

**EDPB TECH ESG
13/11/2020**



EDPS Opinion 7/2020

**on the Proposal for temporary
derogations from Directive
2002/58/EC for the purpose of
combating child sexual abuse
online**

Background

- Extended scope ECC as from December 2020
 - e-PD will become applicable to OTT inter-personal communication services
 - *Article 5 Confidentiality of the communications*
 - *Article 6 Traffic data*
- EU strategy for a more effective fight against child sexual abuse
 - Voluntary measures for detection, removal and reporting of child sexual abuse online ... “*would lack legal basis*” → short-term: temporary derogation
 - Long-term: legislation to make detection, removal & reporting mandatory



Relationship Child Sexual Abuse Directive (2011/93/EU)

- Requires following intentional conduct to be punishable:
 - *intentionally and knowingly obtaining access, by means of ICT, to child pornography;*
 - *distribution, dissemination or transmission of child pornography;*
 - *offering, supplying or making available child pornography*
- Requires MS measures to ensure prompt removal of webpages containing or disseminating child pornography
- Allows MS measures to block access to web pages containing or disseminating child pornography



Main recommendations

- Issues not specific to fight against CSAM online
- Voluntary measures also constitute interference
- Not relevant that merely seeks to allow « continuation » of existing voluntary practices
- Must comply with Article 52 CFEU

=> Need for comprehensive legal framework



Specific recommendations

1. *Legal basis*

- make explicit whether derogation is intended to provide GDPR legal basis or not
- legitimate interest ?

2. *Necessity and proportionality*

- Cf. *La QDN a.o.*, [ECLI:EU:C:2020:791](#), at para 121 et seq + [EDPS Guidelines on assessing proportionality](#)
- « PhotoDNA » vs. grooming detection based on keyword analysis
- IA (?)



Specific recommendations

3. *Scope and extent of derogation*

- « NIICS » includes variety of services (e.g. messaging, VOIP, web-based e-mail) – all of them?
- Types of detection measures and « well-established » technologies?
- Extent of the proposed derogation – why art. 6 ePD?

4. *Purpose and storage limitation*

- Categories of data to be collected/retained/reported?
- Which recipients (« other relevant public authorities »)?
- When to report? What is confirmation process?
- How long to retain?



Specific recommendations

5. Reporting to relevant authorities

- Variety of DS: content providers, users, « suspects », victims
- Who manages/oversees relevant databases?

6. Transparency and data subject rights

- Any restrictions should comply with A23(1)-(2) GDPR
- Compare Proposal for Regulation on Terrorist Content

7. Keeping up with SotA

- « Well-established » vs. further development of PETs



Specific recommendations

8. *DPIA – prior consultation*

- « without prejudice » does not suffice
- regulatory guidance is not a substitute for legality

9. *Duration of the derogation*

- temporary derogation should not exceed 2 years

CONCLUSION:

Proposal should not be adopted w/out further safeguards





For more information:
[Full text of Opinion 7/2020](#)

Contacts at EDPS