



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 17.6.2002
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OPINION OF THE COMMISSION

**pursuant to Article 251 (2), third subparagraph, point (c) of the EC Treaty,
on the European Parliament's amendments
to the Council's common position regarding the
proposal for a**

**DIRECTIVE OF THE EUROPEAN PARLIAMENT
AND OF THE COUNCIL**

**on the processing of personal data and the protection of privacy in the electronic
communications sector**

**AMENDING THE PROPOSAL OF THE COMMISSION
pursuant to Article 250 (2) of the EC Treaty**

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1. INTRODUCTION

Article 251(2), third subparagraph, point (c) of the EC Treaty provides that the Commission is to deliver an opinion on the amendments proposed by the European Parliament at second reading. The Commission sets out its opinion below on the 18 amendments proposed by Parliament.

2. BACKGROUND

In response to the conclusions of the special European Council of Lisbon of 23 – 24 March 2000, and building on the Communication on the results of the public consultation on the 1999 Review of the Electronic Communications Sector and the principles and orientations for the new Regulatory Framework¹, the Commission proposed a package of five directives and a decision that would make up the new regulatory framework, including a Directive on the processing of personal data and the protection of privacy in the electronic communications sector. The decision and the four other directives were all formally adopted by the European Parliament and the Council on 7 March 2002². The present directive is the last element of the package to be adopted.

The European Parliament adopted its first reading on 13 November 2001. The Council adopted its common position on 28 January 2002³. The Commission supported the common position⁴.

¹ COM(2000) 239, 26.4.2000.

² OJ L 108, 24.4.2002.

³ OJ C 113E, 14.5.2002.

⁴ SEC(2002) 124 final, 30.1.2002.

3. PURPOSE OF THE PROPOSAL

This proposed Directive aims to ensure that consumers and users obtain the same level of protection of their personal data and privacy regardless of the technology used for the transmission of their electronic communications.

The Directive will replace Directive 97/66/EC concerning the processing of personal data and the protection of privacy in the telecommunications sector, which was adopted by the European Parliament and the Council on 15 December 1997. It will adapt and update the existing provisions to new and foreseeable developments in electronic communications services and technologies.

4. OPINION OF THE COMMISSION ON THE AMENDMENTS BY THE EUROPEAN PARLIAMENT

The European Parliament adopted 18 amendments to the Council's common position on a Directive on the processing of personal data and the protection of privacy in the electronic communications sector on 30 May 2002. The amendments were based on a compromise package of amendments that was put as an ensemble to the European Parliament by the Council Presidency. The Commission can accept all the EP amendments in full.

Amendment 47 – Recital 11 ; Amendment 46 – Article 15, paragraph 1

These amendments strengthen the existing recital and relevant article concerning measures that Member States may take in derogation from certain provisions of the Directive.

As the Commission explained in its position on the common position, the present Directive based on Article 95 of the Treaty cannot include substantive provisions on law enforcement measures. It should neither prohibit nor approve any particular measure Member States may deem necessary. Article 15(1) of the proposed Directive provides a general basis for Member States to take such measures while respecting their obligations under Community law, including obligations under the European Convention on Human Rights.

With regard to the sentence on the retention of data in Article 15(1), the Commission has made a formal statement for the minutes of the Council meeting of ministers of 6 December 2001 stating that the Commission “(...) *interprets the second sentence of Article 15, paragraph 1 (...) as merely adding a possible example of measures that Member States may take under the circumstances and conditions laid down under Article 15, paragraph 1. This phrase does not legally alter the substance of, or add any element to, the first sentence of Article 15. Nor does it exempt any measures that Member States may take from verification of their respect for their obligations under the Directive and under Community law generally, including the obligation to respect fundamental rights and general principles of Community law such as those enshrined in the European Union Charter of Fundamental Rights and the European Convention on Human Rights.*”

The amendments proposed by the European Parliament are therefore fully in line with the position of the Commission.

Amendment 26 – Recital 25 ; Amendment 25 – Article 5, paragraph 3

The amendments align the recital and article on invisible tracking devices with the provisions of the general data protection Directive 95/46/EC. While somewhat less clear than the original provisions in the common position, this represents an acceptable compromise.

Amendment 29 – Recital 41 ; Amendment 44 – Article 13, paragraph 2

The exception clause and relevant recital that will allow the use of contact details obtained from customers to be used for direct marketing on the basis of an opt-out, has been slightly redrafted. This does not entail any changes of substance.

Amendment 9 – Recital 44

The European Parliament has voted in favour of deletion of a recital explaining to what extent the provisions on unsolicited e-mail for direct marketing purposes would affect messages sent by political parties and charities. The recital only clarified an existing interpretation under the General data protection Directive 95/46/EC on this issue. Its deletion therefore does not mean a change of substance, only a lesser degree of transparency that is acceptable as part of the overall compromise package.

Amendment 45 – Recital 44a

A new recital was added to clarify that technical modalities allowing e-mail users to view the subject line of a message before downloading it, may continue to be a useful tool. While there is no corresponding provision in the body of the Directive, the proposed clarification may nevertheless be helpful.

Amendment 13 – Article 12, paragraph 1

The European Parliament proposed to clarify that subscribers must be informed about the purposes of a directory before their details are included in it. This is a useful additional element that strengthens the provision.

Amendments 24 and 36 – Article 12, paragraph 3

In view of different attitudes to reverse search functions (e.g. finding a name and address on the basis of a telephone number) in various Member States, the European Parliament proposed to let Member States decide whether or not to require a separate opt-in for the use of subscriber details for reverse search. Since a harmonised opt-in will be maintained for inclusion of subscriber details in public directories, flexibility on the aspect of reverse search is unlikely to cause difficulties for the functioning of the single market and is therefore acceptable.

Amendment 28 – Article 13, paragraph 3

This amendment only entails a drafting clarification.

Amendment 18 – Article 13, paragraph 6 ; Amendment 49 – New article 17a

The European Parliament proposed to delete the review clause concerning unsolicited commercial e-mail as proposed in Article 13(6), in order to replace it by a wider review clause that covers the Directive as a whole. The Commission considers this to be an improvement of the common position.

Amendment 38 – Article 14, paragraph 3

This amendment only entails a drafting change that does not affect the substance of the provision, since any measures with regard to the compatibility of terminal equipment with data protection rules will in any case fall under Directive 1999/5/EC.

Amendment 37 – Article 16, paragraph 2

The European Parliament proposed to widen the transition arrangement regarding public subscriber directories to cover not only subscribers to fixed but also to mobile telephony services. While in most cases the inclusion of mobile subscribers in public directories is already based on an opt-in approach, the proposed extension will ensure that even in those cases where an opt-out approach was used, details of existing subscriber may remain included in directories on the basis of an opt-out. The amendment also clarifies that the arrangement equally applies for reverse search functions.

Amendment 48 – Article 17, paragraph 1 ; Amendment 50 – Article 18, paragraph 1

Amendment 48 introduces a period of fifteen months for the transposition of the Directive in national law. The amendment deletes the single date of application in order to allow Member States to apply the new provisions before the ultimate transposition date. Amendment 50 aligns Article 18 with the changes in Article 17. The proposed arrangement is acceptable for the Commission.

5. CONCLUSION

Pursuant to Article 250(2) of the EC Treaty, the Commission amends its proposal as set out above, incorporating all amendments proposed by the European Parliament.