Presidency's view, the '*lex specialis*' relation of the ePR to the GDPR as set out in art. 1(3) needs further clarification. Some delegations have already provided useful suggestions in this respect and the Presidency would like to discuss this issue in the WP meeting.

Article 2: Material scope

7. In **art. 2(1)(a)** the Presidency has clarified the link to the GDPR with regard to content by specifying that the ePR applies to content data 'in transmission'.
8. In **art. 2(1)(b) and throughout the Regulation**, delegations will notice the following wording: 'data [related to or processed by or emitted by or stored in] the terminal equipment'. The text in square brackets lists all the proposals by delegations as the Presidency is looking for the best wording to be used in this context encompassing all the proposed meanings.
9. In **art. 2(1)** the Presidency has added new elements with the aim to reference all the services covered by the ePR.

Article 3: Territorial scope and representative

10. In **art. 3(1)(a)** the phrase concerning the payment of the end user has been deleted as redundant.
11. In **art. 3(1)** the Presidency has added new points with the aim to reference all the services covered by the ePR.
12. In **art. 3(2) to (5)** the Presidency has tried to streamline the provisions on the representative, also bearing in mind the corresponding provisions of the GDPR.

13. **Issue for discussion (2):** The proposal provides for an obligation to appoint a representative for providers of electronic communication services not established in the Union. Some delegations suggested to extend this obligation also to other actors covered by the proposal. At the WP TELE meeting, the Presidency would like to hear the views of delegations with regard to **which actors should be subject to the obligation to designate the representative.**

Article 4: Definitions

14. Only minor changes and clarifications (such as in **art. 4(1)(b) and(c)**) have been made with regard to definitions as more detailed analysis will be needed once there is a clear understanding of the operative part of the proposal.
15. In **art. 4(1)(d)** a reference to the definition of 'information society service' has been added.
16. In **art. 4(2)** the word 'minor' has been deleted in line with a similar change in the Code.
17. In **art. 4(2)(e)** the word 'mail' has been replaced by 'message' as it seemed to be too restrictive and not in line with the content of the definition.

Article 4a: Consent

18. Original **art. 9** on consent has been moved to the general part since it applies to the whole Regulation, including chapter III. This is without impact on the policy choice concerning where consent should be required and where not which is subject to further debate.
19. The wording of **art. 4a (the original art. 9)** has been simplified and aligned with art. 10 and the GDPR. The possibility to withdraw the consent is already provided by the GDPR and **art. 4a(3)** adds the obligation to remind the end-user of that possibility. The interval for the reminder has been extended from 6 to not longer than 12 months.

Heading of Chapter II

20. The **heading of Chapter II** has been simplified.

Article 5: Confidentiality of electronic communications data

21. In **art. 5(1)** the Presidency has clarified that the listed activities represent processing of data, which is also in line with the wording used in art. 6.
22. **Issue for discussion (3)**: The Presidency has included a new **art. 5(2)** clarifying that machine-to-machine communications are covered as long as they are related to end-user. Text as proposed has been inserted to start the discussion, and is therefore in the square brackets. At the WP TELE meeting, the Presidency will invite delegations to express their view **on how to approach and further clarify the issue of machine-to-machine communications**.

Article 6: Permitted processing of electronic communications data

23. Introductory parts of **art. 6(1), (2) and (3)** have been amended to clarify the relationship with the GDPR.
24. In **art. 6(1)(b)** it has been clarified that the exception covers also the need to detect security attacks.
25. In **art. 6(2)(c) and (3)(a)** the word 'specific' has been deleted as it is unclear and does not seem to bring any added value.
26. In **art. 6(3)(b)** a minor drafting modification has been made.
27. **Issue for discussion (4)**: Delegations have proposed **different legal grounds to be included for the purposes of data processing**. To this regard the Presidency would like to go through all of them one by one during the WP TELE meeting and would ask the delegations to clearly indicate their preferences, also bearing in mind the different types of data (content and metadata).

Article 7: Storage and erasure of electronic communications data

28. **Issue for discussion (5):** In relation to art. 7, the Presidency is of the view that more discussion is needed on **further processing of data** and before making any changes would seek delegations' views on how to approach that question, keeping in mind that Articles 6 and 7 are among those articles the Presidency would consider to be *lex specialis* to the GDPR.

Article 8: Protection of information stored in and related to end-users' terminal equipment

29. For the **heading**, see explanation in point 8 of this note.
30. In **art. 8(1)(d)** it has been clarified that the audience measuring can be carried out also by a third party if it is done on behalf of the information society service provider and is meeting certain safeguards laid down in art. 28 of the GDPR.
31. In **new art. (8)(1)(e)** a new ground for processing has been proposed for security updates.
32. **Issue for discussion (6):** During the WP TELE meeting the Presidency will seek delegations' views on the **changes made in art. 8(1) and whether any other grounds for processing could be considered**.
33. **Art. 8(2)** has been amended to address concerns about lowering the level of protection of GDPR. The Presidency added a new ground for processing based on end-user consent and also provided for a possibility for visitor counting as long as end-users concerned are sufficiently informed and adequate security measures are in place.
34. **Issue for discussion (7):** The Presidency will ask delegations to express their views on the **changes introduced in art. 8(2) and also with regard to the information to be displayed and/or icons to be used in this context** as foreseen in art. 8(2a) and (3).
35. In **art. 8(4)** a reference has been corrected and the whole paragraph put in square brackets as the issue of the delegated act will have to be addressed at a later stage after a decision related to icons has been made (see point 34).

Article 9: Consent

36. Moved to Chapter I, see points 18 and 19 of this note.

Article 10: Information and options for privacy settings to be provided

37. In **art. 10(1)** it has been made clear that the wording 'third parties' was not meant to refer to 'third-party cookies' but to 'any other parties than the end-user'.

38. In **art. 10(2)** it has been clarified that the end-user will be asked to consent to the settings upon installation or upon 'first usage' of the software.

39. **Issue for discussion (8)**: The Presidency has included a **new art. 10(2a)** to **allow end-users to change easily the settings selected according to art. 10(2)** and would like to know delegations' view on that matter.

40. The date in **art. 10(3)** has been put in square brackets to be discussed at a later stage.

Article 11

41. No changes have been made in art. 11 at this stage as the data retention elements linked to this article are being analysed in the Friends of Presidency context. The Presidency will come back to the issue in due course. With view of the WP meetings on 19, 20 and 25 September, the Presidency does not intend to discuss article 11 during those meetings.

Article 12: Presentation and restriction of calling and connected line identification

42. Minor modifications have been made in **art. 12(1)(d), (2) and (4)**.

Article 13: Exceptions to presentation and restriction of calling and connected line identification

43. The word 'transparent' has been included in **art. 13(2)**.

Article 14: Incoming call blocking

44. The phrase 'publicly available' has been deleted in **art. 14, introductory part**, as services which are not publicly available are excluded from the scope already in art. 2(2)(c).

45. In order to improve consistency, 'unwanted calls' has been replaced by 'malicious or nuisance calls' in **art. 14, introductory part**.

Article 15: Publicly available directories

46. The wording of **art. 15** has been brought closer to the text of the current art. 12 of the ePrivacy Directive.

47. **Issue for discussion (9)**: At the WP TELE meeting, the Presidency would like to discuss **to whom the obligations in the article 15 should be addressed to** as it seems that it might be difficult for providers of publicly available directories to obtain the consent of the end-users.

Article 16: Unsolicited communications

48. The **heading of art. 16** has been changed to direct marketing communications.

49. The word 'present' (direct marketing communications) has been included **throughout art. 16** as the word 'send' does not seem to cover all possibilities. The most appropriate wording, is however, is still to be discussed as indicated by putting the phrase in square brackets.

50. In **art. 16(2), (3)(a), (5) and (6)** the wording has been clarified/streamlined.
51. In **art. 16(7)** the whole paragraph has been put in square brackets as the issue of the implementing act will have to be addressed at a later stage.

Article 17: Information about detected security risks

52. **Art. 17** has been moved to the Code (art. 40(3a)).

Articles 18 to 20

53. **Issue for discussion (10):** Many delegations asked for more flexibility with regard to the **supervisory authority**. Keeping in mind that the Data Protection Authorities (DPAs) have the experience and knowledge needed to monitor the application of Chapter II of this Regulation and, on the other hand, some of the provisions might require expertise beyond DPAs competences, the Presidency proposes to keep the DPAs as authorities for monitoring the application of Chapter II while providing flexibility to Member States to designate supervisory authorities responsible for monitoring the application of Chapter III. During the WP TELE meeting, the Presidency will seek delegations' views on this issue.
54. A minor change has been included in **art. 19 introductory part and art. 20**, stemming from changes in art. 18. More detailed revision of these articles will be made after the text of art. 18 is more advanced.

Articles 21 to 24 (Chapter V)

55. A new **art. 21(1a)** has been included, as asked by some delegations providing for a possibility of collective redress for end-users who are natural persons to ensure the consistency with the GDPR.
56. A sentence has been deleted in **art. 21(2)** as it unduly restricted the right to an effective remedy provided for in art. 47 of the Charter of Fundamental Rights.
57. A phrase has been deleted in **art. 22** as art. 82 of GDPR should apply in its entirety and the deleted phrase represented only one of the elements provided for in that article.
58. A reference has been corrected in **art. 23(1)**.
59. A reference to art 17 in **art. 23(4)** has been deleted (see point 52).

Articles 25 and 26 (Chapter VI)

60. No changes have been introduced in art. 25 and 26. These articles will be revisited after the related content provisions have been agreed upon.

Articles 27, 28 and 29 (Chapter VII)

61. The Presidency has added square brackets to all dates in Chapter VII as the dates of application and other deadlines cannot be determined before the content of the Regulation has been agreed upon.

III. CONCLUSION

62. At the meetings of 19, 20 and 25 September, the Presidency intends to discuss the text of the proposal article-by-article. During the discussion, the Presidency will invite delegations to express their **views on proposed changes and also on the 10 policy issues set out above. Delegations are also welcome to raise further issues within each article and to indicate their preferred solutions.**
63. The Presidency kindly asks delegations to provide **written comments by 27 September 2017.**
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CHAPTER I GENERAL PROVISIONS

Article 1 *Subject matter*

1. This Regulation lays down rules regarding the protection of fundamental rights and freedoms of natural ~~and legal~~ persons in the provision and use of electronic communications services, and in particular, the rights to respect for private life and communications and the protection of natural persons with regard to the processing of personal data.
 - 1a. **This Regulation lays down rules regarding the protection of the communications of legal persons in the provision and use of the electronic communications services.**
2. ~~This Regulation ensures~~ **The** free movement of electronic communications data and electronic communications services within the Union, ~~which~~ shall be neither restricted nor prohibited for reasons related to the respect for the private life and communications of natural ~~and legal~~ persons and the protection of natural persons with regard to the processing of personal data, **and for protection of communications of legal persons.**
3. The provisions of this Regulation particularise and complement Regulation (EU) 2016/679 by laying down specific rules for the purposes mentioned in paragraphs 1 ~~and~~ to 2.

Article 2 *Material Scope*

1. This Regulation applies to:
 - (a) the processing of electronic communications **content data in transmission and of electronic communications metadata** carried out in connection with the provision and the use of electronic communications services; ~~and to~~
 - (b) information [related to **or processed by or emitted by or stored in**] the terminal equipment of end-users.
 - (c) **the placing on the market of software permitting electronic communications, including the retrieval and presentation of information on the internet;**
 - (d) **the offering of a publicly available directory of end-users of electronic communications services;**
 - (e) **the sending or presenting direct marketing communications to end-users.**

2. This Regulation does not apply to:
 - (a) activities which fall outside the scope of Union law;
 - (b) activities of the Member States which fall within the scope of Chapter 2 of Title V of the Treaty on European Union;
 - (c) electronic communications services which are not publicly available;
 - (d) activities of competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security;
3. The processing of electronic communications data by the Union institutions, bodies, offices and agencies is governed by Regulation (EU) 00/0000 [new Regulation replacing Regulation 45/2001].
4. This Regulation shall be without prejudice to the application of Directive 2000/31/EC², in particular of the liability rules of intermediary service providers in Articles 12 to 15 of that Directive.
5. This Regulation shall be without prejudice to the provisions of Directive 2014/53/EU.

Article 3
Territorial scope and representative

1. This Regulation applies to:
 - (a) the provision of electronic communications services to end-users in the Union, ~~irrespective of whether a payment of the end-user is required;~~
 - (aa) the processing of electronic communications content in transmission of electronic communications metadata of end-users located in the Union;**
 - ~~(b) the use of such services;~~
 - (c) the protection of information [related to **or processed by or emitted by or stored in**] the terminal equipment of end-users located in the Union.

² Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ L 178, 17.7.2000, p. 1–16).

- (ca) **the offering of publicly available directories of end-users of electronic communications services located in the Union;**
 - (cb) **the placing on the Union market of software permitting electronic communications, including the retrieval and presentation of information on the internet;**
 - (cc) **the [sending or presenting] of direct marketing communications to end-users located in the Union.**
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- 2. Where the [provider of an electronic communications service] is not established in the Union it shall designate in writing a representative in the Union.
 - 3. The representative shall be established in one of the Member States where the end-users of such electronic communications services are located.
 - 4. The representative shall ~~have the power to answer questions and provide information~~ **be mandated by the provider it represents to be addressed** in addition to or instead of the provider it represents, in particular, to supervisory authorities, and end-users, on all issues related to processing electronic communications data for the purposes of ensuring compliance with this Regulation.
 - 5. The designation of a representative pursuant to paragraph 2 shall be without prejudice to legal actions, which could be initiated against ~~a natural or legal person who processes electronic communications data in connection with the provision of electronic communications services from outside the Union to end-users in the Union~~ **the provider it represents.**

Article 4
Definitions

1. For the purposes of this Regulation, following definitions shall apply:
 - (a) the definitions in Regulation (EU) 2016/679;
 - (b) the definitions of ‘electronic communications network’, ‘electronic communications service’, ‘interpersonal communications service’, ‘number-based interpersonal communications service’, ‘number-independent interpersonal communications service’, ‘end-user’ and ‘call’ in ~~points~~ **paragraphs** (1), (4), (5), (6), (7), (14) and (21) respectively of Article 2 of [Directive establishing the European Electronic Communications Code];
 - (c) the definition of 'terminal equipment' in ~~point (1)~~ of Article 1(1) of Commission Directive 2008/63/EC³;
 - (d) **the definition of ‘information society service’ in point (b) of Article 1 (1) of Directive (EU) 2015/1535⁴.**
2. For the purposes of point (b) of paragraph 1, the definition of ‘interpersonal communications service’ shall include services which enable interpersonal and interactive communication merely as a ~~minor~~ ancillary feature that is intrinsically linked to another service.
3. In addition, for the purposes of this Regulation the following definitions shall apply:
 - (a) ‘electronic communications data’ means electronic communications content and electronic communications metadata;
 - (b) ‘electronic communications content’ means the content exchanged by means of electronic communications services, such as text, voice, videos, images, and sound;
 - (c) ‘electronic communications metadata’ means data processed in an electronic communications network for the purposes of transmitting, distributing or exchanging electronic communications content; including data used to trace and identify the source and destination of a communication, data on the location of the device generated in the context of providing electronic communications services, and the date, time, duration and the type of communication;

³ Commission Directive 2008/63/EC of 20 June 2008 on competition in the markets in telecommunications terminal equipment (OJ L 162, 21.6.2008, p. 20–26).

⁴ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ L 241, 17.9.2015, p. 1-15).

- (d) ‘publicly available directory’ means a directory of end-users of electronic communications services, whether in printed or electronic form, which is published or made available to the public or to a section of the public, including by means of a directory enquiry service;
- (e) ‘~~electronic mail~~ **message**’ means any electronic message containing information such as text, voice, video, sound or image sent over an electronic communications network which can be stored in the network or in related computing facilities, or in the terminal equipment of its recipient;
- (f) ‘direct marketing communications’ means any form of advertising, whether written or oral, sent to one or more identified or identifiable end-users of electronic communications services, including the use of automated calling and communication systems with or without human interaction, electronic mail, SMS, etc.;
- (g) ‘direct marketing voice-to-voice calls’ means live calls, which do not entail the use of automated calling systems and communication systems;
- (h) ‘automated calling and communication systems’ means systems capable of automatically initiating calls to one or more recipients in accordance with instructions set for that system, and transmitting sounds which are not live speech, including calls made using automated calling and communication systems which connect the called person to an individual.

Article 94a
Consent

1. ~~The definition of and conditions for consent provided for under Articles 4(11) and 7 of Regulation (EU) 2016/679/EU shall apply.~~
2. Without prejudice to paragraph 1, where technically possible and feasible, for the purposes of point (b) of Article 8(1), consent may be expressed by using the appropriate technical settings of a software application enabling access to the internet **placed on the market permitting electronic communications, including the retrieval and presentation of information on the internet.**
3. End-users who have consented to the processing of electronic communications data as set out in point (c) of Article 6(2) and points (a) and (b) of Article 6(3) shall ~~be given the possibility to withdraw their consent at any time as set forth under Article 7(3) of Regulation (EU) 2016/679 and~~ be reminded of **this the possibility to withdraw their consent at periodic intervals of [no longer than 12 months]**, as long as the processing continues.

CHAPTER II
PROTECTION OF ELECTRONIC COMMUNICATIONS OF
~~NATURAL AND LEGAL PERSONS~~ END-USERS AND OF
~~INFORMATION STORED IN~~ THE INTEGRITY OF THEIR
TERMINAL EQUIPMENT

Article 5

Confidentiality of electronic communications data

1. Electronic communications data shall be confidential. Any ~~interference with~~ **processing of** electronic communications data, ~~such as by~~ **including** listening, tapping, storing, monitoring, scanning or other kinds of interception, ~~or surveillance or processing of~~ electronic communications data, by persons other than the end-users, shall be prohibited, except when permitted by this Regulation.
2. **[Confidentiality of electronic communications data in machine-to-machine communications shall only apply when such communication is related to the end-user.]**

Article 6

Permitted processing of electronic communications data

1. Providers of electronic communications networks and services ~~may~~ **shall be permitted to** process electronic communications data **only** if:
 - (a) it is necessary to achieve the transmission of the communication, for the duration necessary for that purpose; or
 - (b) it is necessary to maintain or restore the security of electronic communications networks and services, or detect technical faults and/or errors **and/or attacks** in the transmission of electronic communications, for the duration necessary for that purpose.

2. **Without prejudice to paragraph 1, Providers of electronic communications networks and services may shall be permitted to process electronic communications metadata only** if:
- (a) it is necessary to meet mandatory quality of service requirements pursuant to [Directive establishing the European Electronic Communications Code] or Regulation (EU) 2015/2120⁵ for the duration necessary for that purpose; or
 - (b) it is necessary for billing, calculating interconnection payments, detecting or stopping fraudulent, or abusive use of, or subscription to, electronic communications services; or
 - (c) the end-user concerned has given his or her consent to the processing of his or her communications metadata for one or more specified purposes, including for the provision of ~~specific~~ services to such end-users, provided that the purpose or purposes concerned could not be fulfilled by processing information that is made anonymous.
3. **Without prejudice to paragraph 1, Providers of the electronic communications networks and services may shall be permitted to process electronic communications content only:**
- (a) for the sole purpose of the provision of a ~~specific~~ service to an end-user, if the end-user or end-users concerned have given their consent to the processing of his or her electronic communications content and the provision of that service cannot be fulfilled without the processing of such content; or
 - (b) if all end-users concerned have given their consent to the processing of their electronic communications content for one or more specified purposes that cannot be fulfilled by processing information that is made anonymous, and the provider has consulted the supervisory authority. ~~Points (2) and (3) of~~ Article 36(2) and (3) of Regulation (EU) 2016/679 shall apply to the consultation of the supervisory authority.

⁵ Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (OJ L 310, 26.11.2015, p. 1–18).

Article 7
Storage and erasure of electronic communications data

1. Without prejudice to point (b) of Article 6(1) and points (a) and (b) of Article 6(3), the provider of the electronic communications service shall erase electronic communications content or make that data anonymous after receipt of electronic communication content by the intended recipient or recipients. Such data may be recorded or stored by the end-users or by a third party entrusted by them to record, store or otherwise process such data, in accordance with Regulation (EU) 2016/679.
2. Without prejudice to point (b) of Article 6(1) and points (a) and (c) of Article 6(2), the provider of the electronic communications service shall erase electronic communications metadata or make that data anonymous when it is no longer needed for the purpose of the transmission of a communication.
3. Where the processing of electronic communications metadata takes place for the purpose of billing in accordance with point (b) of Article 6(2), the relevant metadata may be kept until the end of the period during which a bill may lawfully be challenged or a payment may be pursued in accordance with national law.

Article 8
*Protection of information stored in **terminal equipment of end-users** and [related to **or processed by or emitted by]** ~~end-users' terminal~~ **such equipment***

1. 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 shall be prohibited, except on the following grounds:
 - (a) it is necessary for the sole purpose of carrying out the transmission of an electronic communication over an electronic communications network; or
 - (b) the end-user has given his or her consent; or
 - (c) it is necessary for providing an information society service requested by the end-user; or
 - (d) ~~if it is necessary for web-audience measuring~~, provided that such measurement is carried out by the provider of the information society service requested by the end-user **or by a third party on behalf of the provider of the information society service provided that conditions laid down in Article 28 of Regulation (EU) 2016/679 are met;**

- (e) **it is necessary for a security update provided that the privacy settings chosen by the end-user are not changed in any way, the end-user is informed in advance and is given the possibility to postpone or turn off the automatic installation of these updates.**
2. The collection of information emitted by terminal equipment **of the end-user** to enable it to connect to another device and, or to network equipment shall be prohibited, except ~~if~~ **on the following grounds:**
- (a) it is done exclusively in order to, for the time necessary for, and for the purpose of establishing a connection; or
- (b) **the end-user has given his or her consent; or**
- (c) **it is necessary for the purpose of statistical counting that is limited in time and space to the extent necessary for this purpose and the data is made anonymous or erased as soon as it is no longer needed for this purpose.**
- ~~(b)~~**2a. For the purpose of paragraph 2 points (b) and (c), a clear and prominent notice is shall be displayed informing of, at least, the modalities of the collection, its purpose, the person responsible for it and the other information required under Article 13 of Regulation (EU) 2016/679 where personal data are collected, as well as any measure the end-user of the terminal equipment can take to stop or minimise the collection.**
- 2b. For the purpose of paragraph 2 points (b) and (c), ~~the~~ the collection of such information shall be conditional on the application of appropriate technical and organisational measures to ensure a level of security appropriate to the risks, as set out in Article 32 of Regulation (EU) 2016/679, have been applied.**
3. The information to be provided pursuant to ~~point (b)~~ of paragraph 2a may be provided in combination with standardized icons in order to give a meaningful overview of the collection in an easily visible, intelligible and clearly legible manner.
4. [The Commission shall be empowered to adopt delegated acts in accordance with Article 257 determining the information to be presented by the standardized icon and the procedures for providing standardized icons.]

Article 9
Consent

- ~~1. The definition of and conditions for consent provided for under Articles 4(11) and 7 of Regulation (EU) 2016/679/EU shall apply.~~
- ~~2. Without prejudice to paragraph 1, where technically possible and feasible, for the purposes of point (b) of Article 8(1), consent may be expressed by using the appropriate technical settings of a software application enabling access to the internet.~~
- ~~3. End users who have consented to the processing of electronic communications data as set out in point (c) of Article 6(2) and points (a) and (b) of Article 6(3) shall be given the possibility to withdraw their consent at any time as set forth under Article 7(3) of Regulation (EU) 2016/679 and be reminded of this possibility at periodic intervals of 6 months, as long as the processing continues.~~

Article 10
Information and options for privacy settings to be provided

1. Software placed on the market permitting electronic communications, including the retrieval and presentation of information on the internet, shall offer the option to prevent ~~third~~ **any other parties than the end-user** from storing information on the terminal equipment of an end-user or processing information already stored on that equipment.
2. Upon installation **or first usage**, the software **referred to in paragraph 1** shall inform the end-user about the privacy settings options and, to continue with the installation **or usage**, require the end-user to consent to a setting.
- 2a. The software referred to in paragraph 1 shall provide in a clear manner easy ways for end-users to change the privacy setting consented to under paragraph 2 at any time during the use.**
3. In the case of software which has already been installed on [25 May 2018], the requirements under paragraphs 1 and 2 shall be complied with at the time of the first update of the software, but no later than [25 August 2018].

Article 11
Restrictions

1. Union or Member State law may restrict by way of a legislative measure the scope of the obligations and rights provided for in Articles 5 to 8 where such a restriction respects the essence of the fundamental rights and freedoms and is a necessary, appropriate and proportionate measure in a democratic society to safeguard one or more of the general public interests referred to in Article 23(1)(a) to (e) of Regulation (EU) 2016/679 or a monitoring, inspection or regulatory function connected to the exercise of official authority for such interests.
2. Providers of electronic communications services shall establish internal procedures for responding to requests for access to end-users' electronic communications data based on a legislative measure adopted pursuant to paragraph 1. They shall provide the competent supervisory authority, on demand, with information about those procedures, the number of requests received, the legal justification invoked and their response.

CHAPTER III
NATURAL AND LEGAL PERSONS' RIGHTS TO CONTROL
ELECTRONIC COMMUNICATIONS

Article 12
Presentation and restriction of calling and connected line identification

1. Where presentation of the calling and connected line identification is offered in accordance with Article [107] of the [Directive establishing the European Electronic Communication Code], the providers of publicly available number-based interpersonal communications services shall provide the following:
 - (a) the calling end-user with the possibility of preventing the presentation of the calling line identification on a per call, per connection or permanent basis;
 - (b) the called end-user with the possibility of preventing the presentation of the calling line identification of incoming calls;
 - (c) the called end-user with the possibility of rejecting incoming calls where the presentation of the calling line identification has been prevented by the calling end-user;

- (d) the called end-user with the possibility of preventing the presentation of the connected line identification to **which** the calling end-user **is connected**.
2. The possibilities referred to in ~~points (a), (b), (c) and (d)~~ of paragraph 1 shall be provided to end-users by simple means and free of charge.
3. Point (a) of paragraph 1 shall also apply with regard to calls to third countries originating in the Union. Points (b), (c) and (d) of paragraph 1 shall also apply to incoming calls originating in third countries.
4. Where presentation of calling or connected line identification is offered, providers of publicly available number-based interpersonal communications services shall provide information to the public regarding the options set out in ~~points (a), (b), (c) and (d)~~ of paragraph 1.

Article 13

Exceptions to presentation and restriction of calling and connected line identification

1. Regardless of whether the calling end-user has prevented the presentation of the calling line identification, where a call is made to emergency services, providers of publicly available number-based interpersonal communications services shall override the elimination of the presentation of the calling line identification and the denial or absence of consent of an end-user for the processing of metadata, on a per-line basis for organisations dealing with emergency communications, including public safety answering points, for the purpose of responding to such communications.
2. Member States shall establish more specific provisions with regard to the establishment of **transparent** procedures and the circumstances where providers of publicly available number-based interpersonal communication services shall override the elimination of the presentation of the calling line identification on a temporary basis, where end-users request the tracing of malicious or nuisance calls.

Article 14

Incoming call blocking

Providers of ~~publicly available~~ number-based interpersonal communications services shall deploy state of the art measures to limit the reception of ~~unwanted~~ **malicious or nuisance** calls by end-users and shall also provide the called end-user with the following possibilities, free of charge:

- (a) to block incoming calls from specific numbers or from anonymous sources;
- (b) to stop automatic call forwarding by a third party to the end-user's terminal equipment.

Article 15
Publicly available directories

1. The [providers of publicly available directories] shall ~~obtain the consent of~~ **give** end-users who are natural persons ~~to include their personal data in the directory and, consequently, shall obtain consent from these end-users for inclusion of data per category of personal data~~ **the opportunity to determine per category of personal data whether their personal data are included in the publicly available directory**, to the extent that such data are relevant for the purpose of the directory as determined by the provider of the directory.
 - 1a. **The [providers of publicly available directories]** shall give end-users who are natural persons the means to verify, correct and delete ~~such~~ **data included in a publicly available directory**.
2. The [providers of a publicly available directory] shall inform end-users who are natural persons whose personal data are in the directory of the available search functions of the directory and obtain **the additional consent of** end-users' ~~consent~~ before enabling such search functions related to their own data.
3. The [providers of publicly available directories] shall provide end-users that are legal persons with the possibility to object to data related to them being included in the directory.
 - 3a. **The [providers of publicly available directories]** shall give ~~such~~ end-users that are legal persons the means to verify, correct and delete ~~such~~ **data included in a publicly available directory**.
4. The possibility for end-users not to be included in a publicly available directory, or to verify, correct and delete any data related to them shall be provided free of charge.

Article 16
~~Unsolicited~~ **Direct marketing** communications

1. Natural or legal persons may use electronic communications services for the purposes of [sending **or presenting**] direct marketing communications to end-users who are natural persons that have given their consent.

2. Where a natural or legal person obtains electronic contact details for electronic ~~mail~~ **message** from its customer, in the context of the sale of a product or a service, in accordance with Regulation (EU) 2016/679, that natural or legal person may use these electronic contact details for direct marketing of its own similar products or services only if customers are clearly and distinctly given the opportunity to object, free of charge and in an easy manner, to such use. The right to object shall be given at the time of collection and each time a ~~message~~ **direct marketing communication** is [sent or presented].
3. Without prejudice to paragraphs 1 and 2, natural or legal persons using electronic communications services for the purposes of placing direct marketing calls shall:
 - (a) present the ~~identity of a~~ **calling line identification** on which they can be contacted; or
 - (b) present a specific code/or prefix identifying the fact that the call is a marketing call.
4. Notwithstanding paragraph 1, Member States may provide by law that the placing of direct marketing voice-to-voice calls to end-users who are natural persons shall only be allowed in respect of end-users who are natural persons who have not expressed their objection to receiving those communications.
5. Member States shall ensure, in the framework of Union law and applicable national law, that the legitimate interest of end-users that are legal persons with regard to ~~unsolicited~~ **direct marketing** communications [sent or presented] by means set forth under paragraph 1 are sufficiently protected.
6. Any natural or legal person using electronic communications services to ~~transmit~~ [send or present] direct marketing communications shall inform end-users of the marketing nature of the communication and the identity of the legal or natural person on behalf of whom the **direct marketing** communication is ~~transmitted~~ [sent or presented] and shall provide the necessary information for recipients to exercise their right to withdraw their consent, in an easy manner, to receiving further **direct** marketing communications.
7. [The Commission shall be empowered to adopt implementing measures in accordance with Article 26(2) specifying the code/or prefix to identify marketing calls, pursuant to point (b) of paragraph 3.]

Article 17

Information about detected security risks

~~In the case of a particular risk that may compromise the security of networks and electronic communications services, the provider of an electronic communications service shall inform end-users concerning such risk and, where the risk lies outside the scope of the measures to be taken by the service provider, inform end-users of any possible remedies, including an indication of the likely costs involved.~~

CHAPTER IV INDEPENDENT SUPERVISORY AUTHORITIES AND ENFORCEMENT

Article 18

Independent supervisory authorities

- 0. Each Member State shall provide for one or more independent public authorities to be responsible for monitoring the application of this Regulation ('supervisory authorities'), in accordance with paragraphs 1 and 1a of this Article.**
1. The independent supervisory authority or authorities responsible for monitoring the application of Regulation (EU) 2016/679 shall also be responsible for monitoring the application of **Chapter II** of this Regulation. Chapters VI and VII of Regulation (EU) 2016/679 shall apply *mutatis mutandis*. The tasks and powers of the supervisory authorities shall be exercised with regard to end-users.
- 1a. Member States shall entrust the monitoring of the application of Chapter III of this Regulation to the supervisory authorities referred to in paragraph 1 of this Article or to other supervisory authorities having an equivalent level of independence.**
- 1b. Where more than one supervisory authority is responsible for monitoring the application of this Regulation in a Member State, such authorities shall cooperate with each other.**
2. The supervisory ~~authority~~ or authorities referred to in paragraphs 1 **and 1a** shall cooperate whenever appropriate with national regulatory authorities established pursuant to the [Directive Establishing the European Electronic Communications Code].

Article 19

European Data Protection Board

The European Data Protection Board, established under Article 68 of Regulation (EU) 2016/679, shall have competence to ensure the consistent application of **Chapter II** of this Regulation. To that end, the European Data Protection Board shall exercise the tasks laid down in Article 70 of Regulation (EU) 2016/679. The Board shall also have the following tasks:

- (a) advise the Commission on any proposed amendment of this Regulation;
- (b) examine, on its own initiative, on request of one of its members or on request of the Commission, any question covering the application of this Regulation and issue guidelines, recommendations and best practices in order to encourage consistent application of this Regulation.

Article 20
Cooperation and consistency procedures

Each supervisory authority shall contribute to the consistent application of this Regulation throughout the Union. For this purpose, the supervisory authorities **designated in accordance with Article 18(1)** shall cooperate with each other and the Commission in accordance with Chapter VII of Regulation (EU) 2016/679 regarding the matters covered by **Chapter II** of this Regulation.

CHAPTER V

REMEDIES, LIABILITY AND PENALTIES

Article 21
Remedies

1. Without prejudice to any other administrative or judicial remedy, every end-user of electronic communications services shall have the same remedies provided for in Articles 77, 78, and 79 of Regulation (EU) 2016/679.
 - 1a. **End-users who are natural persons shall also have the right to representation provided for in Article 80 of Regulation (EU) 2016/679.**
2. Any natural or legal person other than end-users adversely affected by infringements of this Regulation ~~and having a legitimate interest in the cessation or prohibition of alleged infringements~~, including a provider of electronic communications services protecting its legitimate business interests, shall have a right to bring legal proceedings in respect of such infringements.

Article 22
Right to compensation and liability

Any end-user of electronic communications services who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the infringer for the damage suffered, ~~unless the infringer proves that it is not in any way responsible for the event giving rise to the damage~~ in accordance with Article 82 of Regulation (EU) 2016/679.

Article 23
General conditions for imposing administrative fines

1. For the purpose of this Article, Chapter VIII of Regulation (EU) 2016/679 shall apply to infringements of this Regulation.
2. Infringements of the following provisions of this Regulation shall, in accordance with paragraph 1, be subject to administrative fines up to EUR 10 000 000, or in the case of an undertaking, up to 2 % of the total worldwide annual turnover of the preceding financial year, whichever is higher:
 - (a) the obligations of any legal or natural person who process electronic communications data pursuant to Article 8;
 - (b) the obligations of the provider of software enabling electronic communications, pursuant to Article 10;
 - (c) the obligations of the providers of publicly available directories pursuant to Article 15;
 - (d) the obligations of any legal or natural person who uses electronic communications services pursuant to Article 16.
3. Infringements of the principle of confidentiality of communications, permitted processing of electronic communications data, time limits for erasure pursuant to Articles 5, 6, and 7 shall, in accordance with paragraph 1 of this Article, be subject to administrative fines up to 20 000 000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher.
4. Member States shall lay down the rules on penalties for infringements of Articles 12, 13, **and 14**, ~~and 17~~.

5. Non-compliance with an order by a supervisory authority as referred to in Article 18, shall be subject to administrative fines up to 20 000 000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher.
6. Without prejudice to the corrective powers of supervisory authorities pursuant to Article 18, each Member State may lay down rules on whether and to what extent administrative fines may be imposed on public authorities and bodies established in that Member State.
7. The exercise by the supervisory authority of its powers under this Article shall be subject to appropriate procedural safeguards in accordance with Union and Member State law, including effective judicial remedy and due process.
8. Where the legal system of the Member State does not provide for administrative fines, this Article may be applied in such a manner that the fine is initiated by the competent supervisory authority and imposed by competent national courts, while ensuring that those legal remedies are effective and have an equivalent effect to the administrative fines imposed by supervisory authorities. In any event, the fines imposed shall be effective, proportionate and dissuasive. Those Member States shall notify to the Commission the provisions of their laws which they adopt pursuant to this paragraph by [xxx] and, without delay, any subsequent amendment law or amendment affecting them.

Article 24
Penalties

1. Member States shall lay down the rules on other penalties applicable to infringements of this Regulation in particular for infringements which are not subject to administrative fines pursuant to Article 23, and shall take all measures necessary to ensure that they are implemented. Such penalties shall be effective, proportionate and dissuasive.
2. Each Member State shall notify to the Commission the provisions of its law which it adopts pursuant to paragraph 1, no later than 18 months after the date set forth under Article 29(2) and, without delay, any subsequent amendment affecting them.

CHAPTER VI

DELEGATED ACTS AND IMPLEMENTING ACTS

Article 25 *Exercise of the delegation*

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The power to adopt delegated acts referred to in Article 8(4) shall be conferred on the Commission for an indeterminate period of time from [the data of entering into force of this Regulation].
3. The delegation of power referred to in Article 8(4) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.
4. Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Inter-institutional Agreement on Better Law-Making of 13 April 2016.
5. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
6. A delegated act adopted pursuant to Article 8(4) shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.

Article 26
Committee

1. The Commission shall be assisted by the Communications Committee established under Article 110 of the [Directive establishing the European Electronic Communications Code]. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011⁶.
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

CHAPTER VII

FINAL PROVISIONS

Article 27
Repeal

1. Directive 2002/58/EC is repealed with effect from [25 May 2018].
2. References to the repealed Directive shall be construed as references to this Regulation.

Article 28
Monitoring and evaluation clause

By [1 January 2018] at the latest, the Commission shall establish a detailed programme for monitoring the effectiveness of this Regulation.

⁶ Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13–18).

No later than three years after the date of application of this Regulation, and every three years thereafter, the Commission shall carry out an evaluation of this Regulation and present the main findings to the European Parliament, the Council and the European Economic and Social Committee. The evaluation shall, where appropriate, inform a proposal for the amendment or repeal of this Regulation in light of legal, technical or economic developments.

Article 29
Entry into force and application

1. This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.
2. It shall apply from [25 May 2018].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President

Definitions referred to in art. 4(1)(b), in art. 4(1)(c) and 4(1)(d)

‘electronic communications network’ means transmission systems, whether or not based on a permanent infrastructure or centralised administration capacity, and, where applicable, switching or routing equipment and other resources, including network elements which are not active, which permit the conveyance of signals by wire, radio, optical or other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed;

‘electronic communications service’ means a service normally provided for remuneration via electronic communications networks, which encompasses 'internet access service' as defined in Article 2(2) of Regulation (EU) 2015/2120; and/or 'interpersonal communications service'; and/or services consisting wholly or mainly in the conveyance of signals such as transmission services used for the provision of machine-to-machine services and for broadcasting, but excludes services providing, or exercising editorial control over, content transmitted using electronic communications networks and services;

‘interpersonal communications service’ means a service normally provided for remuneration that enables direct interpersonal and interactive exchange of information via electronic communications networks between a finite number of persons, whereby the persons initiating or participating in the communication determine its recipient(s); it does not include services which enable interpersonal and interactive communication merely as an ~~minor~~ ancillary feature that is intrinsically linked to another service;

‘number-based interpersonal communications service’ means an interpersonal communications service which **uses or** connects with publicly assigned numbering resources, i.e. a number or numbers in national or international numbering plans, or by enabling communication with a number or numbers in national or international numbering plans;

'number-independent interpersonal communications service' means an interpersonal communications service which does not use or connect with publicly assigned numbering resources, i.e. a number or numbers in national or international numbering plans, or by enabling communication with a number or numbers in national or international numbering plans;

‘end-user’ means a user not providing public communications networks or publicly available electronic communications services.

‘call’ means a connection established by means of a publicly available interpersonal communications service allowing two-way voice communication;

‘terminal equipment’ means:

(a) equipment directly or indirectly connected to the interface of a public telecommunications network to send, process or receive information; in either case (direct or indirect), the connection may be made by wire, optical fibre or electromagnetically; a connection is indirect if equipment is placed between the terminal and the interface of the network;

(b) satellite earth station equipment;

‘service’ means any **Information Society service**, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

(i) **‘at a distance’** means that the service is provided without the parties being simultaneously present;

(ii) **‘by electronic means’** means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;

(iii) **‘at the individual request of a recipient of services’** means that the service is provided through the transmission of data on individual request.