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*Committee on Citizens' Freedoms and Rights, Justice and Home Affairs*

PRELIMINARY  
2000/0189(COD)

23 May 2001

**\*\*\*I**

## **DRAFT REPORT**

on the proposal for a European Parliament and Council directive concerning the processing of personal data and the protection of privacy in the electronic communications sector  
(COM(2000) 385 – C5-0439/2000 – 2000/0189(COD))

Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

Rapporteur: Marco Cappato

Draftsman (\*) : Ilka Schröder, Committee on Industry, External Trade,  
Research and Energy

(\*) Enhanced Hughes Procedure

### ***Symbols for procedures***

- \* Consultation procedure  
*majority of the votes cast*
- \*\*I Cooperation procedure (first reading)  
*majority of the votes cast*
- \*\*II Cooperation procedure (second reading)  
*majority of the votes cast, to approve the common position*  
*majority of Parliament's component Members, to reject or amend*  
*the common position*
- \*\*\* Assent procedure  
*majority of Parliament's component Members except in cases*  
*covered by Articles 105, 107, 161 and 300 of the EC Treaty and*  
*Article 7 of the EU Treaty*
- \*\*\*I Codecision procedure (first reading)  
*majority of the votes cast*
- \*\*\*II Codecision procedure (second reading)  
*majority of the votes cast, to approve the common position*  
*majority of Parliament's component Members, to reject or amend*  
*the common position*
- \*\*\*III Codecision procedure (third reading)  
*majority of the votes cast, to approve the joint text*

(The type of procedure depends on the legal basis proposed by the Commission)

### ***Amendments to a legislative text***

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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(\*) Enhanced Hughes Procedure

## PROCEDURAL PAGE

By letter of 25 August 2000 the Commission submitted to Parliament, pursuant to Article 251(2) and Article 95 of the EC Treaty, the proposal for a European Parliament and Council directive on concerning the processing of personal data and the protection of privacy in the electronic communications sector (COM(2000) 385 - 2000/0189 (COD)).

At the sitting of 8 September 2000 the President of Parliament announced that she had referred this proposal to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs as the committee responsible and the Committee on Budgets, the Committee on Legal Affairs and the Internal Market and the Committee on Industry, External Trade, Research and Energy and Committee on the Environment, Public Health and Consumer Policy for their opinions (C5-0439//2000).

At the sitting of 6 October 2000 the President of Parliament announced that Committee on Industry, External Trade, Research and Energy, which had been asked for its opinion, would be involved in drawing up the report, under the Hughes Procedure.

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs had appointed Marco Cappato rapporteur at its meeting of 29 August 2000.

It considered the Commission proposal and draft report at its meeting(s) of ... and ... .

At last meeting it adopted the draft legislative resolution by .. votes to ..., with ... abstention(s)/unanimously.

The following were present for the vote: ..., chairman/acting chairman; ... (and ...), vice-chairman/vice-chairmen; ..., rapporteur; ..., ... (for ...), ... (for ... pursuant to Rule 153(2)), ... and ... .

The opinions of the Committee on Legal Affairs and the Internal Market, the Committee on Industry, External Trade, Research and Energy and the Committee on the Environment, Public Health and Consumer Policy and the Commission position/statement is (are) attached; the Committee on Budgets decided on 14 September 2000 not to deliver an opinion.

The report was tabled on .....

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session/is ... p.m. on .....

## LEGISLATIVE PROPOSAL

### Proposal for a European Parliament and Council directive concerning the processing of personal data and the protection of privacy in the electronic communications sector (COM(2000) 385 – C5-0439/2000 – 2000/0189(COD))

The proposal is amended as follows:

Text proposed by the Commission <sup>1</sup>

Amendments by Parliament

#### Amendment 1 Recital 10

Like Directive 95/46/EC, this Directive does not **address** issues of protection of fundamental rights and freedoms related to activities which are not governed by Community law. ***It is for Member States to take such measures as are necessary for the protection of public security, defence, State security*** (including the economic well-being of the State when the activities relate to State security matters) **and the enforcement of criminal law. This Directive does not affect the ability of Member States to carry out lawful interception of electronic communications if necessary for any of these purposes.**

Like Directive 95/46/EC, this Directive **addresses** issues of protection of fundamental rights and freedoms, related to activities which are governed by Community law. ***In taking measures for the protection of public security, defence, State security*** (including the economic well-being of the State when the activities relate to State security matters), ***the enforcement of criminal law, and in carrying out lawful interception of electronic communications if necessary for any of these purposes, Member States have to act on the basis of a specific law and the measures have to be proportionate and necessary in a democratic society. Exploratory or general electronic surveillance on a large scale are proscribed.***

#### *Justification*

*Conformity with proposed amendments to Art. 1 and Article 15.*

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<sup>1</sup> OJ C 365, 19.12.2000, p. 223

Amendment 2  
Recital 15

The data relating to subscribers processed within electronic communications networks to establish connections and to transmit information contain information on the private life of natural persons who have a right to respect for their correspondence. The legitimate interests of legal persons should also be protected. Such data may only be stored to the extent that is necessary for the provision of the service for the purpose of billing and for interconnection payments, and for a limited time. Any further processing of such data which the provider of the publicly available electronic communications services may want to perform for the marketing of *its own* electronic communications services or for the provision of value added services, may only be allowed if the subscriber has agreed to this on the basis of accurate and full information given by the provider of the publicly available electronic communications services about the types of further processing it intends to perform and about the subscriber's right not to give or to withdraw his consent to such processing. Traffic data used for marketing of *own* communications services or for the provision of value added services should also be erased or made anonymous after the provision of the service. Service providers should always keep subscribers informed of the types of data they are processing and the purposes and duration for which this is done.

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*Justification*

*Conformity with proposed amendment to Art. 6.*

Amendment 3  
Recital 20

Directories of subscribers to electronic communications services are widely distributed and publicly available. The right to privacy of natural persons and the legitimate interest of legal persons require that subscribers ***are able to*** determine ***whether*** their personal data are published in a directory ***and, if so, which***. ***Providers of public directories should inform the subscribers included in such directories of the purposes of the directory and of any particular usage which may be made of electronic versions of public directories especially through search functions embedded in the software, such as reverse search functions enabling users of the directory to discover the name and address of the subscriber on the basis of a telephone number only.***

Directories of subscribers to electronic communications services are widely distributed and publicly available. The right to privacy of natural persons and the legitimate interest of legal persons require that subscribers ***shall be entitled, free of charge, to be omitted at his or her request or determine the extent to which*** their personal data are published in a directory.

*Justification*

*Conformity with the proposed amendment to Article 12.*

Amendment 4  
Recital 22

The functionalities for the provision of electronic communications services may be integrated in the network or in any part of the terminal equipment of the user, including the software. The protection of the personal data and the privacy of users of publicly available electronic communications services should be independent of the configuration of the various components necessary to provide the service and of the distribution of the necessary functionalities between these

The functionalities for the provision of electronic communications services may be integrated in the network or in any part of the terminal equipment of the user, including the software. The protection of the personal data and the privacy of users of publicly available electronic communications services should be independent of the configuration of the various components necessary to provide the service and of the distribution of the necessary functionalities between these

components. Directive 95/46/EC covers any form of processing of personal data regardless of the technology used. The existence of specific rules for electronic communications services alongside general rules for other components necessary for the provision of such services may not facilitate the protection of personal data and privacy in a technology neutral way. It may therefore be necessary to adopt measures requiring manufacturers of certain types of equipment used for electronic communications services to construct their product in such a way as to incorporate safeguards to ensure that the personal data and privacy of the user and subscriber are *protected*. The adoption of such measures in accordance with Directive 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity will ensure that the introduction of technical features of electronic communication equipment including software for data protection purposes is harmonised in order to be compatible with the implementation of the internal market.

components. Directive 95/46/EC covers any form of processing of personal data regardless of the technology used. The existence of specific rules for electronic communications services alongside general rules for other components necessary for the provision of such services may not facilitate the protection of personal data and privacy in a technology neutral way. It may therefore be necessary to adopt measures requiring manufacturers of certain types of equipment used for electronic communications services to construct their product in such a way as to incorporate safeguards to ensure that the personal data and privacy of the user and subscriber are *not infringed*. The adoption of such measures in accordance with **Directives 95/46/EC and** 1999/5/EC of the European Parliament and of the Council of 9 March 1999 on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity will ensure that the introduction of technical features of electronic communication equipment including software for data protection purposes is harmonised in order to be compatible with the implementation of the internal market.

#### *Justification*

*Conformity with the proposed amendment to article 14.*

#### Amendment 5 Article 1, paragraph 3

This Directive shall not apply to activities which fall outside the scope of the EC Treaty, *such as those covered by Titles V and VI of the Treaty on European*

This Directive shall not apply to activities which fall outside the scope of the EC Treaty.

*Union, and in any case to activities concerning public security, defence, State security (including the economic well-being of the State when the activities relate to State security matters) and the activities of the State in areas of criminal law.*

*Justification*

*Giving examples of activities which fall outside the scope of the EC Treaty is redundant, and inflexible with a view to any future changes to the Treaty.*

Amendment 6  
Article 2, point b) and c)

(b) 'traffic data' means any data processed in the course of or for the purpose of the transmission of a communication over an electronic communications network;

(c) 'location data' means any data processed in an electronic communications network, indicating the geographic position of the terminal equipment of a user of a publicly available electronic communications service;

(b) 'traffic data' means any **personal** data processed in the course of or for the purpose of the transmission of a communication over an electronic communications network;

(c) 'location data' means any **personal** data processed in an electronic communications network, indicating the geographic position of the terminal equipment of a user of a publicly available electronic communications service;

*Justification*

*This directive, like 95/46/EC, is on the protection of individuals with regard to the processing of personal data.*

Amendment 7  
Article 2 point d)

(d) 'communication' means **any information exchanged or transmitted**

(d) 'communication' means any **exchange or transmission of information**

between a finite number of parties by means of a publicly available electronic communications service;

between a finite number of parties by means of a publicly available electronic communications service;

*Justification*

*The term "communication" has to be clearly referred to the process of transmitting and exchanging information, not to the information itself.*

Amendment 8  
Article 3, paragraphs 2 and 3

2. Articles 8, 10 and 11 shall apply to subscriber lines connected to digital exchanges and, where technically possible and if it does not require a disproportionate economic effort, to subscriber lines connected to analogue exchanges.

2. Articles 8, **9**, 10 and 11 shall apply to subscriber lines connected to digital exchanges and, where technically possible and if it does not require a disproportionate economic effort, to subscriber lines connected to analogue exchanges.

3. Cases where it would be technically impossible or require a disproportionate economic effort to fulfil the requirements of Articles 8, 10 and 11 shall be notified to the Commission by the Member States.

3. Cases where it would be technically impossible or require a disproportionate economic effort to fulfil the requirements of Articles 8, **9**, 10 and 11 shall be notified to the Commission by the Member States.

*Justification*

*There is no reason to exclude location data requirements from the evaluation of technical possibility and disproportionate economic effort.*

Amendment 9  
Article 5, paragraph 1

*Confidentiality of the communications*

1. Member States shall ensure the **confidentiality** of communications and the related traffic data by means of a public communications network and publicly

*Secrecy of the communications*

1. Member States shall ensure the **secrecy** of communications and the related traffic data by means of a public communications network and publicly

available electronic communications services, through national legislation. In particular, they shall prohibit listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data, by persons other than users, without the consent of the users concerned, except when legally authorised to do so, in accordance with Article 15(1).

available electronic communications services, through national legislation. In particular, they shall prohibit listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data, by persons other than users, without the consent of the users concerned, except when legally authorised to do so, in accordance with Article 15(1).

*Justification*

*"Secrecy" is stronger than "confidentiality", and it is used in international law and in many national constitutions.*

Amendment 10  
Article 6, paragraph 3

For the purpose of marketing *its own* electronic communications services or for the provision of value added services to the subscriber, the provider of a publicly available electronic communications service may process the data referred to in paragraph 1 to the extent and for the duration necessary for such services, if the subscriber has given his consent.

For the purpose of marketing electronic communications services or for the provision of value added services to the subscriber, the provider of a publicly available electronic communications service may process the data referred to in paragraph 1 to the extent and for the duration necessary for such services, if the subscriber has given his consent.

*Justification*

*Privacy should be protected irrespective of who owns the services marketed.*

Amendment 11  
Article 6, paragraph 5

Processing of traffic data, in accordance with paragraphs 1 to 4, must be restricted

Processing of traffic data, in accordance with paragraphs 1 to 4, must be restricted

to persons acting under the authority of providers of the public communications networks and services handling billing or traffic management, customer enquiries, fraud detection, marketing *the provider's own* electronic communications services or providing a value added service, and must be restricted to what is necessary for the purposes of such activities.

to persons acting under the authority of providers of the public communications networks and services handling billing or traffic management, customer enquiries, fraud detection, marketing electronic communications services or providing a value added service, and must be restricted to what is necessary for the purposes of such activities.

*Justification*

*Privacy should be protected irrespective of who owns the services marketed.*

Amendment 12  
Article 8, paragraph 5

The provisions of paragraph 1 shall also apply with regard to calls to third countries originating in the Community. The provisions of paragraphs 2, 3 and 4 shall also apply to incoming calls originating in third countries.

The provisions of paragraph 1 shall also apply, *if technically feasible*, with regard to calls to third countries originating in the Community. The provisions of paragraphs 2, 3 and 4 shall also apply, *if technically feasible*, to incoming calls originating in third countries.

*Justification*

*The application of provisions of Article 8 to cross-border situations can be problematic; the inclusion of a technical feasibility clause does not reduce the level of protection at the stage of technology.*

Amendment 13  
Article 12

1. *Member States shall ensure that subscribers are informed, free of charge,*

1. *Personal data contained in printed or electronic directories of subscribers*

*about the purpose(s) of a printed or electronic directory of subscribers available to the public or obtainable through directory enquiry services, in which their personal data can be included and of any further usage possibilities based on search functions embedded in electronic versions of the directory.*

*available to the public or obtainable through directory enquiry services should be limited to what is necessary to identify a particular subscriber, unless the subscriber has given his unambiguous consent to the publication of additional personal data. The subscriber shall be entitled, free of charge, to be omitted from a printed or electronic directory at his or her request, to determine which data may be listed, to verify, correct or withdraw such data, to indicate that his or her personal data may not be used for the purpose of direct marketing, to have his or her address omitted in part and not to have a reference revealing his or her sex, where this is applicable linguistically.*

*2. Member States shall ensure that subscribers are given the opportunity, free of charge, to determine whether their personal data are included in public directories, and if so, which, to the extent that such data are relevant for the purpose of the directory as determined by the provider of the directory, and to verify, correct or withdraw such data.*

3. Paragraphs 1 *and* 2 shall apply to subscribers who are natural persons. Member States shall also ensure, in the framework of Community law and applicable national legislation, that the legitimate interests of subscribers other than natural persons with regard to their entry in public directories are sufficiently protected.

3. Paragraph 1 shall apply to subscribers who are natural persons. Member States shall also ensure, in the framework of Community law and applicable national legislation, that the legitimate interests of subscribers other than natural persons with regard to their entry in public directories are sufficiently protected.

#### *Justification*

*The current legislation (Directive 97/66) is re-proposed as a satisfactory solution, because everyone is already entitled to have his or her personal data, mobile-phone number or email address taken out of the directories.*

*It is just gnecessary to specify that any request coming from the user for total or partial omission*

should be free of charge. For that reason the provision allowing operators to require a payment is deleted.

Amendment 14  
Article 13

1. The use of automated calling systems without human intervention (automatic calling machines), facsimile machines (fax) **or electronic mail** for the purposes of direct marketing may only be allowed in respect of subscribers who have given their prior consent.

2. Member States shall take appropriate measures to ensure that, free of charge, unsolicited communications for purposes of direct marketing, by means other than those referred to in paragraph 1, are not allowed either without the consent of the subscribers concerned or in respect of subscribers who do not wish to receive these communications, the choice between these options to be determined by national legislation.

3. Paragraphs **1 and 2** shall apply to subscribers who are natural persons. Member States shall also ensure, in the framework of Community law and applicable national legislation, that the legitimate interests of subscribers other than natural persons with regard to unsolicited communications are

**- 1. Personal data treatment for unsolicited communications is regulated by the General Data Protection Directive 95/46/EC)**

1. The use of automated calling systems without human intervention (automatic calling machines), facsimile machines (fax) for the purposes of direct marketing may only be allowed in respect of subscribers who have given their prior consent.

2. Member States shall take appropriate measures to ensure that, free of charge **and in an easy and clear manner**, unsolicited communications for purposes of direct marketing, by means other than those referred to in paragraph 2, are not allowed either without the consent of the subscribers concerned or in respect of subscribers who do not wish to receive these communications, the choice between these options to be determined by national legislation.

**2a.. The practice of sending electronic messages for the purpose of direct marketing disguising or concealing the identity of the sender on whose behalf the communication is made shall be prohibited.**

3. Paragraphs **-1, 1, 2 and 2a** shall apply to subscribers who are natural persons. Member States shall also ensure, in the framework of Community law and applicable national legislation, that the legitimate interests of subscribers other than natural persons with regard to unsolicited communications are

sufficiently protected.

sufficiently protected.

#### *Justification*

*General directive 46/95/EC already enables it to be established when the processing of personal data for unsolicited communication is lawful, according to "principles relating to data quality". The general directive also establishes a series of criteria for "making data processing legitimate" (e.g. when "unambiguous consent" of the data subject is expressed, but also when public data, freedom of expression or vital interests of the data subject are involved), that it would be wrong (and technologically "non-neutral") to eliminate on technological grounds.*

*The explicit reference to the fraudulent practice of disguising the identity of the sender could strengthen anti-spam efforts, also if not only the general directive, but also other directives already protect the consumer (84/450 on misleading advertising, 93/13 on unfair terms in consumer contracts and 98/6 on the indication of prices).*

*Opt-in and opt-out systems are both used in the Member States, and the subsidiarity principle would tend to argue against the imposition of a common practice, which would in any case co-exist with hundreds of national legislations around the world. Opt-out systems are already specified by the e-commerce Directive (2000/31) and the Distance-selling Directive (97/7).*

#### Amendment 15 Article 14, paragraph 3

Where required, the Commission shall adopt measures to ensure that terminal equipment incorporates the necessary safeguards to guarantee the protection of personal data and privacy of users and subscribers, in accordance with Directive 1999/5/EC and Council Decision 87/95/EEC .

Where required, the Commission shall adopt measures to ensure that terminal equipment ***does not infringe the right to privacy***, in accordance with Directive ***95/46/EC***, 1999/5/EC and Council Decision 87/95/EEC<sup>1</sup>.

#### *Justification*

*The Commission should intervene in order to prevent violations of the right to privacy, not to impose specific technical solutions.*

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<sup>1</sup> OJ L 36, 7.2.1987, p. 310.

Amendment 16  
Article 15, paragraph 1

Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1) to (4), and Article 9 of this Directive when such restriction constitutes a necessary measure to safeguard national security, defence, public security, the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of Directive 95/46/EC.

Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1) to (4), and Article 9 of this Directive when such restriction constitutes a necessary **and proportionate** measure to safeguard national security, defence, public security, the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of Directive 95/46/EC. ***Exploratory or general surveillance on a large scale is consequently not allowed.***

*Justification*

*National legislative measures that restrict the scope of the Directive have to be not only necessary, but also proportionate. For that reason exploratory or general surveillance on a large scale is forbidden.*

Amendment 17  
Article 15, paragraph 3

The Working Party on the Protection of Individuals with regard to the Processing of Personal Data instituted by Article 29 of Directive 95/46/EC shall also carry out the tasks laid down in Article 30 of that Directive with regard to matters covered by this Directive, ***namely the protection of fundamental rights and freedoms and of legitimate interests in the electronic communications sector.***

The Working Party on the Protection of Individuals with regard to the Processing of Personal Data instituted by Article 29 of Directive 95/46/EC shall also carry out the tasks laid down in Article 30 of that Directive with regard to matters covered by this Directive.

*Justification*

*Article 30 of Directive 95/46/EC covers more than just fundamental rights or legitimate interests. It is preferable to include the reference to Article 30 without making a partial resumé.*

## DRAFT LEGISLATIVE RESOLUTION

### **European Parliament legislative resolution on the proposal for a European Parliament and Council directive concerning the processing of personal data and the protection of privacy in the electronic communications sector (COM(2000) 385 – C5-0439/2000 – 2000/0189(COD))**

**(Codecision procedure: first reading)**

*The European Parliament,*

- having regard to the Commission proposal to the European Parliament and the Council (COM(2000) 385<sup>1</sup>),
  - having regard to Article 251(2) of the EC Treaty and Articles 95 of the EC Treaty, pursuant to which the Commission submitted the proposal to Parliament (C5-0439//2000),
  - having regard to Rule 67 of its Rules of Procedure,
  - having regard to the report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs and the opinions of the Committee on Legal Affairs and the Internal Market, the Committee on Industry, External Trade, Research and Energy and the Committee on the Environment, Public Health and Consumer Policy (A5-0000/2000),
1. Approves the Commission proposal as amended;
  2. Asks to be consulted again should the Commission intend to amend the proposal substantially or replace it with another text;
  3. Instructs its President to forward its position to the Council and Commission.

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<sup>1</sup> OJ C 365, 19.12.2000, p. 223

## EXPLANATORY STATEMENT

### **\* Introduction**

The proposed directive introduces significant changes with respect to Directive 97/66/EC. The definitions are updated so as to bring them into line with developments in telecommunications technologies, and special arrangements are introduced for some types of personal data (traffic data and location data) and some technologies (email, electronic directories).

### **\* Technological neutrality**

The need for a separate directive covering electronic communications is in itself questionable, since general Directive 95/46/EC lays down general principles covering the protection of privacy, which can easily be adapted to the various technologies. The proposed introduction of special arrangements for some types of data which hinge on the use of specific technologies could well make matters extremely confusing for national legislative authorities and, all the more so, for the legal authorities.

The need to ensure the 'technological neutrality' of privacy rules is one of the Commission's main arguments for proposing this directive. The rapporteur considers, however, that technological neutrality is to be secured through rules and principles that may be applied to all technologies, rather than through a process of continuous updating as new technologies appear on the market. In other words, the legislation should regulate the processing of data, not the technologies which enable use to be made of those data.

### **\* A single legislative framework**

It would therefore be preferable for the Commission to revise the parent directive at the earliest opportunity (a report on the implementation of Directive 95/46/EC is anyway to be submitted by October 2001, together with proposed amendments, where appropriate), and to incorporate the specific proposals for each sector, not just the telecommunications sector. This would make the legislation more consistent and homogeneous.

The need to ensure that the legislative authorities' activities are not spread over too wide an area is reinforced by the fact that transposition of both directives has proved problematic:

- Directive 95/46/EC has been transposed by 6 Member States (EL, P, S, I, B, FIN). Nine have yet to do so, 5 of which (F, D, L, NL, IRL) have been brought before the Court of Justice by the Commission. A ruling has already been delivered against one of them (France).

- Directive 97/66/EC has been transposed by 6 Member States (D, E, FIN, I, NL, P).

It would therefore appear wise to consolidate the European legislative authorities' efforts vis-à-vis the Member States.

### **\* Proposed amendments**

Detailed justifications are given for the proposed amendments.