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NOTE

From: Presidency
To: Permanent Representatives Committee

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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

The present report has been drawn up under the responsibility of the Presidency and is without prejudice to particular points of interest or further contributions of 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 in the examination of the above mentioned proposal.

I. INTRODUCTION

1. The Commission adopted the proposal for a Regulation on Privacy and Electronic Communications (ePrivacy proposal) on 10 January 2017 with the aim to replace the current ePrivacy Directive¹. The proposal was one of the actions foreseen by the Digital Single Market Strategy² to reinforce trust and security in the Digital Single Market.
2. The aim of the Commission proposal, based on Articles 16 and 114 TFEU, is to ensure protection of fundamental rights and freedoms, in particular the rights to respect for private life and communications and protection of personal data in the electronic communications sector. It contains provisions ensuring confidentiality of electronic communications, including provisions concerning the protection of users' terminal equipment, as well as provisions on end-users' control over their electronic communications. The proposal also covers rules on enforcement and supervisory authorities.
3. In the European Parliament, the lead committee on civil liberties, justice and home affairs (LIBE) 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).
4. The European Economic and Social Committee adopted its opinion on 5 July 2017.

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

II. WORK WITHIN THE COUNCIL

5. 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, 8 June⁵ and 4 December 2018⁶ and 7 June 2019⁷ took note of the progress made respectively under the Maltese, Estonian, Bulgarian, Austrian and Romanian Presidencies. Ministers also held a policy debate and an exchange of views on the proposal at the 8 June and 4 December 2018 TTE Councils respectively. The Finnish Presidency worked intensively to find compromise solutions for various open issues with the view to reaching a general approach. However, at the COREPER meeting held on 27 November 2019 Member States were unable to reach a general approach on the proposed compromise text⁸ and, as a result, the Finnish Presidency presented a progress report⁹ to TTE Council on 3 December 2019.
6. After a thorough reflection on the topic and based on the discussions in the WP TELE, Coreper and in the December 2019 TTE Council, the Croatian Presidency came to the conclusion that at that stage, further work could not continue on the basis of the existing version of the text and that substantial changes in the proposal were necessary. The Presidency therefore proposed a number of revisions to simplify the text of some of the core provisions and to further align them with the GDPR¹⁰.

³ Doc. 9324/17
⁴ Doc. 14374/17 + COR 1
⁵ Doc. 9079/18 + COR 1
⁶ Doc. 14991/18 + COR 1
⁷ Doc. 9351/19 + COR 1
⁸ Doc14068/19 + COR 1
⁹ Doc. 14447/19
¹⁰ Docs. 5979/20 and 6543/20

7. The most important modification introduced by the Presidency was **the possibility to process** electronic communications metadata (article 6b) and to use processing and storage capabilities of terminal equipment and the collection of information from end-users' terminal (article 8) when it is necessary **for the purpose of legitimate interests**. In order to provide a balanced solution, the Presidency has also proposed a number of **safeguards**, namely:

- prohibition to share the metadata or the collected information with third parties, unless they are anonymised;
- the need to carry out an impact assessment and, where appropriate, consult a supervisory authority;
- the obligation to inform the end-users of the envisaged processing operations and to provide them with the right to object;
- the obligation to provide adequate technical and organisational measures, such as pseudonymisation or anonymization

Moreover, the legitimate interest ground cannot be used when the legitimate interests pursued by providers are overridden by interests or fundamental rights and freedoms of the end-users (for instance if the data or information are used to determine the nature or characteristics or the end-user or to build an individual profile of the end-user). The proposed text also provides for certain presumptions for when this would be the case.

Following the introduction of the legitimate interests ground in the text, the Presidency deleted a number of other processing grounds in articles 6b, 6c and 8, which would be considered covered by legitimate interest. Accompanying recitals provide **examples of situations** where the legitimated interests ground could be relied upon. In the case of processing of metadata this could be, for example, when such processing occurs for the purpose of detecting or stopping fraudulent or abusive use of electronic communications services, for calculating and billing interconnection payments, for the purposes of network management or network optimisation or for the purpose of meeting mandatory technical quality of service requirements. In the case of terminal equipment, a legitimate interest could be relied upon, for example, when the storage, processing or collection of information could reasonably be expected by an end-user in the context of an existing customer relationship with the service provider, when it is necessary to fix security vulnerabilities and other security bugs, or for website content or services accessible without direct monetary payment and wholly or mainly financed by advertising.

8. **Other modifications** introduced by the Presidency aimed mainly at further clarifying the text, in particular in the preamble. The Presidency has thus provided further clarifications with regard to processing of electronic communications data by end-users after receipt, including when this is carried out by third parties (recital 8aa). Other clarifications concerned the extent to which the proposed Regulation would apply to Machine-to-Machine or Internet of Things services (recital 12). Finally, the Presidency also tried to streamline the text by reshuffling and regrouping text parts in the preamble, without, in most cases, changing the substance.

N.B. The issues of child imagery or data retention have not been discussed under the Croatian Presidency.

9. Member States' first **reactions to the introduced modifications**, in particular to the introduction of legitimate interests ground, were rather mixed. A number of Member States would prefer not to include this new ground and would prefer to revert to the previous text with a closed list of permitted processing grounds. Others were positive about the new direction of the text trying to align it with the GDPR but warned about the need to keep the right balance between the rights and interests of end-users and those of providers. On the other hand, certain delegations could support going even further in aligning the text to the GDPR. Some also proposed to re-introduce some of the deleted processing grounds back in the text as they were not convinced that those would be adequately covered by legitimate interests, also taking into account all the related safeguards that need to be applied. Certain delegations asked for more clarity when it comes to information society services financed through advertising.

10. Despite the Presidency's best intentions, subsequent deliberations on the ePrivacy proposal in WP TELE were rendered impossible by the outbreak of the COVID-19 pandemic and the measures that had to be taken in this context. In addition, it was clear from the first Member States' reactions, as outlined in the previous paragraph, that further work would be needed on the file. The Croatian Presidency is therefore committed to work closely with the incoming German Presidency in June to facilitate further discussions and to ensure smooth progress on the file.

11. Due to the cancellation of the 5 June TTE Council in relation to the COVID-19 pandemic, the present progress report will be presented by the Presidency to the Permanent Representatives Committee on 3 June 2020 with the invitation to take note of it.