EDPS Opinion 7/2020

on the Proposal for temporary derogations from Directive 2002/58/EC for the purpose of combatting 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**
   - « 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