

23 April 1999 A4-0243/99



REPORT

on the draft Council Resolution on the lawful interception of telecommunications in relation to new technologies (10951/2/98 - C4-0052/99 - 99/0906(CNS))

Committee on Civil Liberties and Internal Affairs

Rapporteur: Gerhard Schmid

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By letter of 27 January 1999 the Presidency of the Council of the European Union consulted Parliament, pursuant to Article K.6(2) of the EU Treaty, on the draft Council Resolution on the lawful interception of telecommunications in relation to new technologies (10951/2/98 - C4-0052/99 - 99/0906(CNS)).

At the sitting of 12 April 1999 the President of Parliament announced that he had referred this proposal to the Committee on Civil Liberties and Internal Affairs as the committee responsible and to the Committee on Legal Affairs and Citizens' Rights and the Committee on Economic and Monetary Affairs and Industrial Policy for their opinions.

At its meeting of 26 January 1999, the Committee on Civil Liberties and Internal Affairs appointed Mr Gerhard Schmid rapporteur.

The committee considered the draft resolution and the draft report at its meetings of 16 March and 20 April 1999.

At the latter meeting it unanimously adopted the draft legislative resolution.

The following took part in the vote: d'Ancona, chairman; Reding, vice-chairman; Schmid, rapporteur; Cederschiöld, Ceyhun, Chanterie (for Deprez), Colombo Svevo, De Esteban Martin, Goerens, Lindeperg, Palacio (for Nassauer), Pirker, Schulz, Stewart-Clark, Terrón i Cusi and Wiebenga.

The opinion of the Committee on Legal Affairs and Citizens' Rights is attached. The opinion of the Committee on Economic and Monetary Affairs and Industrial Policy could not be considered as it was not available on the day the vote was taken.

The report was tabled on 23 April 1999.

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session.

A
LEGISLATIVE PROPOSAL

Draft Council Resolution on the lawful interception of telecommunications in relation to new technologies (10951/2/98 - C4-0052/99 - 99/0906(CNS))

The draft was approved with the following amendments:

Council Text

Amendments by Parliament

(Amendment 1)
Recital -1 (new)

having regard to the Council of Europe Convention of 28 January 1981 on the protection of personal data;

(Amendment 2)
Recital -1a (new)

having regard to the directive of 24 October 1995 on the protection of individuals and processing of personal data;

(Amendment 3)
Third paragraph a (new)

The intention is not to constitute a legal framework that would force the Internet Service Providers to establish outside the Union because of the economic burden it imposes in respect of competitiveness.

(Amendment 4)
Third paragraph a (new)

The Council intends to ascertain by 1 July 2000 the extent to which the Member States have transposed this resolution and the resolution of 17.1.1995 on the lawful interception of telecommunications into national law.

DRAFT LEGISLATIVE RESOLUTION

Legislative resolution embodying Parliament's opinion on the draft Council Resolution on the lawful interception of telecommunications in relation to new technologies (10951/2/98 - C4-0052/99 - 99/0906(CNS))

(Consultation procedure)

The European Parliament,

- having regard to the Council proposal (10951/2/98 - 99/0906(CNS),
 - having been consulted by the Council Presidency pursuant to Article K.6(2) of the Treaty on European Union (C4-0052/99),
 - having regard to Rule 58 of its Rules of Procedure,
 - having regard to the report of the Committee on Civil Liberties and Internal Affairs and the opinion of the Committee on Legal Affairs and Citizens' Rights (A4-0243/99),
1. Approves the Council proposal, subject to the amendments adopted by Parliament;
 2. Asks to be consulted again, should the Council intend to make substantial modifications to the proposal;
 3. Instructs its President to forward this opinion to the Council and Commission.

B

EXPLANATORY STATEMENT

In its resolution of 17 January 1995 on the lawful interception of telecommunications⁽¹⁾ the Council lists the 'requirements' to be met in the Member States for the lawful interception of telecommunications traffic. As far as possible, these requirements should ensure a common technical standard for interception. Comparable standards are needed, on the one hand because of the importance of monitoring telecommunications in the fight against international organised crime and, on the other, to facilitate interception on the basis of letters rogatory.

This resolution is not binding in nature and gives law enforcement authorities in the Member States no rights of interception outside their own jurisdiction. Nor does the resolution in any way alter the various regulatory conditions for the lawful interception of telecommunications. It does not, therefore, affect the tension between fundamental rights and internal security.

In the draft resolution on which the Council has consulted Parliament the Council basically seeks to make it clear that these requirements apply to both existing and new communications technologies, e.g. satellite and Internet communications. It also lists a number of new requirements tailored to them. It is therefore to some extent an update of the 1995 resolution.

Parliament has nothing against this. What does, however, emerge from a comparison of the initial document, ENFOPOL 10951/98 of 3 September 1998, and the present shortened and twice amended version on which Parliament has now been consulted, is rather the question of whether needs have really been taken into account. Internet service providers frequently give their customers access via 'dynamic' IP addresses. If records are not kept, addresses cannot subsequently be ascribed to individuals. However, in serious crime cases (e.g. where a blackmailer has a virtual account) the law enforcement authorities must be able to ascribe network activities to their originators. Prominent providers are, on cost grounds, not keeping such records. The industry has therefore been working hard to restrict the requirements.

The draft resolution should also contain a provision requiring a check on the transposition of the two resolutions into national law so that any further action required to improve lawful interception might be taken on the basis of reliable data.

⁽¹⁾ OJ C 329, 4.11.1996, p. 1.

25 March 1999

OPINION
(Rule 147)

for the Committee on Civil Liberties and Internal Affairs

on the draft Council resolution on the lawful interception of telecommunications in relation to new technologies (10951/2/98 - C4-0052/99 - 99/0906(CNS)) (report by Mr Schmid)

Committee on Legal Affairs and Citizens' Rights

Draftsman: Luigi A. Florio

PROCEDURE

At its meeting of 24 February 1999 the Committee on Legal Affairs and Citizens' Rights appointed Mr Florio draftsman.

It considered the draft opinion at its meetings of 16 and 25 March 1999.

At the last meeting it adopted the following conclusions by 7 votes to 4.

The following were present for the vote: De Clercq, chairman; Malangré, vice-chairman; Ahern, Añoveros Trías de Bes (for C. Casini), Cot, Gebhardt, Habsburg-Lothringen (for Lehne), Oddy, Sierra González, Thors and Ullmann.

1. INTRODUCTION/GENERAL COMMENTS

Telecommunications technology has swept into our everyday life. The most important and rapid developments have been in mobile telephones and Internet connection. If it were possible to monitor communications conducted directly or indirectly by an individual it would be easy to know where he was going and when, what Internet sites he was consulting, what electronic messages he was sending, what electronic payments he was making ... In short, it would be possible to know everything about his private life. A prospect recalling George Orwell's *1984*⁽¹⁾.

⁽¹⁾ The French Human Rights League is devoting its Congress of 26-28 March 1999 to 'science, technology and human rights'. In its December 1998 review Alain Weber on p. 34 writes of the Internet surfer who is surreptitiously sent those electronic delicacies, the 'cookies' which spy on him. Sophisticated software is being developed to follow him where ever he roams on

That is a long way off, but simply mentioning it should remind us that the protection of privacy is one of the fundamental norms of a democratic society, and that the interception of telecommunication must remain the exception.

the Net; it can retrieve what he said, what he read, and what he thought about it... On ENFOPOL see also a highly critical assessment in 'Monde Diplomatique', March 1999, p. 21 and Internet World, April 1999, p. 18-20.

This proposal on the lawful interception of telecommunications in relation to new technologies (ENFOPOL) amends the Council resolution of 17 January 1995⁽¹⁾ to take account of technical development:

- (a) The legal basis of the proposal is Article Member States.1(9) in conjunction with Article Member States.3(2), second indent, of the TEU. On police cooperation the Commission does not have the right of initiative and this proposal was originally put forward by the UK and espoused by the Austrian Presidency of the Council.
- (b) The 1995 resolution, like the resolution now being proposed, is not legally binding on the Member States. They are more in the nature of recommendations.
- (c) There are therefore no European rules on telephone-tapping or in more general terms on the lawful interception of telecommunications. National legislation applies. At national level procedures in principle provide for such telephone-tapping (or comparable procedures for non-telephonic communications) to be conducted by the police on the basis of authorisation by the appropriate Minister or of letters rogatory issued by a magistrate. These letters rogatory set bounds to police action (for example in time, type of information which may be collected, etc.).

2. PROTECTION OF PRIVACY

All Member States of the European Union are parties to the European Convention for the protection of human rights and fundamental freedoms, and Article Member States.2 of the TEU states that police cooperation has to be dealt with in compliance with that Convention.

Article 8 of the Convention lays down provisions concerning the protection of private life. The European Court of Human Rights in Strasbourg has produced a considerable amount of case law restricting phone-tapping as an extension of the protection of privacy. On numerous occasions it has pointed out that telephone calls from the home⁽¹⁾ or business premises⁽¹⁾ fall under the concept of private life and correspondence which appear in Article 8(1). The interception of telephone calls constitutes interference by a public authority within the meaning of Article 8(2) of the Convention in the exercise of a right which is guaranteed to the individual, regardless of whether the calls in question are made on a third party's telephone line⁽¹⁾.

According to Article 8(2) interference by a public authority is subject to strict conditions: it has to be 'in accordance with the law' and be 'necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedoms of others'. The Registrar's office of the European Court of Human Rights has told the rapporteur that the ECHR has not yet ruled on the violation of the secrecy of correspondence in respect of electronic mail.

⁽¹⁾ OJ C 329, 4.11.1996, pp. 1-6.

⁽²⁾ e.g. ECHR Judgment of 30 July 1998, Valenzuela Contreras v. Spain, 1998 - V.

⁽³⁾ ECHR Judgment of 25 March 1998, Kopp v. Switzerland, 1998 - II.

⁽⁴⁾ ECHR Judgment of 24 August 1998, Lambert v. France, not yet published.

3. CRITICAL ASSESSMENT OF THE PROPOSAL

The proposed resolution is far from perfect. In particular:

- (d) The first paragraph in the proposal extends the applicability of lawful interception of telecommunications to 'new communications technologies'. Are bank transactions, Internet shopping, and electronic cash cards covered by this definition⁽¹⁾? As this area closely impinges on individual freedoms and the protection of privacy it would have been preferable to include an exclusive list of the technologies involved, and be prepared to update it at regular intervals. The draftsman for the Committee on Legal Affairs and Citizens' rights does not therefore concur with the rapporteur for the Committee on Civil Liberties and Internal Affairs who claims in the explanatory statement in his report that the current proposal does not tip the balance between fundamental rights and internal security.
- (e) The second paragraph provides that 'in view of ongoing progress in telecommunications technology', the requirements need to be clarified on a number of points. Here too the text is extremely vague. It would have been desirable to state these requirements in greater detail, with reference to each new technology. The requirements are extremely important as they mark the boundary between State action and individual freedoms. Nor is the purpose of a non-binding text couched in such vague terms very obvious.
- (f) Another point the proposal passes over in silence is the cost to the operators of the new technologies. Let us look at a few examples. You can have a mobile telephone with a smart card prepaid by coins or banknotes and thus escape police monitoring. The same applies to electronic 'purses' which can be acquired for cash without passing through a bank account. Some technologies also allow one card to be charged from another (non-accountable system) which will make operations very difficult to trace. In such cases, if the police's needs are to be met, operators might be obliged to make substantial changes to their systems, which could be extremely expensive and which need to be taken into account. Telecommunications-related sectors account for over 5 % of the EU's GDP⁽¹⁾.
- (g) Finally, within a few weeks of the entry into force of the Amsterdam Treaty, should the Council really be rushing to adopt such a sensitive matter when the new Treaty will entail a change of legal basis? The Commission, pursuant to new Article K6(2) (Article 34 in the new numbering), will have full power of initiative.

In view of the above, the rapporteur recommends that the proposal be withdrawn and calls on the Commission, once the Treaty of Amsterdam has come into force, to draw up a new proposal taking these points into account.

⁽¹⁾ See '*An appraisal of technologies of political control - Interim study*', STOA, Luxembourg, 19 January 1998 (PE 166.499/Int.St.).

⁽²⁾ According to Eurostat, telecommunications alone (which is only one of the sectors covered by the resolution) in 1996 employed 867 762 people in the EU.

4. CONCLUSIONS

The Committee on Legal Affairs and Citizens' Rights calls on the Committee on Civil Liberties and Internal Affairs to include the following conclusions in its report:

1. Rejects the Council proposal,
2. Calls on the Commission to draw up a new proposal once the Treaty of Amsterdam has entered into force.