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Opinion

on the Proposal of the European Commission for a Regulation of the European Parliament and of the Council on 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)

of 10 January 2017 (COM (2017) 10 final)

Preliminary remarks

The proposal of the European Commission, to reinforce data protection in the Union and to complement the General Data Protection Regulation (GDPR) by a regulation on privacy and electronic communications should be supported. The GDPR does not cover all areas of the processing of personal data, especially in the case of electronic communications, which follows already from Article 95 of the GDPR. This is especially true for the confidentiality and security of electronic communications between persons, but also for machine-to-machine communications. In Recital 173 of the GDPR, the Union legislator has already pointed out that Directive 2002/58/EC of the European Parliament and of the Council will be reviewed and amended to ensure consistency with the GDPR. It follows from there that the Commission is now also proposing a reguation for electronic communications for an enhanced harmonization of data protection law throughout the Union.

In particular, the following points are highlighted:

1. The draft regulation for good reasons - as did in principle the Directive 2002/58/EC – covers the protection of fundamental rights and fundamental freedoms both of natural and legal persons in electronic communications (Art. 1 para. 1).

2. Extending the scope of the new regulation to all messaging and other "OTT" services, including social networks is appropriate. However, the term "electronic mail", which, pursuant to Article 4 para. 3 lit. e of the draft regulation should cover these new services, should be replaced by a more general term (e.g. „electronic messages“) in order to avoid misunderstandings.

3. It is to be welcomed that the Commission proposes to guarantee, in principle, confidentiality of all electronic communication data (content data and metadata) alike (Article 5 para.1, first sentence).

4. The requirement in Art. 7 para. 2 of the draft regulation for the deletion and anonymisation of the communications metadata is to be welcomed. In view of the sometimes very long retention periods of communications metadata for the purpose of billing of services provided by several providers, it is suggested to oblige the providers to design their technical and organizational procedures in such a way that the scope and length of the retention of communications metadata are minimized.

5. Art. 8 para.1 lit.d allows for the collection of information from end-users‘ terminal equipment against the user's will to measure the web audience if carried out by the operator of the service of the information society. That would allow for the collection of personal data by the provider, whereas third-party measuring of web audience is prohibited even if this is done without collecting personal data or the reference to individual persons is minimized. This differentiation is not appropriate. Data minimization should be the rule

regardless whether the data are collected and subsequently processed by the provider of the service himself or by a third party.

6. End-users should have the possibility to completely prevent the collection of their data emitted by their terminal equipment to which they have not given their consent. Therefore, in Article 8 para. 2 lit. b, first sentence, the word "end" should be replaced by "prevent".

7. The wording in Article 9 para. 2 of the draft regulation („where technically possible and feasible") is unclear. Where technical possibilities exist end-users should be entitled to use them. Threfore the words „and feasible" are redundant and should be deleted.

8. The fact that software on the market permitting electronic communications according should offer the option to prevent third parties from storing cookies in terminal equipment and processing them (Art. 10 para. 1) is welcomed. It is however suggested to clarify that this obligation applies to terminal equipment of end-users. The proposal in Art. 10 para. 2, that the software has to inform the the end-user during installation about the possible privacy settings and to require his consent to a specific setting.

9. The draft regulation would no longer allow for the creation of pseudonymized use profiles with an opt-out for the user as currently provided for in § 15 (3) of the German Telemedia Act. This would lead to a higher level of protection for personal data throughout the Union which should be supported by Germany.

10. It order to ensure effective and coherent data protection oversight the Commission rightly poposes to transfer the enforcement of the proposed regulation to the same supervisory authorities which have to enforce the GDPR in the Member States (Art. 18 of the draft regulation). This – alongside with the jurisdiction of the European Data Protection Board (Art. 19 of the draft regulation) and the consistency mechanism (Art. 20 draft reguation) - , enhances the development of uniform standards for practical implementing

data protection rules throughout the Union inside as well as outside the communication sector.

11. The Commission proposes that the Member States should: have the power to restrict the scope of the obligations and rights provided for in Articles 5 to 8 in particular cases if the requirements of Article 23 (1) GDPR are met, without taking any compensatory measures according to Art. 23 para. 2 GDPR (Art. 11 para. 1 of the draft regulation). This deviation from the GDPR is not justified, in particular since it is not merely a question of restrictions of the rights of the data subject, but refers also to restrictions on the secrecy of communications under Article 5 of the draft regulation.

12. Furthermore, the power to restrict obligations and rights provided for in Article 11 of the draft regulation is too far reaching. It goes well beyond the current rule in Art. 15 para. 1 Directive 2002/58/EC. By referring to Art. 23 para. 1 lit. e GDPR, the power to restrict also extends to "other important objectives of general public interest of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation a matters, public health and social security". The need for such an expansion of restriction powers is not apparent. In addition, it would endanger the harmonization objective of the draft regulation. It is therefore recommended that the powers of restriction should only be provided for the cases listed in Art. 23 para. 1 lit. a to d GDPR, but not for Art. 23 para. 1 lit. e.

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