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#### NOTE

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From: Presidency

To: Permanent Representatives Committee/Council

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

- Progress report

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*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. The Council will be invited to take note of the report.*

## 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 Directive<sup>1</sup>. The proposal is one of the actions foreseen by the Digital Single Market Strategy<sup>2</sup> to reinforce trust and security in the Digital Single Market.
2. 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).
3. 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 June<sup>3</sup>, 4 December<sup>4</sup> 2017, 8 June<sup>5</sup> and 4 December 2018<sup>6</sup> took note of the progress made respectively under the Maltese, Estonian, Bulgarian and Austrian Presidencies. Ministers also held a policy debate and an exchange of views on the proposal at the 8 June and 4 December 2018 TTE Councils respectively, in particular on such issues as: the link between personal data protection and protection of privacy of electronic communications; the need for future-proof privacy-protective and flexible rules taking into account latest developments in such areas as Artificial Intelligence or Internet of Things; the need to address the issue of child imagery online; the data retention issue; and the supervisory authorities.

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<sup>1</sup> 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)

<sup>2</sup> Doc. 8672/15

<sup>3</sup> Doc. 9324/17

<sup>4</sup> Doc. 14374/17 + COR 1

<sup>5</sup> Doc. 9079/18 + COR 1

<sup>6</sup> Doc. 14991/18 + COR 1

4. Under the Romanian Presidency, the WP TELE examined this proposal thoroughly on nine occasions, including a joint meeting with the Friends of Presidency on Data Retention (FoP DAPIX), with the aim to clarify the issues mentioned above. In order to advance the work on this file, the Presidency has issued a number of new compromise texts<sup>7</sup> and introduced further modifications on some of the key provisions of the proposal. The Romanian Presidency discussed all the issues raised in the June and December 2018 TTE Councils and addressed the vast majority of those issues. Section II below outlines the state of discussions on the main topics considered in the WP TELE during the first half of 2019.

## II. STATE OF PLAY IN THE COUNCIL

5. Throughout the discussions in WP TELE and at the Council, some delegations have underlined repeatedly concerns about the way the ePrivacy proposal would interact with new technologies, in particular in the context of Machine-to-Machine, Internet of Things or Artificial Intelligence. The Presidency therefore organised several WP meetings on this topic. Following those debates and taking into account explanations provided by the Commission, the Presidency introduced numerous clarifications in the respective recitals, in particular 13, 20a and 21, addressing namely situations of multiple end-users and the question of consent.
6. Another issue discussed in depth under the Romanian Presidency, at the request of delegations both at the WP and Council level, was the issue of processing of electronic communications data for the purposes of prevention/detection/reporting of child abuse imagery. While there was support for addressing this issue at the EU level, delegations had diverging views on whether and how to do so in the ePrivacy proposal. Some Member States suggested to include a provision to this end under article 6 on processing of electronic communications data, others argued that this issue could be better addressed in a separate legal act in the context of article 11 on restrictions. The WP also debated the need to ensure appropriate safeguards for this type of processing.

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<sup>7</sup> Docs. 5934/19, 6467/19, 6771/19 and 7099/19 + REV 1

7. The WP TELE also discussed, including in a joint meeting with FoP DAPIX, which is primarily responsible for the issue of data retention, the ways to ensure that the provisions of the ePrivacy proposal maintain the possibility for existing and future data retention regimes to be compliant with the requirements of the Charter, as interpreted by the Court of Justice of the European Union.<sup>8</sup> Many, albeit not all, delegations were of the view that simply replicating the respective provisions and structure of the ePrivacy Directive was not a sufficient solution.
8. Following discussions both in the WP TELE and at the last Council, the Presidency devoted significant attention to the provisions on supervisory authorities (article 18), with the aim to provide more flexibility for Member States, while respecting the independence requirements stemming from Art. 8(3) of the Charter, as is now expressly recalled in recital 38. The Presidency has also introduced significant simplifications and clarifications with regard to cross-border cooperation (article 20) and the role and involvement of the European Data Protection Board (article 19).
9. Following the WP TELE on 21 May 2019, the Presidency will submit the progress report to the Coreper on 24 May 2019, with a view to submitting it to the TTE Council on 7 June 2019.

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<sup>8</sup> Judgment of the Court of Justice of the EU (Grand Chamber) *"Digital Rights Ireland and Seitlinger and others"* of 8 April 2014 in joined Cases C-293/12 and C-594/12 and Judgment of the Court of Justice of the EU (Grand Chamber) *"Tele 2 and Watson"* of 21 December 2016 in joined Cases C-203/15 and C-698/15