EuroISPA monthly report

October 2020

As we enter the fourth quarter of 2020, EU policymakers have been busy in advancing their positions on several key political dossiers. On intermediary liability, ahead of the publication of the much-awaited Digital Services Act and Digital Markets Act by the Commission in December, the European Parliament finally adopted its own-initiative reports. For their part, more and more Member States are finalising their official positions, ahead of what we can expect to be very heated discussions for the years to come. When it comes to the proposal on ePrivacy, which has been discussed within the Council for several years, the German Presidency has attempted to unblock the current impasse with a new text, with a view to achieve a political agreement by the end of the year. On a related matter, The Council adopted on 28 October its general approach on the interim ePrivacy Regulation which sets temporary rules to allow tech companies to continue detecting child sexual abuse online while complying with ePrivacy. In October, we saw important developments in terms of case law in the field of data retention. The CJEU unveiled an important series of judgements on the topic, confirming that EU law precludes national legislation requiring electronic communications services to carry out general and indiscriminate data retention for the purpose of combating crime in general or safeguarding national security.

Intermediary Liability

Several Member States unveil position on the DSA/DMA

In October, during an informal meeting of telecommunications ministers, several Member States unveiled their preliminary positions on the Digital Services Act. There was a unified backing of all the speakers on the need to preserve the basic principles of the existing E-Commerce Directive, while at the same time agreeing that these rules, which are dating back to year 2000, need to be modernised. There was also wide support for a new set of ex-ante obligations and prohibitions for gatekeeping platforms, and for the need to create new competition powers. Of particular interest was the position of France and the Netherlands**,** which vocally supported the Commission's intention to regulate gatekeeping platforms and the need to keep digital markets open and contestable. Earlier, they also published a joint Franco-Dutch position paper on the issue. France also provided further details on its specific position, such as its ambition to impose a "duty of care" on platforms. Other delegations concurred on the need to ensure that digital market remain open and competitive, improve the cooperation between the regulatory bodies and establish sector specific ex-ante rules focusing on the largest platforms. Furthermore, several Member States called for the establishment of a harmonised notice-and-actions system.

Parliament adopts DSA reports in Plenary Session

On 20 October, the European Parliament Plenary adopted the three reports on the Digital Services Act, tackling different aspects of the dossier (here, here, and here). The three reports do not have legislative power; however, they do carry significant political weight and can influence the European Commission, which is expected to publish a proposal on 2 December 2020. It is interesting to note that, even though the areas of focus of the reports differ, they are quite cohesive. In addition, it is worth noting that they were all adopted with comfortable majorities, which signals that the Parliament will be able to speak with one voice to the European Parliament on a wide range of issues. Positively for EuroISPA, all reports call for the preservation of key principles of the E-Commerce Directive, including the limited exemption from third party liability, the prohibition for Member States to impose general obligations to monitor, as well as the country of origin principle. Furthermore, in line with EuroISPA, the focus of the reports was on illegal, rather than harmful content. In terms of

angle, the three reports do focus on online platforms – however, the report by MEP Saliba has the ambition to encompass "all digital services". Several elements of the reports, however, remain concerning, notably when it comes to very strict proposed rules for marketplaces in terms of liability and know your customer obligations, envisaged opt-outs from recommender systems, as well as the call on the European Commission to consider a phase-out of targeted advertising.

Data protection

ePrivacy: German Presidency unveils new compromise text

The German Presidency of the Council has released its compromise position on the ePrivacy Regulation. It will be discussed at the Council's Working Party in charge of telecommunications on 11 November. It is now likely that Germany will push this compromise to the political level in November in order to find a political agreement and begin negotiations with Parliament and Commission before the end of the year. The compromise is quite strict as any flexibility in processing metadata in Article 6b has been deleted from the text, including "legitimate interest", "further compatible processing for metadata", "contractual legal ground". New legal grounds in article 6b have been introduced under the form of the protection of vital interest of the end-user and statistical counting. In article 8, a stricter wording has been introduced to define clearly the conditions when the use of terminal equipment is necessary for providing a service specifically requested by the end-user.

Schrems II judgement: next steps

According to new information on the aftermath of the Schrems II judgement on international data flows, the new Standard Contractual Clauses (SCCs) are expected to be ready by mid-November. When finalised, they will be sent to the European Data Protection Board (EDPB) for an opinion, which is expected to take up to 8 weeks, with a possibility to extend by another 6 weeks. Parallel to this, a consultation will take place and the approval of the Member States would also be required. In conclusion, this file might spill over to beginning 2021. On an additional note, the EDPS published a strategic document to guide EU institutions and bodies on how to comply with the Schrems II ruling with short- and medium-term actions. The overall goal of the document is to ensure that international transfers comply with the Charter of Fundamental Rights and the GDPR.

Cybersecurity

Data retention rulings

On 6 October, The Court of Justice of the European Union issued two rulings about the retention of location and traffic data. The rulings are Privacy International (C-623/17) as well as joined cases La Quadrature du Net and Others (C-511/18), French Data Network and Others (C-512/18), and Ordre des barreaux francophones et germanophone and Others (C-520/18). The CJEU confirmed that EU law precludes national legislation requiring electronic communications services to carry out general and indiscriminate data retention for the purpose of combating crime in general or safeguarding national security. However, it if a Member State faces a "serious threat to national security", genuine and present or foreseeable, it may order data retention measures, if they are limited in time to what is strictly necessary. Member States can also provide for targeted data retention in the context of combating serious crime and preventing serious threats to public security, if they ensure effective safeguards and the measures are reviewed by a court or by an independent administrative authority. Similarly, Member States can engage in data retention of IP addresses assigned to the source of a communication if the retention is limited to what is strictly necessary. In the case of data retention relating to the civil identity of users of electronic communication services, the retention is not subject to a specific time limit.

Commissioner Reynders and German Presidency eager to continue discussions on e-evidence

On 9 October, Justice and Home Affairs Ministers of the EU Member States had an "informal videoconference", during which they discussed several topics, including e-evidence, AI, the fight against CSAM and the Schrems II judgement. At the press conference which ensued, both Commissioner for Justice Didier Reynders and German Justice Minister Christine Lambrecht expressed their will to see the European Parliament formulate a position on the e-evidence package so that interinstitutional negotiations can start. In the meantime, the European Parliament's LIBE Committee (Civil Liberties, Justice and Home Affairs) has advanced on finding an agreement at technical level so there is a chance we see the compromise amendments during November.

Safer Internet

Council adopts general approach on the interim ePrivacy Regulation

The Council adopted on 28 October its general approach on the interim ePrivacy Regulation which sets temporary rules to allow tech companies to continue detecting child sexual abuse online while complying with ePrivacy. One of the main changes compared to the Commission's proposal is that the Council's position does not limit the exception to existing technologies used before the entry into force of the regulation but would allow the use of new solutions prior consultation to the relevant supervisory authorities. However, the supervisory bodies would have to check first if these technologies are sufficiently non-intrusive compared with the state of the art in the industry. The European Data Protection Board (EDPB) is mandated to issue guidelines on this process. Now, the pressure is on the European Parliament that must develop its position as soon as possible so interinstitutional negotiations can begin. However, it seems unlikely that Parliament and Council will reach an agreement before the 21 December deadline as little progress has been made so far in the LIBE Committee.