

EMFA Regulation

Article 4 - Rights of media service providers

Compromise text for the third Trilogue

AVMWP on 12/12/2023

Article 4:

1. Media service providers shall have the right to exercise their economic activities in the internal market without restrictions other than those allowed pursuant to Union law.

2. Member States shall respect the effective editorial freedom and independence of media service providers. Member States, including their national regulatory authorities and bodies, shall not interfere in or try to influence the editorial policies and editorial decisions of media service providers.

2a. Member States shall ensure that [“journalistic sources and communications” or “journalistic sources, reporting, communications and investigation”] are effectively protected. Member States shall not carry out any of the following actions:

(a) oblige media service providers, their editorial staff, or any persons who, because of their regular or professional relationship with a media service provider or its editorial staff, might have [“information on or related to journalistic sources, or information capable of identifying them, to disclose such information” or “journalistic sources or communications or information related thereto or capable of identifying them, to disclose those sources, communications or information”];

(b) detain, sanction, intercept or inspect media service providers, their editorial staff or any persons who, because of their regular or professional relationship with a media service provider or its editorial staff, might have [“information on or related to journalistic sources, or information capable of identifying them” or “journalistic sources or communications or information related thereto or capable of identifying them”] subject any of them or their corporate or private premises to surveillance, search and seizure, [“for the purpose of obtaining such information” or “for the purpose of obtaining such sources or communications or information”];

(c) deploy intrusive surveillance software, on any material or digital device, machine or tool used by media service providers, their editorial staff or any persons who, because of their regular or professional relationship with a media service provider or its editorial staff, might have [“information on or related to journalistic sources, or information capable of identifying them” or “journalistic sources or communications or information related thereto or capable of identifying them”].

By way of derogation from points (a) and (b) of this paragraph, Member States may take a measure referred to therein, provided that it:

- (i) is provided for by national law or Union law;
- (ii) is in compliance with Article 52(1) of the Charter and other Union law;
- (iii) is justified on a case-by-case basis by an overriding reason of public interest and is proportionate; and
- (iv) is subject to prior authorisation by a judicial authority or an independent and impartial decision-making authority or, in duly justified exceptional and urgent cases, is subsequently authorised by such authority without undue delay.

By way of derogation from point (c) of this paragraph, Member States may deploy intrusive surveillance software, provided that the deployment complies with the conditions referred to in the second subparagraph above and it is carried out for the purposes of investigations of one of the persons referred to in point (c) for offences referred to in Article 2(2) of Council Framework Decision 2002/584/JHA33 punishable in the Member State concerned by a custodial sentence or a detention order of a maximum period of at least three years or for other specific crimes punishable in the Member State concerned by a custodial sentence or a detention order of a maximum period of at least five years, as determined by the law of that Member State.

[Open issue for the trilogue: EP wants to include a prohibition to Member States to commission a third party to carry out any of the actions referred to in point (c) of the first subparagraph on their behalf.]

Member States shall not take a measure as referred to point (c) of the first subparagraph where a measure as referred to in point (a) or (b) of the first subparagraph would be adequate and sufficient to obtain the information sought.

[“Member States shall ensure that [the surveillance measures referred to in point (b) of this paragraph and] the deployment of intrusive surveillance software referred to in point (c) of this paragraph is [are] regularly reviewed by a judicial authority or an independent and impartial decision-making authority in order to determine if the conditions justifying its [their] use continue to be fulfilled” or “Member States shall ensure that, where they carry out surveillance as referred to in point (b) or actions as referred to in point (c) of the first subparagraph, such actions are subject to ex-post scrutiny by means of judicial review or another independent oversight mechanism”].

[Open issue for the trilogue: EP wants to add the obligation for Member States to inform ex post persons targeted by surveillance as referred to in point (b) or actions as referred to in point (c) of the first subparagraph and persons whose data or communications were accessed as a result of such actions.]

3. Member States shall ensure that media service providers or their editorial staff, or any persons who, because of their regular or professional relationship with a media service provider or its editorial staff, might have *[“information on or related to journalistic sources, or capable of identifying them” or “journalistic sources or communications or information related thereto or capable of identifying them”]* have a right to an effective judicial protection, *in line with Article 47 of the Charter*, in cases regarding breaches of paragraph 2a. Member States shall entrust an independent authority or body with relevant expertise to provide assistance to those persons with regard to the exercise of that right. *Where no such authority or body exists, those persons may seek assistance from a self-regulatory body or mechanism.*

[Open issue for the trilogue: EP wants to delete “4. This Article is without prejudice to the Member States’ responsibility for safeguarding national security”].

Definitions

(16) 'intrusive surveillance software' means any product with digital elements specially designed to exploit vulnerabilities in other products with digital elements that enables the covert surveillance of natural or legal persons by monitoring, extracting, collecting or analysing data from such products or from the natural or legal persons using such products, including in an indiscriminate manner;

(17) - Deletion kept

Recitals

Recital 17a: "Intrusive surveillance software, commonly referred to as 'spyware', represents a particularly invasive form of surveillance over media professionals and their sources. It can be deployed to secretly record calls or otherwise use the microphone of an end-user device, film or photograph natural persons, machines or their surroundings, copy messages, access encrypted content data, track browsing activity, track geolocation or collect other sensor data [...]"