

EuroISPA monthly report

December 2020 – January 2021

The year 2021 might start with the closure of a chapter that has been open for too long: ePrivacy. The Council seems to be moving towards an agreement and we will soon know if the Portuguese Presidency manages to obtain a mandate so negotiations with Parliament and Commission can start. Another chapter that closes is the one on the Regulation for Tackling Terrorist Content Online, as EU institutions reached an agreement before the end of 2020. On data related matters we have seen the EDPB and EDPS adopt joint opinions on the new sets of SCCs to feed into the Commission's implementing work, and policymakers have also been very active on cybersecurity issues, with the Parliament finally adopting its position on the e-Evidence proposal and the Commission publishing its proposals on the revision of the NIS Directive or the new Europol framework. As for the safer internet space, negotiations on the interim eprivacy measures are advancing slowly because of the many doubts of the Parliament as regards the Commission's proposal, which has not stopped the EU's legislative body to kick off its work on the new legislative proposal to fight CSAM. Last but not least, the long awaited DSA (and DMA) proposals finally saw the light in December and will become EuroISPA's priority in the next months, if not years.

Data protection

ePrivacy : towards a potential agreement in Council in 2021

In January 2021, the Portuguese Presidency diligently tried to accommodate comments from Member States and shared a new text with Member States. The main outcome so far was that the majority of Member States supported the Portuguese Presidency's ambition to swiftly find a compromise in Council in the COREPER meeting, gathering the Deputy Permanent Representatives of Member States, by February, and start negotiations with Parliament immediately afterwards. Changes suggested by the Portuguese seek overall consistency between articles and recitals; a positive amendment concerns the 24 months application deadline from the entry into force. Unfortunately, the legal ground of processing data for "compliance with a legal obligation" has been reinstated to its original wording and limited to compliance with a legal obligation "to safeguard the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the safeguarding against and the prevention of threats to public security."

Actions:

- *EuroISPA to publish a statement if the COREPER meeting adopts a mandate to start negotiations with the European Parliament*

EDPB & EDPS adopt joint opinions on new sets of SCCs

On 15 January, the EDPB (European Data Protection Board) as well as the EDPS (European Data Protection Supervisor) [adopted joint opinions](#) on the SCCs for contracts between controllers and processors and the ones for the transfer of personal data to third countries. The opinions include requests of amendments on a series of issues, such as the interplay between the two documents, clarifying obligations for processors, etc.

The recommendations are key for the European Commission, which was waiting for them, to integrate them in their procedure with Member States to finally adopt the SCCs. In terms of next steps, the SCCs could be adopted by March.

Actions :

- EuroISPA shared [written comments](#) with the European Commission on the SCCs, and participated in a European Commission's roundtable with other industry players.

Cybersecurity

European Commission presents its proposal for a revised NIS Directive

On 16 December 2020, the European Commission published its proposal for a [revised Network and Information Security Directive \(NISD 2\)](#) as part of the EU's Cybersecurity Strategy and bringing a new categorisation for entities according to whether they are 'important' or 'essential', and have responsibilities accordingly, and introducing new sectors into the scope, including data centres, manufacturing of certain products. The proposal has been sent to both the European Parliament and the Council of the EU so they can start working on their positions. In the European Parliament, the Industry, Research and Energy (ITRE) Committee was attributed the file with MEP Bart Groothuis (Renew, Netherlands) chosen as rapporteur. However, the Internal Market and Consumer Protection (IMCO) Committee has challenged the attribution what could delay the work in the Parliament presumably until May.

European Parliament adopts its position on the e-Evidence proposal

After many months of difficult discussions, the European Parliament adopted its position on the e-Evidence proposal together with the mandate to start interinstitutional negotiations. The mandate was passed not without showing the strong division between groups in the LIBE Committee, with the Renew, Greens/EFA and ECR Groups voting against the proposal and EPP, S&D and GUE/NGL voting in favour. The Parliament's proposal shows improvements in respect the Commission's proposal and the Council's position, providing clearer safeguards for ISPs. However, there are aspects raised by EuroISPA that have not been properly addressed yet. Interinstitutional negotiations will start on the 10 February and EuroISPA will share its recommendations to achieve a balanced system and a future proof E-Evidence legislation.

European Commission publishes proposal for strengthening the mandate of Europol

The European Commission has released its [proposal for strengthening the mandate of Europol](#), along with the [Impact Assessment](#). Positively, the main concern noted in our contribution to the public consultation, that it was the possibility for the Regulation to empower Europol to directly request data from private entities has been not included in the proposal. However, the Commission's text allows the Agency to receive data from private parties, to ask Member States to request other private parties to share further information and, to exchange personal data with companies in cases related to crisis response. The proposal has been sent to the European Parliament and European Council so they can start working on the proposal.

EU Commission's study on Data Retention published

In February, Milieu presented the [study on the retention of electronic communications non-content data for law enforcement purposes](#). The study was commissioned by the Commission's DG HOME and collects information on the legal framework and practices for retention of and access to electronic communications non-content data in 10 EU Member States (Austria, Estonia, France, Germany, Ireland, Italy, Poland, Portugal, Slovenia and Spain). This information will be used by the Commission to assess whether and under which conditions data retention rules and practices contribute to preventing, investigating and prosecuting criminal offences. The study also highlights the fragmentation and legal uncertainty of the regulatory and institutional framework for data retention in the Member States studied and includes concrete findings as regards data retention practices, access and procedures to access data, retention practices by OTTs, and technological challenges.

European Commission explains the state of the EU Security Union Strategy 2020-2025

The Commission stresses in its [Progress Report](#) that the COVID-19 pandemic has put the focus on security as Europe's critical infrastructure and urges to maintain the momentum so Member States help to accelerate the implementation of the agreed legislation and other initiatives, in particular on critical infrastructure (revision of the Critical Entities Resilience Directive and the NIS Directive), cybersecurity (EU cybersecurity certification framework by the Cybersecurity Act, NIS Cooperation Group as well as via the CSIRTs Network, CyCLONe, etc.), cybercrime (e-evidence and the Council of Europe's Budapest Convention on cybercrime for which negotiations should be concluded in 2021) and modern law enforcement (Data Governance Act and encryption, where it will look for options for lawful access to electronic information in encrypted environments).

Actions :

- EuroISPA shared written comments on the [new draft provisions](#) to the Second Additional Protocol to the Budapest Convention.
- EuroISPA to develop recommendations for the E-Evidence trilogues and to share them with relevant MEPs and Member States' representatives.
- EuroISPA to develop its position for the NIS Directive proposal and to share them with relevant MEPs and Member States' representatives.

Safer Internet

Interim eprivacy regulation negotiations advance at a very slow rate

In December, the Civil Liberties (LIBE) Committee adopted its position and backed the decision to enter into interinstitutional talks with the first trilogue meeting taking place before the Christmas break. However, the European Parliament wants to take its time to properly assess a legislation that, in views of Rapporteur MEP Sippel, was very badly designed by the Commission from its inception. More technical discussions are scheduled in order to find a common ground in important issues that allow to resume trilogue meetings at political level. At this point, there are two main hurdles for the negotiations to advance: first, which should the supervisory authorities in charge and second (and more important), if the Regulation should act as a derogation or as a restriction. In short, the European Parliament wants the regulation to become a restriction of fundamental rights acting as a *lex specialis*, defining cases of processing for child protection purposes which would be legal or not. This is opposed to the Commission's proposal and something the Council disagrees with, especially in light of the temporary nature of the measures.

EU Commission starts its work on the new legislative proposal to fight CSAM

As part of the [EU strategy for a more effective fight against child sexual abuse](#), the Commission published in December the [Inception Impact Assessment](#) (IIA) on a proposal for a Regulation on the detection, removal and reporting of child sexual abuse online. The IIA intends to collect feedback from stakeholders for further development and fine tuning of the initiative, which is expected to be adopted by the end of Q2 2021. Additionally, the Commission will launch a formal public consultation in Q1 2021.

Actions :

- EuroISPA sent a letter supporting the temporary derogations from the ePrivacy Directive to protect children from sexual abuse online.
- EuroISPA [submitted](#) comments on the inception impact assessment on the Commission's proposal for a Regulation on the detection, removal, and reporting of child sexual abuse online.
- EuroISPA to participate in the upcoming public consultation on the proposal for a Regulation on the detection, removal and reporting of child sexual abuse online.

Intermediary Liability

European Commission publishes Digital Services Act

On 15 December 2020, the European Commission published its much-awaited [Digital Services Act](#). The draft Regulation will cover the whole EuroISPA membership, as the categories envisaged by the proposal include intermediary services (which encompass mere conduit, caching, hosting, exactly as defined by the E-Commerce Directive), 'online platforms', and 'very large online platforms.' Positively for EuroISPA, the liability regime of the E-Commerce Directive is almost literally transposed in the DSA. In addition, the text includes provisions on 'own initiative investigations' and an Article prohibiting general monitoring obligations. The draft Regulation also features a comprehensive set of due diligence obligations, which become progressively more stringent respectively for intermediary services, hosting services, platforms and very large online platforms. As a law which focuses on procedural obligations, the DSA naturally has a very well developed section reinforcing the current enforcement system, with dedicated Digital Services Coordinators which have extensive powers of investigation and of enforcement, a Board, procedures for cross-border cooperation, as well as the possibility of joint investigations.

Actions:

- *EuroISPA to develop position paper to be submitted to the European Commission by 25 March 2021 (deadline to submit feedback). In addition, the position paper will be distributed to relevant MEPs and Member States' representatives.*

EU institutions reach agreement on the Regulation for Tackling Terrorist Content Online

In December 2020, the German Presidency of the Council and the European Parliament found a political agreement on the Regulation for Tackling Terrorist Content Online (please see here a [consolidated text](#)). The European Parliament's LIBE Committee (Civil Liberties) approved it in January 2021. In terms of next steps, the European Parliament will need to vote on the Regulation in plenary, potentially in April. The regulation will introduce binding removal orders. These will be issued by national authorities, who will request hosting service providers to remove terrorist content online or disable access to it within 1 hour. The proposal also creates a duty of care obligation for hosting service providers to take proactive measures including the deployment of automated detection tools where appropriate and when they are exposed to the risk of hosting terrorist content.

Markets and services

European Commission publishes Digital Markets Act

On 15 December, the European Commission published the [Digital Markets Act](#), alongside the DSA. The regulation lays down harmonized rules in the digital sector and across the Union where gatekeepers are present. A provider of core platform services is considered a gatekeeper if it has significant impact on the internal market, serves as an important gateway for business users to reach end users and, enjoys an entrenched and durable position in its operations and for the foreseeable future. Respectively, the core platform service meets the three cumulative criteria: a) annual EEA turnover equal or above 6.5 bn Euros in last three financial years or market cap of +65bn Euros, and active in at least three MS; b) core platform service has +45 million monthly active end users in the Union or more than 10.0000 yearly active business users; c) point b was met consecutively in the last three financial years. The Regulation then includes a series of 'do's and don'ts' of gatekeepers, to ensure that the Digital Single Market remains competitive.