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to: President of the Council of the European Union
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Subject: Proposal for a Directive of the European Parliament and of the Council on the
harmonisation of the laws of the Member States relating to the making available
on the market of radio equipment
– Formal comments

Delegations will find attached the formal comments by the European Data Protection Supervisor on the above mentioned Directive.

Formal comments of the EDPS on a Proposal for a Directive 'on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment', replacing the R&TTE Directive 1999/5/EC

On 17 October 2012, the Commission put forward a Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment (hereafter 'the Proposal')¹, which will replace the R&TTE Directive 1999/5/EC.

By way of background, it must be underlined that the R&TTE Directive on radio equipment and telecommunication terminal equipment and the mutual recognition of their conformity² has been very important from a data protection perspective as an incentive for manufacturers of such equipment to build in 'privacy by design'. Article 3(3)(c) of Directive 1999/5/EC in particular, as well as recitals 17 and 19, have provided language to allow privacy and data protection to be considered from a very early stage of the design of the equipment. This concept of 'privacy by design', which is particularly crucial for data protection, is also being emphasized in the context of the proposal for a data protection Regulation³.

I. General comments

The EDPS welcomes that the Proposal builds on the approach of the R&TTE Directive as regards privacy and data protection. In particular, he notes with satisfaction the references to privacy and data protection in recitals 14 and 18 of the Proposal, and that privacy and data protection remain considered as essential requirements for the design of radio equipment in Article 3(3)(c) of the Proposal.

Furthermore, the EDPS is pleased to see that Article 3(3)(c) of the Proposal requires that radio equipment be so constructed that 'radio equipment incorporates safeguards to ensure that the personal data and privacy of the user and of the subscriber are protected'. This obligation will help ensure that 'privacy by design' is built in the radio equipment.

A similar obligation to integrate 'privacy by design' is also imposed for the design of radio equipment that would be combined with software, in Article 4 of the Proposal. This is also welcomed as this will allow an appropriate consideration of the additional personal data and privacy protections that should be embedded in the equipment taking into account the possibilities offered by the use of radio equipment together with software and their potential risks on the privacy and data protection of users.

¹ COM (2012) 584 final.

² OJ L 091, 07/04/1999, p.10-28.

³ See Article 23(1) of the Proposal for a Regulation of the European Parliament and Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012) 11 final.

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The EDPS also welcomes the clarification in Article 10(1) of the Proposal that manufacturers are under an obligation to ensure that radio equipment placed on the market has been designed and manufactured in accordance with the essential requirements set out in Article 3, which underlines the responsibility of equipment manufacturers. This is in line with the concept of accountability which is also an essential aspect of the proposal for a data protection Regulation.

II. Specific comments on the scope of the Proposal

From a data protection viewpoint, the EDPS regrets the reduction of the scope of the directive. Article 2(1) of the Proposal sets out a new definition of 'radio equipment', that includes all and only equipment which intentionally transmits signals using radio spectrum, whether for the purpose of communication or other. The scope of the new Proposal would no longer include terminal equipment not using radio, which means that the rules providing an obligation to build in 'privacy by design' will only apply to a much more limited range of devices.

This is particularly regrettable as none of the other legislative instruments referred to in the Proposal, which apply to terminal equipments not using radio, make any reference to the protection of personal data and privacy⁴. Even though the Commission has never used its powers to formally require manufacturers to build in 'privacy by design' in that domain, the presence of these powers in the R&TTE Directive may be a strong incentive for industry stakeholders to pursue and maintain self regulation initiatives in order to avoid regulatory intervention.

Recital 5 of the Proposal points out that competition issues in the market for terminal equipment which would no longer be covered by the new Directive still falls within the scope of Commission Directive 2008/63/EC which allows Member States to *"refuse to allow such equipment to be connected to the public telecommunications network where it does not satisfy the relevant common technical regulations adopted in pursuance of Directive 1999/5/EC or, in the absence thereof, the essential requirements laid down in Article 3 of that Directive"*.

However, the EDPS underlines that this wording does not provide for an explicit obligation for manufacturers and importers of terminal equipment to comply with the essential requirements but only for the possibility to refuse connection to public networks. Besides, the impact assessment has not analysed whether this new legal situation can promote compliance with essential public interest requirements as effectively as the R&TTE Directive. The impact assessment focuses mainly on the radio related requirements such as the avoidance of harmful interference and efficient use of spectrum and does not provide a thorough analysis of the impact on other public interest objectives, such as privacy and data protection.

The EDPS underlines that terminal equipment plays an increasingly important role for the protection of privacy due to the abundance of services and applications processing personal data. Appropriate features of terminal equipment, radio based or not, can provide users with certain minimum levels of transparency and control, even when functionality is added through software in the form of apps, etc. The existing provision of the current R&TTE Directive

⁴ It is stated in page 7 of the Explanatory Memorandum that '[p]ure receivers and fixed-line terminals cease to fall within the scope of the Directive, falling instead within the scope of Directive 2004/108/EC and Directive 2006/95/EC, or depending on their voltage falling within the scope of Directive 2004/108/EC and Directive 2001/95/EC.' Furthermore, recital 4 states that '[t]he essential requirements in Directive 1999/5/EC which are relevant to fixed-line terminal equipment, i.e. the protection of health and safety and the protection of electromagnetic compatibility, are appropriately covered by Directive 2006/95/EC [...] and 2004/108/EC [...]'.
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connects well with the possibility provided for by the Authorisation Directive 2002/20/EC, which in its Annex allows for conditions related to privacy and personal data to be attached to a general authorisation of electronic communications services. By removing fixed terminal equipment from the scope of the Directive, the incentive for seamless 'privacy by design rules' is reduced.

In order to maintain the motivation and incentives for 'privacy by design' and other non-technical public interest objectives, the EDPS recommends that the Proposal should include a commitment from the Commission to monitor the compliance of terminal equipment with such essential requirements and consider appropriate measures should the need arise.

Brussels, 27 February 2013