



REVISED POSITION PAPER ON THE TELECOM REVIEW

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SUMMARY

1) e-Privacy Directive

- Breach notification (Article 4): EuroISPA believes that, insofar as legislation is necessary on this point, it should be targeted at serious breaches, focused on publicly electronic communication services, and should be left to the concerned entity to assess the seriousness of the breach. As a result, we support the approach taken by the European Council.
- Right of action (Article 13 (6)): EuroISPA believes that extension of the scope of right of action beyond the Commission's initial proposal carries with it far more risks than benefits. Therefore, we support the Council's text insofar the last sentence is deleted.
- Extension of the scope to cover private networks (Article 3): The current legislation is unclear with regard to the definition of public and private networks and this situation would be worsened by the text proposed by the European Parliament. EuroISPA welcomes the position of the Council, especially the clarification made to the respective recital.
- Cookies (Article 5): EuroISPA believes that the amendment proposed by the European Parliament risks creating legal uncertainty while adding no additional consumer protection. This is why we support the text adopted by the Council.

2) Universal Services Directive

- Accessibility (Article 2, 7, 22 and 26 (4)): EuroISPA believes that legislation with regard to accessibility should allow flexibility, in order to ensure that innovation is not throttled. Therefore, EuroISPA welcomes changes adopted by the Council with regard to Accessibility issues, however we encourage the Institutions to give further consideration to technical challenges and limitations in this field.
- Voice over IP (Article 2, 20, 23 and 26): EuroISPA believes that old regulatory approaches are not necessarily appropriate for new technologies. Therefore we support the approach taken by the European Council, but we urge the Institutions to give further consideration to technical feasibility.
- Illegal content (Article 20): We support the European Parliament proposal that significant costs be reimbursed by the relevant authorities. This principle is important to ensure that excessive burdens are not placed on industry.

3) Access Directive

- Access to the local loop (Article 2, Article 9, Annex II) and Investment, (Article 12 and 13(1))
- EuroISPA welcomes confirmation of a technology neutral approach to the local loop and clarifications from the Council regarding access conditions and "risk sharing".

4) Framework Directive

- Spectrum (Article 8, Article 9) and Investment (Article 8)
- EuroISPA regrets the lack of ambition of the Parliament and Council with regard to spectrum liberalisation and simplification. We feel that this failure will have long-lasting negative effects for innovation, consumer choice, the single market and competition in the EU.
- We welcome the clarification from the Council with regard to "risk sharing" in Article 8.

5) Authorisation Directive

- With regard to Article 5, we support the Council's texts on paragraphs (1) and (2), on the basis that the Council's proposal refines and clarifies the principles proposed by the Parliament and limits the risk of deliberate or accidental misinterpretation.

1 E-PRIVACY DIRECTIVE

1.1 Breach notification (Article 4)

EuroISPA believes that, insofar as legislation is necessary on this point, it should be targeted at serious breaches, where there is a risk of real consumer harm. As a result, we support the approach taken by the European Council with regard to breach notification.

EuroISPA is sceptical about the need for sector-specific legislation on security breaches relating to networks. To the extent that a regulatory response would improve consumer protection, it is important for this to be targeted directly at incidents where there is a real risk of harm to consumers. Security breach notifications should be limited to situations where there has been a security leak that is likely to cause significant harm to individuals. Unduly broad scope risks leading in practice to a multitude of notifications that could needlessly reduce trust in the information society, possibly over-stretch the resources of the relevant NRAs, make it difficult for consumers to pay adequate attention to possibly significant reports, if they exist and, ultimately, be a cost with no corresponding benefit for consumers.

EUROISPA welcomes the approach taken by the European Council according to which notification of breaches of personal data only occur if it they are likely to cause **serious risks** to the users. We are also pleased to see that notification is not required if the provider has demonstrated that it has implemented appropriate technological protection measures, and these measures rendered the data unintelligible to any person who is not authorized to access the data. We would however encourage the institutions to include these important clarifications not only in recital 29, but also in Article 4.

EUROISPA also welcomes the position taken by the European Council, whereby it should be up to **concerned entities to make the assessment** whether the breach meets or fails to meet the standard. We agree with the European Data Protection Supervisor that, bearing in mind the difficulty of the assessment and the fact that some authorities have limited resources, it will be very difficult for authorities to comply with the obligations required by the proposal of the European Parliament or the Commission. As the EDPS notes, the authorities would also need to make the assessment within very short time-limits and, if they fail to do so, the damages suffered by the concerned individual may increase. In order to ensure certain data protection safeguards, a requirement to maintain a detailed and comprehensive internal audit trail describing any breaches that have occurred could be a valuable solution.

We also share the view expressed by the Commission that the extension of the **scope** of this provision beyond public electronic communications networks/publicly available services goes against the logic of the regulatory framework as a whole. Moreover, the language proposed by the European Parliament is not clear as to what the new scope would be. Therefore, we welcome the fact that the Council kept the focus of the article on publicly available electronic communication services.

EuroISPA only regrets to see that none of the proposals addressed how a multi-jurisdictional provider should comply with different member states' notification requirements.

EuroISPA therefore supports the Council's text with a minor change:

The notification to the subscriber shall at least describe the nature of the personal data breach and the contact points where more information can be obtained, and it shall recommend measures to mitigate (...) possible negative effects of the personal data breach. The notification to the competent national (...) authority shall, in addition, describe the consequences of and the measures proposed or taken by the provider to address the personal data breach.

*A breach of security resulting in the loss or compromising personal data of an individual subscriber may, if not addressed in an adequate and timely manner, result in substantial economic loss and social harm, including identity fraud. Therefore, **as soon as the provider of publicly available electronic communications service becomes aware that such breach has occurred it should assess the risks associated with it, e.g. by establishing the type of data affected by the breach (including their sensitivity, context and security measures in place), the cause and extent of the security breach, the number of subscribers affected and the possible harm for subscribers as a result of the breach (e.g. identity theft, financial loss, loss of business or employment opportunities, physical harm.)** The subscribers concerned by (...) security incidents **that could result in a serious risk to subscribers privacy (e.g. identity theft or fraud, physical harm, significant humiliation or damage reputation), should be notified without delay (...) in order to be able to take the necessary precautions. The notification should include information about measures taken by the provider to address the breach, as well as recommendations for the users affected. Notification of a security breach to a subscriber should not be required if the provider has demonstrated to the competent authority that it has implemented appropriate technological protection measures, and those measures were applied to the data concerned by the security breach. Such technological protection measures shall render the data unintelligible to any person who is not authorized to access the data.***

1.2 Right of action (Article 13 [6])

EUROISPA believes that extension of the scope of right of action beyond the Commission's initial proposal carries with it far more risks than benefits. Therefore, we support the Council's text insofar the last sentence is deleted.

We were closely involved, from the earliest stages, in discussing and supporting the European Commission's proposal to extend the right to take legal action against spammers to individuals and enterprises with a legitimate interest. However, we have major concerns about the extension of this right of action to cover the entire Directive.

As the Commission notes, the original proposal has been justified by a very particular situation observed with regard to spam (individuals being often unaware, since spam filtered out at ISP level... etc). However, we share the view of the Commission that it is not clear what other cases should justifiably be covered by this particular measure.

The provision also admittedly interferes with national legal systems of Member States. We believe that national data protection authorities, supported by the Article 29 Working Group, have the legal expertise to interpret and apply consistent rules to principles that are open to a wide variety of interpretations.

Finally, the proposal appears to open the door to US-style litigation and legal abuses, which would risk long-term damage to reputations of companies incorrectly accused, would undermine legal certainty for consumers and, ultimately, would achieve nothing that would not be achieved by diligent enforcement by the network of European data protection authorities.

However, EuroISPA is very much concerned about the Council's approach, according to which services providers could be held liable if "by their negligence" they may contribute to the infringements of national

provisions adopted pursuant this article. We believe that companies, who might be themselves the source of the problem, would normally be liable without the modification of the Commission's original text. The text proposed by the European Council only opens the door for legal abuses, as even when companies invest significant resources in fighting spammers, no system which gives due respect to consumer privacy, could be seen as 100% perfect.

On the other hand, we welcome clarification introduced by the European Parliament and accepted by the European Council that clarifies the scope of the provision (Recital 35).

Based on the Council text, EuroISPA therefore supports the following wording:

Article 13 (6): "Without prejudice to any administrative remedy for which provision may be made, inter alia under Article 15 (a)(2), Member States shall ensure that any individual or legal person (...) adversely affected by infringements of national provisions adopted pursuant to this Article and therefore having a legitimate interest in the cessation or prohibition of such infringements, including an electronic communications service provider protecting its legitimate business interests (...), may take legal action against such infringements before the courts.

1.3 Extension of the scope to cover private networks (Article 3)

The current legislation is unclear with regard to the definition of public and private networks and this situation would be worsened by the text proposed by the European Parliament. EuroISPA welcomes the position and clarifications adopted by the European Council.

Private networks include, for example, university, museum and corporate networks. They are essentially different from public networks, including in terms of user expectation and their relationship with the provider. The application of the Directive to private networks would create an extraordinary burden on providers without any evident benefit to the rights of data subject. For example, such an extension would introduce caller ID obligations on corporate networks which are unnecessary and unhelpful among an individual company's employees.

This is why EuroISPA welcomes clarification introduced by the European Council in Recital 27 a (new), which states that "this Directive focuses on public electronic communications networks or services, and does not apply to closed user groups or corporate networks."

EuroISPA notes that the European Parliament amended the respective article to include not only private, but also "publicly accessible" private networks. However, this would lead to legal uncertainty, as it is unclear what "publicly accessible private networks" are intended to refer to.

EuroISPA therefore supports the text proposed by the European Council:

Article 3: "This Directive shall apply to the processing of personal data in connection with the provision of publicly available electronic communications services in public communication networks¹ in the Community, **including public communications networks supporting data collection and identification devices.**"

Recital 27a (new): "**In line with the objectives of the EU electronic communications regulatory framework, with the principles of proportionality and subsidiarity, and for purposes of legal certainty and efficiency to European businesses and national regulatory authorities alike, this Directive focuses on public electronic communications networks or services, and does not apply to closed user groups and corporate networks.**"

¹ We see no pressing reason to refer to "private" networks. However, should this be necessary, we would suggest that the text refer to "private networks knowingly opened to the public"

1.4 Cookies (Article 5)

EUROISPA believes that the amendment proposed by the European Parliament risk creating legal uncertainty while adding no additional consumer protection. This is why we support the text adopted by the European Council.

The amendments put forward by the committees do not seek to have any material impact on the current legal framework and therefore risk creating uncertainty. As the Commission noted, adding the reference to “storage medium” would have the effect of substantially reducing the scope of the provisions: neither cookies, nor spyware would be covered, since those are usually delivered to users’ terminal equipment through network connections.

Therefore, we are happy to see that neither the Council, nor the Commission supported the Parliament’s amendment.

However, we regret to see that concerns that the proposed revision of the spyware definition would inadvertently ban certain legitimate applications and product features was not addressed by any of the proposals.

EuroISPA supports the Council wording:

Article 5 (3): “Member States shall ensure that the storing of information, or gaining access to information already stored, in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned is provided with clear and comprehensive information in accordance with Directive 95/46/EC, *inter alia* about the purposes of the processing and is offered the right to refuse such processing by the data controller. This shall not prevent any technical storage or access for the sole purpose of carrying out or facilitating the transmission of a communication over an electronic communications network, or as strictly necessary in order to provide an information society service explicitly requested by the subscriber or user.”²

² If the concept of prior consent should be adopted we would suggest the following wording: “Member States shall ensure that the storing of information, or gaining access to information already stored, in the terminal equipment of a subscriber or user, **either directly or indirectly by means of any kind of storage medium, is prohibited unless** ~~is only allowed on condition that the subscriber or user concerned~~ **has given his/her prior consent, taking into account that respective browser settings constitute prior consent, and or** is provided with clear and comprehensive information in accordance with Directive 95/46/EC, *inter alia* about the purposes of the processing and is offered the right to refuse such processing by data controller. This shall not prevent any technical storage or access for the sole purpose of carrying out ~~or facilitating~~ the transmission of a communication over an electronic communication network, or as strictly necessary in order to provide an information society service explicitly requested by the subscriber or user.”

2 UNIVERSAL SERVICE DIRECTIVE

2.1 Accessibility (Article 2, 7, 22 and 26 (4))

EuroISPA believes that legislation with regard to accessibility should allow flexibility, in order to ensure that innovation is not throttled. Therefore, EuroISPA welcomes changes adopted by the Council with regard to Accessibility issues; however we would encourage the institutions to give further consideration to technical challenges and limitations in this field.

While EuroISPA supports access to communications services for disabled end-users, the legislative proposals have become too prescriptive and are applied so broadly that we are concerned they will discourage innovative accessibility solutions.

We welcome changes made by the Council as they rightly focuses on those services that are identified as a priority for all end-users. Parliament's amendment proposes requiring NRAs to take measures to ensure access to all electronic communications services. This is an extremely broad category of services with a very uncertain scope as the ECS definition is unclear and national regulators have struggled to determine what services are within the legal definition.

We welcome the Council text, which focuses on comparable, rather than equivalent, access. This latter approach would risk blocking the use of technologies that may be well-suited for disabled end-users but have a different 'look and feel' from conventional services. For all these reasons, EuroISPA support the text proposed by the European Council with regard to Article 7, 22 and 26.

EuroISPA supports the Council text with minor changes:

Article 7 (1) "Member states shall unless requirements have been specified under Chapter IV which achieve the equivalent effect, take specific measures to ensure access to and affordability of the services identified in Article 4(3) and 5 for disabled end-users comparable to that enjoyed by other end-users. Member States may oblige national regulatory authorities to assess the general need and the specific requirements, including the extent and concrete form of such specific measures for disabled users."

Article 7(2): "Member States **may** take specific measures, in the light of national conditions, to ensure that disabled end-users can also take advantage of the choice of undertakings and service providers available to the majority of end-users."

Article 22 (1): "Member States shall ensure that national regulatory authorities are, after taking account of the views of interested parties, able to require undertakings that provide publicly available electronic communications **networks and/or** services to publish comparable, adequate and up-to-date information for end-users on the quality of services, **and on measures taken to ensure comparable access for disabled end-users.** The information shall, on request, also be supplied to the national regulatory authority in advance of its publication."

Article 26 (4): "Member States shall ensure that **access for disabled end-users to emergency services is comparable to that enjoyed by other end-users.** In order to ensure that disabled end-users are able to access emergency services while travelling in other Member States, the measures taken **for this purpose will be based to the greatest extent possible on European standards or specifications published** in accordance with the provisions of Article 17 of Directive 2002/21/EC (Framework Directive), **and they shall not prevent Member States from adopting additional requirements in order to pursue the objectives set out in this Article.**"

Recital 5: "(...) Publicly available telephone services also include means of communication specifically intended for disabled users to originate and receive calls, which may include using³ - text relay or to total conversation services."

³ Underlined text is change suggested by EuroISPA

2.2 Voice Over IP (Article 2, 20, 23, 26)

EuroISPA believes that old regulatory approaches are not necessarily appropriate for new technologies. Therefore we support the approach taken by the European Council, but would urge the Institutions to give further consideration to technical feasibility.

The amendments proposed by the European Parliament would extend traditional telephone regulation to new services that are very different from telephone services and which consumers do not expect to have telephone-like features. Currently, it is not feasible for these new services to comply with many of the new requirements because the regulations were designed with traditional telephone networks in mind. Internet-based voice services face particular challenges with the new requirements because the service provider does not manage the network that is used to access the service and end-users can use Internet voice applications from any number of locations.

We welcome the changes proposed by the European Council to **PATS definition (Article 2)**, as it preserves the existing focus of the definition on “two-way” services - services that allow calls to be made to PSTN numbers and receive calls from PSTN numbers. In the Council text, services also must allow national calling in order to be PATS. We are also pleased to see that reference to certain specific types of services intended for disabled users are not included in the general definition. In our view, it is inappropriate and unnecessary to include references to specific technologies in the general definitions, which should be technology-neutral. We would also encourage the institutions to amend corresponding Recital 5 to make clear that text relay and total conversation services are not automatically within the scope of the PATS definition – means of communications for disabled end-users using these technologies still must meet the requirements of the PATS definition.⁴

We also raise concerns with regard to the proposals that would require that all services allowing calls to be made to a telephone number would need to provide reliable access to **emergency services** via 112 and any national emergency number. This would mean that emergency calling requirements would be applied beyond traditional telephone services as ‘outbound-only’ calling services would be subject to the requirement. We welcome the Council proposal with regard to Article 20 that only requires contract disclosures for electronic communication services that allow voice communications. It also requires disclosure of limitations on access (rather than lack of access), which allows for network-independent providers to note the limitations of their services for these functions, and does not require further disclosures “regularly thereafter”. Further disclosure is only required if there is a change in access.

Concerning Article 23, we are also concerned about proposals that would require *reliable and uninterrupted* access to emergency services to be provided. This obligation is a particular problem for Internet voice services – they cannot guarantee any level of reliability as the calls are carried over the Internet, which is cannot guarantee reliability due to transmission delays and other factors that the service provider cannot control. Unfortunately, none of the proposals take adequately into account the technical challenges of ensuring network integrity and uninterrupted access to emergency services beyond PSTN telephone services from fixed locations. The Council text at least refers to the “fullest possible” availability, which is intended to consider some measure of technical feasibility, and does not require uninterrupted access to emergency services from any place within the EU. However, the inclusion of a reference to “technical feasibility” and “cost implementation” would be welcomed by EuroISPA.

With regard to **Article 26**, as noted above, there are technical challenges to offering access to the emergency services from all electronic communications services, particularly those that are independent from underlying communications networks. Therefore, we would recommend to include “to the extent technically feasible” in the text.

⁴ To achieve this the text could be amended as the following: “Publicly available telephone services also include means of communication specifically intended for disabled users to originate and receive calls, which may include using text relay or total conversation services.”

Finally, we equally raise the problem of providing **caller location information** to the emergency services. We welcome the Council text proposed for Article 26 (5), which recognises that it is not yet technically feasible for caller location information to be supplied by all electronic communications services.

EuroISPA supports the Council texts (with possible changes):

Article 2(C): “publicly available telephone service” means a service available to the public for originating **and receiving, directly or indirectly**, national **or national and** international calls **and other means of communication specifically intended for disabled users using text relay or total conversation services** through a number or numbers in a national or international numbering plan.”

Article 20 (4): “Member States shall ensure that where contracts are concluded between subscribers and undertakings providing electronic communications services that allow voice communication subscribers are clearly informed whether or not access to emergency services, and whether caller location information, is provided. Providers of electronic communications services shall ensure that customers are clearly informed of **any limitation in the** access to emergency services in advance of the conclusion of a contract and **in case of any change in the access to the emergency services.**”

Article 23: “Member States shall take ~~all necessary measures~~ **appropriate steps** to ensure the ~~fullest possible~~ availability of publicly available telephone services provided over public communications networks in the event of catastrophic network breakdown or in case of force majeure. Member States shall ensure that undertakings providing publicly available telephone services take ~~all necessary measures~~ **appropriate steps** with respect to the services that they operate to ensure uninterrupted access to emergency services, taking into account technical feasibility and the costs of implementation.”⁵

Article 26(5): “Member States shall ensure that, **to the extent technically feasible, undertakings concerned make** caller location information available **free of charge to the** authority handling emergency **calls and services as soon as the call reaches that authority. This applies to** all calls to the single European emergency call number “112”. **Member States may extend this obligation to cover also calls to other national emergency numbers. Where undertakings referred to in paragraph 2 wish to claim that providing caller location information is not technically feasible, they shall bear the burden of providing this.**”

2.3 Copyright / Illegal content (Article 21)

EuroISPA maintains its opposition in principle to the inclusion of obligations with regard to copyright or illegal content in the review of the regulatory framework. Nonetheless the association welcomes the Parliament’s suggestion that expenses related to the provision of public interest information be reimbursed by the relevant authorities. We welcome the Council’s acceptance of the Parliament’s new recital 14a in order to create more legal certainty and coherence in this area.

2.4 Copyright in Authorisation and Framework Directives

With regard to Recital 12c, we welcome the clarification from the Council that the information should also be included in contracts when *required by Member States*, rather than as a matter of course. We find it contradictory that a similar amendment from the Parliament on Article 8 - paragraph 4 - point g a (new) and supported by the Commission, was rejected by the Council. Finally, we welcome the removal of references to Directives 2001/29/EC and 2004/48/EC from the Authorisation Directive.

⁵ Underlined text is proposed by EuroISPA

EuroISPA supports the Parliament text on Article 21.4a (new):

Significant additional costs incurred by an undertaking in complying with these obligations shall be reimbursed by the relevant public authorities. We furthermore welcome the agreement of the institutions on recital 14a

3 ACCESS DIRECTIVE

3.1 Access to the local loop (Article 2, Article 9, Annex ii),

Neutrality of the local loop is a milestone of the European Framework and it provides certainty to operators and investors. We welcome the inclusion of this provision in the package.

The Council has added some additional clarifications with regard to access to the local loop in Article 2e, Article 9.4 and Annex 2. All of the additions build on the logic of the Parliament's text adding a list of conditions for access. Experience from the implementation of the Regulation on Local Loop Unbundling (2887/2000) shows that such additional detail in the Directive should be beneficial.

3.2 Investment, Article 12 and Article 13(1)

We welcome the amendments of the Council to Articles 12 and 13(1) of the Access Directive. These changes add clarity and minimise the risk that the principles proposed by the Parliament would be interpreted in an anti-competitive way.

EuroISPA supports the Council text on Article 2e, Article 9.4, Articles 12, 13(1) and Annex 2:

Significant additional costs incurred by an undertaking in complying with these obligations shall be reimbursed by the relevant public authorities.
We furthermore welcome the agreement of the institutions on recital 14a

4 FRAMEWORK DIRECTIVE

4.1 Spectrum (Article 8, Article 9)

Spectrum is probably the most economically important part of the whole package, and will be a vital ingredient for much future innovation in Europe. Spectrum also offers new ways of covering the regional divide, and provides a means for improving infrastructure competition. Above all, IP networks (wired or wireless) probably represent the future of broadcasting - it may not be in the long-term interests of broadcasters to be kept on linear terrestrial broadcasting networks (even with HDTV) when the consumer is moving in a totally different direction.

We believe that liberalisation and simplification of spectrum management is of major significance for European competitiveness, helping to support the development and roll-out of new and innovative services on a national and pan-European basis and playing a key role in bridging the digital divide. We strongly support the principles proposed by the Commission and regret that the Parliament was not more ambitious in pushing the Council to adopt a more far-reaching and innovation-friendly approach in this crucial policy area.

In Article 8, paragraph 8(1) establishes technology neutrality as a priority, while Articles 8(2) to 8(4) lists other public policy objectives.

EuroISPA recognises the value of priorities identified in Articles 8(2) to 8(4) but see no possible or likely contradiction between these and Article 8(1.2) and they should therefore not be mentioned in 8(1). The inclusion in Article 8(1.2) of a reference to paragraphs 2 to 4 could be exploited as an excuse to limit technology neutrality and this could, ironically, undermine those very principles (such as competition and efficiency) that Articles 8(2) to 8(4) aim to promote. As a result, we support the Council and Commission text of Article 8(1.2).

EuroISPA supports the Parliament's amendments on Recital 16a, Recital 16c and Recital 16d.

In Article 9, insofar as procedurally possible, EuroISPA urges the institutions to work towards eliminating all unclear and open-ended possibilities to limit access to spectrum and to reinstate the Parliament's texts on Article 9c, which was deleted by the Council.

5 AUTHORISATION DIRECTIVE

With regard to Article 5, we support the Council's texts on paragraphs (1) and (2), on the basis that the Council's proposal refines and clarifies the principles proposed by the Parliament and limits the risk of deliberate or accidental misinterpretation.

5.1 Spectrum

EuroISPA welcomes the Council text on Article 8.1 and calls on the Parliament and Council to work toward the most ambitious possible agreement on Article 9 of the Directive.

In Article 9, insofar as procedurally possible, EuroISPA urges the institutions to work towards eliminating all unclear and open-ended possibilities to limit access to spectrum and to reinstate the Parliament's texts on Article 9c, which was deleted by the Council.