

Meijers Committee

standing committee of experts on international
immigration, refugee and criminal law

Meijers Committee

to Vice-President of the European Commission
Mr. Andrus Ansip
By email

Standing
committee of
experts on
international
immigration,
refugee and
criminal law

date 5th of January 2017

reference CM1701

subject **CM1701**

Mailing address
Postbus 2894
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Amsterdam

Dear Mr. Ansip,

Visiting address
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Amsterdam

This letter aims at drawing the Commission's attention on the importance of the confidentiality of communications as an essential element in the update of the e-Privacy Directive.

The Meijers Committee is aware that a Commission Proposal for a Regulation on the respect for private life and the protection of personal data in electronic communications is to be expected soon. The Meijers Committee also took note of an early draft that recently circulated in the public domain.

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The current e-Privacy Directive contains specific rules on the right to confidentiality of communications in the electronic communications sector. The directive requires Member States to prohibit tapping, storing or other kinds of surveillance of communications, without the consent of the users or other legal authorisation.

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The right to confidentiality of communications is an important right, which is recognised in Article 7 of the Charter of Fundamental Rights of the European Union as a right to the respect for communications. Moreover, it is also recognised in the European Convention on Human Rights.

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The right to confidentiality of communications is important as such. Moreover, the right is important to foster privacy, personal data protection, freedom of expression and freedom of thought. In view of the importance of the confidentiality of communications, we take the view that this right is not sufficiently protected by the General Data Protection Regulation, which deals with the fair processing of personal data. It is therefore mandatory to uphold a strong and effective right in future e-privacy rules and regulations.

The Meijers Committee welcomes the plan to review the e-privacy regime. While the ideas behind the current e-Privacy Directive are commendable, the directive leaves gaps in protecting fundamental rights. For instance, the scope of some provisions is ambiguous. The new e-Privacy Directive should make clear that any party (rather than only "providers of publicly available electronic communications services" and "providers of public communications networks") must respect confidentiality of communications.

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The need for strong rules for the confidentiality of communications is also the consequence of the case law of the Court of Justice of the European Union. In its recent Tele2 Sverige judgment, the Court gave further emphasis to the purpose of the e-Privacy Directive to ensure the confidentiality of communications.¹ The Court also repeated that retained communications data (metadata) “is liable to allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained”, and that such data “is no less sensitive, having regard to the right to privacy, than the actual content of communications.”² We also recall the judgement in Schrems, where the Court made clear that generalised access to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life.³ It would be useful if the e-Privacy regime referred to all fundamental rights concerned, including the rights to privacy, personal data protection, freedom of expression, and freedom of thought.

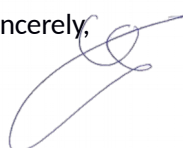
Any interference with confidentiality of communications should only be allowed when this is really necessary for a specific and legitimate purpose and after consent of all users concerned (e.g. from people sending and receiving communication). Consent should only be valid if it is genuinely freely given, in line with the General Data Protection Regulation. Consent should be invalid, in all circumstances, if the user has no genuine and free choice, or is unable to refuse or withdraw consent without detriment.

Tracking of a user’s location over time (e.g. through collecting information emitted by terminal equipment such as mobile phones) should only be allowed after the user’s consent. Merely giving notice for such tracking should not suffice.⁴

The Meijers Committee calls upon the European Commission to adopt an e-Privacy regime that offers effective protection of confidentiality of communications, personal data, privacy and related fundamental rights. Exceptions to these rights should be in full compliance with the requirements of fundamental rights protection. Finally, the new rules should under no circumstances offer less protection than the General Data Protection Regulation and the current e-Privacy Directive.

The Meijers Committee suggests the Commission to take the above considerations into account in the final Commission proposal. As always, we are available for your questions and remarks.

Sincerely,



Theo de Roos
Chairman

Copy to the First Vice-President Mr. Timmermans, Commissioner Mrs. Jourova

1 CJEU, Joined cases C-203/15 and C-698/15.

2 CJEU, Joined cases C-203/15 and C-698/15, par. 99.

3 CJEU, Case C-362/12, para 94.

4 Exceptions may be appropriate for establishing a connection or for security reasons.