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Subject:	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)

INTRODUCTION

For the purpose of discussion in the WP TELE meeting of 14 of March 2019, delegations will find in Annex a revised compromise proposal for a number of provisions of the Regulation on ePrivacy. The amendments are based on the discussions in the preceding WP meetings and delegations' written comments. Following the in-depth discussion on 12 of March, the Presidency is reflecting on the other provisions.

The recitals and articles where the Presidency has introduced amendments are listed below. For ease of reference, the changes introduced by this document are underlined.

In **Recital 17aa** a reference to the consultation of the supervisory authority was introduced and the expression “genuinely” was added.

In **Recital 19b**, the term “entity” was replaced by “person”.

In **Recital 20** “in particular” was replaced by “inter alia”.

In **Recital 20a** several amendments were introduced in order to bring clarifications in relation to consent request information, consent granted by end user, through software settings, to a specific provider and whitelisting.

Recital 21 remains unchanged but the phrase 'has accepted such use' has been put in square brackets.

In **Article 2(3)** a reference to Regulation (EU) 2018/1725 was added.

In **Article 4(3)** a new definition was added in line (i) for “direct marketing calls” for the purposes of article 15.

Further to the discussions on 12 March, the flexibility in **Article 18(0)** 2nd subparagraph was extended also to articles 15 and 16.

In **Article 19** the term “competence” was replaced by “task” and a reference to Chapter III was added in addition to Chapter I and II. Paragraphs 2(aa), (c) and (i) were deleted. In turn, in paragraph 5 a new phrase was added, mentioning that the Board shall closely cooperate with the supervisory authorities referred to in Article 18(0) for the purposes of the application of this Regulation.

Article 21(1) clarifies that Articles 77-80 of Regulation (EU) 2016/679 shall apply *mutatis mutandis*. Article 21(1a) was deleted.

Article 23(1) clarifies that Article 83 of Regulation (EU) 2016/679 shall apply *mutatis mutandis* to infringements of this Regulation.

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(17aa) Metadata such as location data can provide valuable information, such as insights in human movement patterns and traffic patterns. Such information may, for example, be used for urban planning purposes. Further processing for such purposes other than for which the metadata were initially collected may take place without the consent of the end-users concerned, provided that such processing is compatible with the purpose for which the metadata are initially collected, certain additional conditions are met and safeguards are in place, including, where appropriate, the consultation of the supervisory authority, an impact assessment by the provider of electronic communications networks and services and the requirement to genuinely anonymise the result before sharing the analysis with third parties. As end-users attach great value to the confidentiality of their communications, including their physical movements, such data cannot be used to determine the nature or characteristics on an end-user or to build a profile of an end-user, in order to, for example, avoid that the data is used for segmentation purposes, to monitor the behaviour of a specific end-user or to draw conclusions concerning the private life of an end-user. For the same reason, the end-user must be provided with information about these processing activities taking place and given the right to object to such processing.

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(19b) Providers of electronic communications services may, for example, obtain the consent of the end-user for the processing of electronic communications data, at the time of the conclusion of the contract, and any moment in time thereafter. In some cases, the legal entity person having subscribed to the electronic communications service may allow a natural person, such as an employee, to make use of the service. In such case, consent needs to be obtained from the individual concerned.

(20) Terminal equipment of end-users of electronic communications networks and any information relating to the usage of such terminal equipment, whether in particular is ~~stored in~~ **processed by** or emitted by or **stored in** such equipment, requested from or processed in order to enable it to connect to another device and or network equipment, are part of the private sphere, **including the privacy of one's communications**, of the end-users requiring protection under the Charter of Fundamental Rights of the European Union ~~and the European Convention for the Protection of Human Rights and Fundamental Freedoms~~. Given that such equipment contains or processes information that may reveal details of an individual's emotional, political, social complexities, including the content of communications, pictures, the location of individuals by accessing the device's GPS capabilities, contact lists, and other information already stored in the device, the information related to such equipment requires enhanced privacy protection. Furthermore, the so-called spyware, web bugs, hidden identifiers, tracking cookies and other similar unwanted tracking tools can enter end-user's terminal equipment without their knowledge in order to gain access to information, to store hidden information and to trace the activities. Information related to the end-user's device may also be collected remotely for the purpose of identification and tracking, using techniques such as the so-called 'device fingerprinting', often without the knowledge of the end-user, and may seriously intrude upon the privacy of these end-users. Techniques that surreptitiously monitor the actions of end-users, for example by tracking their activities online or the location of their terminal equipment, or subvert the operation of the end-users' terminal equipment pose a serious threat to the privacy of end-users. Therefore, any such interference with the end-user's terminal equipment should be allowed only with the end-user's consent ~~and or~~ for specific and transparent purposes.

The responsibility for obtaining consent for the storage of a cookie or similar identifier lies on the entity that makes use of processing and storage capabilities of terminal equipment or collects information from end-users' terminal equipment, such as an information society service provider or ad network provider. Such entities may request another party to obtain consent on their behalf. The end-user's consent to storage of a cookie or similar identifier may also entail consent for the subsequent readings of the cookie in the context of a revisit to the same website domain initially visited by the end-user. ~~Access to specific website content may still be made conditional on the consent to the storage of a cookie or similar identifier.~~

~~Not all cookies are needed in relation to the purpose of the provision of the website service. Some are used to provide for additional benefits for the website operator.~~ Making access to the website content provided without direct monetary payment conditional to the consent of the end-user to the storage and reading of cookies for additional purposes would normally not be considered disproportionate in particular inter alia if the end-user is able to choose between an offer that includes consenting to the use of cookies for additional purposes on the one hand, and an equivalent offer by the same provider that does not involve consenting to data use for additional purposes on the other hand. Conversely, in some cases, making access to website content conditional to consent to the use of such cookies may be considered to be disproportionate. This would normally be the case for websites providing certain services, such as those provided by public authorities, where the user could be seen as having few or no other options but to use the service, and thus having no real choice as to the usage of cookies.

(20a) End-users are increasingly often requested to provide consent to the storage and access to stored data in their terminal equipment, due to the ubiquitous use of tracking cookies and similar tracking technologies. As a result, end-users are may be overloaded with requests to provide consent, leading to what has been can be referred to as ‘consent-fatigue’. This can lead to a situation where consent request information is no longer read and the protection offered by consent is undermined. Implementation of technical means in electronic communications software to provide specific and informed consent through transparent and user-friendly settings, can be useful to address this ~~problem~~ issue. Where available and technically feasible, ~~Aan~~ an end user may therefore grant, through software settings, consent to a specific provider for the use of processing and storage capabilities of his or her terminal equipment for one or multiple specific purposes across one or more specific services of that provider. ~~Such consent can be given to several providers for specific purposes.~~ For example, an end-user can give consent to the use of ~~all or~~ certain types of cookies by whitelisting one or several providers for their specified purposes. ~~To that end, web browser and operating system providers p~~Providers of software are encouraged to include settings in their software which allows end-users, in a user friendly and transparent manner, to manage consent to the storage and access to stored data in their terminal equipment by easily setting up and amending whitelists and withdrawing consent at any moment, such as whitelisting mechanisms. should ~~To this end they are encouraged to ensure that end users can easily set up and amend such white lists and withdraw consent at any moment in a user friendly and transparent manner.~~

- (21) ~~Exceptions to the obligation to obtain consent to make u~~Use of the processing and storage capabilities of terminal equipment or ~~to access to~~ information stored in terminal equipment **without the consent of the end-user** should be limited to situations that involve no, or only very limited, intrusion of privacy. For instance, consent should not be requested for authorizing the technical storage or access which is ~~strictly~~ necessary and proportionate for the legitimate purpose of ~~enabling the use of~~ **providing** a specific ~~information society~~ service, **such as those used by IoT devices (for instance connected devices like connected thermostats)**, explicitly requested by the end-user. This may include the storing of cookies for the duration of a single established session on a website to keep track of the end-user's input when filling in online forms over several pages, **authentication session cookies used to verify the identity of end-users engaged in online transactions or cookies used to remember items selected by the end-user and placed in shopping basket. Access to specific website content may still be made conditional on the well-informed acceptance of the storage of a cookie or similar identifier, if it is used for a legitimate purpose. This will for example not be the case of a cookie which is recreated after the deletion by the end-user. Consent should not be necessary either if the use of processing and storage capabilities of terminal equipment and the collection of information from end-users' terminal equipment is necessary for the provision of the information society services, such as those used by IoT devices (for instance connected devices, such as connected thermostats), requested by the end-user.**

In some cases the use of processing and storage capabilities of terminal equipment and the collection of information from end-users' terminal equipment may also be necessary for providing an information society service, requested by the end-user, that is wholly or mainly financed by advertising provided that, in addition, the end-user has been provided with clear, precise and user-friendly information about the purposes of cookies or similar techniques and [has accepted such use].

~~Conversely, to the extent that use is made of processing and storage capabilities of terminal equipment and information from end-users' terminal equipment is collected for other purposes than for what is necessary for the purpose of carrying out the transmission of an electronic communication over an electronic communications network or for the provision of the information society service requested, consent should be required. Where the terminal equipment is provided to the end-user by the provider of the information society service, In such a scenario, consent should normally be given by the end-user who requests the service from the provider of the service. Where that end-user enables the use of the terminal equipment by other end-users, such as employees, it should respect the rights of those other end-users in accordance with Regulation (EU) 2016/679, employment and other applicable laws.~~

~~In some cases the use of processing and storage capabilities of terminal equipment and the collection of information from end-users' terminal equipment may also be necessary for providing an information society service, requested by the end-user, that is wholly or mainly financed by advertising provided that, in addition, the end-user has been provided with clear, precise and user-friendly information about the purposes of cookies or similar devices and has accepted such use.~~

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CHAPTER I

GENERAL PROVISIONS

Article 2

Material Scope

1. This Regulation applies to:
 - (a) the processing of electronic communications **content data in transmission and of electronic communications metadata** carried out in connection with the provision and the use of electronic communications services; ~~and to~~
 - (b) **end-users' terminal equipment** information ~~related to~~ **processed by or emitted by or stored in the terminal equipment of end-users.**
 - ~~(c) the placing on the market of software permitting electronic communications, including the retrieval and presentation of information on the internet;~~
 - (d) the offering of a publicly available directory of end-users of electronic communications services;
 - (e) the sending ~~or presenting~~ of direct marketing communications to end-users.
2. This Regulation does not apply to:
 - (a) activities **which fall outside the scope of Union law, such as activities concerning national security and defence;**
 - ~~(aa) activities concerning national security and defence;~~
 - (b) activities of the Member States which fall within the scope of Chapter 2 of Title V of the Treaty on European Union;

- (c) electronic communications services which are not publicly available;
 - (d) activities of competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security;
 - (e) **electronic communications content processed by the end-users concerned after receipt, or by a third party entrusted by them to record, store or otherwise process ~~such data~~ their electronic communications content;**
 - (f) **electronic communications metadata processed by the end-users concerned or by a third party entrusted by them to record, store or otherwise process their electronic communications metadata ~~on their behalf~~.**
3. The processing of electronic communications data by the Union institutions, bodies, offices and agencies is governed by Regulation (EU) 00/0000-2018/1725 ~~[new Regulation replacing Regulation 45/2001]~~.
 4. This Regulation shall be without prejudice to the application of Directive 2000/31/EC¹, in particular of the liability rules of intermediary service providers in Articles 12 to 15 of that Directive.
 5. This Regulation shall be without prejudice to the provisions of Directive 2014/53/EU.

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¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ L 178, 17.7.2000, p. 1–16).

Article 4
Definitions

1. For the purposes of this Regulation, following definitions shall apply:
 - (a) the definitions in Regulation (EU) 2016/679;
 - (b) the definitions of ‘electronic communications network’, ‘electronic communications service’, ‘interpersonal communications service’, ‘number-based interpersonal communications service’, ‘number-independent interpersonal communications service’, ‘end-user’ and ‘call’ in ~~points~~ **paragraphs** (1), (4), (5), (6), (7), (14) and ~~(21)~~**(31)** respectively of Article 2 of [Directive establishing the European Electronic Communications Code];
 - (c) the definition of 'terminal equipment' in ~~point (1)~~ of Article 1**(1)** of Commission Directive 2008/63/EC²; ;
 - (d) the definition of ‘information society service’ in point (b) of Article 1 (1) of Directive (EU) 2015/1535³.**

2. For the purposes of ~~point (b) of paragraph 1~~ **this Regulation**, the definition of ‘interpersonal communications service’ **referred to in point (b) of paragraph 1** shall include services which enable interpersonal and interactive communication merely as a **minor** ancillary feature that is intrinsically linked to another service.

For the purposes of this Regulation, the definition of 'processing' referred to in Article 4(2) of Regulation 2016/679 shall not be limited to processing of personal data.

² Commission Directive 2008/63/EC of 20 June 2008 on competition in the markets in telecommunications terminal equipment (OJ L 162, 21.6.2008, p. 20–26).

³ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ L 241, 17.9.2015, p. 1-15).

3. In addition, for the purposes of this Regulation the following definitions shall apply:
- (a) ‘electronic communications data’ means electronic communications content and electronic communications metadata;
 - (b) ‘electronic communications content’ means the content exchanged by means of electronic communications services, such as text, voice, videos, images, and sound;
 - (c) ‘electronic communications metadata’ means data processed ~~in an~~ **by means of** electronic communications ~~network~~ **services** for the purposes of transmitting, distributing or exchanging electronic communications content; including data used to trace and identify the source and destination of a communication, data on the location of the device generated in the context of providing electronic communications services, and the date, time, duration and the type of communication;
 - (d) ‘publicly available directory’ means a directory of end-users of ~~electronic~~ **number-based interpersonal** communications services, whether in printed or electronic form, which is published or made available to the public or to a section of the public, including by means of a directory enquiry service **and the main function of which is to enable to identify identification of such end-users;**
 - (e) ‘electronic ~~mail~~ **message**’ means any ~~electronic~~ message containing information such as text, voice, video, sound or image sent over an electronic communications network which can be stored in the network or in related computing facilities, or in the terminal equipment of its recipient, **including e-mail, SMS, MMS and functionally equivalent applications and techniques;**
 - (f) ‘direct marketing communications’ means any form of advertising, whether written or oral, sent ~~or presented~~ to one or more identified or identifiable end-users of electronic communications services, including the **placing of voice-to-voice calls, the** use of automated calling and communication systems with or without human interaction, electronic ~~mail~~ **message, SMS, etc.;**

- (g) ‘direct marketing voice-to-voice calls’ means live calls, which do not entail the use of automated calling systems and communication systems;
- (h) ‘automated calling and communication systems’ means systems capable of automatically initiating calls to one or more recipients in accordance with instructions set for that system, and transmitting sounds which are not live speech, including calls made using automated calling and communication systems which connect the called person to an individual.
- (i) ‘direct marketing calls’ means direct marketing voice-to-voice calls and calls made via automated calling and communication systems for the purpose of direct marketing.**

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CHAPTER IV

INDEPENDENT SUPERVISORY AUTHORITIES AND ENFORCEMENT

Article 18

~~Independent~~ Supervisory authorities

0. Each Member State shall provide for one or more independent public authorities meeting the requirements set out in Articles 51 to 54 of Regulation (EU) 2016/679 to be responsible for monitoring the application of this Regulation ('supervisory authorities'), ~~in accordance with paragraphs 1 and to 1aa of this Article.~~

Member States may entrust the monitoring of the application of Articles 12 to ~~14~~16 to the supervisory authority or authorities referred to in the previous subparagraph or to another authority or authorities having the appropriate expertise. As far as ~~processing of electronic communications data qualifying as~~ personal data is concerned, the supervisory authority referred to in the previous subparagraph shall be responsible for monitoring the application of those articles ~~Regulation (EU) 2016/679 shall be responsible for monitoring the application of this Regulation. Chapters VI and VII of Regulation (EU) 2016/679 shall apply *mutatis mutandis*.~~

- ~~1. The independent supervisory authority or authorities responsible for monitoring the application of Regulation (EU) 2016/679 shall also be responsible for monitoring the application of Chapter II of this Regulation. Without prejudice to article 19, Chapters VI and VII of Regulation (EU) 2016/679 shall apply *mutatis mutandis*. The tasks and powers of the supervisory authorities shall be exercised with regard to end users.~~

- ~~1a. Member States shall entrust the monitoring of the application of Chapter III of this Regulation to the supervisory authority or authorities referred to in paragraph 1 of this Article or to another supervisory authority or other supervisory authorities having the appropriate expertise and independence.~~
- ~~1aa. Notwithstanding paragraph 1a, Member States may entrust the monitoring of the application of Articles 12 to 14 of this Regulation to another supervisory authority or other supervisory authorities having the appropriate expertise.~~
- 1ab. The supervisory authorities referred to in paragraphs 1 and to 1aa 0 shall have investigative and corrective powers, including the power to provide remedies pursuant to article 21(1) and to impose administrative fines pursuant to article 23.
- 1b. Where more than one supervisory authority is responsible for monitoring the application of this Regulation in a Member State, such authorities shall cooperate with each other.
2. ~~Where the supervisory authority or authorities referred to in paragraphs 1 and to 1aa 0 shall cooperate with~~ **Where the supervisory authority or authorities referred to in paragraphs 1 and to 1aa 0 are not the supervisory authorities responsible for monitoring the application of Regulation (EU) 2016/679, they shall cooperate with the latter and, whenever appropriate, with national regulatory authorities established pursuant to the {Directive Establishing the European Electronic Communications Code} and other relevant authorities.**

Article 19

European Data Protection Board

1. The European Data Protection Board, established under Article 68 of Regulation (EU) 2016/679, shall have ~~competence the task~~ to ~~ensure~~ **contribute to** the consistent application of **Chapters I and II and III** of this Regulation. ~~To that end, the European Data Protection Board shall exercise the tasks laid down in Article 70 of Regulation (EU) 2016/679.~~

2. ~~For the purposes of this Regulation~~ **To that end,** ~~the~~ Board shall also have the following tasks:
 - ~~(aa) — monitor and ensure the correct application of this Regulation in the cases provided for in Articles 64 and 65 of Regulation (EU) 2016/679 without prejudice to the tasks of national supervisory authorities;~~
 - (a) advise the Commission on any proposed amendment of this Regulation;
 - (b) examine, on its own initiative, on request of one of its members or on request of the Commission, any question covering the application of this Regulation **in relation to Chapters I, and II and III** and issue guidelines, recommendations and best practices in order to encourage consistent application of this Regulation;
 - ~~(c) — draw up guidelines for supervisory authorities referred to in paragraph 1 0 of Article 18 in relation to their powers as laid down in Article 58 of Regulation (EU) 2016/679 and setting of administrative fines pursuant to Article 23 of this Regulation;~~

- (d) **issue guidelines, recommendations and best practices in order to facilitate cooperation, including exchange of information, between supervisory authorities referred to in paragraph 0 of Article 18 and/or the supervisory authority responsible for monitoring the application of Regulation (EU) 2016/679 in accordance with point (b) of this paragraph for establishing common procedures for reporting by end-users of infringements of this Regulation regarding rules laid down in paragraph 2 of Article 54 of Regulation (EU) 2016/679;**
- (da) **issue guidelines, recommendations and best practices in accordance with point (b) of this paragraph to assess for different types of electronic communications services the moment in time of receipt of electronic communications content;**
- (db) **issue guidelines, recommendations and best practices in accordance with point (b) of this paragraph on the provision of consent in the context of Article 6 and 8 of this Regulation by end-users who are legal persons and or in an employment relationship;**
- (e) **{provide the Commission with an opinion on the icons referred to in paragraph 3 of Article 8};**
- ~~(f) — promote the cooperation and effective bilateral and multilateral exchange of information and best practices between the supervisory authorities referred to in paragraph 10 of Article 18;~~
- ~~(g) — promote common training programmes and facilitate personnel exchanges between the supervisory authorities referred to in paragraph 10 of Article 18 and, where appropriate, with the supervisory authorities of third countries or with international organisations;~~

- (h) promote the exchange of knowledge and documentation on legislation on protection of electronic communications of end-users and of the integrity of their terminal equipment as laid down in Chapter II and practice relevant supervisory authorities world wide;
- (i) ~~maintain a publicly accessible electronic register of decisions taken by supervisory authorities referred to in paragraph 0 of Article 18 and courts on issues handled in the consistency mechanism.~~
3. Where the Commission requests advice from the Board, it may indicate a time limit, taking into account the urgency of the matter.
4. The Board shall forward its opinions, guidelines, recommendations, and best practices to the Commission and make them public.
5. The Board shall closely cooperate with the supervisory authorities referred to in Article 18(0) for the purposes of the application of this Regulation. The Board shall, where appropriate, consult interested parties and give them the opportunity to comment within a reasonable period. The Board shall, without prejudice to Article 76 of Regulation (EU) 2016/679, make the result of the consultation procedures publicly available.

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CHAPTER V

REMEDIES, LIABILITY AND PENALTIES

Article 21

Remedies

1. Without prejudice to any other administrative or judicial remedy, every end-user of electronic communications services shall have the ~~same remedies provided for in Articles 77, 78, and 79 of Regulation (EU) 2016/679~~ **right to an effective judicial remedy in relation to any infringement of his or her rights under this Regulation, the right to lodge a complaint with a supervisory authority and the right to an effective judicial remedy against any decision of a supervisory authority.**

~~1a. — End-users who are natural persons shall also have the right to representation provided for in~~

Articles 77-80 of Regulation (EU) 2016/679 shall apply *mutatis mutandis*.

2. Any natural or legal person other than end-users adversely affected by infringements of this Regulation ~~and having a legitimate interest in the cessation or prohibition of alleged infringements~~, including a provider of electronic communications services protecting its legitimate business interests, shall have a right to bring legal proceedings in respect of such infringements.

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Article 23

General conditions for imposing administrative fines

1. ~~For the purpose of this Article, Article 83 Chapter VIII~~ of Regulation (EU) 2016/679 shall apply *mutatis mutandis* to infringements of this Regulation.
2. Infringements of the following provisions of this Regulation shall, in accordance with paragraph 1, be subject to administrative fines up to EUR 10 000 000, or in the case of an undertaking, up to 2 % of the total worldwide annual turnover of the preceding financial year, whichever is higher:
 - (a) the obligations of any legal or natural person who process electronic communications data pursuant to Article 8;
 - ~~(b) the obligations of the provider of software enabling electronic communications, pursuant to Article 10;~~
 - (c) the obligations of the providers of publicly available directories pursuant to Article 15;
 - (d) the obligations of any legal or natural person who uses electronic communications services pursuant to Article 16.
3. Infringements of the principle of confidentiality of communications, permitted processing of electronic communications data, time limits for erasure pursuant to Articles 5, 6, and 7 shall, in accordance with paragraph 1 of this Article, be subject to administrative fines up to 20 000 000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher.
4. Member States shall lay down the rules on penalties for infringements of Articles 12, 13, **and 14,** ~~and 17.~~

5. Non-compliance with an order by a supervisory authority as referred to in Article 18, shall be subject to administrative fines up to 20 000 000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher.
6. Without prejudice to the corrective powers of supervisory authorities pursuant to Article 18, each Member State may lay down rules on whether and to what extent administrative fines may be imposed on public authorities and bodies established in that Member State.
7. The exercise by the supervisory authority of its powers under this Article shall be subject to appropriate procedural safeguards in accordance with Union and Member State law, including effective judicial remedy and due process.
8. Where the legal system of the Member State does not provide for administrative fines, this Article may be applied in such a manner that the fine is initiated by the competent supervisory authority and imposed by competent national courts, while ensuring that those legal remedies are effective and have an equivalent effect to the administrative fines imposed by supervisory authorities. In any event, the fines imposed shall be effective, proportionate and dissuasive. Those Member States shall notify to the Commission the provisions of their laws which they adopt pursuant to this paragraph by [xxx] and, without delay, any subsequent amendment law or amendment affecting them.

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