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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) - Progress report

The present report has been drawn up under the responsibility of the Estonian 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 its 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 and, among others, seeks to align the rules for electronic communications with the new standards of the General Data Protection Regulation³ (hereinafter: GDPR) adopted in 2016.
2. In the Council, the proposal and the impact assessment were presented to the Working Party on Telecommunications and Information Society (hereinafter: WP TELE) in February 2017, which was followed by the article-by-article examination of the whole proposal. The Maltese Presidency presented a progress report⁴ to the June 2017 TTE Council.
3. In the European Parliament, the lead LIBE committee adopted its report, together with the mandate to start interinstitutional negotiations on 19 October 2017, which was confirmed by a plenary vote on 26 October 2017. The rapporteur for the file, Marju Lauristin (S&D, Estonia), who has left the European Parliament, has been replaced by Birgit Sippel (S&D, Germany).

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 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)

⁴ Doc. 9324/17

II. STATE OF PLAY IN THE COUNCIL

4. Under the Estonian Presidency, considerable efforts have been put into advancing negotiations on the proposal. The WP TELE has discussed the proposal in six full-day meetings and the Presidency has issued several compromise texts⁵. In this context, the Presidency is grateful for the delegations' constructive approach, bearing in mind that, in many cases, the analysis of the proposal at the national level is still ongoing.
5. On the basis of the discussions in the WP TELE and of the written comments submitted by delegations so far, the Presidency put together the present progress report. The objective is to inform Ministers about the state of play of the proposal and to draw attention to the issues that will necessitate further discussions.
 - i. **Link to the General Data Protection Regulation (GDPR) and consent**
6. During the discussions and in their written comments, many delegations inquired about the interplay between the ePR and the GDPR. Delegations sought clarifications with regard to the application of the 'lex specialis' principle to the ePR vis-à-vis the GDPR, in particular bearing in mind that not all electronic communications data qualifies as personal data and that while the ePR covers electronic communications data of both natural and legal persons, the GDPR only protects natural persons' related data.
7. The Presidency has introduced changes in the text with the aim to make clear that the ePR is a lex specialis vis-à-vis the GDPR as far as personal data (i.e. of natural persons) is concerned. If no specific rules are established in the ePR, the provisions of the GDPR apply to any processing of data that qualify as personal data. Moreover, the GDPR as such does not apply to data related to legal persons which does not constitute personal data. Therefore it should be clear that relevant provisions of the GDPR shall apply to them, for the purposes of the ePR, only where the ePR explicitly provides for it.

⁵ Doc. 11995/17, 12955/17, 13217/17+COR1

8. In this connection, a lot of work has been done also on the concept of consent that comes from the GDPR. Firstly, the provision on consent has been moved to the general provisions to ensure that the same concept is applied throughout the proposal. Secondly, a number of delegations raised concerns with regard to who can give the GDPR-compliant consent on behalf of legal persons. In this regard, the Commission has provided explanation based on the distinction whether a natural person is using the service concerned (then this natural person has to give the consent) or not (in such a case national law provides who can act on behalf of a legal person).
9. While delegations mostly welcome the clarifications mentioned in points 7 and 8, it is clear that further work is needed with regard to specific wording of the relevant provisions.
- ii. **Machine-to-machine communications**
10. Delegations raised concerns with regard to the application of the ePR to machine-to-machine communications, in particular those that only involve business-to-business communications or communications without human interaction. The first Presidency compromise proposal included a provision specifying that machine-to-machine communications were only covered as long as they were related to end-users. However, following further analysis of the issue, the Presidency has proposed to clarify that the ePR follows the same approach as in the compromise proposal of the European Electronic Communications Code (EECC)⁶. Under the EECC compromise proposal the transmission services used for the provision of machine-to-machine services constitute an electronic communications service and as such should be covered by the ePR. However, the application layer of such machine-to-machine services, which does not normally constitute an electronic communications service, is not covered by the ePR.
11. Further reflection is necessary on this approach, including on the appropriate way to translate it in concrete drafting. Furthermore, the aim of future discussions should also be to dispel certain misunderstandings surrounding this rather complicated topic.

⁶ Latest version: doc. 12797/1/17 REV 1

iii. **Publicly available directories**

12. Discussions on publicly available directories (article 15) focused mainly on the question of who the relevant obligations should be addressed to. In line with the approach taken in the EECC, the Presidency has proposed to address them to providers of number-based interpersonal communications services instead of providers of directories as they should have easier access to the end-user. The latter approach seemed to be supported by many delegations but its consequences still need to be carefully considered. Delegations also sought clarity on what is actually considered to be a publicly available directory under the ePR proposal.
13. Moreover, some delegations raised a question of the added value of the provision vis-à-vis the protection already offered (for natural persons) by the GDPR.

iv. **Direct marketing communications**

14. The original Commission proposal provided that persons making direct marketing calls should either present their calling line identification or use a specific prefix (specified by the Commission's implementing act) indicating that their call is a marketing call. Delegations raised concerns regarding the difficulties to enforce such an obligation and regarding the related implementing act from the numbering management point of view. The Presidency has therefore proposed that presentation of the calling line identification by persons making direct marketing calls shall be mandatory. In addition, if Member States so wish, they can require by national law that persons making direct marketing calls use specific codes or prefixes. In such a case the code or prefix should be made available at national level, which removes the need for the implementing act. While a number of delegations indicated that the Presidency proposal is moving in the right direction, concerns remain as to the technical feasibility as well as compatibility with national and international rules on numbering that need further examining.

v. **Supervisory authorities**

15. Most delegations asked for more flexibility with regard to the supervisory authorities. Keeping in mind that the Data Protection Authorities (DPAs) have the experience and knowledge needed to monitor the application of Chapter II of ePR and, on the other hand, some of the provisions might require expertise beyond DPAs competences, the Presidency has proposed 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. While certain delegations would still prefer to keep flexibility with regard to supervision of the whole proposal, including Chapter II, others found the Presidency proposal to be moving in the right direction.
16. Further work will be needed on the text of the relevant provisions, bearing in mind the requirements stemming from Article 8(3) of the Charter and Article 16(2) of the TFEU, including on the cooperation between the supervisory authorities and on the role of the European Data Protection Board.

vi. **Grounds for processing electronic communications data, protection of terminal equipment, browser privacy settings**

17. From the initial discussions on the permitted processing of electronic communications data (article 6), it is clear that further analysis is necessary as to whether, and to what extent, the grounds for processing proposed by the Commission need to be complemented by additional grounds. Further consideration might be needed of certain grounds permitted under the GDPR, keeping in mind, on the other hand, the specific nature of the electronic communications data.
18. Further discussions will be needed on the issue of the protection of the end-users' terminal equipment, including the use of cookies and other tracking techniques as well as on device tracking (article 8). Delegations stressed the need to find a balance between ensuring proper privacy protection without undermining legitimate business models. On cookies, considerations should also be given to their purpose and their actual impact on privacy.

19. With regard to software privacy settings (article 10), delegations raised a number of relevant questions that need to be addressed before any redrafting of the text can take place. Those include the impact on the role of browsers in the internet ecosystem, the added value from the user perspective or the question of whether, given the existing market solutions, regulation is needed at all in this respect.

vii. **Data retention**

20. 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 DAPIX - Friends of Presidency setting. The Presidency has, however, organised a joint DAPIX - FoP/ WP TELE meeting which focused on the issues relevant in the ePR context, in particular the availability of electronic communications data. Following the joint meeting, the debate was opened also in the WP TELE. Delegations proposed various solutions in the context of articles 2 (scope), 6 (permitted processing), 7 (storage and erasure) and 11 (restrictions of rights and obligations under Chapter II), which will need to be analysed in future discussions.

viii. **Other elements**

21. The Presidency has put considerable efforts into addressing other elements of the proposal, such as clarifying the material scope, the requirement of a representative or clarifying the scope of ancillary services. Further analysis is needed on those elements.

III. CONCLUSION

22. The above listed issues represent a selection of topics discussed in the WP TELE so far. There is a number of other issues that that will need to be addressed, such as the definitions or Chapters V, VI and VII.
23. The Presidency keeps a possibility for an additional WP TELE meeting in December, which would, if confirmed, focus on articles 6 to 8 and 10 to facilitate future progress on this proposal.