



Brussels, 23 October 2020
(OR. en)

12084/20

LIMITE

TELECOM 190
COMPET 509
MI 414
DATAPROTECT 104
CONSUM 176
JAI 847
DIGIT 96
FREMP 102
CYBER 197
CODEC 1027

**Interinstitutional File:
2020/0259(COD)**

NOTE

From: Presidency
To: Permanent Representatives Committee

No. prev. doc.: 11964/20
No. Cion doc.: 10682/20

Subject: Proposal for a Regulation of the European Parliament and of the Council on a temporary derogation from certain provisions of Directive 2002/58/EC of the European Parliament and of the Council as regards the use of technologies by number-independent interpersonal communications service providers for the processing of personal and other data for the purpose of combatting child sexual abuse online
- Mandate for negotiations with the European Parliament

1. On 15 September 2020 the Commission presented the Proposal for a Regulation on a temporary derogation from certain provisions of the ePrivacy Directive for the purpose of combatting child sexual abuse online.
2. The Working Party for Telecommunications and Information Society discussed the Proposal at its meetings on 15, 28 September, 6, 14, 20 October 2020.

3. As a consequence of the discussions at the WP TELE on 20 October, the Presidency proposes a few amendments in the text as compared to doc. 11964/20. The changes are underlined, deletions are marked with ~~strike through~~, the new text is in **bold**.
4. The definition contained in Art. 6(2) of Directive 2011/93/EU of the European Parliament and of the Council has been added to **Art. 2(2)b(ii)** of the present Regulation.
5. The matter of the prior consultation procedure is now additionally addressed in **Recital 14a**, in conjunction with **Article 3a**, whose wording had been clarified.
6. Brackets have been removed from **Art. 3(c)**. Regarding this Article, delegations are asked to comment on whether they consider an addition as set out below to be necessary:

*(c) the technology used to detect solicitation of children is limited to the use of relevant key indicators, such as keywords and objectively identified risk factors such as age difference, without prejudice to the right to human review **and shall not include systematic filtering and scanning of communications containing text unless in case of concrete element of suspicion of child sexual abuse;***

7. The Presidency invites the Permanent Representatives Committee to agree on a mandate for negotiations with the European Parliament on the basis of the text set out in the Annex.

2020/0259 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on a temporary derogation from certain provisions of Directive 2002/58/EC of the European Parliament and of the Council as regards the use of technologies by number-independent interpersonal communications service providers for the processing of personal and other data for the purpose of combatting child sexual abuse online

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 16(2), in conjunction with Article 114(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee¹,

Acting in accordance with the ordinary legislative procedure,

Whereas:

¹ OJ C , , p. .

- (1) Directive 2002/58/EC of the European Parliament and of the Council² lays down rules ensuring the right to privacy and confidentiality with respect to the processing of personal data in exchanges of data in the electronic communication sector. That Directive particularises and complements Regulation (EU) 2016/679 of the European Parliament and of the Council³.
- (2) Directive 2002/58/EC applies to the processing of personal data in connection with the provision of publicly available electronic communication services. The definition of electronic communication service is currently to be found in Article 2, point (c), of Directive 2002/21/EC of the European Parliament and of the Council⁴. Directive (EU) 2018/1972 of the European Parliament and of the Council⁵ repeals Directive 2002/21/EC with effect from 21 December 2020. From that date, the definition of electronic communications services will be replaced by a new definition, in Article 2(4) of Directive (EU) 2018/1972, which includes number-independent interpersonal communications services as defined in Article 2(7) of that Directive. Those services, which include, for example, voice over IP, messaging and web-based e-mail services, will therefore fall within the scope of Directive 2002/58/EC, as of 21 December 2020.
- (3) In accordance with Article 6(1) of the Treaty on European Union, the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union. Article 7 of the Charter of Fundamental Rights of the European Union (“the Charter”) protects the fundamental right of everyone to the respect for his or her private and family life, home and communications, which includes the confidentiality of communications. Article 8 of the Charter contains the right to protection of personal data. Article 24(2) of the Charter provides that, in all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.

² Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).

³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

⁴ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ L 108, 24.4.2002, p. 33).

⁵ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ L 321, 17.12.2018, p. 36).

- (4) Sexual abuse and sexual exploitation of children constitute serious violations of human rights, in particular of the rights of children to be protected from all forms of violence, abuse and neglect, maltreatment or exploitation, including sexual abuse, as provided for by the 1989 United Nations Convention on the Rights of the Child and by the Charter. Digitisation has brought about many benefits for society and the economy, but also challenges including an increase of child sexual abuse online. The protection of children online is one of the Union's priorities. On 24 July 2020, the Commission adopted an EU strategy for a more effective fight against child sexual abuse⁶ (“the Strategy”), which aims to provide an effective response, at Union level, to the crime of child sexual abuse.
- (5) Certain providers of number-independent interpersonal communications services, such as webmail and messaging services, are already using specific technologies to detect and report child sexual abuse online to law enforcement authorities and to organisations acting in the public interest against child sexual abuse, or to remove child sexual abuse material, on a voluntary basis. Those organisations refer to national hotlines for reporting child sexual abuse material, as well as to organisations whose purpose is to reduce child sexual exploitation, and prevent child victimisation, located both within the Union and in third countries. Collectively, those voluntary activities play a valuable role in enabling the identification and rescue of victims, and reducing the further dissemination of child sexual abuse material, while also contributing to the identification and investigation of offenders, and the prevention of child sexual abuse offences.
- (6) Until 20 December 2020, the processing of personal data by providers of number-independent interpersonal communications services by means of voluntary measures for the purpose of detecting and reporting child sexual abuse online and removing child sexual abuse material is governed by Regulation (EU) 2016/679.
- (7) Directive 2002/58/EC does not contain any specific provisions concerning the processing of personal and other data in connection with the provision of electronic communication services for the purpose of detecting and reporting child sexual abuse online and removing child sexual abuse material. However, pursuant to Article 15(1) of Directive 2002/58/EC, Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in, inter alia, Articles 5 and 6 of that Directive, which concern confidentiality of communications and traffic data, for the purpose of prevention, investigation, detection and prosecution of criminal offences linked to child sexual abuse. In the absence of such legislative measures, and pending the adoption of a new longer-term legal framework to tackle child sexual abuse effectively at Union level as announced in the Strategy, there would be no legal basis for providers of number-independent interpersonal communications services to continue to detect and report child sexual abuse online and remove child sexual abuse material in their services beyond 21 December 2020.

⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU strategy for a more effective fight against child sexual abuse, 24.7.2020 COM (2020) 607 final.

- (8) This Regulation therefore provides for a temporary derogation from Article 5(1) and Article 6 of Directive 2002/58/EC, which protect the confidentiality of communications and traffic data. Since Directive 2002/58/EC was adopted on the basis of Article 114 of the Treaty on the Functioning of the European Union, it is appropriate to adopt this Regulation on the same legal basis. Moreover, not all Member States have adopted legislative measures at national level to restrict the scope of the rights and obligations provided for in those provisions in accordance with Article 15(1) of Directive 2002/58/EC, and the adoption of such measures involves a significant risk of fragmentation likely to negatively affect the internal market.
- (9) Given that electronic communications involving natural persons will normally qualify as personal data, this Regulation should also be based on Article 16 of the Treaty, which provides a specific legal basis for the adoption of rules relating to the protection of individuals with regard to the processing of personal data by Union institutions and by the Member States when carrying out activities which fall within the scope of Union law, and rules relating to the free movement of such data.
- (10) To the extent that processing of personal data in connection with the provision of electronic communications services by number-independent interpersonal communications services for the sole purpose of detecting and reporting child sexual abuse online and removing child sexual abuse material falls within the scope of the derogation provided for by this Regulation, Regulation (EU) 2016/679 applies to such processing, including, **but not limited to, its provisions on principles relating to processing of personal data (Article 5), lawfulness of processing (Article 6), processing of special categories of personal data (Article 9), restrictions (Article 23), independent supervisory authorities (Chapter VI), cooperation and consistency (Chapter VII) and remedies, liability and penalties (Chapter VIII), as well as the requirement to carry out an assessment of the impact of the envisaged processing operations where appropriate pursuant to Article 35 of that Regulation prior to the deployment of the technologies concerned.**

- (11) Since the sole objective of this Regulation is to enable the continuation of certain existing activities aimed at combating child sexual abuse online, the derogation provided for by this Regulation should be limited to well-established technology that is regularly used by number-independent interpersonal communications services for the purpose of detecting and reporting child sexual abuse online and removing child sexual abuse material ~~before the entry into force of this Regulation~~. The reference to the technology includes where necessary any human review directly relating to the use of the technology and overseeing it. The use of the technology in question should therefore be common in the industry, without it necessarily being required that all providers use the technology and without precluding the further evolution of the technology in a privacy-friendly manner. In this respect, it should be immaterial whether or not a particular provider that seeks to rely on this derogation itself already uses such technology on the date of entry into force of this Regulation. The types of technologies deployed should be the least privacy-intrusive in accordance with the state of the art in the industry and should not include systematic filtering and scanning of communications containing text but only look into specific communications in case of concrete elements of suspicion of child sexual abuse.
- (12) In order to ensure accuracy and reliability as much as possible, the technology used should, in accordance with the state of the art in the industry, be such as to limit the error rate of false positives to the maximum extent possible and, where necessary, to rectify without delay any such errors that may nonetheless occur.
- (13) The personal and other data used when carrying out the activities covered by the derogation set out in this Regulation, as well as the period during which the data is subsequently retained in case of positive results, should be minimised so as to ensure that the derogation remains limited to what is strictly necessary. **This regulation does not prevent providers from requesting a proof of receipt by law enforcement authorities after reporting child sexual abuse online to them.**
- (14) In order to ensure transparency and accountability in respect of the activities undertaken pursuant to the derogation, the providers should **make publicly available** reports on an annual basis on the processing falling within the scope of this Regulation, including on the type and volumes of data processed, number of cases identified, measures applied to select and improve key indicators, the numbers and ratios of errors (false positives) of the different technologies deployed, measures applied to limit the error rate and the error rate achieved, ~~the retention policy~~ and the data protection safeguards applied. **In order to ensure efficient supervision, providers should also submit their reports to the supervisory authorities responsible in accordance with Regulation (EU) 2016/679.**

- (14a) **In order to support the responsible supervisory authorities in their task, the European Data Protection Board should issue guidelines on compliance with this Regulation and with Regulation (EU) 2016/679 of the processing falling within the scope of the derogation laid down in this Regulation. Those guidelines ~~should~~ will in particular assist the supervisory authorities in providing advice in the framework of the prior consultation procedure referred to in set out in Article 36 of Regulation (EU) 2016/679, notably that should be carried out when assessing if a new technology to be used is state-of-the-art and the least privacy-intrusive.**
- (15) This Regulation should enter into force on the third day following that of its publication in the *Official Journal of the European Union*, in order to ensure that it is applicable as from 21 December 2020.
- (16) This Regulation restricts the right to protection of the confidentiality of communications and derogates from the decision taken in Directive (EU) 2018/1972 to subject number-independent interpersonal communications services to the same rules as all other electronic communications services as regards privacy. The period of application of this Regulation should, therefore, be limited until 31 December 2025, that is to say for a time period reasonably required for the adoption of a new long-term legal framework, with more elaborate safeguards. In case the long-term legislation is adopted and will enter into force before that date, that legislation should repeal this Regulation.
- (17) Providers of number-independent interpersonal communications services should be subject to the specific obligations set out in Directive 2002/58/EC, **and consequently to the monitoring and investigative powers of the competent authorities designated pursuant to that Directive**, with regard to any other activities that fall within its scope.
- (18) The objective of this Regulation is to create a temporary derogation from certain provisions of Directive 2002/58/EC without creating fragmentation in the Internal Market. In addition, national legislation would most probably not be adopted in time in all Member States. As this objective cannot be sufficiently achieved by the Member States, but can rather be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives. It introduces a temporary and strictly limited derogation from the applicability of Articles 5 (1) and 6 of Directive 2002/58/EC, with a series of safeguards to ensure that it does not go beyond what is necessary for the achievement of the set objectives.

- (19) The European Data Protection Supervisor was consulted in accordance with Article 42(1) of Regulation (EU) 2018/1725 of the European Parliament and of the Council⁷ and delivered its opinion on [...],

HAVE ADOPTED THIS REGULATION:

⁷ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ C 20, 21.1.2019, p. 1).

Article 1

Subject matter

This Regulation lays down temporary and strictly limited rules derogating from certain obligations laid down in Directive 2002/58/EC, with the sole objective of enabling providers of number-independent interpersonal communications services to continue, **without prejudice to Regulation (EU) 2016/679**, the use of technologies for the processing of personal and other data to the extent necessary to detect and report child sexual abuse online and remove child sexual abuse material on their services.

Article 2

Definitions

For the purpose of this Regulation, the following definitions apply:

(1) ‘number-independent interpersonal communications service’ means a service as defined in Article 2(7) of Directive (EU) 2018/1972;

(2) ‘child sexual abuse online’ means:

(a) material constituting child pornography as defined in Article 2, point (c), of Directive 2011/93/EU of the European Parliament and of the Council;

(b) ‘solicitation’ as:

(i) the proposal by an adult to meet a child who has not reached the age of sexual consent, for the purpose of committing any of the offences referred to in Article 3(4) and Article 5(6) of Directive 2011/93/EU, where that proposal was followed by material acts leading to such a meeting;

(ii) an attempt to commit the offences provided for in Article 5(2) and (3) by an adult soliciting a child who has not reached the age of sexual consent to provide child pornography depicting that child.

~~solicitation of children for the purpose of engaging in sexual activities with a child or of producing child pornography by any of the following:~~

~~(i) luring the child by means of offering gifts or other advantages;~~

~~(ii) threatening the child with a negative consequence likely to have a significant impact on the child;~~

~~(iii) presenting the child with pornographic materials or making them available to the child.~~

(c) ‘pornographic performance’ as defined in Article 2(e) of Directive 2011/93/EU.

Article 3

Scope of the derogation

The specific obligations set out in Article 5(1) and Article 6 of Directive 2002/58/EC shall not apply to the processing of personal and other data in connection with the provision of number-independent interpersonal communications services strictly necessary for the use of technology for the sole purpose of removing child sexual abuse material and detecting or reporting child sexual abuse online to law enforcement authorities and to organisations acting in the public interest against child sexual abuse, provided that:

- (a) the processing is proportionate and limited to well-established technologies regularly used by providers of number-independent interpersonal communications services for that purpose ~~before the entry into force of this Regulation~~, and that are in accordance with the state of the art used in the industry and are the least privacy-intrusive **and shall not include systematic filtering and scanning of communications containing text but only look into specific communications in case of concrete elements of suspicion of child sexual abuse;**
- (aa) **technology which has not been used before the entry into force of this regulation, the prior consultation procedure set out in Article 36 of Regulation (EU) 2016/679 shall apply;**
- (b) the technology used is in itself sufficiently reliable in that it limits to the maximum extent possible the rate of errors regarding the detection of content representing child sexual abuse, and where such occasional errors occur, their consequences are rectified without delay;

- (c) the technology used to detect solicitation of children is limited to the use of relevant key indicators, such as ~~the~~ keywords and objectively identified risk factors such as age difference, without prejudice to the right to human review;
- (d) the processing is limited to what is strictly necessary for the purpose of detection and reporting of child sexual abuse online and removal of child sexual abuse material and, unless child sexual abuse online has been detected and confirmed as such, **data generated through such processing** is erased immediately;
- (e) the provider ~~annually~~ publishes **and submits** a report **to the supervisory authority responsible in accordance with Regulation (EU) 2016/679 six months after the entry into force of this Regulation, and thereafter annually**, on its related processing, including on the type and volumes of data processed, number of cases identified, measures applied to select and improve key indicators, numbers and ratios of errors (false positives) of the different technologies deployed, measures applied to limit the error rate and the error rate achieved ~~the retention policy~~ and the data protection safeguards applied.

As regards point (d), where child sexual abuse online has been detected and confirmed as such, the relevant data may be ~~retained~~ **processed** solely for the following purposes and only for the time period necessary:

- for its reporting to **one or several law enforcement authorities and to organisations acting in the public interest against child sexual abuse** and to respond to proportionate requests by law enforcement and other relevant public authorities;
- for the blocking of the concerned user's account;
- in relation to data reliably identified as child pornography, for the creation of a unique, non-reconvertible digital signature ('hash').

Article 3a

European Data Protection Board guidelines

The European Data Protection Board shall publish guidelines for the purpose of assisting the supervisory authorities responsible in accordance with Regulation (EU) 2016/679 in assessing compliance with ~~this Regulation and~~ Regulation (EU) 2016/679 of the processing falling within the scope of this regulation.

Article 4

Entry into force and application

This Regulation shall enter into force on the third day following that of its publication in the Official Journal of the European Union.

It shall apply from 21 December 2020 until 31 December 2025.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the European Parliament
The President*

*For the Council
The President*