

ROADMAP	
TITLE OF THE INITIATIVE	Proposal for a review of the Directive 2006/24/EC (Data Retention)
TYPE OF INITIATIVE	<input checked="" type="checkbox"/> CWP <input type="checkbox"/> Non-CWP <input type="checkbox"/> Implementing act/Delegated act
LEAD DG	HOME
EXPECTED DATE OF ADOPTION	Month/Year: 2011
VERSION OF ROADMAP	No: 3 Last modification: Month/Year: 09/2010

This indicative roadmap is provided for information purposes only and is subject to change. It does not prejudge the final decision of the Commission on whether this initiative will be pursued or on its final content and structure.

A. Context, problem definition
<p>(i) What is the political context of the initiative?</p> <p>(ii) How does it relate to past and possible future initiatives, and to other EU policies?</p> <p>(iii) What ex-post analysis of the existing policy has been carried out and what results are relevant for this initiative?</p>
<p>Article 14 of Directive 2006/24/EC requires that COM submits by 15 September 2010 an evaluation report on its operation in view of determining whether the Directive should be amended. Further to findings of the evaluation report and analysis of judgements of constitutional courts in Germany and Romania (and possibly Hungary), and also in the light of the referral to the ECJ for a preliminary ruling at the behest of the Irish High Court (ruling of 5 May 2010, not yet published), the review of the Directive will be considered.</p> <p>The review is a potential, logical result of the evaluation of the Data Retention Directive.</p> <p>(i) The Directive is a powerful law enforcement instrument but also sensitive from a data protection point of view. The law enforcement benefits have to be proportional to the impact on fundamental rights, in the light of Articles 7 and 8 of the EU Charter on FR and Article 8 ECHR.</p> <p>(ii) the DRD entered into force on 15 September 2007, with the possibility to defer application of the internet part until 15 March 2009. Most Member States were late in transposing, and 6 have not yet introduced transposing legislation, whereas in 2 Member States the Constitutional Court annulled the national law transposing the Directive.</p> <p>The Directive relates to the Data Protection Directive 95/46/EC on the one hand and the e-Privacy Directive 2002/58/EC on the other, in that it provides for a specific, partly harmonised, regime for its Article 15.</p> <p>The way in which Member States operate the DRD is currently being evaluated. To gather the relevant information, the Commission organised a conference on 14 May 2009 that identified the issues that stakeholders and commission considered relevant for the evaluation, drafted on that basis a questionnaire for each of the four stakeholder groups that it issued on 30 September 2010, discussed the answers and opinions in the expert group on Data Retention in December 2009 and March 2010, organised general and organised meetings with each of the Member States and non-EU EEA States, The Commissioner responsible for the file announced she intends to present a review of the Directive. In the context of the impact assessment process, the Commission may engage in future consultations and/or studies. Further details may be provided after the finalisation of the evaluation.</p>
<p>What are the main problems which this initiative will address?</p>
<p>The evaluation looks at the minimum harmonisation that the Directive ought to bring (period of retention, types of data to retain, categories of crime for which they can be used), the levelling of the playing field for economic operators (reimbursement of costs), and avoiding removal of the distortion of the internal market. Moreover, data protection concerns remain, but relate most of the time to access and use of the retained data that are until now, covered by national law. The cross-border use of retained data is very low.</p>
<p>Who will be affected by it?</p>
<p>Member States' law enforcement authorities, telecommunication market regulators, private sector, citizens, data protection authorities.</p>

- (i) Is EU action justified on grounds of subsidiarity?
- (ii) Why can Member States not achieve the objectives of the proposed action sufficiently by themselves? (Necessity Test)
- (iii) Can the EU achieve the objectives better? (Test of EU Value Added)

(i) The review proposal aims at better matching the data retention obligations with law enforcement needs, impact on fundamental rights, and internal market impacts. This objective cannot be achieved by Member States acting alone. If Member States were to implement uncoordinated national data retention obligations on their own, the level of distortion of the market would increase and the difficulties to cooperate between law enforcement would be bigger. In addition, it is essential that there is an equivalent level of data security and data protection is achieved across the EU to afford a similar level of protection for all citizens, irrespective of the place of residence.

(ii). Telecommunication and Internet are cross-border communication devices, as much as crime and in particular organised crime is an international phenomenon. The use of these tools by criminals to prepare or commit crime can not be addressed on the basis of national legislation or by MS acting alone..

(iii) The expert group on data retention unites in a single platform all European stakeholders: Member states' law enforcement authorities, telecommunication market regulators, the European parliament, national and European DPAs and industry. This level of concerted cooperation and input is necessary to deal with the issue of data retention at the most appropriate level, i.e. at the level of the EU. Moreover, telecommunication providers are often multinational companies that tend to have single business models implemented across the EU. Member States are not in the best position to influence the shaping of these business models, but at the level of the EU they can, together, make a more and more meaningful impact.

B. Objectives of the initiative

What are the main policy objectives?

Under evaluation, but provisionally the objective could be to bring the data retention directive in line with policy concerns, in particular regarding law enforcement efficiency, internal market impact and the protection of personal data.

Do the objectives imply developing EU policy in new areas?

Depending on the outcome of the evaluation option chosen, the review could entail the development of a European Law Enforcement Data Retention Policy which will cover the access to and use of retained data which are currently excluded from the scope of the Directive.

C. Options

- (i) What are the policy options being considered?
- (ii) What legislative or 'soft law' instruments could be considered?
- (iii) How do the options respect the proportionality principle?

(i) Under evaluation, but probably the four following options could be envisaged:

- do nothing;
- minimum review;
- broad overhaul;
- withdraw the directive.

(ii) The implementation of the Directive is accompanied by an Expert Group that assists the Commission in giving guidance on its implementation. A number of position papers have been adopted and published that guide communication service providers as well as law enforcement authorities towards a more coherent interpretation and approach to the Data retention Directive. The position papers could be integrated in the upcoming review and acquire the status of *ius cogens*.

(iii) Depending on the outcome of the evaluation, it cannot be excluded that the scope of the directive may be extended. In that case, the extension will be proportionate because the evaluation will have demonstrated that the creation of a level playing field on the internal market and the generation of law enforcement benefits can only be achieved by extending the scope.

The current Directive was considered non-excessive and proportionate to the security objectives pursued in relation to market and fundamental rights impact; the review should lead to a situation that either will stay the same or will even better match law enforcement, internal market and data protection needs hence, increase the level of proportionality

D. Initial assessment of impacts

What are the benefits and costs of each of the policy options?

Under evaluation; as this may be a review of an existing instrument, the impacts may be that side effects may be reduced and market and law enforcement efficiencies may be improved, whilst reducing the degree of privacy interference.

Could any or all of the options have significant impacts on (i) simplification, (ii) administrative burden and (iii) on relations with other countries, (iv) implementation arrangements? And (v) could any be difficult to transpose for certain Member States?

(i) No - the structure of the current Directive will not be affected - data retention period will be reduced - data categories will be clearer and more specific. Even if the Directive would be withdrawn MS can continue data retention under Art 15 of Directive 2002/58/EC

(ii) No additional burden unless the political choice is made and comitology is introduced. The only administrative burden that could be relieved is the organisation of the Expert Group "Platform for electronic data retention" which could be abolished if the Directive were to be abolished.

(iii) No - no international component foreseen in any option

(iv) No - no specific implementation arrangements foreseen: the Directive is implemented and executed under national law

(v) Yes - in certain Member States data retention causes concerns because of the impact it has on privacy of citizens whose communications are recorded without link to any crime or suspicion; However, the Commission is set to give full consideration to fundamental right impacts and propose legislation that will raise less privacy concerns than the current one.

(i) Will an IA be carried out for this initiative and/or possible follow-up initiatives? (ii) When will the IA work start? (iii) When will you set up the IA Steering Group and how often will it meet? (iv) What DGs will be invited?

(i) yes

(ii) After the adoption of the Data Retention Directive evaluation report, and confirmation of the intention of the Commission to present a review of the Data Retention Directive, work on an Impact Assessment work should start rather soon. One of the inputs in that process will be provided by the conference that the Commission intends to organise on 25 November 2010.

(iii) under evaluation: the need of an IA steering group will be examined later.

(iv) DG INFSO, JUSTICE, HOME, SG and LS; may be COMP, OLAF and SANCO.

(i) Is any of options likely to have impacts on the EU budget above €5m?

(ii) If so, will this IA serve also as an ex-ante evaluation, as required by the Financial regulation? If not, provide information about the timing of the ex-ante evaluation.

(i) no

(ii) not relevant

E. Evidence base, planning of further work and consultation

(i) What information and data are already available? Will existing impact assessment and evaluation work be used?

(ii) What further information needs to be gathered, how will this be done (*e.g. internally or by an external contractor*), and by when?

(iii) What is the timing for the procurement process & the contract for any external contracts that you are planning (*e.g. for analytical studies, information gathering, etc.*)?

(iv) Is any particular communication or information activity foreseen? If so, what, and by when?

(i) The evaluation is ongoing; A conference was organised on 14 May 2009, a number of meetings took place with Member States in 2009 and 2010, as well with a multi-stakeholder expert group, 30 bilateral meetings took place with Member States, a questionnaire was drawn up and replies were received and evaluated. The conclusions will have to be endorsed by DG JUSTICE, DG HOME, and DG INFSO, and maybe SANCO (consumer protection) and OLAF

(ii) a first impact assessment was carried out in 2005 and was taken on board in the evaluation that will result in the adoption of a report early autumn 2010. No information gathering by an external contractor is foreseen.

(iii) further information could be gathered by DG INFSO about the market impact of data retention. Although outside the scope of the Directive, DG HOME also gathered information from Member States about the national

legislation and law enforcement practice regarding the access to and use of retained data. In the context of the announced review of the Directive (CLWP 2011) the issue of administrative costs will be examined in the context of the evaluation of the options for extending the use of the Directive (access and use of data).

(iv) All along the evaluation process, the Commission involved the expert group "the platform on electronic data retention", set up by Commission Decision 2008/324/EC and whose mandate is i.a. to assist the Commission with the evaluation of the Directive, to provide feedback and information from its stakeholders. The stakeholders to be involved are known and familiar with the subject. The IA legislative options will be informed by the information obtained (see item (iv) before) and analysed by the Commission with feedback from stakeholders.

Which stakeholders & experts have been or will be consulted, how, and at what stage?

Law enforcement, telecommunication market regulators, data protection authorities, civil society, academia, private sector; the EP and the EPDS have been involved all along the process inter alia as members of the Expert Group "Platform on electronic data retention", an advisory body to the Commission, that has published position papers on the current Data Retention Directive and that provided further input in the evaluation process.