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## **REPORT**

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from : General Secretariat

to : Coreper

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Subject: **PREPARATION FOR THE TRANSPORT AND  
TELECOMMUNICATIONS COUNCIL ON 27 AND 28 JUNE 2001**  
Proposal for a Directive of the European Parliament and of the Council  
concerning the processing of personal data and the protection of privacy in the  
electronic communications sector

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## **I. INTRODUCTION**

In July 2000 the Commission adopted a package of proposals on a regulatory framework for electronic communication infrastructures and associated services. The aim is to adapt current Community legislation to the profound changes which have occurred in telecommunications, media and information technology.

The proposal for a Directive concerning the processing of personal data and the protection of privacy figures among those proposals. The Commission does not intend to create major changes to the substance of the existing Directive (97/66/EC) but merely to adapt and update the existing provisions to new and foreseeable developments by creating rules which are technology neutral and maintain a high level of data protection and privacy for citizens.

The Opinion of the European Parliament is expected for September 2001 while that of the Economic and Social Committee was delivered on 24 January 2001. The Committee of the Regions informed the Council that it did not intend to deliver an opinion on the proposal.

## **II. OUTCOME OF PROCEEDINGS**

Following agreement within the Transport and Telecommunications Council on 4 April 2001 on three of the other Directives in the legislative package, the Telecommunications Working Party began to examine the present proposal, on which extremely rapid progress has been made.

At the close of its meeting on 29 May 2001 the Working Party agreed to submit to Coreper the draft Directive annexed to 9337/01, in respect of which a few questions remain to be resolved. Those questions are set out below in Part III of this report.

It should be noted that as matters stand, the F delegation has upheld a general scrutiny reservation on the draft Directive, while the E and P delegations have upheld general linguistic reservations. The DK/F and UK delegations have entered parliamentary scrutiny reservations.

## **III. QUESTIONS OUTSTANDING**

### **1. Erasure of traffic data (Article 6 (1))**

In accordance with certain principles laid down in general Directive 95/46/EC on the protection of personal data, Article 6(1) of the Commission proposal provides that, as in the Directive currently in force, traffic data relating to subscribers and users must be erased or made anonymous upon completion of the transmission, with the exception of data necessary for billing purposes. Moreover, subject to the subscriber's consent, a derogation is allowed for marketing the provider's electronic communications services, along with another derogation proposed by the Commission for the provision of value added services.

Three delegations (B/S/UK) entered reservations on the Commission proposal, requesting that the principle of erasing or rendering the data anonymous be dropped from paragraph 1. They considered that it did not take into account the needs of law enforcement authorities and did not match the technical requirements of new means of communication via the Internet network and technology.

The Working Party was unable to find a solution on the basis of the amendments proposed by the B and S delegations, in particular given the refusal of certain delegations (EL/I/NL) and the Commission to have that aspect of the text of the current Directive amended. The latter emphasised the importance and sensitivity of this question, which affected human rights and fundamental freedoms. The Commission also drew the Working Party's attention to two new recitals which it felt clarified the technical aspects raised by the S delegation (9337/01, footnote 10, p. 5 and footnote 13, p. 7).

In the light of the discussion, the Presidency agreed to submit the latest proposal from the S delegation, set out below, which it considered the most conducive to reconcile the various points of view, to Coreper by way of a compromise.

#### Article 6(1)

"Traffic data relating to subscribers and users processed and stored by the provider of a public communications network or service must be erased or made anonymous when it is no longer needed for the purpose of the transmission of a communication without prejudice to the provisions of paragraphs 2 and 3 and Article 15(1)."

#### New recital

"The obligation to erase traffic data or to make such data anonymous when it is no longer needed for the purpose of the transmission of a communication does not conflict with such procedures on the Internet as the caching in the Domain Name System of IP-addresses or the caching of IP-address to physical address bindings or the use of log-in information to control the right of access to networks or services."

The EL and I delegations and the Commission were unable to endorse that proposal in view of the repercussions of the proposed wording of paragraph 1 and the reference to Article 15. The other delegations upheld their scrutiny reservations on the matter, either in order to continue consultations in their capitals or, in some cases (A/FIN/P/UK), as they preferred certain proposals for amendments tabled previously. The B delegation wished to maintain its own proposal (9337/01, footnote 12, p. 7).

## 2. Restriction of rights and obligations (Article 15(1))

The Commission proposes preserving the principle underpinning the provisions in force by providing for the exclusion of activities which fall outside the scope of Community law in Article 1(3) and by allowing Member States to restrict the scope of certain provisions of the Directive on the basis of Article 15(1) where necessary to safeguard certain important national interests, in particular public security and the investigation of criminal offences. Thus a broader provision contained in Article 13(1) of general Directive 95/46/EC is applied to the Telecommunications Directive. It should be noted that Article 6 on traffic data is one of the provisions to which such restrictions may apply.

The UK delegation proposed extending the scope of public interests which may authorise such restrictions by including all of the interests provided for in the general Directive, while adding public health.

The E and F delegations entered scrutiny reservations on the proposed amendment, with the E delegation open-minded as to the addition of a reference to important economic or financial interests of a Member State or the EU.

The Commission, backed by the I delegation, was against the proposed change and pointed out that the aim of the general Directive was to cover all economic sectors, while the Directive under consideration, which affected matters as sensitive as the secrecy of communications, should remain more restrictive in that respect.

### 3. Directories of subscribers (Articles 12 and 16)

Under the present Directive, subscriber data strictly necessary to the subscriber's identification are automatically included in the directory on the understanding that the subscriber may, free of charge (subject to possible derogations at national level), ask not to be included in it or for certain data to be withdrawn or their use restricted. In the light of the practice which has grown up around the new communications services (GSMs, electronic mail), the Commission has proposed that the subscriber be able to choose whether or not to be included in a public directory, to select the data used and to be kept fully informed of the directory's possible uses. Article 16 also lays down transitional provisions to cover editions of directories published before the new Directive enters into force in the Member States.

In order to allay certain concerns voiced during the discussions, a new paragraph 2a has been added to Article 12 to make it clear that the subscriber's additional consent must be obtained before the possible uses other than the straightforward search for telephone numbers on the basis of a name can be implemented. A new recital has also been drafted spelling out the legal position with data collected for transmission purposes. With regard to the transitional provisions, the text of Article 16 is clarified in paragraph 1 and a new paragraph 2 has been added in order to introduce a degree of flexibility for the updating of databases collected on the basis of the current legislation.

The present text received wide support from the Working Party, notwithstanding the following scrutiny reservations:

- the F delegation stood by a scrutiny reservation on Article 12(1) and (2) and thought that the new provisions could favour historical operators. It also preferred that the legislation refer, as at present, to the list of data which could be included in the directory. The FIN delegation also maintained a reservation on this Article, in conjunction with Article 16;
- the DK and IRL delegations upheld scrutiny reservations on the new paragraph 2a and the B and F delegations stood by a linguistic reservation on it, in particular on the words "communication details of persons";

- finally, three delegations maintained scrutiny reservations on the rewording of Article 16 (FIN on the whole Article, P on paragraph 1 and IRL on paragraph 2).

4. Unsolicited communications (Article 13 and Article 2(h))

The Commission proposal adopts the principle of the provisions of the Directive in force, i.e. the need to obtain the prior consent (opt-in) of the subscriber for use, for the purposes of direct marketing, of the means of communication referred to in paragraph 1, on the understanding that in the case of all other means of communication the Member States may choose between opt-in and opt-out. Out of concern for technological neutrality, however, provision is made for extending paragraph 1 to include electronic mail. These arrangements were completed during discussions by the addition of a definition (in Article 2(h)) of "electronic mail".

There was wide Working Party support for the present text.

The UK delegation was alone in standing by a reservation on the opt-in principle for electronic mail. It thought that the implementation of this provision would impose an unnecessary burden on the undertakings concerned inasmuch as other means, including software, could enable an equivalent result to be achieved in terms of data protection for a lower cost. The FIN delegation upheld a reservation pending clarification by the Commission, in a recital, of the situation regarding communications in connection with charities, political measures or measures designed to secure customer loyalty.

It should also be noted that several delegations stood by scrutiny reservations on this Article in connection with the definition of electronic mail in particular. Some (F/S/UK) actually questioned the inclusion of telephone transponders, while NL wanted to have SMSs covered.

## 5. Other questions

Specific points on which one or more delegations continue to have reservations or scrutiny reservations are shown as footnotes in the draft Directive (9337/01 ECO 147 CODEC 492):

- Article 2(b): F scrutiny reservation on the new recital;
- Article 2(d): D linguistic reservation, S and UK scrutiny reservations on the new recital;
- Article 5(1): I reservation on the final sentence, UK and Cion proposed amendments, UK scrutiny reservation on the new recital;
- Article 5(2): UK reservation, E and P scrutiny reservations;
- Article 9: F scrutiny reservation, B scrutiny reservation on paragraph 1;
- Article 10(a): D linguistic reservation.

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