

E-0969/09EN  
Answer given by Mr Barrot  
on behalf of the Commission  
(16.4.2009)

The Honourable Member asks the Commission if the term 'providers of publicly available electronic communications services' as used in Article 3(1) of Directive 2006/24/EC (the Data Retention Directive) covers services that are provided free of charge.

Article 2 of the Data Retention Directive provides that, inter alia, the definitions in the Framework Directive 2002/21/EC shall apply. A definition of the term 'electronic communications service' is provided in Article 2(c) of the Framework Directive. One element of the definition is that the service is 'normally provided for remuneration'. This reflects the wording of Article 50 of the Treaty establishing the European Community, which defines the term 'services' in the context of the free movement of persons, services and capital. This definition is relevant for the interpretation of the Framework Directive and the Data Retention Directive as both instruments are based on Article 95 of the Treaty, which concerns measures for the functioning of the internal market for goods, persons, services and capital.

The definition of services in the Treaty does not require that the remuneration for the service is charged to the user or subscriber of the service; it covers also cases where remuneration is paid by a third party<sup>1</sup>. The definition covers in particular services of a commercial character. On the other hand, an activity which is not of an economic or commercial character itself or linked to such an activity does not constitute a service in the meaning of the Treaty<sup>2</sup>.

The Commission has to indicate that it is not the final arbiter for the interpretation of Community law, but that this responsibility lies with the courts, and ultimately, the European Court of Justice. To determine if an activity is considered to be a service, each case would need to be assessed individually.

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<sup>1</sup> E.g. Case C-352/85 Bond van Adverteerders v NL

<sup>2</sup> E.g. Case C-159/90 SPUC v Grogan