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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 note

I. INTRODUCTION

The Commission has adopted the above mentioned proposal (ePR) in January 2017 and, under the Maltese Presidency, the Working Party for Telecommunications and Information Society (WP TELE) finalised the first examination of the proposal. For the TTE Council of 9 June 2017, the Maltese Presidency put together a progress report¹ summarising the state of play of the discussions.

¹ Doc. 9324/17

As indicated at the June TTE Council, the Estonian Presidency is committed to advance further this important dossier. It is clear from the progress report, discussions at the WP TELE and delegations' written comments that there are open questions. The Presidency believes that in order to ensure further progress on the proposal, these open issues need to be addressed. The Presidency would therefore like to devote the first WP TELE on ePrivacy on 10 July to that objective.

For the purposes of the meeting, and since it is not possible to cover the entirety of the proposal, the Presidency has identified two sets of issues: the interplay between the proposed Regulation and the General Data Protection Regulation (GDPR) and issues related to processing information stored in the devices (cookies).

During the meeting, the Commission will take the delegations through these topics, with the aim to provide further clarity, answer open questions and dispel potential misunderstandings with regard to the proposal. The Commission will also provide practical examples to demonstrate how the proposal would translate into practice. The aim of the session is to provide delegations with useful information that would also feed into the process of forming their respective national positions.

II. DISCUSSION TOPICS

Delegations will find below an overview of issues that the Presidency has identified for the purposes of the WP TELE meeting on 10 July and are, of course, welcome to ask further questions in connection with the listed topics. This is without prejudice to any other existing or future topics that might need more detailed examination in the WP.

1. Link to GDPR

As the ePR is *lex specialis* vis-à-vis the GDPR, proper understanding of the interplay between the ePR and GDPR is a prerequisite for any future discussion on this dossier. In addition, many stakeholders have stressed the need to avoid possible duplications or contradictions between the GDPR and ePR. The Presidency is of the view that clarifications are needed, in particular, for the following three broader areas where the GDPR and ePR are closely linked together:

a. Material scope of application (GDPR vs ePR)

It is clear from the discussions in the WP TELE, that there are some doubts about where the scope of the ePR ends and the scope of the GDPR begins and *vice-versa*. Under this section, the Commission will therefore explain what activities and which actors are covered by the ePR and which by the GDPR and how the two regulations complement each other.

b. Legal grounds for processing electronic communications data

Both the GDPR and ePR provide for legal grounds under which processing of respectively personal or communications data (including both content and metadata) is permitted. Since the legal grounds under the ePR are not identical to those under the GDPR, this session should provide a comparison of what legal grounds exist and how they apply, including the reasoning behind the choices made in the ePR proposal. In addition, it should clarify the relations between different data categories (e.g. link between metadata in ePR and personal data in GDPR).

c. Consent under the GDPR and its application in the ePR context

Art. 9(1) of ePR specifically refers to the definition and conditions for consent provided for in the GDPR. It is therefore important to explain the concept of consent under the GDPR and clarify how the conditions for consent set in the GDPR can be complied with in the ePR context. The session will also address some specific issues, such as consent by legal persons or in machine-to-machine communications.

2. Processing of information stored in the device (cookies)

The ePR proposal updates the current rules on cookies. To facilitate the assessment of the proposed changes, this session will focus on technical and economic features of the advertisement ecosystem, including the actors and technologies involved. During this session, the Presidency also seeks additional clarifications on the exceptions applicable to cookies under art. 8(1) and the modalities of consent via the browser settings under art. 9(2).
