

EuroISPA monthly report

November 2020

The final stretch of the year has brought with it very important developments in key files for the different EuroISPA Committees. On Data Protection, the German Presidency could not finally reach significant progress on e-privacy and presented a Progress report to pass the burden to the upcoming Portuguese Presidency. Furthermore, institutions are trying to tackle the uncertainty produced by the Schrems II judgement with initiatives by the Commission and the EDPB trying to fill the legislative gap for international transfers by offering guidance on SCCs and supplementary data protection measures. On cybersecurity, the e-evidence proposal is set to enter the final stage of negotiations after the LIBE Committee found a very long fought agreement, and the Commission presented its proposal for a new mandate for Europol. Meanwhile, the Cybersecurity Committee has been working to respond to a new round of consultation on the second additional protocol of the Budapest Convention. On a different note, our Safer Internet Committee has been busy following the developments of the very controversial interim eprivacy Regulation, matter on which, after very tense weeks, interinstitutional negotiations are expected to begin before the end of the year, coinciding with the announcement of the Inception Impact assessment on a new CSAM regulation that should establish a long-term framework for companies to tackle this heinous material. Finally, the Commission published a short-term review of the Geo-blocking Regulation, concluding that when it comes to audiovisual, a broader analysis will be necessary to evaluate the potential effects of an extension of the Regulation.

Data protection

German Presidency's progress report on E-Privacy

The German Presidency has presented on 7 December a Progress Report on the e-Privacy file for the Member States delegations via videoconference for the Council telecommunication group meeting. This signifies that the current Presidency will take no further action on this file and will support the upcoming Portuguese Presidency instead. In the report, the Presidency recalled the main topics of discussion, such as processing of metadata; access of final users; vital and legitimate interest; child protection; and data storage. The Commission thanked the Presidency for the progress report, while regretting no further progress had been achieved on this priority proposal. It concurred with the Presidency that the urgency of an agreement is further justified by the entry into force of the European Electronic Communications Code on 21 December.

European Commission shares a New EU-US Agenda for Global Change

On 2 December, the European Commission and the EU High Representative for Foreign Affairs and Security Policy put forward a proposal for a new transatlantic agenda, called "[A new EU-US Agenda for global change](#)". The new initiative touches upon many topics of interest, such as data transfers, cloud services, security and AI. The European Council, gathering the heads of Member States, is invited to endorse this initiative and propose first steps in a roadmap for a new transatlantic agenda for global cooperation. As first steps for technology, trade and standards, the Commission and the High Representative propose key actions, such as close cooperation on solving bilateral trade irritants through negotiated solutions and lead WTO reform efforts. More interestingly, there's a proposal to establish a new EU-US Trade and Technology Council to help, facilitate trade, develop compatible standards and promote innovation. The agenda also includes the proposal to open a transatlantic dialogue on the responsibility of online platforms and "Big Tech" and working together to find global solutions for fair taxation and market distortions in the digital economy.

Commission publishes new draft Standard Contractual Clauses

The European Commission published the draft Implementing Decision on Standard Contractual Clauses (SCCs) for the transfer of personal data to non-EU countries. The document looks at transfers from the perspectives of controller-to-controller, controller-to-processor, processor-to-processor and processor-to-controller and foresees a transition period of 1 year. It introduces and confirms a set of obligations and liabilities, of which the most notable ones relate to the obligation to carry out an assessment of the laws of the third country, in particular the possibility of requests for access by authorities. Elaborating further on this, there is an obligation for data importers to notify exporters – and, if possible, the data subjects themselves – on any legally binding requests by government authorities to disclose personal data. The text also provides that each party would be liable to the other party/ies and to the data subjects for any material or non-material damages, although punitive damages are excluded. Liability is to be shared between parties if more than one is found liable to the data subject, which opens the possibility for data subjects to file collective lawsuits in the future.

Actions :

- *EuroISPA shared feedback with the European Commission and participated in the European Commission's roundtable with trade associations on 10 December*

EDPB shares Recommendations on supplementary measures for transfer tools

The European Data Protection Board (EDPB) has issued its [Recommendations on supplementary data protection measures](#) following the Schrems II judgement. The recommendations consist of a series of steps to follow in order to help data exporters with the task of assessing the equivalence of data protection in third countries. The steps include gathering knowledge and awareness about the transfers and the third countries, labelled as the ‘know your transfers’ recommendation; to ensure the legality of the tools the transfers are based on, to assess the third-country law for a possibility of personal data becoming compromised and, lastly, to adopt supplementary measures if such risks are identified. Interestingly, encryption is the main example of an effective supplementary measure. The recommendations also advise regular evaluations and monitoring for developments that may change the exporters’ assessment of transfer tools, third–country laws or the effectiveness of supplementary measures. The recommendations have been issued with a consultation period until 21 December.

Actions:

- *EuroISPA participated in the EDPB Workshop on legitimate interest on 27 November.*

Cybersecurity

Parliament adopts its position on e-evidence

The Parliament’s Civil Liberties (LIBE) Committee finally reached an agreement on the e-Evidence report, along with the mandates to begin trilogues. The compromise was adopted with the votes of the S&D, EPP and GUE/NGL groups (35 votes in favour and 22 against, 5 abstentions). However, the Renew, Greens/EFA and ECR Groups voted against as, in their view, the text was “insufficient in guaranteeing fundamental rights.” From the compromise amendments, we also saw that many of the issues raised by EuroISPA were not addressed (like the short deadlines to respond to a cross border request, the lack of prior involvement of a domestic executing authority or the issue of double criminality). The Parliament will now have to negotiate with the Commission and the Council of the EU, with trilogues likely to start in January next year.

New round of consultations on the Second additional protocol of the Budapest convention

The Council of Europe [published in November a new draft](#) of the Second Additional Protocol to the Budapest Convention and opened a new round of consultations until the 15 of December. Whilst the old provisions have essentially remained unchanged (only minor changes in Art 1 – Languages that now also address service providers) the protocol now includes three additional provisions: on joint investigation teams and joint investigations (Art. 3); request for domain name registration information (Art. 6); and, expedited disclosure of stored computer data in an emergency (Art. 7). As in previous rounds, EuroISPA will provide comments on the new provisions.

European Commission announces a revised mandate for Europol

The Commission released on 9 December its [proposal for strengthening the mandate of Europol](#), along with the [Impact Assessment](#). This initiative that is part of the Commission's new [Counter-Terrorism agenda](#), would not empower Europol to make binding requests towards service providers for any data, but would enable the agency to receive it.

Safer Internet

The LIBE Committee votes to enter interinstitutional talks on the interim eprivacy Regulation

The Civil Liberties (LIBE) Committee adopted on 7 December its position (53 votes in favor and 9 against, 2 abstentions) and backed, with 54 votes to 10 votes, the decision to enter interinstitutional talks. The Committee's text would allow the use of technologies that scan the content (images, text, or traffic data) and the use of classifiers and artificial intelligence to detect grooming. However, it is not intended to cover audio communications. Furthermore, it is clarified that the legislation should not be interpreted as prohibiting or weakening end-to-end encryption. Negotiations between the co-legislators will start before the end of the year if the mandate is endorsed in the plenary of the week of 14 December.

Actions:

- *EuroISPA to send a letter encouraging EU Institutions to ensure that negotiations on the temporary derogation are concluded swiftly and that the law enters into force as soon as possible.*

Inception Impact assessment on a new CSAM regulation presented

The Commission presented on 2 December an "[Inception Impact Assessment \(IIA\) on Fighting child sexual abuse: detection, removal and reporting of illegal content online](#)". The IIA will set the basis for a proposal for a CSAM regulation in Q2 2021, requiring relevant online services providers to detect and report child sexual abuse on their services. The proposal also includes the possible creation of a European Centre to prevent and counter CSAM. In its IIA, the Commission sets three legislative options, which should all be consistent with the upcoming DSA's liability regime:

1. A legal basis under which relevant service providers could choose to implement voluntary measures to detect and counter CSAM, including both previously known and new material, and text-based threats.
2. A legal basis under which relevant service providers would have a binding obligation, to detect and counter known CSAM. Service providers could choose to implement voluntary measures to detect new material and/or text-based threats.
3. A binding obligation for relevant service providers to detect and counter all known and unknown CSAM.

Concerning the timeline, the feedback period on the IIA is open until 30 December and, a public consultation will be launched in Q1 2021. Finally, the Commission's proposal is expected to be published in Q2 2021.

Actions:

- *EuroISPA to share feedback with the European Commission on the IIA and to participate in the public consultation.*

Innovation and growth

Commission publishes short-term review of the Geo-blocking Regulation

In November the European Commission [unveiled](#) its conclusions of its first short-term review of the 2018 Geo-blocking Regulation. The report analyses – inter alia - the potential extension of the scope of the Regulation to electronically supplied services giving access to copyright-protected content by gathering information on three elements: (i) consumers' expectations/demands; (ii) possible variety and price effects for consumers; and (iii) impacts on different sectors. It assesses several sectors: audiovisual services, music, games and software, e-books. When it comes to audiovisual, the report concludes that a broader analysis will be necessary to evaluate the potential effects of an extension of the Regulation. In terms of next steps, the Commission will engage with stakeholders in a dialogue to identify how to foster better circulation of audiovisual content across the EU, and will assess the progress achieved on the availability of audiovisual content following the dialogue with industry by the end of 2022.