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#### NOTE

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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) - Examination of the Presidency discussion paper
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#### INTRODUCTION

At the WP TELE meeting on 30 January (a.m. only), the Presidency would like to continue the discussion of both policy and technical nature on the proposal for a Regulation on Privacy and Electronic Communications ("ePrivacy proposal" or "ePR"), this time focussing on Articles 12 to 16. With a view to that meeting, delegations will find below the topics for discussion proposed by the Presidency on the basis of comments raised by delegations in previous WP TELE meetings, as well as delegations' written comments. The Presidency has based its work on the latest version of the proposal - document 15333/17 issued by the EE Presidency.

At the meeting of 30 January, the Presidency will invite delegations to express their views on these options.

## DISCUSSION TOPICS

### 1. Article 12: Presentation and restriction of calling and connected line identification

Article 107(1) of the EECC<sup>1</sup> provides:

"Without prejudice to Article 83(2), Member States shall ensure that competent authorities are able to require all undertakings that provide internet access services and/or publicly available number-based interpersonal communications services to make available free of charge all or part of the additional facilities listed in Part B of Annex VI, subject to technical feasibility, as well as all or part of the additional facilities listed in Part A of Annex VI."

Additional facilities listed in Part B of Annex VI of the EECC include *inter alia* calling line identity, subject to technical feasibility.

Article 12 of the ePR applies where presentation of the calling and connected line identification is offered in accordance with Article 107 of the EECC, thus when availability of the facility is required by the competent authorities.

Article 12 follows the ePrivacy Directive and thus the status quo. Article 12 in doc. 15333/17 has not been substantially amended vis-à-vis the Commission's proposal.

#### The Presidency seeks the views of delegations on:

- **Option 0:** Keep the status quo, as under the ePrivacy Directive and in doc. 15333/17, i.e., ensuring alignment with Article 107 of the EECC.
- **Option 1:** Further clarifying the relationship with Article 107 EECC in recitals. In this case, which clarification would be needed?
- **Option 2:** Are any further changes needed in art. 12 as set out in doc. 15333/17? And if yes, how should they be formulated?

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<sup>1</sup> doc. 12797/1/17 REV 1 + COR 1

## 2. Article 13: Exceptions to provide access to emergency services

Article 13(1) concerns exceptions to Articles 6 and 12 of the ePR to ensure access to emergency services. To this end, it requires providers of number-based interpersonal communications services to 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, for the purpose of responding to such communications.

Article 13(3) in doc. 15333/17 would address new techniques to locate an end-user calling to emergency services, explained in recital 28:

"(..)Location information established by the terminal equipment, using its built-in Global Navigation Satellite Systems (GNSS) capabilities may supplement the location data supplied by providers of number-based interpersonal communications services when a call is made to emergency services. The temporary denial or absence of consent of an end-user to access location data provided by the terminal equipment GNSS, for example, because location settings are turned off, shall not prevent the transfer of such information to emergency services for the purposes of facilitating access to such services."

Article 13(2) of doc. 15333/17 requires Member States to establish more specific provisions with regard to the establishment of procedures and the circumstances where providers of 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 13 (1) and (2) are a continuation of exceptions existing in the ePrivacy Directive and thus maintain the status quo.

**The Presidency seeks the views of delegations on:**

- **Option 0:** Keep the provision as in doc. 15333/17.
- **Option 1:** Extend the scope to all providers of interpersonal communications services, as opposed to only providers of number-based interpersonal communications services. And if yes, for which paragraphs would it be appropriate?
- **Option 2:** Are any further changes needed in art. 13 as set out in doc. 15333/17? And if yes, how should they be formulated? (e.g., clarifications in recitals?)

**3. Article 14: Incoming call blocking**

Article 14 requires providers of number-based interpersonal communications services to deploy state of the art measures to limit the reception of unwanted malicious or nuisance calls by end-users. It also regulates the possibility for end-users to block incoming calls from specific numbers or from anonymous sources or from numbers using a specific code or prefix referred to in Article 16(3a). In addition, it gives end-users the possibility to stop call forwarding by a third party to the end-user's terminal equipment.

Malicious or nuisance calls figure very high on the list of consumer complaints to the responsible authorities. Article 14 provides for measures addressing these complaints and is based on the existing ePrivacy Directive.

**The Presidency seeks the views of delegations on:**

- **Option 0:** Keep the provision as in the doc. 15333/17.
- **Option 1:** Are any further changes needed in art. 14 as set out in doc. 15333/17? And if yes, which changes? For instance, in line with the proposal for EECC subject to technical feasibility.

#### 4. Article 15: Publicly available directories

Art. 15 (1) in document 15333/17 provides that:

"The providers of number-based interpersonal communications services shall give end-users who are natural persons the opportunity to determine per category of personal data whether their personal data are included in the publicly available directory (...)."

Annex VII bis, B.II of the EECC<sup>2</sup> requires that:

"(...) providers of publicly available number-based interpersonal communications services shall also provide the following information:

(...)

(2) the end-user's right to determine whether or not to include his or her personal data in a directory, and the types of data concerned, in accordance with Article 12 of Directive 2002/58/EC;"<sup>3</sup>

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<sup>2</sup> doc. 12797/1/17 REV 1 + COR 1

<sup>3</sup> Directive 2002/58/EC: Article 12 Directories of subscribers

1. Member States shall ensure that subscribers are informed, free of charge and before they are included in the directory, about the purpose(s) of a printed or electronic directory of subscribers available to the public or obtainable through directory enquiry services, in which their personal data can be included and of any further usage possibilities based on search functions embedded in electronic versions of the directory.

2. Member States shall ensure that subscribers are given the opportunity to determine whether their personal data are included in a public directory, and if so, which, to the extent that such data are relevant for the purpose of the directory as determined by the provider of the directory, and to verify, correct or withdraw such data. Not being included in a public subscriber directory, verifying, correcting or withdrawing personal data from it shall be free of charge.

3. Member States may require that for any purpose of a public directory other than the search of contact details of persons on the basis of their name and, where necessary, a minimum of other identifiers, additional consent be asked of the subscribers.

4. Paragraphs 1 and 2 shall apply to subscribers who are natural persons. Member States shall also ensure, in the framework of Community law and applicable national legislation, that the legitimate interests of subscribers other than natural persons with regard to their entry in public directories are sufficiently protected.

Art. 15 of doc. 15333/17 follows the language of the ePrivacy Directive and of Annex VII bis of the EEC Directive and foresees 'the opportunity to determine' whether personal data are included in the publicly available directory, as compared to the Commission's proposal that requires the end-users consent before personal data can be included in a publicly available directory.

Referring to 'the opportunity to determine' may not achieve the goals of harmonisation since, as it is the case today, it may be interpreted as requiring consent (opt-in), but as well as a right to object (opt-out).

Doc. 15333/17 makes providers of number-based interpersonal communications services addressee of the provision, instead of providers of publicly available directories, as they should have easier access to the end-user.

In addition to changing the addressee of the provision, providers of number-independent interpersonal communications services are excluded from the scope of the provision. This might have as a consequence that the inclusion of contact details of end-users of such service providers in a publicly available directory would be subject to a different legal framework than of the end-users of number-based interpersonal communications services.

During previous meetings, the status of natural persons that act in a professional capacity (having a status of an independent worker) was discussed, more in particular, whether they should fall under the rules on the inclusion of contact details in publicly available directories for end-users who are natural persons or legal persons. The delegations are requested to take into account the level of protection currently provided for this group in various Member States and this group's interests.

During previous meetings, it also appeared that more clarity might be needed on what is actually considered to be a publicly available directory under the ePR. Questions were raised for instance with regard to certain lists available online, that contain, besides the basic information such as names and phone numbers, also other information such as opening hours, ratings etc.

## The Presidency seeks the views of delegations on:

- **Option 0:** Keep the provision as in the doc. 15333/17.
- **Option 1:** Extend the scope to number independent electronic communications services, as in the initial Commission proposal, subject to setting out how exactly consent would be expressed in those cases, bearing mind that often users of number-independent electronic communications services use nicknames.
- **Option 2:** Regarding the addressee of Article 15 (1), (1a) and (2):
  - **Option 2.1:** The obligations under Article 15 (1), (1a) and (2) should be addressed to both providers of number-based interpersonal communications services and to the providers of publicly available directories.
  - **Option 2.2:** The obligation under Article 15 (1) should be addressed to the providers of number-based interpersonal communications services, subsequent rights under Article 15 (1a) and (2) should be addressed to both providers of number-based interpersonal communications services and to the providers of publicly available directories.
- **Option 3:** Whether there is a need for uniform rules, which could be created by replacing 'the opportunity determine' in Article 15(1) by:
  - **Option 3.1:** Setting forth a requirement to obtain the consent of an end-user who is a natural person ("opt-in"). For Member States that currently allow for an opt-out system, should the Regulation provide for transitional measures, and if so, which ones?
  - **Option 3.2:** Giving end-users who are natural persons the right to object (opt-out) to have their personal data being included in a public directory, bearing in mind that this would lower the level of protection of end-users that are natural persons in Member States that currently require consent for inclusion of personal data in a publicly available directory. Again, this sub-option should be considered in the light of the need for transitional measures.
- **Option 4:** Clarify in recitals that for the purpose of Article 15, natural persons acting in a professional capacity should be treated as legal persons.
- **Option 5:** Is there a need for more clarity on the concept of publicly available directory?
- **Option 6:** Are any further changes needed in art. 15 as set out in doc. 15333/17? And if yes, how should they be formulated?

## 5. Article 16: Direct marketing

The ePrivacy proposal requires, just as the ePrivacy Directive, consent for the use of automated calling systems without human intervention, facsimile machines (fax) or electronic mail for the purposes of direct marketing. For the placing of direct marketing voice-to-voice calls, Member States may provide by law a right to object to receiving such calls. This approach is the same as under the ePrivacy Directive. Some Member States that currently provide for a right to object have introduced Do Not Call Registers to make the right effective. Such a register ensures that end-users in Member States with an opt-out system can object to receiving direct marketing voice-to-voice calls via providers of a Do Not Call Registers and only need to opt-out once.

The Commission proposal introduces a new requirement vis-à-vis the ePrivacy Directive, namely that natural or legal persons using electronic communications services for the purposes of placing direct marketing calls shall either present the identity of a line on which they can be contacted; or present a specific code/or prefix identifying the fact that the call is a marketing call. The Commission shall be empowered to adopt implementing measures specifying the code/or prefix to identify marketing calls.

Doc. 15333/17 amended Article 16 on this point, requiring natural or legal persons using electronic communications services for the purposes of placing direct marketing calls to present the identity of a calling line identification on which they can be contacted. In addition, Member States may require natural or legal persons using electronic communications services for the purposes of placing direct marketing calls to present a specific code/or prefix identifying the fact that the call is a direct marketing. Member States requiring the use of such a specific code or prefix shall make it available, removing the need for implementing measures.



Regarding direct marketing voice-to-voice calls, the level of protection offered already to the users should not be lowered compared to what is now at stake in the e-Privacy Directive. The delegations are asked to consider in what way the direct marketing voice-to-voice calls to natural and legal persons should be regulated. **Delegations could consider whether it should be left to the Member States to determine the use of an opt-in or opt-out system as in doc. 15333/17, whether there should be a general opt-in system or whether there should be a general opt-out system. The introduction of an obligatory opt-out system for voice-to-voice calls would have as a consequence lowering the level of protection in some Member States that currently have a consent-based system.**

Recital (32) of doc. 15333/17 clarifies that:

"(...) The provisions on direct marketing communications do not apply to any other form of marketing, e.g. displaying advertising to the general public on a website which is not directed to any specific identified or identifiable end-user. (...)".

#### **The Presidency seeks the views of delegations on:**

- **Option 0:** Whether to keep the provision as in doc. 15333/17 or revert to the Commission's proposal regarding the use of a prefix/code for direct marketing calls, but leave to the Member States to specify the code/or prefix to identify marketing calls in line with the national numbering competences.
- **Option 1:** Whether there is a need for uniform rules across Member States for direct marketing voice-to-voice calls to end-users who are natural persons (Article 16(4)):
  - **Option 1.1:** There is a need for uniform rules and there should be an obligation to obtain the consent from the end-user who is a natural person for direct marketing calls (opt-in).
  - **Option 1.2:** No harmonisation is needed and Article 16(4) should remain, allowing Member States to derogate from Article 16(1) for direct marketing voice-to-voice calls to end-users who are natural persons. To make the opt out workable, the ePrivacy Regulation should set forth the conditions for a Do Not Call Register, and require Member States with an opt-out system to provide for such register.

- **Option 2.3:** No harmonisation is needed and Article 16(4) should remain, allowing Member States to derogate from Article 16(1).
  - **Option 2.4:** There is a need for uniform rules and there should be an obligation to provide for a right to object to end-users who are natural persons for direct marketing calls (opt-out).
  - **Option 3:** Whether there is a need for uniform rules for direct marketing communications with regard to end-users that are legal persons and there should be an opt-out system for such communications (Article 16(5)).
  - **Option 4:** Recital (32) of doc. 15333/17 clarifies what constitutes direct marketing communications. Is more clarification needed? Is there any need for alignment with the requirements of the eCommerce Directive?
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