

The Legal base

The Council Legal Service (CLS) view is that the correct legal base for rules on data retention is Article 95 TEC. Its written Opinion of 5 April 2005 (7688/05 JUR 137) sets out in more detail the reasoning for that view. The EP shares the view that a First Pillar legal base is the only appropriate one. The CLS view is also that any challenge in the ECJ to a Framework Decision on data retention would succeed. The measure would be annulled: this could result in claims for compensation from any operator who had already been obliged to implement the measure.

The Presidency considers that there is, as a result, a strong case for adopting a Directive provided that, in doing so, it is possible to meet the concerns of delegations on substance.

Substance

In the light of discussion at COREPER, it is clear that a number of Member States have concerns about whether a Directive would:

- imply an unacceptable level of harmonisation in respect of retention periods and costs;
- have implications for the rules on state aids;
- introduce unacceptable constraints on Member States in the area of law enforcement because of the Community control method of oversight

The Presidency believes that it is possible to proceed on a basis which will meet the concerns of a majority of Member States in these areas.

- **Flexibility.** The CLS has made clear that a Directive would not require absolute harmonisation. In relation to retention periods, the CLS has confirmed the possibility of including a range within the terms of the Directive. In addition, Article 95 TEC foresees the possibility for a Member State to maintain its national provisions where necessary for public security and for safeguard clauses authorising Member States to take provisional measures, again where necessary for public security. In relation to costs, the CLS considered that there was no obligation flowing from the provisions of Art 95 TEC to impose on Member States a compensation mechanism.
- **State Aids and the payment of costs.** The extent to which state aid rules apply would not be affected by the choice of legal base.

- **The Community control method of oversight.** The Community's role under Art 95(4) TEC would be to assess existing national legislation to ensure that it was not incompatible with the functioning of a single market. Experience in the application of this provision suggests that when justifications have been duly provided, such application has been generally unproblematic.
- **Member States' capacity to go further than the Directive e.g. in relation to retaining forms of data excluded from the Directive.** The existing derogation from the obligation to delete or anonymise data in Article 15(1) of the 2002 Telecomms Directive would be repealed in relation to the retention of data for the purposes of prevention, investigation, detection and prosecution of serious criminal offences. But it would continue to apply at least in relation to the retention of data for the purposes of national security (i.e. State security), defence, public security.

Against that background, the Presidency believes that the elements set out in Annex A might form the basis of a compromise package. It covers the questions of **retention periods, costs, scope and comitology**. (Negotiations will also need to continue on other outstanding ancillary issues).

1.1.1.1. Contacts with the European Parliament

The Presidency is pursuing with the EP whether it would be possible to complete a first reading deal on a Directive by the end of the year, and will report to the Council on 12 October. In its contacts with the EP, the Presidency is making clear that the 12 October JHA Council will have to take the key decisions on the substance of any Directive. The next opportunity for discussion by Ministers will be the 1 December JHA Council – too late for a first reading agreement in 2005. It will therefore be essential to have reached an understanding with the EP on issues of substance by 12 October.

1.1.1.2. Conclusion

Subject to the outcome of its contacts with the EP, the Presidency invites the JHA Council to agree Annex A as the basis for negotiating with the EP and Commission on a Directive on data retention.

Annex A

1. Scope¹ – inclusion of data on fixed network and mobile telephony; Internet access and Internet communication services (telephony and email); and unsuccessful call attempts, with an extended implementation period of an additional two years for Internet data and data on unsuccessful call attempts.²
2. Retention periods – approximation based on a minimum level of 6 months for Internet and 12 months for telephony, with a maximum level of 2 years retention, recalling the possibility for Member States who already have national legislation going beyond that period to retain such legislation by virtue of Article 95 TEC.
3. Costs – discretion for Member States to decide at a national level whether to reimburse industry for the additional costs associated with the retention of data for law enforcement purposes, achieved by having no provision at all on costs in the instrument.
4. Review clause / comitology – use of a fixed technical list of the data to be retained with the inclusion of a review clause (rather than a comitology arrangement) to consider practical experience in the effectiveness of the Directive 5 years after its implementation and to ensure that it remains in line with developments in telecommunications technology.

¹ This would be without prejudice to finalising the list of technical descriptions of the types of data falling within these general definitions.

² The Presidency notes that five delegations are currently arguing for an opt-out clause on unsuccessful calls. The CLS has made clear that an opt-out is not possible under either Pillar.