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*Committee on Civil Liberties, Justice and Home Affairs*

PROVISIONAL  
**2004/0813(CNS)**

18.4.2005

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## **DRAFT REPORT**

on the initiative by the French Republic, Ireland, the Kingdom of Sweden and the United Kingdom for a Draft Framework Decision on the retention of data processed and stored in connection with the provision of publicly available electronic communications services or data on public communications networks for the purpose of prevention, investigation, detection and prosecution of crime and criminal offences including terrorism

(8958/2004 – C6-0198/2004 – 2004/0813(CNS))

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Alexander Nuno Alvaro

### ***Symbols for procedures***

- \* Consultation procedure  
*majority of the votes cast*
- \*\*I Cooperation procedure (first reading)  
*majority of the votes cast*
- \*\*II Cooperation procedure (second reading)  
*majority of the votes cast, to approve the common position  
majority of Parliament's component Members, to reject or amend  
the common position*
- \*\*\* Assent procedure  
*majority of Parliament's component Members except in cases  
covered by Articles 105, 107, 161 and 300 of the EC Treaty and  
Article 7 of the EU Treaty*
- \*\*\*I Codecision procedure (first reading)  
*majority of the votes cast*
- \*\*\*II Codecision procedure (second reading)  
*majority of the votes cast, to approve the common position  
majority of Parliament's component Members, to reject or amend  
the common position*
- \*\*\*III Codecision procedure (third reading)  
*majority of the votes cast, to approve the joint text*

(The type of procedure depends on the legal basis proposed by the Commission)

### ***Amendments to a legislative text***

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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## DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

**on the initiative by the French Republic, Ireland, the Kingdom of Sweden and the United Kingdom for a Draft Framework Decision on the retention of data processed and stored in connection with the provision of publicly available electronic communications services or data on public communications networks for the purpose of prevention, investigation, detection and prosecution of crime and criminal offences including terrorism**

**(8958/2004 – C6-0198/2004 – 2004/0813(CNS))**

**(Consultation procedure)**

*The European Parliament,*

- having regard to the initiative by the French Republic, Ireland, the Kingdom of Sweden and the United Kingdom (8958/2004)<sup>1</sup>,
  - having regard to Article 34(2)(b) of the EU Treaty,
  - having regard to Article 39(1) of the EU Treaty, pursuant to which the Council consulted Parliament (C6-0198/2004),
  - having regard to the opinion of the Committee on Legal Affairs on the proposed legal basis,
  - having regard to Rules 93, 51 and 35 of its Rules of Procedure,
  - having regard to the report of the Committee on Civil Liberties, Justice and Home Affairs and the opinion of the Committee on Industry, Research and Energy(A6-0000/2005),
1. Rejects the initiative by the French Republic, Ireland, the Kingdom of Sweden and the United Kingdom;
  2. Calls on the French Republic, Ireland, the Kingdom of Sweden and the United Kingdom to withdraw their initiative;
  3. Instructs its President to forward its position to the Council and Commission, and the governments of the French Republic, Ireland, the Kingdom of Sweden and the United Kingdom.

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<sup>1</sup> Not yet published in OJ.

## EXPLANATORY STATEMENT

### **I. Aim of the proposal**

At the Justice and Home Affairs Council of 29 and 30 April 2004, France, the United Kingdom, Ireland and Sweden submitted a joint proposal<sup>1</sup> for a framework decision on the retention of communications data. The background to the initiative was a declaration on combating terrorism<sup>2</sup> adopted by the European Council on 25 March 2004, in which the Council was instructed to examine measures for establishing rules on the retention of communications traffic data by service providers.

The aim of the proposal is to facilitate judicial cooperation in criminal matters by approximating Member States' legislation on the retention of data processed and stored by providers of a publicly available electronic communications service for the purpose of prevention, investigation, detection and prosecution of crime or criminal offences including terrorism.

This would cover traffic and location data, including subscriber and user data, generated by telephony, Short Message Services and Internet protocols, including e-mails, but would not apply to the content of the information communicated. The proposal provides for data to be retained in principle for a minimum of 12 and a maximum of 36 months. In the case of the latter two communication methods, the Member States may decide to derogate from the stipulated retention period. When requesting mutual legal assistance, Member States would be able to gain access to data stored in other Member States. The proposal contains no reimbursement rules for costs incurred.

### **II. Assessment of the proposal**

There are sizeable doubts concerning the choice of legal basis and the proportionality of the measures. It is also possible that the proposal contravenes Article 8 of the European Convention on Human Rights.

#### **1. Legal basis**

The legal basis chosen by the Council does not, in the rapporteur's opinion, tally with European legislation. Instead, the proposal consists of various measures that come under both the third and the first pillars of the Union.

The Council, making use of its sole legislative power in accordance with Title VI of the Treaty on European Union (TEU), cites Article 31(1)(c) in conjunction with Article 34(2)(b) TEU.

The rapporteur, however, takes the view that the proposed measures affect two separate areas. On the one hand, the Council's proposal attempts inter alia to establish the obligation for service providers to retain data, the definition of data and the retention period, all of which

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<sup>1</sup> Council document 8958/04 of 28 April 2004.

<sup>2</sup> Council document 7764/04 of 28 March 2004.

comes under the area of Community law. On the other hand, the proposal mentions access to and the exchange of data stored in the Member States, which is classed as common action in the area of judicial cooperation in criminal matters, meaning it comes under the third pillar.

Community legislation on the obligations of service providers already exists. The data in question is covered by Articles 1 and 2 of Directive 95/46/EC of 24 October 1995. The directive addresses the general obligations of Member States to guarantee the protection of the right to privacy of natural persons with respect to the processing of personal data. Furthermore, Directive 2002/58/EC of 12 July 2002 contains specific provisions on the processing of personal data and protection of the right to privacy in electronic communication. The principle behind both these directives is that the stored data is to be deleted once its retention is longer justifiable. Article 15 of Directive 2002/58/EC allows Member States to retain data in exceptional circumstances, provided that this constitutes a necessary, appropriate and proportionate measure to tackle crime. In the course of the negotiations on the Directive on privacy and electronic communications, the Member States were unable to agree on a retention period and no provisions were laid down in this regard.

The legal basis chosen by the Council is, therefore, contrary to Article 47 TEU, which states that the TEU should make no changes to the Treaties establishing the European Communities (TEC). According to this article, no provision of the TEU may affect those of the TEC. In this case, the failure to observe the existing legislative framework constitutes a contravention of the above. For this reason, service providers' obligation to retain data, the definition of the data to be retained and the retention period fall under the scope of the TEC.

The measures proposed must logically have the same legal basis as the existing legislation. Article 95 TEC, which provides for the codecision procedure, should, therefore, again be used as a basis.

This viewpoint is backed by the European Parliament's Committee on Legal Affairs. The rapporteur was also informed that both the Commission's and the Council's Legal Service agree with this legal interpretation.

## **2. Proportionality of the measure**

The rapporteur also has doubts as to the proportionality of the individual measures. The ends do not justify the means, as the measures are neither appropriate nor necessary and are unreasonably harsh towards those concerned.

Given the volume of data to be retained, particularly Internet data, it is unlikely that an appropriate analysis of the data will be at all possible.

Individuals involved in organised crime and terrorism will easily find a way to prevent their data from being traced. Possible ways of doing so include using 'front men' to buy telephone cards or switching between mobile phones from foreign providers, using public telephones, changing the IP or e-mail address when using an e-mail service or simply using Internet service providers outside Europe not subject to data retention obligations.

If all the traffic data covered by the proposal did indeed have to be stored, the network of a large Internet provider would, even at today's traffic levels, accumulate a data volume of

20 - 40 000 terabytes. This is the equivalent of roughly four million kilometres' worth of full files, which, in turn, is equivalent to 10 stacks of files each reaching from Earth to the moon. With a data volume this huge, one search using existing technology, without additional investment, would take 50 to 100 years. The rapid availability of the data required seems, therefore, to be in doubt.

In comparison with the present proposal for 'blanket' data retention, storage for a specific purpose, a model laid down inter alia by the Council of Europe's Convention on Cybercrime<sup>1</sup>, could be a suitable and milder option.

Looking at the Council's reasons for rejecting this alternative<sup>2</sup>, the question arises as to the extent to which the proposed data retention arrangements are compatible with the principle of presumption of innocence.

The proposal also fails to address the possible strains on those concerned. Aside from the infringement of the protection of personal data of individuals, there is a danger that enormous burdens would be placed on the European telecommunications industry, particularly on small and medium-sized telecom companies.

Costs would result primarily from:

- technical changes to systems for data generation and storage,
- changes to firms' in-house processes for secure data archiving, and
- the processing and analysis of security authorities' inquiries.

According to estimates by a variety of large firms in the Member States, this would require investment in traditional circuit-switched telephony amounting to around EUR 180m a year for each firm, with annual operating costs of up to EUR 50m. In the case of small and medium-sized businesses, their ability to operate would no doubt be in jeopardy. According to estimates, the Internet-related burden would exceed that within traditional circuit-switched telephony many times over. For this reason, the Article 36 Committee proposes that only the data currently accumulated should be covered<sup>3</sup>.

The Council's proposal contains no Europe-wide harmonised arrangements for spreading the cost burden it would create. Distortions of competition would arise that could jeopardise competition structures that are viable in the long term, thereby preventing the completion of a single European internal market.

### **3. Compatibility with Article 8 of the European Convention on Human Rights**

The proposal is also incompatible with Article 8 of the European Convention on Human Rights.

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<sup>1</sup> ETS No 185, 8 November 2001; the Convention has not yet been transposed in all the Member States.

<sup>2</sup> Council document 8958/04 ADD 1. The explanatory note on the framework decision on data retention simply states that storage for a specified purpose 'will never aid in the investigation of a person who is not already suspected of involvement with a criminal or terrorist organisation'. It 'is therefore not sufficient to meet the needs of the security, intelligence and law enforcement agencies in the fight against modern criminals including terrorists.'

<sup>3</sup> Council document 15098/04 of 23 November 2004.



The monitoring and storage of data must be rejected if the measures do not comply with three basic criteria in line with the European Court of Human Rights' interpretation of Article 8(2) of the European Convention on Human Rights: they must be laid down by law, necessary in a democratic society and serve one of the legitimate purposes specified in the Convention.<sup>1</sup> As has already been illustrated, it is debatable, to say the least, whether the proposal fulfils all the necessary criteria<sup>2</sup>.

### **III. Conclusion**

For the reasons outlined above, the rapporteur rejects the proposal for a framework decision and calls on the four Member States to withdraw their initiative.

The rapporteur expects the Member States to produce a study proving the unquestionable need for the proposed data retention arrangements. In addition to this, the data retention obligation, the definition of the data to be retained and the retention period should be dealt with separately from the other aspects of the proposal as the subject of a directive. The Commission should draft an appropriate proposal. It should be pointed out that the proposal's objectives could be achieved simply by implementing the Council of Europe's Convention on Cybercrime and improving crossborder cooperation in the area in question. Before a final decision can be taken on new measures, the results of the requested study must be considered. Should the Council's proposal unexpectedly obtain a majority, the requirement for a review of the measures in the form of an evaluation after three years in force should be incorporated into the text, so that the actual effectiveness of the measures can be established and the act of data retention justified.

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<sup>1</sup> Article 29 Data Protection Working Party, Council document 11885/04 of 9 November 2004.

<sup>2</sup> The European Court of Human Rights has stressed that the contracting states do not have unlimited discretion to subject individuals within their territory to clandestine surveillance. Given that corresponding powers, conferred on the ground that the intention is to defend democracy, threaten to undermine or destroy democracy, the Court stresses that contracting states are not allowed to adopt any measure they deem appropriate in order to combat espionage or terrorism.