

NON PAPER ON OPTIONS REGARDING E-PRIVACY REGULATION

Introduction

Under the Finnish Presidency, the WP TELE examined the proposal for a Regulation on Privacy and Electronic Communications (ePrivacy proposal) on ten occasions and the Presidency issued a number of new compromise texts. The discussion in the WP TELE was difficult and revealed different views and priorities among Member States on several aspects of the proposal. Accordingly, the FI Presidency worked intensively to find compromise solutions to accommodate the various concerns raised by delegations in order to strike a proper balance in the text with the view to reaching a general approach at the TTE Council on 3 December 2019.

At the COREPER meeting held on 27 November 2019, Member States were unable to reach a general approach. Discussion held on TTE Council has shown that the majority of Member States taking the floor were unable to support the text of the proposal as it stands. They expressed their wish for more substantial changes in the proposal.

During the WP TELE meeting held on 9 January 2020 the Commission clarified that it still stands behind the proposal and expressed its willingness to continue working with HRP to try to find a compromise solution.

After bilateral exchanges with Member States, the Presidency concluded that a majority would support a simplification of the text and its better alignment with the GDPR.

That is why the Presidency decided to hold three informal meetings with the Member States on 4th, 5th and 6th February to discuss options for future work. The Presidency opted for three separate meetings in order to have more focused discussion. The groups of Member States for each meeting were composed randomly and have no relation to position of Member States expressed during discussions held at the WP TELE.

The Presidency herewith presents a possible solution for the way forward. Please note that this document does not represent Presidency's formal compromise proposal. During the informal meeting, we invite you to indicate whether you can support the direction which the Presidency suggests.

The Presidency remains open to any alternative solution coming from Member States.

Alignment of Article 6 with GDPR and deletion of Article 8

In its proposed solution the Presidency tries to address the persistent criticism that the ePrivacy proposal, instead of complementing and making GDPR provisions more specific, derogates from them and thus creates legal uncertainty for all addressees.

The Presidency in particular takes into the consideration the fact that the current structure of Articles 6 to 6d is a very complex one, providing for a large number of exceptions based on existing business models and services. Thus it risks to become obsolete with time.

Having in mind that processing of electronic communications data often includes use and processing of personal data, the Presidency wants to examine the possibility of alignment of legal grounds for processing of electronic communications data with the legal grounds provided by GDPR. In that way, obligations of providers/data controllers would be aligned, as well as activities and measures imposed by supervisory authorities in case of breach of obligations prescribed by e-Privacy Regulation and GDPR

This solution presumes that the legal grounds for processing as set out in the GDPR are sufficiently flexible on one hand and offer a high level of protection on the other.

The Presidency also considers to delete Article 8. Namely, it is hard to distinguish the protection of terminal equipment from the protection of personal data stored on it. Having in mind that each collecting and processing of personal data has to have a valid legal ground under GDPR, there is no need for additional protection of terminal equipment as such.

The proposed solution needs further work and fine tuning especially in recitals and in relation to the application of the ePrivacy proposal to legal persons. However, this work only makes sense if Member States are ready to accept shifting the concept.

Data retention and child abuse provisions

The Presidency intends to postpone discussions on these two sensitive topics. The Presidency believes that firstly it has to be seen whether we can make progress regarding Articles 6 and 8 of the ePrivacy proposal.

In parallel the Presidency intends to explore with the Commission other solutions for child abuse issue. Pending this examination, the Presidency for the moment does not propose changes in these provisions in relation to FIP text.

Conclusion

Further steps will be based on the outcome of the informal meetings.