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NOTE

From: Presidency
To: Delegations

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

At the first Working Party discussion of the ePrivacy proposal under the DE Presidency on 13 July 2020, we would like to prepare our work for the following months with the aim of reaching a General Approach and/or a mandate to start negotiations with the European Parliament. The starting point for our work is the latest compromise proposal of the HR Presidency of 6 March 2020 as set out in 6543/20.

The Presidency is of the opinion that agreeing on a General Approach is possible. A key precondition is, however, an agreement on the core provisions of the proposal, namely the rules for the processing of electronic communications data in Articles 6 to 6d and for the protection of end-users' terminal equipment information in Article 8.

a) Questions on the core articles of the proposal

When exploring possible options for resolving outstanding issues in these Articles, the Presidency will strive to follow two general principles:

- to ensure effective protection of privacy in electronic communications in accordance with the requirements of the Charter of Fundamental Rights; and
- to ensure the preservation and advancement of innovative business models in the digital world, in particular with regard to the competitiveness of small and medium-sized enterprises and start-ups established in the Union in relation to large market players established outside of the Union.

At the Working Party meeting on 13 July 2020, Member States will be asked to give their opinions on the following set of questions concerning Articles 6b, 6c and 8, where we assume there is a need for further discussion.

To prepare drafting of a new compromise text, we will also ask Member States to submit written comments until 24th of July 2020.

i. Article 6b (1) (d) – ‘vital interest’

Including in the light of the COVID-19 pandemic, the Presidency would like to discuss whether provisions on the permission to process electronic communications metadata for the protection of vital interests as set out in the latest compromise text 6543/20 are still supported by Member States, or whether further alignment to the GDPR is needed.

The Presidency therefore invites Member States to comment on the following **options**:

Option 1:

Article 6b (1) (d) in the latest compromise text 6543/20 is to remain unchanged:

'(d) it is necessary to protect the vital interest of a natural person, in the case of emergency, in general upon request of a public authority, in accordance with Union or Member State law; or' (...)

Option 2:

Article 6b (1) (d) should be aligned on the wording of Article 6 (1) (d) GDPR, and a recital corresponding to Recital 46 GDPR should be included, replacing Recital 17a in the latest compromise text set out in 6543/20:

‘(d) it is necessary in order to protect the vital interests of the end-user or of another natural person.’

New recital: ***‘The processing of electronic communications metadata should also be regarded as lawful where it is necessary to protect an interest which is essential for the life of the end-user or that of another natural person. Processing of electronic communications metadata for the protection of vital interests of the end-user may include for instance processing necessary for humanitarian purposes, including for monitoring epidemics and their spread or in humanitarian emergencies, in particular natural and man-made disasters.’***

ii. **Article 6b(1) (e) and Article 6b(2) – ‘legitimate interest’/ ‘statistical counting’**

The Presidency sees a need for further discussion of the proposals for Article 6b(1) (e) and Article 6b(2) in the latest compromise proposal set out in 6543/20. As a general principle, in order to achieve legal clarity, processing of electronic communications data has to be based on a clear and unambiguous purpose for as long as it is carried out without the consent of the end-user. To define the ‘direction of travel’ for further work on the text, the Presidency would like to discuss the following general options:

Option 1:

Proposals for Article 6b(1) (e) and Article 6b(2) as set out in the latest compromise text 6543/20, which permit the processing of electronic communications metadata on the basis of legitimate interests subject to specific conditions and safeguards.

Option 2:

Should Article 6b(1) (e) and 6b(2) as set out in the latest compromise text 6543/20 not be supported, the Presidency would like to propose to combine the last compromise proposal under the FI Presidency (14068/19), with modified points (e) and (f). Those two points correspond to the version contained in 9958/18 under the BG Presidency. The text would read:

Article 6b

Permitted processing of electronic communications metadata

Without prejudice to Article (6)1, providers of electronic communications networks and services shall be permitted to process electronic communications metadata only if:

- (a) it is necessary for the purposes of network management or network optimisation, or to meet technical quality of service requirements pursuant to Directive (EU) 2018/1972 or Regulation (EU) 2015/2120¹; or***
- (b) it is necessary for calculating and billing interconnection payments or for the performance of an electronic communications service contract to which the end-user is party, in particular if necessary for billing, or if it is necessary for detecting or stopping fraudulent or abusive use of or subscription to electronic communications services; or***
- (c) the end-user concerned has given consent to the processing of communications metadata for one or more specified purposes; or***
- (d) (...[see point (a) i.]***

¹ 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).

- (e) *it is necessary for the purpose of statistical counting, provided that:*
- *the processing is limited to electronic communications metadata that constitutes location data and that is pseudonymised,*
 - *the processing could not be carried out by processing information that is made anonymous, and the location data is erased or made anonymous when it is no longer needed to fulfil the purpose, and*
 - *the location data is not used to determine the nature or characteristics of an end-user or to build a profile of an end-user.*
- (f) *it is necessary for statistical counting, other than based on electronic communications metadata that constitute location data or for scientific research, 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 protect 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.'*

iii. **Article 8**

The Presidency sees a need for further discussion of the proposals for Article 8 as set out in the HR Presidency text (doc. 6543/20), and would like to ask for Member States' opinions on the following options:

Option 1

Should the proposals for paragraph 1(g) and for paragraph 1a to permit access to terminal devices for the sole purpose of a legitimate interest subject to specific conditions and safeguards be supported, the Presidency would like to discuss how the security of the respective equipment can be ensured under these conditions, given that this approach would considerably facilitate the installation of software which is frequently seen as a major gateway for malicious software.

Option 2

Should Article 8 in the version of the last compromise proposal of the FI Presidency as set out in 14068/19 be supported, the Presidency would like to ask:

1. whether delegations agree that Article 8, together with Recitals 20 and 21, establishes rules that appropriately balance a high level of protection of end-users' privacy with the legitimate interests of online publishers, given their important role for freedom of speech and media pluralism - if not, what changes need to be introduced to achieve such an appropriate balance;
2. whether delegations see a need to further discuss the provision in Article 8(1), especially with regard to requirements for access to terminal equipment in connection with IoT (e. g. automated and networked driving or in the health sector) and with regard to effective protection of end-users' privacy - if yes, what changes/aspects need to be addressed in the text;
3. whether delegations agree with the text of Article 8(2) or they see a need for further discussions - if the latter, what changes/aspects need to be addressed in the text; and
4. whether access to terminal equipment should be regulated in order to protect vital interests, as in Article 6(1)(d) GDPR.

b) Article 6d – ‘detection of child abuse imagery’

Regarding Article 6d, the Presidency assumes a common understanding among Member States that the ePrivacy Regulation should not prevent effective and well-established measures against child abuse and potentially against other serious illegal activities, most notably terrorism.

However, previous discussions have shown that elementary questions regarding i.a. the scope and the appropriate legal instrument for the relevant provisions remain highly controversial. The Presidency would therefore like to discuss this issue separately at a later date, also in the light of potential initiatives outside the ePrivacy Regulation that are relevant to the matter.

c) Additional need for discussion

With regard to the other provisions and recitals of the Regulation, for example Article 2 and the related recital 8aa or Article 6c, the Presidency would like to ask Member States to indicate where they see a need for further discussion in order to clear the way for a General Approach.
