



Council of the
European Union

Brussels, 20 November 2020
(OR. en)

12891/20

**Interinstitutional File:
2017/0003(COD)**

LIMITE

**TELECOM 215
COMPET 556
MI 465
DATAPROTECT 125
CONSOM 187
JAI 967
DIGIT 120
FREMP 116
CYBER 229
CODEC 1142**

NOTE

From: Presidency
To: Delegations

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

Subject: Proposal for a Regulation of the European Parliament and of the Council
concerning the respect for private life and the protection of personal data in
electronic communications and repealing Directive 2002/58/EC (Regulation
on Privacy and Electronic Communications)
- Progress report

The present report has been drawn up under the responsibility of the Presidency and is without prejudice to particular points of interest or further contributions of individual delegations. It sets out the work done so far in the Council's preparatory bodies and gives an account on the state of play in the examination of the above mentioned proposal.

I. INTRODUCTION

1. The Commission adopted the proposal for a Regulation on Privacy and Electronic Communications (ePrivacy proposal) on 10 January 2017 with the aim to replace the current ePrivacy Directive¹. The proposal was one of the actions foreseen by the Digital Single Market Strategy² to reinforce trust and security in the Digital Single Market.
2. The aim of the Commission proposal, based on Articles 16 and 114 TFEU, is to ensure protection of fundamental rights and freedoms, in particular the rights to respect for private life and communications and protection of personal data in the electronic communications sector. It contains provisions ensuring confidentiality of electronic communications, including provisions concerning the protection of users' terminal equipment, as well as provisions on end-users' control over their electronic communications. The proposal also covers rules on enforcement and supervisory authorities.
3. In the European Parliament, the lead Committee on Civil Liberties, Justice and Home Affairs (LIBE) adopted its report, together with the mandate to start inter-institutional negotiations on 19 October 2017, which was confirmed by a plenary vote on 26 October 2017. The rapporteur for the file is Birgit Sippel (S&D, Germany).
4. The European Economic and Social Committee adopted its opinion on 5 July 2017.

¹ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)

² Doc. 8672/15

II. WORK WITHIN THE COUNCIL

5. In the Council, the examination of the proposal has been carried out in the Working Party on Telecommunications and Information Society (hereinafter: WP TELE). The TTE Councils of 9 June³ and 4 December⁴ 2017, 8 June⁵ and 4 December 2018⁶ and 7 June 2019⁷ took note of the progress made respectively under the Maltese, Estonian, Bulgarian, Austrian and Romanian Presidencies. The Finnish Presidency submitted a General approach to the Coreper⁸ on 27 November 2019 which was not adopted. After a thorough reflection on the topic in the Committee and based also on the discussions in the 4 December 2019 TTE Council, the Croatian Presidency brought substantial changes in the proposal. The outbreak of the COVID-19 pandemic and the subsequent disruption in the regular work of the Working Party did not allow further progress during the term of the Croatian Presidency⁹.
6. The German Presidency took up the work by offering the delegations options¹⁰ on the core provisions of the proposal to facilitate the further progress. Delegations gave their views on Article 6b (1) (d) on 'vital interest', Article 6b(1) (e) and Article 6b(2) on 'legitimate interest' and 'statistical counting', on Article 8 on Protection of end-users' terminal equipment information and on Article 6d on 'detection of child abuse imagery'.
7. In its subsequent compromise proposal¹¹ the Presidency proposed to remove the legitimate interests of an electronic communications network or service provider as a legal basis for processing of electronic communications metadata or for using processing and storage capabilities of terminal equipment or collecting information from an end-users' terminal equipment. Instead, the proposal provided for detailed cases in which providers of electronic communications networks and services shall be permitted to process metadata.

³ Doc. 9324/17
⁴ Doc. 14374/17 + COR 1
⁵ Doc. 9079/18 + COR 1
⁶ Doc. 14991/18 + COR 1
⁷ Doc. 9351/19 + COR 1
⁸ Doc. 14068/19 + COR 1
⁹ Doc. 8204/20
¹⁰ Doc. 9243/20
¹¹ Doc. 9931/20

8. The Presidency also proposed to delete specific data retention issues in the proposal in light of the recent Court's judgments from 6 October 2020¹².
9. The Presidency moreover suggested to delete Article 6d (Processing of electronic communications for the purpose of preventing child sexual abuse) following the presentation by the Commission of a proposal for a Regulation on Derogation from certain Articles of the ePrivacy directive on processing of electronic communications data for the purpose of preventing child sexual abuse online¹³.
10. Member States' reactions to the introduced modifications were rather mixed. The deletion of the “legitimate interests” as legal basis was broadly supported. In the opinion of some Member States, the text was too restrictive towards innovation and the permission for processing of metadata. A number of Member States would have preferred the legal basis for the further compatible processing of metadata to be reinstated. Many Member States would have liked to see the data retention provisions kept as in the text of the Finnish Presidency. Other Member States argued for a broader exemption of security related issues from the scope of the proposal. A number of Member States expressed the view that the Finnish Presidency proposal¹⁴ could be considered as the starting point for future negotiations.
11. It is clear from the Member States' reactions to the compromise proposal of the Presidency¹⁵ that further work is needed on the file. The German Presidency is committed to working closely with the forthcoming Portuguese Presidency to facilitate further discussions and to ensure smooth progress on the file.

¹² Judgement of the Court of Justice in Case C-623/17 (6 October 2020).

¹³ Doc. 10682/20 (COM proposal) and doc. 12084/20 (Coreper mandate).

¹⁴ Doc. 14068/19 + COR 1

¹⁵ Doc. 9931/20