university of groningen / faculty of law

STeP SECURITY, TECHNOLOGY & E-PRIVACY RESEARCH GROUP

Presentation of findings: Targeted substitute impact assessment on Commission Proposal COM(2020) 568 final

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4 Central Questions

1) What are the impacts of the proposed regulation **on EU privacy and data protection rights** (ePD and GDPR) as well **as EU fundamental rights and ECHR human rights** of persons affected?
2) Does the proposed regulation comply with the **principle of proportionality** and the **principle of subsidiarity**, which includes an 'EU added value' test?
3) Are the **safeguards** provided for in the proposed regulation sufficient **to ensure compliance with Article 52(1) of the EU Charter**, taking account of current **case law of the CJEU and GDPR rules**?
4) What is the impact of the proposed regulation on the **right to an effective remedy** in accordance with Article 47 of the EU Charter of Fundamental Rights, if the users are not aware that the content of their private communications is scanned and potentially flagged up for human review?

METHODOLOGY AND FRAMEWORK FOR ANALYSIS

1. Literature review

2. Interviews – to validate understanding

3. Analysis based on current regulatory framework (including fundamental rights, current legislation and case law) and current practices

Limitations: time (limited empirical research; timing (in parallel with intense discussions); limited information on practices of NI-ICS providers; and lack of objective benchmarks.

Q2. Respect to principles of subsidiarity and proportionality

- Possible fragmentation and resulting lack of legal certainty if common derogation framework in not in place

- Limited time frame of the Proposed Regulation, together with commitment to long-term legislative framework respect Art.5(4) TEU

Detection of images and videos containing CSAM

Requirements of the Proposed Regulation	Hashing Algorithms [Microsoft PhotoDNA]	Hashing Algorithms [Facebook (PDQ, TMK+PDQF)]	Hashing Algorithms [Thorn Safer (perceptual hashing)]	Artificial Intelligence/Machine Learning [Facebook (AI/ML tools)]	Artificial Intelligence/Machine Learning [Thorn Safer (classifiers)]
Article 3(a):					
- Well-established technology	YES	YES	NO	NO	NO
- Regularly in use	YES	YES	NO	UNKNOWN	UNKNOWN
- State of the art	YES	YES	YES	YES	YES
- Least privacy intrusive	YES	YES	YES	NO	NO
Article 3(b):					
- Sufficiently reliable	YES	YES	YES	UNKNOWN	UNKNOWN
- Occasional errors corrected without delay	YES	YES	YES	UNKNOWN	UNKNOWN
Article 3(c):					
Limited to the use of relevant key indicators	YES	YES	YES	UNKNOWN	UNKNOWN

Detection of text-based child grooming and abuse		
Requirements of the Proposed Regulation	Artificial Intelligence/Machine Learning [Microsoft Project Artemis]	Artificial Intelligence/Machine Learning [Facebook (AI/ML tools)]
Article 3(a):		
- Well-established technology	NO	NO
- Regularly in use	UNKNOWN	UNKNOWN
- State of the art	YES	YES
- Least privacy intrusive	NO	NO
Article 3(b):		
- Sufficiently reliable	NO	UNKNOWN
- Occasional errors corrected without delay	NO	UNKNOWN
Article 3(c):		
Limited to the use of relevant key indicators	UNKNOWN	UNKNOWN

Impact on Fundamental rights (Q1 and Q3)

Art 52(1) Charter Requirements	Finding
• Provided by law	• Proposed regulation does not provide for clear legal basis • We propose Article 6(1)(d) or 6(1)(f) as legal basis
• Respect the essence of the rights	• Due to the specific standards and safeguards set out under Article 3, the Proposed Regulation respects the essence of the rights.
• Genuinely meet objectives of general interest	• Pursues a legitimate aim (prevention, detection & prosecution of crimes, and protection of the child)

Impact on Fundamental rights (Q1 and Q3)

Charter Requirements	Finding

• Necessity and Proportionality	• Proposed Regulation is not accompanied by a detailed explanation of the specific measures or the existence of other possible measures
	• Covered technologies are different in terms of accuracy, effectiveness, and their level of intrusiveness
	• Hashing algorithms are the least-intrusive: meets the proportionality test
	• Text-based child grooming detection techniques:
	  • Involve automated analysis and indiscriminate scanning
	  • Prone to errors and vulnerable to abuse these technologies will not meet the necessity and proportionality test
	
	Possible additional safeguards:
	• These technologies should be used only when there is a suspicion of soliciting child abuse or distributing CSAM,
	• It should be restricted in time, and
	• It should be subject to periodic review by DPAs

Right to effective remedy (Q4)

- The Proposed Regulation makes no reference to options for effective remedies.
- Users are dependent on NI-ICS voluntarily introducing remedies.
- Charter Article 47 and remedies provided in the GDPR are also not sufficient.
- The exercise of these rights is dependent on the user knowing that the decision of the NI-ICS providers to block or suspend access to their account is related or based on the processing of their personal data.

Additional safeguards

- Differentiating between safeguards based on the type of technology in use;
- Protecting personal data transferred to third countries;
- Receiving prior authorisation from DPAs;
- Adding a more elaborate internal review mechanism;
- Expanding human oversight before reports are sent to LEAs;
- Adding safeguards for data retention;
- Clearly excluding end-to-end encryption from the Proposed Regulation; nd
- Improving transparency and accountability
- Introduction of possible remedies for injured parties.

Thank you!

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