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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 text

I. INTRODUCTION

For the purpose of discussion in the WP TELE meeting of 19 April, delegations will find in Annex a revised text of the ePrivacy proposal (ePR), focusing on Chapters I, II and III and the related recitals. The revisions are based on the discussions held in the WP TELE on 13 and 28 March and on the written comments provided by delegations.

For the sake of completeness, the Presidency has included in Annex all articles that belong to the above-mentioned Chapters (except Article 11 and the related recital 26), even though not all of them have been amended. Delegations will find the overview of the modifications in Section II below. For ease of reference, the latest changes to the text in Annex are underlined.

II. AMENDMENTS TO THE TEXT

a. LINK TO GDPR

Following comments from a number of delegations, **recital 2aa** has been simplified.

Wording of **recital 2a** has been reshuffled to provide further clarity on the lex specialis relation of ePR to GDPR.

b. ARTICLE 6: Permitted processing

The Presidency has noted the interest of some delegations to further develop the permitted processing of electronic communications metadata. With this in mind, the Presidency has introduced two main changes in Article 6:

- **Art. 6(2)(a)** has been expanded to allow processing for purposes of network management and optimisation;
- the Presidency has added a new basis for processing in **Art. 6(2)(f)** for the purpose of statistical counting. The new basis is subject to a number of conditions that must be fulfilled and is accompanied by **Art. 6(3a)**, which introduces a number of safeguards to be applied when this grounds is used.

Other changes to Article 6 are as follows:

- the Presidency has deleted **Art. 6(2)(ba)** on legal obligation, as it considered that this point partially overlapped with Article 11 and created interpretation issues;
- **Art. 6(2)(d)** has been reworded to better serve its purpose, as the protection of vital interest might encompass situations where the end-user is actually not physically or legally incapable of giving consent. The Presidency has added a requirement of a request by a competent authority, to avoid that providers have to decide themselves when vital interests are at stake.

c. ARTICLE 8: Protection of end-users' terminal equipment information

It has been clarified in **Art. 8(2)(a)** that collection of terminal equipment information is allowed not only for the purpose of establishing but also for the purpose of maintaining a connection.

In **recitals 20 and 21** the word 'device' has been replaced by 'identifier' as it seems to be a more correct terminology in relation to cookies. Moreover, **recital 21** now provides an example where making access to a website conditional on the acceptance of cookies is not considered justified.

Recital 21a includes a new example of cookies that can be legitimate and useful tools.

d. ARTICLE 10: Privacy settings

Following questions by some delegations with regard to the addressees of the obligation set out in **Art. 10(1)**, the Presidency would like to clarify that this applies to anyone who places the software on the market, be it its manufacturer, importer or distributor. This is in line with Art. 3(1)(ca) and with EU law in other sectors, which introduces requirements for services or products placed on the market.

The Presidency has further improved **Art. 10(2)** by removing the ambiguity of 'periodic intervals' and linking the information on the settings to 'every update' instead. In addition, the Presidency has introduced the obligation to navigate the end-user through the privacy settings to make sure that end-users are fully aware of them.

The Presidency has also noted the concerns of some delegations with regard to software that is placed on the market but is no longer updated, and is reflecting how to address this issue.

Recitals 22 to 24 have been aligned to Article 10. In addition, **recital 24** clarifies that updates of software should not alter the privacy settings selected by the end-users.

e. ARTICLE 13: Exceptions to presentations and restriction of CLI

A minor improvement has been introduced in **Art. 13(1)**.

Text of **Art. 13(3)** has been aligned with language of Art. 13(1).

A new sentence in **Recital 28** recalls that delegated acts adopted on the basis of the Radio Equipment Directive (2014/53/EU) might require specific radio equipment to support certain features ensuring access to emergency services.

f. ARTICLE 15: Publicly available directories

The Presidency has noted the wish of some delegations to keep the flexibility provided by the current ePrivacy Directive as well as concerns of other delegations about the lack of clarity of the text of Art. 15(1). In an attempt to address both concerns, the Presidency proposes the following solution:

- reverting back to the (slightly simplified) original Commission proposal of **Art. 15(1)** which requires consent, as a default rule,
- providing for a possibility in new **Art. 15(1aa)** for Member States to have an opt-out system, and
- deleting the word 'additional' in **Art. 15(2)**.

Moreover, in order to make clear that Member States may maintain their current regimes as to the addressees of the obligations in Art. 15(1a),(2), (3) and (3a), the Presidency has introduced new **Art. 15(3aa)**. Thus, obligations of these provisions apply to number-based ICS providers, unless Member States' law provides that they apply to providers of directories or to both types of providers. Deletions in Art. 15(1a), (2), (3) and (3a) reflect this approach.

Recitals 30 and 31 have been aligned to Article 15. In **recital 30**, it has been clarified that the treatment of natural persons acting in professional capacity as legal persons applies only to provisions on publicly available directories.

g. ARTICLE 16: Direct marketing

The word 'unsolicited' has been reintroduced in the **title** of the article.

Art. 16(1) has been reworded as a prohibition instead of a permission without, however, changing the substance of the provision.

A minor language improvement has been introduced in the last sentence of **Art. 16(2)**.

Art. 16(2a) leaves it for Member States to decide, if they so wish, what is the appropriate time limit for using customers' contact details for direct marketing. The word 'customer' has been replaced by 'end-user who is a natural person' for consistency purposes.

In **Art. 16(6)(a)** the word 'true' has been replaced by 'effective'.

Art. 16(6)(c) and (d) have been merged to avoid unnecessary duplication.

The word 'present' has been removed throughout the text of the Article and related recitals as the Presidency considers, following comments by some delegations, that 'send' is sufficient in connection with direct marketing.

As a consequence of the previous change, new **Art. 16(6a)** has been removed as redundant. Delegations are reminded that similar clarification is still present in recital 32.

h. OTHER ELEMENTS

Further clarifications have been introduced in **recital 8** on processing of electronic communications data by end-users as recipients or other parties on their behalf, which is not covered by ePR.

In **recital 11**, the Presidency has introduced examples of services that are not considered interpersonal communications services, such as linear broadcasting, video on demand, or others.

New **recital 15aa** clarifies that the EECC and GDPR apply to providers of electronic communications services with regard to security measures. The recital also clarifies that trade secrets are protected by Directive (EU) 2016/943.

Recital 16 clarifies that the concept of 'security' covers availability, authenticity, integrity or confidentiality. It also makes clear that processing of metadata to make it anonymous is allowed.

The Presidency has not introduced any new text with regard to '**ancillary services**' but plans to work on further improvements of the relevant provisions.

- (1) Article 7 of the Charter of Fundamental Rights of the European Union ("the Charter") protects the fundamental right of everyone to the respect for his or her private and family life, home and communications. Respect for the privacy of one's communications is an essential dimension of this right, **applying both to natural and legal persons**. Confidentiality of electronic communications ensures that information exchanged between parties and the external elements of such communication, including when the information has been sent, from where, to whom, is not to be revealed to anyone other than to the parties involved in a communication. The principle of confidentiality should apply to current and future means of communication, including calls, internet access, instant messaging applications, e-mail, internet phone calls and personal messaging provided through social media.
- (2) The content of electronic communications may reveal highly sensitive information about the natural persons involved in the communication, from personal experiences and emotions to medical conditions, sexual preferences and political views, the disclosure of which could result in personal and social harm, economic loss or embarrassment. Similarly, metadata derived from electronic communications may also reveal very sensitive and personal information. These metadata includes the numbers called, the websites visited, geographical location, the time, date and duration when an individual made a call etc., allowing precise conclusions to be drawn regarding the private lives of the persons involved in the electronic communication, such as their social relationships, their habits and activities of everyday life, their interests, tastes etc.
- (2aa) Regulation (EU) 2016/679 regulates the protection of personal data. This Regulation protects in addition the respect for private life and communications, which applies both to end-users who are natural persons and who are legal persons.**

(2a) The provisions of this Regulation particularise and complement the general rules on the protection of personal data laid down in Regulation (EU) 2016/679 as regards data that qualify as personal data. This Regulation therefore does not lower the level of protection enjoyed by natural persons under Regulation (EU) 2016/679. The provisions particularise Regulation (EU) 2016/679 by translating its principles into specific rules. If no specific rules are established in this Regulation, Regulation (EU) 2016/679 should apply to any processing of data that qualify as personal data. ~~They provisions~~ complement Regulation (EU) 2016/679 by setting forth rules regarding subject matters that are not within the scope of Regulation (EU) 2016/679, such as the protection of the rights of end-users who are legal persons. ~~This Regulation therefore does not lower the level of protection enjoyed by natural persons under Regulation (EU) 2016/679.~~ Processing of electronic communications data by providers of electronic communications services and networks should only be permitted in accordance with this Regulation. ~~If no specific rules are established in this Regulation, Regulation (EU) 2016/679 should apply to any processing of data that qualify as personal data.~~ Insofar as end-users who are legal persons are concerned, provisions of Regulation (EU) 2016/679 should apply only to the extent specifically required by this Regulation.

- (3) Electronic communications data may also reveal information concerning legal entities, such as business secrets or other sensitive information that has economic value **and the protection of which allows legal persons to conduct their business, supporting among other innovation**. Therefore, the provisions of this Regulation should **in principle** apply to both natural and legal persons. Furthermore, this Regulation should ensure that, **where necessary**, provisions of the Regulation (EU) 2016/679 of the European Parliament and of the Council¹, also apply *mutatis mutandis* to end-users who are legal persons. This includes ~~the definition of provisions on consent under Regulation (EU) 2016/679. When reference is made to consent by an end-user, including legal persons, this definition should apply. In addition, legal persons should have the same rights as end-users that are natural persons regarding the supervisory authorities; furthermore, supervisory authorities under this Regulation should also be responsible for monitoring the application of this Regulation regarding legal persons.~~
- (3a) This Regulation should not affect national law regulating for instance the conclusion or the validity of a contract. Similarly, this Regulation should not affect national law in relation to determining who has the legal power to represent legal persons in any dealings with third parties or in legal proceedings.**
- (4) Pursuant to Article 8(1) of the Charter and Article 16(1) of the Treaty on the Functioning of the European Union, everyone has the right to the protection of personal data concerning him or her. Regulation (EU) 2016/679 lays down rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data. Electronic communications data may include personal data as defined in Regulation (EU) 2016/679.

¹ 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) (OJ L 119, 4.5.2016, p. 1–88).

- (5) ~~The provisions of this Regulation particularise and complement the general rules on the protection of personal data laid down in Regulation (EU) 2016/679 as regards electronic communications data that qualify as personal data. This Regulation therefore does not lower the level of protection enjoyed by natural persons under Regulation (EU) 2016/679. Processing of electronic communications data by providers of electronic communications services should only be permitted in accordance with this Regulation.~~
- (6) While the principles and main provisions of Directive 2002/58/EC of the European Parliament and of the Council² remain generally sound, that Directive has not fully kept pace with the evolution of technological and market reality, resulting in an inconsistent or insufficient effective protection of privacy and confidentiality in relation to electronic communications. Those developments include the entrance on the market of electronic communications services that from a consumer perspective are substitutable to traditional services, but do not have to comply with the same set of rules. Another development concerns new techniques that allow for tracking of online behaviour of end-users, which are not covered by Directive 2002/58/EC. Directive 2002/58/EC should therefore be repealed and replaced by this Regulation.
- (7) The Member States should be allowed, within the limits of this Regulation, to maintain or introduce national provisions to further specify and clarify the application of the rules of this Regulation in order to ensure an effective application and interpretation of those rules. Therefore, the margin of discretion, which Member States have in this regard, should maintain a balance between the protection of private life and personal data and the free movement of electronic communications data.

² 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) (OJ L 201, 31.7.2002, p.37).

(8) This Regulation should apply to providers of electronic communications services, to providers of publicly available directories, and to ~~software~~ providers **of software** permitting electronic communications, including the retrieval and presentation of information on the internet. This Regulation should also apply to natural and legal persons who use electronic communications services to send **or present** direct marketing commercial communications or **make use of processing and storage capabilities of terminal equipment** or collect information ~~related to~~ **processed by or emitted by** or stored in end-users' terminal equipment. **Furthermore, this Regulation should apply regardless of whether the processing of electronic communications data or personal data of end-users who are in the Union takes place in the Union or not, or of whether the service provider or person processing such data is established or located in the Union or not.**

Some end-users, such as financial institutions, process as recipients their electronic communications data for different purposes or permit other parties to process their data on their behalf. Such processing may include the processing by a website provider, or another party on its behalf, for purposes such as ensuring network and information security, including the prevention and termination of Distributed Denial of Service attacks, or facilitating efficient delivery of website content. Such processing is not covered by this Regulation.

~~(9) This Regulation should apply to electronic communications data processed in connection with the provision and use of electronic communications services in the Union, regardless of whether or not the processing takes place in the Union. Moreover, in order not to deprive end-users in the Union of effective protection, this Regulation should also apply to electronic communications data processed in connection with the provision of electronic communications services from outside the Union to end-users in the Union.~~

- (10) Radio equipment and its software which is placed on the internal market in the Union, must comply with Directive 2014/53/EU of the European Parliament and of the Council³. This Regulation should not affect the applicability of any of the requirements of Directive 2014/53/EU nor the power of the Commission to adopt delegated acts pursuant to Directive 2014/53/EU requiring that specific categories or classes of radio equipment incorporate safeguards to ensure that personal data and privacy of end-users are protected.
- (11) The services used for communications purposes, and the technical means of their delivery, have evolved considerably. End-users increasingly replace traditional voice telephony, text messages (SMS) and electronic mail conveyance services in favour of functionally equivalent online services such as Voice over IP, messaging services and web-based e-mail services. In order to ensure an effective and equal protection of end-users when using functionally equivalent services, this Regulation uses the definition of electronic communications services set forth in the [Directive of the European Parliament and of the Council establishing the European Electronic Communications Code⁴]. That definition encompasses not only internet access services and services consisting wholly or partly in the conveyance of signals but also interpersonal communications services, which may or may not be number-based, such as for example, Voice over IP, messaging services and web-based e-mail services. **Services such as linear broadcasting, video on demand, websites, social networks, blogs, or exchange of information between machines, should not be considered as interpersonal communications services.**

³ Directive 2014/53/EU of the European Parliament and of the Council of 16 April 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment and repealing Directive 1999/5/EC (OJ L 153, 22.5.2014, p. 62).

⁴ Commission proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code (Recast) (COM/2016/0590 final - 2016/0288 (COD)).

(11a) The protection of confidentiality of communications is crucial also as regards interpersonal communications services that are ancillary to another service; therefore, **the processing of electronic communications data in the context of the provision of such type of ancillary services ~~also having a communication functionality~~ should be covered by this Regulation. In such cases, this Regulation applies only to the ancillary feature itself and the electronic communications functionality it provides. To determine whether an electronic communications functionality constitutes an ancillary feature, the end-users expectations have to be taken into account. For example such communications functionality is considered to be ancillary feature in**

In all the circumstances where electronic communication is taking place between a finite, that is to say not potentially unlimited, number of end-users which is determined by the sender of the communications, e.g. any messaging application allowing two or more people to connect and communicate, such services constitute interpersonal communications services. Conversely, a communications channel does not constitute an interpersonal communications service when it does not enable direct interpersonal and interactive exchange of information via electronic communications networks between a finite number of persons, whereby the persons initiating or participating in the communication determine its recipient(s). This is for example the case when the entity providing the communications channel is at the same time a communicating party, such as a company that operates a communications channel for customer care that allows customers solely to communicate with the company in question. ~~However~~ Also, where access to ~~an~~ electronic communications ~~functionality~~ is available for anyone, e.g. communications in an electronic communications channel in online games which is open to all persons playing the game, such channel does not constitute an ~~ancillary~~ interpersonal communications feature. This reflects the end-users' expectations regarding the confidentiality of a service.

(12) ~~Connected devices and machines increasingly communicate with each other by using electronic communications networks (Internet of Things).~~ **The use of machine-to-machine services, that is to say services involving an automated transfer of data and information between devices or software-based applications with limited or no human interaction, is emerging. While the services provided at the application-layer of such services do normally not qualify as an electronic communications service as defined in the [Directive establishing the European Electronic Communications Code],** ~~the transmission services used for the provision of machine-to-machine communications services regularly involves the conveyance of signals over~~ **via an electronic communications network and, hence, usually normally constitutes an electronic communications service.** In order to ensure full protection of the rights to privacy and confidentiality of communications, and to promote a trusted and secure Internet of Things in the digital single market, it is necessary to clarify that this Regulation, **in particular the requirements relating to the confidentiality of communications,** should apply to the transmission of machine-to-machine **electronic communications where carried out via an electronic communications service.** ~~Therefore, the principle of confidentiality enshrined in this Regulation should also apply to the transmission of machine-to-machine communications.~~ Specific safeguards could also be adopted under sectorial legislation, as for instance Directive 2014/53/EU.

- (13) The development of fast and efficient wireless technologies has fostered the increasing availability for the public of internet access via wireless networks accessible by anyone in public and semi-private spaces such as 'hotspots' situated at different places within a city, department stores, shopping malls and hospitals. To the extent that those communications networks are provided to an undefined group of end-users, **regardless if these networks are secured with passwords or not**, the confidentiality of the communications transmitted through such networks should be protected. The fact that wireless electronic communications services may be ancillary to other services should not stand in the way of ensuring the protection of confidentiality of communications data and application of this Regulation. Therefore, this Regulation should apply to electronic communications data using electronic communications services and public communications networks. In contrast, this Regulation should not apply to closed groups of end-users such as corporate networks, access to which is limited **pre-defined group of end-users, e.g.** to members of the corporation. **Therefore, only networks proving access to a group of end-users which is not pre-defined and where end-users get access to the network under the same conditions, e.g. wifi network of a department store open to all customers, are regulated by this Regulation.**

- (14) Electronic communications data should be defined in a sufficiently broad and technology neutral way so as to encompass any information concerning the content transmitted or exchanged (electronic communications content) and the information concerning an end-user of electronic communications services processed for the purposes of transmitting, distributing or enabling the exchange of electronic communications content; including data to trace and identify the source and destination of a communication, geographical location and the date, time, duration and the type of communication. Whether such signals and the related data are conveyed by wire, radio, optical or electromagnetic means, including satellite networks, cable networks, fixed (circuit- and packet-switched, including internet) and mobile terrestrial networks, electricity cable systems, the data related to such signals should be considered as electronic communications metadata and therefore be subject to the provisions of this Regulation. Electronic communications metadata may include information that is part of the subscription to the service when such information is processed for the purposes of transmitting, distributing or exchanging electronic communications content.

(15) Electronic communications data should be treated as confidential. This means that any ~~interference with the transmission~~ **processing** of electronic communications data, whether directly by human intervention or through the intermediation of automated processing by machines, without the consent of all the communicating parties should be prohibited. ~~The prohibition of interception of communications data should apply during their conveyance, i.e. until receipt of the content of the electronic communication by the intended addressee.~~ Interception of electronic communications data may occur, for example, when someone other than the communicating parties, listens to calls, reads, scans or stores the content of electronic communications, or the associated metadata for purposes other than the exchange of communications. Interception also occurs when third parties monitor websites visited, timing of the visits, interaction with others, etc., without the consent of the end-user concerned. As technology evolves, the technical ways to engage in interception have also increased. Such ways may range from the installation of equipment that gathers data from terminal equipment over targeted areas, such as the so-called IMSI (International Mobile Subscriber Identity) catchers, to programs and techniques that, for example, surreptitiously monitor browsing habits for the purpose of creating end-user profiles. Other examples of interception include capturing payload data or content data from unencrypted wireless networks and routers, including browsing habits without the end-users' consent.

(15aa) In order to ensure the confidentiality of electronic communications data, providers of electronic communications services should apply security measures in accordance with Article 40 of the [Directive establishing the European Electronic Communications Code] and Article 32 of Regulation (EU) 2016/679. Moreover, trade secrets are protected in accordance with Directive (EU) 2016/943.

- (15a) **The prohibition of interception of communications data should apply during their conveyance, i.e. until receipt of the content of the electronic communication by the intended addressee. The exact moment of the completion of the transmission of electronic communications content may depend on the type of electronic communications service that is provided. For instance for a voice call the transmission will be completed as soon as either of the end-users terminates the connection. For electronic mail or instant messaging the transmission is completed as soon as the addressee has collected the message, typically from the server of the electronic communications service provider. Upon completion of the transmission, electronic communications content and related metadata should be erased or made anonymous by the provider of the electronic communications service except when processing is permitted under this Regulation or when the end-users has entrusted the provider of the electronic communications service or another third party to record, store or otherwise process such data in accordance with Regulation (EU) 2016/679.**
- (16) The prohibition of storage of communications is not intended to prohibit any automatic, intermediate and transient storage of this information insofar as this takes place for the sole purpose of carrying out the transmission in the electronic communications network. It should not prohibit ~~either~~ the processing of electronic communications data to ensure the security ~~and continuity~~, **including the availability, authenticity, integrity or confidentiality**, of the electronic communications services, ~~including for example~~ checking security threats such as the presence of malware, ~~or~~ **Neither should it prohibit** the processing of metadata to ensure the necessary quality of service requirements, such as latency, jitter etc. nor the processing of metadata to make it anonymous **nor the processing of metadata to make it anonymous**.

(17) The processing of electronic communications data can be useful for businesses, consumers and society as a whole. Vis-à-vis Directive 2002/58/EC, this Regulation broadens the possibilities for providers of electronic communications services to process electronic communications metadata, based on end-users consent. However, end-users attach great importance to the confidentiality of their communications, including their online activities, and that they want to control the use of electronic communications data for purposes other than conveying the communication. Therefore, this Regulation should require providers of electronic communications services to obtain end-users' consent to process electronic communications metadata, which should include data on the location of the device generated for the purposes of granting and maintaining access and connection to the service. Location data that is generated other than in the context of providing electronic communications services should not be considered as metadata. Examples of commercial usages of electronic communications metadata by providers of electronic communications services may include the provision of heatmaps; a graphical representation of data using colors to indicate the presence of individuals. To display the traffic movements in certain directions during a certain period of time, an identifier is necessary to link the positions of individuals at certain time intervals. This identifier would be missing if anonymous data were to be used and such movement could not be displayed. Such usage of electronic communications metadata could, for example, benefit public authorities and public transport operators to define where to develop new infrastructure, based on the usage of and pressure on the existing structure. Where a type of processing of electronic communications metadata, in particular using new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons, a data protection impact assessment and, as the case may be, a consultation of the supervisory authority should take place prior to the processing, in accordance with Articles 35 and 36 of Regulation (EU) 2016/679.

- (17a) **The processing of electronic communications metadata should also be regarded to be permitted where it is necessary in order to protect an interest which is essential for the life of the end-users who are natural persons or that of another natural person. Processing of electronic communications metadata of an end-user for the protection of the vital interest of an end-user who is a natural person should in principle take place only where the protection of such interests cannot be ensured without that processing.**
- (17b) **Processing of electronic communication metadata for scientific research or statistical purposes should be considered to be permitted processing. This type of processing should be subject to further safeguards to ensure privacy of the end-users by employing appropriate security measures such as encryption and pseudonymisation. In addition, end-users who are natural persons should be given the right to object.**
- (18) End-users may consent to the processing of their metadata to receive specific services such as protection services against fraudulent activities (by analysing usage data, location and customer account in real time). In the digital economy, services are often supplied against counter-performance other than money, for instance by end-users being exposed to advertisements. ~~For the purposes of this Regulation, consent of an end-user, regardless of whether the latter is a natural or a legal person, should have the same meaning and be subject to the same conditions as the data subject's consent under Regulation (EU) 2016/679.~~ Basic broadband internet access and voice communications services are to be considered as essential services for individuals to be able to communicate and participate to the benefits of the digital economy. Consent for processing **electronic communications** data from internet or voice communication usage will not be valid if the ~~data subject~~ **end-user** has no genuine and free choice, or is unable to refuse or withdraw consent without detriment.

(19) The **protection of the** content of electronic communications pertains to the essence of the fundamental right to respect for private and family life, home and communications protected under Article 7 of the Charter. Any interference with the content of electronic communications should be allowed only under very clear defined conditions, for specific purposes and be subject to adequate safeguards against abuse. This Regulation provides for the possibility of providers of electronic communications services to process electronic communications data in transit, with the informed consent of all the end-users concerned. For example, providers may offer services that entail the scanning of emails to remove certain pre-defined material. Given the sensitivity of the content of communications, this Regulation sets forth a presumption that the processing of such content data will result in high risks to the rights and freedoms of natural persons. When processing such type of data, the provider of the electronic communications service should always consult the supervisory authority prior to the processing. Such consultation should be in accordance with Article 36 (2) and (3) of Regulation (EU) 2016/679. The presumption does not encompass the processing of content data to provide a service requested by the end-user where the end-user has consented to such processing and it is carried out for the purposes and duration strictly necessary and proportionate for such service. After electronic communications content has been sent by the end-user and received by the intended end-user or end-users, it may be recorded or stored by the end-user, end-users or by a third party entrusted by them to record or store such data. Any processing of such data must comply with Regulation (EU) 2016/679.

- (19a) Services that facilitate end-users everyday life such as index functionality, personal assistant, translation services and services that enable more inclusion for persons with disabilities such as text-to-speech services are emerging. Therefore, processing electronic communications content for services explicitly requested by the end-user for their own individual use, consent should only be requested from the end-user requesting the service taking into account that the processing must be limited to that purpose, limited to the duration necessary for providing the requested services and shall not adversely affect fundamental rights and interest of another end-user concerned.**
- (19b) Providers of electronic communications services may, for example, obtain the consent of the end-user for the processing of electronic communications data, at the time of the conclusion of the contract, and any moment in time thereafter. In some cases, the legal entity having subscribed to the electronic communications service may allow a natural person, such as an employee, to make use of the service. In such case, consent needs to be obtained from the individual concerned.**

(20) Terminal equipment of end-users of electronic communications networks and any information relating to the usage of such terminal equipment, whether in particular is ~~stored in~~ **processed by** or emitted by or **stored in** such equipment, requested from or processed in order to enable it to connect to another device and or network equipment, are part of the private sphere, **including the privacy of one's communications**, of the end-users requiring protection under the Charter of Fundamental Rights of the European Union ~~and the European Convention for the Protection of Human Rights and Fundamental Freedoms~~. Given that such equipment contains or processes information that may reveal details of an individual's emotional, political, social complexities, including the content of communications, pictures, the location of individuals by accessing the device's GPS capabilities, contact lists, and other information already stored in the device, the information related to such equipment requires enhanced privacy protection. Furthermore, the so-called spyware, web bugs, hidden identifiers, tracking cookies and other similar unwanted tracking tools can enter end-user's terminal equipment without their knowledge in order to gain access to information, to store hidden information and to trace the activities. Information related to the end-user's device may also be collected remotely for the purpose of identification and tracking, using techniques such as the so-called 'device fingerprinting', often without the knowledge of the end-user, and may seriously intrude upon the privacy of these end-users. Techniques that surreptitiously monitor the actions of end-users, for example by tracking their activities online or the location of their terminal equipment, or subvert the operation of the end-users' terminal equipment pose a serious threat to the privacy of end-users. Therefore, any such interference with the end-user's terminal equipment should be allowed only with the end-user's consent and for specific and transparent purposes. **The end-user's consent to storage of a cookie or similar device identifier may also entail consent for the subsequent readings of the cookie in the context of a revisit to the same website domain initially visited by the end-user.**

- (21) Exceptions to the obligation to obtain consent to make use of the processing and storage capabilities of terminal equipment or to access information stored in terminal equipment should be limited to situations that involve no, or only very limited, intrusion of privacy. For instance, consent should not be requested for authorizing the technical storage or access which is ~~strictly~~ necessary and proportionate for the legitimate purpose of enabling the use of a specific service ~~explicitly~~ requested by the end-user. This may include the storing of cookies for the duration of a single established session on a website to keep track of the end-user's input when filling in online forms over several pages, **authentication session cookies used to verify the identity of end-users engaged in online transactions or cookies used to remember items selected by the end-user and placed in shopping basket. Access to specific website content may still be made conditional on the well-informed acceptance of the storage of a cookie or similar device-identifier, if it is used for a legitimate purpose. This will for example not be the case of a cookie which is recreated after the deletion by the end-user.**

(21a) Cookies can also be a legitimate and useful tool, for example, in **assessing the effectiveness of a delivered information society service, for example of website design and advertising or by helping to measureing web traffic to the numbers of end-users visiting a website, certain pages of a website or the number of end-users of an application. This is not the case, however, regarding cookies and similar identifiers used to determine the nature of who is using the site.** Information society providers that engage in configuration checking to provide the service in compliance with the end-user's settings and the mere logging of the fact that the end-user's device is unable to receive content requested by the end-user should not constitute access to such a device or use of the device processing capabilities. **Consent should not be necessary either when the purpose of using the processing storage capabilities of terminal equipment is to fix security vulnerabilities and other security bugs, provided that such updates do not in any way change the functionality of the hardware or software or the privacy settings chosen by the end-user and the end-user has the possibility to postpone or turn off the automatic installation of such updates. Software updates that do not exclusively have a security purpose, for example those intended to add new features to an application or improve its performance, should not fall under this exception.**

(22) The methods used for providing information and obtaining end-user's consent should be as user-friendly as possible. Given the ubiquitous use of tracking cookies and other tracking techniques, end-users are increasingly requested to provide consent to store such tracking cookies in their terminal equipment. As a result, end-users are overloaded with requests to provide consent. The use of technical means to provide consent, for example, through transparent and user-friendly settings, may address this problem. Therefore, this Regulation should provide for the possibility to express consent by using the appropriate settings of a browser or other application. The choices made by end-users when establishing its general privacy settings of a browser or other application should be binding on, and enforceable against, any third parties.

(22a) Web browsers are a type of software application that permits the retrieval and presentation of information on the internet. Other types of applications, such as the ones that permit calling and messaging or provide route guidance, have also the same capabilities. Web browsers mediate much of what occurs between the end-user and the website. From this perspective, they are in a privileged the position to play an active role to help the end-user to control the flow of information to and from the terminal equipment. More particularly web browsers may be used as gatekeepers, thus helping end-users to prevent information from their terminal equipment (for example smart phone, tablet or computer) from being accessed or stored.

- (23) ~~The principles of data protection by design and by default were codified under Article 25 of Regulation (EU) 2016/679. Currently, the default settings for cookies are set in most current browsers to ‘accept all cookies’. Therefore providers of software enabling the retrieval and presentation of information on the internet should have an obligation to configure the software so that it offers the option to prevent third parties from storing information on the terminal equipment; this is often presented as ‘reject third party cookies’.~~ End-users should be offered a set of privacy setting options, ranging from higher (for example, ‘never accept cookies’) to lower (for example, ‘always accept cookies’) and intermediate (for example, ‘reject third party cookies’ or ‘only accept first party cookies’). Such privacy settings should be **presented offered** in an easily visible and intelligible manner.

(24) ~~For web browsers to be able to obtain end-users' consent as defined under Regulation (EU) 2016/679, for example, to the storage of third party tracking cookies, they should, among others, require a clear affirmative action from the end-user of terminal equipment to signify his or her freely given, specific informed, and unambiguous agreement to the storage and access of such cookies in and from the terminal equipment. Such action may be considered to be affirmative, for example, if end-users are required to actively select 'accept third party cookies' to confirm their agreement and are given the necessary information to make the choice. To this end, it~~ It is necessary to require providers of software enabling access to internet that, at the moment of installation ~~or first use and at the moment of every update~~, end-users are informed about ~~the possibility to choose the available~~ privacy settings ~~among the various options and ask them to make a choice~~. Information provided should not dissuade end-users from selecting higher privacy settings and should include relevant information ~~about the default setting~~ and about the risks associated ~~with the different privacy settings, including those related~~ to allowing third party cookies to be stored in the computer, including the compilation of long-term records of individuals' browsing histories and the use of such records to send targeted advertising. ~~Updates of software enabling access to internet should not alter the privacy settings selected by the end-user.~~ Web browsers are encouraged to provide easy ways for end-users to change the privacy settings at any time during use and to allow the user to make exceptions for or to whitelist certain websites or to specify for which websites (third) party cookies are always or never allowed.

(25) Accessing electronic communications networks requires the regular emission of certain data packets in order to discover or maintain a connection with the network or other devices on the network. Furthermore, devices must have a unique address assigned in order to be identifiable on that network. Wireless and cellular telephone standards similarly involve the emission of active signals containing unique identifiers such as a MAC address, the IMEI (International Mobile Station Equipment Identity), the IMSI, **the WiFi signal** etc. A single wireless base station (i.e. a transmitter and receiver), such as a wireless access point, has a specific range within which such information may be captured. Service providers have emerged who offer **physical movements'** tracking services based on the scanning of equipment related information with diverse functionalities, including people counting, **such as** providing data on the number of people waiting in line, ascertaining the number of people in a specific area, ~~etc referred to as statistical counting for which the consent of end-users is not needed, provided that such counting is limited in time and space to the extent necessary for this purpose. Providers should also apply appropriate technical and organisations measures to ensure the level of security appropriate to the risks, including pseudonymisation of the data and making it anonymous or erase it as soon it is not longer needed for this purpose. Providers engaged in such practices should display prominent notices located on the edge of the area of coverage informing end-users prior to entering the defined area that the technology is in operation within a given perimeter, the purpose of the tracking, the person responsible for it and the existence of any measure the end-user of the terminal equipment can take to minimize or stop the collection. Additional information should be provided where personal data are collected pursuant to Article 13 of Regulation (EU) 2016/679.~~ This information may be used for more intrusive purposes, **which should not be considered statistical counting**, such as to send commercial messages to end-users, for example when they enter stores, with personalized offers. ~~While some of these functionalities do not entail high privacy risks, others do, for example, those involving as well as the tracking of individuals over time, including repeated visits to specified locations. Providers engaged in such practices should display prominent notices located on the edge of the area of coverage informing end-users prior to entering the defined area that the technology is in operation within a given perimeter, the purpose of the tracking, the person responsible for it and the existence of any measure the end-user of the terminal equipment can take to minimize or stop the collection.~~

~~Additional information should be provided where personal data are collected pursuant to Article 13 of Regulation (EU) 2016/679.~~

...

- (27) As regards calling line identification, it is necessary to protect the right of the calling party to withhold the presentation of the identification of the line from which the call is being made and the right of the called party to reject calls from unidentified lines. Certain end-users, in particular help lines, and similar organisations, have an interest in guaranteeing the anonymity of their callers. As regards connected line identification, it is necessary to protect the right and the legitimate interest of the called party to withhold the presentation of the identification of the line to which the calling party is actually connected.
- (28) There is justification for overriding the elimination of calling line identification presentation in specific cases. End-users' rights to privacy with regard to calling line identification should be restricted where this is necessary to trace **malicious or** nuisance calls and with regard to calling line identification and location data where this is necessary to allow emergency services, such as eCall, to carry out their tasks as effectively as possible. **Location information established by the terminal equipment, using its built-in Global Navigation Satellite Systems (GNSS) capabilities or other types of terminal equipment based location data, such as location data derived from the WiFi functionality,** 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. **Directive 2014/53/EU empowers the Commission to adopt delegated acts requiring that specific categories or classes of radio equipment support certain features ensuring access to emergency services.**

- (29) Technology exists that enables providers of electronic communications services to limit the reception of **unwanted, malicious or nuisance** calls by end-users in different ways, including blocking silent calls and other ~~fraudulent~~ **unwanted, malicious** and nuisance calls, **such as calls originating from invalid numbers, i.e. numbers that do not exist in the numbering plan, valid numbers that are not allocated to a provider of a number-based interpersonal communications service, and valid numbers that are allocated but not assigned to an end-user.** Providers of publicly available number-based interpersonal communications services should deploy this technology and protect end-users against ~~nuisance~~ **such** calls and free of charge. Providers should ensure that end-users are aware of the existence of such functionalities, for instance, by publicising the fact on their webpage.
- (30) ~~Publicly available directories of end-users of electronic communications services are widely distributed.~~ Publicly available directories means any directory or service containing ~~categories of information on~~ end-users ~~information~~ **personal data of number-based interpersonal communication services** such as **name**, phone numbers (including mobile phone numbers), email address ~~contact details~~, **home address** and includes inquiry services, **the main function of which is to enable to identify such end-users.** The right to privacy and to protection of the personal data of a natural person requires that end-users that are natural persons are **asked for consent before their personal data are included in a directory** ~~able to determine per category of personal data whether their personal data are included in a directory.~~ The legitimate interest of legal ~~entities~~ **persons** requires that end-users that are legal ~~entities~~ **persons** have the right to object to the data related to them being included in a directory. **End-users who are natural persons acting in a professional capacity should be treated as legal persons for the purpose of the provisions on publicly available directories.**

- (31) ~~If end-users that are natural persons give their consent to their data being included in such directories, they should be able to determine on a consent basis which categories of personal data are included in the directory (for example name, email address, home address, user name, phone number). In addition, p~~Providers of publicly available directories **number-based interpersonal communications services and/or providers of publicly available directories** should inform the end-users **who are natural persons** ~~of the purposes of the directory and of the search functions of the directory~~ **and obtain their additional consent before including them in that directory enabling such search functions related to their personal data.** ~~End users should be able to determine by consent on the basis of which categories of personal data their contact details can be searched.~~ The categories of personal data included in the directory and the categories of personal data on the basis of which the end-user's contact details can be searched should not necessarily be the same.
- (31a) **For the purposes of the provisions relating to direct marketing communications, electronic message should include e-mail, SMS, MMS and functionally equivalent applications and techniques.**
- (32) In this Regulation, direct marketing **communications** refers to any form of advertising by which a natural or legal person sends **or presents** direct marketing communications directly to one or more identified or identifiable end-users using electronic communications services. **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.** In addition to the offering of products and services for commercial purposes, ~~this should~~ **direct marketing communications also may** include messages sent by political parties that contact natural persons via electronic communications services in order to promote their parties. The same ~~should~~ **applies** to messages sent by other non-profit organisations to support the purposes of the organisation.

- (33) Safeguards should be provided to protect end-users against ~~unsolicited~~ **direct marketing** communications ~~for direct marketing purposes~~, which intrude into the ~~private life~~ **privacy** of end-users. The degree of privacy intrusion and nuisance is considered relatively similar independently of the wide range of technologies and channels used to conduct these electronic communications, whether using automated calling and communication systems, instant messaging applications, emails, SMS, MMS, Bluetooth, etc. It is therefore justified to require that consent of the end-users **who are natural persons** is obtained before ~~commercial electronic communications for direct marketing~~ **communications** purposes are sent ~~or presented~~ to end-users **them** in order to effectively protect ~~individuals~~ **them** against the intrusion into their private life ~~as well as the legitimate interest of legal persons~~. Legal certainty and the need to ensure that the rules protecting against ~~unsolicited electronic~~ **direct marketing** communications remain future-proof justify the need to define **in principle** a single set of rules that do not vary according to the technology used to convey these ~~unsolicited direct marketing~~ communications, while at the same time guaranteeing an equivalent level of protection for all citizens throughout the Union. However, it is reasonable to allow the use of ~~e-mail~~ contact details **for electronic message** within the context of an existing customer relationship for the offering of similar products or services. Such possibility should only apply to the same company that has obtained the ~~electronic~~ contact details **for electronic message** in accordance with Regulation (EU) 2016/679.
- (~~36~~**33a**) Voice-to-voice direct marketing calls that do not involve the use of automated calling and communication systems, ~~given that they~~ are more costly for the sender and impose no financial costs on end-users. Member States should therefore be able to establish and or maintain national systems only allowing such calls to end-users **who are natural persons and** who have not objected.

- (34) When end-users **who are natural persons** have provided their consent to receiving ~~unsolicited direct marketing communications for direct marketing purposes~~, they should still be able to withdraw their consent at any time in an easy manner **and without any cost to them**. To facilitate effective enforcement of Union rules on ~~unsolicited messages for direct marketing~~ **communications**, it is necessary to prohibit the masking of the identity and the use of false identities, false return addresses or numbers while sending **or presenting** ~~unsolicited commercial direct marketing communications for direct marketing purposes~~. ~~Unsolicited~~ **Direct** marketing communications should therefore be clearly recognizable as such and should indicate the identity of the legal or the natural person ~~transmitting~~ **sending or presenting** the communication or on behalf of whom the communication is ~~transmitted~~ **sent or presented** and provide the necessary information for recipients ~~end-users who are natural persons~~ **end-users who are natural persons** to exercise their right to ~~oppose~~ **withdraw their consent** to receiving further ~~written and/or oral marketing messages~~ **direct marketing communications, such as valid contact details (e.g. link, e-mail address) which can be easily used by end-users who are natural persons to withdraw their consent free of charge.**
- (35) ~~In order to allow easy withdrawal of consent, legal or natural persons conducting direct marketing communications by email should present a link, or a valid electronic mail address, which can be easily used by end-users to withdraw their consent.~~ Legal or natural persons conducting direct marketing communications through voice-to-voice calls and through calls by automating calling and communication systems should ~~display~~ **present** their identity line on which the company can be called. **Member States are encouraged to introduce by means of national law or present** a specific code **or prefix** identifying the fact that the call is a **direct marketing call to improve the tools provided for the end-users in order to protect their privacy in more efficient manner. Using a specific code or prefix should not relieve the legal or natural persons sending or presenting direct marketing call from the obligation to present their calling line identification.**

~~(37) — Service providers who offer electronic communications services should inform end-users of measures they can take to protect the security of their communications for instance by using specific types of software or encryption technologies. The requirement to inform end-users of particular security risks does not discharge a service provider from the obligation to take, at its own costs, appropriate and immediate measures to remedy any new, unforeseen security risks and restore the normal security level of the service. The provision of information about security risks to the subscriber should be free of charge. Security is appraised in the light of Article 32 of Regulation (EU) 2016/679.~~

...

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter

1. This Regulation lays down rules regarding the protection of fundamental rights and freedoms of natural ~~and legal~~ persons in the provision and use of electronic communications services, and in particular, the rights to respect for private life and communications and the protection of natural persons with regard to the processing of personal data.
 - 1a. **This Regulation lays down rules regarding the protection of the fundamental rights and freedoms of legal persons in the provision and use of the electronic communications services, and in particular their rights to respect of communications.**
2. ~~This Regulation ensures~~ **The** free movement of electronic communications data and electronic communications services within the Union, ~~which~~ shall be neither restricted nor prohibited for reasons related to the respect for the private life and communications of natural ~~and legal~~ persons and the protection of natural persons with regard to the processing of personal data, **and for protection of communications of legal persons.**
3. The provisions of this Regulation particularise and complement Regulation (EU) 2016/679 **with regard to the processing of electronic communications data that qualify as personal data** by laying down specific rules for the purposes mentioned in paragraphs 1 ~~and~~ to 2.

Article 2
Material Scope

1. This Regulation applies to:
 - (a) the processing of electronic communications **content data in transmission and of electronic communications metadata** carried out in connection with the provision and the use of electronic communications services; ~~and to~~
 - (b) information ~~related to~~ **processed by or emitted by or stored in** the terminal equipment of end-users.
 - (c) **the placing on the market of software permitting electronic communications, including the retrieval and presentation of information on the internet;**
 - (d) **the offering of a publicly available directory of end-users of electronic communications services;**
 - (e) **the sending or presenting direct marketing communications to end-users.**
2. This Regulation does not apply to:
 - (a) activities which fall outside the scope of Union law;
 - (b) activities of the Member States which fall within the scope of Chapter 2 of Title V of the Treaty on European Union;
 - (c) electronic communications services which are not publicly available;
 - (d) activities of competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security;

3. The processing of electronic communications data by the Union institutions, bodies, offices and agencies is governed by Regulation (EU) 00/0000 [new Regulation replacing Regulation 45/2001].
4. This Regulation shall be without prejudice to the application of Directive 2000/31/EC⁵, in particular of the liability rules of intermediary service providers in Articles 12 to 15 of that Directive.
5. This Regulation shall be without prejudice to the provisions of Directive 2014/53/EU.

Article 3

Territorial scope and representative

1. This Regulation applies to:
 - (a) the provision of electronic communications services to end-users **who are** in the Union;
~~irrespective of whether a payment of the end-user is required;~~
 - (aa) the processing of electronic communications content in transmission and of electronic communications metadata of end-users who are in the Union;**
 - ~~(b) the use of such services;~~
 - (c) the protection of information ~~related to~~ **processed by or emitted by or stored in** the terminal equipment of end-users ~~located~~ **who are** in the Union.
 - (ca) the placing on the Union market of software permitting electronic communications, including the retrieval and presentation of information on the internet;**

⁵ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ L 178, 17.7.2000, p. 1–16).

- (cb) **the offering of publicly available directories of end-users of electronic communications services who are in the Union;**
- (cc) **the sending or presenting of direct marketing communications to end-users who are in the Union.**
2. Where the provider of an electronic communications service, **the provider of a publicly available directory or the provider of software enabling electronic communications or a person using electronic communications services to send or present direct marketing communications or makes use of processing and storage capabilities or collects information processed by or emitted by or stored in the end-users' terminal equipment** is not established in the Union it shall designate in writing a representative in the Union.
- 2a. **The requirements laid down in paragraph 2 shall not apply if activities listed in paragraph 1 are occasional and are unlikely to result in a risk to the fundamental rights of end-users taking into account the nature, context, scope and purpose of those activities.**
3. The representative shall be established in one of the Member States where the end-users of such electronic communications services are located.
4. The representative shall ~~have the power to answer questions and provide information~~ **be mandated by the provider or person it represents to be addressed** in addition to or instead of the provider it represents, in particular, to supervisory authorities, and end-users, on all issues related to processing electronic communications data for the purposes of ensuring compliance with this Regulation.

5. The designation of a representative pursuant to paragraph 2 shall be without prejudice to legal actions, which could be initiated against ~~a natural or legal person who processes electronic communications data in connection with the provision of electronic communications services from outside the Union to end-users in the Union~~ **the provider or person it represents.**

Article 4

Definitions

1. For the purposes of this Regulation, following definitions shall apply:
- (a) the definitions in Regulation (EU) 2016/679;
 - (b) the definitions of ‘electronic communications network’, ‘electronic communications service’, ‘interpersonal communications service’, ‘number-based interpersonal communications service’, ‘number-independent interpersonal communications service’, ‘end-user’ and ‘call’ in ~~points~~ **paragraphs** (1), (4), (5), (6), (7), (14) and (21) respectively of Article 2 of [Directive establishing the European Electronic Communications Code];
 - (c) the definition of 'terminal equipment' in ~~point (1)~~ of Article 1(1) of Commission Directive 2008/63/EC⁶ ;
 - (d) **the definition of ‘information society service’ in point (b) of Article 1 (1) of Directive (EU) 2015/1535⁷.**

⁶ Commission Directive 2008/63/EC of 20 June 2008 on competition in the markets in telecommunications terminal equipment (OJ L 162, 21.6.2008, p. 20–26).

⁷ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ L 241, 17.9.2015, p. 1-15).

2. For the purposes of ~~point (b) of paragraph 1~~ **this Regulation**, the definition of ‘interpersonal communications service’ **referred to in point (b) of paragraph 1** shall include services which enable interpersonal and interactive communication merely as a ~~minor~~ ancillary feature that is intrinsically linked to another service.
3. In addition, for the purposes of this Regulation the following definitions shall apply:
- (a) ‘electronic communications data’ means electronic communications content and electronic communications metadata;
 - (b) ‘electronic communications content’ means the content exchanged by means of electronic communications services, such as text, voice, videos, images, and sound;
 - (c) ‘electronic communications metadata’ means data processed ~~in an~~ **by means of** electronic communications ~~network~~ **services** for the purposes of transmitting, distributing or exchanging electronic communications content; including data used to trace and identify the source and destination of a communication, data on the location of the device generated in the context of providing electronic communications services, and the date, time, duration and the type of communication;
 - (d) ‘publicly available directory’ means a directory of end-users of ~~electronic~~ **number-based interpersonal** communications services, whether in printed or electronic form, which is published or made available to the public or to a section of the public, including by means of a directory enquiry service **and the main function of which is to enable to identify such end-users**;
 - (e) ‘electronic ~~mail~~ **message**’ means any ~~electronic~~ message containing information such as text, voice, video, sound or image sent over an electronic communications network which can be stored in the network or in related computing facilities, or in the terminal equipment of its recipient;

- (f) ‘direct marketing communications’ means any form of advertising, whether written or oral, sent **or presented** to one or more identified or identifiable end-users of electronic communications services, including the use of automated calling and communication systems with or without human interaction, electronic ~~mail~~ **message**, SMS, etc.;
- (g) ‘direct marketing voice-to-voice calls’ means live calls, which do not entail the use of automated calling systems and communication systems;
- (h) ‘automated calling and communication systems’ means systems capable of automatically initiating calls to one or more recipients in accordance with instructions set for that system, and transmitting sounds which are not live speech, including calls made using automated calling and communication systems which connect the called person to an individual.

Article 94a

Consent

1. The ~~definition of and conditions~~ **provisions** for consent provided for under ~~Articles 4(11) and 7~~ of Regulation (EU) 2016/679/EU shall apply **to natural persons and, *mutatis mutandis*, to legal persons.**
- 1a. **Paragraph 1 is without prejudice to national legislation on determining the persons who are authorised to represent a legal person in any dealings with third parties or in legal proceedings.**

2. Without prejudice to paragraph 1, where technically possible and feasible, for the purposes of point (b) of Article 8(1), consent may be expressed by using the appropriate technical settings of a software ~~application enabling access to the internet~~ **placed on the market permitting electronic communications, including the retrieval and presentation of information on the internet.**

3. End-users who have consented to the processing of electronic communications data as set out in point (c) of Article 6(2) and points (a) and (b) of Article 6(3) shall ~~be given the possibility to withdraw their consent at any time as set forth under Article 7(3) of Regulation (EU) 2016/679~~ and be reminded of ~~this~~ **the possibility to withdraw their consent** at periodic intervals of **[no longer than 12 months]**, as long as the processing continues, **unless the end-user requests not to receive such reminders.**

CHAPTER II

PROTECTION OF ELECTRONIC COMMUNICATIONS OF ~~NATURAL AND LEGAL PERSONS~~ **END-USERS** AND OF ~~INFORMATION STORED IN~~ **THE INTEGRITY OF THEIR** TERMINAL EQUIPMENT

Article 5

Confidentiality of electronic communications data

- ~~1.~~ **1.** Electronic communications data shall be confidential. Any ~~interference with~~ **processing of** electronic communications data, ~~such as by~~ **including** listening, tapping, storing, monitoring, scanning or other kinds of interception, ~~or surveillance or processing of~~ electronic communications data, by ~~persons~~ **anyone** other than the end-users **concerned**, shall be prohibited, except when permitted by this Regulation.
- ~~2.~~ **[Confidentiality of electronic communications data shall apply to the transmission of machine-to-machine electronic communications where carried out via an electronic communications service.]**

Article 6

Permitted processing of electronic communications data

1. Providers of electronic communications networks and services ~~may~~ **shall be permitted to** process electronic communications data **only** if:
 - (a) it is necessary to achieve the transmission of the communication, for the duration necessary for that purpose; or

(b) it is necessary to maintain or restore the security of electronic communications networks and services, or detect technical faults and/or errors **and/or attacks** in the transmission of electronic communications, for the duration necessary for that purpose.

2. **Without prejudice to paragraph 1, Providers of electronic communications networks and services may shall be permitted to process electronic communications metadata only if:**

(a) it is necessary **for the purposes of network management or optimisation,** or to meet mandatory quality of service requirements pursuant to [Directive establishing the European Electronic Communications Code] or Regulation (EU) 2015/2120⁸ for the duration necessary for that purpose; or

(b) it is necessary for **performance of the contract to which the end-user is party, including** billing, calculating interconnection payments, detecting or stopping fraudulent, or abusive use of, or subscription to, electronic communications services; or

~~(ba) — it is necessary for compliance with a legal obligation to which the provider is subject;~~
~~or~~

(c) the end-user concerned has given ~~his or her~~ consent to the processing of ~~his or her~~ communications metadata for one or more specified purposes, including for the provision of ~~specific~~ services to such end-users, provided that the purpose or purposes concerned could not be fulfilled by processing information that is made anonymous; **or**

⁸ Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (OJ L 310, 26.11.2015, p. 1–18).

- (d) **it is necessary to protect the vital interest of an end-user who is a natural person, or that of another natural person, upon request of a competent authority, in accordance with Union or Member State law where the end-user who is a natural person is physically or legally incapable of giving consent; or**
- (e) **it is necessary for scientific research or statistical purposes provided it is based on Union or Member State law which shall be proportionate to the aim pursued and provide for specific measures, including encryption and pseudonymisation, to safeguard fundamental rights and the interest of the end-users. Processing of electronic communications metadata under this point shall be done in accordance with paragraph 6 of Article 21 and paragraphs 1, 2 and 4 of Article 89 of Regulation (EU) 2016/679.**
- (f) it is necessary for the purpose of statistical counting at the request of a public authority, provided that the processing is limited to electronic communications data that constitutes geolocation data, such processing could not be carried out by processing information that is made anonymous, such data is erased or made data anonymous when it is no longer needed to fulfil the purpose and at the latest 24 hours after its collection, and such data is not used to determine the nature or characteristics of an end-user or to build a profile of an end-user.**
3. **Without prejudice to paragraph 1, Providers of the electronic communications networks and services may shall be permitted to process electronic communications content only:**
- (a) **for the sole purpose of the provision of a specific service to an end-user, if the end-user or end-users concerned have given their consent to the processing of his or her electronic communications content and the provision of that service cannot be fulfilled without the processing of such content; or**

- (aa) **for the purpose of the provision of an explicitly requested services by an end-user for purely individual use if the requesting end-user has given consent and where such requested processing does not adversely affect fundamental rights and interest of another end-user concerned and does not exceed the duration necessary for the provision of the requested services and is limited to that purpose only; or**
- (b) if all end-users concerned have given their consent to the processing of their electronic communications content for one or more specified purposes that cannot be fulfilled by processing information that is made anonymous, and the provider has **prior to the processing carried out an assessment of the impact of the envisaged processing operations on the protection of electronic communications data and** consulted the supervisory authority. ~~Points (2) and (3) of Article 36(2) and (3) of Regulation (EU) 2016/679 shall apply to the consultation of the supervisory authority.~~

3a. For the purposes of point (f) of paragraph 2, the provider of the electronic communications service shall:

- (a) exclude electronic communications metadata that reveal special categories of personal data pursuant to Article 9 of Regulation (EU) 2016/679 from processing where technically possible, and otherwise take their nature into account;**
- (b) not share such data with the public authority or any other third party, unless it is made anonymous;**
- (c) prior to the processing carry out an assessment of the impact of the envisaged processing operations on the protection of electronic communications data and consult the supervisory authority. Points (2) and (3) of Article 36(2) and (3) of Regulation (EU) 2016/679 shall apply to the consultation of the supervisory authority; and**

(d) inform the end-user of specific processing on the basis of point (f) of paragraph 2 and give the right to object to such processing.

4. A third party on behalf of a provider of electronic communications network or services shall be permitted to process electronic communications data in accordance with paragraphs 1 to 3 provided that conditions laid down in Article 28 of Regulation (EU) 2016/679 are met.

Article 7

Storage and erasure of electronic communications data

1. Without prejudice to point (b) of Article 6(1) and points (a), and (b) of Article 6(3), the provider of the electronic communications service shall erase electronic communications content or make that data anonymous after receipt of electronic communication content by the intended recipient or recipients. ~~Such data may be recorded or stored by the end-users or by a third party entrusted by them to record, store or otherwise process such data, in accordance with Regulation (EU) 2016/679.~~
2. Without prejudice to point (b) of Article 6(1) and points (a), (c) and (ee) of Article 6(2), the provider of the electronic communications service shall erase electronic communications metadata or make that data anonymous when it is no longer needed for the purpose of the transmission of a communication. ~~Such data may be recorded or stored by the end-users or by a third party entrusted by them to record, store or otherwise process such data, in accordance with Regulation (EU) 2016/679.~~
3. Where the processing of electronic communications metadata takes place for the purpose of billing in accordance with point (b) of Article 6(2), the relevant metadata may be kept until the end of the period during which a bill may lawfully be challenged or a payment may be pursued in accordance with national law.

Article 8

Protection of end-users' terminal equipment information ~~stored in terminal equipment of end-users and related to or processed by or emitted by end-users' terminal such equipment~~

1. The use of processing and storage capabilities of terminal equipment and the collection of information from end-users' terminal equipment, including about its software and hardware, other than by the end-user concerned shall be prohibited, except on the following grounds:
 - (a) it is necessary for the sole purpose of carrying out the transmission of an electronic communication over an electronic communications network; or
 - (b) the end-user has given his or her consent; or
 - (c) it is necessary for providing an information society service requested by the end-user; or
 - (d) ~~if~~ it is necessary for web-audience measuring, provided that such measurement is carried out by the provider of the information society service requested by the end-user **or by a third party on behalf of the provider of the information society service provided that conditions laid down in Article 28 of Regulation (EU) 2016/679 are met;** or
 - (e) **it is necessary for a security update provided that:**
 - (i) **security updates are necessary and do not in any way change the privacy settings chosen by the end-user are not changed in any way,**
 - (ii) **the end-user is informed in advance each time an update is being installed, and**
 - (iii) **the end-user is given the possibility to postpone or turn off the automatic installation of these updates; or**
 - ~~(f) it is necessary to locate, at the time of the incident, a caller of an emergency call from the terminal by organisations dealing with emergency communications.~~

2. The collection of information emitted by terminal equipment **of the end-user** to enable it to connect to another device and, or to network equipment shall be prohibited, except ~~if~~ **on the following grounds:**
 - (a) it is done exclusively in order to, for the time necessary for, and for the purpose of establishing **or maintaining** a connection; or
 - (b) the end-user has given his or her consent; or**
 - (c) it is necessary for the purpose of statistical counting that is limited in time and space to the extent necessary for this purpose and the data is made anonymous or erased as soon as it is no longer needed for this purpose.**
- ~~(b)~~**2a.** **For the purpose of paragraph 2 points (b) and (c),** a clear and prominent notice ~~is~~ **shall** be displayed informing of, at least, the modalities of the collection, its purpose, the person responsible for it and the other information required under Article 13 of Regulation (EU) 2016/679 where personal data are collected, as well as any measure the end-user of the terminal equipment can take to stop or minimise the collection.
- 2b.** **For the purpose of paragraph 2 points (b) and (c),** ~~the~~ collection of such information shall be conditional on the application of appropriate technical and organisational measures to ensure a level of security appropriate to the risks, as set out in Article 32 of Regulation (EU) 2016/679, have been applied.
3. The information to be provided pursuant to ~~point (b) of~~ paragraph **2a** may be provided in combination with standardized icons in order to give a meaningful overview of the collection in an easily visible, intelligible and clearly legible manner.
4. [The Commission shall be empowered to adopt delegated acts in accordance with Article ~~257~~ determining the information to be presented by the standardized icon and the procedures for providing standardized icons.]

Article 9

Consent

1. ~~The definition of and conditions for consent provided for under Articles 4(11) and 7 of Regulation (EU) 2016/679/EU shall apply.~~
2. ~~Without prejudice to paragraph 1, where technically possible and feasible, for the purposes of point (b) of Article 8(1), consent may be expressed by using the appropriate technical settings of a software application enabling access to the internet.~~
3. ~~End users who have consented to the processing of electronic communications data as set out in point (c) of Article 6(2) and points (a) and (b) of Article 6(3) shall be given the possibility to withdraw their consent at any time as set forth under Article 7(3) of Regulation (EU) 2016/679 and be reminded of this possibility at periodic intervals of 6 months, as long as the processing continues.~~

Article 10

Information and options for privacy settings to be provided

1. Software placed on the market permitting electronic communications, including the retrieval and presentation of information on the internet, shall offer the option to prevent ~~third~~ **any other parties than the end-user** from storing information on the terminal equipment of an end-user or processing information already stored on that equipment.
2. ~~Upon~~ **At the time of installation or first usage and every update**, the software referred to in paragraph 1 shall inform the end-user about the privacy settings options **and navigate the end-user through them, to continue with the installation or usage, require the end-user to consent to a setting shall remind the end-users of the availability of privacy settings with periodic intervals.**

- 2a. **The software referred to in paragraph 1 shall provide in a clear manner easy ways for end-users to change the privacy setting ~~consented to under paragraph 2~~ at any time during the use.**
3. In the case of software which has already been installed on [~~25 May 2018~~ **the date of entry into application**], the requirements under paragraphs 1 and 2 shall be complied with at the time of the first update of the software, but no later than [~~25 August 2018~~ **3 months after the date of entry into application**].

...

CHAPTER III

~~NATURAL AND LEGAL PERSONS~~ **END-USERS'** RIGHTS TO CONTROL ELECTRONIC COMMUNICATIONS

Article 12

Presentation and restriction of calling and connected line identification

1. Where presentation of the calling and connected line identification is offered in accordance with Article [107] of the [Directive establishing the European Electronic Communication Code], the providers of ~~publicly available~~ number-based interpersonal communications services shall provide the following:
- (a) the calling end-user with the possibility of preventing the presentation of the calling line identification on a per call, per connection or permanent basis;
 - (b) the called end-user with the possibility of preventing the presentation of the calling line identification of incoming calls;

- (c) the called end-user with the possibility of rejecting incoming calls where the presentation of the calling line identification has been prevented by the calling end-user;
 - (d) the called end-user with the possibility of preventing the presentation of the connected line identification to **which** the calling end-user **is connected**.
2. The possibilities referred to in ~~points (a), (b), (c) and (d)~~ of paragraph 1 shall be provided to end-users by simple means and free of charge.
 3. Point (a) of paragraph 1 shall also apply with regard to calls to third countries originating in the Union. Points (b), (c) and (d) of paragraph 1 shall also apply to incoming calls originating in third countries.
 4. Where presentation of calling or connected line identification is offered, providers of **publicly available** number-based interpersonal communications services shall provide information to the public regarding the options set out in ~~points (a), (b), (c) and (d)~~ of paragraph 1 **and the exceptions set forth in Article 13(1), (1a) and (2)**.

Article 13

Exceptions to presentation and restriction of calling and connected line identification, to rejection of incoming calls and to provide access to emergency services

1. Regardless of whether the calling end-user has prevented the presentation of the calling line identification, where ~~a call is~~ **emergency communications are** made to emergency services, providers of ~~publicly available~~ number-based interpersonal communications services shall 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, including public safety answering points, for the purpose of responding to such communications.

- 1a. **Regardless whether the called end-user rejects incoming calls where the presentation of the calling line identification has been prevented by the calling end-user, providers of number-based interpersonal communications services shall override this choice, where technically possible, when the calling end-user is an organisation dealing with emergency communications, including public safety answering points, for the purpose of responding to such communications.**
2. Member States shall establish more specific provisions with regard to the establishment of **transparent** procedures and the circumstances where providers of ~~publicly available~~ 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 **unwanted**, malicious or nuisance calls.
3. **Regardless of whether the end-user has prevented access to the terminal equipment's Global Navigation Satellite Systems (GNSS) capabilities capabilities or other types of terminal equipment based location data through the terminal equipment settings, when a call is made to emergency services, such settings may not prevent access to GNSS such location data to determine and provide the caller calling end-user's location to emergency services an organisation dealing with emergency communications, including public safety answering points, for the purpose of responding to such calls.**

Article 14

Incoming call blocking

1. Providers of ~~publicly available~~ number-based interpersonal communications services shall deploy state of the art measures to limit the reception of **unwanted, malicious or nuisance** calls by end-users. ~~and~~

2. **Providers of number-based interpersonal communications services** shall also provide the called end-user with the following possibilities, free of charge:
- (a) 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); and**
 - (b) to stop automatic call forwarding by a third party to the end-user's terminal equipment.

Article 15

Publicly available directories

1. The providers of ~~publicly available directories~~ **number-based interpersonal communications services** shall **obtain the consent of** ~~inform end-users who are natural persons about the possibility to include their personal data in a publicly available directory and give end-users who are natural persons them to include their personal data in the directory and~~, consequently, shall obtain consent from these end-users **for inclusion of such data per category of personal data** ~~the opportunity to determine per category of personal data whether their personal data are included in the publicly available directory~~, to the extent that such data are relevant for the purpose of the directory as determined by the provider of the directory.
- 1aa. Notwithstanding paragraph 1, Member States may provide by law that the inclusion of personal data of an end-user who is a natural person in a publicly available directory can take place provided that he end-user who is a natural person shall have the right to object to such inclusion.**
- 1a. ~~The~~ **Providers of number-based interpersonal communications services and/or providers of publicly available directory** shall give end-users who are natural persons the means to verify, correct and delete such data **included in a publicly available directory**.

2. The providers of a ~~publicly available directory~~ **number-based interpersonal communications services and/or providers of publicly available directory** shall inform end-users who are natural persons whose personal data are in the directory of ~~the available~~ **any search functions that is not based on name of** in the directory and obtain ~~the~~ **additional consent** of end-users' ~~consent~~ before enabling such search functions related to their own data.
3. The providers of ~~publicly available directories~~ **number-based interpersonal communications services and/or providers of publicly available directory** shall provide end-users that are legal persons with the possibility to object to data related to them being included in the directory.
- 3a. ~~The~~ **Providers of number-based interpersonal communications services and/or providers of publicly available directory** shall give such end-users that are legal persons the means to verify, correct and delete such data **included in a publicly available directory**.
- 3aa. Notwithstanding paragraphs 1aa to 3a, Member States may provide by law that the requirements under those paragraphs apply to providers of publicly available directories, in addition to or instead of, providers of number-based interpersonal communications services.**
4. The possibility for end-users not to be included in a publicly available directory, or to verify, correct and delete any data related to them shall be provided free of charge.

Article 16

Unsolicited and ~~D~~direct marketing communications

1. Natural or legal persons ~~may~~ **shall be prohibited from** ~~using~~ electronic communications services for the purposes of [sending or presenting] direct marketing communications to end-users who are natural persons ~~that~~ **unless they** have given their consent.
2. **Notwithstanding paragraph 1, ~~W~~**where a natural or legal person obtains ~~electronic~~ contact details for electronic ~~mail~~ **message** from ~~its customer~~ **end-users who are natural persons**, in the context of the sale of a product or a service, in accordance with Regulation (EU) 2016/679, that natural or legal person may use these ~~electronic~~ contact details for direct marketing of its own similar products or services only if ~~customers~~ **such end-users** are clearly and distinctly given the opportunity to object, free of charge and in an easy manner, to such use. The right to object shall be given at the time of collection **of such end-users' contact details** and, **if that end-user has not initially refused that use**, each time ~~that when a natural or legal persons~~ **sends a message to that end-user for the purpose of such direct marketing communication is [sent or presented]**.
- 2a. **Member States may provide by law a period of time, after the sale of the product or service occurred, that within which a natural or legal person may use its customer's contact details of the end-user who is a natural person for direct marketing purposes, as provided for in paragraph 2 only where the sale of the product or service occurred not more than twelve months prior to the sending of an electronic message for direct marketing.**
3. Without prejudice to paragraphs 1 and 2, natural or legal persons using electronic communications services for the purposes of placing direct marketing calls shall:
 - (a) present the ~~identity of a~~ **calling line identification** on which they can be contacted; ~~or.~~

- ~~(b)~~**3a.** Member States may require natural or legal person 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 call **in addition to the obligation set out in paragraph 3. Member State requiring the use of such a specific code or prefix shall make it available for the natural or legal persons who use electronic communications services for the purposes of direct marketing calls.**
4. Notwithstanding paragraph 1, Member States may provide by law that the placing of direct marketing voice-to-voice calls to end-users who are natural persons shall only be allowed in respect of end-users who are natural persons who have not expressed their objection to receiving those communications.
5. Member States shall ensure, in the framework of Union law and applicable national law, that the legitimate interest of end-users that are legal persons with regard to ~~unsolicited~~ **direct marketing** communications ~~sent~~ **or presented** by means set forth under paragraph 1 are sufficiently protected.
6. Any natural or legal person using electronic communications services to ~~transmit~~ [send or present] direct marketing communications shall, **each time a direct marketing communication is ~~sent~~ or presented:**
- (a) **reveal his or its identity and use true effective return addresses or numbers;**
- (b) inform end-users of the marketing nature of the communication and the identity of the legal or natural person on behalf of whom the **direct marketing** communication is transmitted ~~sent~~ **or presented**;
- (c) ~~and shall provide the necessary information for recipients end-users who are natural persons to exercise their right to object or to withdraw their consent, in an easy manner and free of charge, to receiving further direct marketing communications;~~

(d) clearly and distinctly give the end-users who are natural persons a means to object or to withdraw their consent, free of charge, at any time, and in an easy and effective manner and free of charge, to receiving further direct marketing communications, and shall provide the necessary information to this end. This means shall also be given at the time of collection of the contact details according to paragraph 2. It shall be as easy to withdraw as to give consent.

~~6a. Advertisements on a website that are displayed to the general public and do not require any contact details of end-users should not be subject to this article.~~

~~7. [The Commission shall be empowered to adopt implementing measures in accordance with Article 26(2) specifying the code/or prefix to identify marketing calls, pursuant to point (b) of paragraph 3.]~~
