



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 05.03.1997
COM(97) 94 final - COD 288

OPINION OF THE COMMISSION

pursuant to Article 189 b (2) (d) of the EC Treaty,
on the European Parliament's amendments
to the Council's common position regarding the

proposal for a
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE

concerning the
processing of personal data and the protection of privacy in the telecommunications
sector, in particular in the integrated services digital network (ISDN) and in the public
digital mobile networks

AMENDING THE PROPOSAL OF THE COMMISSION

pursuant to Article 189 a (2) of the EC Treaty

1. BACKGROUND

On 27 July 1990 the Commission presented a proposal for a Council Directive concerning the protection of personal data and privacy in the context of public digital telecommunications networks, in particular the integrated services digital network (ISDN) and public digital mobile networks (COM(90)314 final- SYN 288). This formed part of a package of measures including the proposal for a general data protection directive (Directive 95/46/EC on the protection of individuals with regards to the processing of personal data and the free movement of such data, approved on 24 October 1995¹).

The Economic and Social Committee adopted its opinion on the proposal on 24 April 1991.

In the framework of the co-operation procedure the European Parliament delivered its opinion on 11 March 1992 including a number of proposed amendments.

In view of these amendments and taking due account of subsidiarity considerations, the Commission submitted by letter of 23 June 1994 an amended proposal for a European Parliament and Council Directive concerning the protection of personal data and privacy in the context of digital telecommunications networks, in particular the integrated services digital network (ISDN) and digital mobile networks (COM(94)128 final COD 288 of 13.06.1994).

The Council adopted its common position (EC No 57/96) on 12 September 1996² on which the Commission delivered its opinion on 12 September 1996 (SEC (96)1605 fin).

In second reading, the European Parliament on 16 January 1997 proposed 11 amendments to the common position.

2. - PURPOSE OF THE COMMISSION PROPOSAL

The proposal for a Directive (concerning the protection of personal data and privacy in the telecommunications sector, in particular the integrated services digital network (ISDN) and digital mobile networks) intends to ensure the free movement of data and of telecommunications equipment and services in the Community by harmonising the level of protection of the processing of personal data in the telecommunications sector and of the legitimate interests of subscribers to public telecommunications services who are legal persons.

The Directive will specify, for the telecommunications sector, the general rules as laid down by the general Directive on the processing of personal data and it will enhance

¹OJ L 281 of 23 November 1995, p 31.

²OJ C 315 of 24 October 1996, p.30

the protection of privacy of individuals and of the legitimate interests of subscribers to telecommunications services who are legal persons.

In a rapidly expanding telecommunications sector it is of great importance that subscribers to public telecommunications services can rely on it that their communications and related data are safe and are not used for other purposes than those for which they were intended. A sound development of new telecommunications services depends to a great extent on consumer confidence.

3. OPINION OF THE COMMISSION ON THE AMENDMENTS OF THE EUROPEAN PARLIAMENT

Of the eleven amendments adopted by the European Parliament in second reading, seven can be accepted by the Commission, four cannot be supported.

Amendments which can be accepted

- Amendment 2 simplifies the title of the Directive and aligns it closer to its substance, which makes it a useful drafting clarification.
- Amendment 3 changes the drafting of recital 7 on the issue of subsidiarity. The original text and the proposed amendment are not contradictory, they merely highlight different aspects of subsidiarity.
- Amendment 4 introduces a new recital on cooperation between all parties concerned to ensure that technologies are available to implement the guarantees offered by the Directive. Although care has been taken to draft the Directive in such a way that the privacy options required do not depend on the availability of any particular technology, the incentive to cooperate is a positive new element.
- Amendment 6 underlines that the comitology procedure cannot be used for changes of substance thus stating a matter of fact.
- Amendment 7 adds a useful cross reference to Article 5 which in its present drafting could lead to misunderstandings.
- Amendment 9 deletes the possibility for operators to charge subscribers for not having their particulars entered in the public directory. The Commission agrees with the Parliament that individual subscribers should not have to pay for the exercise of their right to privacy.
- Finally, Amendment 10 clarifies an element which was already implicitly included in the list in the Annex and is acceptable.

Amendments which cannot be accepted

- Amendment 5 is problematic because it introduces a new concept namely 'the right to information of the user' which is not otherwise addressed by the Directive. The amendment interprets the possibility for Member States not to apply the article on directories to legal persons, as being limited to cases where they would need to oblige such legal persons to appear in the public directory in view of the right to information of the public. The scope of the paragraph was however intended differently. Legal persons would not necessarily need to have all the options which are enumerated in paragraph 1 of article 11. Moreover, since in their case not the right to privacy but rather a legitimate interest would be concerned, such options would not necessarily need to be free of charge.
- Amendment 8 is not acceptable because it contains a drafting error which would render article 9 to which it relates inapplicable. For this reason a corrected version of the same amendment had been submitted to the Plenary by one of the political groups, but it was not adopted.
- Two related amendments (unnumbered) proposing the suppression of part of recital 20 and of paragraph 3 of article 12 on unsolicited calls for marketing purposes. The Commission cannot accept these amendments which would result in an obligation to apply article 12 equally to natural and legal persons. There are valid reasons to accept a differentiated treatment for legal persons, who need not under all circumstances have to have the right to shield themselves from direct marketing calls.

4. MODIFIED PROPOSAL

On 12 September 1996 the Commission has adopted its opinion on the common position regarding a Directive of the European Parliament and the Council concerning the processing of personal data and the protection of privacy in the telecommunications sector, in particular in the integrated services digital network ((ISDN) and in the public digital mobile networks, by which it accepted the revised text for the proposed Directive.

Following the second reading of the draft Directive by the European Parliament, the Commission herewith modifies its proposal for a Directive including seven of the amendments which were adopted by the European Parliament on 16 January 1997.

With regard to three of the four amendments which the Commission cannot support, alternative proposals were already mentioned by the Commission during the debate in the European Parliament's plenary session on 15 January 1997. Instead of amendment 8 the Commission proposes a text along the lines of amendment 12 (intended to correct amendment 8) and instead of the suppression of recital 20 and paragraph 3 of Article 12, the Commission proposes to add a clarification to paragraph 12.3.

AMENDED PROPOSAL FOR

A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND THE COUNCIL

**CONCERNING THE PROCESSING OF PERSONAL DATA AND THE PROTECTION OF
PRIVACY IN THE TELECOMMUNICATIONS SECTOR**

Title

(following amendment 2)

Directive of the European Parliament and the Council concerning the processing of personal data and the protection of privacy in the telecommunications sector, in particular in the integrated services digital network (ISDN) and in the public digital mobile networks

Directive of the European Parliament and the Council concerning the processing of personal data and the protection of privacy in the telecommunications sector.

Recital 7

(following amendment 3)

Whereas legal, regulatory, and technical provisions adopted by the Member States concerning the protection of personal data, privacy and the legitimate interests of legal persons, in the telecommunications sector, must be harmonised in order to avoid obstacles to the internal market for telecommunications in conformity with the objective set out in Article 8a of the Treaty, whereas the harmonisation pursuant to the principle of subsidiarity is limited to requirements that are strictly necessary to guarantee that the promotion and development of new telecommunications services and networks between Member States will not be hindered;

Whereas legal, regulatory, and technical provisions adopted by the Member States concerning the protection of personal data, privacy and the legitimate interests of legal persons, in the telecommunications sector, must be harmonised in order to avoid obstacles to the internal market for telecommunications in conformity with the objective set out in Article 8a of the Treaty, whereas the application of the subsidiarity principle is not appropriate to harmonisation in the telecommunications sector because of the essentially transnational nature of telecommunications networks and services and, whereas, in any case, such harmonisation will have to guarantee that the promotion and development of new telecommunications services and networks between Member States are not hindered;

New Recital 7a

(following amendment 4)

Whereas the Member States, providers and users concerned, together with the competent Community bodies, must cooperate in introducing and developing the relevant technologies needed to apply the guarantees provided for by the provisions of this Directive;

Recital 25

(following amendment 6)

Whereas, given the technological developments and the attendant evolution of the services on offer, it will be necessary technically to specify the categories of data listed in the Annex to this Directive for the application of Article 6 of this Directive with the assistance of the Committee composed of representatives of the Member States set up in Article 31 of Directive 95/46/EC in order to ensure a coherent application of the requirements set out in this Directive regardless of changes in technology

Whereas, given the technological developments and the attendant evolution of the services on offer, it will be necessary technically to specify the categories of data listed in the Annex to this Directive for the application of Article 6 of this Directive with the assistance of the Committee composed of representatives of the Member States set up in Article 31 of Directive 95/46/EC in order to ensure a coherent application of the requirements set out in this Directive regardless of changes in technology, and bearing in mind that this procedure cannot apply to substantial changes in these categories of data, which may be undertaken only in accordance with the procedure laid down in Article 100A of the EC Treaty;

Article 5

(following amendment 7)

Member States shall ensure via national regulations the confidentiality of communications by means of public telecommunications network and publicly available telecommunications services. In particular, they shall prohibit listening, tapping, storage or other kinds of interception or surveillance of communications, by others than users, without the consent of the users concerned, except when legally authorised.

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Article 9

(following (rejected) amendment 12 instead of amendment 8)

Member States shall ensure that the provider of a public telecommunications network and/or publicly available telecommunications service may override the elimination of presentation of the calling line identification:

- (a) on a temporary basis, upon application of a subscriber requesting the tracing of malicious or

Member States shall lay down legal provisions governing the way in which the provider of a public telecommunications network and/or publicly available telecommunications service may override the elimination of presentation of the calling line identification:

- (a) on a temporary basis, upon application of a

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nuisance calls; in this case, in accordance with national law, the data containing the identification of the calling subscriber will be stored and be made available by the provider of a public telecommunications network and/or publicly available telecommunications service;

- (b) on a per-line basis for Organizations dealing with emergency calls and recognised as such by a Member State, including law enforcement agencies, ambulance services and fire brigades, for the purpose of answering such calls.

amended proposal

subscriber requesting the tracing of malicious or nuisance calls; in this case, in accordance with national law, the data containing the identification of the calling subscriber will be stored and be made available by the provider of a public telecommunications network and/or publicly available telecommunications service;

- (b) on a per-line basis for Organizations dealing with emergency calls and recognised as such by a Member State, including law enforcement agencies, ambulance services and fire brigades, for the purpose of answering such calls.

Article 11

(following amendment 9)

1. Personal data contained in printed or electronic directories of subscribers available to the public or obtainable through directory enquiry services should be limited to what is necessary to identify a particular subscriber, unless the subscriber has given his unambiguous consent to the publication of additional personal data. The subscriber shall be entitled, free of charge, to be omitted from a printed or electronic directory at his or her request, to indicate that his or her personal data may not be used for the purpose of direct marketing, to have his or her address omitted in part and not to have a reference revealing his or her sex, where this is applicable linguistically.

2. Member States may allow operators to require a payment from subscribers wishing to ensure that their particulars are not entered in a directory, provided that the sum involved is reasonable and does not act as a disincentive to the exercise of this right.

3. Member States may limit the application of this

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2. Member States may limit the application of this

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Article to subscribers who are natural persons.

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Article to subscribers who are natural persons.

Article 12

(instead of suppression of paragraph 3 as proposed by the EP)

1. The use of automated calling systems without human intervention (automatic calling machine) or facsimile machines (fax) for the purposes of direct marketing may only be allowed in respect of subscribers who have given their prior consent.

2. Member States shall take appropriate measures to ensure that, free of charge, unsolicited calls for purposes of direct marketing, by means other than those referred to in paragraph 1, are not allowed either without the consent of the subscribers concerned or in respect of subscribers who do not wish to receive these calls, the choice between these options to be determined by national legislation.

3. Member States may limit the application of paragraphs 1 and 2 to subscribers who are natural persons.

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2. Member States shall take appropriate measures to ensure that, free of charge, unsolicited calls for purposes of direct marketing, by means other than those referred to in paragraph 1, are not allowed either without the consent of the subscribers concerned or in respect of subscribers who do not wish to receive these calls, the choice between these options to be determined by national legislation.

3. Member States may limit the application of paragraphs 1 and 2 to subscribers who are natural persons to the extent that the legitimate interests of subscribers other than natural persons and, in particular, those of small and medium-sized enterprises, remain sufficiently protected.

Annex

(following amendment 10)

List of data

For the purpose referred to in Article 6(2) the following data may be processed:

Data containing the:

- number or identification of the subscriber station.
- address of the subscriber and the type of station.
- total number of units to be charged for the accounting period.

List of data

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Data containing the:

- number or identification of the subscriber station.
- address of the subscriber and the type of station.
- total number of units to be charged for the accounting period.

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- called subscriber number,
- type, start time and duration of the calls made and/or the data volume transmitted,
- other information concerning payments such as advance payment, payments by instalments, disconnection and reminders.

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- called subscriber number,
- type, start time and duration of the calls made and/or the data volume transmitted,
- date of call /service
- other information concerning payments such as advance payment, payments by instalments, disconnection and reminders.

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