Dear Minister,
Dear Member of the WP TELE,

We, the undersigned organisations, support the ongoing and much-needed efforts to reform Europe's ePrivacy legislation. As we mentioned in our recent open letter, the reform is essential in order to strengthen individuals' rights to privacy and freedom of expression across the EU and to rebuild trust in online services, in particular given the revelations of the Cambridge Analytica scandal.[1]

Despite the urgent need to protect the confidentiality of communications, we are aware of the political difficulties that were met during debates in Council and at Working Party level, specifically regarding Article 11 of the proposed ePrivacy Regulation.

Given these difficulties and following the recent publication of the full document WK 11127/2017,[2] we would like to highlight a number of legal points that may help move the discussion forward:

- The Court of Justice of the European Union (CJEU) clarified, in two different judgements (Digital Rights Ireland – joined cases C-293/12 and C-594/12 and Tele2-Watson, joined cases C-203/15 and C-698/15), that mandatory bulk retention of communications data breaches the Charter of Fundamental rights. Any attempt to subvert CJEU case law by adding "clarity to the legal context" without a legal basis that respects the Charter is a direct attack on the most basic foundations of the European Union and should be dismissed. In fact, the current legal framework (the e-Privacy Directive, Directive 2002/58) provides legal clarity since mandatory retention of metadata for the purpose of prevention, investigation, detection or prosecution of criminal offences, as well as access to retained metadata for this purpose, is regulated in its Article 15(1).

- A Regulation aimed at protecting personal data and confidentiality of electronic communications would be deprived of its purpose if certain types of processing ("processing for law enforcement purposes") are completely excluded from its scope. This was also noted by the Court of Justice in paragraph 73 of the Tele2-Watson judgment. Furthermore, such processing requires specific safeguards defined by the Court and must be necessary and proportionate.

- Finally, we have also noted certain attempts by a number of delegations to introduce a minimum storage period (of 6 months) for all categories of data processed under Article 6(2)(b). If approved, this would impose indiscriminate retention of personal data in a way that has already been ruled as unlawful by the Court of Justice of the European Union in Tele2/Watson. If Article 6(2)(b) establishes a legal basis for processing communications data in order to maintain or restore security of electronic communications networks and services, or to detect errors, attacks and abuse of these networks/services, the processing should still be limited to the duration necessary for this purpose. On top of this, the general principles of GDPR Article 5 should apply, e.g. storage limitation in Article 5(1)(e). If the technical purpose can be achieved with anonymised data, this is no justification for

1https://edri.org/files/eprivacy/20180327-ePrivacy-openletter-final.pdf and https://edri.org/cambridge-analytica-access-to-facebook-messages-a-privacy-violation/
2https://www.asktheeu.org/en/request/updated_discussions_in_telecommu#incoming-16851

processing data for identified or identifiable end-users. Setting a minimum mandatory retention period for communications data processed under Article 6(2)(b) will mean weakening the level of protection guaranteed under the GDPR, which is not only unacceptable but also contradictory to the concept of *lex specialis*.

We are aware of the political difficulties raised in Council around the issue of data retention, however the clarity provided by the CJEU in two landmark rulings on that matter can not and must not simply be ignored. We strongly encourage you to keep in mind all of the legal points above in the ongoing debates. We count on the Council to swiftly conclude a general approach on the ePrivacy Regulation, which should include a legally sound Article 11 rooted in respect for the EU Charter and the CJEU case law, to provide law enforcement authorities with the legal certainty needed to accomplish their duties.[3]

Yours faithfully,

European Digital Rights

Access Now

Privacy International

IT-Political Association of Denmark

3https://edri.org/eprivacy-reform-open-letter-to-eu-member-states/