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MI 409
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NOTE

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 Maltese Presidency and is without prejudice to particular points of interest 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. On 10 January 2017, the Commission adopted its proposal for a Regulation on Privacy and Electronic Communications. The proposed Regulation will replace the current ePrivacy Directive¹, the review of which was foreseen by the Digital Single Market Strategy² as one of the actions to reinforce trust and security as well as a level playing field for all market players in the Digital Single Market.
2. The proposal, based on Articles 16 and 114 TFUE, aims to ensure protection of fundamental rights and freedoms, in particular the rights to respect for private life and communications and protection of personal data in the electronic communications sector. It also aims to ensure free movement of electronic communications data and services in the EU. Furthermore, the proposal seeks to align the rules for electronic communications with the new standards of the General Data Protection Regulation³ (hereinafter: GDPR) adopted in 2016.
3. The proposal contains provisions ensuring confidentiality of electronic communications and specifies under which conditions processing of electronic communications data is permitted. It covers the protection of users' terminal equipment, updates the rules on cookies and introduces provisions on device tracking. With regard to control of end-users over their electronic communications, the proposal provides for possibilities to prevent the presentation of the calling line identification and updates the current rules on public directories and spam.

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. The proposal extends the scope of the current rules to cover not only traditional telecom operators but also new internet-based services enabling inter-personal communications such as Voice over IP, instant messaging and web-based email services. The enforcement of the new rules would be entrusted in national data protection authorities. The proposed date of entry into application is 25 May 2018, the date when the GDPR will start to apply.
5. In the European Parliament, Ms Marju Lauristin (LIBE committee) has been appointed as the rapporteur. ITRE, IMCO and JURI committees are expected to deliver opinions. The vote in the LIBE committee is tentatively scheduled for October 2017.
6. The European Economic and Social Committee has not yet adopted its opinion and the Committee of the Regions decided at its meeting of 31 March 2017 not to issue an opinion but to respond in form of a letter.

II. STATE OF PLAY IN THE COUNCIL

7. The Commission presented the proposal and the impact assessment to the Working Party on Telecommunications and Information Society (hereinafter: WP TELE) respectively on 8 and 28 February 2017. The WP TELE proceeded with the article-by-article examination of the proposal on 29 March and 3 May 2017, covering, to date, Articles 1 to 8. Member States are still in the process of analysing the proposal and formulating their respective national positions. With the aim to inform the Ministers at the TTE Council of 9 June 2017 and on the basis of the preliminary comments made by delegations during the meetings of the WP TELE, the Presidency has put together the present progress report summarising the issues discussed so far.

8. The impact assessment (hereinafter: IA) was discussed in the WP TELE on 28 February 2017. In addition, several delegations provided written comments and/or the filled-in IA checklists. In general, delegations were mostly of the opinion that the IA provides a good analysis of the key problems and possible solutions and adequately supports the Commission proposal. Among the issues raised during the discussion and/or in the written comments were in particular the following:

A number of delegations would have liked more a detailed analysis with regard to possible overlaps, duplication or contradictions with other legislation, in particular with the GDPR and the proposal on the European Electronic Communications Code⁴. Some delegations were unconvinced by the justifications provided for the appointment of national data protection authorities as supervisory authorities for the purposes of the ePrivacy Regulation and claimed that the IA lacked evidence that this proposal would solve the problem of inconsistent implementation and enforcement of ePrivacy rules. Some delegations felt that the impact of the extension of scope to over-the-top players would necessitate clearer explanations, and some criticised the lack of analysis with regard to the inclusion of providers of 'ancillary services'. Certain delegations raised doubts as to whether the proposed solution for cookies (consent via browser settings) would achieve the desired objectives. A number of delegations would welcome more thorough analysis of the impact of these provisions on specific market players, in particular on online advertising companies and/or on business models using third-party cookies. With regard to public directories, some delegations would have liked to see more detailed assessment concerning the direct impact of the change from the opt-out to opt-in regime on directory providers as well as indirect effect on small enterprises and self-employed in terms of online visibility.

⁴ Doc. 12252/1/16 REV 1.

9. During the discussions in the WP TELE, delegations in general welcomed the proposal and supported the objective of ensuring high level of protection of privacy in electronic communications. While delegations do not generally oppose the form of a Regulation, they recognise that this form of legal act requires a higher level of precision and clarity than a Directive and the proposal therefore necessitates a thorough examination in the WP. In this context, delegations consider the proposed date of application of 25 May 2018 to be unrealistic. Other general concerns that will need to be discussed in detail include the interaction of the new rules with the GDPR and Telecoms Code, the institutional setup and the issue of data retention.
10. Delegations also raised a number of specific concerns:
- a) On the scope (Articles 2 and 3), further discussions will be needed with regard to the extension to the over-the-top players and the inclusion of 'ancillary services'. Delegations also sought clarifications with regard to 'not publicly available' electronic communication services which are out of scope. A number of issues will need to be addressed in relation to machine-to-machine communications. While delegations seem to support the general logic of the provision on the territorial scope and the representative, further discussions will be needed in this regard, for instance on possible sanctions for failure to designate a representative.
 - b) With regard to confidentiality of electronic communications data (Article 5) some delegations are concerned about differences between the new provision and the current Directive, and some consider the provision too broad and general. On the other hand, a number of delegations consider the provision on permitted processing (Article 6) to be too restrictive and ask for more flexibility, also taking into account that the GDPR provides for a number of legal grounds for processing of personal data.

- c) Further work will also be needed concerning the protection of information stored in, or emitted by, end-users' terminal equipment (Article 8). A number of delegations requested clarifications with regard to the exceptions in relation to both cookies and device tracking and some of them suggested additional exceptions to the list. It is crucial to find a balanced solution to address the issue of 'consent fatigue', especially in cases with limited/no risk to privacy.

III. OUTLOOK

11. The above listed issues stem from the discussions held in the WP TELE so far. The work on the proposal is ongoing and the Presidency has foreseen several additional WP TELE meetings on the subject. The objective is to finalise the first examination of the proposal by the end of the Maltese Presidency in June 2017 in order to provide a solid basis for future progress on this file.
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