



SPANISH PARLIAMENT

REPORT 12/2017 FROM THE JOINT COMMITTEE ON THE EUROPEAN UNION, OF 30 MARCH 2017, ON THE APPLICATION OF THE SUBSIDIARITY PRINCIPLE TO THE 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) (TEXT WITH EEA RELEVANCE) [COM (2017) 10 FINAL] [2017/0003 (COD)] {SWD (2017) 3 FINAL} {SWD (2017) 4 FINAL} {SWD (2017) 5 FINAL} {SWD (2017) 6 FINAL}

BACKGROUND

A. The Protocol on the application of the principles of subsidiarity and proportionality annexed to the 2007 Lisbon Treaty, which has been in force since 1 December 2009, introduced a control procedure whereby national parliaments check whether draft EU legislation complies with the principle of subsidiarity. Spain implemented this Protocol by means of Law 24/2009 of 22 December 2009 amending Law 8/1994 of 19 May 1994. More specifically, Articles 3(j), 5 and 6 of Law 8/1994 constitute the legal basis for this report.

B. The 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) was adopted by the European Commission and submitted to national parliaments, which have a deadline of eight weeks – ending on 12 April 2017 – to check on the subsidiarity aspect of this initiative.

C. On 21 February 2017 the Bureau and Spokespersons of the Joint Committee on the European Union decided to examine the proposal, appointed Senator María Mercedes Mallol Gil as rapporteur and requested from the Government the report referred to in Article 3(j) of Law 8/1994.

D. This report has now been received from the Government, which concludes that the initiative respects the principle of subsidiarity. A report from the Parliament of Catalonia calls for the scope of the Regulation to include recognition of the capacity of inspection authorities, independent of subnational bodies, where such inspection authorities have competences. It concludes that the initiative complies with the principle of subsidiarity. There are also written submissions from the Parliaments of La Rioja,



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Galicia, Cantabria and the Basque Country notifying acknowledgement or closure of the file, or stating that a reasoned opinion is not being issued.

E. At its meeting on 30 March 2017 the Joint Committee on the European Union approved the following:

REPORT

1. Article 5.1 of the Treaty on European Union states that ‘the use of Union competences is governed by the principles of subsidiarity and proportionality’. According to Article 5(3) of the same Treaty, ‘under the principle of subsidiarity the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can be better achieved, by reason of the scale or effects of the proposed action, at Union level’.

2. The legislative proposal analysed is based on Articles 16 and 114 of the Treaty on the Functioning of the European Union, which provides as follows:

‘Article 16

- 1. Everyone has the right to the protection of personal data concerning him or her.*
- 2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.*

The rules adopted on the basis of this Article shall be without prejudice to the specific rules laid down in Article 39 of the Treaty on European Union. ’

‘Article 114

- 1. Save where otherwise provided in the Treaties, the following provisions shall apply*



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for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.

3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.

4. If, after the adoption by the European Parliament and the Council, by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 36 or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.

5. Moreover, without prejudice to paragraph 4, if, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.

6. The Commission undertakes to approve or reject, within six months of the notifications referred to in paragraphs 4 and 5, the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market. In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved. When justified by the complexity of the matter and in the absence of danger for human health, the Commission may



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notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.

7. When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.

8. When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonisation measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council.

9. By way of derogation from the procedure laid down in Articles 258 and 259, the Commission and any Member State may bring the matter directly before the Court of Justice of the European Union if it considers that another Member State is making improper use of the powers provided for in this Article.

10. The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Union control procedure.'

3. The purpose of the Regulation is to update the rules in force (essentially Directive 2002/58) and widen their scope to all providers of electronic communications services. It also aims to create new possibilities to process communication data and reinforce trust and security in the Digital Single Market – a key objective of the Digital Single Market strategy. At the same time, the proposal aligns the rules for electronic communications with the new standards of the EU's General Data Protection Regulation. It also ensures that when personal data are handled by EU institutions and bodies, privacy is protected in the same way as it is in Member States under the General Data Protection Regulation, as well as setting out a strategic approach to the issues concerning international transfers of personal data.

Privacy will be guaranteed for both content and metadata derived from electronic communications (e.g. time of a call and location). Both have a high privacy component and, under the proposed rules, will need to be anonymised or deleted if users have not given their consent, unless



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the data is required, for instance, for billing purposes.

Once consent is given for communications data – either content or metadata – to be processed, traditional telecoms operators will have more opportunities to use data and provide additional services. For example, they could produce heat maps indicating the presence of individuals to help public authorities and transport companies when developing new infrastructure projects.

The so called "cookie provision", which has resulted in an overload of consent requests for internet users, will be streamlined. New rules will allow users to be more in control of their settings, providing an easy way to accept or refuse the tracking of cookies and other identifiers in case of privacy risks. The proposal clarifies that no consent is needed for non-privacy intrusive cookies improving internet experience (e.g. to remember shopping cart history).

Cookies set by a visited website counting the number of visitors to that website will no longer require consent.

The proposal also bans unsolicited electronic communication by any means, e.g. by email, SMS and in principle also by phone if users have not given their consent. Member States may opt for a solution that gives consumers the right to object to the reception of voice-to-voice marketing calls, for example by registering their number on a do-not-call list. Marketing callers will need to display their phone number or use a special prefix that indicates a marketing call.

CONCLUSION

For the above reasons, the Joint Committee on the European Union is of the opinion that the 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) is consistent with the principle of subsidiarity set out in the current Treaty on European Union.