EUROPEAN UNION

THE EUROPEAN PARLIAMENT **THE COUNCIL**

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LEGISLATIVE ACTS AND OTHER INSTRUMENTS

Subject: DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC

COMMON GUIDELINES
Consultation deadline for Bulgaria and Romania: 14.02.2006

DIRECTIVE 2006/.../EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of

on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Economic and Social Committee[1],

Acting in accordance with the procedure laid down in Article 251 of the Treaty[2],

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1 OJ C

2 Opinion of the European Parliament of 14 December 2005 (not yet published in the Official Journal) and Council Decision of ..... (not yet published in the Official Journal).

Whereas:

(1) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[1] requires Member States to protect the rights and freedoms of natural persons with regard to the processing of personal data, and in particular their right to privacy, in order to ensure the free flow of personal data in the Community.

(2) Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)[2] translates the principles set out in Directive 95/46/EC into specific rules for the electronic communications sector.

(3) Articles 5, 6 and 9 of Directive 2002/58/EC lay down the rules applicable to the processing by network and service providers of traffic and location data generated by using electronic communications services. Such data must be erased or made anonymous when no longer needed for the purpose of the transmission of a communication, except for the data necessary for billing or interconnection payments. Subject to consent, certain data may also be processed for marketing purposes and the provision of value-added services.

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[1] OJ L 281, 23.11.1995, p. 31. Directive as amended by Regulation (EC) No 1882/2003 (OJ L 284, 31.10.2003, p. 1).

[2] OJ L 201, 31.7.2002, p. 37.

(4) Article 15(1) of Directive 2002/58/EC sets out the conditions under which Member States may restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1),(2),(3) and (4), and Article 9 of that Directive. Any such restrictions must be necessary, appropriate and proportionate within a democratic society for specific public order purposes, i.e. to safeguard national security (i.e. State security), defence, public security or the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communications systems.

(5) Several Member States have adopted legislation providing for the retention of data by service providers for the prevention, investigation, detection, and prosecution of criminal offences. Those national provisions vary considerably.

(6) The legal and technical differences between national provisions concerning the retention of data for the purpose of prevention, investigation, detection and prosecution of criminal offences present obstacles to the internal market for electronic communications, since service providers are faced with different requirements regarding the types of traffic and location data to be retained and the conditions and periods of retention.

(7) The Conclusions of the Justice and Home Affairs Council of 19 December 2002 underline that, because of the significant growth in the possibilities afforded by electronic communications, data relating to the use of electronic communications are particularly important and therefore a valuable tool in the prevention, investigation, detection and prosecution of criminal offences, in particular organised crime.

(8) The Declaration on Combating Terrorism adopted by the European Council on 25 March 2004 instructed the Council to examine measures for establishing rules on the retention of communications traffic data by service providers.

(9) Under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), everyone has the right to respect for his private life and his correspondence. Public authorities may interfere with the exercise of that right only in accordance with the law and where necessary in a democratic society, inter alia, in the interests of national security or public safety, for the prevention of disorder or crime, or for the protection of the rights and freedoms of others. Because retention of data has proved to be such a necessary and effective investigative tool for law enforcement in several Member States, and in particular concerning serious matters such as organised crime and terrorism, it is necessary to ensure that retained data are made available to law enforcement authorities for a certain period, subject to the conditions provided for in this Directive. The adoption of an instrument on data retention that complies with the requirements of Article 8 of the ECHR is therefore a necessary measure.

(10) On 13 July 2005, the Council reaffirmed in its declaration condemning the terrorist attacks on London the need to adopt common measures on the retention of telecommunications data as soon as possible.

(11) Given the importance of traffic and location data for the investigation, detection, and prosecution of criminal offences, as demonstrated by research and the practical experience of several Member States, there is a need to ensure at European level that data that are generated or processed, in the course of the supply of communications services, by providers of publicly available electronic communications services or of a public communications network are retained for a certain period, subject to the conditions provided for in this Directive.

(12) Article 15(1) of Directive 2002/58/EC continues to apply to data, including data relating to unsuccessful call attempts, the retention of which is not specifically required under this Directive and which therefore fall outside the scope thereof, and to retention for purposes, including judicial purposes, other than those covered by this Directive.

(13) This Directive relates only to data generated or processed as a consequence of a communication or a communication service and does not relate to data that are the content of the information communicated. Data should be retained in such a way as to avoid their being retained more than once. Data generated or processed when supplying the communications services concerned refers to data which are accessible. In particular, as regards the retention of data relating to Internet e-mail and Internet telephony, the obligation to retain data may apply only in respect of data from the providers' or the network providers' own services.

(14) Technologies relating to electronic communications are changing rapidly and the legitimate requirements of the competent authorities may evolve. In order to obtain advice and encourage the sharing of experience of best practice in these matters, the Commission intends to establish a group composed of Member States' law enforcement authorities, associations of the electronic communications industry, representatives of the European Parliament and data protection authorities, including the European Data Protection Supervisor.

(15) Directive 95/46/EC and Directive 2002/58/EC are fully applicable to the data retained in accordance with this Directive. Article 30(1)(c) of Directive 95/46/EC requires the consultation of the Working Party on the Protection of Individuals with regard to the Processing of Personal Data established under Article 29 of that Directive.

(16) The obligations incumbent on service providers concerning measures to ensure data quality, which derive from Article 6 of Directive 95/46/EC, and their obligations concerning measures to ensure confidentiality and security of processing of data, which derive from Articles 16 and 17 of that Directive, apply in full to data being retained within the meaning of this Directive.

(17) It is essential that Member States adopt legislative measures to ensure that data retained under this Directive are provided to the competent national authorities only in accordance with national legislation in full respect of the fundamental rights of the persons concerned.

(18) In this context, Article 24 of Directive 95/46/EC imposes an obligation on Member States to lay down sanctions for infringements of the provisions adopted pursuant to that Directive. Article 15(2) of Directive 2002/58/EC imposes the same requirement in relation to national provisions adopted pursuant to Directive 2002/58/EC. Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems[1] provides that the intentional illegal access to information systems, including to data retained therein, is to be made punishable as a criminal offence.

(19) The right of any person who has suffered damage as a result of an unlawful processing operation or of any act incompatible with national provisions adopted pursuant to Directive 95/46/EC to receive compensation, which derives from Article 23 of that Directive, applies also in relation to the unlawful processing of any personal data pursuant to this Directive.

(20) The 2001 Council of Europe Convention on Cybercrime and the 1981 Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data also cover data being retained within the meaning of this Directive.

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[1] OJ L 69, 16.3.2005, p. 67.

(21) Since the objectives of this Directive, namely to harmonise the obligations on providers to retain certain data and to ensure that those data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Directive, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(22) This Directive respects the fundamental rights and observes the principles recognised, in particular, by the Charter of Fundamental Rights of the European Union. In particular, this Directive, together with Directive 2002/58/EC, seeks to ensure full compliance with citizens' fundamental rights to respect for private life and communications and to the protection of their personal data, as enshrined in Articles 7 and 8 of the Charter.

(23) Given that the obligations on providers of electronic communications services should be proportionate, this Directive requires that they retain only such data as are generated or processed in the process of supplying their communications services. To the extent that such data are not generated or processed by those providers, there is no obligation to retain them. This Directive is not intended to harmonise the technology for retaining data, the choice of which is a matter to be resolved at national level.

(24) In accordance with paragraph 34 of the Interinstitutional agreement on better law-making[1], the Council will encourage Member States to draw up, for themselves and in the interests of the Community, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.

(25) This Directive is without prejudice to the power of Member States to adopt legislative measures concerning the right of access to, and use of, data by national authorities, as designated by them. Issues of access to data retained pursuant to this Directive by national authorities for such activities as are referred to in the first indent of Article 3(2) of Directive 95/46/EC fall outside the scope of Community law. However, they may be subject to national law or action pursuant to Title VI of the Treaty on European Union. Such laws or action must fully respect fundamental rights as they result from the common constitutional traditions of the Member States and as guaranteed by the ECHR. Under Article 8 of the ECHR, as interpreted by the European Court of Human Rights, interference by public authorities with privacy rights must meet the requirements of necessity and proportionality and must therefore serve specified, explicit and legitimate purposes and be exercised in a manner that is adequate, relevant and not excessive in relation to the purpose of the interference,

HAVE ADOPTED THIS DIRECTIVE:

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[1] OJ C 321, 31.12.2003, p. 1.

Article 1

Subject matter and scope

1. This Directive aims to harmonise Member States' provisions concerning the obligations of the providers of publicly available electronic communications services or of public communications networks with respect to the retention of certain data which are generated or processed by them, in order to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law.

2. This Directive shall apply to traffic and location data on both legal entities and natural persons and to the related data necessary to identify the subscriber or registered user. It shall not apply to the content of electronic communications, including information consulted using an electronic communications network.

Article 2

Definitions

1. For the purpose of this Directive, the definitions in Directive 95/46/EC, in Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)[1], and in Directive 2002/58/EC shall apply.

2. For the purpose of this Directive:

   (a) "data" means traffic data and location data and the related data necessary to identify the subscriber or user;

   (b) "user" means any legal entity or natural person using a publicly available electronic communications service, for private or business purposes, without necessarily having subscribed to that service;

   (c) "telephone service" means calls (including voice, voicemail and conference and data calls), supplementary services (including call forwarding and call transfer) and messaging and multi-media services (including short message services, enhanced media services and multi-media services);

   (d) "user ID" means a unique identifier allocated to persons when they subscribe to or register with an Internet access service or Internet communications service;

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[1] OJ L 108, 24.4.2002, p. 33.

(e) "cell ID" means the identity of the cell from which a mobile telephony call originated or in which it terminated;

(f) "unsuccessful call attempt" means a communication where a telephone call has been successfully connected but not answered or there has been a network management intervention.

Article 3

Obligation to retain data

1. By way of derogation from Articles 5, 6 and 9 of Directive 2002/58/EC, Member States shall adopt measures to ensure that the data specified in Article 5 of this Directive are retained in accordance with the provisions thereof, to the extent that those data are generated or processed by providers of publicly available electronic communications services or of a public communications network within their jurisdiction in the process of supplying the communications services concerned.

2. The obligation to retain data provided for in paragraph 1 shall include the retention of the data specified in Article 5 relating to unsuccessful call attempts where those data are generated or processed, and stored (as regards telephony data) or logged (as regards Internet data), by providers of publicly available electronic communications services or of a public communications network within the jurisdiction of the Member State concerned in the process of supplying the communication services concerned. This Directive shall not require data relating to unconnected calls to be retained.

Article 4

Access to data

Member States shall adopt measures to ensure that data retained in accordance with this Directive are provided only to the competent national authorities in specific cases and in accordance with national law. The procedures to be followed and the conditions to be fulfilled in order to gain access to retained data in accordance with necessity and proportionality requirements shall be defined by each Member State in its national law, subject to the relevant provisions of European Union law or public international law, and in particular the ECHR as interpreted by the European Court of Human Rights.

Article 5

Categories of data to be retained

1. Member States shall ensure that the following categories of data are retained under this Directive:

   (a) data necessary to trace and identify the source of a communication:

      (1) concerning fixed network telephony and mobile telephony:

         (i) the calling telephone number;

         (ii) the name and address of the subscriber or registered user;

(2) concerning Internet access, Internet e-mail and Internet telephony:

(i) the user ID(s) allocated;

(ii) the user ID and telephone number allocated to any communication entering the public telephone network;

(iii) the name and address of the subscriber or registered user to whom an Internet Protocol (IP) address, user ID or telephone number was allocated at the time of the communication;

(b) data necessary to identify the destination of a communication:

(1) concerning fixed network telephony and mobile telephony:

(i) the number(s) dialled (the telephone number(s) called), and, in cases involving supplementary services such as call forwarding or call transfer, the number or numbers to which the call is routed;

(ii) the name(s) and address(es) of the subscriber(s) or registered user(s);

(2) concerning Internet e-mail and Internet telephony:

(i) the user ID or telephone number of the intended recipient(s) of an Internet telephony call;

(ii) the name(s) and address(es) of the subscriber(s) or registered user(s) and user ID of the intended recipient of the communication;

(c) data necessary to identify the date, time and duration of a communication:

(1) concerning fixed network telephony and mobile telephony, the date and time of the start and end of the communication**;**

(2) concerning Internet access, Internet e-mail and Internet telephony:

(i) the date and time of the log-in and log-off of the Internet access service, based on a certain time zone, together with the IP address, whether dynamic or static, allocated by the Internet access service provider to a communication, and the user ID of the subscriber or registered user;

(ii) the date and time of the log-in and log-off of the Internet e-mail service or Internet telephony service, based on a certain time zone;

(d) data necessary to identify the type of communication:

(1) concerning fixed network telephony and mobile telephony:
the telephone service used;

(2) concerning Internet e-mail and Internet telephony:
the Internet service used;

(e) data necessary to identify users' communication equipment or what purports to be their equipment:

(1) concerning fixed network telephony, the calling and called telephone numbers;

(2) concerning mobile telephony:

(i) the calling and called telephone numbers;

(ii) the International Mobile Subscriber Identity (IMSI) of the calling party;

(iii) the International Mobile Equipment Identity (IMEI) of the calling party;

(iv) the IMSI of the called party;

(v) the IMEI of the called party;

(vi) in the case of pre-paid anonymous services, the date and time of the initial activation of the service and the location label (Cell ID) from which the service was activated;

(3) concerning Internet access, Internet e-mail and Internet telephony:

(i) the calling telephone number for dial-up access;

(ii) the digital subscriber line (DSL) or other end point of the originator of the communication;

(f) data necessary to identify the location of mobile communication equipment*:*

(1) the location label (Cell ID) at the start of the communication;

(2) data identifying the geographic location of cells by reference to their location labels (Cell ID) during the period for which communications data are retained.

2. No data revealing the content of the communication may be retained pursuant to this Directive.

Article 6

Periods of retention

Member States shall ensure that the categories of data specified in Article 5 are retained for periods of not less than six months and not more than two years from the date of the communication.

Article 7

Data protection and data security

Without prejudice to the provisions adopted pursuant to Directive 95/46/EC and Directive 2002/58/EC, each Member State shall ensure that providers of publicly available electronic communications services or of a public communications network respect, as a minimum, the following data security principles with respect to data retained in accordance with this Directive:

(a) the retained data shall be of the same quality and subject to the same security and protection as those data on the network;

(b) the data shall be subject to appropriate technical and organisational measures to protect the data against accidental or unlawful destruction, accidental loss or alteration, or unauthorised or unlawful storage, processing, access or disclosure;

(c) the data shall be subject to appropriate technical and organisational measures to ensure that they can be accessed by specially authorised personnel only; and

(d) the data, except those that have been accessed and preserved, shall be destroyed at the end of the period of retention.

Article 8

Storage requirements for retained data

Member States shall ensure that the data specified in Article 5 are retained in accordance with this Directive in such a way that the data retained and any other necessary information relating to such data can be transmitted upon request to the competent authorities without undue delay.

Article 9

Supervisory authority

1. Each Member State shall designate one or more public authorities to be responsible for monitoring the application within its territory of the provisions adopted by the Member States pursuant to Article 7 regarding the security of the stored data. Those authorities may be the same authorities as those referred to in Article 28 of Directive 95/46/EC.

2. The authorities referred to in paragraph 1 shall act with complete independence in carrying out the monitoring referred to in that paragraph.

Article 10

Statistics

1. Member States shall ensure that the Commission is provided on a yearly basis with statistics on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or a public communications network. Such statistics shall include:

   – the cases in which information was provided to the competent authorities in accordance with applicable national law;

   – the time elapsed between the date on which the data were retained and the date on which the competent authority requested the transmission of the data;

   – the cases where requests for data could not be met.

2. Such statistics shall not contain personal data.

Article 11

Amendment of Directive 2002/58/EC

The following paragraph shall be inserted in Article 15 of Directive 2002/58/EC:

"1a. Paragraph 1 shall not apply to data specifically required by Directive 2006/.../EC of the European Parliament and of the Council of .....[+] on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or a public communications network[*] to be retained for the purposes referred to in Article 1(1) of that Directive.

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[*] OJ [++]".

Article 12

Future measures

1. A Member State facing particular circumstances that warrant an extension for a limited period of the maximum retention period referred to in Article 6 may take the necessary measures. The Member State shall immediately notify the Commission and inform the other Member States of the measures taken under this Article and shall state the grounds for introducing them.

[+] Note for the OJ: please insert the number and the date of this Directive.
[++] Note for the OJ: please insert the reference of this OJ.

2. The Commission shall, within a period of six months after the notification referred to in paragraph 1, approve or reject the national measures concerned, after having examined whether they are a means of arbitrary discrimination or a disguised restriction of trade between Member States and whether they constitute an obstacle to the functioning of the internal market. In the absence of a decision by the Commission within that period the national measures shall be deemed to have been approved.

3. Where, pursuant to paragraph 2, the national measures of a Member State derogating from the provisions of this Directive are approved, the Commission may consider whether to propose an amendment to this Directive.

Article 13

Remedies, liability and penalties

1. Each Member State shall take the necessary measures to ensure that the national measures implementing Chapter III of Directive 95/46/EC providing for judicial remedies, liability and sanctions are fully implemented with respect to the processing of data under this Directive.

2. Each Member State shall, in particular, take the necessary measures to ensure that any intentional access to, or transfer of, data retained in accordance with this Directive that is not permitted under national law adopted pursuant to this Directive is punishable by penalties, including administrative or criminal penalties, that are effective, proportionate and dissuasive.

Article 14

Evaluation

1. No later than …[*], the Commission shall submit to the European Parliament and the Council an evaluation of the application of this Directive and its impact on economic operators and consumers, taking into account further developments in electronic communications technology and the statistics provided to the Commission pursuant to Article 10 with a view to determining whether it is necessary to amend the provisions of this Directive, in particular with regard to the list of data in Article 5 and the periods of retention provided for in Article 6. The results of the evaluation shall be made public.

2. To that end, the Commission shall examine all observations communicated to it by the Member States or by the Working Party established under Article 29 of Directive 95/46/EC.

Article 15

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by no later than .....[**]. They shall forthwith inform the Commission thereof.

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[*] Three years from the date referred to in Article 15(1).

[**] 18 months after the date of adoption of this Directive.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

3. Until …*, each Member State may postpone application of this Directive to the retention of communications data relating to Internet Access, Internet telephony and Internet e-mail. Any Member State that intends to make use of this paragraph shall, upon adoption of this Directive, notify the Council and the Commission to that effect by way of a declaration. The declaration shall be published in the Official Journal of the European Union.

Article 16

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

* 36 months after the date of adoption of this Directive.

Article 17

Addressees

This Directive is addressed to the Member States.

Done at,

For the European Parliament	*For the Council*
The President	*The President*