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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 and exchange of views

The Presidency has foreseen a progress report and an exchange of views on the above file for the TTE Council of 4 December 2018. The Council will be invited to take note of the progress made to date on the basis of the report set out in Annex I. The exchange of views will be based on the question proposed 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 Austrian Presidency and is without prejudice to particular points of view 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 with the examination of the above mentioned proposal.

I. INTRODUCTION

1. The Commission adopted the proposal for a Regulation on Privacy and Electronic Communications 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 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).

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. 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 and 8 June 2018⁵ took note of the progress made respectively under the Maltese, Estonian and Bulgarian Presidencies. In addition, the TTE Council of 8 June 2018 held a policy debate, which clearly indicated that, while the text was moving in the right direction, further work was necessary, in particular on such issues as processing of electronic communications data, protection of terminal equipment, privacy settings or supervisory authorities.
4. Under the Austrian Presidency, the WP TELE examined this proposal further at several meetings, with particular attention to the topics mentioned above. In order to advance the work on this file, the Presidency has issued a number of new compromise texts⁶ and introduced some significant changes on the key provisions of the proposal, with the overall goal to bring the proposal closer to the General Data Protection Regulation (hereinafter: GDPR). Section II below outlines the progress on the main elements discussed in the WP TELE during the second half of 2018.

³ Doc. 9324/17

⁴ Doc. 14374/17 + COR 1

⁵ Doc. 9079/18 + COR 1

⁶ Docs. 10975/18, 12336/18, 13256/18

II. STATE OF PLAY IN THE COUNCIL

5. With regard to the permitted processing of electronic communications data (article 6) , discussions both at the WP and at the Council level highlighted the need for the regulation to be more future-proof and flexible enough to enable the development of innovative services. With this in mind, the Presidency has introduced a possibility for further compatible processing of electronic communications metadata, inspired by the GDPR. At the same time, in order to ensure responsible treatment of data in question, the Presidency has complemented this new provision with corresponding safeguards, again taking inspiration from the GDPR. The Presidency has also added a new ground for processing of electronic communications data necessary for the protection of terminal equipment and introduced smaller textual changes throughout article 6. Many delegations have indicated that the text is moving in the right direction, but for several Member States concerns about sufficient incentives for innovation and about the need to align closer with the GDPR remain while there are also several Member States which would be more favourable of a closed list of permitted processing. In addition, several delegations see the need to address, in the context of this Regulation, also the issue of processing data to detect child pornography while some Member States call for caution regarding de facto law enforcement by electronic communications service providers. The WP TELE has also debated about the processing of content and metadata by third parties for ensuring information security and preventing fraud. In this regard, the Presidency has proposed to make clear in the provision on the material scope (article 2) that the Regulation does not apply to the processing, by the end-users concerned or third parties entrusted by them, of content after receipt or of metadata.

6. With regard to protection of terminal equipment information (article 8), the discussions evolved mainly around the issue of conditional access to website content and the need not to undermine business models, such as for instance online services financed through advertising, in particular media websites, while respecting the relevant conditions under the GDPR. The Presidency has made several proposals on how to address this issue in respective recitals which appear to present a balanced reflection of Member States' views. Nevertheless, it appears that some Member States suggest to work further on this text.
7. Throughout the discussions on the proposal, the provision on privacy settings (article 10) has raised a lot of concerns, including with regard to the burden for browsers and apps, the competition aspect, the link to fines for non-compliance, but also the impact on end-users and the ability of this provision to address the issue of consent fatigue, thus raising doubts about its added value. Taking these elements into account, the Presidency has decided to remove article 10. Some delegations could support the deletion while others would prefer to have a simple and light provision on the information about privacy settings to be provided to the end-user.
8. Following discussions both at the WP and Council level and also as indicated in the last progress report, most delegations sought further flexibility with regards to the supervisory authorities (article 18). In order to address this issue, the Presidency has significantly simplified the respective provision which, nevertheless, has to be read in conjunction with the independence requirements stemming from Article 8(3) of the Charter and Article 16(2) of the TFEU. Also, as a consequence of this change, further clarification will be needed with regard to cooperation among various authorities involved and with regard to the role and involvement of the European Data Protection Board.

9. While the issue of data retention is primarily discussed in a different formation (Friends of Presidency on Data Retention under the Justice and Home Affairs Council) delegations underline the need to ensure that the related provisions of the ePrivacy Regulation (article 11 and relevant parts of article 2) do not negatively impact on any potential solution that may eventually be found on data retention.
 10. Following the WP TELE on 22 November 2018, the Presidency will submit the progress report together with the question for the exchange of views to the Coreper on 28 November 2018 with a view to submit it to the TTE Council on 4 December 2018.
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Question for the policy debate at the TTE Council of 4 December 2018

Ministers are invited to exchange views on the basis of the following question:

Do Ministers consider that the most recent work undertaken in Council has moved the text in a good direction in terms of achieving a high level of data and privacy protection and at the same time facilitating business opportunities in the digital era? In this respect, what are the main outstanding issues that still have to be addressed before entering into negotiations with the European Parliament?
