

# Government Response to the Public Consultation on the Transposition of Directive 2006/24/EC

Final phase of the transposition of Directive 2006/24/EC 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 Data Retention Directive” (DRD) into UK law

## February 2009

This document contains;

- the Government response to the Public Consultation on the Transposition of Directive,
- the explanatory memorandum to accompany the Regulations,
- the final impact assessment, and;
- a transposition note.

The amended draft Regulations in the draft Statutory Instrument and its explanatory note are published separately.

## Introduction

In August 2008, the Home Office published a consultation paper inviting the public to comment on draft Regulations for the final phase of transposition of Directive 2006/24/EC, “the Data Retention Directive” (DRD) in relation to the retention of internet-related 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.

2. The consultation paper provided an opportunity to engage formally with the public to explain and seek views about the Government’s proposal for completing the transposition of the DRD and ensuring certain internet-related communication data remains available to support law enforcement in protecting our citizens from those who seek to harm them. The consultation paper covered issues that were considered in previous consultations: in 2003 on the code of practice for voluntary retention of communications data under Part 11 of the Anti-Terrorism, Crime and Security Act 2001(ATCSA) and in 2007 on the first phase of transposition of the DRD.

3. The significant change represented by completion of the transposition of DRD is that retention of communications data will for the most part move to a mandatory, rather than voluntary, framework.

4. This paper outlines the cumulative response to the five specific questions posed and the other issues that prompted comment.

## Summary of responses

5. A total of 54 responses were received and the respondents are listed below. The general reception of the draft Regulations from public communications providers was positive. In particular, there was continued support for the Home Office's pragmatic approach to implementing the Directive in the UK, for example in its model of cost recovery.

*"BT welcomes the commitment and intention expressed in the consultation document for the Government to meet additional costs of retaining data over and above that needed for business purposes....."*

*".....Cable and Wireless welcomes the Home Office's proposals to meet additional expenses with retaining and retrieval of data to meet the obligations of the Regulations....."*

*O2 – ".....without the additional expenses being provided the data retention projects would be vying for commercial budget which would no doubt delay delivery and constrain the end product to the bare minimum."*

Many responses were from members of the public opposed to the Directive on principle (24 out of 54 responses). These responses did not distinguish between the Directive and the draft Regulations on which we were consulting. Liberty, too, repeated its concerns about the Directive but did not offer substantial comment on the draft Regulations. This was because the proposed draft Regulations reflect the Directive closely. They did, however, acknowledge that the Government's proposals were designed to limit the duplication of data retention.

This Government Response is limited to issues which can be addressed in the Regulations. We would advise respondents whose comments are not directly addressed here to contribute to the forthcoming consultation exercise on how the Government can maintain its communications data capability generally.

Full analysis of the responses to each question in turn, as well as additional issues raised, is provided below.

### **Question 1: will individual public communications providers be able to interpret how the draft regulations would apply to their business. If not, why not?**

6. The majority of respondents interpreted the draft Regulations correctly, in that they apply to all public communications providers and that they will supersede the Data Retention (EC Directive) Regulations 2007. Responses from BT, Yahoo! UK & Ireland, Virgin Media, T-Mobile and Cable & Wireless suggested it would assist them implementing the draft Regulations if explicit arrangements were introduced whereby the Secretary of State either gave a Notice to companies required to retain communications data or, where it had been determined that a company's data was held by another public communications provider, gave a Notice confirming that the recipient communications provider would not be obliged to retain data under the Regulations

7. As drafted in the consultation paper, Regulation 13 enables Government to arrange for communications data to be stored in the most efficient manner so that – unless there are business reasons to do so – duplicative storage of data can be avoided. BT expressed concern about how varying business practices will be taken into account and emphasised the responsibility to ensure communications data is retained should either be with the public communications provider with a direct subscriber relationship or with the “upstream” provider and that a flexible approach is required to ensure appropriate expenditure of public money. This concern was summed up in the O2 response:

*“.....whilst the flexibility within the regulation means that it is possible for the majority of providers to generally be able to interpret the draft Regulations.....it also means that some players who should be retaining data may interpret it in such a way that they duck the responsibility.....”*

8. The draft Regulation 13 will be amended to properly reflect the policy intention to allow flexibility within the Regulations to account for the varying practices of public communications providers where they may act as a business partnership to deliver a particular service or where one acts as the reseller of such a service:

*‘13-(1) These Regulations do not apply to a public communications provider unless the provider is given a notice in writing by the Secretary of State in accordance with this regulation.*

*(2) The Secretary of State must give a written notice to a public communications provider under paragraph (1) unless the communications data to which these Regulations apply are retained in the United Kingdom in accordance with these Regulations by another public communications provider.*

*(3) Any such notice must specify—*

*(a) the public communications provider, or category of public communications providers, to whom it is given, and*

*(b) the extent to which, and the date from which, the provisions of these Regulations are to apply.*

*(4) The notice must be given or published in a manner the Secretary of State considers appropriate for bringing it to the attention of the public communications provider, or the category of providers, to whom it given’.*

**Question 2: Is the data required to be retained specified clearly in the draft regulations? If not, why not and can the specification be clearer?**

9. The majority of respondents who had a view on this question considered there was a need for meaning to be given to certain terms and in particular “internet e-mail” and “internet telephony”. However, the DRD makes clear in Article 2(1) that 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), and in Directive 2002/58/EC (Privacy and Electronic Communications) shall apply. For

example the term “email” has the same meaning as “electronic mail” which is given meaning within the Privacy and Electronic Communications (EC Directive) Regulations 2003, transposing Directive 2002/58/EC into UK law. Both terms therefore refer to:

*“any text, voice, sound or image message sent over a public electronic communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient and includes messages sent using a short message service”.*

10. Some respondents suggested that more technical detail should be provided within the draft Regulations. However, the Government's experience of working with public communications providers under the ATCSA voluntary code of practice and the first phase implementation of the DRD suggests that it is unhelpful to provide a high level of technical detail in the legislation as terms that might be meaningful to one business area, may be completely inappropriate for another or may already be given meaning within other legislation.

11. The Home Office therefore proposes to continue the practice, initiated through the ATCSA voluntary code, of developing meaningful detail through bilateral consultation and specific agreements with individual public communications providers (in cases where the public communications provider's own business practices do not already meet Government's public protection requirements).

**Question 3: Do you agree with the Government's approach to meet additional costs to reduce burden and meet requirements?**

13. The vast majority of respondents strongly supported the Government's approach of meeting the additional costs of public communications providers required to retain communications data. However, BT, Cable & Wireless, Virgin Media, ISPA<sup>1</sup>, EuroISPA<sup>2</sup> and UCKTA<sup>3</sup> all considered the draft Regulations should state explicitly that any additional expenses incurred by public communications providers will be met. The Government has indicated that reimbursement may be conditional on such expenses being agreed with the Secretary of State prior to any expenditure taking place and that further audit may be undertaken after any such expenditure and these provisions are included in the draft Regulations. In addition the Government is clear that no service provider need commit its own expenditure to implementing data retention solutions without such agreement.

**Question 4: Do you agree the proposed approach will not have a detrimental effect on competition?**

14. Ensuring that there is no distortion of the market is a primary aim of the Government's reimbursement policy. Many respondents agreed that the provisions in the draft Regulations will enable Government to manage the impact and ensure

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<sup>1</sup> Internet Service Providers Association (ISPA) is the trade association for companies involved in the provision of Internet services in the UK. ISPA currently has 200 members, representing more than 95% of the Internet access market by volume

<sup>2</sup> EuroISPA is a pan European association of ISPAs

<sup>3</sup> United Kingdom Competitive Telecommunications Association (UKCTA) is a trade association promoting the interests of competitive fixed-line telecommunications companies competing against BT, as well as each other, in the UK's residential and business markets

that there is no detrimental effect on competition. It is the Government's practice, developed in work on ATCSA, that any commercial benefit from a data retention solution should be subsidised by the service provider. Submissions from public communications providers highlighted the impact of commercial drivers that determine companies have a duty to their shareholders to use company funds to invest in profit making projects. The point was emphasised by T-Mobile:

*“The concept of cost reimbursement has the advantage that the law enforcement community can rest assured that appropriate investments are made in technologies to search and retrieve information stored by service providers, to speed the investigation process and ultimately reduce the threat to the general public posed by criminals at large in the community. While service providers have corporate and social responsibilities that encourage them to assist the law enforcement community, their fiduciary duties to their shareholders require capital investments to be directed towards areas of the company where the financial return is likely to be greatest. We do not consider such re-imbusement to comprise “state aid”, as any reimbursement relates to expenditure which is solely for the benefit of the law enforcement community.”*

15. An issue concerning copyright infringement was raised. Companies alleging that their copyrights have been infringed (for example, through illicit music and movie downloads) are able to apply to the courts to grant orders requiring public communications providers to disclose data identifying their customer/s by resolution of the IP address. The point was made that the longer periods of retention may increase the workload of service providers. They may also be detrimental to law enforcement and intelligence agencies, as a court order would take precedence over requirements made under provisions of Chapter II Part I of Regulation of Investigators Powers Act 2000.

16. The Government recognises the concerns raised regarding copyright infringement cases. The Home Office is working with Ministry of Justice and the Interception Commissioner to provide guidance for the courts on how these cases should be handled.

**Question 5: Do you think the draft Regulations can provide a framework that will enable implementation of the internet aspects of the Directive?**

17. Many respondents felt that the technical complexity surrounding the provision of internet services made the DRD and the draft Regulations little more than “high level policy” and that a different approach needed to be undertaken than for the retention of mobile and fixed line telephony data. Some respondents from the public communications providers stated they had little or no dialogue with the Home Office concerning the complex issues surrounding internet-related data and the DRD, whilst a significant number stressed the need for continued engagement by Government with industry stakeholders with respect to completion of the transposition.

18. The Government has been working to support industry stakeholders in transposing the DRD. It recognises that many UK-based public communications providers have a presence in several EU member states and/or use equipment from

global manufacturers. The Government appreciates the need to take this into account when transposing and implementing the requirements of the DRD within the United Kingdom. The Government therefore fully accepts the need to remain engaged with industry and law enforcement with respect to the plans for completing the transposition. It proposes to build on the well-established co-operation between industry, law enforcement and Government, by-

- continuing its work with the European Telecommunications Standards Institute (ETSI) and UK industry stakeholders in developing a standard format (“the Retained Data Handover Interface” (RDHI)) for the delivery of communications data from service providers, where a lawful requirement to disclose data has been made, to the law enforcement and intelligence agencies. By using international standards, service providers can implement a single RDHI across their organisation, saving time and money and reducing the development costs;
- the development of a “UK Implementation Group” to support the Home Office’s implementation strategy. This will:
  - support bilateral consultation and specific agreements with individual public communications providers<sup>4</sup> and
  - assist in undertaking an evaluation of the application of the DRD with a view to determining whether it is necessary to amend the provisions.

## Other concerns

19. A submission from a public communications providers argued that Regulation 4(2)(b) appeared to be inconsistent with the definition within the DRD of an “unsuccessful call attempt” which relates to purely to telephone calls. The DRD at Article 3(2) makes clear that “unsuccessful call attempt” also includes Internet data.

20. Several respondents raised concern that Regulation 9(d) of the draft Regulations published in the August consultation document would prevent public communications providers from retaining data for longer than 12 months, if their business practice required it. This is not the effect of draft Regulation 9(d). The policy intention behind Regulation 9(d) is to ensure destruction, at the end of the mandated retention period, of data retained solely for the purposes of the Regulations, while allowing public communications providers to preserve copies of data retained for lawful business purposes aside from the Regulations, or disclosed to law enforcement to enable a member of the company to be able to present the data as evidence in any forthcoming criminal proceedings. However, to ensure clarity, Regulation 9(d) has been amended to read:

*‘except in the case of data lawfully accessed and preserved, the data retained solely in accordance with these Regulations must be destroyed at the end of the retention period’*

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<sup>4</sup> See paragraphs 9 & 10

21. Some respondents observed that Regulation 12 omitted a requirement of Article 10 of the DRD, specifically the category of statistics relating to the time elapsed between the date on which the data were retained and the date on which a lawful request for data was made. This omission has been noted - Regulation 12 has been amended to reflect the requirement:

*'The information required is—*

- (a) the number of occasions when data retained in accordance with these Regulations have been disclosed in response to a request;*
- (b) the time elapsed between the date on which the data were retained and the date on which transmission of the data were requested;*
- (c) the number of occasions when a request for lawfully disclosable data retained in accordance with these Regulations could not be met'.*

## Summary

22. The Home Office is very grateful to all the respondents for their comments. It is clear that much time and effort was spent in preparing them. As with previous consultations in this business area, it is evident there is a great appreciation within the industry of important communications data is in supporting law enforcement to undertake their lawful activities to investigate, detect and prosecute crime and protect the public and the responses have indicated broad support for the draft Regulations.

23. This consultation has also provided invaluable suggestions regarding the retention of internet-related data. It is clear that completing the transposition of the Directive and the maintenance of effective operational capabilities will necessitate Government to maintain the close strategic relationship with industry and law enforcement.

24. Several useful points raised during this exercise have been reflected in the revised draft Regulations which the Government intends to lay before Parliament in time to meet the European Commission's implementation deadline of the 15<sup>th</sup> March 2009.

25. Those who responded to this consultation exercise may also be interested in the forthcoming consultation exercise on maintaining our communications data capability more generally.

**HOME OFFICE**

February 2009

## List of respondents

Stuart Andrews  
Tyler Barton  
Huw Bowen  
John Bramham  
British Computer Society  
David Brown  
BT  
Brian Byrne  
Cable & Wireless  
Fern Camara  
Peter Clifton  
The Criminal Lawyer  
Danny Edan  
Detica  
Martin Donlin  
Ericsson  
EuroISPA  
Dave Gibbs  
Satu Griffiths  
HBOS  
Peter Facey  
Fuller, Smith & Turner plc  
Brendan Hickman  
Internet Service Providers Association (ISPA)  
Land Registry  
Liberty  
Andrea Logan  
Dr Ben Maughan  
Michael McDonald  
Robert Morrell  
Newnet  
Paul Oldham  
Open Rights Group  
Orange  
O2  
Alisdair Owens  
David Powicke  
Release  
Simon Shearer  
Society for Computers and Law  
Colin Spalding  
S21sec  
Will Thompson  
T-Mobile  
UK Competitive Telecommunications Association (UKCTA)  
Watching Them, Watching Us  
Virgin Media  
Ian White



Yahoo! UK & Ireland  
Mark R. Whittet  
Michiel Witkamp

Three respondents wished to remain anonymous.

**EXPLANATORY MEMORANDUM TO**  
**THE DATA RETENTION (EC DIRECTIVE) REGULATIONS 2009**

**[2009] No.**

1. This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

**2. Purpose of the instrument**

2.1 These draft Regulations are intended to complete the transposition of Directive 2006/24/EC into UK law. They require public communications providers to retain certain categories of communications data, which they generate or process, for a minimum period of 12 months.

**3. Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 None

**4. Legislative Context**

4.1 The draft Regulations complete the transposition of Directive 2006/24/EC, 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. They relate to internet access, internet e-mail and internet telephony, as well as mobile and fixed line telephony. They revoke, and supersede, the Data Retention (EC Directive) Regulations 2007 (SI 2007/2199) which transposed the parts of Directive 2006/24/EC relating to mobile and fixed line telephony.

4.2 Part 11 of the Anti-Terrorism, Crime and Security Act 2001 (ATCSA) already provides a legal basis for the retention of communications data in the UK for certain purposes. Parliament approved a voluntary code in connection with this in 2003. In addition, the Data Retention (EC Directive) Regulations 2007 made the retention of communications data relating to mobile and fixed line telephony mandatory. The draft Regulations will make the retention of communications data relating to internet access, internet e-mail and internet telephony, as well as mobile and fixed line telephony, mandatory rather than voluntary.

4.3 Section 106 of the ATCSA makes provision for the Secretary of State to make arrangements for payments to public communications providers in specified circumstances. Under the voluntary code of practice, the Home Office has maintained a policy of reimbursing public communications providers for additional costs incurred through retaining and retrieving communications data in line with the voluntary code. It has maintained this policy in relation to data retained in accordance with the Data Retention (EC Directive) Regulations 2007. The Impact Assessment (attached at Annex A) has identified the importance of ensuring that the draft Regulations are cost neutral to industry. Provision has therefore been made in the draft Regulations to

enable reimbursement of any costs incurred by public communications providers as a result of complying with them.

4.4 A transposition note is attached at Annex B to provide clarity on how the articles in the Directive relate to the draft Regulations. The Directive was examined and cleared by the European Scrutiny Committee at their meeting on 18<sup>th</sup> January 2006 (Report no 26872). The Directive was considered in Dossier 12660/05 and was cleared by Sub-Committee F of the House of Lords on 14/12/2005.

## **5. Territorial Extent and Application**

5.1 This instrument applies to all of the United Kingdom.

## **6. European Convention on Human Rights**

The Minister of State for the Home Department, Vernon Coaker, has made the following statement regarding Human Rights:

“In my view the provisions of the Data Retention (EC Directive) Regulations 2009 are compatible with the Convention rights.”

## **7. Policy background**

- *What is being done and why*

7.1 Communications data, which does not include the contents of communications, has proved valuable for law enforcement purposes over many years. Lawful access to communications data allows investigators to identify suspects and their ‘hidden’ means of communication, trace their criminal contacts, establish hierarchical relationships between conspirators, place them in specific locations at specific times, identify their banks and those engaged in laundering their criminal finances and assets both in the UK and abroad, and can confirm or disprove suspects’ alibis.

7.2 In murder cases especially the analysis of communications data gives an insight to the victims’ movements and details of people they had contact with, using communications equipment, prior to their death. In other cases, communications data can corroborate the testimony of victims, in particular those subject to sexual assault where the offender claims prior contact with the victim. It is regularly used by the police to assist Her Majesty’s Coroner in establishing the activity of a deceased person prior to their death where no crime has occurred. The Child Exploitation and Online Protection Centre, set up by the Government just over two years ago, is completely reliant on the retention of internet-related data by public communications providers to be able to carry out its function of protecting our young citizens by identifying sexual offenders in the online environment.

7.3 Given the essential role communications data plays in assisting law enforcement agencies in protecting our citizens and bring offenders to justice, the Government has for some years sought to ensure that it is retained and made available

to appropriate public authorities lawfully, consistently and efficiently. This has been achieved through Part 11 of the ATCSA and its associated voluntary code since 2003, and, in respect of mobile and fixed line telephony, through the Data Retention (EC Directive) Regulations 2007 since they came into force in 2007. The draft Regulations are a further step in this process.

## **8. Consultation outcome**

8.1 The draft Regulations have been subject to a 12 week public consultation exercise which concluded in October 2008. During this exercise, Home Office officials met with a broad range of public communications providers and their trade associations, the Association of Chief Police Officers, the intelligence agencies, privacy lobbyists and other individuals. A total of 54 responses were received. Many responses were from members of the public who were opposed to the Directive on principle but did not offer suggestions on the wording of the draft Regulations (24 out of 54 responses). Public communications providers welcomed the Government's approach subject to five main concerns, which are addressed below.

8.2 First, draft Regulation 5 has been amended to remove a provision which would have enabled the Secretary of State to vary the period for data must be retained under the Regulations by notice.

8.3 Second, draft Regulation 9 has been amended to ensure that all statistics required to be collected under Directive 2006/24/EC are also required to be collected under the draft Regulations.

8.4 Third, draft Regulation 10 has been amended so that the Secretary of State must issue a notice to any public communications provider required to retain data under the Regulations. Under the amended version of draft Regulation 10, the Secretary of State must issue such a notice to a public communications provider unless the data to which the Regulations apply are retained in the UK in accordance with the Regulations by another public communications provider.

8.5 Fourth, several responses to the consultation exercise expressed concern about how the draft Regulations ought to be interpreted in practice. The Government undertakes to establish an "implementation group". This will develop guidance to assist in the implementation of the draft Regulations.

8.6 Finally, a number of responses queried the meaning of the term "e-mail". The Government confirms that the term "email" has the same meaning as "electronic mail" which is defined in the Privacy and Electronic Communications (EC Directive) Regulations 2003, transposing Directive 2002/58/EC into UK law. Both terms therefore refer to "any text, voice, sound or image message sent over a public electronic communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient and includes messages sent using a short message service".

## **9. Guidance**

9.1 The “implementation group” referred to above will develop guidance to assist in the implementation of the Regulations so that the new obligations which they impose are fully understood and complied with.

## **10. Impact**

10.1 The impact on business, charities or voluntary bodies is cost neutral.

10.2 The impact on the public sector is £46.58 million over three years.

10.3 An Impact Assessment is attached to this memorandum.

## **11. Regulating small business**

11.1 The legislation applies to small business.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is that such firms will only be required to retain data under the draft Regulations if the Secretary of State issues a notice to them requiring them to do so. In addition, all communications service providers which incur additional costs as a result of the draft Regulations will be reimbursed in accordance with draft Regulation 11.

## **12. Monitoring & review**

12.1 Article 14 of Directive 2006/24/EC requires the Commission to submit to the European Parliament and Council an evaluation of the Directive and its impact with a view to determining whether it is necessary to amend its provisions and in particular the types of data or the retention periods which it details. The “implementation group”, which the Government undertakes to establish, will, in addition to assisting in the implementation of these Regulations, monitor and review their effectiveness and impact and will assist the Government in formulating a submission to the Commission giving notice of any amendments considered necessary.

## **13. Contact**

Andrew Knight (Home Office, Room P5.37, 2 Marsham Street, London, SW1P 4DF, Tel No: 0207 035 4848, or email: [commsdata@homeoffice.gsi.gov.uk](mailto:commsdata@homeoffice.gsi.gov.uk)) can answer any queries regarding the instrument.