

EuroSPA monthly report

May 2018

May was an intensive month in terms of political developments on digital files. Notably, the Bulgarian Presidency secured a “negotiating mandate” to initiate talks with the European Parliament on copyright. This will place further pressure on the Parliament’s rapporteur to secure a position by June. In the meantime, the European Commission continues to envisage several options in order to tackle illegal content online, as evidenced by its public consultation – self-regulation, sectoral legislation, and horizontal legislation are still on the table. In this context, France is pushing hard for sectoral legislation on terrorist content by June. Concerning cybersecurity, technical discussions on e-evidence have started in Council, with a Justice and Home Affairs meeting scheduled on 4 June. Finally, given the many unsolved issues regarding ePrivacy, a Council position in June is unlikely, even though technically possible.

Intermediary liability

France seeks support for EU legislation on terrorist content online

Secretariat understands that France has sent letters to other Member States seeking support to ask the European Commission (EC) to put forward sectoral legislation on illegal content in June, focussing specifically on terrorist content online. Such legislation would probably be heavily inspired by the EC’s [Recommendation](#) on measures to effectively tackle illegal content online. The Recommendation included a specific chapter on terrorist content, requiring hosting service providers to take proactive measures and remove or disable content within one hour upon receipt of a notification.

Commission launches public consultation on measures to tackle illegal content online

On 30 April, following the publication of the [Communication](#) and the [Recommendation](#) on illegal content, the EC launched a [public consultation](#) on “measures to further improve the effectiveness of the fight against illegal content online”. It notably aims to 1) gather current best practices and 2) gather data, opinion and preferences on potential policy options in addressing the challenge of illegal content online. The options include sectoral legislation (e.g. on terrorist content online), horizontal legislation, and industry self-regulation. The deadline to respond to the consultation is on 25 June 2018.

European Parliament’s own-initiative report on illegal content online most likely to be dropped

The European Parliament was supposed to draft its own position on the topic of illegal content online (an own-initiative report). However, the IMCO (internal market) and LIBE (justice and home affairs) Committees were not able to agree on the attribution of the file, which is why it is unlikely such a report will ever see the light of the day. Nonetheless, IMCO has scheduled a hearing on “the EU’s horizontal regulatory framework for illegal content removal in the digital single market”; the agenda of the event is yet to be determined.

European Parliament and Commission discuss illegal content

On 16 May, the IMCO Committee held an exchange of views with the EC on the topic of tackling illegal content online. The majority of MEPs were particularly critical towards online platforms, asking them to “do more” to address illegal content online. MEP Julia Reda (Greens, DE) provided a different perspective: she criticised the EC’s Recommendation, arguing that it encouraged companies to over-remove lawful content. Furthermore, she stressed that the E-Commerce Directive’s no-general monitoring obligation must be respected in order to protect users’ fundamental rights. The EC representative did not clarify which kind of further measures to tackle illegal content it favours at this

stage (non-legislative option, sectoral legislation on terrorist content, or horizontal legislative approach).

Innovation and growth

Copyright: Council agrees on negotiating mandate, EP to vote in one month

After a first unsuccessful attempt to secure a [mandate](#) to negotiate with the Parliament on 27 April, the Bulgarian Presidency succeeded in its second attempt, on 25 May. Obtaining such a mandate has been extremely complicated for the Presidency, given Member States' diverging views on Article 11 (press publishers) and on Article 13 (filtering measures). While the final text clearly excludes electronic communication services, including internet access providers, and contains safeguards for micro and small enterprises, Article 13 did not change substantially. It still excludes online platforms from the scope of the E-Commerce Directive, making them liable for the content their users upload, and imposes mitigation measures including filter mechanisms. In the meantime, Axel Voss, rapporteur of the Copyright Directive reform in the European Parliament, is pushing hard to secure a final text on 20-21 June.

Cybersecurity

E-evidence: Member States begin discussions

The debate in the Council on the [proposal](#) for cross-border access to e-evidence for criminal investigations has begun with two technical meetings scheduled on 29-30 May and a **Justice and Home Affairs meeting on 4 June**. We expect Council to proceed quickly on the file, but it remains uncertain if the legislative process will be concluded by the EU elections in 2019.

We understand that Member States already discussed a wide range of issues. Concerning the scope, some Member States would like to enlarge it to cover real-time lawful interception as well as direct access to devices without the provider's knowledge or assistance. Furthermore, a number of Member States already expressed concerns over the lack of harmonised sanctions and lack of harmonised cost recovery mechanism which could lead to providers and criminals' "forum shopping" across the EU. Discussions also focused on the necessity of the EC to conclude agreements with third countries, the importance of creating appropriate safeguards, and the flaws in the categorisation of data, which are not sufficiently differentiated according to some.

In parallel, the EC is [consulting](#) the public on its proposal until **19 July**. This initiative is part of the Better Regulation process and is used by the EC to fine tune its proposal during the negotiation phase.

European Parliament names e-evidence Rapporteur and shadow rapporteurs

In the European Parliament, the Civil Liberties (LIBE) Committee will be responsible for the e-evidence file. German S&D MEP Birgit Sippel, also rapporteur for the ePrivacy regulation, will be Rapporteur for the dossier. On 29 May the shadow rapporteurs have been announced. These are:

- Daniel Dalton (ECR, UK)
- Sophia in t' Veld (ALDE, the Netherlands)
- Cornelia Ernst (GUE/NGL, Germany)
- Jan Philipp Albrecht (Greens/EFA, Germany)

Cybersecurity Act: considerable progresses make possible the adoption of the law in 2018

Deliberations continue on the Cybersecurity Act, which proposes a permanent mandate for ENISA as well as an EU-wide ICT certification framework. In the European Parliament, the lead Industry and Research Committee (ITRE) Committee has published amendments ([here](#) and [here](#)), focussing on whether the scheme should be voluntary or mandatory, as well as considering a risk-based approach to include graduated certification levels for different products and services. The Internal Market (IMCO) Committee adopted its [Opinion](#) on the Cybersecurity act, underlining that the certification

scheme should initially be voluntary, and shows support to establish an EU cybersecurity trust label. Both ITRE and IMCO documents integrate the principles of privacy and security by design, and promote industry engagement. ITRE will hold its final vote on 19 June.

In Council, Member States have reached an agreement, with the COREPER, regrouping Member State EU Ambassadors, having adopted [a general approach](#) in late May. Following this, the EC, Parliament and Council will enter into trilogue negotiations, with the aim to come to an agreement by the close of 2018.

Data Protection

Eprivacy: COREPER mandate in June technically possible but unlikely

The last round of technical discussions in Council did not allow the Bulgarian Presidency to rally Member States and obtain a mandate to start negotiations with Parliament and the EC. We understand that discussions are still going round in circles, with many open questions remaining, as well as a lack of progress due to some Member States still not yet having a firm position. As a consequence, the Presidency will present a progress report to the upcoming **Telecom Council on 8 June** with a set of questions for Ministers on next steps. On the basis of the outcome of the Telecom Council, the Bulgarians could resume technical discussions in June, but it is still unlikely that they could achieve a general approach before the end of their mandate. Therefore, it will be upon the incoming Austrian Presidency (July-December 2018) to reach a Council common position. Should they manage to enter negotiations in the Autumn, there remains a slim chance that the legislative process could be completed before the EU elections in May 2019.

Communication on “Completing a Trusted Digital Single Market for all”

The European Commission has published a [Communication](#) with a set of concrete actions that can be taken by European Leaders to protect citizens’ data as well as to make progress towards achieving the Digital Single Market Strategy. Of particular note is the Commission’s urging for the Council to come to an agreement on the ePrivacy Regulation as soon as possible, in order for trilogue negotiations between the Council, Commission and Parliament to begin by June 2018, with a view to adopting the ePrivacy Regulation by the close of 2018. The Communication also sets out the main steps which are necessary in order to complete a functional Digital Single Market, which covers the full national implementation of the GDPR which came into force on May 25th, further investment for benefitting from new technologies, for example AI, coming to an agreement on the Electronic Communications Code as well as on legislation for the free flow of non-personal data by June 2018.