

**COMMISSION PROPOSAL FOR A DIRECTIVE CONCERNING THE PROCESSING OF PERSONAL DATA
AND THE PROTECTION OF PRIVACY IN THE ELECTRONIC COMMUNICATIONS SECTOR
[COM(2000)385]**

**UNICE's
Telecommunications Working Group
- OPINION -**

I. GENERAL COMMENTS

UNICE's Telecommunications Working Group noted with great interest the Commission's intention to adapt and update the present Telecommunications Data Protection Directive (97/66/EC) to new and foreseeable developments in electronic communications services. We are fully aware of the importance of an adequate and uniform level of privacy protection throughout Europe. In particular adequate data protection is a necessary condition for consumer trust on the one hand and for a reliable and free flow of information on the other hand.

Nevertheless we have questions about the Commission's proposal for an update of the Telecommunications Data Protection Directive for the following reasons.

*1. There are **no conclusive arguments** for these sector-specific rules.*

We applaud the Commission's emphasis on technology-neutral regulations. We are of the opinion that the EU has already successfully obtained the goal of technology-neutral data protection rules through the General Data Protection Directive (95/46/EC). This means in our view that there neither was nor is a need for privacy regulations for the telecommunications sector.

This leads inevitably to the conclusion that reviewing the Directive should lead to repeal of sector-specific rules instead of updating and expanding them.

Any further regulation could best be realised by codes of conduct initiated and formulated by industry, in co-operation with consumer organisations and data protection authorities.

*2. The update of the telecommunications privacy directive is **premature***

In recent years two EU data protection directives came into force, the General Data Protection Directive (95/46/EC) and the above-mentioned sector-specific Telecommunications Data Protection Directive. (97/66/EC). Implementation of the directives is still in progress in some Member States. This means that there is no substantial information available about the effectiveness and workability of the present regulatory framework.

We therefore welcome the Commission's intention to review the General Data Protection Directive in 2001. The outcome of this review will certainly give more insight into the functioning of the present data protection rules in the new communications environment. The present proposal is untimely and premature. It would be more appropriate to review both data protection

directives at the same time. New regulation beforehand may hamper the development of global e-commerce and could have anti competitive effects.

3. *The proposal contains some **fundamental changes** and as such implies an **interpretation** of the present rules*

According to the Commission the new proposal is not intended to lead to significant changes in the content of the existing directive. Some proposals however seem to imply more radical changes. These are as follows:

Recital (8) of the proposal suggests that traffic-data processing within the context of communications in particular is especially dangerous and must be avoided where possible. It suggests that Member States, service providers and users concerned should co-operate in introducing and developing the relevant technologies where this is necessary to apply the guarantees provided for by this directive, and taking particular account of the objectives of minimising the processing of personal data and of using anonymous and pseudonymous data where possible.

We wonder whether the Commission is moving in the right direction and whether all relevant interests are fully taken into consideration. There is, for instance, no reference whatsoever to the legitimate need for companies and organisations to process data in the context of their day-to-day business operations.

Furthermore, the promotion of the use of anonymous or pseudonymous data is not without risk. Anonymous or pseudonymous access to or use of communications services can facilitate cybercrime and cyberfraud. This could have a discouraging impact on consumers trust, which is an essential factor for the development of e-commerce.

Also, the proposed text, as for instance the proposed changes to the new article 9 on location data, inevitably implies an interpretation of the present rules. Hereby the Commission stretches its powers to those which fall as a matter of principle within the competence of the European Court. It is the Court's jurisdiction that has the final word on the understanding and interpretation of European rules. With this proposal the Commission could interfere with the exclusive powers of the Court of Justice and act against fundamental rules of European law.

UNICE's Telecommunications Working Group is concerned about current discussions in the Council Working Group, which – apart from minor issues - do not reflect industry's views. In particular with regard to the provisions on traffic and location data, directory entries, marketing and the development of value-added services, the Council is following the restrictive line of the Commission's proposal whereby data processing for legitimate business purposes would require consent on an opt-in basis. On the other hand there is a risk that the changes proposed to Article 6 by some Member States would establish the legal basis for massive and onerous traffic data retention requirements on operators by law enforcement authorities.

By contrast, UNICE's Telecommunication Working Group very much welcomes the draft Report by *Mr Marco Cappato*, MEP, which proposes considerable improvements to the Commission's text, in particular with regard to technical feasibility of the data protection requirements (Article 3 and 8), the use of traffic data for marketing of value-added services by third parties (Article 6), the default rule for directory entries (Article 12) and unsolicited commercial e-mails (Article 13).

II. **Specific Comments**

Although UNICE's Telecommunications Working Group has a general reservations about the proposed Directive, we nevertheless submit the following comments on specific articles.

Article 2 Definitions

Insert sub paragraph 2 (f)

2.f "consent" shall mean that a user or subscriber has been informed about the processing of traffic data at the time of conclusion of the relevant contract and has not objected to it.

Consent of the data subject is one of grounds for legitimate data processing. In practice consent can be obtained in different ways. Some of these are very cumbersome, especially prior, specific consent. Electronic communications services are mass services. The success of these services relies heavily on the volume of users. Therefore consent, if needed, should be obtained in a practical manner. The term "consent" (which occurs in article 6.3, 6.4, 9.1 and 9.2) should mean that a user or subscriber has been informed about the processing of traffic data at the time of conclusion of the relevant contract (or the first use) and has not objected to it (opt-out).

Article 3 Services concerned:

Article 3.3 of the proposal contains a notification procedure for use where fulfilling certain requirements would be technically impossible or require disproportionate investment. This notification procedure should be extended to all requirements of the proposal and not limited to the articles mentioned. It could for instance be impossible under the standard Internet Protocol to erase traffic data or to make such data anonymous upon completion of a transmission. Therefore a notification procedure should also be possible with respect to article 6 and 9.

Article 5 Confidentiality of communications

The proposal allows recordings of communications to provide evidence of a commercial transaction or any business communication. There may be other circumstances in which recording of communications should be permitted. For instance, in the case of call centres, maintaining a high level of quality of service can only be achieved by monitoring communications between the call centre employee and other parties. This type of monitoring should be permitted as it is in the interest of the consumer.

Article 6 Traffic Data

We welcome the proposed expansion of the permissible uses of traffic data. Companies should be allowed to use such data when offering value-added services. But we oppose the extra condition of obtaining the prior consent of the subscriber before traffic data are used. The General Data Protection already offers sufficient safeguards.

UNICE's Telecommunications Working Group calls for clarification of article 6.5. We assume that the parties mentioned in article 6.5 are authorised to process the data for the purpose of the activities they are responsible. This means that traffic data can also be processed for the purposes of traffic management, fraud detection and providing information to customers. This should be made clear explicitly in the article itself or in a recital

We also call for clarification through a recital that the wording "persons acting under authority of providers of the public communications network and services" means that subsidiaries or parent companies and subcontractors acting on behalf of such providers are allowed to process traffic data for the purposes stated.

Exchange of traffic data between operators and service providers for the prevention or combat of fraud should also be possible under this article.

Article 9 Location data

This article should be deleted.

There is no justified reason to have a different and more stringent regulatory regime for location data than for other traffic data. Apart from that the General Data Protection Directive already offers safeguards for the processing of location data.

Article 12 Directories

The proposed change, allowing subscribers to choose whether their personal data are included in (instead of being excluded from) in public directories, is very onerous for the providers of directories, whether paper or electronic. We propose that subscribers have the right to choose between several options offered by the service providers with respect to subscriber details which are to be included as standard in a directory.

Furthermore the proposal could have a negative effect on the many new, emerging directory services, especially on the Internet.

Article 13 Unsolicited communications

The issue of protecting consumers against certain direct-marketing techniques has been discussed in a number of directives: the General Data Protection Directive, the Directive on Distance Selling and the Directive on Legal Aspects of Electronic Commerce. Extending the scope of the current provision to include direct marketing via e-mail under a compulsory opt-in system is not consistent with the Distance Selling Directive or with Article 7.2 of the Directive on Legal Aspects of Electronic Commerce, which was recently unanimously approved by the European Parliament. Therefore we propose the deletion of the word 'prior' or allowing companies or organisations that adhere to self-regulation to conduct direct marketing via e-mail