



**COUNCIL OF
THE EUROPEAN UNION**

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LIMITE

**COPEN 192
TELECOM 143**

NOTE

from : Presidency
to : COREPER/JHA Council

No. prev. doc. : 15101/05 COPEN 191 TELECOM 141
No. Cion prop. : 12671/05 COPEN 150 TELECOM 96 CODEC 803

Subject : Data retention

At the October JHA Council, the Council agreed that the continuation of work on this dossier was without prejudice to the decision to be made by the JHA Council on the appropriate legal base for rules on data retention. That remains the position and no final decision on the choice of legal instrument has yet been taken by the Council.

In the light of the further discussions that have taken place since then, the text set out in DOC 15101/05 COPEN 191 TELECOM 141 represents the Presidency's assessment of the centre of gravity within the Council, subject to the Council's views on the following four elements. As COREPER agreed on 30 November, these are the key issues on which it would be helpful for the Council to agree a position in advance of any further dialogue with the European Parliament.

Accordingly, the Presidency invites the Council to address the following specific issues:

(i) Retention Periods

The EP has made clear its preference for a retention period of 6-12 months. At the October JHA Council, the Council set out its view that approximation based on a minimum level of 6 months for internet data and 12 months for telephony data, with a maximum level of 2 years retention, was appropriate. In the light of further discussions, the Council has come to the view that a retention period of not less than 6 months with a maximum of two years for all data is appropriate.

(ii) Application of Art. 15(1) of Directive 2002/58/EC

The October JHA Council concluded that it was necessary to maintain the derogation in Art 15(1) of Directive 2002/58/EC in relation to categories of data and purpose outside the scope of the draft 2005 instrument. Subsequent discussions have reiterated the Council's position that Art 15(1) of Directive 2002/58/EC would continue to apply in relation to data which are not specifically mentioned in Art. 4 of the draft Directive and for retention for purposes other than those covered by the draft Directive.

(iii) Serious/all crime

In the light of discussions following the October JHA Council, the majority of Member States confirmed that the scope of the instrument should require retention of data for the purpose of the investigation, detection and prosecution (but not prevention) of all criminal offences. In its discussions with the Presidency, confirmed in its Committee vote on 24 November, the EP has made clear that it cannot accept such a wide scope. It wants to limit the scope to serious criminal offences as referred to in Art. 2(2) of Council Framework Decision 2002/584/JHA (the list of offences in the European Arrest Warrant).

(iv) Categories of data to be retained

It is clear that Member States' concerns about the potential cost of implementing the draft Directive is directly related to the categories of data to be retained. The JHA October Council agreed that the list of data to be retained should include data on fixed network and mobile telephony; internet access and internet communication services (telephony and email); and unsuccessful call attempts, with an extended period of two years for implementation in relation to unsuccessful call data and internet data.

In light of the concerns raised by a number of Member States in subsequent discussion, the Council is invited to consider the following, with a view to finalising the categories of data to be retained:

Unsuccessful calls

On the assumption that explicit exclusion of unsuccessful calls is not acceptable to a majority of Member States because there is a clear understanding in Council that unsuccessful calls provide a useful law enforcement tool, the Presidency would welcome the Council's views on whether the following would assist in meeting Member States' continuing concerns about the impact of including unsuccessful calls:

- (i) Limiting the obligation to retain unsuccessful call data to that which is *generated or processed and stored or logged*. Such an approach might strike the appropriate balance between those who favour inclusion of unsuccessful call data and those concerned about the cost implications. It then could be subject to an evaluation in the future.
- (ii) Extending the implementation period

Internet data

The October JHA Council concluded that internet access and internet communication services (telephony and email) should form part of the Council's mandate for its negotiations with the EP. The Parliament, notably in the opinions of the Internal Market and Consumer Protection Committee and the Industry, Technology and Energy Committee, has expressed concerns that data retention will put a heavy burden of costs on the European communications industry and might harm European competitiveness. That is particularly so in relation to many providers of internet services, who are competing against other providers based outside the EU. The burden falling on small and medium providers may be especially acute. In addition, rapidly changing IP technology is increasing the complexity associated with the retention of data.

Against that background, the Council is invited to consider whether to maintain its current approach in relation to the inclusion of internet data or to consider application in a more limited form, such as internet access data only (i.e., log-on and log-off data and IP addresses).