



Brussels, 7 February 2018
(OR. en)

5827/18

Interinstitutional File:
2017/0003 (COD)

LIMITE

JAI 69
COPEN 22
DAPIX 22
ENFOPOL 44
CYBER 18
EUROJUST 9
TELECOM 27
COMPET 62
MI 70
DATAPROTECT 11
CONSOM 30
DIGIT 12
FREMP 8
CODEC 164

NOTE

From:	Presidency
To:	Delegations
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No. Cion doc.:	5358/17 TELECOM 12 COMPET 32 MI 45 DATAPROTECT 4 CONSOM 19 JAI 40 DIGIT 10 FREMP 3 CYBER 10 IA 12 CODEC 52
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

INTRODUCTION

With a view to the joint meeting of the DAPIX - Friends of Presidency on Data Retention and the WP TELE on 12 February (agenda item 4), delegations will find below a Presidency discussion paper related to Articles 2 and 11 of the proposal for a Regulation on Privacy and Electronic Communications (ePR). The Presidency would like to invite an exchange of views on several topics identified by the Presidency on the basis of comments raised by delegations in previous meetings and/or delegations' written comments.

In line with the approach undertaken by the Presidency with regard to the rest of the articles of this dossier (doc. 5165/18 and 5569/18) the purpose of the current discussion paper is to clarify the provisions of Article 11 in the light of the main objective of the ePR file, namely, to protect the confidentiality of personal data and private life in electronic communications and to define the way forward.

DISCUSSION TOPICS

1. Scope and link between Articles 2 and 11 of ePR

Some delegations raised questions with regard to the interaction between Articles 2 and 11 of ePR.

Article 2 excludes certain activities from the scope of the ePR, in particular activities which fall outside the scope of Union law (art. 2(2)(a) or activities of competent authorities related to criminal matters (art. 2(2)(d)).

On the other hand, Article 11(1) of ePR allows the EU and Member States, under certain conditions, to restrict the rights and obligations provided for in Articles 5 to 8 of ePR by means of legislative measures, making a reference, among others, to art. 23(1)(a) (national security) and (d) (criminal matters) of GDPR.

This structure basically replicates the status quo under the current ePrivacy Directive 2002/58 (Articles 1(3) in combination with Article 15(1)), which, according to the ECJ in its Tele 2 judgement, does not permit the conclusion that the national legislative measures referred to in Article 15(1) are excluded from the scope of the ePrivacy Directive, for otherwise that provision would be deprived of any purpose.

Some delegations raised concerns that the current texts of Articles 2 and 11, in the context of the Tele 2 ruling, could lead to misinterpretations bearing in mind that national security, as defined in Article 4(2) of TEU, remains the sole responsibility of Member States.

Moreover, whereas processing activities of competent authorities related to national security are outside the scope of EU law, the current text leads to the situation where processing activities of competent authorities in criminal matters are regulated by Directive 2016/680 on data protection in police and criminal judicial matters, while any related activities of electronic communications service (ECS) providers fall under Article 11 of ePR.

The Presidency seeks the views of delegations on:

Option 0: keeping the status quo

Option 1: excluding activities of ECS providers from the scope of ePR in Article 2:

Sub-option 1.1: when the ECS providers are assisting competent authorities in relation to national or public security, with the result that such matters would fall under Article 23(1)(a) and (c) of GDPR, and/or

Sub-option 1.2: when the ECS providers are assisting the competent authorities in relation to crime investigation with the result that such matters would fall under Article 23(1)(d) of GDPR

Option 2: Do delegations foresee any other solutions to address the interaction between Articles 2 and 11?

2. List of general public interests referred to in Article 11(1) of ePR

Article 11(1) contains a reference to Article 23(1)(a) to (e) of GDPR. These provisions represent general public interests grounds which can justify the need for legislative measures restricting some of the rights and obligations under the ePR.

Delegations raised a number of questions with regard to that list, for instance why some of the interests listed in the GDPR have not been taken over in the ePR, whether the two provisions should be aligned or what further safeguards could be provided.

The Presidency therefore seeks the views of delegations on:

Option 0: Whether they consider the reference to points (a) to (e) of Article 23(1) of GDPR sufficient.

Option 1: Should the list of general public interests be amended? If so, which additional provisions of Article 23(1) of GDPR should be taken over?

Option 2: Should the list be accompanied by further safeguards, e.g. taking inspiration from Article 23(2) of GDPR?

3. Obligations under Article 11(2) of ePR

Article 11(2) requires ECS providers to establish internal procedures for responding to requests for access to end-users' data and to provide Data Protection Authority (DPA) with information about the procedures, number of requests, justification and their response. The aim of this provision is to provide the DPA with statistical information allowing for adequate monitoring of the application of Article 11(1).

Delegations raised a number of concerns with regard to this provision. Some asked for clarifications on which categories of data or documents ECS providers have to retain and for how long. Others asked about the purpose of the DPA collecting such data. On the other hand, there was also a proposal to provide more detailed information to the DPAs, which would allow DPAs to assess the general situation as well as individual requests for access to end-users' data.

The Presidency seeks the views of delegations on:

Option 1: Keeping the provision as it stands now.

Option 2: Detailing the obligation of the ECS providers with regard to what information or documents about requests they should keep (e.g. staff that handled the request, authority making the request, the purpose of the request, date and time, number of end-users concerned etc.) combined with:

Sub-option 2.1: an annual statistical report by ECS providers and/or

Sub-option 2.2: an annual statistical report by DPAs.

Option 3: Taking into account that Article 11(2) deals with requests for access to electronic communications data, it could be considered whether this issue should not be regulated in a different legislative context.

Besides the issues outlined above, delegations are also invited to comment/present their views on any other issues they deem necessary, related to Articles 2 and 11, in the context of the ECJ jurisprudence.
