AmCham Slovakia draft position on the current ePrivacy working document and the options presented by the BG PRES on Jan 11, 2018

Doc # 5165/18

A. Discussion points (page 3):

AmCham Slovakia position: We would like to add Article 4a – the Consent. We would like to discuss periodical reminder of the possibility to withdraw the Consent.

B. Relationship with GDPR (page 5)

AmCham Slovakia position: We support the Option 0, we agree with the sufficiency.

C. M2M communication (page 11)

AmCham Slovakia position:

We support the "**Option 2"** (exclusion of the scope of ePR) when it comes to **M2M communication** (p11) at the next WP TELE meeting on 17 January (30 January respectively), as

- Enterprise data is protected by Art. 7 of the Charta of Fundamental Rights and business secrecy / unfair competition legislation. When it comes to critical infrastructure, the NIS directive offers additional protection measures.
- Technical means as encryption are industry standard providing for additional layers of confidentiality.

Limiting the ePR scope to M2M data "in transit" (e.g. on transmission from sender to receiver) is in theory a good idea, but there a a lot of details unclear (e.g. when does the transmission start/end; what about services as e.g. in terms of cyber security, which might need to have access to data in transmission)

D. Article 6: Permitted processing of electronic communications data (page 12)

AmCham Slovakia position:

We support Option 5. On legal grounds for processing, the GDPR provides already a balanced set of legal permissions, whereas special (sensitive) data underlie a stronger protection than regular (personal) data, and data subjects have the right to object to processing based on legitimate interest/compatible further processing. This nuanced approach of the GDPR was meant to cover all aspects of data processing in the EU. AmCham supports alignment with the GDPR, since the option of deletion of Art. 6 (2) ePR would strike the balance of protecting individuals' rights of freedom of information and potential for innovation.

In addition, we would like to comment on the following statement:

"The electronic communications data may contain a special category of personal data under Article 9 GDPR. Without processing the electronic communications data, electronic communications services can technically not determine whether it concerns personal data, special categories of personal data, or non-personal data." (page 14)

This assumption does not properly **distinguish between the "collection" phase and the following "processing" phase**, and does not mention that the specific purposes for which personal data are processed must be determined at the time of their collection. Therefore, the identification of whether a certain information is personal, sensitive or non-personal data underpins the collection of such information, which happens before any data can be processed. This holds true also in the context of electronic communications data.

It is thus incorrect to affirm that electronic communications services cannot determine the nature of metadata until they have **processed them, as this operation is performed at the moment of the collection when the purpose of the subsequent processing is established.**

E. **Article 7: Storage and erasure of electronic communications data (page 17)**

AmCham Slovakia position:

We support the deletion of Art. 7 (1) ePR. The scope of the ePR should be limited to data "in transmission", i.e. when transported from sender to receiver on an electronic communication network. Therefore, Art. 7 (1) ePR should be deleted, as proposed by the Estonian presidency: "[There is] no need for this provision, considering the corresponding obligations under the GDPR and also in relation to the limitation of scope in art. 2 to 'content in transmission'."

F. **Article 8: Protection of information stored in terminal equipment of end-users and related to or processed or emitted by such equipment (page 18)**

AmCham Slovakia position to Option 1:

We need broader legal basis. The current text is even stricter than EC proposal. That´s why we support Option 1. Eg. the point 2c – it is limited only to statistical counting and research purposes. It is still not broad enough and not in line with GDPR.

In addition, in case of security updates, the end-users shouldn´t have the possibility to postpone or turn off this update because of the security risk.

G. Article 10: software privacy settings (page 21)

AmCham Slovakia position to Option 0:

We support the current text, but we would like to stress out that in case of IoT, M2M devices this could be problematic and it would be necessary to reconsider the practical approach to usage of this provision.

H. General remarks on Article 9 GDPR in the context of metadata

The underlying presumption that all metadata are inherently sensitive is not justified. In some cases, the processing of metadata can be sensitive, while in others it is not. The analysis of the sensitivity of data always requires to consider first the context and the risk of each processing activity, which can be found in Article 9(1) [as well as e.g. in Article 6 (1)f and 6(4) GDPR], whereby the conditions for processing are subject to a case-by-case assessment.

Therefore, as rightfully noted by the Presidency – in those cases where the processing of metadata would fall under Article 9 GDPR, explicit consent would indeed be required and other legal bases, such as legitimate interests, would not be sufficient. However, in all the other cases where the processing of metadata does not fall under Article 9, such processing based on legitimate interests and/or for further compatible processing would remain possible. The inclusion of options 5 (or, if not full deletion, options 2 and 4 in the ePR) would thus not change the fact that an organization would need to carry out **a case-by-case assessment of each and every processing activity**, to be able to determine which legal bases for processing are available for the intended processing, in compliance with the risk-based approach of the GDPR.